

BALL AND SAVAGE
ATTORNEYS COUNSELORS AT LAW
A PROFESSIONAL ASSOCIATION

August 24, 2009

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

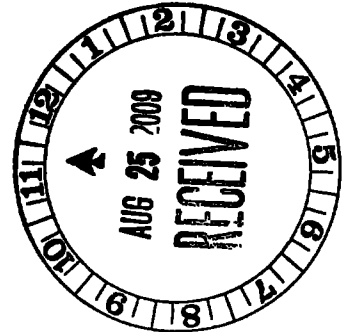
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Office of Proceedings

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Re: Petition to Reopen and Reconsider

TRANSPORTATION BOARD

Finance Docket No. 35164
BNSF Railway Company – Petition for Declaratory Order

225599

Docket No. AB-6 (Sub No. 430X)
BNSF Railway Company – Abandonment Exemption in Oklahoma County, OK

Dear Secretary Quinlan:

Enclosed please find for filing in the above-referenced cases an original and 10 copies of a Petition to Reopen and Reconsider brought forward by Edwin Kessler, Petitioner.

Service upon the parties has been made as noted in the Certificate of Service. Enclosed is a check in the amount of \$250 for the filing fee.

If you have any questions concerning this Petition, please let me know.

Very truly yours,

Darin C. Savage

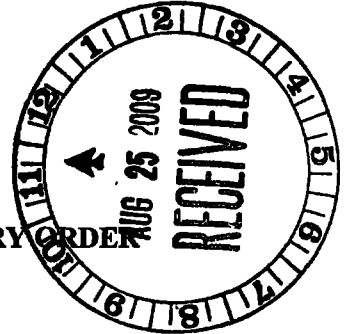
Cc: Edwin Kessler
William P. Tunnell, Jr.
Kristy Clark
Norman N. Hill
Eric M. Hockey
Ellen R. Milcic

Robert D. Hart
Jacqueline C. Rhodes
Kathy Nelson
William L. Humes
Martha Peniston
Kerry Pettingill

**BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

**FINANCE DOCKET NO. 35164
BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER**

**DOCKET NO. AB-6 (SUB NO. 430X)
BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION
IN OKLAHOMA COUNTY, OK**



**PETITION OF EDWIN KESSLER TO REOPEN AND RECONSIDER
THE ABOVE-REFERENCED DECLARATORY ORDER,
FINANCE DOCKET NO. 35164, DECIDED MAY 19, 2009**

Darin C. Savage
Law Office of Darin C. Savage, PLC
Ball & Savage, P.A.
215 W. Main St., Ste 101
Norman, Oklahoma 73069
Ph (405) 701-5355
Fax (405) 292-5465
OBA No. 20803
Attorney for Petitioner

Dated August 24, 2009

SUMMARY OF PETITION

Petitioner's arguments and assertions are summarized as follows:

- I. Petitioner has discovered new evidence – that hazardous materials are being transported on the Packing Town Lead. This new evidence contradicts the answer BNSF made to Question 7(ii) on its Notice of Exemption Under 49 CFR 1152.50 filed September 23, 2005, and therefore, the new evidence signifies a substantial change of conditions from what one would have reasonably anticipated from BNSF's original statements. As a result, Petitioner requests that the Board reopen and reconsider the proceedings of STB Finance Docket 35164 pursuant to 49 U.S.C. 722(c) and 49 CFR 1115.4. *See* Pages 2, 3 and 5, herein. *See also* Exhibit A.
- II. Petitioner asks the Board to consider the zone of danger created by the new evidence, a three point nexus that combines in close proximity, a park full of families and children, a large residential complex for the elderly and disabled, and the transportation of hazardous materials, with the fuse being a strategically positioned and dangerous at-grade crossing, all together creating a formula for potential catastrophe. *See* Page 3, herein. *See also* Exhibits A, B & C; FN 2 at Page 7.
- III. As part of the Board's consideration of this Petition, Petitioner respectfully asks the Board to review closely the language of BNSF's response to Question 7(ii) in light of the new evidence. *See* Page 4, herein.
- IV. Petitioner asserts proper relief for BNSF's abuse of process is to void the declaratory. BNSF's reapplication would ensure a full accounting of all concerns for homeland security and public safety, previously disregarded by BNSF. *See* Page 9, herein.
- V. In the alternative, if upon reopening the proceeding, the Board decides not to void the order, Petitioner asks the Board to protect the Capitol Hill community by requiring BNSF to construct grade separated crossings along PTL's course through the community, especially within the described zone of danger, and to construct substantial fences along the PTL to deter to the extent possible any criminal intent to sabotage a tank car. *See* Page 10, herein.

**BEFORE THE SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

**STB FINANCE DOCKET NO. 35164
BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER**

**STB DOCKET NO. AB-6(SUB NO. 430X)
BNSF RAILWAY COMPANY – PETITION FOR DECLARATORY ORDER**

EDWIN KESSLER (“PETITIONER”) – PETITION TO REOPEN AND RECONSIDER

**PETITION FOR REOPENING AND RECONSIDERATION
OF DECISIONS SERVED MAY 19, 2009**

As a result of the Declaratory Order that was recently issued to BNSF Railway Company (“BNSF”) from the Surface Transportation Board (“Board”), new train traffic has now begun to be rerouted from the Chickasha Line to the Packing Town Lead, through the historic Capitol Hill District, in the south part of Oklahoma City, Oklahoma. *See* STB Finance Docket No. 35164, BNSF Railway Company – Petition for Declaratory Order, decided May 19, 2009 (hereinafter “STB Docket 35164”). Capitol Hill district is an historic Hispanic community and commercial district in the south part of Oklahoma City, Oklahoma, through which trains on the Packing Town Lead (“PTL”) travel. The new train traffic on the PTL travels across two at-grade crossings located at South Walker Avenue and South Robinson Avenue, Oklahoma City, Oklahoma, and the train cars pass adjacent to populated city parks where youth play basketball and adjacent to large residential communities for the disabled and elderly. *See* Exhibits B & C. The Petitioner is highly concerned for the safety of the residents after receiving new

evidence that numerous tank cars with red diamond placards indicating hazardous materials loads are traveling on the PTL, representing a substantial change from the representations made by BNSF during the proceedings. **As a result, Petitioner requests that the Board reopen and reconsider the proceedings of STB Docket 35164 pursuant to 49 U.S.C. 722(c) and 49 CFR 1115.4 and asks the Board to make a determination whether the evidence presented herein is new evidence and whether it signifies a substantial change of conditions from BNSF's original representations.** For Petitioner, there is no doubt the evidence presented herein is new and clearly denotes a substantial change of conditions. A ruling from the Board is requested.

GENERAL ALLEGATIONS AND ARGUMENTS

Petitioner shows that tank cars with hazardous materials pass directly adjacent to a populated park, a large residential center, and across a hazardous at-grade crossing, all within the same dangerous nexus. *See* Exhibits B & C. Both demographics, the young and the elderly in this area, are at great risk from the exposure to even low concentrations of hazardous materials. The extreme danger of this situation lies in the fact that an at-grade crossing is positioned at a critical intersection on South Robinson between the park and the residential community. Photograph C-1 in Exhibit C shows the Cargill plant on South Robinson. The crossing is positioned among the trees, directly in front of Cargill, between the basketball court and the plant, approximately 250 – 300 feet away from the kids. Furthermore, Andrews Square residential community, as depicted in the background of photograph C-3, is to the southwest of the at-grade crossing, approximately 300 – 400 feet away. Petitioner and residents of the community are outraged by the presence on the PTL of tank cars transporting hazardous materials, considering the manner in which BNSF answered Question 7(ii) on its Notice of Exemption Under 49 C.F.R. 1152.50, filed September 23, 2005. Question 7(ii) asks directly: “If hazardous materials are expected to be transported, identify: the materials and quantity; the frequency of service; whether chemicals are being transported that, if mixed, could react to form more hazardous compounds; safety practices (including any speed restrictions; the applicant’s safety record (to the extent available) on derailments, accidents and hazardous spills, the contingency plans to deal with accidental spills, and the likelihood of the accidental

release of hazardous materials.” BNSF answered this highly detailed question in two evasive sentences: “The proposed abandonment will not affect the transportation of hazardous materials. Indeed, the abandonment will not result in the transportation of hazardous materials.” Furthermore, BNSF did not list any hazardous materials when asked to do so. If a railroad company intends to divert hazardous materials to an alternate line, 7(ii) requires the company to list all the hazardous materials to be diverted. BNSF failed this requirement.

