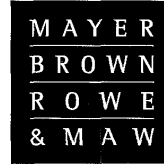


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July 1, 2002

VIA HAND-DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 33740, The Burlington
Northern and Santa Fe Railway Company --
Petition for Declaration or Prescription of
Crossing, Trackage or Joint Use Rights



Dear Secretary Williams:

Enclosed for filing in the above-entitled proceeding are the original and ten copies of BNSF's Petition for Issuance of a Certificate of Public Convenience and Necessity and Declaration of Crossing Rights. Please date-stamp the extra copy that is enclosed and return it to our representative. Also enclosed are three diskettes containing the Petition in electronic format.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "RMJ".
Robert M. Jenkins III

RMJ/bs

Enclosures

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Public Record

EXPEDITED CONSIDERATION REQUESTED

BNSF-7

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 33740

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY –
PETITION FOR DECLARATION OR PRESCRIPTION OF CROSSING, TRackage,
OR JOINT USE RIGHTS**

**BNSF'S PETITION FOR ISSUANCE OF A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
AND DECLARATION OF CROSSING RIGHTS**



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Dated: July 1, 2002

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AND DECLARATION OF CROSSING RIGHTS**

Pursuant to the June 14, 2002 Opinion issued by the United States Court of Appeals for the District of Columbia Circuit, Keokuk Junction Ry. Co. v. Surface Transp. Bd., 2002 U.S. App. LEXIS 11669, The Burlington Northern and Santa Fe Railway Company ("BNSF") submits herewith its Petition for Issuance of a Certificate of Public Convenience and Necessity ("PCN Certificate") and Declaration of Crossing Rights. BNSF respectfully requests that the Board adopt expedited procedures to act on BNSF's Petition. Despite renewed efforts to settle this matter, the parties have been unable to reach agreement, and Keokuk Junction Railway Company ("KJRY") is once again threatening to saddle BNSF's Mooar Line operations with an "interchange" requirement.

INTRODUCTION

Factual Background

BNSF owns a line of railroad near Keokuk, Iowa, known as the Mooar Line. Since 1881, BNSF and its predecessors have accessed that line by crossing over the

lines of the Keokuk Junction Railway Company ("KJRY") and its predecessors. In 1993, flooding along the Mississippi River caused considerable damage to one of the industries, Roquette America, Inc., located along KJRY's and BNSF's lines in Keokuk. To avoid future flooding problems, Roquette America developed a comprehensive flood plan that called for the relocation of part of the Mooar Line and the Keokuk crossing. Rather than use a diamond-type crossing, the new crossing utilized a quarter-mile long series of switches on KJRY's main line and adjacent KJRY trackage.

BNSF and KJRY were amenable to Roquette's plan, and on September 1, 1995, they entered into a "Supplemental Agreement" relating to the ownership, operation, and maintenance of two tracks serving Roquette America's facility as well as the relocated Keokuk crossing. There was, however, some confusion regarding whether a trackage rights notice of exemption was required. BNSF originally filed a notice of exemption with the Interstate Commerce Commission ("ICC") for three different operations, including the relocated crossing operation. Subsequently, counsel for KJRY took issue with BNSF's characterization of two of the three operations as "trackage rights." With respect to BNSF's crossing operation (called "segment three"), counsel for KJRY stated:

KJ concedes that it intended to grant BN trackage rights over segment three, thereby giving BN access to the Mooar Line. KJ has no problem with your trackage rights filing as it pertains to segment three only.

Letter from John Heffner to Michael Roper, dated Oct. 6, 1995, at 1 ("Heffner Letter"), attached as Exhibit 2 to BNSF's Petition for Declaration or Prescription of Crossing, Trackage or Joint Use Rights and for Determination of Compensation and Other Terms, filed April 27, 1999 ("Crossing Petition").

After further discussions, however, BNSF and KJRY concluded that the rights in question were not trackage rights but "terminal crossing rights" that did not require Board approval. They memorialized their understanding in a Crossing Agreement dated March 13, 1996. Among other things, the Crossing Agreement provided for BNSF to request dismissal of its exemption petition at the Board. It also provided:

If it is determined by the STB or successor agency that governmental approval is required, the parties agree to cooperate in seeking such approval.

1996 Crossing Agreement § 9, attached as Exhibit 3 to BNSF's Crossing Petition.

BNSF thereupon moved to withdraw the exemption petition as erroneously filed, which motion the Board granted. See Burlington N. R.R. Co. – Trackage Rights Exemption – Keokuk Junction Ry., Finance Docket No. 32775 (served April 11, 1996).

