

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 35164

223534

PETITION OF BNSF FOR DECLARATORY ORDER

MOTION TO COMPEL

MOTION TO CEASE AND DESIST

ENTERED
Office of Proceedings
SEP - 5 2008
Part of
Public Record

1 Edwin Kessler ("Kessler"), herewith files this Motion to Compel, asking the Board to compel the BNSF Railway Company ("BNSF")

A. To replace the track infrastructure that was removed without authority, between MP 539.96 and MP 542.91 on the Chickasha Line, located in Oklahoma County, OK, which section of the Chickasha Line is the subject of the above entitled proceeding; and

B. To complete delivery of railcar HTTX 93507 to Boardman, Inc., which is located near MP 541 75 on the Chickasha Line.

2. Kessler further files this Motion to Cease and Desist, asking the Board to order BNSF, its agents, employees, contractors, and all parties acting with or without BNSF approval, to cease and desist all activities that would result in the diminution of the rail assets associated with the Chickasha Line between MP 539.96 and MP 542.91, until this proceeding, and all appeals associated with this proceeding, have been completed.

3 In support of these Motions to Compel and to Cease and Desist, Kessler states:

BACKGROUND INFORMATION

4. On September 23, 2005, BNSF filed a Notice of Exemption (“NOE”) to abandon 2.95 miles of the Chickasha rail line, between MP 539 96 and MP 542 91, all in Oklahoma County, OK. See *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*, STB Docket No. AB-6 (Sub-No. 430X) (“**Abandonment Exemption**”) This portion of the Chickasha line is the subject of the above entitled proceeding. Since the NOE contained false and misleading statements, on June 5, 2008, the Board rejected the NOE as void *ab initio*

5 On December 20, 2004, the Stillwater Central Railroad, Inc., filed a NOE:

A. To lease that portion of the Chickasha line that lies between MP 536.4 and MP 540.0;

B. To lease that portion of the Chickasha line that lies between MP 542.0 and MP 549.0;

C To lease that portion of the Packingtown Lead that lies between MP 0.0 and a point 500 feet west of the wye connecting the Packingtown Lead with BNSF’s Red Rock Subdivision,

D To acquire incidental overhead trackage rights over that portion of the Packingtown Lead that lies between 500 feet west of the wye connecting the Packingtown Lead with BNSF’s Red Rock Subdivision, and the connection of the Packingtown Lead with BNSF’s Red Rock Subdivision;

E. To acquire incidental overhead trackage rights over that portion of BNSF’s Red Rock Subdivision that lies between MP 384.6 and MP 390 0. See *Stillwater Central Railroad, Inc – Lease Exemption – The Burlington Northern and Santa Fe Railway Company*, STB Finance Docket No 34610, Served January 19, 2005.

6 On September 23, 2005, Stillwater Central Railroad, Inc (“SLWC”) filed a NOE to discontinue service over the same portion of the Chickasha line that BNSF proposed to abandon. In a decision served on January 26, 2007, the Board granted SLWC authority to discontinue service over two portions of the Chickasha Line (a) Between MP 539 96 and MP 540.0; (b) Between MP 542.0 and MP 542.91.

7 In the months prior to the Board's June 5, 2008 decision rejecting BNSF's NOE as void *ab initio*, the following salvaging activities occurred:

