

215456

SIDNEY STRICKLAND AND ASSOCIATES, PLLC

3050 K ST. N.W., SUITE 101
WASHINGTON, DC 20007-5108
TELEPHONE: 202-295-4024
FAX: 202-672-5399

SIDNEY L. STRICKLAND, JR.
SIDNEY.STRICKLAND@STRICKLANDPLLC.COM

December 29, 2005

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

**Re: STB Docket No. AB-6 (Sub. No. 430X) BNSF Railway Company
Abandonment Exemption in Oklahoma City, OK**

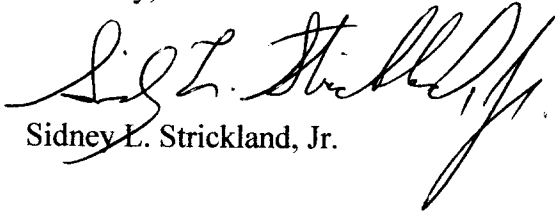
**STB Docket No. AB-1040X, Stillwater Central Railroad, Inc.
Discontinuance of Service Exemption in Oklahoma City, OK**

Dear Secretary Williams:

Enclosed for filing in the referenced dockets are the original and ten copies of a Motion to Redesignate Highly Confidential Materials, or, Alternatively, to Engage in Discovery of Entities Designated Highly Confidential.

Please acknowledge receipt of this material by date stamping the enclosed copy of this letter and returning it to me in the enclosed self-addressed stamped envelope.

Sincerely,


Sidney L. Strickland, Jr.

SLS/cac
Enc.

215457

ENTERED
Office of Proceedings

DEC 30 2005

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-6 (SUB-NO. 430X)

BNSF RAILWAY COMPANY
-- ABANDONMENT EXEMPTION --
IN OKLAHOMA COUNTY, OK

STB DOCKET NO. AB-1040X

STILLWATER CENTRAL RAILROAD, INC.
-- ABANDONMENT EXEMPTION --
IN OKLAHOMA COUNTY, OK

MOTION TO REDESIGNATE
HIGHLY CONFIDENTIAL MATERIALS
OR, ALTERNATIVELY, TO ENGAGE IN DISCOVERY OF ENTITIES
DESIGNATED HIGHLY CONFIDENTIAL

EXPEDITED ACTION REQUESTED

Karl Morell
Of Counsel
Ball Janik LLP
Suite 225
1455 F Street, N.W.
Washington, D.C. 20005
(202) 638-3307

Attorney for:
STILLWATER CENTRAL
RAILROAD, INC.

Sidney L. Strickland, Jr.
Sidney Strickland and
Associates, PLLC
3050 K Street, N.W.,
Suite 101
Washington, DC 20007
(202) 295-4672

Attorney for:
BNSF RAILWAY COMPANY

Dated: December 29, 2005

DEC 30 2005
RECEIVED

ENTERED
Office of Proceedings

DEC 30 2005

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-6 (SUB-NO. 430X)

BNSF RAILWAY COMPANY
-- ABANDONMENT EXEMPTION --
IN OKLAHOMA COUNTY, OK

STB DOCKET NO. AB-1040X

STILLWATER CENTRAL RAILROAD, INC.
-- ABANDONMENT EXEMPTION --
IN OKLAHOMA COUNTY, OK

MOTION TO REDESIGNATE
HIGHLY CONFIDENTIAL MATERIALS
OR, ALTERNATIVELY, TO ENGAGE IN DISCOVERY OF ENTITIES
DESIGNATED HIGHLY CONFIDENTIAL

EXPEDITED ACTION REQUESTED

BNSF Railway Company ("BNSF") and Stillwater Central Railroad, Inc. ("SLWC") (together referred to as "Applicants"), hereby request that the Surface Transportation Board ("Board") redesignate as non-confidential or "Confidential" the material designated as "Highly Confidential" in Petitioners' Statement In Support Of Their Petition To have Applicants' Notice Declared Null and Void filed by Bio-Energy Wellness Center ("Wellness Center") and North American Transportation Institute ("Institute") (collectively "Petitioners") on December 23, 2005 ("Statement in Support").