On March 1, 1999, KJRY terminated the parties' Crossing Agreement and parked a car at the Keokuk crossing, blocking BNSF's access to the Mooar Line. In order to continue to serve its Mooar Line customers, BNSF was required to pay KJRY an \$85 per car (and engine) "interchange fee." To simulate an interchange, KJRY would attach a KJRY locomotive to BNSF's train (including BNSF's own locomotive) and push the train through the crossing to the Mooar Line. On the return trip from the Mooar Line, KJRY would again attach its locomotive to BNSF's train and pull it across the quarter-mile long crossing, again charging an \$85 per car (and engine) "interchange fee." To avoid disrupting service to its shippers on the Mooar Line, on March 2, 1999, BNSF began under protest to tender its cars to KJRY for its sham interchange service.

Procedural History

On April 27, 1999, BNSF filed its Crossing Petition with the Board. BNSF requested that the Board either declare that BNSF had crossing or trackage rights over

KJRY's track which had been improperly terminated by KJRY or prescribe terminal trackage rights. All of the shippers on the Mooar Line supported BNSF's petition in writing. In reply to BNSF's request for a declaration of crossing rights, KJRY argued (a) that the Board did not have regulatory jurisdiction over the "switching" track involved in the crossing, (b) that BNSF's operation did not constitute a "crossing" within the meaning of Section 10901(d), and (c) that the Board could not declare crossing rights under 49 U.S.C. § 10901(d) where it had not previously issued a PCN Certificate authorizing construction of the crossing line.

To address BNSF's Crossing Petition, the Board instituted two related proceedings. Docket No 33740 dealt with BNSF's request for a declaration of its crossing rights. Docket No. 33740 (Sub-No. 1) dealt with BNSF's request for the determination of compensation and other terms for the crossing.

On June 22, 2001, the Board issued a declaratory order in Docket No. 33740 confirming that BNSF had a continuing right to cross KJRY's tracks and rejecting each of KJRY's arguments in opposition. See The Burlington Northern & Santa Fe Railway Co. – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, Finance Docket Nos. 33740 and 33740 (Sub-No. 1) ("Crossing Decision"). Specifically, the Board determined that the Keokuk crossing was within its regulatory jurisdiction, that BNSF's operation constituted a "crossing," that the movement of the Keokuk crossing involved a "relocation" of part of the Mooar Line that did not require the issuance of a certificate, and that BNSF could protect its continuing crossing rights under 49 U.S.C. § 10901(d) without the formality of obtaining a PCN Certificate for its operations. See id.

at 5-9.¹ The Board also found that KJRY had not seriously contested BNSF's contention that the crossing raises no operational issues. See id. at 8. Accordingly, the Board ordered the parties to negotiate compensation and other terms for the crossing.² KJRY appealed the Board's Crossing Decision, but ceased its sham "interchange" operation, and BNSF returned to the same direct crossing operation it had always had.

In its Opinion issued June 14, 2002, the D.C. Circuit vacated the Board's decision on the sole ground that a PCN Certificate had not been issued for the Mooar Line. See Keokuk Junction Ry. Co. v. Surface Transp. Bd., 2002 U.S. App. LEXIS 11669. The court noted that the express terms of Section 10901(d) apply only "[w]hen a certificate had been issued by the Board," Id. at *3, quoting 49 U.S.C. § 10901(d)(1). The court acknowledged that the original Mooar Line track was constructed before there was a certificate requirement, that the 1995 relocation of the Keokuk crossing involved the "rebuilding" of track which did not require a certificate, and that the STB had held that the issuance of a PCN Certificate in a case like this would be an unnecessary

¹ Because of its decision that BNSF had continuing crossing rights, the Board did not reach BNSF's alternative requests for the declaration or prescription of trackage rights.

² The parties were unable to reach agreement on compensation and other terms, and the Board subsequently ordered in Docket No. 33740 (Sub-No. 1) that the parties submit evidence and argument on those issues. See The Burlington Northern & Santa Fe Railway Company – Petition for Determination of Compensation and Other Terms, Finance Docket No. 33740 (Sub-No. 1) (served Jan. 30, 2002). The parties filed comprehensive submissions on those issues, including BNSF's position that it was entitled to a refund of most of the \$663,000 in sham "interchange" fees that KJRY had forced BNSF to pay during the pendency of the STB's proceedings. See BNSF's Opening Statement Regarding Compensation and Other Terms (filed March 1, 2002) at 5-11; BNSF's Reply Statement Regarding Compensation and Other Terms (filed April 1, 2002) at 11-20.

formality. Id. at *5-*6. Nevertheless, the court held that “the issuance of a certificate, formality or not, is the condition precedent” to ordering a crossing. The court vacated the Board’s decision without reaching any of the merits of KJRY’s other arguments. Id.

