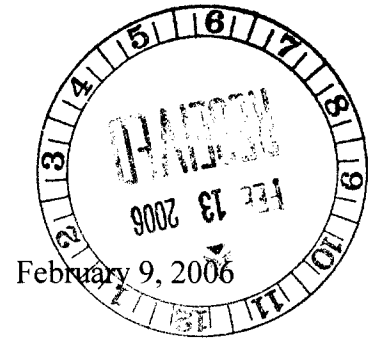


LAW OFFICES
FRITZ R. KAHN, P.C.
EIGHTH FLOOR
1920 N STREET, N.W.
WASHINGTON, D.C. 20036-1601

(202) 263-4152
FAX (202) 331-8330
e-mail: xiccgc@worldnet.att.net

ORIGINAL



Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

Dear Secretary Williams:

25784

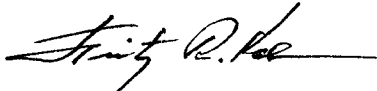
Enclosed for filing in each of STB Dockets No. AB-6 (Sub-No. 430X), BNSF Railway Company—Abandonment Exemption—In Oklahoma County, OK, and No. AB-1040X, Stillwater Central Railroad, Inc.—Abandonment Exemption—In Oklahoma County, OK, are the original and ten copies of the Reply of Petitioners, Bio-Energy Wellness Center and North American Transportation Institute..

Additional copies of this letter and of the Reply are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the enclosed stamped and self-addressed envelope.

Service of the this letter and the Reply has been effected by mailing copies to the railroads' counsel.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.

cc: Sidney L. Strickland, Jr., Esq.
Karl Morell, Esq.

ENTERED
Office of Proceedings

FEB 13 2006

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

ORIGINAL

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

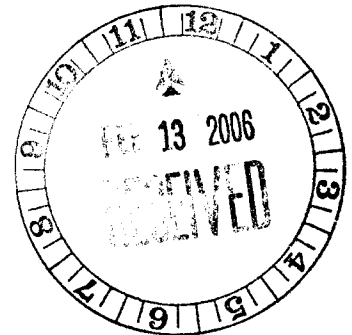
PETITIONERS' REPLY TO
APPLICANTS' MOTION TO STRIKE

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036-1601
Tel.: (202) 263-4152

Attorney for

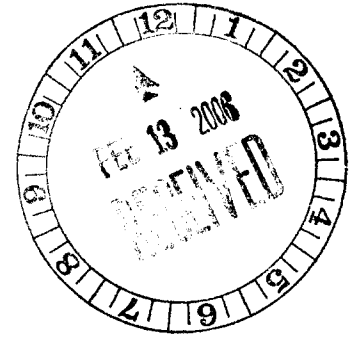
BIO-ENERGY WELLNESS CENTER
NORTH AMERICAN TRANSPORTATION INSTITUTE

Dated: February 9, 2006



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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



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

PETITIONERS' REPLY TO
APPLICANTS' MOTION TO STRIKE

Petitioners, Bio-Energy Wellness Center ("Bio-Energy") and North American Transportation Institute ("NATI"), pursuant to 49 C.F.R. 1104.13(a), reply in opposition to the Motion to Strike of Applicants, BNSF Railway Company ("BNSF") and Stillwater Central Railroad, Inc. ("SLWC"), filed February 6, 2006:

A.

Petitioners' January 13, 2006, letter

The letter which the Petitioners sent to the Board acknowledged that 49 C.F.R. 1104.13(c) ordinarily does not permit the filing of a reply to a reply. It went on, however, to note that surely the rule was not intended to bar a party from inviting the Board's attention to the misrepresentation of the record and the mischaracterization of cited decision in a reply, as the

