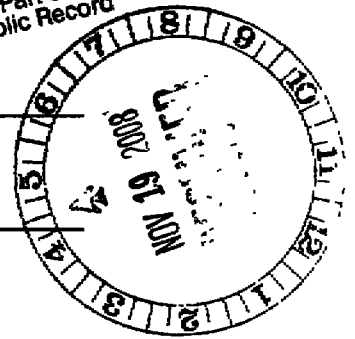


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35164

PETITION OF BNSF FOR DECLARATORY ORDER

**KESSLER'S COMMENTS REGARDING
ODOT'S SUPPLEMENTAL VERIFIED STATEMENT**

1. Edwin Kessler ("Kessler"), pursuant to 49 CFR 1117.1, herewith files this Petition seeking Board permission to file Kessler's Comments Regarding ODOT's Supplemental Verified Statement.

BACKGROUND INFORMATION

2. On October 2, 2008, the Surface Transportation Board ("**Board**") Instituted a Declaratory Order Proceeding in the above entitled case. In this Decision, the Board stated BNSF could submit Supplemental Evidence by October 17, 2008, and interested parties could submit replies by November 6, 2008. The Board directed the parties to focus on the issue of whether the proposed projects "would remove service to shippers and/or extend BNSF's operations into new territory."

3. BNSF timely submitted Supplemental Evidence and a number of persons timely submitted replies. Appended to BNSF's Supplemental Evidence was a Verified Statement of Gary Ridley, Director of the Oklahoma Department of Transportation ("**ODOT**"). Included in Mr. Ridley's Verified Statement were copies of a portion of a document entitled "Revised Financial Plan 2008 Update." On "Page 10 of 61" of Mr. Ridley's Exhibit C, was a list of "I-40 Mainline Projects." The following pertinent language appears:

- A. **“Work Package 1.1C: ... Construct crossovers and switch UPRR to existing Chickasha Lead tracks west of Shields.”**
- B. **“Work Package 1.2: ... Construct permanent UPRR mainline Sta 133+66 to 180+37 including railroad force account work”**
- C. **“Work Package 2.1: ... Construct UPRR permanent mainline tracks.”**
- D. **“Work Package 3.4: ... Construct UPRR mainline including railroad force account work. Move UPRR operations to new mainline tracks.**

4. In Kessler’s Reply, he pointed out that during the course of the proceeding in the U.S. District Court for the Western District of Oklahoma, Case No. 5:08-CV-00358-R, ODOT provided Kessler with a document that briefly noted the railroad related work associated with Work Packages 1.1C and 1.2, noted in ¶3, *supra*. Kessler attached ODOT’s document to his reply, and labeled it: **Exhibit A**. In his Reply, Kessler indicated the following language from that document is relevant in this proceeding:

- A. **“Work Package 1.1C is currently under construction, railroad related work to take place during this work package is as follows:**

)ODOT to acquire segment of rail (Chickasha alignment) that is left in place subject to the STB Abandonment action and allow for the UPRR to tie into each end from their current mainline rail alignment.

) **While operating on the Chickasha alignment, the UPRR will remove and salvage the existing UPRR mainline** from approximately Shields to approximately Classen Blvd. (Emphasis added.)

- B. **Work Package 1.2 is scheduled to LET for bid from Nov. 08. Railroad related work to take place during this work package is as follows:**

)UPRR to construct permanent rail alignment through the project extent. Estimated construction and operational date July / August 09.

)UPRR to remove all shoo fly and temporary tracks through the project extent. Including the chickasha shoo fly alignment. Estimated Construction date Oct / Nov 09.”

5. On November 13, 2008, Mr. Ridley sent a Supplemental Verified Statement (“S.V.S.”) to the Board. The cover letter indicated the Supplemental Verified Statement was being sent to the Board:

“to respond to incorrect characterizations by Edwin Kessler of Mr. Ridley’s original Verified Statement (submitted with BNSF’s Supplemental Evidence). The Supplemental Verified Statement is limited to Mr. Kessler’s characterizations of the use of the middle segment by Union Pacific Railway. Kesler Reply, ¶¶ 11-14.”

