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PUBLIC VERSION

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February 6, 2006

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
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 County, OK**

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

215-755
215 756

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Joint Motion to Strike Petitioners' Letter filed on January 17, 2006 and Petitioners' Reply to Applicants' Motion to Compel Responses to Discovery Requests filed January 23, 2006.

Additional copies of this letter and of the Joint Motions are enclosed for you to stamp to acknowledge your receipt of them.

If you have any questions or concerns, please feel free to contact me.

Very truly yours,

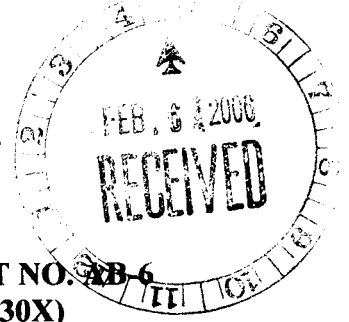
Sidney L. Strickland, Jr.

Attorney for BNSF Railway Company

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BEFORE THE
SURFACE TRANSPORTATION BOARD



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

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

STILLWATER CENTRAL RAILROAD,
INC. - DISCONTINUANCE OF SERVICE
EXEMPTION - IN OKLAHOMA
COUNTY, OK

STB DOCKET NO. AB
1040X

MOTION TO STRIKE PETITIONERS' LETTER FILED ON JANUARY 17, 2006
AND PETITIONERS' REPLY TO APPLICANTS' MOTION TO COMPEL
RESPONSES TO DISCOVERY REQUESTS FILED JANUARY 23, 2006

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Attorney for Stillwater
Central Railroad, Inc.

DATE FILED: February 6, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

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RESPONSES TO DISCOVERY REQUESTS FILED JANUARY 23, 2006**

BNSF RAILWAY COMPANY ("BNSF") and the STILLWATER CENTRAL RAILROAD, INC. ("SLWC") ("Applicants") jointly file this Motion to Strike Petitioners' Letter filed on January 17, 2006 and Petitioners' Reply to Applicants' Motion to Compel Responses to Discovery Requests filed January 23, 2006.

I. The Board Should Strike Petitioners' Letter Filed January 17, 2006.

Petitioners' letter is in violation of 49 CFR 1104.13(c) which provides "[a] reply to a reply is not permitted." Specifically, on January 17, 2006, Petitioners Bio-Energy Wellness Center and North American Transportation Institute ("Petitioners") filed a letter in response to Applicants' Joint Reply to Petitioners' Statement in Support of Their Petition to Have Applicants' Notice Declared Null and Void ("January 17th Letter"). The

*AB-6 (Sub-No. 430X)
AB-1040X*

Surface Transportation Board ("Board") and its predecessor have routinely held that the filing of a reply to a reply is impermissible and violates Section 1104.13. See, e.g., Northeast Interchange Ry., LLC—Lease and Operation Exemption—Line in Croton-on-Hudson, NY, STB Docket No. 34734 (STB served November 18, 2005); CSX Transp., Inc.—Abandonment Exemption—in Franklin County, PA, STB Docket No. AB-55 (Sub-No. 568X) (STB served July 28, 2005); CSX Corp.—Control—Chessie System, Inc., 2 S.T.B. 554 (1997); St. Louis S.W. Ry. Co.—Trackage Rights Over Missouri Pac. R.R. Co.—Kansas City to St. Louis Trackage Rights Compensation, 4 I.C.C.2d 668 (1987). Accordingly, Applicants respectfully request the Board strike the January 17th Letter.

Petitioners argue that 49 C.F.R. 1104.13 was "not intended to bar inviting the agency's attention to the misrepresentation of the record and mischaracterization of cited decisions in a reply." January 17th Letter at 1. Petitioners claim that Applicants misstated in their Environmental Report the trackage leased to SLWC. Petitioners' citation is to Applicants' Historic Report and not to the Environmental Report. Moreover, Petitioners have taken the language out of context. In paragraph 5 of the Historic Report, Applicants set forth a brief narrative history of carrier operations on the line being abandoned, including the fact that the segment has been used for over 100 years for overhead traffic through Oklahoma City and that BNSF had leased the trackage to SLWC. Applicants' failure to identify specifically in the Historic Report the portions of the line being leased by SLWC is inconsequential. The purpose of Applicants' narrative was to inform the reader as to historical operations on the line and not to identify the specific contours of the respective carriers' operating rights over the line.

