

Keokuk Junction Railway

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July 19, 2002



205892

VIA UPS Delivery

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

RE: 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 herewith are an original and twenty five copies of the Keokuk Junction Railway Co., Reply to BNSF's Petition for Issuance of a Certificate of Public Convenience and Necessity and Declaration of Crossing Rights in the above captioned matter. Also enclosed are three 3.5 inch computer disks, each containing a copy of the enclosed Reply Brief. If there are any questions call me at your convenience.

Sincerely,

Jonathan L. Kazense

Jonathan L. Kazense
General Counsel

Enclosures
cc: Parties of Record

ENTERED
Office of Proceedings

JUL 22 2002

Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33740



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

**KEOKUK JUNCTION RAILWAY CO.'S
REPLY TO BNSF'S PETITION FOR ISSUANCE OF A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY AND DECLARATION OF CROSSING RIGHTS**

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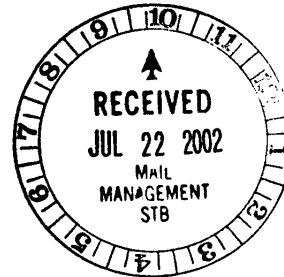
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INTRODUCTION

Keokuk Junction Railway Co. ("KJRY"), hereby replies to the issues raised in the Petition by Burlington Northern and Santa Fe Railway Company ("BNSF") for Issuance of a Certificate of Public Convenience and Necessity ("Certificate PCN") and Declaration of Crossing Rights. BNSF seeks a Certificate PCN pursuant to the provisions of 49 U.S.C. Section 10901 Nunc Pro Tunc in the year 2002 for construction of track actually constructed in the year 1995. BNSF further asks once the Board has issued the Certificate PCN the Board further find BNSF that has had a continuing right to operate over KJRY track since 1995 to access the Mooar Line. The Board should not exercise its authority and grant the relief the BNSF requests. The Petition by BNSF lacks merit and the Board should deny the issuance of the certificate of public convenience and necessity requested and the declaration of continuing rights for the reasons set forth below by KJRY.

FACTUAL BACKGROUND

Both parties in this case have extensively set the facts forth on several occasions and therefore only limited facts will be set forth again. On November 1, 1977 BNSF's predecessor the Chicago, Burlington and Quincy Railroad (CB&Q), KJRY's predecessor the Chicago, Rock Island and Pacific Railroad Company (Rock Island) and Roquette America's (Roquette) predecessor The Hubinger Company (Hubinger) entered into a new agreement (the 1977 Agreement) which was designed to: transfer ownership of certain track from the railroads to Hubinger; cancel certain pre-existing agreements governing the ownership, maintenance and use of track located near Hubinger's facility; and set new terms and conditions for that track. On September 1, 1995 KJRY, BNSF and Roquette entered into a Supplemental Agreement which supplemented the 1977 Agreement and relocated a portion of BNSF's Mooar Line so that BNSF would operate over a portion of KJRY track to access the Mooar Line. After BNSF incorrectly filed for trackage rights over the KJRY tracks to access the Mooar Line the parties agreed that the rights were not trackage rights but terminal crossing rights and entered into a Crossing Agreement on March 13, 1996. On November 13, 1998 KJRY gave notice to BNSF pursuant to Section 19 of the 1977 Agreement that it was exercising its rights to terminate the 1977 Agreement as supplemented and amended by the 1995 Supplemental Agreement and the 1996 Crossing Agreement. BNSF has not challenged KJRY's right under the relevant agreements to cancel those agreements pursuant to voluntarily negotiated cancellation provisions, nor did BNSF negotiate modified cancellation terms in the 1995 Supplemental Agreement or the 1996 Crossing Agreement.

ARGUMENT

The Board should deny the BNSF's request for issuance of a Certificate PCN and declaration of crossing rights for the following reasons: (1) the issuance of a certificate *nunc pro tunc* is inappropriate; (2) the trackage of the KJRY which the BNSF seeks to operate on to access the Mooar Line is excepted track pursuant to 49 U.S.C. Section 10906; (3) 49 U.S.C. Section 10901 (d) is inapplicable to this case; and (4) the BNSF's operations on the KJRY track do not constitute a crossing.