After the D.C. Circuit issued its Opinion, BNSF and KJRY made renewed efforts to settle their dispute, to no avail. By letter dated June 28, 2002, KJRY informed BNSF that KJRY intended to reinstate its “interchange” operation at the crossing on July 1, 2002, and that, as before, it would charge BNSF \$85 per car and locomotive for this “service.” Moreover, KJRY demanded that BNSF make a lump-sum payment to KJRY of \$336,600 before KJRY would permit any cars to move to the Mooar Line. KJRY asserted that BNSF owed KJRY this amount for the time period between the Board’s June 22, 2001 Crossing Decision, which ended KJRY’s “interchange” operation, and the effective date of the D.C. Circuit’s June 14, 2002 decision.

By return letter, also dated June 28, 2002, BNSF informed KJRY that it would be seeking a PCN Certificate from the Board, and that if KJRY reinstituted its “interchange” operation, BNSF, as before, would pay the \$85 fee under protest. At the same time, BNSF took the position that it would not make payment of the \$336,600 KJRY had demanded, even under protest, because KJRY had not sought a stay of the Board’s Crossing Decision and had not performed any “interchange” service during the pendency of its appeal to the D.C. Circuit. If KJRY nevertheless persists in its unjustifiable position that BNSF must pay KJRY \$336,600 before KJRY will permit BNSF access to its Mooar Line shippers via KJRY’s claimed “interchange” service, then BNSF will seek appropriate relief from the Board.

ARGUMENT

The D.C. Circuit's Opinion vacating the Board's Crossing Order rests entirely on the Board's failure to issue a PCN Certificate. "Formality or not," the court held that the issuance of a PCN Certificate was required as a predicate to the Board's application of the crossing protections of Section 10901(d). Keokuk Junction Ry. Co., 2002 U.S. App. LEXIS 11669, at *5. The Board has considerable experience with meeting this formal requirement. Where rail construction projects have been exempted from the certification requirement, the Board has not hesitated to resolve a crossing dispute by "summarily" granting a PCN Certificate to meet the formal requirements of Section 10901(d). See, e.g., Louisville & Jefferson County Riverport Authority & CSX Transportation, Inc. – Construction and Operation Exemption – In Jefferson County, KY, 4 I.C.C.2d 749 (1988).

The Board should apply the same approach here. It has already acknowledged that the issuance of such a certificate is merely a "formality" in this case, and nothing in the D.C. Circuit's decision suggests that the summary grant of a PCN Certificate would be inappropriate. To be sure, the court did observe that the issuance of a PCN Certificate would not be a "mere formality" if the Board determined that there were "merit in any of the several grounds upon which KJRY opposes it." Keokuk Junction Ry. Co., 2002 U.S. App. LEXIS 11669, at *5. As we show below, however, those issues have already been thoroughly briefed by the parties, and none has the slightest merit.

In Parts I and II, we discuss why there is no merit in KJRY's contention that "the Board may not lawfully issue a certificate for track built before the enactment of § 10901." Id. In Parts III and IV, we discuss why there is no merit in KJRY's contentions

that “the track at issue . . . is exempt from the Board’s authority to impose a crossing right” and that “BNSF’s trains operate over rather than ‘cross’ the KJRY’s track.” *Id.* In Part V, we discuss why expedited consideration of BNSF’s Petition is appropriate in this case, and why, pending the Board’s decision, KJRY should be required to hold in an escrow account the monies it collects for its renewed “interchange” operation. While KJRY is certainly entitled under the D.C. Circuit’s Opinion to “present[] its objections anew,” *id.* at *6, there is no need for lengthy proceedings on these arguments, with which the Board is already quite familiar. Nor is there any reason why, assuming the Board issues the necessary certification, BNSF should once again be confronted with the argument that KJRY cannot “afford” to repay monies that it has improperly collected from BNSF.

I. The Board Should Issue A Certificate Of Public Convenience And Necessity *Nunc Pro Tunc* For BNSF’s Mooar Line.

Like the vast majority of rail lines that form the backbone of our nation’s rail system,³ BNSF’s Mooar Line was constructed before the enactment of the Interstate Commerce Act, 24 Stat. 379 (1887), and the Transportation Act of 1920, 41 Stat. 474 (1920). From a regulatory standpoint, all of these lines are treated in the exact same manner as lines that were constructed after 1920, and for good reason. It would make no sense to afford fewer protections to the rail lines constructed prior to 1920 than to rail

³ Most of today’s rail lines are descendants of pre-1920 rail lines. See Frank N. Wilner, *Railroad Mergers: History, Analysis, Insight* 11 (1997) (chart demonstrating growth and decline in U.S. rail mileage, with peak rail mileage in 1916 of 254,037 route miles compared to 146,002 route miles in 1990), citing Henry V. Poor, *Manual of the Railroads of the United States for 1890* (years 1830-1887); Interstate Commerce Commission, *Statistics of Railways in the United States* (years 1888-1953); Interstate Commerce Commission, *Transport Statistics in the United States* (years 1954-1990).

lines constructed after that date, when both pre- and post-1920 lines serve equally important roles in our nationwide rail transportation infrastructure.