Petitioners also claim that the certifications of Messrs. Batie and McKechnie are flawed for lack of personal knowledge of operations over certain line segments for the

full two-year period. This is incorrect. Where, as here, a landlord and tenant carrier jointly file for abandonment and discontinuance authority, the tenant carrier may certify that the line has been out of service for at least two years, but the tenant's certification necessarily pertains only to the time period the tenant was on the line if that time period is less than 2 years. The Board recently found such a practice acceptable under the out-of-service class exemption. In Union Pacific Railroad Company—Abandonment Exemption—in Dane County, WI, STB Docket No. AB-33 (Sub-No. 251X) and Wisconsin & Southern Railroad Company—Discontinuance of Service Exemption—in Dane County, WI, STB Docket No. AB-383 (Sub-No. 4X) (STB served November 22, 2005) ("Dane County Abandonment"), the Board granted abandonment and discontinuance authority to Union Pacific Railroad Company ("UP") and Wisconsin & Southern Railroad Company ("WSOR"), respectively, under similar circumstances. Indeed, their Verified Notice of Exemption, filed April 12, 2005, explains that UP leased the trackage to WSOR. In their respective certifications included as Exhibits B to their Verified Notice of Exemption, both the landlord railroad, UP, and the tenant railroad, WSOR, certified that no local traffic had moved over the Line for at least two years. In permitting the abandonment and discontinuance exemption in Dane County Abandonment to become effective, the Board necessarily accepted the certifications as accurate and complete.

Applicants' certifications are analogous. BNSF leased two small segments at the extremities of the line to SLWC, with BNSF retaining the exclusive right to handle local traffic on the middle portion of the line. As to this middle segment, BNSF certification pertains to the full two years. As to the two end segments leased by SLWC, SLWC's certification pertains to the time period after December 29, 2004 and BNSF's certification pertains to the time period from September 24, 2003 to December 29, 2004. Based on

Dane County Abandonment, the certifications of Messrs. Batie and McKechnie are indeed accurate and complete.

Finally, Petitioners argue the following cases previously cited by Applicants do not involve the “tacking issue”: Missouri Pac. R. Co. – Aban. – Osage & Morris Count., KS, 9 I.C.C.2d 1228 (1993), and CSX Transportation, Inc. – Abandonment Exemption – In Bell County, KY, and Clairborne County, TN, STB Docket No. AB-55 (Sub-No. 478X) Norfolk Southern Railway Company – Discontinuance of Trackage Rights Exemption – In Bell County, KY, and Clairborne County, TN, STB Docket No. AB-290 (Sub-No. 138X) (STB served August 5, 1994. Petitioners are mistaken. Petitioners continue to claim that Applicants inappropriately used the two year out-of-service exemption by *tacking* the experiences of a prior owner of the line with the current owner to cover the two-year period. In this proceeding, BNSF has been the owner of the line for the full two-year period. SLWC, on the other hand, has never been an owner of the line and has simply been a tenant/lessee of two portions of the line for a portion of the two-year period.

II. The Board Should Strike “Petitioners’ Reply to Applicants’ Motion to Compel Responses to Discovery Requests” Filed January 23, 2006.

On January 23, 2006, Petitioners filed a pleading purporting to respond to Applicants’ Motion to Compel. It is readily obvious, however, that Petitioners’ motivation is not to respond to the Motion to Compel but to introduce into the record yet another round of evidence. What makes Petitioners’ conduct particularly egregious is that this is the **fifth round of evidence** Petitioners seek to file with the Board. Moreover, all of the documents attached to this filing have been in the possession of Petitioners for some time and could have been filed with any of the prior rounds of evidentiary filings.

In any event, 49 CFR 1114.21(f) provides that discovery materials “shall be served on the other counsel and parties, but shall not be filed with the Board” unless otherwise indicated by an order from the Board. In City of Lincoln—Petition for Declaratory Order, STB Finance Docket No. 34425 (STB served August 12, 2004)(“City of Lincoln”), as in the instant matter, discovery responses were filed with the Board in addition to being served on counsel and parties to the matter. In City of Lincoln, the Board granted a motion to strike discovery responses for failing to comply with 49 CFR 1114.21(f)

Consistent with the Board’s ruling in City of Lincoln, Applicants request that the Board strike Petitioners’ January 23, 2006 filing for failing to comply with discovery regulations at 49 CFR 1114.21(f).