I. ISSUANCE OF A CERTIFICATE *NUNC PRO TUNC* IS INAPPROPRIATE

The issuance of a certificate PCN as requested by BNSF would be inappropriate in this case for the reasons set forth below. In its simplest terms *nunc pro tunc* stands for the proposition "now for then". Black's Law Dictionary defines *nunc pro tunc* to mean "A phrase applied to acts allowed to be done after the time when they should have been done, with a retroactive effect, i.e. with the same effect as if regularly done. *Nunc pro tunc* entry is an entry made now of something actually previously done to have effect of former date. *Nunc pro tunc* merely describes inherent power of court to make its records speak the truth, i.e. to record that which is actually but is not recorded. *Nunc pro tunc* signifies now for then, or, in other words, a thing is done now, which shall have same legal force and effect as if done at time when it ought to have been done." (Blacks Law Dictionary Fifth Edition) as set forth below and explained in detail the BNSF should not have received a certificate PCN in 1995 if it had petitioned the Board at that time. Now just as then the track was excepted track pursuant to Section 10906; it was a relocation of track which does not require Board approval; the provisions of Section 10901 are not applicable to the facts of this matter and BNSF's operation on approximately one quarter mile of KJRY is not a crossing pursuant to Section 10901. Therefore, BNSF should not have

received a certificate in 1995 if it had petitioned for one and it should not be issued a Certificate PCN in 2002. All of the reasons set forth below in detail as to why a Certificate PCN should issue today apply with equal or greater force in 1995 and the Board should not issue a Certificate PCN to BNSF or grant the declaration of crossing rights it seeks.

II. KJRY TRACK IS EXCEPTED TRACK UNDER 49 U.S.C. SECTION 10906 AND THEREFORE IT IS NOT JURIDICTIONAL TRACK

Once the private agreements governing BNSF's operations on KJRY's track were lawfully terminated, the Board had no authority to grant to BNSF the right to operate over and through KJRY's yard, switching, and terminal tracks. Section 10906 provides that operations over such tracks are not subject to the Board's jurisdiction and Section 10901(d) does not extend the Board's jurisdiction over such tracks. Section 10906 specifically provides that:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

The Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA") does not define the terms "spur, industrial, team or switching track" nor does ICCTA's legislative history shed light on the meaning of those terms. In *Nicholson v. Interstate Commerce Commission*, 711 F.2d 364 (D.C.Cir.1983) ("*Nicholson*"), the D.C. Circuit stated that the determination whether a particular track segment is a "spur, industrial, team, switching or side" track which is exempt from Commission jurisdiction pursuant to Section 10906 turns on the intended use of the track segment, not on the label or cost of the segment. Accordingly, if trackage was used in the loading, reloading, storage and switching of cars

incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage would be "spur, industrial, team, switching or side track" and as such would not fall under Commission jurisdiction. *Nicholson*, 711 F.2d at 368, citing *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir.1966), *cert. denied*, 386 U.S. 942.

In the present case, the available evidence dictates that the KJRY track used by BNSF to access the Mooar Line is "spur, industrial, team, switching or side" track under Section 10906. First, the Agreements make it clear that the parties regarded the KJRY track as switching track. The 1977 Agreement calls KJRY's track "Joint Industry Track" and indicates that the parties would perform their own "switching services" over it. *Id.* at 4. The 1995 Supplemental Agreement refers to the KJRY track as track that "includes seven switches." 1995 Supplemental Agreement Section 6. The 1996 Crossing Agreement at Section 1 refers to the KJRY track as comprising two turnouts and a series of switches.

Second, BNSF uses KJRY's track for switching. The BNSF Petition dated April 27, 1999 at p. 21-22 stated that "the trackage involved here is specifically used today to transfer, collect, and deliver freight" (internal quotation marks omitted). The April 27, 1999 BNSF Petition goes on to state at p. 22 that the KJRY Track "is in the middle of a cohesive commercial area where both BNSF and KJRY have yards and significant switching operations." This statement is a classic definition of a terminal area. *CSX Corp. -- Control -- Chessie and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 518, 585 (1980). Indeed, the parties agreed below that KJRY's track in Keokuk constitutes a "terminal facility." These statements strongly indicate that BNSF views the KJRY track as forming part of its switching and terminal operations in Keokuk.