In the alternative, Applicants request leave to obtain discovery (depositions, interrogatories and/or document requests) from the entities identified in the Highly Confidential materials. Additionally, Applicants request that the Board extend or toll the time for Applicants to respond to the Statement in Support until these matters are resolved.

BACKGROUND

On September 23, 2005, Applicants jointly filed a notice of exemption under 49 CFR 1152 Subpart F-Exempt Abandonment and Discontinuances of Service ("Joint Notice") for BNSF to abandon, and for SLWC to discontinue service over, approximately 2.95 miles of railroad in Oklahoma City, OK (the "Line"). On November 9, 2005, Petitioners filed a Petition seeking to have the Joint Notice declared null and void ("Petition"). In the Petition, Mr. Michael Richards, of the Wellness Center, and Mr. Tom Elmore, of the Institute, declared under penalty of perjury that "the [L]ine has been used to handle local traffic within the past two years." Petition at 2. On November 21, 2005, Petitioners filed a Motion for Protective Order ("Motion") claiming they intended to engage in limited discovery¹ and needed the protective order to protect the identity of shippers on the Line who were "sufficiently concerned about retribution not to make their identities made public." Motion at 2. By decision served November 23, 2005, in this proceeding, the Board granted the Motion. In so doing, however, the Board noted that "it is not altogether clear that confidentiality is needed in this instance...." Slip op. at 1.

¹ What is particularly nebulous is that Petitioners, on November 21st sought a protective order to pursue discovery when on November 9th Petitioners had already suggested to the Board that they already possessed the information needed to void the Joint Notice. Now, Petitioners have engaged in a fishing venture for such evidence while, simultaneously, keeping the alleged supportive information from Applicants and the Board.

On December 23, 2005, Petitioners filed with the Board a Highly Confidential and a Public Version of the Statement in Support. The Public Version does not include the names and addresses of companies Petitioners claim “are shippers situated on, or accessed via, the railroad line proposed to be abandoned and which between September 24, 2003, and September 23, 2005, were served by [BNSF and/or SLWC].” Statement in Support at 2.

ARGUMENT

Applicants attempted to resolve this matter with Petitioners before filing this motion. On December 23, 2005, Applicants requested that Petitioners voluntarily redesignate the Highly Confidential material as Confidential so that the information could be shared with employees of BNSF and SLWC to assist in preparing a response to the Statement in Support, particularly with respect to verifying Petitioners’ movement claims from September 24, 2003, and September 23, 2005, noted above. See Exhibit 1. In their request, Applicants pointed out that even though the designated material was not subject to the Protective Order, Applicants would acquiesce to a Confidential designation provided that Petitioners agree voluntarily to designate it as such. Petitioners, however, have consistently resisted any redesignation of the material in question, contending these entities fear retribution from the “Oklahoma Department of Transportation and the businesses or individuals favoring the relocation of the Crosstown Interstate Highway I-40 for which a part of the right-of-way of line proposed for abandonment is being sought.” See Statement in Support (Redacted Public Version) at 2.

Pursuant to Paragraph 6 of the Protective Order and in light of Petitioners' continuing refusal to redesignate the material in question, Applicants challenge before the Board the designation of the material as Highly Confidential.

Paragraph 1(b) of the Protective Order defines "Confidential Information" as:

traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, or carriers, confidential financial and cost data, and other confidential or proprietary business or personal information.

Pursuant to Paragraph 3 of the Protective Order, material may only be designated Highly Confidential if it "contains shipper-specific rate or cost data, trackage rights compensation levels or other competitively sensitive or proprietary information...."

None of the criteria noted above is satisfied here. Indeed, the Board's confusion correctly observed in the November 23rd Decision issuing a Protective Order -- "it is not altogether clear that confidentiality is needed in this instance," (Slip op. at 1.)-- is all the more understandable. It is now abundantly clear that the information Petitioners have designated Highly Confidential does not even qualify for a Confidential, let alone, Highly Confidential designation.