III. Applicants’ Motion Filed December 30, 2005 Should Be Immediately Granted.

In the event that the Board does not grant these Motions to Strike, Applicants request that the Board immediately grant their December 30, 2005 Joint Motion to Redesignate Highly Confidential Materials, or, Alternatively, to Engage in Discovery of Entities Designated Highly Confidential and provide Applicants an opportunity to respond to the new evidence.

In the December 30th pleading, BNSF and SLWC jointly argued that, 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....”

Moreover Applicants noted that 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. Applicants noted further that Petitioners had simply identified four entities purportedly located in Oklahoma City, OK. No information was 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 identified four entities and claimed that, based on Petitioners’ “observations and their conversations with personnel of the companies,” Petitioners understand that these entities were “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 did not categorically state that these entities shipped local traffic on the Line much less that they were located on the Line. All that Petitioners claimed was that these entities may have been accessed via the Line.

Now, Petitioners have filed a January 23, 2006 pleading with the Board that further demonstrates that Applicants’ Motion of December 30, 2005 should be immediately granted. Petitioners’ pleading of January 23, 2006 attached a Verified Statement of _____, claiming that _____ visited _____ and that “personnel” at _____ indicated to him that the company had shipped an _____ by rail within the last two years on the line Applicants seek to abandon. However, the statement does not provide any day or month of the purported shipment. The _____ statement further states that the _____ is served by an _____ into its _____.

Attached with the _____ Verified Statement is an unverified statement by _____ reiterating the claim that a _____ had been built and shipped from a _____

on the line in question "less than two years ago." also included a statement that he had visited in November 2004 and that would not deny that a large had been manufactured and shipped by rail from the . They then include photographs that allegedly show . The photographs do not include any markings showing the milepost markings or location to this .

Counsel for Applicants need the ability to communicate with their clients to identify records related to their particular shippers as to date and commodity of shipment of said carrier's line. Absent the reclassification of the material discussed above, it will be impossible for counsel to verify with Applicants the validity of Petitioners' claims. Indeed, Applicants will certainly be forced to review documents of numerous shippers in Oklahoma City and still not be able to communicate with Applicants as to the validity of any particular shipments. Moreover, the information concerning is neither confidential nor highly confidential because it involves information concerning shipper and carrier that are the properties of the shipper and carriers themselves. That is to say, the information concerning shipments over BNSF is not confidential as to BNSF and information concerning shipments over SLWC is not confidential as to SLWC. See, e.g., Goldstein v. ICC 1984 US Dist. LEXIS 14768 (July 20, 1984).

IV. Conclusion

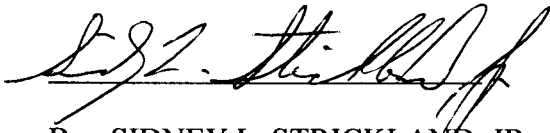
For the above stated reasons, Applicants request that the Board grant each of Applicants' Motions herein.

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Respectfully submitted,

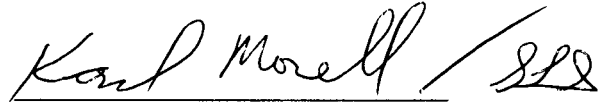
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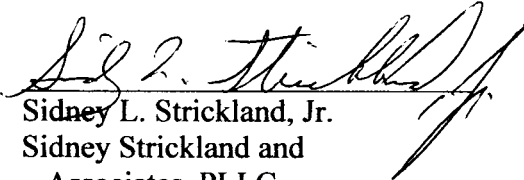
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DATE FILED: February 2, 2006

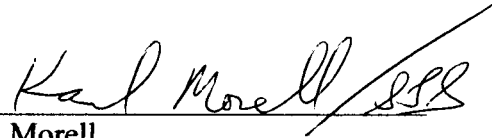
CERTIFICATE OF SERVICE

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 February 6, 2006, Applicants served a copy of the foregoing Motions to
Strike by facsimile transmission and by mailing copies thereof by first-class mail to
Petitioners' counsel, Fritz R. Kahn, Esq.



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