Third, while the 1995 Supplemental Agreement was initially submitted to the Board on BNSF's belief that its operations constituted trackage rights which specifically required Board approval (or an exemption therefrom) pursuant to 49 U.S.C. 11323(a)(6),¹ BNSF later petitioned the Board to withdraw its approval request. The Board granted BNSF's petition. *Burlington Northern RR. Co. -- Trackage Rights Exemption -- Keokuk Junction Railway Co.*, Finance Docket No. 32775, Slip op. (STB served April 11, 1996). In its withdrawal petition, BNSF itself took the view that the KJRY track is excepted track under Section 10906. BNSF stated that the KJRY track "has never been subject to STB regulation" and that a notice of exemption to acquire overhead trackage rights was therefore not necessary. Petition to Withdraw Exemption, Finance Docket No. 32775, filed April 1, 1996 at 1.

Fourth, neither BNSF nor its predecessors requested operating authority from the ICC or the Board authorizing BNSF to cross or use KJRY's track. None of the various agreements providing BNSF with access to its Mooar Line, which lies on the opposite side of KJRY's yard and terminal, were ever submitted to the ICC or Board for approval.

Finally, in 1995, when BNSF abandoned the crossing diamond that had allowed it and its predecessors to cross KJRY's property and track via a diamond crossing for over 100 years, and thus voluntarily cut itself off from its own Mooar Line, BNSF did not seek abandonment authority. Likewise, when BNSF entered into a new agreement with KJRY that granted BNSF the right to operate over and use KJRY's terminal tracks to access its Mooar line, neither BNSF nor KJRY secured construction authority, connecting track authority, or joint relocation authority

¹ ICCTA requires the Board's approval for trackage-rights and lease agreements, construction of track, and abandonments, but it denies the Board jurisdiction over these types of transactions if they include certain classes of track subject to Section 10906. *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 720-21 (D.C. Cir. 1996) ("BLE").

under 49 C.F.R. 1180.2(d)(5), or submitted the new agreement for STB approval. Indeed, no such authority was required for any of these activities because the parties were in agreement that the discontinuance of use of the crossing diamond, relocation of BNSF's operations, and new operating agreement were all subject to Section 10906, and thus exempted from the need for STB approval or authority.

These facts provide strong evidence for the conclusion that BNSF's operations and use of KJRY's tracks have never fallen within the Board's jurisdiction. Indeed, as BNSF's own conduct establishes and as the Agreements make clear, BNSF has always viewed the KJRY track as excepted track falling under Section 10906.² Indeed, this is a classic case of two rail carriers entering into "arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks," an arrangement that is not subject to the STB's jurisdiction.

III. THE PROVISIONS OF 49 U.S.C. SECTION 10901 ARE NOT APPLICABLE

When BNSF Petitioned the Board to issue a Certificate PCN nunc pro tunc and declare that BNSF has continuing crossing rights over KJRY's track to conduct those operations all pursuant to Section 10901 it begs the question of whether Section 10901 is even applicable to the facts of this case. Notwithstanding the fact that BNSF and KJRY entered into a private agreement governing the joint use of the switching and terminal tracks at issue and that the agreement was therefore not subject to the Board's jurisdiction pursuant to Section 10906, BNSF asks the Board to issue a Certificate PCN and find that BNSF has had continuing crossing rights of KJRY's terminal and yard tracks since 1995.

² The argument that the KJRY track is exempt under Section 10906 is bolstered by the fact that KJRY obtained an almost-total exemption from ICC regulation in 1988. See *Simmons v Interstate Commerce Commission and KNRECO, Inc.*, 871 F.2d 702, 704-5 (7th Cir. 1988) for a discussion of the reasons why this exemption was requested and granted.