- A. The turn out connecting the Chickasha Line with the Shields Spur at MP 540.15, was removed, thereby disconnecting this end of the Chickasha Line from the National Rail System;**
- B. About 900 feet of the Chickasha Line between the removed Shields Spur turnout at MP 540.15, and near MP 540.35, were removed,**
- C. Several hundred feet of the Chickasha Line near Lee Street (near MP 540.8), were removed, to facilitate construction of a culvert under the line. Construction of the portion of the culvert that was directly under the Chickasha rails, was completed several months ago (circa June, 2008) To date the rails have not been replaced.**
- D. The turnout that connected the Chickasha Line with the adjacent Union Pacific Line via a crossover track near MP 540.8, was removed, to facilitate construction of the aforementioned culvert. This turnout has not been replaced. Removal of this turnout disconnected the middle segment of the Chickasha Line from the National Rail System.**
- E The joint bars and other track connectors near Boardman's turnout near MP 541.75, were removed, and the rails were cut in several places**
- F Approximately 15 feet of track was removed near MP 541 80, thereby disconnecting the portion of the Chickasha line that lies between MP 540 8 and 541.80, (and Boardman's spur) from the National Rail System.**
- G. A diamond that permitted the Packingtown Lead to cross the Chickasha Line near MP 542.8 (immediately west of where the Chickasha line crosses Agnew Avenue), was removed, as was an additional 60 feet or so of Chickasha line. Removal of the diamond and Chickasha line track on both sides of the former diamond, disconnected the portion of the Chickasha Line that lies to the east of MP 542 8, from the National Rail System**

H. A signal mast was installed on the west side of Agnew Avenue, in the middle of where the Chickasha track had been, thereby preventing passage on the Chickasha Line past this point

8. On July 15, 2008, the BNSF Railway Company ("BNSF") filed a Petition for Declaratory Order ("Petition"), asking the Surface Transportation Board ("Board") to institute a declaratory order proceeding for the purpose of:

A Declaring that BNSF's proposed abandonment and removal of that portion of its Chickasha Line that lies between MP 539.96 and MP 540.15 ("Eastern Segment"), which is located in Oklahoma County, OK, constitutes an unregulated 'relocation' of, rather than an abandonment of, a portion of its Chickasha line,

B Declaring that BNSF's proposed abandonment and removal of that portion of its Chickasha Line that lies between MP 540.15 and MP 541.69 ("Middle Segment"), which is located in Oklahoma County, OK, constitutes an unregulated 'relocation' of, rather than an abandonment of, a portion of its Chickasha line;

C. Declaring that the United States District Court for the Western District of Oklahoma ("District Court"), does not have the jurisdictional authority to enjoin BNSF from attempting to implement its proposed "relocation projects," without prior Board approval.

9. In its Declaratory Order Petition, BNSF states that it intends to institute an abandonment proceeding at some unspecified future date, to abandon that portion of its Chickasha Line that lies between MP 541.69 and 542.91, which is located in Oklahoma County, OK. Petition at 8.

10. On August 5, 2008, Kessler filed Comments. Included with Kessler's Comments was a Verified Statement of Joseph T. Merry, General Manager of Boardman, Inc., a shipper with a rail spur on the Chickasha Line at MP 541.75.¹ Mr. Merry makes it abundantly clear that Boardman desires to utilize rail freight service, and explained that the reason Boardman had not

¹ In paragraph 16 of Mr. Merry's V.S., Mr. Merry stated Boardman's switch was "near MP 541.5." On page 10 of BNSF's August 25, 2008 Amendment to Petition, BNSF stated Boardman's switch is actually located at MP 541.75.

requested rail service for the past several years, was because of the abysmal service BNSF had offered following the merger of the Burlington Northern with the AT&SF

11. In his Comments, Kessler points out that the portion of the Chickasha Line that is the subject of this proceeding, was (prior to BNSF's salvaging of the Line, starting in December, 2007) connected to the National Rail System at three points. On the eastern end, near MP 540.15, where the Shields Spur intersected the Chickasha Line near Shields Blvd; In the middle, near MP 540.8, where the Chickasha Line connected to the adjacent Union Pacific line via a crossover track; On the western end, where the Packingtown Lead connected to the Chickasha Line near MP 542.8, or just west of Agnew Avenue.

12. On August 25, 2008, BNSF filed an Amendment to Petition ("Amendment") In its Amendment, BNSF correctly stated that Kessler's civil Complaint against BNSF had been dismissed by the U.S. District Court for the Western District of Oklahoma Dismissal of the Complaint mooted BNSF's request to have the Board rule that the court does not have the jurisdictional authority to enjoin BNSF from violating a Board order (The Complaint was dismissed owing to the fact that the Board order Kessler was asking the court to enforce, was rendered moot by the Board's June 5, 2008 decision rejecting BNSF's NOE as void *ab initio*.)