When the language of BNSF’s answer to 7(ii) is examined more closely, one sees that the first sentence, “The proposed abandonment will not affect the transportation of hazardous materials,” begs the question, is this statement true because any hazardous materials that were transported on the Chickasha Line, now abandoned, will not be affected, they will continue to be transported, just now diverted toward more hazardous at-grade crossings? BNSF’s second sentence states, “Indeed, the abandonment will not result in the transportation of hazardous materials.” Again, this statement is highly evasive, like the first, and does not answer the question, because if hazardous materials were transported along the abandoned line, and are now diverted to the PTL, this statement still stands as true, ie., “Indeed,” the abandonment itself will not result in the transportation of hazardous materials because they were already being transported on the abandoned line, and are now diverted to the PTL. Petitioner believes BNSF’s tautological response to 7(ii) was a very clever attempt to completely evade the question; if BNSF were ever forced to account for the answer it gave, BNSF might try to claim under oath that technically it spoke the truth. A tautological statement, ie., “A dog is a dog because it is a dog,” is always true no matter what kind of poison was placed in the hamburger. Petitioner believes that 7(ii) should be construed as a direct, forthright question that asks whether, nor not, hazardous materials will be transported along the new line, the PTL, after the former line, the Chickasha, has been abandoned – yes or no -- and if the answer is yes, that hazardous materials will be transported along the new line, then BNSF is required to identify all such materials, their quantities, their known dangers, and contingency plans for managing accidents and spills.

In its answer to 7(ii), BNSF represented to the Board that no hazardous materials were to be transported along the PTL, and in accordance with this representation, BNSF did not list any such

materials, an absence which should stand as a firm confirmation that the transportation of hazardous materials along the PTL line is prohibited. Yet, the new evidence is incontrovertible: members of and visitors to the Capitol Hill community have personally witnessed the transportation of series of tank cars with hazardous material markings. See Exhibit A. Witnesses have taken photographs to document the transportation of hazardous materials along the PTL. See id. These photographs show tank cars with hazmat codes "1230" and "1268," which correspond directly to items on the list of what the Federal Railroad Administration defines as hazardous materials. See 49 CFR 172 et al; specifically 49 CFR 172.101. This new evidence contradicts BNSF's answer to Question 7(ii) and demonstrates that BNSF provided the Board false and misleading information on its Notice of Exemption. This new evidence could not have been previously deduced because BNSF's response to 7(ii) was false and misleading, and Petitioner could not have demonstrated this fact until new train traffic had actually commenced along the PTL line that confirmed the transportation of hazardous materials.

If BNSF is not truthful under certification to a federal agency, then Petitioner believes the railroad company will have no obligation to be truthful to the public who must bear the risk of exposure to hazardous materials upon an accident or spill. Consequently, Petitioner, at this time, fears for the safety of the Capitol Hill residents and respectfully asks the Board to investigate the veracity of BNSF's answer to 7(ii) as well as the current level of risk to the residents of the Capitol Hill district. Petitioner asks the Board to consider that the tank cars depicted were witnessed during the course of one week only. It remains unknown what kinds and quantities of hazardous materials are being transported through the PTL every week and month throughout the year. Chlorine, for example, poses a major threat to the public. A train collision rupturing a tank car holding chlorine can kill up to 17,500 people and injure an additional 10,000 in a densely populated city. See Eben Kaplan, *Rail Security and the Terrorist Threat*, Council on Foreign Relations (2007), available at http://www.cfr.org/publication/12800/rail_security_and_the_terrorist_threat.html.

Moreover, before the abandonment was approved, the Board required from BNSF an environmental report (“EA report”). In order to be valid at the federal level, an EA report must reflect all state regulatory concerns, as required by 49 CFR 1105.7. In its EA report, BNSF certified that “it had consulted with all appropriate agencies in preparing the report” and it has included “any written responses received from the agencies” as well as summaries of any oral responses from such agencies including “names, titles, and telephone numbers of the persons contacted.” *See id.* 1105.7(c). Petitioner has discovered that BNSF did not provide notice to the Oklahoma Homeland Security Office (“OHS Office”) nor did BNSF contact the OHS Director during the completion of its EA, and as a result, Petitioner asserts that BNSF did not satisfy the requirements of 49 CFR 1105.7.

In response to the tragedy of 9-11, Oklahoma passed the Oklahoma Homeland Security Act (“OHSA”), codified as 74 O.S. 51 et seq., which became effective April 26, 2004. Under the OHSA, the OHS Director has a mandate “to develop and coordinate the implementation and administration of a comprehensive statewide strategy to secure the State of Oklahoma from the results of acts of terrorism, from a public health emergency, and from weapons of mass destruction [WMDs] as that term is defined in 18 U.S.C. Section 2332a.” *See* 74 O.S. 51.1 (E). Petitioners find it very disturbing that a train with tank cars full of chlorine, or other highly volatile chemical, qualifies to become the main component of a WMD under federal law.¹ *See* 18 U.S.C. 2332a(c)(2)(A) and (C). According to the Council on Foreign Relations, a non-partisan center for national and international policy, “Hazardous chemicals travel on railcars in ninety-ton pressurized tanks” and should “one of these tanks rupture – either from a terrorist attack or accident – the results could be catastrophic.” *See* Eben Kaplan, *Rail Security and the Terrorist Threat*, Council on Foreign Relations (2007) *available at*

¹ In consideration of this statement, Petitioners ask the STB to contemplate the language of 18 U.S.C. 2332a(c)(2)(A) (the term “weapons of mass destruction” means “any destructive device as defined in Section 921 of this title); 18 U.S.C. Section 921 (the term “destructive device” means “any combination of parts either designed or intended for use in converting any device into any destructive device” which is “any explosive, incendiary, or poison gas – device”). Following this chain of definitions, one realizes that if someone decided to plant a bomb on a 90-ton tanker car full of a volatile chemical, connected in line to numerous other tanker cars, then a “combination of parts either designed or intended for use in converting any device [the train] into any destructive device” would have been created, and the people of Oklahoma City would suddenly find themselves in the presence of a WMD, as defined under federal law.

www.cfr.org/publication/12800/rail_security_and_the_terrorist_threat.html. Fred Miller, a former member of Washington D.C. local Emergency Planning Committee, likens the shipment of chemicals through America's biggest cities to "pre-positioning weapons of mass destruction." *See id.*

BNSF filed with the STB its Notice of Exemption on September 23, 2005, more than a year after the OSHA became law. At the time of its filing, BNSF would have had both actual and constructive notice of the state statutory mandate to account for issues of homeland security when dealing with the potential dangers of rerouting freight trains through a populated city. Also, at the time of its filing, BNSF was fully aware of the federal mandate embodied in 49 CFR 1105.7, that in order for the EA report to be valid, all appropriate agencies needed to be provided notice. BNSF did not provide notice to or consult with the OHS Office, nor did it account for any issues of how the transportation of hazardous materials would impact concerns of homeland security in a city that has a history with terrorism. Furthermore, BNSF's disregard occurred while America was engaged in a war over issues of homeland security. American soldiers are asked to fight and risk their lives in Iraq and Afghanistan for two principles: (1) that our homeland security and safety be better assured, and (2) that the laws and due process of a democratic society be allowed to flourish. Petitioner asserts that BNSF's disregard of the Board's regulations that require it to incorporate into the EA report state agency concerns of homeland security and public safety directly undermines both principles.²

² In March 2007, Congress began focusing on the risk of trains being targeted by terrorists. *See* Charles Perrow and Lee Clarke, *The Next Railroad Catastrophe*, *The Huffington Post*, Jun 20, 2007, *available at* http://www.huffingtonpost.com/charles-perrow-and-lee-clarke/the-next-railroad-catastr_b_53027.html. "In March 2007, terrorists in Iraq started to use tanks of chlorine as destructive weapons." *See id.* "[I]f terrorists placed their bombs next to a railroad tank car with 90 tons of chlorine in Newark, Chicago or Atlanta, they could, according to estimates supplied to the EPA by the chemical industry, harm four million people." *See id.* "Railroad accidents take place every day, and railroads carry extremely dangerous materials." *See id.* When it happens, people will say, as they did after the attack of 9-11 or the drowning of New Orleans, "It was so obvious. That was a disaster waiting to happen." *See id.* America sent its sons and daughters to war to preempt the use of WMDs. This Petition provides new evidence that hazardous materials are being transported on the PTL and that home-grown terrorists could take advantage of such conditions to create and detonate a WMD, as defined under federal law. The circumstances justify a reopening of the declaratory order. At the federal level, the Federal Railroad Safety Program has not been updated since 1994, and in Oklahoma, the state's regulations for railroad safety have not been updated since July 1, 2001, two and a half months before the paradigm shift that forever changed how America thinks about safety. Therefore, the only deliberations of record that, under the changed circumstances, can provide any hope of protecting the people of the Capitol Hill community in Oklahoma City would be the deliberations made by the Board upon reopening and reconsideration of the declaratory order.