There is nothing in the language of 49 U.S.C. § 10901 that indicates that it was intended to override the prohibition against Board regulation of spur, industrial or team tracks found in Section 10906. Indeed, the opposite is true: Section 10906 explicitly states that “(n)otwithstanding section 10901... (railroads may) enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” 49 U.S.C. § 10906 (emphasis added). Thus, while the Board asserts in its Decision that Section 10901(d) trumps Section 10906, the plain language of the statutes dictates that the precise opposite is true.

BNSF asserts that the *Louisville & Jefferson County Riverport Authority & CSX Transportation, Inc.*, 41 I.C. C. 2d 749 case stands for the proposition that section 10901(d) could be invoked and the grandfathered status of the Mooar Line be revoked and a Certificate PCN summarily granted. In *Louisville & Jefferson*, a state agency sought to construct a new rail line that would cross the existing main line track owned by Paducah & Louisville Railway, Inc. (“P&L”). The state agency petitioned the ICC for a construction exemption under 49 U.S.C. § 10502 (formerly 49 U.S.C. § 10505). Because the ICC found that the conditions of Section 10502 were met, the exemption was granted. See *Louisville & Jefferson*, Finance Docket No. 31136, Slip op. (ICC served December 22, 1987). The ICC later found that Section 10901(d) could be used to build an overpass over P&L’s line of rail. *Louisville & Jefferson*, 4 I.C.C.2d 497. As this brief recitation makes clear, *Louisville and Jefferson* had nothing to do with the Board’s use of Section 10901(d) involving tracks subject to Section 10906. The factual situation in the present case is entirely distinguishable and therefore that decision has no bearing on the BNSF’s Petition.

The text of Section 10901 (d) makes clear that it was added to the statutes solely to clarify an issue that might arise in railroad construction cases; namely, the circumstances under which one railroad could block another railroad from constructing new track to cross its property and track. The Board's authority to allow the construction of new track, whether secured by application or exemption, is necessary for Section 10901 (d) to have any effect. Section 10901 (d), and indeed, the entirety of Section 10901 suggests that the statute applies only where new construction is proposed. In this instance, BNSF proposed no new track construction which would require STB approval. Section 10901 (d) clears an obstacle to new track construction; it does not provide any rights outside of the construction context. is not applicable to this proceeding since it only applies to new construction and BNSF merely relocated its track to access the Mooar Line in a different way. It went from a crossing diamond to relocating BNSF track so that it used approximately one-quarter mile of KJRY track to access the Mooar Line. In its Petition BNSF claims the construction which took place in 1995 was only a relocation of a crossing which had been in place since 1881. Since Section 10901 (d) applies only to new construction or extension of a railroad line it has no application to a relocation project such as the one BNSF undertook in 1995. Precedence holds that rail relocation projects do not require construction authority from the Board. See *City of Detroit v. Canadian National RR. Co. et al.*, 9 I.C.C.2d 1208, 1218-29 (1993). Since there was no new track construction in 1995 to access the Mooar Line then the provisions of Section 10901 cannot be invoked and the Board can issue no Certificate PCN. Therefore, BNSF is not entitled to a Certificate PCN in this case.

Further, since Section 10901 (d) by its terms was directed at new construction it cannot be applied to track built prior to the enactment of the statute. There is no legislative history to support the proposition that Section 10901 (d) can be applied to cover track that is already in

existence. The BNSF has admitted in numerous pleadings in this matter that the 1995 Moobar Line project was a relocation project and was not new construction. Since the track at issue was not intended to be covered by the terms of Section 10901 (d) a Certificate PCN cannot be issued pursuant to that statute. In fact it would be error to adopt the BNSF position and use Section 10901 (d) in a situation in which it was never intended to be used.

This is a private dispute governed by the various private agreements entered into by the parties and the Board should not have involved itself in this dispute. When it did involve itself, the Board relied on its authority under Section 10901(d) to declare that BNSF has a statutory right to operate over and use KJRY's tracks. However, KJRY's tracks are yard, switching, and terminal tracks subject to Section 10906 and thus operations over such tracks are not subject to the Board's 10901 jurisdiction. BNSF cannot cite to any precedent or statutory authority holding that Section 10901(d) can be used in this context.