13. In its Amendment, on p. 11, BNSF **incorrectly** states that the Shields Spur turnout had not been removed The photographic evidence submitted by Kessler in the Abandonment Exemption (see Tom Elmore's March 20, 2008 Verified Statement, filed in the Abandonment Exemption), clearly shows that the Shields Spur turnout no longer exists.

14. In its Amendment, on p 11, BNSF states that it did not sanction removal of the crossover track connecting the Chickasha Line with the Union Pacific Line near MP 540 8 In its February 22, 2008, at p.4, and May 20, 2008, at p.4, decisions in *Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS*, STB Docket No. AB-103 (Sub-No. 21X), the Board made it clear, a rail carrier is ultimately responsible for ensuring that its rail assets remain in place, and the Board made it clear that a rail carrier is ultimately responsible for the cost to replace any rail assets unauthorizedly removed.

15 Attached to its Amendment as Exhibit 3, is an undated photograph that is stated by BNSF to depict the crossover track near MP 540 8 on the BNSF Chickasha line The thru-track

depicted in the center of the Exhibit 3 photograph, makes a substantial zig-zag prior to the turnout depicted in the photograph. The track on the right edge of the Exhibit 3 photograph, which BNSF stated was Union Pacific's main line, has a substantial curvature. Appended to Mr. Merry's V.S. as Exhibit D, was a Maps.Live graphic showing the crossover at MP 540.8. The maps.live com graphic clearly shows that both the Chickasha and UP lines are nearly tangent in the vicinity of the MP 540 8 crossover. Kessler has personally viewed the crossover tracks at MP 540.8, and can attest to the fact that the Chickasha and UP lines are nearly tangent at that location, and that there are no zig-zags in the Chickasha Line at this location. The only tracks with a substantial curvature near this location, are the UP wye tracks, which are north of the UP main line (which in turn, is north of the Chickasha line) Since the Chickasha line at this location does not have a zig zag, the UP main line at this location is essentially tangent, the only tracks with a substantial curvature, are UP's wye tracks, which are north of the UP main line tracks, and since the photograph does not depict any tangent tracks between the tracks with the zig zag and the high-curvature tracks (which would correspond to UP's main line), Kessler argues the photograph that appears in BSNF's Amendment Exhibit 3, does not accurately depict the crossover track at MP 540 8. In addition, the photograph should be stricken, since it was not supported by a verified statement.

16. On p 12 of its Amendment, BNSF states that rail access to Boardman has not been permanently severed from the west. BNSF acknowledges that a signal mast has been erected in the middle of where the Chickasha tracks had been, and acknowledges that a portion of the Chickasha rail has been removed. Of particularly significance for this Motion to Compel, is BNSF's statement

"The signal is not a permanent structure and can be readily relocated and the missing track can easily be replaced."

17. On p.12 of its Amendment, BNSF further represents that providing rail service to Boardman from the west (via the Western Segment,) "would be more economical and operationally efficient than the routing Kessler has chosen." Kessler has not chosen a particular route to access Boardman. Kessler, in his Comments, identified four possible ways to access Boardman, one of which was "from the west " Accessing Boardman exclusively "from the west," without granting Boardman trackage rights over BNSF's Packingtown Lead and Red Rock Subdivision lines, (in order to access Union Pacific's line where it connects with BNSF's line in

east Oklahoma City), would deprive Boardman of the access it presently has to Union Pacific's line at the MP 540.8 crossover track Boardman having access to Union Pacific is very important to Boardman, since, as discussed below, BNSF's service continues to be abysmal.

18. Since Kristy Clark, the author of BNSF's Declaratory Order Petition, continues to provide the Board with false and misleading information regarding the status of the portion of the Chickasha line that is the subject of this proceeding, Kessler suggests that Ms Clark take Amtrak's Heartland Flyer to Oklahoma City, then walk the line. Once she has obtained personal knowledge of the present condition of the line, she would be able to recognize when information being provided to her, does not comport with reality. She might also find it helpful to peruse the Birds Eye feature of maps live com for Oklahoma City, to get a better understanding of what the line looked like in the summer of 2007, when the aerial photographs that appear on maps live com were taken.