For the identity of a shipper to be designated as "Confidential", the identity of the shipper must be accompanied with shipper-specific traffic data or other confidential information. In the Statement in Support, Petitioners simply identify four entities purportedly located in Oklahoma City, OK. No information is provided concerning the commodities they ship, the volume of their traffic, or the origin and destination of their

traffic, much less information that could even remotely be deemed confidential.

Petitioners simply identify four entities and claim that, based on Petitioners' "observations and their conversations with personnel of the companies," Petitioners understand that these entities are "situated on, or accessed via, the railroad line proposed to be abandoned" and were served by BNSF and/or SLWC. Statement in Support at 2. Petitioners do not categorically state that these entities shipped local traffic on the Line much less that they are located on the Line. All that Petitioners claim is that these entities may have been accessed via the Line. By utilizing the Highly Confidential designation, Petitioners essentially hide the identity of these entities in a manner that makes it extremely difficult for Applicants to verify or rebut the vague and unsubstantiated allegations.

Even if the information were Highly Confidential, which, of course, it is not, the material would need to be redesignated as Confidential to enable BNSF and SLWC to respond to the Statement in Support. Petitioners allege that the identified entities may have shipped local traffic over the Line within the last two years. BNSF and SLWC have searched their records three times and have been unable to locate any local traffic that moved on the Line since at least September 24, 2003. (Applicants searched their records prior to filing the Joint Notice, before responding to the Petition and, most recently, before responding to Petitioners' discovery request). Nevertheless, to rebut adequately Petitioners' assertions, employees of BNSF and SLWC must be given the opportunity to search their records again for the named entities to verify their prior findings and to determine whether the named entities ever utilized the services of Applicants and, if so, whether that traffic was overhead or local to the Line.

Applicants are not attempting to misuse the Board's class exemption for two-year out-of-service abandonments. If an honest mistake was made and one of the named entities shipped local traffic within the two-year period, Applicants will voluntarily withdraw their Joint Notice. If Petitioners were equally interested in seeking the truth, an accommodation could easily have been made that would have satisfied both sides. Access to the designated information could have been limited to a small group of employees at BNSF and SLWC that are in a position to review their respective company's records. These employees would not be in a position to seek retribution and they would have signed an Undertaking that protected the material from further disclosure. Petitioners' classification of these entities as Highly Confidential, in the first instance, and their subsequent steadfast refusal to permit any verification of the allegations in the Statement in Support places into question (1) the veracity of the allegations; and (2) whether the identified entities are even aware that they are being used as putative shippers in this proceeding.

By designating the identity of the entities Highly Confidential, Petitioners are attempting to deny Applicants due process before the Board. The designation permits Petitioners to make unsupported allegations that are difficult, if not impossible, to challenge because no one with access to company records is permitted to know their identity. Counsel for BNSF and SLWC are effectively prevented from making the necessary inquiries that would bring clarity and resolution to the veracity, or lack thereof, of the Petitioners' submissions before the Board. Accordingly, pursuant to Paragraph 6 of the Protective Order, the Board should unseal Petitioners Highly Confidential filing and place it in the public docket.

If the Board declines to redesignate the material, Applicants alternatively request that the Board grant Applicants permission to engage in discovery (depositions, interrogatories and/or document requests) with respect to the identified entities. In light of Petitioners' refusal to redesignate the material, Applicants requested the names of individuals at these companies on whom discovery could be served. In response, Petitioners' counsel threatened Applicants and their counsel with sanctions if the entities are contacted:

Any attempt on your part to serve discovery requests on the four shippers would be in violation of your undertakings, and Petitioners would seek sanctions accordingly. As counsel for SLWC and BNSF, respectively, you have no standing to pursue discovery -- you are not a party to the proceeding before the Board -- and for your clients to do so obviously would reflect a disclosure of Highly Confidential information provided to the two of you pursuant to your signing of the undertakings.

See Exhibit 3.

