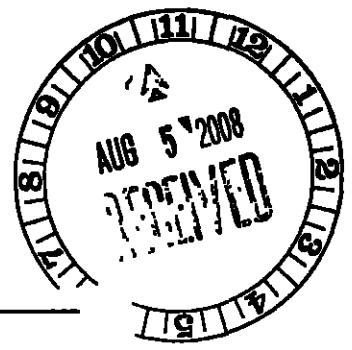


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35164

PETITION OF BNSF FOR DECLARATORY ORDER

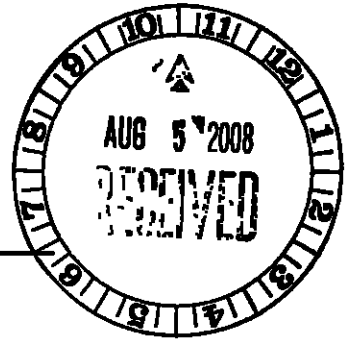
COMMENTS OF EDWIN KESSLER

**ENTERED
Office of Proceedings
AUG 5 2008
Part of
Public Record**

**Edwin Kessler
1510 Rosemont Drive
Norman, OK 73072
(405) 360-2194**

Dated: August 3, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 35164

PETITION OF BNSF FOR DECLARATORY ORDER

COMMENTS OF EDWIN KESSLER

1. Notice is hereby given that Edwin Kessler ("Kessler"), intends to participate as a party of record in this proceeding. Please direct all matters pertaining to this proceeding to: Edwin Kessler; 1510 Rosemont Drive; Norman, OK 73072 Telephone No.: (405) 360-2194.

2. 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 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;

B. 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;

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.

3. In its Petition, BNSF stated 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.

4. Kessler argues that instituting a declaratory order proceeding would be appropriate, for there is an ongoing controversy regarding whether BNSF's actions to date, and proposed future actions, required / will require, prior authority from the Board. Were the Board to institute a declaratory order proceeding in this matter, the Board could resolve the underlying controversies, thereby removing uncertainty in a case that relates to the subject matter jurisdiction of the Board. See 5 U.S.C. 554(e); 49 U.S.C. 721; and *Intercity Transp. Co v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority – Declaratory Order Proceedings*, 5 I.C.C. 2d 675 (1989).

5. Kessler further asks that the Board set a procedural time line for discovery, and responses to material obtained via discovery, and schedule a public hearing in Oklahoma City, so that interested parties can provide comments regarding this matter, as the Board did in the *Coos Bay Rail Line* case.¹

Initial Comments of Edwin Kessler

6. The subject of this proceeding, was the same subject of *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*, STB Docket No. AB-6 (Sub-No. 430X), that is, the portion of BNSF's Chickasha line that lies between MP 539.96 and 542.91 (“Abandonment Exemption”).

7. In a Decision served on June 5, 2008, the Board found that BNSF had misused the Board's Notice of Exemption procedures, by knowingly including material false and misleading statements in its Abandonment Exemption, then held that BNSF's Abandonment Exemption was void *ab initio*. Since BNSF knowingly misled the Board in its Abandonment Exemption, any representations made by BNSF in this Declaratory Order proceeding should be closely scrutinized by the Board.

¹ *Central Oregon & Pacific Railroad, Inc. – Coos Bay Rail Line*, STB Finance Docket No. 35130.

8. In its Petition, BNSF accused Kessler numerous times of misusing the Board's Offer of Financial Assistance ("OFA") procedures, Petition at 3-4, 8, 11, 20 and made numerous unsubstantiated allegations that Kessler was attempting to halt a freeway project, Petition at 3, 8, 20-21. Both statements are irrelevant and immaterial, and should be stricken from the record. The party that misused the Board's procedures is BNSF, which knowingly and deliberately provided false and misleading statements to the Board, not once, not twice, but numerous times. Not only did BNSF provide false and misleading statements to the Board in its initial filing, it continued to provide false and misleading statements to the Board in subsequent filings, by filing false and misleading verified statements.

9. The Board's OFA procedures were created for the explicit purpose of preserving rail service threatened by a proposed abandonment. Kessler attempted to use the OFA procedures for precisely the purpose for which they were created: To preserve rail service threatened with abandonment.

10. In its Petition, BNSF made the following unsubstantiated statements, which Kessler argues are irrelevant, immaterial, offensive, and highly misleading, and thus should be stricken:

A. A new freeway is needed because the existing highway is in a dangerous condition. Petition at 5. **Kessler's response:** If the highway is truly dangerous, why has the Oklahoma Department of Transportation ("ODOT") failed to repair or maintain the highway? Why has the motoring public been permitted to continue to use this 'dangerous' highway? It is not the duty of the Board to provide ODOT with a remedy to alleviate its failure to maintain its roads.

B. The planning for the new highway began in 1996. Numerous Federal, State and local entities were contacted. Petition at 5. **Kessler's response:** Obviously BNSF and ODOT did not think input from the Board was needed, desirable, or relevant, since no one bothered to contact the Board until the design for the new highway had been finalized. Now, after the project has been started, and after it has finally become obvious to BNSF and ODOT that Board approval was not guaranteed, BNSF and ODOT are asking the Board to expeditiously 'rubber stamp' their abandonment request, without any inquiry as to whether the proposed abandonment would adversely affect any shipper, past, present or future, or would comport with public convenience and necessity.

C. BNSF has accused Kessler of abusing the Board's OFA procedures. Petition at 3-4, 8,11, 20. **Kessler's response:** BNSF's allegations are unaccompanied by any explanation indicating in what way Kessler abused the Board's OFA procedures. It should be recalled that the Board summarily rejected Kessler's OFA request. Consequently, Kessler's OFA request had no impact on the proceedings before the Board. What did impact the proceeding, were the false and misleading statements BNSF kept uttering.

D. BNSF stated Kessler made 'countless filings.' Petition at 9. **Kessler's response:** Kessler made fourteen filings in the Abandonment Exemption proceeding. It took fourteen filings to convince the Board that BNSF had provided false and misleading statements to the Board. And then, the Board became convinced only after BNSF filed statements and documents which clearly demonstrated that BNSF had provided false and misleading statements in its Abandonment Exemption. In the very beginning stages of the proceeding, Tom Elmore presented evidence to the Board that demonstrated that BNSF had provided, and continued to provide, local service using the Chickasha Line. The Board summarily rejected this evidence. Had the Board not blindly accepted BNSF's statements that no portion of the Chickasha line was needed to provide service to local shippers, the proceeding would have ended much sooner, and Kessler would not have had to file 14 pleadings.

E. BNSF stated on p. 9 of its Petition, that it did not realize that the Shields Spur connected to the Chickasha Line. **Kessler's response:** This statement is not credible. Even a cursory look at the map appended to BNSF's Abandonment Exemption clearly shows that the Shields Spur was connected to the Chickasha line, and that the Shields Spur did not cross the Chickasha line. BNSF's photographs appended to its Abandonment Exemption also clearly show the Shields Spur connecting to the Chickasha line, rather than crossing the Chickasha line.

F. BNSF complained that the Abandonment Exemption took three years to resolve, Petition at 10, and that BNSF's Declaratory Order should be expeditiously ruled on. Petition at 19. **Kessler's response:** The reason it took three years to resolve the Abandonment Exemption, is because it took the Board three years to realize that the Board could not continue to ignore the false and misleading statements in the BNSF Abandonment Exemption. Kessler believes that a reason the Board actually began to question BNSF's Abandonment Exemption, was related to Kessler's filing of a Petition for Review with the DC Court of Appeals.

G. On page 11 of its Petition, BNSF states that Kessler has “demonstrated a total distain (sic) for the Board’s procedures.” **Kessler’s response:** Kessler has religiously complied with the Board’s procedures. BNSF is the party that has “demonstrated a total disdain for the Board’s procedures,” by filing false and misleading statements in the Abandonment Exemption proceeding.

H. BNSF stated: “While BNSF had various relocation options available, it opted to pursue the fastest and least expensive one, which was to rebuild the Packingtown Lead, which essentially parallels the Middle Segment.” Petition at 6. **Kessler’s response:** BNSF failed to disclose to the Board that the Packingtown Lead is about one mile south of the Middle Segment of the Chickasha line, and serves a totally different market. BNSF failed to disclose to the Board that BNSF did not consult with, nor did it solicit any input from the shippers who are located adjacent to the portions of the Chickasha line that BNSF proposes to abandon (between MP 539.96 and MP 542.91). BNSF failed to support its statement that totally rebuilding the Packingtown Lead (new track, new crossties, new signals, new crossings, new gates and flashers along the corridor, and constructing a new wye) was less expensive, or would be faster, than realigning the middle portion of the Chickasha line 200 feet south of its existing alignment. Kessler points out that rebuilding the Packingtown Lead took more than two years, and cost in excess of \$8 million Dollars, or more than \$5 million Dollars per mile. Kessler further points out that realigning the middle segment of the Chickasha line 200 feet south of its existing alignment, **would not** have required BNSF to purchase new rails (the existing rails are in excellent condition and could have been reused), to purchase a complete set of new crossties (many of the existing crossties could have been reused), or to install new signals, crossings, gates or flashers. (There are no BNSF signals, crossings, gates or flashers in the middle segment. All arterial crossings in the middle segment are grade-separated.)