Petitioner believes Oklahoma is unique in relation to concerns for homeland security and public safety, as it is one of only three cities in the United States to have suffered a major act of terrorism, and Petitioner believes it is this tragic fact that makes Oklahoma City susceptible to future acts of terror, as terrorists may want to exploit any deep rooted fears and anxieties already internalized by Oklahomans, and terrorists may want to send tremors of terror throughout America by striking the center of its heartland, again. For whatever reason, Oklahoma and surrounding states must contend with a high concentration of extremists who consider themselves militia-foot-soldiers. Such extremists spew hatred; they desire to kill large numbers of people; and they invoke words such as, “Waco” and “Ruby Ridge” for inspiration and to justify criminal intent. The Federal Bureau of Investigation further confirms that many such home-grown terrorist groups are motivated by racial hatred. *See* Robert S. Mueller, III, FBI Director, Speech to Stanford Law School (Oct. 18, 2002) (the FBI Director warning that “when we discuss terrorism, we cannot forget domestic terrorism and domestic terrorist groups who operate in our own country. These groups, espousing racial supremacy principles and anti-government rhetoric, are a serious menace, as we came to understand by the April 1995 bombing in Oklahoma City”). A Timothy-McVeigh-clone could potentially jeopardize the entire population of the south half of Oklahoma City by sabotaging tank cars on the PTL. Such concerns for public safety are certainly on par with those of the I-40 Expressway, and potentially, under foreseeable circumstances, such concerns would fully eclipse any concerns regarding the Expressway.³ The current danger resides in the unknown, and such considerations remain unknown for one reason: they were completely omitted from the Board’s deliberations through fault of BNSF. Frankly, it is beyond Petitioner’s comprehension that a major railroad company such as BNSF could provide false and misleading information on the transportation of hazardous materials, and then without accounting for homeland security or public safety, divert through an historic minority community 90-ton tank cars filled to the brim with hazardous materials. Yet, the evidence shows this to be the case.

³ The safety of the I-40 Expressway was one of the main reasons the Board issued the Abandonment Exemption. Without full disclosure regarding the transportation of hazardous materials, the Board had no way to assess the overall threat to homeland security and public safety. *See* STB Docket 35164 at 6, 11.

REQUESTED RELIEF: VOID THE DECLARATORY ORDER TO SET AN EXAMPLE

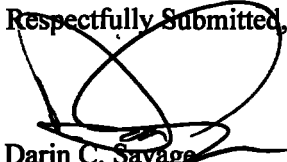
Consequently, Petitioner asserts the safety of Capitol Hill residents should not be jeopardized from BNSF's misrepresentation under the rationale that the declaratory order has already been granted and consummated and to reconsider it at this time would be too burdensome upon BNSF. **Petitioner asks the Board to send a signal to all railroad companies that may be contemplating the conveyance of false and misleading information. Such responses should not be tolerated, and any declaratory order based on a false premise put in place by the direct response of a party seeking the order should be voided. Petitioner asks the Board to void the declaratory order.** At a minimum, BNSF's abuse of process should result in its loss of the exemption privilege. If it wants to proceed, BNSF should be required to answer for its false and misleading statements by accounting for all provisions of the abandonment application which were designed to protect the public. In support of what may be considered a harsh but necessary action, Petitioner asserts that declaratory orders of the Board are permissive, not mandatory, meaning that once granted, BNSF is the party with the discretion whether to exercise its option to commence abandonment or not. *See* 49 CFR 1152.29 (e) 2. BNSF has full notice that it must not exercise its option to abandon the line unless it is certain it has made every good faith effort to uphold the integrity of the approval process and that all regulatory matters had been accounted for. If BNSF does not do this, then it alone assumes the risk for any reliance that it knows to be without warrant. *See* *Busboom Grain Co. v. ICC*, 830 F.2d 74, 75-76 (7th Cir. 1987) (noting that a party taking action in reliance on a declaratory order issued by the Board assumes the risk of liability should the order be later overturned). Petitioner respectfully requests the Board to act upon this new evidence and change of circumstances -- that hazardous materials are being transported along the PTL -- by reevaluating the validity of the declaratory order and reopening the matter to assess the veracity of BNSF's responses to Question 7(ii). Because BNSF was the only party in the abandonment process with actual knowledge that there was every intention to transport hazardous materials on the PTL, as well as having full knowledge of the types and quantities of such materials and the potential likelihood of any accidents, Petitioner believes that BNSF should be the sole party to bear the risk of the Board's reevaluation.

**RELIEF IN THE ALTERNATIVE: CONSTRUCT FENCES
AND GRADE SEPARATED CROSSINGS**

If after reopening the proceedings, the Board decides not to void the order, then in the alternative, Petitioner asks the Board to have BNSF provide a full accounting for the concerns of homeland security and public safety. **In doing so, Petitioner asks the Board to take affirmative steps to protect this vital community and require BNSF to install substantial fences along the PTL and require BNSF to replace the hazardous at-grade crossings at South Walker Avenue and South Robinson Avenue, in Oklahoma City, Oklahoma, with grade separated crossings.** Furthermore, as an integral part of this remedy, Petitioner asks the Board to issue an order that BNSF shall be subject to concurrent jurisdiction and authority that the Oklahoma Corporation Commission (“OCC”) holds over local issues of railroad safety, when such local jurisdiction is properly exercised within the scheme of federal regulation. *See Tyrell v. Norfolk Southern Railway Company*, 248 F. 3d 517 (6th Cir. 2001) (holding that the [Surface Transportation Board’s and Federal Railroad Administration’s] complementary exercise of their statutory authority accurately reflects Congress’ intent for the ICCTA and the FRSA to be construed *pari materia*,” and thus, “the FRA exercised primary authority over rail safety matters under 49 U.S.C. 20101 et seq., while the STB handled economic regulation and environmental impact assessment”). To Petitioner, the holdings of the *Tyrell* court are clear. The OCC, under the proper statutory relationship with the FRA, may establish jurisdiction over the safe operation of railroads. *See also* Brief for Appellant at 3, *Tyrell v. Norfolk*, 248 F. 3d 517 (6th Cir. 2001) (the Board explaining that an overly-broad interpretation of 49 U.S.C. 10501(b) will “undermine the primary authority of the [FRA] (or the states where FRA has no federal standards) to regulate railroad safety under the FRSA. 49 U.S.C. 20101; 20102; 20106”)(paratheses in original); *Iowa, Chicago & Eastern Railroad Corporation v. Washington County, Iowa*, 384 F. 3d 557 (8th Cir. 2004) (holding that “Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular. ICCTA does not address these problems”).