NEW DEVELOPMENTS – RAILCAR: HTTX 93507

19 On Monday, July 28, 2008, rail car HTTX 93507, which has Kessler's "blue-carded" locomotive on it, was delivered by the Delta Valley and Southern Railway Company, to BNSF's interchange track in Wilson, Arkansas. This rail car was way-billed to Kessler. care of Boardman, 1135 S. McKinley Avenue, Oklahoma City, OK. The BNSF freight charges were pre-paid. BNSF's web site indicates the transit time from Wilson, Ark to Oklahoma City, is 3-4 days

20. BNSF elected to route the car to Oklahoma City via Blytheville, Arkansas, Memphis, TN, Springfield, MO, and Tulsa, OK. BNSF elected to transport the car to Tulsa, OK using BNSF's trains. BNSF elected to deliver the car to the Stillwater Central Railroad, Inc (SLWC) in Tulsa, OK. BNSF's routing instructions stated SLWC was to transport the car from Tulsa, OK to Oklahoma City, then SLWC was to place the car on Boardman's spur track

21 On Tuesday, July 29, 2008, a local BNSF crew, moved this rail car to Blytheville, Ark On Thursday, July 31, 2008, a BNSF south-bound crew delivered this car to Memphis, TN. On Monday, August 4, 2008, this car was placed in a train that was going to Tulsa, OK. The car arrived in Tulsa, OK on Tuesday, August 5, 2008, where it languished in BNSF's rail yard for nine days, despite daily telephone calls asking when the car would be interchanged with the

Stillwater Central Railway Company. Finally, on Thursday, August 14, 2008, the car was placed on SLWC's Tulsa, OK interchange track.

22. On Thursday, August 14, 2008, the SLWC consist that had car HTTX 93507 in it, moved from Tulsa, OK to Bristow, OK, or about 20 miles (The train crew ran out of operating time) On Friday, August 15, 2008, the SLWC consist made it to Hibsaw, OK, which is about 40 miles west of Bristow. On Saturday, August 16, 2008, the SLWC arrived in Oklahoma City, OK (Oklahoma City is about 20 miles from Hibsaw, OK.)

23. On Friday, August 15, 2008, John Spawn, SLWC's customer service representative, stated that the car should be delivered to Boardman on Tuesday, August 19, 2008. Earlier, on Thursday, August 14, 2008, Mr Spawn e-mailed Corey Burkhart, SLWC's roadmaster, asking Mr Burkhart to inspect Boardman's spur to verify it was in proper working order. (The Board may recall, Corey Burkhart is the person Tom Elmore spoke with on February 14, 2008, when Mr Elmore observed a Lone Star crew cutting the Chickasha rails near Shields Blvd, near MP 540.4. See Kessler's March 24, 2007 Motion to Cease and Desist, filed in the Abandonment Exemption) On Monday, August 18, 2008, Brad Hays, the SLWC Oklahoma City Trainmaster, stated the car should be delivered to Boardman on Tuesday, August 19, 2008.

24 On Tuesday, August 19, 2008, Mr. Hays informed Kessler that SLWC cannot deliver the car to Boardman, since the tracks leading to Boardman, have been removed

25 On Friday, August 22, 2008, Ray Pena, General Manager of SLWC, stated in an e-mail

"After our phone conversation I checked with our General Counsel [Craig Richey] and he has informed me that Stillwater Central RR does not have STB authority to serve the Boardman facility in Oklahoma City We therefore cannot legally deliver that shipment to Boardman "

26. On Friday, August 22, 2008, Joseph Merry, General Manager of Boardman, received a telephone call from a BNSF representative in Fort Worth, Texas, who asked "where he wanted them to deliver the locomotive." Mr Merry replied: "Right here, at Boardman's plant at 1135 S. McKinley, via the rail line adjacent to Boardman "