I. BNSF is asking the Board to find that public convenience and necessity will best be served by eliminating a line of railroad:

- a. Without any input from any of the shippers who would be affected by the proposed abandonment;
- b. Without any input regarding the relative costs of rebuilding the Packingtown Lead vs. realigning the middle portion of the Chickasha line;

- c. Without any input regarding the public's inconvenience or dangers associated with BNSF's use of the Packingtown Lead, with its at-grade crossings, for significant quantities of overhead traffic, vs the total lack of public inconvenience or danger associated with using the Chickasha line, which has grade-separated crossings in the middle segment, for moving overhead traffic;
- d. Without any evidence that realigning the Chickasha line 200 feet south of its existing alignment, on land presently vacant and owned either by BNSF or ODOT, would not be feasible, would not be cost-effective, or would preclude construction of the proposed Crosstown Freeway.
- e. Without any evidence that retaining the crossover track that connects the Chickasha line with the adjacent, parallel Union Pacific line at MP 541.0, would preclude construction of the proposed Crosstown Freeway. (The Crosstown Freeway could cross the crossover track with a grade separated crossing. The crossover track would occupy a strip of dirt just 30 feet wide, or about the same width as the new culvert that is being constructed across the Crosstown Freeway's proposed right-of-way at nearby Lee Street. This culvert was the subject of one of Kessler's filings in the Abandonment Exemption. BNSF stated that the culvert would only temporarily disrupt service over the Chickasha line, and further stated that the Chickasha rails BNSF removed at this location, would be reinstalled after the culvert had been built. What Kessler finds puzzling, is that the culvert has been built for more than two months. However, to date, the hole that was excavated to permit construction of the culvert, has not been fully back-filled, and remains a significant hazard for anyone, and especially a child, who might fall into the hole. There has been no construction activity at this site for more than a month. All the construction equipment that was at this site, has been removed.)

11. BNSF is asking the Board to 'rubber stamp' its unilateral decision that totally rebuilding the Packingtown Lead was the 'fastest and least expensive' option, and that BNSF's decision to abandon a portion of the Chickasha line, in fact best suited the public's convenience and necessity, **without any input from the public**. Kessler advocates that the Board should afford the public an opportunity to be heard, and that **the Board should schedule a public hearing in Oklahoma City**, so that the public can meaningfully participate in this proceeding, much as the

Board has deemed it appropriate to do in the *Coos Bay Rail Line* case.²

12. BNSF argued vigorously in its Petition that the existing I-40 freeway through Oklahoma City is outdated, has insufficient capacity, and has been allowed to deteriorate to the point where it is dangerous. Petition at 5. BNSF argued vigorously that the new Crosstown Freeway is needed, is necessary, and that if the Board does not expeditiously grant BNSF authority to permanently remove that portion of the Chickasha line that lies between MP 539.96 and MP 542.91, ODOT will incur “millions of dollars of cost overruns.” Petition at 19-20. **Kessler’s response: None of any of BNSF’s allegations are supported by verified statements. All of BNSF’s allegations are hearsay, and thus have no substantive evidentiary value. In addition, BNSF appears to be asking the Board to move heaven and earth, expeditiously, in order to accommodate ODOT’s demand that the Board immediately grant BNSF authority to remove a portion of the Chickasha line, so that ODOT can immediately commence constructing a freeway in the right-of-way of the Chickasha line. In effect, BNSF is asking the Board:**

- A. To accept its unsupported statements at face value;
- B. Is asking the Board to forego any kind of evidentiary proceedings that would elicit facts indicating:
 - a. That construction of the Crosstown Freeway is more important than preserving rail service on the Chickasha line; or
 - b. That BNSF’s decision to rebuild the Packingtown Lead / abandon a portion of the Chickasha line, rather than relocate the subject portion of the Chickasha line 200 feet south of its present alignment, best suited the public convenience and necessity criteria that ultimately governs this proceeding.

PROPOSED EASTERN SEGMENT RELOCATION

13. BNSF has argued that moving the Eastern Segment alignment 200 feet south of its present alignment, disconnecting from the Chickasha line the two spurs which serve Producers

² *Central Oregon & Pacific Railroad, Inc – Coos Bay Rail Line*. STB Finance Docket No. 35130.

Co-Op and Mid-States Lumber, removing the two Union Pacific diamond crossings which permit BNSF to cross UP's line to access Producers Co-Op and Mid-States Lumber, and disconnecting the Middle Segment from Eastern Segment / Shields Spur, would not adversely affect either overhead traffic or local traffic.

14. BNSF has argued that overhead traffic would not be adversely affected if the Eastern Segment is moved 200 feet south of its present alignment. This appears to be correct, if the realignment occurs as depicted in BNSF's / ODOT's graphics. [Kessler is acutely aware that had BNSF been granted authority to abandon that portion of the line that lies between MP 539.96 and 540.15, then that abandonment would have made it impossible for overhead traffic to move from the eastern portion of the Chickasha line to the western portion of the Chickasha line. Had Kessler been granted authority to acquire that portion of the line that lies between MP 539.96 and 540.15, Kessler's acquisition would have preserved the ability to provide overhead traffic service. Preserving the ability to continue to provide overhead service over this portion of the line, was one of Kessler's unannounced goals. Kessler did wonder why no one, except Kessler, noted this glaring error / misstatement on the part of BNSF. (BNSF stated in its Abandonment Exemption that abandonment of the line between MP 539.96 and MP 540.15, would not adversely affect overhead traffic. The reality is that abandonment of this portion of the line, would have precluded all overhead traffic.)]

15. Since realigning the Eastern Segment 200 feet south of its present alignment, in accordance with the graphics offered by BNSF / ODOT, would not adversely affect overhead traffic, the issues can be narrowed to the following:

A. Does BNSF need abandonment authority prior to removing the two diamonds which carry the Producers Co-Op and Mid-States Lumber spurs over Union Pacific's line? Kessler argues below that abandonment authority is needed, since the spurs are in fact branch lines

B. Are the Co-Op / Mid-States Lumber spurs that are north of UP's line, in fact branch lines of railroad? Kessler argues below that the spurs are in fact branch lines, and thus abandonment authority is required prior to their removal.

C. Since the new tracks that will be built to access Mid-States Lumber and Producers Co-Op from the Red Rock line, will traverse over property owned by Mid-States Lumber, before

reaching Producers Co-Op, are these new tracks in fact an additional line of railroad? Kessler argues below that the new tracks are in fact additional lines of railroad.

D. Must BNSF obtain a permanent, irrevocable easement over Mid-States Lumber's property? Kessler argues below that a permanent, irrevocable easement over Mid-States Lumber's property is required, for without a permanent, irrevocable easement, Mid-States could unilaterally sever Producers Co-Op from the National Rail System.

E. Would disconnecting the Middle Segment from the Eastern Segment at MP 540.15, adversely affect local traffic on either the Middle or Western Segments? Kessler argues below that disconnecting the Eastern Segment will adversely affect local traffic on the Western Segment.

16. BNSF proposes to construct a new line of railroad that would connect Producers Co-Op and Mid-States Lumber to BNSF's Red Rock line. This new line of railroad would pass through Mid-States Lumber's property, then end on Producers Co-Op property. BNSF has not provided the Board with a copy of whatever agreements have been executed regarding easements over Mid-States Lumber's property.

17. Presently, both Mid-States Lumber and Producers Co-Op can independently be accessed from the Chickasha line. (Each shipper has a rail spur that connects to the Chickasha line at different locations.) Under the proposal advanced by BNSF, Producers Co-Op would lose its independent rail spur. To access Producers Co-Op from the Red Rock line, BNSF would have to traverse over property owned by Mid-States Lumber. If at some future date, Mid-States Lumber, or its successor in title, decided it no longer wanted, or needed, rail service, it could remove the track that traversed its property. If the track BNSF proposes to lay on Mid-States Lumber's property were to be removed, or blocked, then Producers Co-Op no longer would have access to the national rail system. Unless and until BNSF provides the Board with a copy of an agreement between Mid-States Lumber, Producers Co-Op and BNSF, which states that Mid-States Lumber is granting to Producers Co-Op / BNSF a permanent, irrevocable easement across its property for railroad purposes, BNSF's proposed relocation of its tracks should be denied.

18. Presently, BNSF must cross Union Pacific's line to access Mid-States Lumber and Producers Co-Op. Because the existing tracks cross another carrier's line, these existing tracks

constitute lines of railroad. (They permit BNSF to access a market BNSF could not access prior to crossing UP's tracks. Historically, the Chickasha line was owned by the Saint Louis and San Francisco railroad, while the Red Rock line was owned by the ATSF railroad company.) The existing spurs only connect to these two shippers. Were BNSF to be granted permission to access these two shippers from the Red Rock line as proposed, the new track would permit BNSF to penetrate into a new market area: All that area north of UP's line. Consequently, Kessler argues that BNSF must seek authority under 49 U.S.C. §10901 to construct this additional line of railroad, and must seek authority to abandon the existing spurs which, Kessler argues, are in fact existing branch lines, since they permit BNSF to access markets north of Union Pacific's line.

19. It should be noted that crossings are not mentioned in 49 U.S.C. §10906. Instead, crossings are regulated under 49 U.S.C. §10901 (d), which regulates construction / acquisition of lines of railroad. Consequently, the removal of a crossing, and the line associated with the crossing, is subject to regulation, and as such, cannot be removed without authority from the Board.

20. The issue of whether disconnecting the Middle Segment from the Eastern Segment would adversely affect local traffic in the Middle or Eastern Segment, is addressed below.