Both ICC and STB precedent support the argument that pre-certificate (i.e., pre-1920) rail lines are treated identically to those lines that were constructed in the post-1920 regime. There is no dispute that the Board has jurisdiction over rail lines built prior to the passage of the Transportation Act of 1920 or the passage of the Interstate Commerce Act. And there is equally no dispute that any extension or abandonment of a pre-1920 rail line requires Board approval through the issuance of a PCN Certificate. In fact, when BNSF's predecessor sought to abandon part of the same line that is at issue in this proceeding, it was required to obtain approval from the ICC. See Chicago, B. & Q. R.R. Co. Abandonment, 180 I.C.C. 65 (1931). It would be incongruous, then, to not issue a certificate for BNSF's line. BNSF is already required to obtain the Board's approval should it wish to either extend or abandon the Mooar Line, but without the formality of a PCN Certificate, as the D.C. Circuit has construed Section 10901(d), BNSF does not have a continuing right to cross KJRY's track to access that line. If BNSF is required to follow current law and regulations on its pre-1920 Mooar Line so as to protect the interests of shippers and the transportation public generally, then BNSF and its customers are also entitled to the benefits and protections – including continuing crossing rights – that derive from or mirror those obligations.

All of this is familiar to the Board. It thoroughly analyzed the law and policy behind Section 10901(d) in arriving at the conclusion in its Crossing Decision that it could, if it chose to, issue BNSF a PCN Certificate to meet the formal requirement of Section 10901(d). Crossing Decision at 7. Nothing in the D.C. Circuit's opinion takes

issue with the Board's reasoning in this regard. Nevertheless, because KJRY will undoubtedly argue here that the Board is barred from summarily issuing a PCN Certificate for the Mooar Line, we review in more detail below why KJRY's position must fail.

First, granting a PCN Certificate – even when it is a mere “formality” – for the sole purpose of permitting a crossing railroad to invoke Section 10901(d) is not a new practice for the ICC or the STB. For example, in Louisville & Jefferson County Riverport Authority & CSX Transportation, Inc., 4 I.C.C.2d 749, the ICC resolved a dispute about whether it could mandate a crossing under Section 10901(d) – where no construction certificate had been issued because the construction was taking place pursuant to an exemption – by partially revoking the exemption and summarily issuing a certificate. See also Ex Parte No. 392 (Sub-No. 3), Class Exemption for Rail Construction Under 49 U.S.C. 10901, 1987 ICC LEXIS 289 (served May 29, 1987) (same). Certainly if the ICC can revoke an exemption and summarily grant a certificate for crossing purposes, then the Board can apply the same logic in this case by “revoking” the grandfathered status of the Mooar Line and issuing a PCN Certificate for crossing purposes. Otherwise, crossing carriers relying on private crossing agreements involving pre-certificate track would be exposed to coercive conduct like that exhibited by KJRY here.

KJRY may attempt to argue that Louisville and Jefferson is distinguishable because it applied to ongoing construction, but there can be no doubt under the Board's reasoning in Louisville and Jefferson that the result would have been the same if, instead of opposing the crossing at the time it was built, the crossed railroad had entered into a voluntary crossing agreement, subsequently cancelled it, and then

claimed that it could block the crossing because the crossing railroad had no PCN Certificate for the original construction and subsequent operation of the line. If the Board had no authority to issue a PCN Certificate in that situation *nunc pro tunc* – that is, effective as of the date of the original construction⁴ – then crossing carriers would have to seek mandatory crossing orders every time exemption procedures are used to build track. Otherwise, the crossing carrier (and that carrier's shippers) would run the risk of later coercion from the crossed railroad, since "a carrier whose line was to be crossed could feign agreement with the crossing (thus, prompting an exemption petition rather than an application) until after the construction exemption was effective, and then oppose the crossing." 4 I.C.C.2d at 753.⁵

Alternatively, KJRY may attempt to argue that, when Congress added the crossing protections of Section 10901(d) in 1980, it intended those protections to only apply to lines built after 1980.⁶ But such an argument is not supported by the language

⁴ Both the Board and the ICC have granted exemptions *nunc pro tunc* when the law, logic, and the equities have supported granting an exemption "now for then." See, e.g., Brotherhood of Maintenance of Way Employees – Lease Exemption – Soo Line R.R. Co. D/B/A CP Rail System, 3 S.T.B. 1076 (1998) (granting on Board's own motion exemption *nunc pro tunc* where parties had believed that temporary lease transaction involved exempt yard trackage and hence did not obtain approval); CSX Transp., Inc. & So. Ry. Co. – Construction & Operation Exemption – Atlanta, GA, 1987 ICC LEXIS 188 (Aug. 4, 1987) (granting exemption *nunc pro tunc* where "the failure to request exemptions appears to have been based on the colorable belief that the constructions were not subject to the prior approval requirements of section 10901").