27 As stated in ¶16 above, on p 12 of its Amendment, BNSF states that rail access to Boardman has not been permanently severed from the west. BNSF acknowledges that a signal

mast has been erected in the middle of where the Chickasha tracks had been, and acknowledges that a portion of the Chickasha rail has been removed. Of particular significance, is BNSF's statement:

"The signal is not a permanent structure and can be readily relocated and the missing track can easily be replaced "

SALVAGING OF THE CHICKASHA LINE CONTINUES

28. On Thursday, July 17, 2008, Steve Davis observed SLWC personnel removing the crossing signals at Western Avenue. He further observed the crossing signals and crossing signal infrastructure at additional grade crossings, had been recently removed. See Steve Davis' two Verified Statements dated August 30, 2008, attached hereto.

29. On page 13 of its August 25, 2008 Amendment, BNSF stated:

"Until this proceeding is completed, BNSF will not allow any further removal of tracks in the path of the highway Project."

30. While BNSF's statement regarding further salvaging activities only mentions removal of track material in the Middle and Eastern Segments, Kessler argues that removing crossing signals and the associated infrastructure from the Western Segment is not consonant with the spirit of BNSF's "no further salvaging activities" statement, and constitutes further acts of abandonment, which the Board has specifically prohibited.

MOTION TO COMPEL

31. In STB Docket No. AB-103 (Sub No. 21X), *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the Matter of a Request to Set Terms and Conditions*, Served February 22, 2008, on p.9, the Board stated.

".. a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service "

32. In the instant case, a shipper, Kessler / Boardman, has sought service, has paid for service, and has made a demand that the service sought and paid for, be provided. On August 19, 2008, 22 days after BNSF accepted railcar HTTX 93507, then had it transported from Wilson,

Arkansas to Oklahoma City, OK., and some three days after the rail car arrived in Oklahoma City, BNSF and SLWC refused to deliver the car the last 2 miles of its journey.

33. On p. 4 of BNSF's April 8, 2008 Reply to Kessler's Motion for Cease and Desist Order, filed in Abandonment Exemption, BNSF made the following representations to the Board:

- "1 BNSF acknowledges track was removed on January 25, 2008 and BNSF is prepared to reconstruct such track if BNSF is not permitted to consummate abandonment of the Line
2. Pursuant to the continuing construction activities in the area, small areas of track have been removed by unauthorized parties without BNSF's knowledge or authorization.
3. After being made aware of the activity described in 2 above, BNSF made concerted efforts to ensure there would be no other permanent track removal without BNSF authorization.
4. Any rail that has been or will be removed as a result of ongoing construction in the vicinity can and will be replaced by BNSF if BNSF is not permitted to consummate abandonment of the Line "

34. WHEREFORE, in light of the foregoing, Kessler asks that the Board issue an Order Compelling BNSF:

- A To replace all track and all track infrastructure that has been removed from the Chickasha Line between MP 539.96 and MP 542.91, within 30 days after the Board issues its Order,
- B. To deliver railcar HTTX 93507 to Kessler / Boardman at Boardman's rail spur, within five days of the date the Board serves its Order,
- C. To pay to Kessler monetary damages in the sum of \$250.00 per day for each and every day Kessler has been deprived of the use of his locomotive, beginning on August 19, 2008, and continuing until the date railcar HTTX 93507 is delivered to Kessler on Boardman's rail spur;
- D To pay all demurrage charges associated with railcar HTTX 93507, up until the day rail car HTTX 93507 has been delivered to Boardman's rail spur;

- E. To give Kessler 3 business days notice of the date railcar HTTX 93507 will be delivered to Boardman's rail spur, so that Kessler can arrange for equipment to be delivered to Boardman's site for the purpose of unloading railcar HTTX 93507.