Recently, residents of the Capitol Hill district have appealed to the OCC to address a number of local safety concerns that have arisen from the declaratory order, including concerns of homeland security. *See* OCC Cause No. TD-2009-00032 (Hearing on Jurisdiction, August 19, 2009). In these proceedings, the Oklahoma Department of Transportation (“ODOT”) and BNSF have vigorously opposed these efforts by warning the OCC that the residents are persisting in an “attempt to have the Commission take actions beyond its jurisdiction and to involve it in matters that are exclusively in the province of federal statutes and regulations.” *See* Reply of [ODOT] in Opposition to the Applicant’s Request for the Exercise of Jurisdiction and Objection to Motions to Dismiss, OCC Cause TD 2009-00032, *filed* August 17, 2009. The OCC is currently deliberating the extent of its local jurisdiction. Petitioner requests that the Board provide the OCC clarification of the law. After BNSF accomplishes the Board’s requirements in this matter, Petitioner asks the Board to order BNSF to fulfill all conditions that the OCC mandates in the exercise of its proper jurisdiction over safety. Given the catastrophic threat posed by the presence of hazardous materials on the PTL, the question that BNSF was not forthright about the presence of such materials, the failure of BNSF to provide notice to the OHS Office, and the resulting absence in the EA report of proper comment on questions of homeland security and public safety, the Petitioner respectfully requests that the Board reopen and reconsider the proceeding to account for BNSF’s misrepresentations.

Respectfully Submitted,


Darin C. Savage
Law Office of Darin C. Savage, PLC
OBA No. 20830
Attorney for Petitioner

Ball & Savage, P.A.
215 W. Main, Suite 101
Norman, Oklahoma 73069
Phone: (405) 701-5355
Facsimile: (405) 701-2830

Dated: August 24, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August 2009, a copy of the foregoing Petition to Reopen and Reconsider STB Finance Docket No. 35164/STB Docket No. AB-6(SUB NO. 430X) was mailed, postage prepaid thereon, to the following:

William P. Tunnell, Jr.
Rod L. Cook
Hugh D. Rice
RAINEY, ROSS, RICE & BINNS
120 N. Robinson Suite 735W
OKC, OK 73102
Attorneys for BNSF Railway Company

Kristy Clark, General Attorney
BNSF Railway Company
2500 Lou Menk Drive, AOB-3
Fort Worth, TX 76131

Norman N. Hill, General Counsel
Oklahoma Department of Transportation
200 Northeast 21st Street
OKC, OK 73105
Attorney for ODOT

Eric M. Hockey
Ellen R. Milcic
Thorp Reed & Armstrong, LLP
One Commerce Square
2005 Market St., Ste. 1910
Philadelphia, PA 19103-7041
Counsel for ODOT

Robert D. Hart
Jacqueline C. Rhodes
GIBBS ARMSTRONG BOROCHOFF
MULLICAN & HART, P.C.
601 S. Boulder Avenue, Suite 500
Tulsa, OK 74119
Attorneys for Stillwater Central Railroad

Military Traffic Management Command
Transportation Energy Agency
Railroads for National Defense Program
720 Thimble Shoals Blvd., Suite 130
Newport News, Virginia 23606-2574

Kathy L. Nelson
Assistant General Counsel
Oklahoma Corporation Commission
P.O. Box 52000
OKC, OK 73105-2000

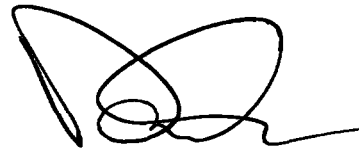
William L. Humes
Office of Attorney General
313 NE 21st Street
OKC, OK 73105

Martha Peniston
General Counsel
Oklahoma Dept. of Environmental Quality
P.O. Box 1677
Oklahoma City, OK 73101-1677

Edwin Kessler
1510 Rosemont Drive
Norman, OK 73072

Kerry Pettingill, Director
Oklahoma Office of Homeland Security
3600 Martin Luther King Blvd
Oklahoma City, OK 73136

Charles B. Davis, Attorney
207 West Main, Ste 200
Norman, OK 73069



DARIN C. SAVAGE

Exhibit A

To that certain Petition, dated August 21, 2009, for Reopening the STB Finance Docket No. 35164

Photos A-1 through A-11

A-1: Tank cars with hazardous material markings in Oklahoma City, Oklahoma, observed traveling on the Packing Town Lead by Wanda Stapleton on August 13, 2009

A-2: Tank cars with hazardous material markings on the Packing Town Lead in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-3: Tank cars with hazardous material markings on the Packing Town Lead in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-4: Hazardous material code on tanker car located on the Packing Town Lead in Oklahoma City, Oklahoma, south of Agnew Street, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-5: Train with tank cars (not visible) on the Packing Town Lead. in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009

A-6: Tank cars, visible and in line, of train pictured in A-5, on the Packing Town Lead, in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-7: Tank car with hazardous material code, 1268, located on the Packing Town Lead, in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-8: Tank car with hazardous material code, 1230, located on the Packing Town Lead, in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-9: Tank car with hazardous material code, 1268, located on Packing Town Lead, in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-10: Tank car with hazardous material markings. located on Packing Town Lead. in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009.

A-11: Tank car with hazardous material markings. located on Packing Town Lead. in Oklahoma City, Oklahoma, observed by Wanda Stapleton and Tom Elmore on August 17, 2009. The presence of vandalism on this particular tanker car demonstrates to extent to which these tanker cars are susceptible to criminal intent.

A-12: Affidavit of Ms. Wanda Jo Stapleton, long-time resident of the Capitol Hill community, and former state representative, from 1986-1996, of the Capitol Hill community, House District 93.

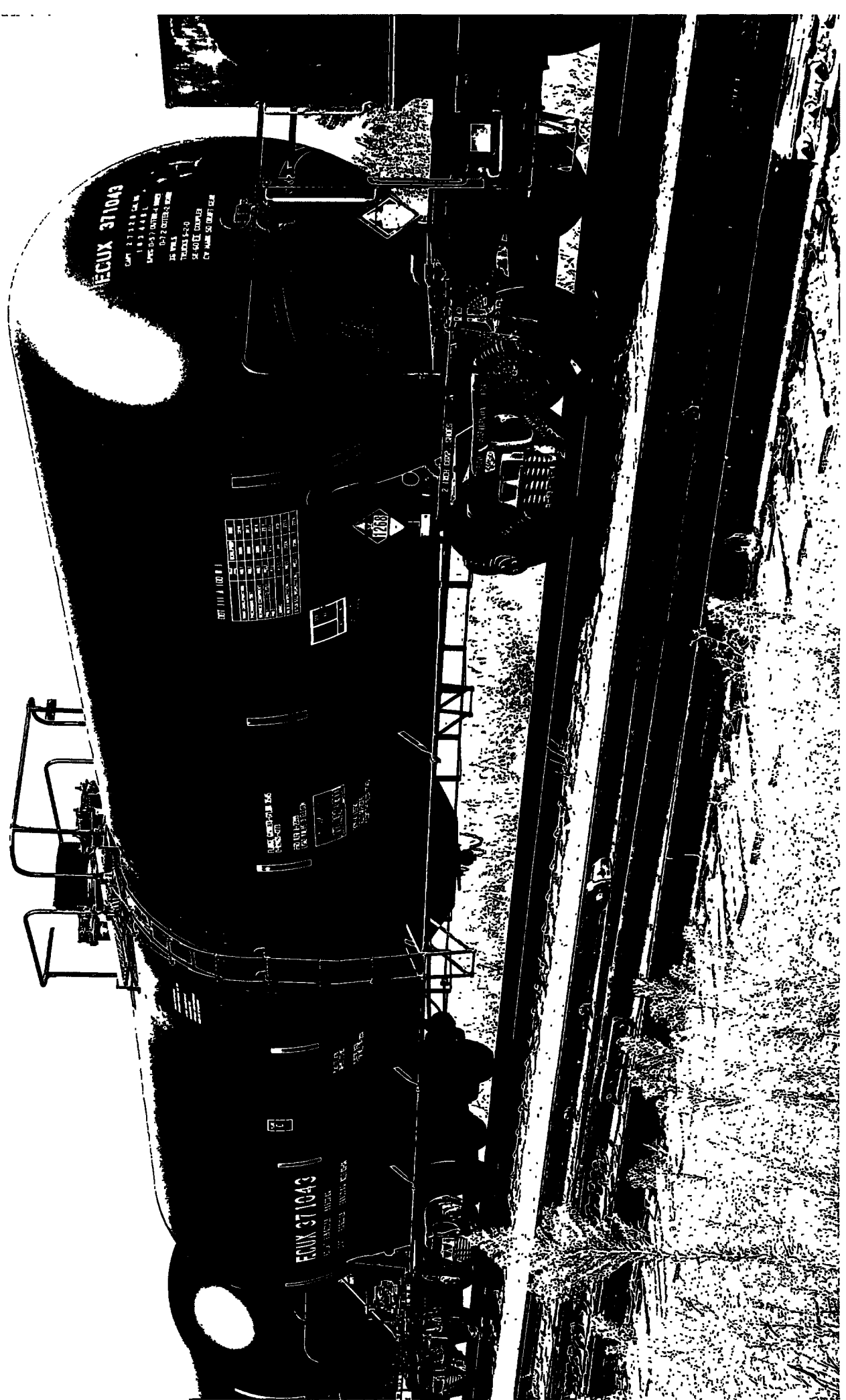
A-13: Affidavit of Mr. Tom Elmore, Oklahoma resident and party to the initial proceedings before the Board.