IV. BNSF TRAINS OPERATE OVER RATHER THAN CROSS KJRY'S TRACKS

The statutory language and legislative history of Section 10901(d) clearly indicate that it was intended to aid a railroad seeking to build a new rail line across the property of another railroad. It was not intended to be used as a means to gain forced access to the track of another railroad, and in fact had never before been used in any other proceeding to allow one railroad to force its operations over another railroad's track. The Board's own precedent recognizes the very different standards applicable to the crossing of property and the forced use of another railroad's track. Therefore it would be clear error for the Board to utilize Section 10901(d) to give BNSF operating rights over KJRY's track. Section 10901(d) is simply inapplicable to the facts of this proceeding.

The Board's regulation over the construction and operation of railroad lines is conducted pursuant to the authority of 49 U.S.C. § 10901. Subsection (a) of that statute specifies that a person may "provide transportation over, or by means of, an extended or additional railroad line...only if the Board issues a certificate authorizing such activity under subsection (c)." 49 U.S.C. § 10901(a)(3). Subsection (c) provides that the Board shall issue the necessary certificate "unless the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c).³ Under these provisions, a party seeking to construct an extended or additional rail line must petition the Board for a certificate, which shall be issued unless the Board determines that the activities to be conducted pursuant to the certificate are not consistent with the public convenience and necessity.

The final subsection of 49 U.S.C. § 10901 is subsection (d), which provides:

(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if--

(A) the construction does not unreasonably interfere with the operation of the crossed line;

(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

³ A party need not actually file an application pursuant to Section 10901 in order to obtain construction authority. Parties may also seek an exemption pursuant to 49 U.S.C. § 10502 ("Section 10502") whereby the parties request to be exempted from the application procedures and processes of Section 10901. *Alamo North Texas RR. Corp. -- Construction and Operation Exemption -- Wise County, TX*, Finance Docket No. 34002, Slip op. (STB served Nov. 16, 2001); *Louisville & Jefferson*.

The statutory language of Section 10901(d) could not make more plain that it was designed to insure that a railroad that has been granted the right to construct a line of railroad pursuant to Section 10901 can not be prevented in doing so by another railroad that refuses to allow the constructing railroad the right to install and use a crossing diamond. It was not intended, however, to grant operating rights over one-quarter mile (including seven switches) of another railroad's tracks. "When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction authorized by such certificate by refusing to permit the carrier to cross its property if...". Section 10901(d) (emphasis added). Section 10901(d) is addressed to construction of a new or extended rail line that crosses the property of another carrier. It makes no provision for carrier's seeking to force access to the tracks of another carrier.

The phrase "cross the property" cannot possibly be read to mean "operate on the trackage of." Such a construction is far beyond what the word "cross" means. Merriam-Webster's Collegiate Dictionary, 10th Ed. (Merriam-Webster, Inc., Springfield, MA, 1998) provides several definitions of the verb "cross," starting with "to lie or be situated across; intersect." More particularly, a "crossing" has never meant "operation over track" in traditionally railroad parlance. A railway crossing is an "intersection of railway tracks. (O)ne railroad cannot be said to cross another unless the rails of one extend over that rail of the other which is furthest from the side of approach." *Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City, Mexico & Orient Ry. Co. et al.*, 70 P. 939, 941 (Kansas, 1902), *rev's on othert grounds* 73 P. 899 (Kansas, 1903). See also *Missouri, Kansas & Texas Ry. Co. v. Thomas*, 28 S.W. 343 (Texas, 1894) (interpreting a state statute regulating railroad crossings to mean crossings at grade). Further, "Rail Talk: A Lexicon of Railroad Language" (James H. Beck, Ed., James Publications, Gretna, Neb. 1978)