PROPOSED WESTERN SEGMENT ABANDONMENT

21. On pages 6 - 8 of its Petition, BNSF indicated that it intends to institute an abandonment proceeding for the Western Segment (between MP 541.69 and MP 542.91), in order to "accommodate Oklahoma City's desire to rail-bank the Western Segment. Pursuant to current STB policy, a rail line may only be rail-banked if it is first approved for abandonment. In other words, the right-of-way underlying a rail line that has been relocated will not qualify for rail-banking."

22. Appended hereto as **Exhibit One**, is a Verified Statement of Joseph Merry ("**Boardman V.S.**"), VP and General Manager of Boardman, Inc. ("**Boardman**"). As BNSF acknowledged on p. 6 of its Petition, Boardman is a rail-served shipper located on the Western Segment, near MP 541.7 (at 1135 S. McKinley). Boardman has its own rail spur, which connects to the Chickasha line near MP 541.75.

23. In Boardman's V.S., Boardman states that it strongly desires to retain its rail service. Boardman further states that it is maintaining its rail spur, and continues to pay to BNSF its switch-maintenance fee. Boardman also states that the reason it stopped using rail service, was because of the abysmal rail service that was offered by BNSF following the merger of the Burlington Northern with the ATSF.

24 Prior to January 1, 2008, the portion of the Chickasha line that is adjacent to Boardman, was connected to the national rail system at three points:

- A. At MP 540.15, or where the Shields Spur connects to the Chickasha line;
- B. At MP 541.0 (near Shartel), where a cross-over track connected the Chickasha line to Union Pacific's line (See **Exhibit D** of Boardman's V S.);
- C. Near MP 542.9, where the Packingtown Lead connects to the Chickasha line (west of Agnew).

NATIONAL RAIL SYSTEM CONNECTION AT MP 540.15 SEVERED

25. The Chickasha line's Middle Segment connection to the National Rail System at MP 540.15 was severed by the following BNSF-sanctioned activities:

A. On February 14, 2008, Tom Elmore witnessed Lone Star Railroad Contractors' employees cutting and removing rails from the Chickasha line near MP 540.45 (west of Shields Ave.) See Verified Statement of Tom Elmore, February 17, 2008, filed in Abandonment Exemption, and which is incorporated by reference herein.

B. Sometime between February 26, 2008 and March 17, 2008, the turnout that connected the Chickasha line with the Shields Spur, at MP 540.15, and several hundred feet of the Chickasha line west of MP 540 15, were removed. See Tom Elmore's March 20, 2008 Verified Statement, filed in Abandonment Exemption, which is incorporated by reference herein.

NATIONAL RAIL SYSTEM CONNECTION AT MP 541 SEVERED

26. The Chickasha's Middle and Western Segments' connection to the National Rail System near MP 541 (between Shartel and Lee Streets), was severed by the following BNSF-sanctioned

activities (See Tom Elmore's April 8, 2008 Verified Statement and BNSF's Reply to Kessler's Motion to Cease and Desist, filed in Abandonment Exemption, both of which are incorporated by reference herein):

A. Sometime around April 1, 2008, the turnout that connected the Chickasha / Union Pacific crossover track at MP 540.8 – MP 541.0, to the Union Pacific Line, was removed.

B. On April 3, 2008, several thousand yards of earth were removed from the Line by the Wittwer Construction Company, near MP 540.8 (near Lee St), pursuant to a contract with the Oklahoma Department of Transportation.

C. On April 7, 2008, an additional 200 feet of track was removed by the Hulcher Services Company, near MP 540.8 (near Lee St), pursuant to a salvage contract with BNSF.

NATIONAL RAIL SYSTEM CONNECTION AT MP 542.9 SEVERED

27. The Chickasha's Western Segment connection to the National Rail System near MP 542.9 (west of Agnew), was severed by the following BNSF-sanctioned activities (See Tom Elmore's March 5, 2008 Verified Statement and BNSF's April 8, 2008 Reply to Kessler's March 24, 2008 Motion for Cease and Desist Order, at p.4 - 5, both of which were filed in Abandonment Exemption, and both of which are incorporated by reference herein):

A. Sometime prior to February 21, 2008, the diamond that enabled the Packingtown Lead to cross the Chickasha line at Agnew Ave, near MP 542.9, and approximately 60 feet of the Chickasha line on both sides of the diamond, were removed. On February 21, 2008, a signal mast was installed in the middle of where the Chickasha tracks had been prior to their removal.

B. On or about January 28, 2008, approximately 20 feet of the Chickasha line was removed immediately west of where Boardman's rail spur connects to the Chickasha line near MP 541.75. See Tom Elmore's January 28, 2008 V.S., filed in Abandonment Exemption, which is incorporated by reference herein.

BNSF'S PROPOSED 'RELOCATION,' IS IN FACT, AN ABANDONMENT

28. As a result of the above described activities, the portion of the Chickasha line that serves Boardman's rail spur at MP 541.75, has been unlawfully severed from the National Rail system. Since the western approach to Boardman's spur has been blocked by the removal of the diamond at Agnew Ave (MP 542.8), and has been permanently blocked by the signal mast that was erected in the middle of the Chickasha track bed at Agnew Avenue, if BNSF is permitted to 'relocate' the Eastern and Middle Segments, and is permitted to salvage track from the existing Eastern and Middle Segments, then Boardman will forever lose not only its existing eastern connection to the National Rail System, but all connection to the National Rail System. Likewise, if BNSF is permitted to abandon the Western Segment, then Boardman will forever lose its existing western connection to the National Rail System. Since BNSF's proposed 'relocation' / abandonment will result in Boardman's permanent loss of rail service, the actions proposed by BNSF would constitute a regulated abandonment of a line of railroad. Consequently, BNSF's request to have the Board characterize its proposed activities as unregulated 'relocation' activities, should be denied.

**BNSF SHOULD BE ORDERED TO REPLACE
ALL TRACK MATERIAL IT UNLAWFULLY REMOVED**

29. 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."

30. The Board, in its June 5, 2008 Abandonment Exemption Decision, declared BNSF's Abandonment Exemption to be void *ab initio*. Consequently, BNSF has / had no authority to salvage any portion of the Line, and per BNSF's own April 8, 2008 representations to the Board,

is willing, and is prepared, to replace all of the track and track material that was removed.

31. Rather than acting to replace the track that BNSF removed without authority, BNSF now asks the Board for authority to 'relocate' the Chickasha line to an alignment which is one mile south of the existing alignment, and further asks the Board to issue a Declaratory Order stating that BNSF does not need Board authority to finish salvaging the portion of the Chickasha line that lies between MP 539.96 and MP 542.91.

**THE PORTION OF THE CHICKASHA LINE THAT LIES BETWEEN
MP 540.6 AND MP 542.8, IS NEEDED FOR CONTINUED FREIGHT RAIL SERVICE**

32. Boardman's V.S. makes it clear that the portion of the line that Boardman's spur is connected to, (near MP 541.75) is needed for continued local rail service.

33. Under 49 U.S.C. §10907, Kessler (or Boardman, or any other interested party) has the right to file a feeder line application to acquire that portion of the line that is needed to provide service for Boardman. Kessler intends to make such a filing.

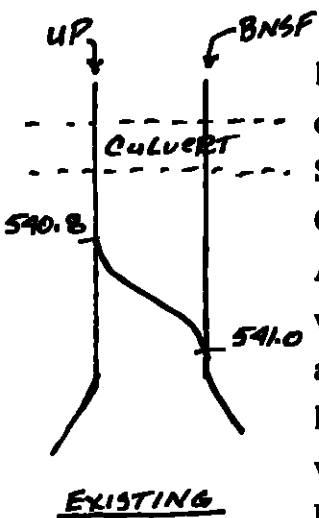
34. For the following reasons, the portion of the line that lies between MP 540.6 +/- (near Lee St) and MP 542.4, (3,500 feet +/- west of the point where Boardman's spur connects to the Chickasha line, near MP 541.75), **is needed for continued freight rail service:**

A. Access to the National Rail System via that portion of the Chickasha line that lies between MP 541.75 (where Boardman's spur connects to the Chickasha line) and MP 542.91 (west of Agnew), **has been permanently severed**, due to BNSF-sanctioned placement of a signal mast in the middle of the tracks west of Agnew, near MP 542.8, and BNSF-sanctioned removal of the diamond that permitted the Packingtown Lead to cross the Chickasha line near MP 542.8. (See the attached **Exhibit 2**, which is a photograph of the Chickasha line at Agnew Ave, near MP 542.8, which photograph was appended to Kessler's Motion for Cease and Desist Order, which was filed in Abandonment Exemption on March 24, 2008);

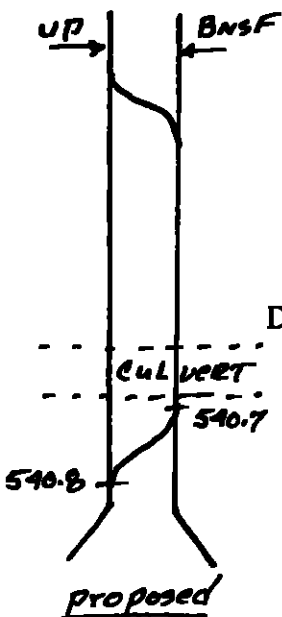
B. Access to the National Rail System via that portion of the Chickasha line that lies between MP 540.6 +/- (near Lee Street) and MP 540.15 (where the Chickasha line

connected to the Shields Spur), **has been permanently severed** due to:

- a. BNSF-sanctioned removal of the Chickasha line / Shields Spur turnout at MP 540.15;
 - b. BNSF-sanctioned removal of several thousand feet of track between MP 540.15 (where the Shields Spur turnout used to be) and MP 540.45;
 - c. BNSF-sanctioned reconstruction of the Red Rock line railroad bridge, which reconstructed railroad bridge carries the Red Rock line over the Chickasha line near MP 540.25. [The reconstructed Red Rock line railroad bridge may not have been designed to accommodate passage of the Chickasha line under the new railroad bridge. (The former Red Rock line railroad bridge was designed so that the Chickasha line could pass under the former Red Rock line railroad bridge.) (Construction of the reconstructed Red Rock line railroad bridge is either complete, or nearly complete.)];
 - d. BNSF-sanctioned reconstruction of the Shields Blvd highway bridge, which reconstructed highway bridge carries Shields Blvd over the Chickasha line near MP 540.3. [The reconstructed highway bridge may not have been designed to accommodate passage of the Chickasha line under the reconstructed Shields Blvd highway bridge. (The former Shields Blvd highway bridge was designed so that the Chickasha line could pass under the Shields Blvd highway bridge.)]
- C. The Chickasha line was / will be connected to the Union Pacific line (and thus to the National Rail System) at MP 541.0 via a crossover track. See Exhibit D, which is a Maps.live aerial graphic depicting the line in 2007, which graphic is appended to Boardman's V.S. The Chickasha line turnout to this crossover track is still in place, as is most of the crossover track. The only portion of the crossover track that has been removed, is the turnout that connected the crossover track to the Union Pacific line. This UP turnout was removed circa March, 2008, in order to facilitate BNSF-sanctioned construction of a culvert under the Chickasha / UP rights-of-ways near Lee St (near MP 540.8). BNSF referenced this culvert on pages 5-6 of BNSF's April 8, 2008 Reply to Kessler's Motion for Cease and Desist Order in Abandonment**



Exemption. During a week-of-April 7, 2008 conversation between Norman Hill, counsel for ODOT, and Michel Salem, counsel for Ed Kessler, Mr. Hill told Mr. Salem that a shoo-fly was to be constructed which would connect the UP line to the Chickasha line near MP 540.8 (west of Lee St) and MP 540.25 (near Shields Blvd). After this shoo-fly is constructed, UP traffic will be diverted onto the Chickasha line while portions of the UP line are removed, to accommodate construction of the aforementioned culvert under the UP line, and to accommodate relocation of the UP line 30 or so feet north of its present alignment. The proposed MP 540.8 UP turnout will be placed in the UP track basically in the same location as the recently removed UP turnout to the Chickasha. The existing turnout was a left-hand turnout, which permitted west-bound UP traffic to cross over to the Chickasha line / east-bound BNSF traffic to cross over to the UP line. The proposed turnout will be a right-hand turnout, which will permit east-bound UP traffic to cross over to the Chickasha line / west-bound BNSF traffic to cross over to the UP line. See the graphic in the left hand margin.



- D. After the UP / Chickasha shoo-fly has been built, the portion of the Chickasha line that is connected to Boardman's rail spur, will once again be connected to the National Rail System near MP 540.7.

ALTERNATIVE MEANS TO KEEP BOARDMAN'S SPUR CONNECTED TO THE NATIONAL RAIL SYSTEM

35. Kessler has identified four means by which the portion of the Chickasha line that Boardman's spur is connected to, can be reconnected to the National Rail System:

A. The Board could order BNSF to keep the new shoo-fly in place. Were this to happen, BNSF would not need to replace the Shields Spur turnout, would not need to replace the ½-mile of track it removed immediately west of the Shields Spur turnout, would not need to relocate the signal mast at Agnew Avenue, and would not need to replace the diamond that was removed at Agnew Avenue. 1,500 feet or so of the Chickasha line that lies east of where the new shoo-fly will connect to the Chickasha line near MP 540.7, would have to remain in place, so that traffic from Boardman could pull east of the new turnout, then reverse back onto the UP line. Keeping 1,500 feet of the Chickasha line east of MP 540.7 (near Lee St) in place, may compromise

ODOT's plans for its proposed Crosstown Freeway, since this 1,500 feet of track may be where ODOT proposes to put the east-bound lanes of the freeway.

B. The Board could order BNSF to restore the UP turnout that connected the Chickasha line / UP line crossover track to the UP line near MP 540.8. **This appears to be the best alternative.** Were this to occur, only a small portion of the Chickasha line would cross the proposed right-of-way of the Crosstown Freeway. (A strip of dirt 30 feet wide by 300 or so feet long. The freeway could cross over the crossover track with a highway bridge that is only 30 feet long.) Were this to happen, BNSF would not need to replace the Shields Spur turnout, would not need to replace the ½- mile of track it removed immediately west of the Shields Spur turnout, would not need to relocate the signal mast at Agnew Avenue, would not need to replace the diamond that was removed at Agnew Avenue, and would not need to keep 1,500 feet of Chickasha line east of MP 540.7, in place.

C. The Board could order BNSF to relocate the signal mast that was placed in the middle of the Chickasha track bed at Agnew Avenue, and could order BNSF to replace the diamond that was removed at Agnew Avenue. This alternative would have no impact on the proposed Crosstown Freeway. This alternative probably would be costly. **Kessler would oppose this alternative, since this alternative would preclude Kessler from accessing UP's line.³** **HOWEVER**, if BNSF were to grant Kessler trackage rights over the Packingtown Lead, Red Rock Line, and other portions of its lines, sufficient to permit Kessler to access UP lines at some other location, this would be acceptable.

D. The Board could order BNSF to pursue the alternative that BNSF elected not to pursue: Relocate the Middle Segment of the Chickasha line 200 feet or so south of the existing alignment. This would reconnect the Western Segment with the Eastern Segment at the Shields Spur. This alternative would preclude direct access to the UP line from the Chickasha line at MP 541.0. Were BNSF to offer sufficient trackage rights to enable Kessler to access UP lines at some other location, this would be an acceptable alternative. There appears to be sufficient

³ Prior to BNSF's unauthorized salvaging activities, the Western Segment portion of the line was connected to two Class I carriers (BNSF at MP 542.9; Union Pacific at MP 541.0). Having a line that is connected to two or more Class I carriers would provide competitive advantages for shippers along the line. Since BNSF's service has been so abysmal, the portion of the line that connects the Chickasha line with the UP line is needed, in order to have access to a Class I carrier other than BNSF.

vacant land adjacent to, and south of the Chickasha right-of-way, which land is owned either by BNSF or ODOT, to accommodate this alignment. The only problems Kessler can foresee with this alternative, are the reconstructed Red Rock line railroad bridge and reconstructed Shields Blvd highway bridge. These reconstructed bridges may not accommodate passage of a realigned Chickasha line under them.

BNSF HAS FAILED TO MEET THE CRITERIA FOR ‘RELOCATION’

36. BNSF correctly stated the law regarding whether a proposed action would constitute an unregulated ‘relocation,’ or a regulated ‘abandonment.’ In the instant case, BNSF has failed to demonstrate that its proposed actions would meet the criteria of an unregulated ‘relocation.’

37. BNSF’s proposed Eastern Segment actions (construction of new tracks accessible from the Red Rock line, which tracks would serve more than one existing shipper, and could be used to serve future new shippers), would enable BNSF to penetrate a new market: That area north of UP’s line.

38. BNSF’s proposed removal of the two diamonds that permitted BNSF to cross UP’s line to access Producers Co-Op and Mid-States Lumber, would constitute removal of a line of railroad, rather than a spur, since diamonds are regulated under 49 U.S.C. §10901(d), and are not listed in 49 U.S.C. §10906.

39. BNSF’s proposed relocation of the Eastern and Middle Segments, would result in the abandonment of the Middle Segment. As discussed above, abandonment of the Middle Segment would seriously adversely affect Boardman, a shipper on the Line, by severing the portion of the line that serves Boardman’s spur, from the National Rail System. As BNSF correctly pointed out, if a proposed ‘relocation’ action would affect a shipper, then the proposed action would affect rail transportation, and consequently, would not meet the criteria for an unregulated ‘relocation.’

40. BNSF’s characterization of rebuilding the Packingtown Lead as essentially a double-tracking project, is wholly misplaced. The Packingtown Lead serves a totally different market, and was formerly owned by a competing railroad: The ATSF. The Chickasha line was owned by a different rail carrier, the St. Louis and San Francisco, and served totally different shippers.

Shippers on the Packingtown Lead cannot be accessed via the Chickasha line, nor can shippers on the Chickasha line be accessed via the Packingtown Lead. If the Chickasha line is removed, shippers on the portion of the line that is removed, will no longer have access to rail service.

**RETAINING RAIL SERVICE ON THE WESTERN SEGMENT
WOULD NOT PRECLUDE CONSTRUCTION OF THE CROSTOWN FREEWAY**

41. BNSF has argued if BNSF's proposed actions regarding the Eastern and Middle Segments are not permitted, then construction of the Crosstown Freeway will be delayed and / or precluded. As Kessler pointed out in ¶34 above, preserving rail service on the Western Segment, would not preclude construction of the Crosstown Freeway. Presently, construction of the Red Rock railroad bridge and Shields Blvd highway bridge, are under way. Construction of the culvert at Lee Street has stopped. Until the culvert project is completed, additional work in the Middle Segment cannot commence. Consequently, there does not appear to be any reason for the Board to rush to judgment. If and when the culvert and shoo-fly projects have been completed, then BNSF may advise the Board that additional projects cannot be completed until the Board renders its decision. In the meantime, Kessler would suggest BNSF evaluate the alternatives Kessler listed in ¶34 above, then advise the Board which of the various alternatives, it would prefer to implement. The sooner BNSF advises the Board which alternative it prefers, the sooner the Board can grant BNSF authority to pursue the alternative it has selected. Effectively, BNSF has control over how soon a decision will be forthcoming. In the mean time, since whatever decision the Board renders will affect numerous citizens of Oklahoma, Kessler suggests that the Board schedule a public hearing in Oklahoma City, so that the Board can receive input from the citizens of Oklahoma.