⁵ Such a result would directly conflict with Congress' goal of encouraging private crossing agreements. See H.R. Rep. No. 1430, 96th Cong., 2d Sess. 116 (1980), reprinted in 1980 U.S.S.C.A.N. 3978, 4148 ("Only if a dispute is submitted to the [Board] would there be a need to obtain a certificate of public convenience and necessity. . . .").

⁶ Significantly, KJRY concedes that ongoing construction and an active certificate are not necessary for the Board to apply the protections of Section 10901(d) for the benefit of the crossing carrier. Specifically, KJRY represented to the D.C. Circuit that

of the statute, its legislative history, or simple logic. It is true that the language of Section 10901(d) begins, "When a certificate has been issued" 49 U.S.C. § 10901(d)(1). But there is no evidence that Congress meant anything by this language other than that the rail line at issue is a regulated line, whether built in 1981, 1931, 1919, or 1881.⁷ Certainly, Section 10901(d) does not say that it applies only to lines certificated after the passage of the Staggers Act. Moreover, nothing in the Staggers Act's legislative history suggests that Congress intended section 10901(d) to apply only prospectively. On the contrary, when Congress added Section 10901(d) to the statute, it did so because it noted that an issue had been raised about whether the ICC had authority to regulate a crossing. Congress determined to add Section 10901(d) to the statute in order to remove any doubt, not to create doubt about the great majority of lines constructed in this country prior to 1980. See H.R. Rep. No. 1035, 96th Cong., 2d Sess. 67 (1980), reprinted in 1980 U.S.C.C.A.N. 2978, 4011. It clearly was not Congress' intent that the perverse result of adding that provision to the statute would be that parties could claim that only crossings established after 1980 were protected.⁸

"once new construction has been authorized under Section 10901, a certificate issued, and a crossing is built, whether as a result of a voluntary agreement or through invocation of Section 10901(d), the crossed carrier may not cancel that crossing without running afoul of Section 10901(d)." Petitioner's Reply Brief at 13, Keokuk Junction Ry. Co. v. Surface Transportation Bd. (D.C. Cir. No. 01-1305).

⁷ KJRY may attempt to argue that Congress intended by this language that the Board must conduct a full-scale PCN proceeding in any case in which Section 10901(d) is invoked. The Board, however, specifically considered and rejected such an argument in the Louisville and Jefferson case. See 4 I.C.C.2d at 752-53 & n. 7.

⁸ Legislative history further suggests that PCN Certificates can be issued even when a line is not regulated by the STB. See H.R. Rep. No. 1430, 96th Cong., 2d Sess. 116 (1980), reprinted in 1980 U.S.S.C.A.N. 4147 (notwithstanding that a license "would not otherwise be required," agency has "jurisdiction under 10901(d) . . . to assure that

Finally, it would be illogical to apply Section 10901(d) only to rail lines constructed after 1980, but not those constructed prior to that date (including, for example, a rail line constructed in 1979). Not only would such a statutory reading conflict with settled principles of statutory application, see Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974) (“a court is to apply the law in effect at the time it renders its decision, unless . . . there is statutory direction or legislative history to the contrary”), but it would place vast reaches of the nation’s rail system beyond the reach – and the protection – of Section 10901(d).

KJRY may also attempt to argue that there should be a new proceeding to determine, again, whether the Mooar Line should be “built,” or “relocated” to its present position. Any such argument should be rejected.⁹ Obviously, the Mooar Line has already been built and has been an important part of our nation’s rail infrastructure for well over a hundred years. It stands in no different position than a rail line that was built in 1981, or in 1921. It has the same regulatory status. If a rail line built in 1981 or 1921 would not be subject to a new PCN proceeding, then neither should the Mooar Line.

In the end, the most that can be said for the fact that rail lines built before 1920 are not “certificated” is that there is an inadvertent gap in the statutory scheme. But such gap does not prevent the Board from fulfilling its regulatory obligations. Nothing in the statute prevents the Board from filling the gap by providing the necessary

[a] crossing carrier has a right to serve” its shippers). However, the Board need not reach that issue to decide this case, since, as discussed in Part III below, the Mooar Line is clearly a regulated line.