In light of the Petitioners' counsel threats, there is a clear need for Applicants' counsel to seek an order from the Board itself authorizing the service of discovery on the four entities so as to avoid the expense of refuting any claims for sanctions.

Fundamental fairness necessitates that Applicants have a reasonable opportunity to gather information from these entities to assess the veracity of Petitioners' claims. Moreover, Petitioners' concern over confidentiality is misplaced. If the material is not redesignated by the Board, Applicants' outside counsel will engage in the discovery and file the information under seal. Petitioners' strident refusal to permit any contact with these entities and their threats of sanctions raises questions of whether these entities are even aware of their presence in this proceeding. Limited discovery will quickly resolve that issue.

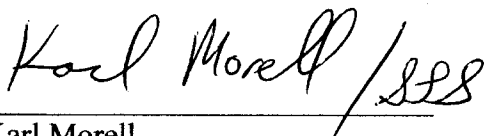
In light of the aforementioned disputes, Applicants request that the Board extend

or toll the deadline for Applicants to respond to the Statement in Support. It would be fundamentally unfair to require Applicants to respond to Petitioners' allegations without first having a meaningful opportunity to review company records and/or seek limited discovery from the entities.

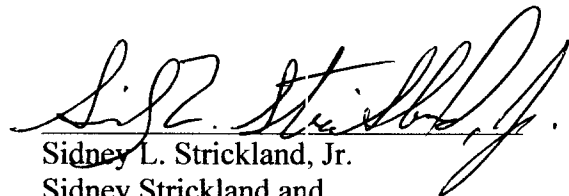
CONCLUSION

For the foregoing reasons, Applicants request that the Board redesignate as non-confidential or Confidential the material designated as Highly Confidential in the Statement in Support. Alternatively, Applicants request that the Board issue an order permitting Applicants to engage in limited discovery with the entities designated Highly Confidential. Further, Applicants request that the Board extend or toll the filing deadline for Applicants' response to the Statement in Support.

Respectfully Submitted,


Karl Morell
Of Counsel
Ball Janik LLP
Suite 225
1455 F Street, N.W.
Washington, D.C. 20005
(202) 638-3307

Attorney for:
STILLWATER CENTRAL
RAILROAD, INC.

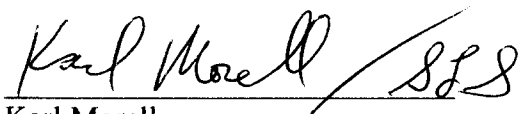

Sidney L. Strickland, Jr.
Sidney Strickland and
Associates, PLLC
3050 K Street, N.W.,
Suite 101
Washington, DC 20007
(202) 295-4672

Attorney for:
BNSF RAILWAY COMPANY

Dated: December 29, 2005

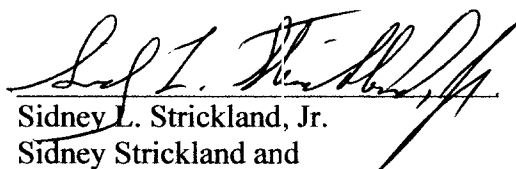
CERTIFICATE OF SERVICE

BNSF Railway Company and the Stillwater Central Railroad, Inc., ("Applicants")
by and through their counsel, Sidney L. Strickland, Jr., and Karl Morell, respectively,
certify that on December 29, 2005, Applicants served a copy of the foregoing Motion, by
facsimile transmission and by mailing copies thereof by first-class mail to Petitioners'
counsel, Fritz R. Kahn, Esq.



Karl Morell
Of Counsel
Ball Janik LLP
Suite 225
1455 F Street, N.W.
Washington, D.C. 20005
(202) 638-3307

Attorney for:
STILLWATER CENTRAL
RAILROAD, INC.