**U.S. DISTRICT COURT HAS JURISDICTIONAL AUTHORITY
TO ENJOIN BNSF FROM ACTING WITHOUT BOARD AUTHORITY**

42. BNSF is asking the Board to declare that the U.S. District Court for the Western District of Oklahoma ("District Court") does not have the jurisdictional authority to enjoin BNSF from implementing any of its proposed 'relocation' projects without prior Board approval.

43. 49 U.S.C. §11704 states in pertinent part:

(b) A rail carrier providing transportation subject to the jurisdiction of the Board under this part is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part.

(c)(1) A person may file a complaint with the Board under section 11701(b) of this title or bring a civil action under subsection (b) of this section to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board under this part. (Emphasis added.)

44. In the District Court, Kessler is arguing that BNSF salvaged portions of the Chickasha line without Board authority, and, that if not enjoined, BNSF is likely to continue to salvage additional portions of the Chickasha line, without prior Board authority. These unlawful salvaging actions have injured Kessler, by depriving Kessler of his right to acquire, intact, portions of the Chickasha line either via the Offer of Financial Assistance procedures (49 U.S.C. §10904) or the Feeder Line procedures (49 U.S.C. §10907). As Kessler's Comments above make clear, BNSF does not have clear authority to salvage additional portions of the line without express prior Board authority. All Kessler is asking the District Court to do, is to maintain the status quo.

45. For the above reasons, Kessler asks that the Board declare that the District Court (or any U.S. District Court with venue), **does have the jurisdictional authority under 49 U.S.C. §11704 to enjoin any rail carrier subject to the jurisdiction of the Board, from acting, or failing to act, in violation of the Interstate Commerce Act, as amended, particularly when the rail carrier's actions, proposed actions, failure to act, or proposed failure to act, may cause injury to a person.**

Respectfully,



Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2008, a copy of the foregoing Comments of Edwin Kessler, 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

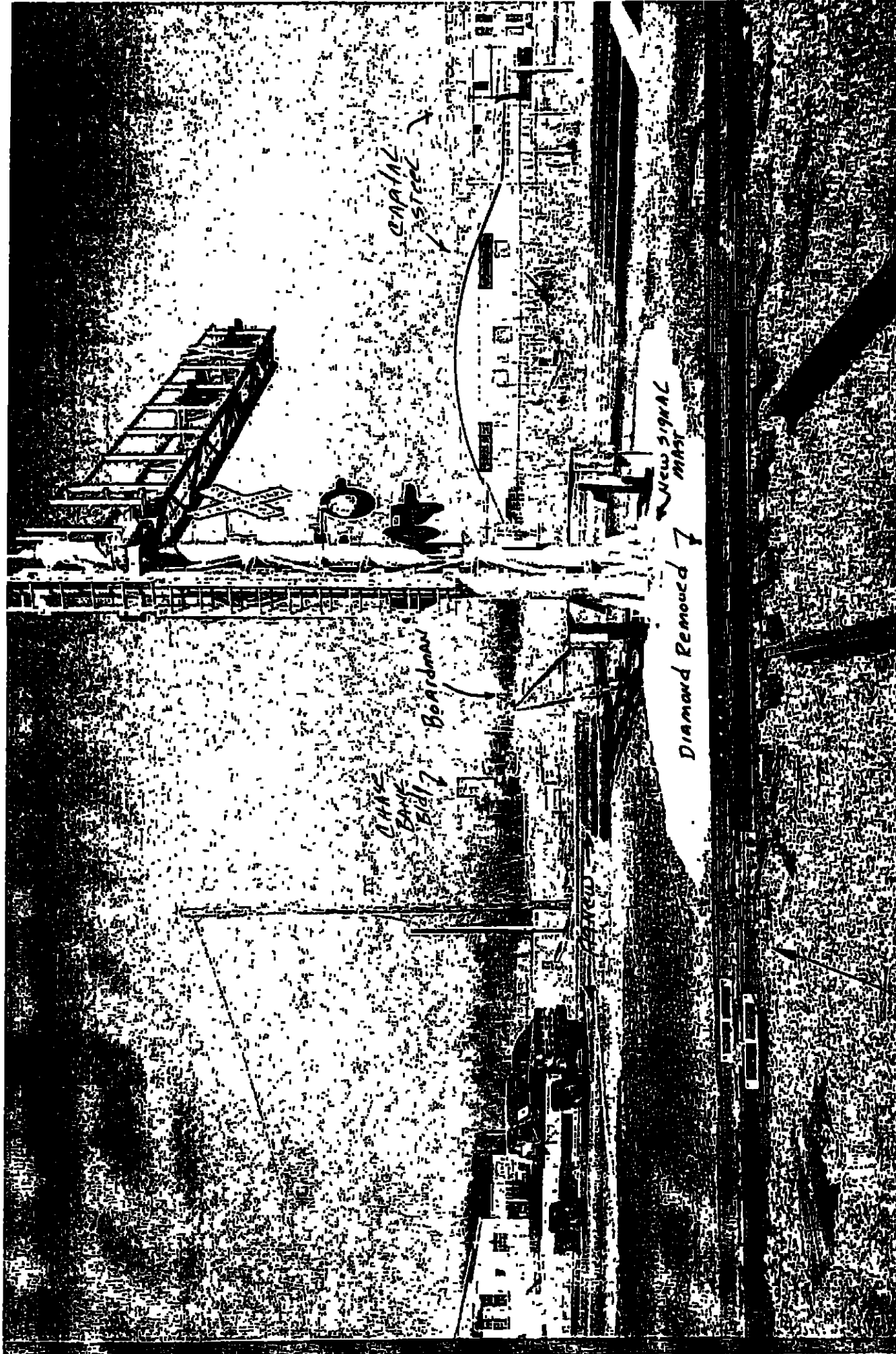


EXHIBIT 2

CHUCKASHA Line

@ Agnew Ave

@ MP 542.0 ±

Looking EAST

Photo Taken by Tom Elmore

PACKINGTOWN LEAD

signal mast installed
FRI. 2/22/08

4-N

2011
Picture 81

VERIFIED STATEMENT OF JOSEPH T. MERRY

1. My name is **Joseph T. Merry**. I am over the age of 18, and I am legally qualified to make this Statement. I am the Vice President and General Manager of Boardman, Incorporated ("Boardman"). Boardman is located at 1135 S McKinley Avenue, Oklahoma City, Oklahoma 73108-7012. My contact information is: Telephone: (405) 634-5434, Extension 234, Telefax: (405) 632-6948. The Boardman web site is: www.boardmaninc.com

2. I have been employed by Boardman for over twenty years. I have held various positions within the organization. My responsibilities encompass day-to-day management of plant operations, including General Administration, Contracts Administration, Customer Service, Engineering, and Environmental Safety.

3. I have forty (40) plus years of experience in the manufacturing environment, including twenty-two (22) years in structural steel fabrication, twenty (20) years experience in gas and oil pressure-vessel fabrication, and five (5) years in fire truck fabrication.

4. I am authorized on behalf of Boardman to make this Verified Statement.

THE BOARDMAN COMPANY

5. The Boardman Company manufactures large industrial equipment. Boardman was founded in 1910. It currently has a 144,000 sf fabrication facility on 8 acres, with excellent rail and highway access. However, we have not made recent use of rail service for the reasons noted below. Our facility can be viewed by placing our Oklahoma City address into: www.maps.live.com. We are located in a triangular segment bounded by S. McKinley Avenue on the east, S.W. 11th Street on the south, and the Chickasha Subdivision rail track on the north.

6. We are an ASME Code, Sec. VIII, Div. 1 and Sec. I fabricator, and a custom manufacturer of heavy industrial fabrications, including ASME pressure vessels, such as towers, tanks and reactors, rotary kilns, dryers and stacks, FCCU components, trayed towers, jet engine test cells, augmenters, hush houses, special shapes and complex structures. FCCU components include air distributors, reactor lines riser, wye sections and plenums. Fabrication materials include carbon steels, nickel, Monel, stainless steel, Hastelloy, high nickel alloys, low alloys and alloy clads. Markets served include aviation, chemical, defense, environmental, gas processing and refining industries. Certifications include ASME Code, Sec. VIII & Division I stamp, national board 'R' stamp, AISC, API, AWS and AWWA.

7. Boardman's upper management staff has over two hundred years of accumulative metal fabrication experience.

8. We work in a variety of materials, such as: Stainless Steel, Hastelloy, Alloy 20, high Nickel Alloys, Aluminum, clad materials, and any form of Carbon Steel. These materials have

been used in a variety of industries, such as Carbon Black Plants, Chemical, Oil, and Gas Refineries, food services, and Power Generating. Just as we serve a variety of industries, we also supply a variety of equipment within the different industries, such as Pressure Vessels, Duct work, Hoppers and Dryers

9 Boardman's export markets include: Western Europe, Middle East, Asia, Canada, and Mexico. Boardman's import markets include: Asia, Europe, Canada and Mexico.