Applicants had in their Reply, filed January 12, 2006. Indeed, the Board has accepted replies to replies in the interest of having a complete evidentiary record. See, STB Finance Docket No. 34425, City of Lincoln–Petition for Declaratory Order, served December 8, 2003; STB Docket No. 42078, Norfolk Southern Railway Company–Petition for Declaratory Order–Interchange with Reading Blue Mountain & Northern Railroad Company, served April 29, 2003; STB Finance Docket No. 33388, CSX Corporation, et al.–Control and Operating Leases/Agreements–Conrail Inc., et al., served May 20, 1999.¹ The evidentiary record in the instant proceeding would be aided if the Board were to accept the letter, particularly since the Applicants by their motion effectively have submitted their response. See, STB Finance Docket No. 33950, Jefferson Terminal Railroad Company–Acquisition and Operation Exemption–Crown Enterprises, Inc., served March 19, 2001; STB Finance Docket No. 33824, Great Salt Lake and Southern Railroad, L.L.C.–Construction and Operation–In Tooele County, UT, served December 15, 2000.

1. Nowhere in their Verified Notice of Exemption, filed September 23, 2005, did the Applicants reveal that SLWC had leased from BNSF only two small segments of the railroad line sought to be abandoned. To the contrary, at page 14 of the accompanying Environmental Report, Applicants declared, “On December 29, 2004, BNSF leased this [entire] trackage to SLWC.” At page 4 of their Motion, Applicants now seek to explain away their statement, contending that it merely was a part of the historical narrative. At no other place in their filing, however, did the Applicants “identify the specific contours of the respective carriers’ operating rights over the

¹ Applicants mischaracterize STB Docket No. AB-55 (Sub-No. 568X), CSX Transp., Inc.–Abandonment Exemption–in Franklin County, PA, served July 28, 2005, as a decision in which the Board disallowed the filing of a reply to a reply.

line.” The public was not otherwise informed of the late and limited arrangement between the two carriers as it relates to the Oklahoma City railroad line.

2. Try as they might, the Applicants cannot explain away the misrepresentations in their Notice’s certifications of BNSF’s Mr. Batie or SLWC’s Mr. McKechnie that each had personal knowledge that no operations had been performed on the line sought to be abandoned for two years’ time. At page 5 of their Motion, Applicants contend that a lessee’s certification pertains “only to the time period the tenant was on the line if that time period is less than 2 years.” To support their strained reading of 49 C.F.R.1152.50, Applicants cite STB Docket No. AB-33 (Sub-No. 251X), Union Pacific Railroad Company–Abandonment Exemption–in Dane County, WI, STB Docket No. AB-383 (Sub-No. 4X), Wisconsin & Southern Railroad Company--Discontinuance of Service Exemption–in Dane County, WI, served May 2, 2005. The cited decision, however, is inapposite, because, as the Verified Notice of Exemption, filed by the two carriers April 12, 2005, discloses, Wisconsin & Southern Railroad Company leased the line in 1996. In other words, both the lessor and the lessee in that proceeding had been on the premises far longer than the two years of the out-of-service exemption. That, of course, was not true of BNSF and SLWC in the instant proceeding, with SLWC having leased the two small segments of the line proposed for abandonment less than a years before the Applicants filed their Notice of Exemption.

3. At page 6 of their Motion, Applicants seek to fault Petitioners for having pointed out in their letter that the two trackage rights decisions Applicants cited at page 7 of their Reply² do

² Docket No. AB-55 (Sub-No. 478X), CSX Transportation, Inc.–Abandonment Exemption–In Bell County, KY, and Clairborne County, TN, Docket No. AB-290 (Sub-No. 138X), Norfolk southern Railway Company–Discontinuance of Trackage Rights Exemption–In

not support the tacking of the lessor's experience with that of the lessee in order to satisfy the two-year requirement of the out-of-service exemption of 49 C.F.R. 1152.50. That BNSF owned the line for the entire two years does not obscure the fact that it did not operate the two small segments leased to SLWC after December 29, 2004. In order to establish that the line proposed for abandonment had not been operated for the two years preceding the filing of the Applicants' Verified Notice of Exemption it was necessary to tack BNSF's lack of operations between September 23, 2003, and December 29, 2004, with SLWC's lack of operations between December 29, 2004, and September 23, 2005. Such tacking of claimed no service by one operator for a period of time with the claimed no service by a second operator for another period of time, both occurring within the two years preceding the filing of the carriers' notice fails to meet the two-year out of service requirement for the section-1152.50 exemption to apply.

B.