Sidney L. Strickland, Jr.
Sidney Strickland and
Associates, PLLC
3050 K Street, N.W.,
Suite 101
Washington, DC 20007
(202) 295-4672

Attorney for:
BNSF RAILWAY COMPANY

Dated: December 29, 2005

BALL JANIK LLP

A T T O R N E Y S

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

www.balljanik.com

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

KARL MORELL

kmorell@dc.bjllp.com

December 23, 2005

BY TELECOPY

Fritz Kahn, Esq.
Fritz R. Kahn, P.C.
1920 N Street, N.W.
Eighth Floor
Washington, D.C. 20036-1601

Re: STB Docket No. AB-6 (Sub-No. 430X), BNSF Railway Company --
Abandonment Exemption -- In Oklahoma County, OK

STB Docket No. AB-1040X, Stillwater Central Railroad, Inc. --
Abandonment Exemption -- In Oklahoma County, OK

Dear Fritz:

This is in response to Petitioners' Supplemental Response To Applicants' Initial Discovery Requests dated December 22, 2005 ("Supplemental Response"). You have designated the entire Supplemental Response Highly Confidential on grounds that the identified entities fear retribution from the Oklahoma Department of Transportation ("ODOT").

BNSF Railway Company ("BNSF") and Stillwater Central Railroad ("SLWC") hereby request that you re-designate the Supplemental Response as Confidential so the information can be shared with employees of BNSF and SLWC. Although we do not believe the information can even be properly classified as Confidential, we would be willing to acquiesce to such a designation provided you voluntarily re-designate it as such. We seek only to share the information with appropriate employees of BNSF and SLWC who need to be consulted to prepare a response to your filings with the Board. These individuals have signed or will sign the Confidential Undertaking thereby adequately protecting the information from the ODOT.

BALL JANIK LLP

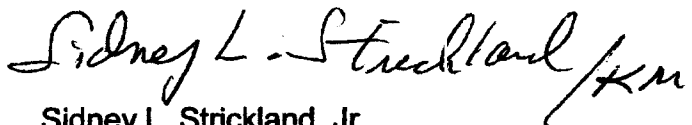
Fritz Kahn, Esq.
December 23, 2005
Page 2

Please let us know as soon as possible whether you are willing voluntarily to re-designate the Supplemental Response or whether you are going to force us to take this matter to the Board.

Sincerely,

A handwritten signature in black ink, appearing to read "Karl Morell". The signature is fluid and cursive, with the first name "Karl" being more prominent than the last name "Morell".

Karl Morell
Attorney for Stillwater Central Railroad

A handwritten signature in black ink, appearing to read "Sidney L. Strickland, Jr.". The signature is cursive and includes a small mark at the end that looks like "Jr." or a similar flourish.

Sidney L. Strickland, Jr.
Attorney for BNSF Railway Company

Morell, Karl

From: xiccgc@att.net
Sent: Tuesday, December 27, 2005 5:38 PM
To: Morell, Karl
Subject: Re: your mail

Karl, Sidney:

Any attempt on your part to serve discovery requests on the four shippers would be in violation of your undertakings, and Petitioners would seek sanctions accordingly. As counsel for SLWC and BNSF, respectively, you have no standing to pursue discovery -- you are not a party to the proceeding before the Board -- and for your clients to do so obviously would reflect a disclosure of Highly Confidential information provided to the two of you pursuant to your signing of the undertakings.

Fritz

--

Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036

Tel.: (202) 263-4152
Fax: (202) 331-8330

This transmission is privileged
and intended for the exclusive use
of the addressee only. If it has
been misdirected, please advise by
telephone and return the
transmission by mailing it to the
originator at the above address.

----- Original message from "Morell, Karl" <kmorell@dc.bjllp.com>: -----

In light of your e-mail this morning refusing to redesignate the Highly Confidential discovery response and Board filing as Confidential, it is difficult to verify the veracity of your allegations through the records of BNSF and SLWC. Consequently, we are considering other options to rebut the unsubstantiated allegations in your filing that there has been local traffic on the line in the last two years. One of these options is to serve discovery on the four companies you identified in your Highly Confidential filing. Please provide us the names of the individuals at these companies that you or your clients have been dealing with so that we can serve the discovery directly on them. If you do not provide us the names, we will serve the discovery on the owner(s) of each company.