10. Boardman has more than 70 employees. Boardman is a privately owned company

11 Some of Boardman's key officers and critical employees are listed below

Roger Grommet, President
Jim Hagemann, CFO
Joseph Merry, VP, General Manager
Jake Page, Custom Fabrication Sales
Mike Ashby, Estimating Manager
Eddie Adams, Quality Control Manager
William Brown, Plant Superintendent
Rusty Dill, Engineering Manager
Randy Wolf, Senior Designer
Terry Walker, Purchasing Manager

12. Boardman has custom fabrication sales representatives located in Oklahoma City, OK; The Woodlands, TX; Denver, Colorado; Vista, California; Kirkland, Washington, and Louisiana.

13. Presently, Boardman receives steel plate via motor carrier, and ships its finished product via motor carrier, to California, the Gulf Coast, the Mid-West, and to Pennsylvania.

14. I have attached to this Verified Statement a partial list of Boardman's customers, engineering and other firms for whom Boardman has done metal fabrication or other work. See **Exhibit A**.

15. I have attached to this Statement a partial list of the logos of some of our customers. See **Exhibit B**. This list includes Refining Clientele, Engineering Firms, Chemical Clientele, and Automotive and Power Clientele.

BOARDMAN'S EXISTING RAIL INFRASTRUCTURE

16. Boardman has a rail siding which connects to the BNSF Chickasha rail line near MP 541.5. This line of railroad was the subject of STB Docket No. AB-6, (Sub-No. 430X), *BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK*, and is the subject of

17. Boardman continues to maintain its rail siding and has continued to pay its Switch Maintenance Fee to BNSF. A copy of the last such invoice payment showing a zero previous balance, is attached hereto as **Exhibit C**, and is incorporated by reference herein.

18. Over the years, Boardman has developed extensive infrastructure on its property in order to conduct business via rail service. Currently we have a single track (which we continue to maintain) which passes through our main fabrication shop complex. We have the ability to add additional track capacity within our complex to handle additional rail needs. We have a 20-ton capacity overhead crane over our rail line to facilitate loading and unloading railcars. Duplicating this type of infrastructure elsewhere would be very costly and difficult to do. If Boardman were to lose its access to rail service, that would seriously devalue our plant facilities. Attempting to replicate the rail-service facilities we presently have somewhere else would be outrageously expensive.

BOARDMAN HISTORY OF SHIPPING BY RAIL

19. For many years, Boardman received inbound raw materials, and shipped its finished product via rail. Prior to the Burlington Northern - Santa Fe ("BNSF") merger in the early 1990's, Boardman received excellent service from one of BNSF's predecessors, the Burlington Northern Railroad ("BN"). BN's multiple connections to other Class I railroads allowed Boardman's products to reach markets quickly and cost effectively.

20. After the BNSF merger, Boardman had high hopes that the new expanded carrier would provide superior services. Boardman also hoped the merger would provide other benefits, such as better service. However, Boardman quickly learned that there would be no merger-related benefits for Boardman. Indeed, it turned out that the BNSF merger was the beginning of the end for our company's ability to make effective use of rail freight service, despite continued efforts to do so.

21. BNSF made misrepresentations to Boardman with regard to the level and availability of continued service. Any merger-related promises which Boardman had been told would be forthcoming, quickly evaporated. Our service began to deteriorate soon after the merger. It appeared to Boardman that this occurred because BNSF began to focus solely on their long-haul intermodal and coal-traffic customers. For Boardman, rates became harder and harder to obtain. BNSF market managers for carload freight took longer and longer to return telephone calls. Our shipments could not be reliably planned and executed.

22. It became quite obvious to Boardman that the supposed new and improved BNSF did not consider us to be a valued customer any longer. Indeed, BNSF appeared to go to great lengths to discourage Boardman from shipping its products via their system.

23 Changes at BNSF's headquarters in Fort Worth, Texas, apparently brought new employees into their Fort Worth headquarters. Frequently, when we would call for a rate or other information, Boardman would be given yet another new account manager, or another new employee with whom to interact. Boardman constantly felt the need to re-educate BNSF about our firm, and our needs on almost every shipment Boardman sent them. Boardman felt that they would forget who Boardman was between telephone calls

24. In addition, BNSF began to reduce the number of crews in Oklahoma City, combining both BN and ATSF crews, and apparently reassigning workers to areas other than local service in Oklahoma City. Crew employees Boardman personnel had been acquainted with for years, disappeared. New railroad workers did nothing to ensure the rapid placement and removal of cars from our facility. When cars did move, they would sit in nearby yards for days, waiting for trains to take them to BNSF's main transcontinental yard, where they would sit some more, waiting for a BNSF mainline train to begin to move them to their destination.

25. In the post-merger world, it became apparent to Boardman that BNSF appeared to focus solely on developing other business, such as coal traffic and intermodal traffic, to the exclusion of Boardman's local traffic needs. Boardman was unable to rely upon BNSF for effective, adequate, and responsive shipping service.

26. Due to BNSF's failure to provide reasonable, adequate, and responsive rail service, Boardman began receiving its steel, and shipping its finished products, via motor carrier. Due to the type of materials that Boardman receives, and the type of large vessels that Boardman ships, this alternate form of shipping is significantly more expensive.

27. For example, the cost to ship to Houston, Texas, via motor carrier, one of the large vessels we fabricated, was approximately \$150,000.00. This is several times what it would cost to ship the same item via rail.

28. Shipping expenses are borne by our customers. The ability to use rail service, would be a significant benefit, not only for us for our inbound shipments of steel and other raw materials, but also for our numerous customers, who would have the benefit of significant reductions of shipping costs.

CURRENT SHIPPING NEEDS AND NEED FOR CONTINUED RAIL SERVICE

29. At this time, we ship very large items to most refineries within the United States, and to custom transporters, to ship abroad. With the rising cost of truck fuel we could offer our customers substantial savings in shipping costs if we had a viable rail option. For example, Boardman is scheduled to ship a large fabricated unit to the Gulf Coast. Boardman would prefer to ship this item via rail. Unfortunately, BNSF removed portions of the Chickasha line which are both east and west of Boardman's rail siding, effectively isolating Boardman from the national rail system.

30. Boardman has rail service, which it strongly desires to keep. We continually advertise that our facility is rail served. We continue to maintain all of our rail infrastructure, despite the fact that BNSF has done everything in its power to discourage us, and our customers, from using their system

31 Boardman was never made aware of BNSF's efforts to remove rail service over that portion of the Chickasha subdivision that services Boardman, until it was brought to our attention by Mr. Kessler. Boardman can, and will if necessary, direct some inbound shipments via rail to its plant *immediately* to demonstrate to the Board its serious intent to maintain its existing rail service. Since we have maintained in good working order all of our rail infrastructure, we can make arrangements today to receive material via rail, without any need to invest any funds into Boardman's rail infrastructure.

BOARDMAN'S CONTINUING DESIRE / DEMAND FOR RAIL SERVICE

32. Boardman has never lost interest in receiving, or in sending, shipments via rail. Boardman continues to advertise on our website and on Thomas Net. com, that Boardman has excellent rail access. Regretfully, Boardman has not been able to effectively utilize rail service since the BNSF merger.

33. As previously indicated, Boardman continues to maintain the rail siding into Boardman's facility. Boardman has continuously been billed by BNSF for maintenance of the rail switch into our facility. Boardman has made no recent request for service due to BNSF's prior abysmal service, and due to the fact that BNSF has removed substantial portions of the Chickasha line to the east and west of Boardman's siding, effectively disconnecting Boardman from the national rail system. If effective rail service had been available, Boardman would have used it. If effective rail service were to be offered, Boardman would utilize it.

34. Boardman received no notice regarding the abandonment exemption in AB-6 (Sub-No. 430X), nor did Boardman receive any notice regarding BNSF's Petition for Declaratory Order in FD 35164. The only individual who has asked if Boardman has a desire, or need, for rail service, has been Mr. Kessler.

35. Boardman continues to advertise that it has excellent rail service, in the hope that excellent rail service will be forthcoming. Prior to Mr. Kessler offering to provide rail service via a new short line that he would create, Boardman's prospects for obtaining rail service were dim to none. As stated previously, BNSF recently (February - May, 2008) removed about ½ mile of the eastern portion of the Chickasha line from MP 540.15 to MP 540.5. BNSF removed the turnout which connected the Chickasha line to the Shields Spur at MP 540.15. Near MP 540.9, BNSF has removed several hundred additional feet of rail, and has removed the tracks which connected the Chickasha line to the UP line near MP 540.9. A few hundred feet to the west of Boardman's switch, approximately 10 feet of track was removed. Further west of Boardman's

switch, near MP 542.8, at Agnew Avenue, a large signal-mast pole was erected in the middle of the removed tracks. Immediately west of this pole, the diamond that permitted the Chickasha line to cross the Packing Town Industrial Lead, was removed, as was another 20+ feet of Chickasha track. These recent actions have disconnected the portion of the Chickasha line which connects to Boardman's rail siding, from the national rail system, thereby denying Boardman access to the national rail system.

36 Boardman has been informed that BNSF stated in recent legal filings that the removal of portions of the Chickasha line were temporary, and that if a demand for service was made, BNSF would replace the track material that was removed. Boardman does not find BNSF's statement to be credible. While Boardman has a high desire to utilize rail service, it is reluctant to ship a carload of material via rail to Boardman, particularly in light of the extensive quantity of rail line that has been removed. The reality is, if a rail car was consigned to Boardman, it would arrive in Oklahoma City, then languish in a rail yard for months, if not years, while BNSF argued that Boardman's demand for rail service was not 'reasonable,' and thus did not compel BNSF to replace the rail it removed.