MOTION TO CEASE AND DESIST

35. WHEREFORE, in light of the foregoing, Kessler asks that the Board issue a Cease and Desist Order:

- A Directing BNSF, SLWC, and their agents, employees, contractors, and all entities acting with, or without, BNSF or SLWC authority, to cease and desist from all further activities on the Chickasha Line between MP 539.96 and MP 542 91, which in any way would diminish the rail assets associated with this portion of the Chickasha Line, until this proceeding, and all appeals associated with this proceeding, have been resolved,
- B. Directing BNSF to cease and desist from refusing to deliver railcar HTTX 93507 to Boardman's rail spur, which is located at MP 541 75 on the Chickasha Line, located in Oklahoma County, OK.

Respectively submitted,



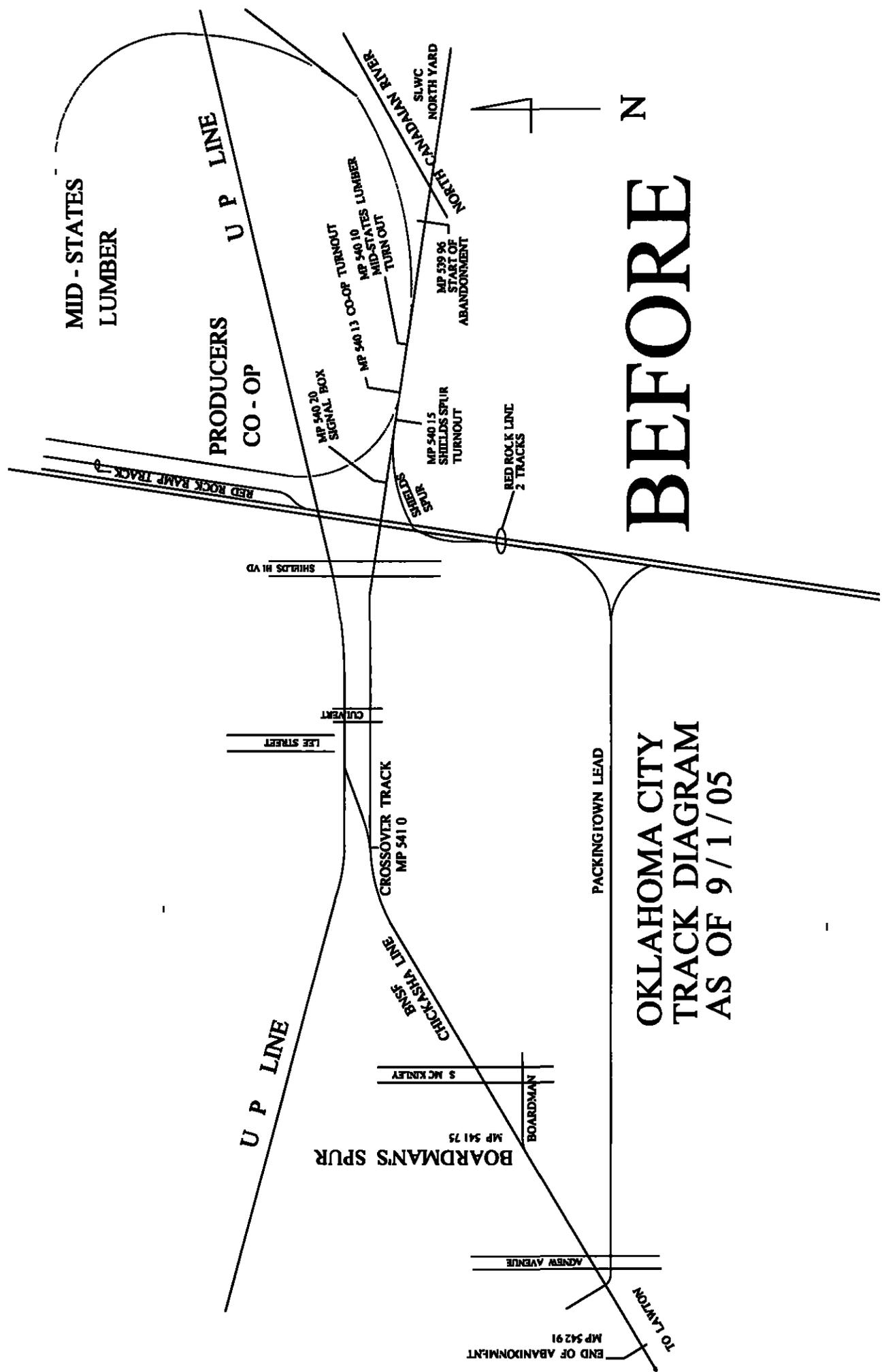
Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2008, a copy of the foregoing Motion to Compel, Motion to Cease and Desist, was mailed by first class mail, postage prepaid, to Kristy Clark, BNSF Railway Company, 2500 Lou Menk Drive, Fort Worth, TX 76131-2828, and a copy was E-mailed to Fritz Kahn, 8th Floor, 1920 N Street, N.W., Washington, DC 20036-1601.