A-1



A-2





A-4

ECUX 371043

LD LMT 199500 LB 90500 KG

LT WT 63500 LB 28800 KG RELT 06-06

2 INCH COP. SHOES

ESSNIEUA 682

ECUX 371043

A-5





A-7

DB-11 A 100 W

		STATION STICK	QUALIFIED	DUE
TANK QUALIFICATION		RELT	2006	2016
THICKNESS TEST		RELT	2006	2016
SERVICE EQUIPMENT		RELT	2006	2016
PRD 1:	75 PSI	RELT	2006	2016
PRD 2:		N/A	N/A	N/A
LINING:		RELT	PP	NONE
88 B.2 INSPECTION		RELT	2006	2016
STUB SILL INSPECTION		RELT	2006	2016

DB-10 DB-20	LUB NO
BLT 8-95	

PAINTED 8-95
SHOP 85
SYSTEM 438



2 INCH COMP SHOES

PSH111N-0A 0-95

ECUX 37

DOT 11A100W1

TANK QUALIFICATION		TRGS	2008	2018
THICKNESS TEST		TRGS	2008	2018
SERVICE EQUIPMENT		TRGS	2008	2018
PRESS. VALVE		TRGS	2008	2018
LINING				
SSEL2 INSPECTION		TRGS	2008	2018
STUB GILL INSPECTION		TRGS	2008	2018

DB-X0	DB-Z0
GLT08-08 REPLY	

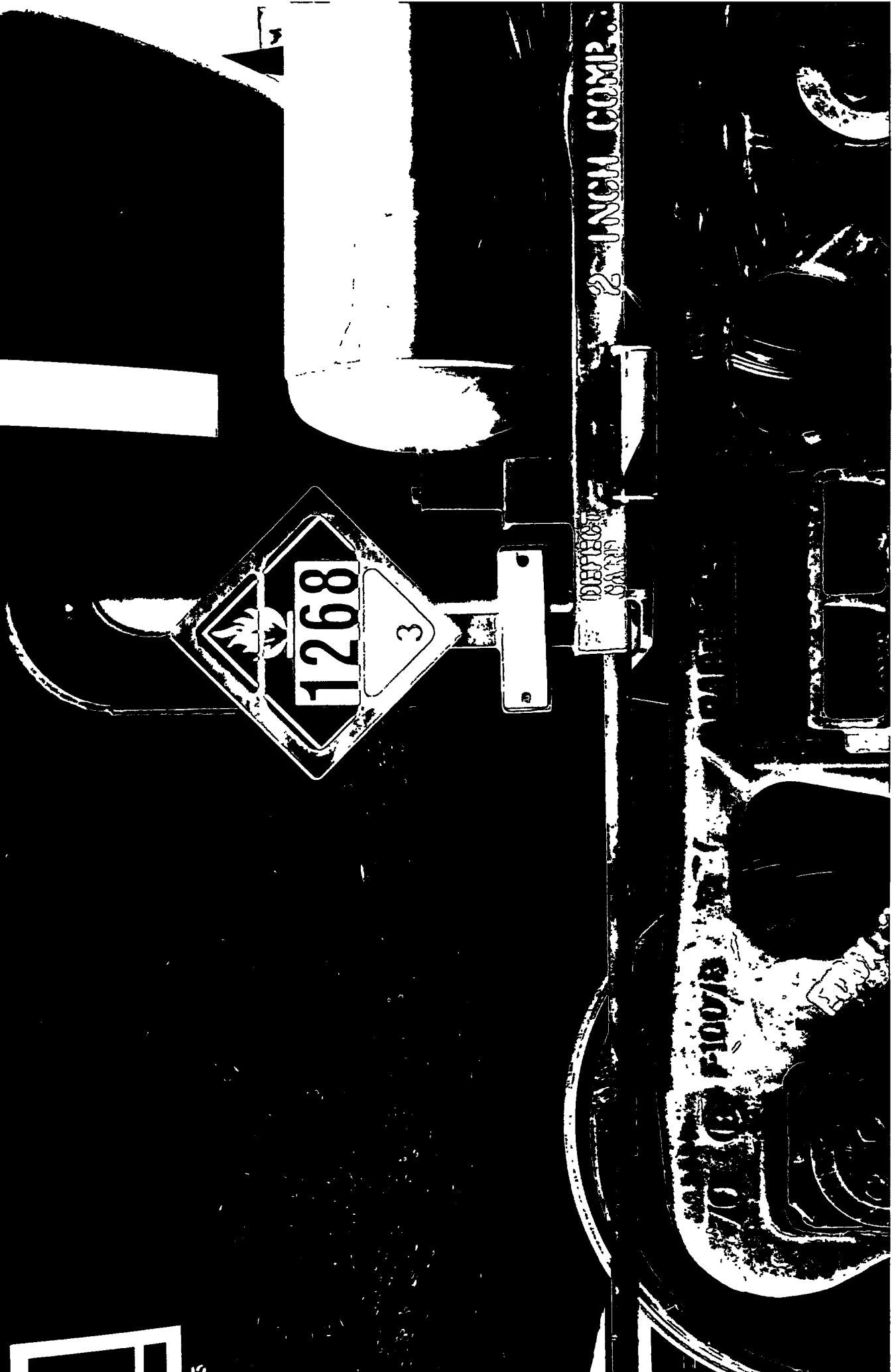


2 INCH HF COMP SHOES

CAUTION CONTROL

A-9

88.B.2 INSPECTION	RELT	2006	2016
STUB SILL INSPECTION	RELT	2006	2016



A-10

CTCX 731033

PLATE
C

LD LMT	198600LB	90100KG
LT WT	64400LB	29200KG

A-11

ECUX 371043

LD LMT 199 500 LB 905 00 KG
LT WT 63 500 LB 285 00 KG RELT 06-06

[Handwritten signature]



BEFORE THE SURFACE TRANSPORTATION BOARD

Edwin Kessler	)	
	)	
Petitioner,	)	
	)	
v.	)	STB Finance Docket No. 35164
	)	STB Docket No. AB-6 (Sub No. 430X)
BNSF Railway Company.	)	
	)	
Respondent.	)	

STATE OF OKLAHOMA)
)
 COUNTY OF OKLAHOMA) SS.

AFFIANT, of lawful age, first being duly sworn, states:

1. That on Thursday, August 13, 2009, at 8:52 a.m., I witnessed the transportation by rail of a tank car with a red diamond placard indicating a hazardous materials load on the Packing Town Lead in Oklahoma City, Oklahoma, the train having crossed the intersection at Pennsylvania Ave. The tank car I witnessed at the Pennsylvania intersection is the same tank car documented by photograph A-1.

2. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed the transportation by rail of a tank car with a red diamond placard indicating a hazardous materials load on the Packing Town Lead in Oklahoma City, Oklahoma, the tank car having crossed S. Robinson Street. The tank car I witnessed is documented as being on the Packing Town Lead by photograph A-2.

3. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed the transportation by rail of a tank car with a red placard indicating a hazardous materials load on the Packing Town Lead in Oklahoma City, Oklahoma, the tank car having crossed S. Robinson Street. The tank car I witnessed is documented as being on the Packing Town Lead by photograph A-3.

4. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed the transportation by rail of a tank car with a red diamond placard indicating a hazardous materials load on the Packing

Town Lead in Oklahoma City, Oklahoma, the tank car having crossed S. Robinson Street. The tank car I witnessed is documented as being on the Packing Town Lead by photograph A-4.

5. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed a train transporting a tank car with a red diamond placard indicating a hazardous materials load on the Packing Town Lead, it having crossed S. Robinson Street in Oklahoma City, Oklahoma. The train with tank cars that I witnessed is documented as being on the Packing Town Lead by photographs A-5 and A-6.

6. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed a tank car with a red diamond placard indicating a hazardous materials load, displaying hazmat code "1268," on the Packing Town Lead, in Oklahoma City, Oklahoma, it having crossed S. Robinson Street. The tank car I witnessed is documented by photograph A-7.

7. That on Monday, August 17, 2009, at 7:58. I witnessed a tank car with a red diamond placard indicating the transportation of hazardous materials, displaying hazmat code "1230," on the Packing Town Lead, it having crossed S. Robinson Street, in Oklahoma City, Oklahoma. The tank car I witnessed is documented by photograph A-8.

8. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed a tank car with a red diamond placard indicating the transportation of hazardous materials, displaying hazmat code "1268," on the Packing Town Lead, it having crossed S. Robinson Street, in Oklahoma City, Oklahoma. The tank car I witnessed is documented by photograph A-9.

9. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed a tank car with a red diamond placard indicating the transportation of hazardous materials, and with other hazardous material markings, on the Packing Town Lead, in Oklahoma City, Oklahoma, it having crossed S. Robinson Street. The tank car I witnessed is documented by photograph A-10.

10. That on Monday, August 17, 2009, at 7:58 a.m., I witnessed a tank car with a red diamond placard indicating the transportation of hazardous materials, and with other hazardous material markings, on the Packing Town Lead, in Oklahoma City, Oklahoma. The tank car I witnessed is documented by photograph A-11. I observed that this tank car had been subjected to criminal vandalism as depicted in the photograph.

11. That I witnessed all of the occurrences as described above, and Mr. Tom Elmore documented with photographs all the trains and tank cars that I witnessed on the dates specified. These photographs are marked A-1 through A-11 in Exhibit A of the Petition to Reopen STB Finance Docket No. 35164. The photographs accurately represent in detail the trains and tank cars I personally witnessed on the Packing Town Lead and have described herein.

Further the affiant sayeth not.

Wanda Stapleton

Wanda Stapleton, resident and former
state representative of the Capitol Hill
district (House District 93) Oklahoma City,
Oklahoma

Signed and sworn to before me this 20th of August, 2009.

Bubba A. Kunt #02020895
(Notary Public)

My Commission Expires:

January 18, 2011

BEFORE THE SURFACE TRANSPORTATION BOARD

Edwin Kessler	)	
	)	
Petitioner,	)	
	)	
v.	)	STB Finance Docket No. 35164
	)	STB Docket No. AB-6 (Sub No. 430X)
BNSF Railway Company,	)	
	)	
Respondent.	)	

STATE OF OKLAHOMA)
)
 COUNTY OF OKLAHOMA) SS.

AFFIANT, of lawful age, first being duly sworn, states:

1. That on Thursday, August 13, 2009, at little after 9:00 a.m., I witnessed the transportation of a tank car with a red diamond placard indicating a hazardous materials load on the Packing Town Lead in the Capitol Hill district, Oklahoma City, Oklahoma. I photographed this train at the Portland Ave. intersection. It had traveled, east to west, via the Packing Town Lead to this intersection. Wanda Stapleton, Capitol Hill resident, observed this same tanker car, with the identifying number CTCX 730998, earlier on the Packing Town Lead. The tanker car is documented by photograph A-1.

2. That on Monday, August 17, 2009, at little after 8:00 a.m., I witnessed the transportation of a tank car with a red diamond placard indicating a hazardous materials load on the Packing Town Lead in Oklahoma City, Oklahoma, the tank car located on tracks south of Agnew Ave. Wanda Stapleton observed this same tanker car crossing S. Robinson on the Packing Town Lead. The tank car I witnessed is documented as being on the Packing Town Lead by photograph A-2.

3. That on Monday, August 17, 2009, a little after 8:00 a.m., I witnessed the transportation of a tank car with a red diamond placard indicating a hazardous load on the

Packing Town Lead in Oklahoma City, Oklahoma, the tank car being located at the BNSF/Stillwater Central Packing Town Lead crossing of south Agnew Ave. The tank car I witnessed is documented as being on the Packing Town Lead by photograph A-3.

4. That on Monday, August 17, 2009, at little after 8:00 a.m., I witnessed the transportation of a tank car with a red diamond placard indicating a hazardous materials load on the Packing Town Lead in Oklahoma City, Oklahoma, the tank car being located the BNSF/Stillwater Central Packing Town Lead crossing at south Agnew Ave. Wanda Stapleton witnessed this same tanker truck crossing S. Robinson street on the Packing Town Lead. The tank car I witnessed is documented as being on the Packing Town Lead by photograph A-4.

5. That on Monday, August 17, 2009, a little after 8:00 a.m., I witnessed a train transporting tank cars with a red diamond placard indicating a hazardous materials load on the Packing Town Lead near Capitol Steel, the train being located on tracks near south Agnew Ave. The train with tank cars that I witnessed is documented as being on the Packing Town Lead by photographs A-5 and A-6.

6. That on Monday, August 17, 2009, a little after 8:00 a.m., I witnessed a tank car with a red diamond placard indicating a hazardous materials load, displaying hazmat code "1268," on the Packing Town Lead, in Oklahoma City, Oklahoma, the tank car being located on tracks near south Agnew Ave. Wanda Stapleton witnessed this same tank car crossing S. Robinson on the Packing Town Lead. The tank car I witnessed is documented by photograph A-7.

7. That on Monday, August 17, 2009, a little after 8:00 a.m., I witnessed a tank car with a red diamond placard indicating a hazardous materials load, displaying hazmat code "1230," on the Packing Town Lead, it having been located on tracks near south Agnew Ave, in Oklahoma City, Oklahoma. Wanda Stapleton witnessed this same tank car crossing S. Robinson on the Packing Town Lead. The tanker car I witnessed is documented by photograph A-8.

8. That on Monday, August 17, 2009, a little after 8:00 a.m., I witnessed a tank car with a red diamond placard indicating a hazardous materials load, displaying hazmat code "1268", on the Packing Town Lead, located on tracks near south Agnew Ave. in Oklahoma City, Oklahoma. Wanda Stapleton witnessed this same tanker car crossing S. Robinson on the Packing Town Lead. The tank car I witnessed is documented by photograph A-9.

9. That on Monday, August 17, 2009, a little after 8:00 a.m., I witnessed tank car with a red diamond placard and other hazardous material markings on the Packingtown Lead, in Oklahoma City, Oklahoma, it having been located near south Agnew Ave. Wanda Stapleton witnessed this same tank car crossing S. Robinson on the Packing Town Lead. The tank car I witnessed is documented by photograph A-10.

10. That on Monday, August 17, 2009, a little after 8:00 a.m., I witnessed a tank car with a red diamond placard and other hazardous material markings on the Packing Town Lead, in Oklahoma City, Oklahoma. The tank car I witnessed is documented by photograph A-11. Wanda Stapleton witnessed this same tank car crossing S. Robinson Street on the Packing Town Lead. I observed that this tank car had been subjected to criminal vandalism as depicted in the photograph.

11. That I witnessed all of the occurrences as described above, and I documented all the occurrences with photographs, marked A-1 through A-11 in Exhibit A of the Petition to Reopen STB Finance Docket No. 35164. The photographs accurately represent in detail the trains and tanker cars I and/or Wanda Stapleton, resident of the Capitol Hill district, personally witnessed on the Packing Town Lead and have described herein.

Further the affiant sayeth not.


Tom Elmore, Executive Director of the
North American Transportation Institute

Signed and sworn to before me this 21th of August, 2009.


(Notary Public)

My Commission Expires:

January 18, 2011

Exhibit B

To that certain Petition, dated August 20, 2009, for Reopening the STB Finance Docket No. 35164

Photos B-1 through B-7

B-1: Andrew Square residential center for the elderly and disabled, located 2101 S. Harvey, adjacent to the Packingtown Lead over which hazardous materials are transported. Andrew square is a 201 unit, 5-story high-rise apartment complex in which 300 – 400 people permanently reside.