37. The present complete lack of rail service leaves Boardman no alternative but to continue to ship its products via motor carrier, at great additional expense. And the fact that Boardman no longer has viable rail service, could precipitate an increase in Boardman's motor carrier rates, due to the lack of viable competitive rail service.

38. Boardman has been informed that BNSF intends to abandon the portion of the Chickasha line that is adjacent to Boardman, then offer the line to the City of Oklahoma City, to be used as a trail. If this were to happen, the Surface Transportation Board would retain jurisdiction over the rail line, even though the rail would be removed. If at some future date Boardman made a demand for rail service, that rail service would only be provided if Boardman agreed to pay the full costs of restoring the rail infrastructure. The cost to restore the rail infrastructure would be so enormous, it would not be economically feasible to restore the line and would effectively preclude any future use of rail service by Boardman.

STATEMENT OF SUPPORT FOR THE NEW RAILROAD OPERATION

39. As stated previously, Mr. Kessler has informed Boardman that he desires to acquire the rail line that is adjacent to Boardman, and that if he is successful in acquiring the line, he will offer Boardman rail service. Boardman strongly supports Mr. Kessler's efforts, and would resume utilizing rail service, once it became available, viable, and cost effective.

40. Boardman, by this Verified Statement, is attempting to communicate to the Board, that it has a **strong desire to retain its rail service**. Boardman strongly supports Mr. Kessler's efforts to preserve rail service on the line that services Boardman. In the event BNSF files an abandonment application to abandon the portion of the Chickasha line that services Boardman (between MP 540.8 and 542.96), Boardman will file a strong protest.

41 Boardman understands that currently, for the portion of the Line that lies between MP 540.8 and 542.96, there is no abandonment proceeding before the Board. Consequently, there is no proposed abandonment that Boardman could protest. However, a small portion of this portion of the Line is the subject of STB Finance Docket No. 35164, *BNSF – Petition for Declaratory Order*. (Between MP 540.8 and 541.15.)

42. This section of the Line is critical, for there is / was / will be¹, a crossover track which connects BNSF's Chickasha line with the adjacent Union Pacific line at Lee Street. In the event Mr. Kessler is granted authority to acquire the portion of the Chickasha line that serves Boardman, the portion of the Line that lies between MP 540.8 and 541.15, will become critical. If Mr. Kessler is granted authority to acquire this portion of the Line, then the line will be connected to two Class I carriers. Being connected to two Class I carriers is important to Boardman, since to date, Boardman has been captive to BNSF's abusive policies. Having access to UP hopefully will give Boardman access to a Class I carrier that believes in providing service to its shippers.

Respectfully,



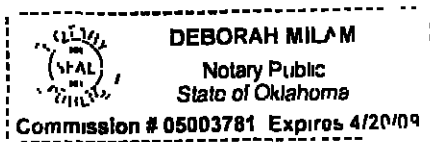
Joseph T. Merry
Vice President
Boardman, Incorporated

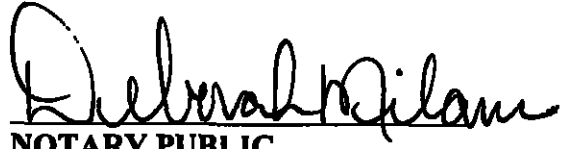
¹ Prior to February, 2008, there was a crossover track connecting the Chickasha line with the adjacent Union Pacific Line. See Exhibit D. I understand that around February, 2008, parts of the crossover track were removed, to facilitate the construction of an underground culvert. Upon information and belief, I also understand that BNSF and UP propose to replace the previous crossover track, with a new crossover track, which will be aligned one hundred feet or so west of where the former crossover track was located. BNSF and UP have indicated that after the UP tracks have been realigned, to accommodate the Cross Town freeway project, this newly installed crossover track will be removed, as will that portion of the Chickasha line that lies between MP 539.96 and MP 541.15. This crossover track is critical, since BNSF disconnected both ends of the portion of the Chickasha line that connects to Boardman, from the National Rail system. This crossover track, when reinstalled, will be the only point where Boardman's portion of the Chickasha Line, will be connected to the National Rail system. Consequently, preserving this crossover track is critical.

VERIFICATION

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Subscribed and sworn before me by **JOSEPH T. MERRY**, this 29th day of July, 2008.




NOTARY PUBLIC

My Commission Expires: 4-20-2009
(SEAL)



Products

- ASME Pressure Vessels
- Rotary Kilns, Dryers & Stacks
- FCCU Components
- Trayed Towers
- Special Shapes & Tough Specifications
- Jet Engine Test Cells, Augmenters & Hush Houses

Capabilities

Client Lists

References

Structural Steel and API Tanks



References

This is a partial list of customers for which we have successfully fabricated

ENGINEERING

Fluor Engineering
Sugarland, TX
Irvine, CA
Trayed towers, vessels, FCCU components from carbon steel, stainless steel, nickel alloy including clad material

Foster Wheeler Engineering
Houston, TX
Vessels from Carbon Steel

C & I Engineering, Inc.
Louisville, KY
Trayed towers, vessels from carbon steel

Kellog, Brown & Root "KBR"
Houston, TX
Trayed towers, vessels from carbon and stainless steel

Jacobs Engineering Group, Inc.
Alliso Viejo, CA
Houston, TX
Trayed towers, vessels from carbon steel

Englobal Engineering
Tulsa, OK
Trayed towers, vessels from carbon steel

Burns & McDonnell
Kansas City, MO
Vessels

Black & Veatch
Overland Park, KS
Trayed towers, vessels from carbon and stainless steel

S & B Engineering & Constructors
Houston, TX
Trayed towers, vessels from carbon steel, stainless steel and alloy

Mustang Engineering
Houston, TX

REFINING

Valero
St Charles, LA
Wilmington, CA
Houston, TX
Sunray, TX
Benecis, CA
Three Rivers, TX
Ardmore, OK
Trayed towers, vessels, FCCU components from carbon steel, stainless steel & alloy

NCRA Refining
McPherson, KS
Trayed towers, vessels from carbon steel, monel and clad materials

ATOFINA
Port Arthur, TX
Trayed towers and vessels from carbon and stainless steel

Conoco Phillips
Trainer, PA
Ponca City, OK
Wood River, IL
Lake Charles, LA
Billings, MT
Trayed towers, vessels, stacks and ducting, FCCU components from carbon steel and stainless steel

Chevron
Richmond, CA
El Segundo, CA
Pascagoula, MS
Salt Lake City, UT
Trayed towers & vessels

Wynnewood Refining
Wynnewood, OK
Vessels from carbon steel

Frontier Refining
El Dorado, KS
Cheyenne, WY
Vessels from carbon steel

Exxon Mobil Corporation
Baton Rouge, LA
Beaumont, TX

OTHER INDUSTRIES

Lockheed Martin
Vandenberg AFB, CA
Vessels

John Zink Company
Tulsa, OK
Vessels, stacks, combustion chambers, thermal oxidizers

Durr Industries for General Motors
Oklahoma City, OK
Carbon steel paint tanks for GM assembly plant

Johnston Test Cell Group
Oklahoma City, OK
Aircraft acoustical enclosures and jet engine test cells

Degusa Corporation
Humble, TX
Stainless steel rotary dryers with riding rings, gear boxes, etc

Rauta Precision
Lahti, Finland
Silos

American Electric Power
Tulsa, OK
Ohio
Vessels

Vessels from carbon steel

**CDI Engineering Group,
Inc**
Houston, TX
Beaumont, TX
Vessels from carbon steel

Thomas Russell Co.
Tulsa, OK
Vessels, Columns, Stainless
and Carbon

CHEMICAL

Shell Chemical
Deer Park, TX
Geismar, LA
San Juan, P R
Trayed towers and vessels
from carbon and stainless
steel

Nova Chemical
Lake Charles, LA
Vessels & Towers

Vulcan Materials
Wichita, KS
Geismar, LA
Towers, tower sections and
vessels from carbon steel,
stainless steel and nickel alloy
including clad materials and
rubber lined vessels

Proctor & Gamble
Kansas City, MO
Vessels

CP Kelco (Nutri-sweet)
Okmulgee, OK
Vessels

**Calgon Carbon
Corporation**
Pittsburgh, PA
Rotary dryers from carbon
steel

Continental Carbon Co
Ponca City, OK
Rotary Dryer drums from
T-316L / Incoloy 825 material

PPG
Pittsburgh, PA
API Tanks

**Texas Eastman Division of
Eastman Chemicals**
Longview, TX
Towers, vessels from carbon
steel and stainless steel

Dupont Chemical

Joliet, IL
Vessels from carbon steel

Amerada Hess
St Croix, VI
Stack

Coffeyville Resources
Coffeyville, KS
Vessels, Towers, Columns

Shell Oil Company
Anacortes, WA
Deer Park, TX
Vessels

Giant
Artesia, NM
Vessels

Sinclair
Tulsa, OK
Vessels

Western Refining
El Paso, TX
Vessels

NATURAL GAS

BP
North Slope, AK
Vessels

Williams Company
Opal, WY
Towers

Costa Azul
Baja Mexico, Mexico
Vessels, Towers, Stainless
Steel and Carbon

Victoria, TX
Bulgaria, EU
Vessels, Columns

Air Liquide
Newport, DE
Vessels

Reference names, phone numbers and address given upon request.