defines "crossing" as "a structure used where one track crosses another at grade, and consisting of four connected frogs."⁴ The Internet provides several definitions of a "crossing" in a railroad context, including the "Glossary of Railroad-Related Terms" published by the San Diego Railroad Museum, which defines a "crossing" as "(a) length of track that carries one track across another." (*Railroad Definitions*, internet-accessible at: www.sdrm.org/faqs/defs.html), and H&R Trains, that defines a crossing as "(a)n intersection between two tracks on the same level." (*Glossary of Model Railroad & Prototype Railroad Terms*, internet-accessible at: www.hrtrains.com/glossery.html). In terminology familiar to every automobile driver, a "railroad crossing" is a location where railroad tracks intersect a road. *Newcomb v. Baltimore & Ohio RR. Co.*, 352 F.2d 406, 407 (6th Cir. 1965). No one would suggest that a railroad track constructed parallel to and in the center of a roadway was a "railroad crossing," and yet the Board's Decision requires just this type of linguistic gymnastics to attempt to shoe-horn these facts into the limited scenarios encompassed in Section 10901(d). A "crossing" implies an "intersection," nothing more. *Wheeling & Lake Erie Ry. Co. v. Penn. Public Utility Comm'n*, 778 A.2d 785, 790 (Pa. Cmwlth. 2001) (interpreting state public utility code).

The operations conducted by BNSF on KJRY's tracks, involving the use of terminal and yard tracks (including operation on seven switches in KJRY's track) cannot under any circumstance be considered a crossing. BNSF's locomotives and cars switch from BNSF's tracks onto KJRY's tracks, where they operate for approximately one-quarter mile before returning to BNSF's rails. There is no "intersection" or "crossing" of KJRY's tracks. The crossing diamond that BNSF and its predecessors used to cross over KJRY's track and property

⁴ A "frog" is "a track structure used at the intersection of two running rails to provide support for wheels and passageways for their flanges, thus permitting wheels on either rail to cross to the other." *Id.*

was voluntarily abandoned by BNSF in favor of contractual operating rights on KJRY's tracks. In that contract, BNSF agreed that its rights to operate on KJRY's tracks would be terminable on three months notice, and BNSF makes no argument that KJRY did not properly invoke the cancellation provisions of that contract. Section 10901(d) was intended to allow a carrier to construct new track and cross the property and regulated tracks of another carrier; it was never intended to supplement cancelable contractual rights and provide one railroad with access to another carrier's tracks.

Where Congress intended to provide a means in limited circumstances for one carrier to gain access to operate over another carrier's tracks through regulatory proceedings, it very simply stated that purpose. For example, a statutory section allowing one railroad to use the terminal trackage of another railroad provides: "The Board may require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal, owned by a rail carrier providing transportation subject to the jurisdiction of the Board under this part, to be used by another rail carrier...". 49 U.S.C. § 11102(a). Similarly, where one railroad seeks to purchase a to-be-abandoned or underperforming rail line from another carrier, "the Board shall, upon the request of the acquiring carrier, require the selling carrier to provide to the acquiring carrier trackage rights to allow a reasonable interchange with the selling carrier...". 49 U.S.C. § 10907(d). Because Congress limited the application of Section 10901(d) to circumstances where one railroad wished to "cross the property" of another railroad, and did not provide any means to use that statute to force a "use of tracks," it would be contrary to the plain language of that statute to grant BNSF the Certificate PCN and declaration of crossing rights it requests in its Petition.

The legislative history of Section 10901(d) lends further support for the use of Section 10901(d) only to cross property, not to use tracks. The House report states that Section

109801(d) allows one carrier to “cross another carrier’s property...”. (H.R. Rep. No. 1035, 96th Cong., 2d Sess. 66 (1980)), and that Section 10901(d) was enacted to eliminate the question of whether the crossed carrier “could block the construction by refusing to let the first railroad cross its property.” *Id.*, at 67. Nowhere in the legislative history is there any discussion of the use of Section 10901(d) to give one railroad access to use another railroad’s tracks. Such an application strains Section 10901(d) far beyond its intended scope, and well past the point of breaking.