⁹ See note 7, supra.

certification.¹⁰ “Courts [and agencies] are not helpless captives when a literal application of statutory language would subvert a regulatory scheme.” Buffalo Crushed Stone v. STB, 194 F.3d 125, 129 (D.C. Cir. 1999). Moreover, the Board has “implied authority . . . to take all actions that are legitimate, reasonable and directly adjunct to carrying out [its] explicit statutory powers.” Delaware & Hudson Ry. – Unilateral Joint Rate Cancellation, 2 I.C.C.2d 631, 639 (1986).

The Board should utilize its broad discretion to interpret Section 10901(d) so as to effect Congress’ broad remedial mandate in Section 10901(a). There is ample authority for this approach. See ICC v. American Trucking Ass’ns, 467 U.S. 354, 355 (1984) (ICC has broad “discretion to fashion remedies in furtherance of its statutory responsibilities”); In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 654 (1978) (ICC has ancillary power to enforce statutory requirements that do not depend on express grant of authority); United States v. Pennsylvania R.R., 323 U.S. 612, 619 (1945) (the “unquestioned power of the Commission to require establishment of [through rates] would be wholly fruitless, without the correlative power to abrogate the Association’s rule which prohibits the interchange”); Railroad Cost Recovery Procedures, 3 I.C.C.2d 60 (1986), aff’d, Alabama Power v. ICC, 852 F.2d 1361 (D.C. Cir. 1988) (despite express statutory reference only to rate “increases,” ICC had broad authority to order rate rollbacks where costs had declined); Delaware & Hudson Ry. – Unilateral Joint Rate Cancellations (power to retroactively reject tariff a necessary adjunct to express authority to reject tariff after it took effect).

¹⁰ Significantly, a PCN Certificate is required under Section 10901 for both the construction and operation of a rail line. That is, it is not a static authorization that applies only to the construction phase of a line. Where, as here, the ongoing operation of a line requires the formality of a PCN Certificate, it should be routinely issued.

II. The Board Should Declare That BNSF Has, And Has Had, A Continuing Crossing Right

The crossing that is at issue here has been in place since the Mooar Line was constructed in 1881. It was relocated in 1995, but its essential character remains the same. It is part of the same continuous operation that BNSF and its predecessors have conducted for over 100 years.

By summarily issuing a PCN Certificate for the Mooar Line *nunc pro tunc*, the Board will be affirming the obvious – that the original construction and continuing operation of the Mooar Line have the same regulatory imprimatur of the Board that the Mooar Line would have had if it had originally been constructed in 1921 or 1981. The Board should go further, however, and make clear that under Section 10901(d) BNSF has a continuing right to cross the Mooar Line. While this might seem equally obvious, KJRY has taken the position in Docket No. 33740 (Sub-No. 1) that BNSF has no right to cross until the Board issues a crossing order, and then only has the prospective right to cross after the effective date of that order.¹¹

KJRY's position runs directly counter to the Board's determination in the Crossing Order that "[t]he purpose of a line construction in general, and crossing rights in particular, would be thwarted if a carrier could be required to allow its competitor to

¹¹ KJRY's position appears inconsistent with the position it took before the D.C. Circuit, where KJRY represented that the protection of Section 10901(d) extended to a certificated line regardless of whether the crossing was built "as a result of voluntary agreement or through invocation of Section 10901(d)." Pet. Reply Br. at 13. KJRY there said that "the crossed carrier may not cancel that crossing without running afoul of Section 10901(d)." *Id.* Surely, KJRY did not mean that the crossed carrier could cancel the crossing and collect sham "interchange" fees – without any recourse from the railroad ousted from the crossing – for the duration of any proceeding before the STB to set new terms and conditions for the crossing. Such a position would make a mockery of the protections of Section 10901(d).

construct a crossing, but then – in a day, or a week, or years later – block the other carrier from operating over the crossing track to serve shippers in interstate commerce.” Crossing Decision at 6. Nothing in the Board’s decision suggested that extortionate activity by the crossed railroad would be excused between the time the railroad blocked the crossing and the time the Board ruled on new terms and conditions for the crossing.

Accordingly, BNSF respectfully requests that the Board reaffirm that BNSF has, and has had, a continuing right to cross KJRY’s track as part of BNSF’s Moor Line operations in Keokuk.

III. The Board Should Reject KJRY’s Argument That A Crossing Cannot Be Ordered Because Its Track Is Exempt Track.

BNSF anticipates that KJRY will, once again, argue that the Board lacks jurisdiction to order a crossing. Ignoring the unfortunate reality that a significant portion of the Keokuk crossing involves KJRY’s own main line, KJRY has consistently asserted that its track is switching track that, pursuant to Section 10906, is exempt from the Board’s jurisdiction. This argument has been rejected by the Board, and the D.C. Circuit expressly declined to reach its merits. See Crossing Decision at 8; Keokuk Junction Ry. Co., 2002 U.S. App. LEXIS at *5.