6. Mr. Ridley made the following statements in his Supplemental Verified Statement:

- A. “I am providing this Supplemental Verified Statement to correct **errors in Mr. Kessler’s Reply.**” ¶1 S.V.S. (Emphasis added.)
- B. “In particular, Mr. Kessler’s Reply discusses his (mis)understanding of the possible use of the BNSF “middle segment” by Union Pacific Railway (“UP”). ¶2 S.V.S.
- C. “The February 2008 plans as attached as Exhibit C to my Verified Statement and cited by Kressler, **did at that time anticipate that UP would use the middle segment** as a temporary detour while UP’s own roughly parallel main line was being relocated.” ¶2 S.V.S. (Emphasis added.)
- D. “It was never anticipated that UP would perform any local service to or from the middle segment.” ¶2 S.V.S.
- E. “Nor was it contemplated that BNSF would be using the tracks at the same time as UP.” ¶2 S.V.S.
- F. “(In any event, as is clear from this proceeding and **prior proceedings** before the Board, **no service has been provided** to, from or **over this segment for over two years**.) ¶2 S.V.S. (Emphasis added.)
- G. “Further, ODOT’s plans with respect to the UP relocation plans have changed since February, 2008. This change was not addressed in my Verified Statement because it was not responsive to the **questions directed to ODOT** by the Board.” ¶3 S.V.S. (Emphasis added.)
- H. “ODOT’s current proposal is to construct a UP “shoofly” in a different alignment that will not require UP to use the middle segment.”

§ 1117.1 PETITION

7. 49 CFR 1117.1 states a party seeking relief not provided for in any other rule may file a petition for such relief. ODOT filed a reply-to-a-reply. The Board's rules do not permit Kessler to file a reply to ODOT's Supplemental Verified Statement. ODOT's Supplemental Verified Statement contains a number of false or misleading statements. In the event the Board accepts ODOT's Supplemental Verified Statement into the record, Kessler would ask leave from the Board to reply to ODOT's Supplemental Verified Statement. Permitting Kessler to file a reply to ODOT's Supplemental Verified Statement would provide the Board with a more complete record. The Reply Kessler seeks permission to submit to the Board, is presented below.

KESSLER'S COMMENTS

8. Kessler notes ODOT's Supplemental Verified Statement was not timely filed. Mr. Ridley's S.V.S. would constitute a reply-to-a-reply, which is prohibited by 49 CFR 1104.13(c). Mr. Ridley did not seek leave from the Board to late-file a reply-to-a-reply, nor did Mr. Ridley provide any good cause as to why the Board should exempt Mr. Ridley from the Board's rules. Generally, under these circumstances, the Board either strikes such impermissible statements, or grants other parties an opportunity to respond to the impermissible statements.

8. If the Board is inclined to accept Mr. Ridley's S.V.S. into the record, Kessler would ask that the Board permit Kessler to file these Kessler's Comments.

9. Kessler would argue that there were no errors in his Reply. He merely commented on material submitted to the Board by BNSF.

10. Kessler argues he did not misunderstand UP's prospective use of the Middle Segment while UP's main line was being salvaged, then realigned. The documents presented to the Board by BNSF were quite explicit: UP would use a portion of the Middle Segment to operate its trains on while UP's main line was being salvaged, then realigned. This was verified in ¶2 of Mr. Ridley's SVS, which stated:

“The February 2008 plans as attached as Exhibit C to my Verified Statement and cited by Kressler, did at that time anticipate that UP would use the middle segment as a temporary detour while UP’s own roughly parallel main line was being relocated.”