B-2: This photograph demonstrates the very close proximity of the Packingtown Lead to Andrew Square.

B-3: Many of the residents of Andrew Square suffer precarious health conditions that could be exacerbated by exposure to even low concentrations of hazardous materials.

B-4: This photograph reveals the full size and extent of the Andrew Square residential complex.

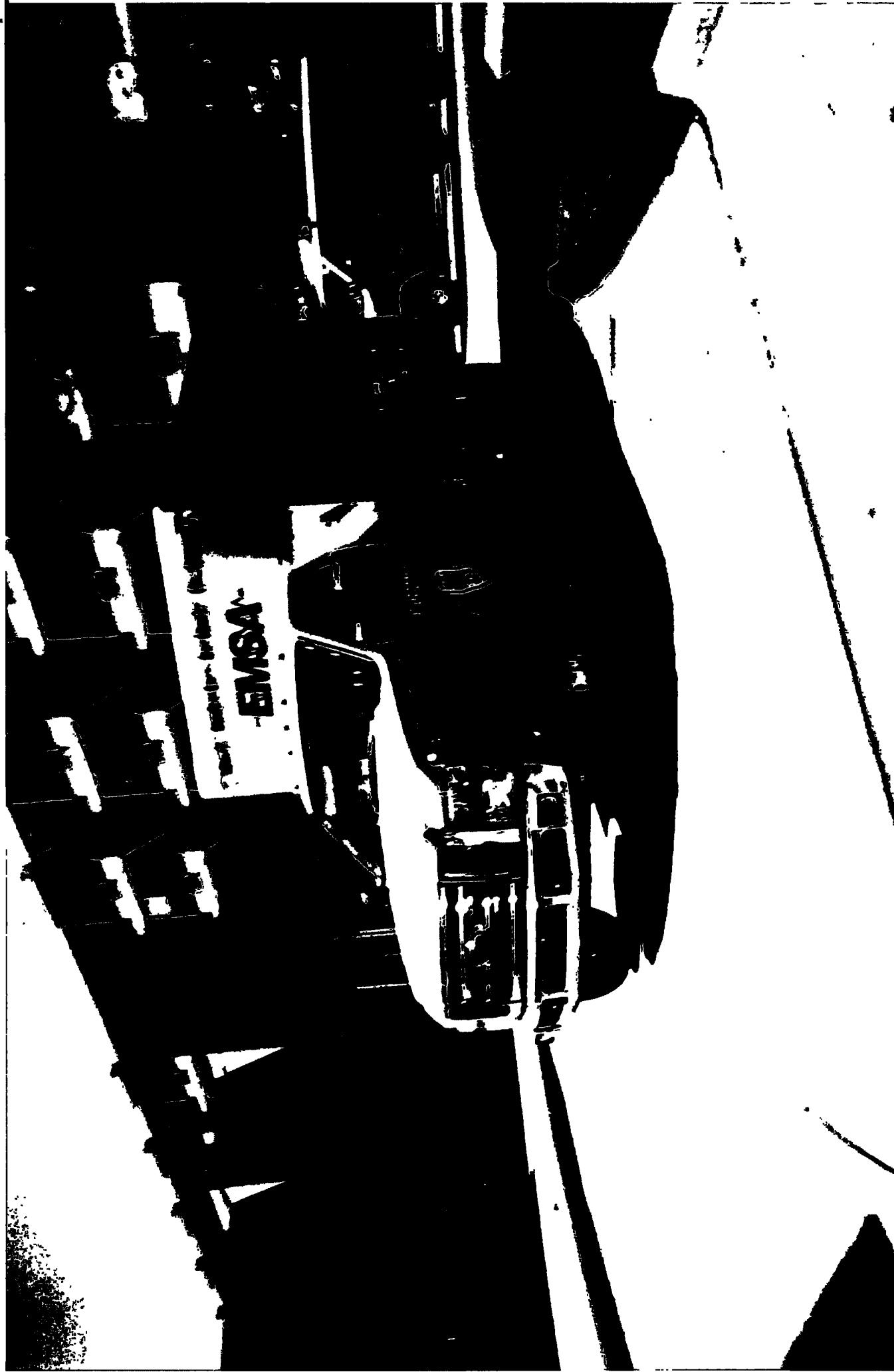
B-5: Residents of Andrew Square sharing in a meal.

B-6: Staff members of Andrew Square joining in with residents during recreational activities.

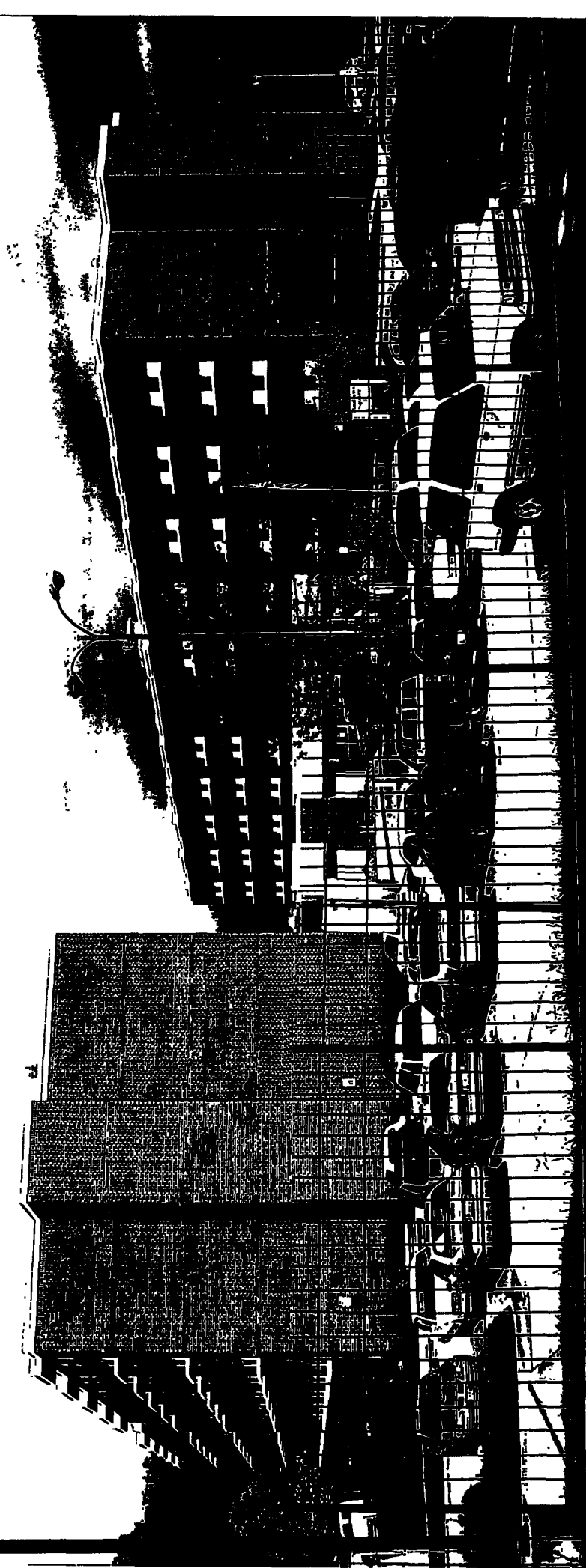
B-7: Residents represent a diverse set of demographics and walks of life.