The Board could again resolve the issue of whether the Keokuk crossing involves exempt track in the same manner as it did in its June 22, 2001 Crossing Decision. As the Board has already held:

[I]t does not matter whether the track to be crossed is excepted or not, because excepted track, while it may not require a license for construction, operation, or abandonment, is not otherwise beyond our regulatory reach. It may be that there is no Federal interest in whether a spur is constructed or abandoned, but there is a Federal interest in the actions of the owner of a spur to block an interstate

carrier from conducting interstate operations to meet its common carrier obligations. Thus, we conclude that the status of KJRY's track does not divest us of authority to require a crossing.

Crossing Decision at 8.

A more conclusive means to address KJRY's argument, however, is to find that KJRY's track is not exempt track. The Board has already determined that the Mooar Line "operation involved here is far more pervasively regulated than a spur subject to Section 10906." See id. at 7. It is also beyond dispute that BNSF uses KJRY's track as part of the Mooar Line. The law is well-settled that the proper classification of a rail line depends upon its principal use by the railroad whose operations are at issue, regardless of the use to which the track is put by another railroad. See United Transp. Union v. STB, 183 F.3d 606, 613 (7th Cir. 1999); Brotherhood of Locomotive Eng'rs v. STB, 101 F.3d 718, 727-28 (D.C. Cir. 1996); Brotherhood of Maintenance of Way Employees – Lease Exemption – Soo Line R.R. Co. D/B/A CP Rail Sys., 3 S.T.B. 1076, 1081 (1998). Since BNSF uses KJRY's track as part of its continuous movements onto and off of the Mooar Line, the Board should find that the Keokuk crossing is not exempt track for purposes of this case. Such a finding would eliminate the need to reach a legal determination here on the scope of the application of Section 10901(d) to exempt track.

IV. The Board Should Reject KJRY's Argument That A Crossing Cannot Be Ordered Because BNSF's Operation Over KJRY's Track Is Not A Crossing.

KJRY is likely to repeat its three-year-old argument that – despite (a) over one hundred years of crossing practice, (b) the parties' negotiation of a "Crossing Agreement," (c) the lack of a statutory definition of a "crossing" under Section 10901(a), (d) the lack of any agency or court decision holding that a crossing must be a diamond or involve a certain amount of track, and (e) the identical functionality of BNSF's

operations and need to get across KJRY's track both before and after the Mooar Line relocation – BNSF's operations somehow do not involve a "crossing." This issue has been extensively briefed, the Board has already rejected KJRY's arguments, and the D.C. Circuit has expressly declined to reach the merits of the parties' dispute. The question of whether BNSF's Mooar Line operations involve a crossing is ideally suited to the Board's expertise, and the Board should once again reject any attempt by KJRY to characterize BNSF's Mooar Line operations as anything other than a crossing.

Nevertheless, it bears emphasizing that there exists a fundamental flaw in any KJRY argument that BNSF's Mooar Line operations over KJRY's track do not constitute a crossing. After the Mooar Line was relocated in 1995, BNSF and KJRY agreed that BNSF had acquired "trackage rights" over KJRY's track in order to access the Mooar Line. To that end, BNSF filed its notice of exemption with the Board, and KJRY conceded "that it intended to grant BN trackage rights." Heffner Letter at 1. Upon further discussion, the parties determined that BNSF's operations were in the nature of "terminal crossing rights" that did not require STB approval and entered into a "Crossing Agreement." Relying on the Crossing Agreement, and as provided in the agreement, BNSF withdrew its trackage rights petition.

However, the Crossing Agreement also placed obligations upon KJRY. Among those obligations was the following:

If it is determined by the STB or successor agency that governmental approval is required, the parties agree to cooperate in seeking such approval.

Crossing Agreement § 9. Thus, if the Board reversed course and determined that BNSF's Mooar Line operations do not involve a crossing, KJRY would be required to support an application by BNSF to the Board for trackage rights *nunc pro tunc*.¹²

V. The Board Should Apply Expedited Procedures To Its Consideration of BNSF's Petition

BNSF respectfully requests expedited consideration of its petition. BNSF is only requesting here that the STB issue a PCN Certificate *nunc pro tunc* and reaffirm its earlier decision that BNSF has, and has had, a continuing crossing right on KJRY's track to reach its Mooar Line.¹³ That will permit BNSF to continue its crossing operations and provide service to its shippers without threat from KJRY of interference from sham "interchange" operations or even foreclosure of BNSF's Mooar Line service.