11. Mr. Ridley stated: **“It was never anticipated that UP would perform any local service to or from the middle segment.”** ¶2 S.V.S. Kessler argued UP needed to **operate OVER** the Middle Segment, in order to provide local and overhead service in the Oklahoma City portion of UP’s market. The thrust of Kessler’s argument, was that the Middle Segment was needed for continued rail service – by UP.

12. Kessler **did not** represent that UP and BNSF would be using the Middle Segment tracks at the same time. BNSF has indicated that it has rerouted the local and overhead traffic that formerly was routed over the Middle Segment, onto the Packingtown Lead. If this representation by BNSF is accurate, then UP and BNSF would not be attempting to use the Middle Segment tracks at the same time.

13. Mr. Ridley stated:

“(In any event, as is clear from this proceeding and prior proceedings before the Board, no service has been provided to, from or over this segment for over two years). ¶2 S.V.S.

14. In the Abandonment Proceeding, the Board found BNSF had in fact used, and was continuing to use, the Middle Segment when BNSF provided local service to the Producer’s Co-Op. A number of photographs were included in the Abandonment Proceeding depicting BNSF consists operating adjacent to the signal box located at MP 540.20, which is located in the Middle Segment. Gail Poole provided photographic evidence, and a verified statement, showing an overhead traffic consist operating in the Middle Segment. The reason the Board voided BNSF’s Abandonment exemption, was because it contained false and misleading information, to wit: BNSF’s representation that the Line had not been used for the previous two years, was false.

15. Mr. Ridley alleges that sometime between **October 17, 2008**, the date BNSF provided the Board with Mr. Ridley's first verified statement, which contained documents stating the Middle Segment was to be used by UP as a "shoofly" while UP's main line was salvaged and relocated, and **November 13, 2008**, ODOT suddenly changed its mind about UP using the Middle Segment. While this is possible, it is not very believable.

16. Mr. Ridley now represents to the Board that UP's main line will be relocated someplace other than in the Middle Segment. Kessler would ask that the Board direct ODOT to provide more detail about the "different alignment" that would "not require UP to use the middle segment." [There is less than 44 feet of dirt separating the UP and BNSF tracks in the middle segment. Kessler is not aware of any other east-west rail corridor through Oklahoma City, other than the Packingtown Lead, which is more than a mile distant from the UP tracks.]

17. Mr. Ridley stated the reason ODOT did not tell the Board about its alleged change of plan regarding the UP shoofly, was because this issue was not "directed to ODOT by the Board." ¶3 S.V.S. While the Board did not direct ODOT to address this issue in the Board's October 2, 2008 Decision [it could not have, since the use of the Middle Segment as a UP shoofly had not been revealed to the Board], the Board did direct the parties to focus on the issue of whether the proposed projects "would remove service to shippers." The Board's Decision was not limited solely to service to BNSF shippers. The Board's decision directed the parties to focus on service to shippers, irrespective of which rail carrier provided that service.

18. 49 CFR 1103.27 states filings with the Board should be candid, and should not be misleading. Kessler would argue ODOT's representations to the Board have been less than candid.

19. UP's main line is to be put out of service for an extended period of time. If the Middle Segment rail corridor were to be abandoned, as proposed by BNSF, then UP's main line could not be relocated in the Middle Segment. Since there does not appear to be any other rail corridor within which UP's main line could be realigned, the removal of the Middle Segment from the National Rail System "would remove service to shippers" located on UP's main line.

20. WHEREFORE, Kessler would ask that the Board accept this filing into the record, and would ask that the Board direct ODOT to provide the Board with more detail concerning where ODOT / UP propose to realign UP's main line.

21. I, Edwin Kessler, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the above pleading.

Executed on: November 19, 2008

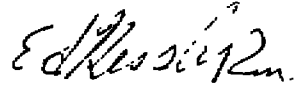
Respectfully submitted,



Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2008, a copy of the foregoing Kessler's Comments Regarding ODOT's Supplemental Verified Statement, was mailed by first class mail, postage prepaid, to the parties of record indicated below.



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