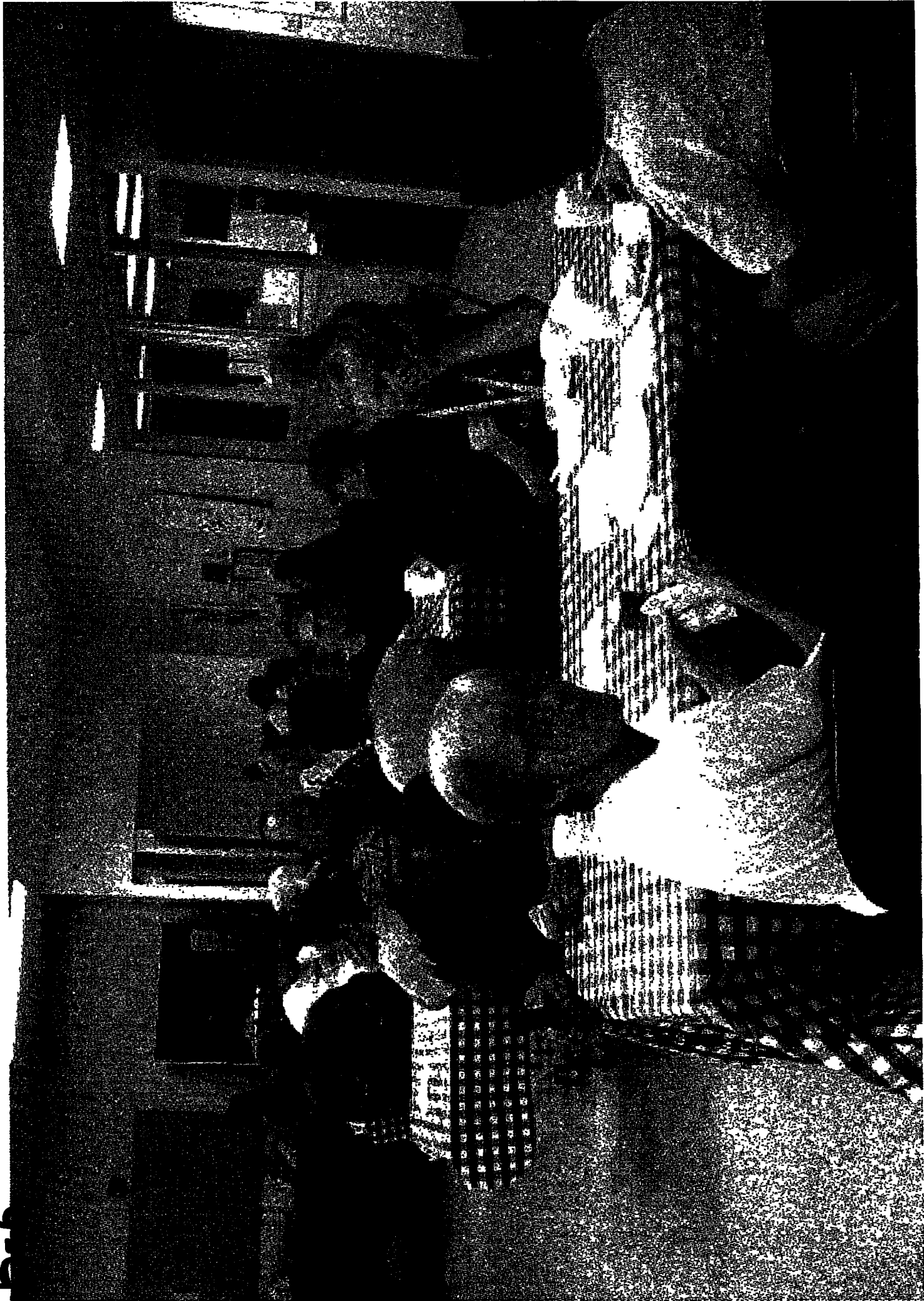




B-4



B-5





B-6



Exhibit C

To that certain Petition, dated August 21, 2009, for Reopening the STB Finance Docket No. 35164

Photos C-1 through C-7

C-1: Capitol Hill youth play pick up basketball games at Wiley Post Park every evening. This basketball court is not more than 250 – 300 feet from the Packing Town Lead. The large building in the background is Cargill. The Packing Town Lead runs east-west between the park and that buildings. In fact, one of the hazardous at-grade crossings is located right next to the Cargill building on South Robinson.

C-2: Children of all ages and all ethnicities use the basketball courts at Wiley Post Park.

C-3: The Packing Town Lead is located between this summer fountain and the apartment complex shown among the trees in the photograph. In fact, the apartment complex depicted is the same Andrews Square complex featured in Exhibit B.

C-4: All walks of life find recreation and exercise in this park. The Packing Town Lead runs between the cars depicted and Andrews Square complex shown in the background.

C-5: Adults gather in front of the conference center at Wiley Post Park. The Packing Town Lead runs along the nearby berm in front of the apartment complex.

C-6: Parents want Wiley Post park maintained as a safe place for children.

C-7: Playgrounds of this caliber attracts families throughout south Oklahoma City.







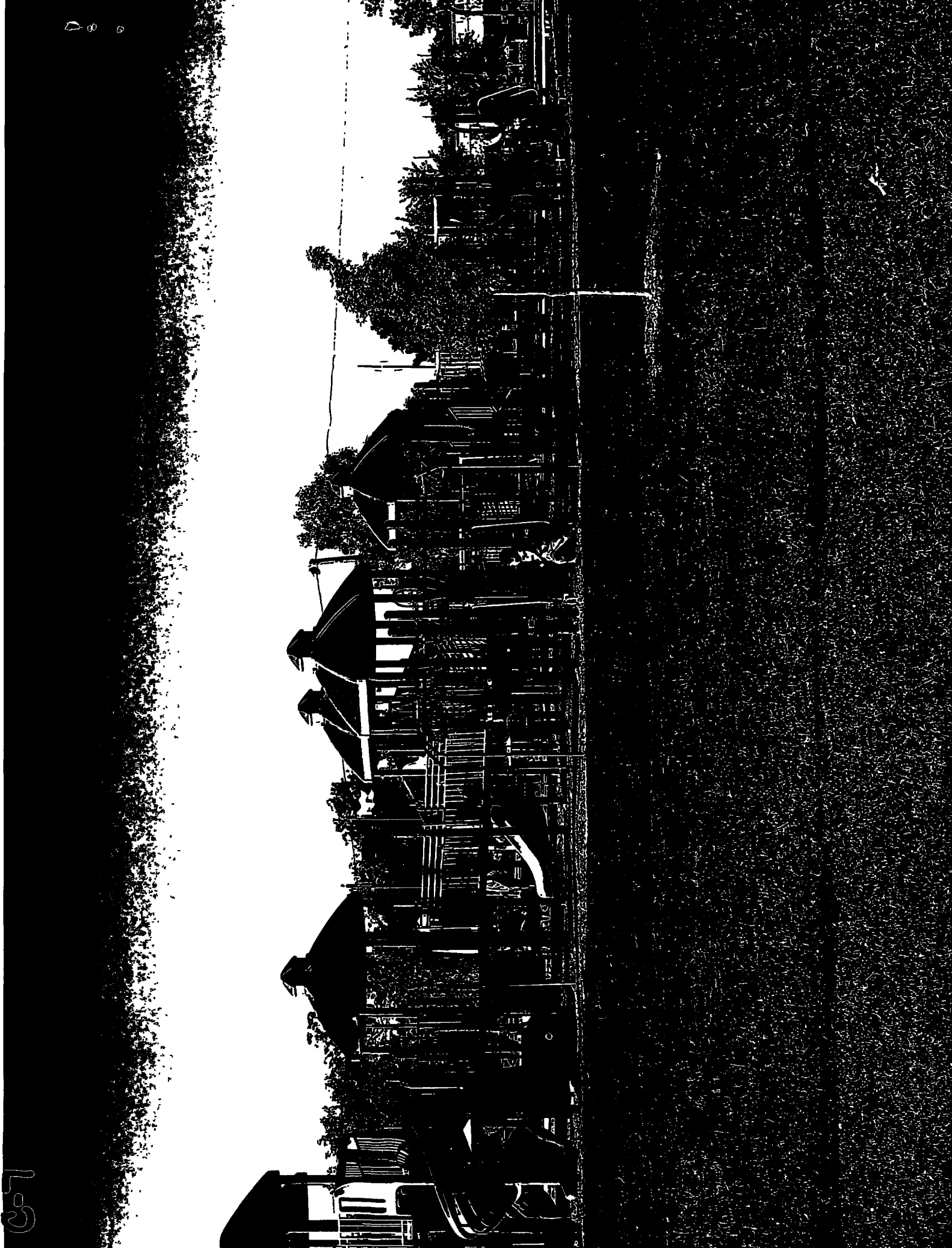
8-4







06



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1-3