Petitioners' Reply to Applicants' Motion to Compel

Beginning at page 6 of their Motion, Applicants argue that the Petitioners' Reply, filed January 23, 2006, to Applicants' Motion to Compel Responses to Discovery Requests, filed January 3, 2006, should be stricken, because it is an evidentiary filing. In support of their contention, Applicants cite the decision in STB Finance Docket No. 34425, City of Lincoln—Petition for Declaratory Order, served August 12, 2004. The decision, however, is inapposite, because in that proceeding Lincoln Lumber Company filed its initial discovery responses with the Board at the same time it served them on the City of Lincoln. The Petitioners

Bell County, KY, and Clairborne County, TN, served August 5, 1994; Missouri Pac.R. Co.—Aban.—Osage & Morris Count., KS, 9 I.C.C.2d 1228 (1993).

did not do that in the instant proceeding. Petitioners' initial discovery responses and their supplemental discovery responses were served only on the Applicants and were not filed with the Board. It was the Applicants who deemed the Petitioners' initial discovery responses and their supplemental discovery responses to be inadequate, and it was the Applicants who filed the Motion to Compel Responses to Discovery Requests. Pursuant to 49 C.F.R. 1104.13(a), Petitioners were entitled to Reply to Applicants' Motion, and it is that Reply which the Applicants now wish to have stricken. In other words, Applicants ask that the Board approve their Motion without, however, receiving Petitioners' Reply. That would be highly irregular and offend the fundamentals of fairness which inhere in the Board's procedural regulations.

C.

Applicants' December 30, 2005, Motion

Beginning at page 7 of their Motion, Applicants endeavor to renew their Motion to Redesignate Highly Confidential Materials or, Alternatively, to Engage in Discovery of Entities Designated Highly Confidential, filed December 30, 2005. Their effort requires rejection by the Board. Applicants' current arguments are repetitive of the arguments they advanced in their earlier pleading. Such redundant pleadings are disfavored, pursuant to 49 U.S.C. 1104.8. Moreover, Applicants ignore the fact that the Petitioners filed a Reply on January 3, 2006. In effect, therefore, Applicants' renewed motion is nothing more than an impermissible reply to a reply, in violation of 49 C.F.R. 1104.13(c). See, STB Docket No. 34734, Northeast Interchange Ry., LLC—Lease and Operation Exemption—Line in Croton-on-Hudson, NY, served November 18, 2005; STB Finance Docket No. 34319, Consolidated Rail Corporation—Declaratory Order Proceeding, served October 10, 2003. The Board does not need Applicants' reiterated assertions

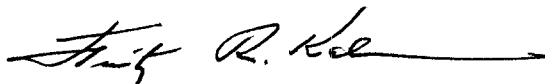
in order to have a complete evidentiary record.

Petitioners again state, as they made clear at page 3 of their Reply, the relief which Applicants seek would result in a breach of the commitment which Petitioners made, for it would disclose the identity of the four shippers on or accessed via the line proposed for abandonment to the very railroads whose retribution they feared. If there were no other way that Petitioners were able to persuade the Board to deny Applicants the extraordinary relief they seek, Petitioners would agree to have first paragraph number 2 stricken from their Statement, filed December 23, 2005, and rely upon the other four grounds for urging that the Applicants' Verified Petition for Exemption be declared null and void *ab initio*, because it contained false and misleading information.

WHEREFORE, Petitioners, Bio-Energy Wellness Center and North American Transportation Institute, ask that the Motion which Applicants, BNSF Railway Company and Stillwater Central Railroad, Inc., filed February 6, 2006, be denied.

BIO-ENERGY WELLNESS CENTER
NORTH AMERICAN TRANSPORTATION INSTITUTE

By their attorney,



Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036-1601
Tel.: (202) 263-4152

Dated: February 9, 2006

CERTIFICATE OF SERVICE

I certify that I this day served the foregoing Reply upon BNSF Railway Company and Stillwater Central Railroad, Inc., by mailing copies thereof, with first-class postage prepaid, to their respective attorneys, Sidney L. Strickland, Jr., Esq., and Karl Morell, Esq.


Fritz R. Kahn