Edwin Kessler



MID - STATES
LUMBER

PRODUCERS
CO - OP
U P LINE

BOARDMAN'S SPUR
MP 541 75

U P LINE

CHICKASHA LINE
MP 541 0

CROSSOVER TRACK
MP 541 0

PACKINGTOWN LEAD

OKLAHOMA CITY
TRACK DIAGRAM
AS OF 9/1/05

END OF ABANDONMENT
MP 542 91

ACME AVENUE

BOARDMAN

S. MC KINLEY

LEE STREET

CURBERT

SHIELDS HWY

RED ROCK LINE
2 TRACKS

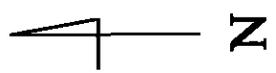
MP 540.15
SHIELDS SPUR
TURNOUT

MP 540.20
SIGNAL BOX

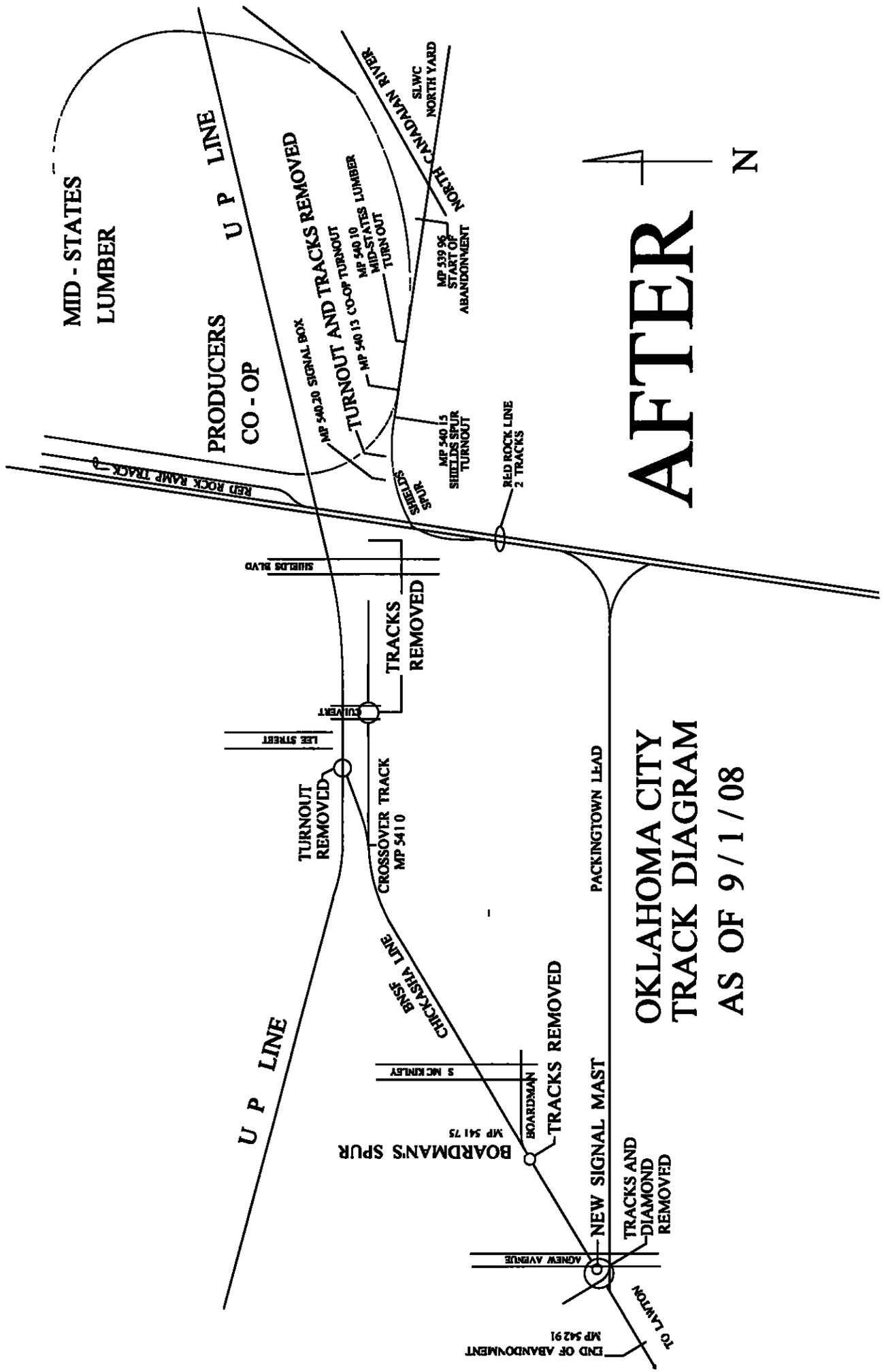
MP 540.13 CO-OP TURNOUT
MP 540.10
MID-STATES LUMBER
TURNOUT