These are not hypothetical threats. As noted earlier, upon issuance of the STB's June 22, 2001 decision, KJRY ceased imposing an "interchange" requirement on BNSF and assessing an \$85 per car switching fee. BNSF was able to return to serving its shippers as it had for years under its established crossing rights. When the D.C. Circuit

¹² It is also worth noting, as discussed in Part III above, that because BNSF regularly uses KJRY's track as part of its "pervasively regulated" Mooar Line operation, KJRY would be estopped from claiming that it was free to cancel BNSF's trackage rights on the basis that "exempt track" was involved. Accordingly, if BNSF has trackage rights over KJRY's track, those trackage rights are not exempt from regulation and cannot be cancelled absent KJRY applying for and being granted an adverse abandonment certificate. See, e.g., Chelsea Property Owners – Abandonment – Consolidated Rail Corp., 8 I.C.C.2d 773 (1992), aff'd sub nom., Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994).

¹³ Although the issue of crossing compensation has been fully briefed in Docket No. 33740 (Sub-No. 1), the STB need not immediately resolve that issue. Whatever determination it makes regarding the appropriate level of compensation can and should be applied from the time of KJRY's cancellation of the parties' voluntary crossing agreement.

issued its June 14, 2002 opinion vacating the STB's decision, KJRY took the position that it was entitled not only to reinstitute the sham "interchange" operation over the crossing and assess BNSF \$85 per car, but also to be paid \$336,600.00 in "interchange" charges for the one-year period between the issuance of the STB's decision and the issuance of the D.C. Circuit's order. Even though KJRY did not seek a stay of the STB's decision and did not even purport to "interchange" traffic over the crossing during that time, KJRY has demanded that BNSF pay the \$336,600.00 as a condition of being permitted to operate over the crossing at all.

Even aside from the threat of \$336,600.00 in supposedly past-due charges, KJRY's demand for \$85 per car and reinstitution of its sham interchange operation is a serious issue for BNSF. The Board will recall that the two-year delay involved in obtaining the Crossing Decision from the Board resulted in BNSF having to pay KJRY some \$663,000.00 in excess "interchange" fees. KJRY subsequently claimed in the compensation proceeding that BNSF was not entitled to a refund of that money and, moreover, that KJRY should be excused from paying the money back because it had already spent it, and could not "afford" to pay it back. See, e.g., KJRY's Reply Statement Regarding Compensation and Other Terms (filed April 1, 2002) at 2 (ordering a refund "would impose substantial financial hardship on KJRY. The magnitude of the refund sought by BNSF would plague KJRY with debt, potentially endangering essential services"); at 22 (KJRY did not establish a trust fund or other escrow device to set aside the \$663,000 because it "invested its limited resources in plant and equipment, to better serve its shippers"); at 23 ("In short, KJRY cannot simply 'cut a check' for the refund that

BNSF seeks without compromising service to its customers, reducing capital improvements, and severely limiting maintenance and operating practices.”).

BNSF fully expects that KJRY will make the same arguments about any money that BNSF pays KJRY for the sham “interchange” it has reinstituted, regardless of the fact that BNSF has again notified KJRY that BNSF is paying for that “service” under protest. Accordingly, BNSF respectfully requests that KJRY be required to hold only monies it collects from BNSF under its reinstituted “interchange” arrangement in an escrow account.

In any event, the sooner the Board rules on BNSF’s petition, the more academic these issues will be. There is no need for a lengthy proceeding. All of the merits issues have been exhaustively briefed before. There is no reason that KJRY cannot timely file its reply to BNSF’s petition within the 20-day period provided under the Board’s rules.

See 49 C.F.R. § 1104.13

Moreover, expedited consideration by the Board is important to minimize the uncertainty that is currently faced by railroads with thousands of crossings across the country that were obtained without recourse to Section 10901(d). The decision of the D.C. Circuit has unfortunately created considerable question about whether those crossings are protected from the same kind of extortionate behavior that KJRY has exhibited in this case. The sooner the Board issues a decision making clear that those crossings are in fact protected, the less likely it is that the D.C. Circuit’s decision will be abused at crossing locations around the country.

CONCLUSION

For the foregoing reasons, the Board, following expedited procedures, should issue a Certificate of Public Convenience and Necessity for BNSF's Mooar line operations *nunc pro tunc* and declare that BNSF has continuing crossing rights over KJRY's track to conduct those operations.

Respectfully submitted,

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Dated: July 1, 2002

CERTIFICATE OF SERVICE

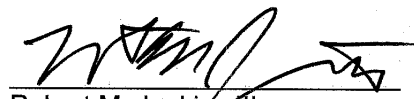
I hereby certify that on this 1st day of July, 2002, I caused copies of the foregoing
Petition for the Issuance of a Certificate of Public Convenience and Necessity and
Declaration of Crossing Rights to be served on the following individuals by the methods
shown below:

By Hand Delivery:

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