Boardman Inc. • 1135 S McKinley • Oklahoma City, OK 73108 • Fax (405) 632-6948

- Privacy Policy -



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Products

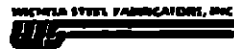
- ASME Pressure Vessels
- Rotary Kilns Dryers & Stacks
- FCCU Components
- Trayed Towers
- Special Shapes & Tough Specifications
- Jet Engine Test Cells, Augmenters & Hush Houses

Capabilities

Client Lists

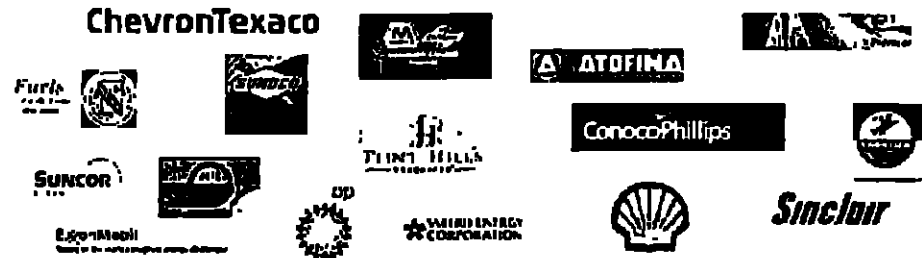
References

Structural Steel and API Tanks

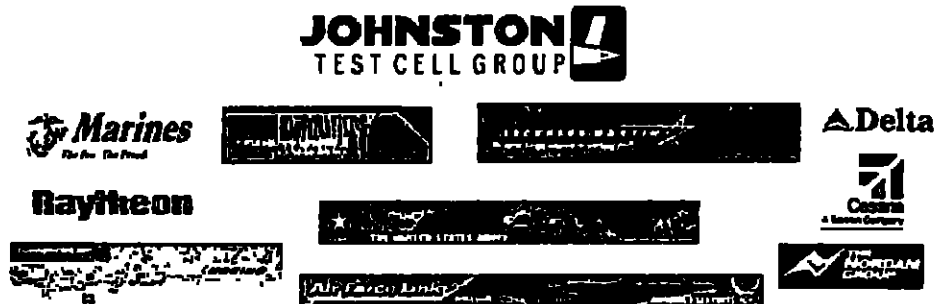


Client Lists

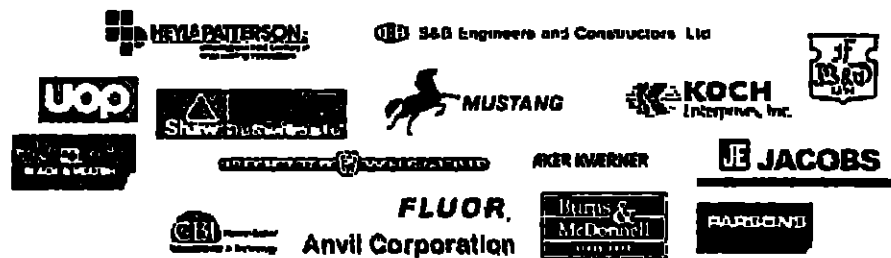
Refining Clientele:



Aviation/Defense Clientele:



Engineering Firms:



Chemical Clientele:



Automotive and Power Clientele.



Environmental and Misc. Clientele:



BNSF Railway Company

INVOICE / STATEMENT

PLEASE MAIL YOUR PAYMENT TO:
Staubach Representative for BNSF
P.O. Box 876160
Dallas, TX 75267-6160

PLEASE MAKE CHECKS PAYABLE TO: BNSF Railway Company

To ensure proper credit of your account.
- Include ONE COPY of this statement with your payment
- Write the CONTRACT NUMBER on your check

CONTRACT NUMBER 41411000

TO: BOARDMAN COMPANY
1135 S. MCKINLEY AVE
Oklahoma City, OK 73108

INVOICE DATE 11/10/06

PREMISES LOCATION.
OKLAHOMA CITY, OK
OKLAHOMA County

LM

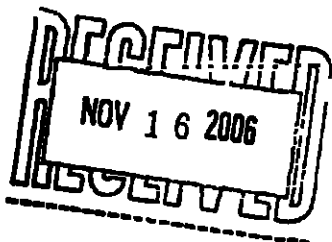
LEASE DESCRIPTION. YARD AT OKLAHOMA CITY OK

BILLING PERIOD FROM 12/28/06 TO 12/27/07

PREVIOUS BALANCE - INCLUDES PAYMENTS RECEIVED THROUGH 11/9/2006 \$ 0.00

BILLING

INVOICE #	DUE DATE		\$ AMOUNT
06111823	12/28/06	LEASE	\$ 1,250.00
06111823	12/28/06	3% RENT INCREASE	\$ 37.50



TOTAL BILLED \$ 1,287.50

Effective January 1, 2001, BNSF owned real estate is being managed by The Staubach Company.
Please update your records to reflect the updated billing remittance address

TOTAL AMOUNT DUE \$ 1,287.50

DIRECT BILLING INQUIRIES TO BART MCLEROY 866-498-6647 Bart.McLeroy@staubach.com
PLEASE RETURN ONE COPY OF THIS STATEMENT WITH YOUR PAYMENT
TO AVOID LATE CHARGES, WE MUST RECEIVE YOUR PAYMENT ON OR BEFORE THE DUE DATE
BNSF Railway Company

500-505000
gms

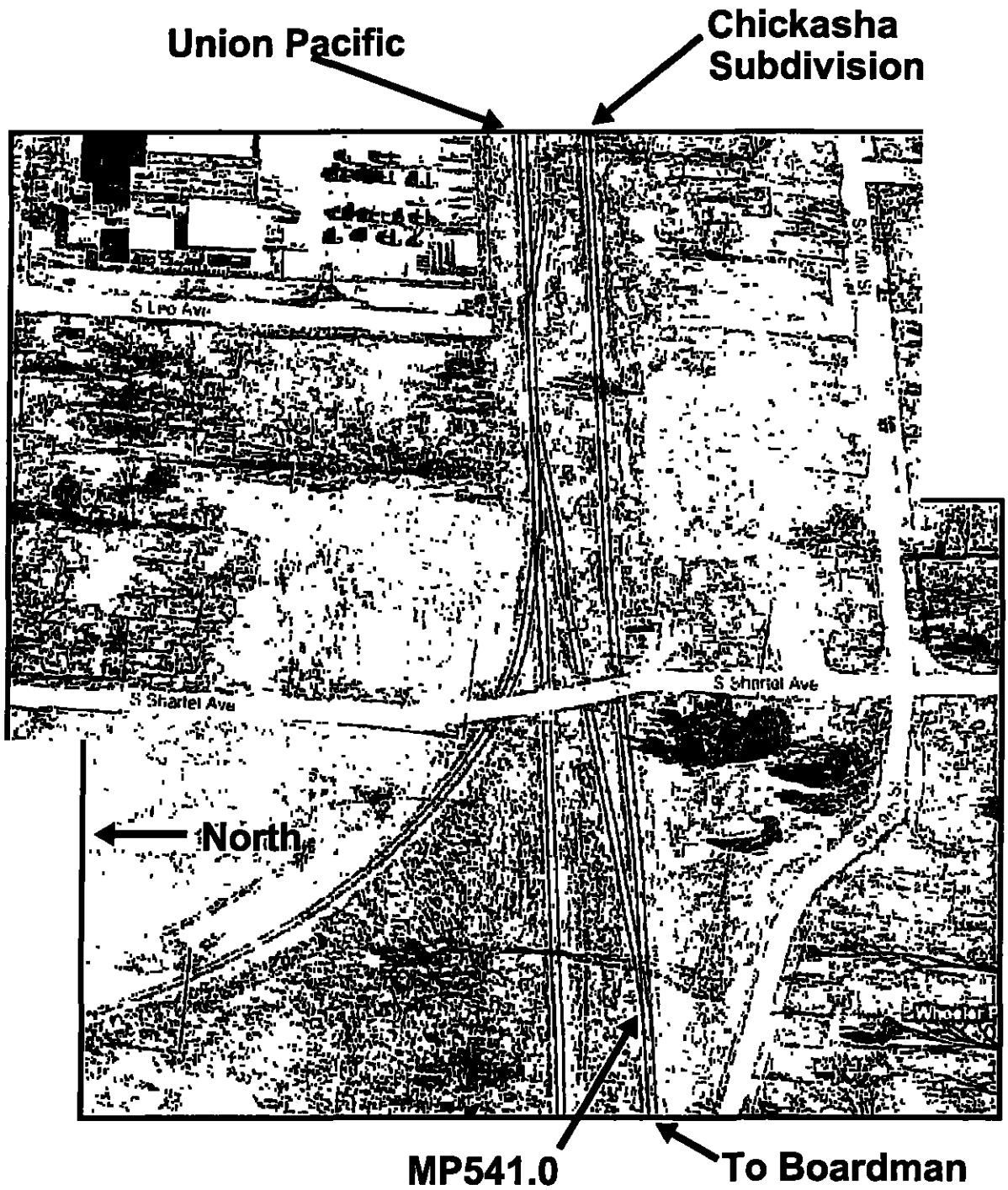
Boardman - Exhibit C



For the best possible print results click the printer icon on the Live Search Maps page

Location result for

S Shartel Ave Oklahoma City, OK 73109



**Boardman - Exhibit D
Cross-over Switch Connection**