MP 539.96
START OF
ABANDONMENT

NORTH CANADIAN RIVER
S.W.C.
NORTH YARD



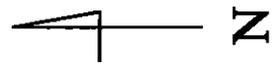
BEFORE



AFTER

**OKLAHOMA CITY
TRACK DIAGRAM**

AS OF 9/1/08



AFFIDAVIT AND DECLARATION OF STEVEN C. DAVIS
August 30, 2008

STEVEN C DAVIS, also known as STEVE DAVIS, makes the following Affidavit and Declaration under penalty of perjury as permitted by 28 U S C 1746

1 I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit

2 Shortly after the noon hour on Thursday, 7-17-08 in Oklahoma City, OK, I observed and photographed an individual in standard railroad safety gear (hard hat, orange safety vest) working from a blue truck with Kansas license plates apparently removing the wiring and working elements from the automatic railway crossing signal control box at the BNSF railway crossing of South Western Avenue near SW 9th Street The photos I shot at that time accompany this document

3. This rail line is the subject of Surface Transportation Board case BNSF Railway Company -- Abandonment Exemption -- In Oklahoma County, OK, AB-6 (Sub-No. 430 X), and, more lately, of the STB Finance Docket No 35164

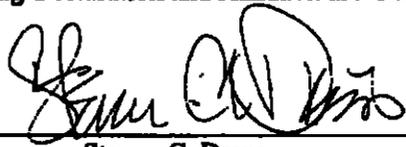
4. As I observed and approached on foot, taking photos of the activity, the workman objected I asked if he did not know the railway company had been placed under orders to cease abandonment activity on this line He said he did not know this. I then left the scene

5 When I approached the same railroad crossing again, less than an hour later, I observed that the workman and his truck were no longer there The following day, I observed that the signal electrical boxes were also gone.

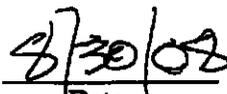
6 Further this Affiant sayeth not

OATH AND AFFIRMATION

I SOLEMNLY DECLARE AND AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Declaration and Affidavit are true and correct to the best of my knowledge and belief



Steven C Davis
1010 W Main Street
Oklahoma City, OK 73106



Date