Moreover, in the history of Section 10901(d) cases processed by the Board and the ICC, no party has ever previously suggested that it should be allowed to invoke Section 10901(d) to use the tracks of another carrier, and certainly no carrier has ever been granted such authority. *See K&K Warehouse -- Exemption From 49 U.S.C. § 10901(d)*, Finance Docket 30858, Slip op. (ICC decided April 3, 1987) (construction of switch and connecting track sought); *Louisville & Jefferson County Riverport Authority and CSX Trans., Inc. -- Petition Under 49 U.S.C. § 10901(d)*, Finance Docket 31136 (Sub-No. 1), Slip op. (ICC decided July 27, 1987) (construction of a grade-separated overpass over the property of another carrier); *Iowa Power, Inc. -- Petition Under 49 U.S.C. § 10901(d)*, Finance Docket 31716, Slip op. (ICC decided Dec. 11, 1990) (construction to cross an abandoned railroad right-of-way); *Gateway Western Ry. Co. -- Petition Under 49 U.S.C. § 10901(d)*, Finance Docket No. 32158 (Sub-No. 1), Slip op. (ICC served Nov. 28, 1994) (construction of a rail line crossing rail lines owned by two other carriers); *Chicago and North Western Transportation Co. -- Petition for Issuance of an Order Pursuant to 49 U.S.C. § 10901(d)*, Finance Docket No. 32433 (Sub-No. 1), Slip op. (Aug. 11, 1995) (construction of new rail line crossing competitor’s line); *WFEC RR. Co. -- Petition for Issuance of an Order Pursuant to 49 U.S.C. § 10901(d)*, Finance Docket 32607 (Sub-No. 1), Slip op. (STB served Feb. 23, 1996) (construction of new rail line to cross other carrier’s property);

Omaha Public Power District -- Petition Under 49 U.S.C. § 10901(d), Finance Docket No. 32630 (Sub- No. 1), Slip op. (ICC served Nov. 30, 1995) (construction of new rail line to cross another carrier's tracks); *Big Stone-Grant Industrial Development and Transportation, LLC -- Petition Under 49 U.S.C. § 10901(d)*, Finance Docket No. 32645 (Sub-No. 1) (STB served June 9, 1998) (construction of new rail line crossing another carrier's tracks); *Public Service Company of Colorado -- Petition for Crossing Authority Under 49 U.S.C. § 10901(d)*, Finance Docket No. 33862 (Sub-No. 1), Slip op. (STB served March 22, 2001) (construction of new rail line across another railroad's track); *Illinois Central RR. Co. -- Petition for Crossing Authority -- in East Baton Rouge Parish, LA*, 33877 (Sub-No. 1), Slip op. (STB served Oct. 25, 2001) (construction of new rail line across another carrier's track). There is no indication, in any of this precedent, that the extraordinary declaration of crossing rights BNSF seeks in its Petition rights is in any way justified by the language of Section 10901(d), nor has Section 10901(d) ever been construed to allow for the use of another carrier's tracks. The Petition for Certificate PCN and declaration of crossing rights pursuant to its interpretation of Section 10901(d) is at odds with the language of the statute and its legislative history, and should be rejected.

Finally, it is instructive to note that in situations where the Board has been called upon to set compensation for one carrier's operation over the facilities of another carrier, the Board has used very different compensation elements depending upon whether the crossing carrier is crossing over property, or using the other carrier's tracks. When property is to be crossed without operating on the tracks of another carrier, the Board has traditionally required as full and complete compensation only the "fair market value of the rail property taken by the crossing carrier." *Chicago and North Western Transportation Co. -- Petition for Issuance of an Order Pursuant to 49 U.S.C. § 10901(d)*, Finance Docket No. 32433 (Sub-No. 1), Slip op. (Aug. 11,

1995). However, where a party is granted the right to use the tracks of another carrier against the will of the other carrier, compensation is set by a three part formula that includes the variable cost incurred by the owner due to the tenant's use, the tenant's pro-rata share of maintenance and operating expense (track maintenance, property taxes, etc.), and an interest or rental component for use of capital invested in track. *St. Louis Southwestern Railway Company -- Trackage Rights Over Missouri Pacific Railroad Company -- Kansas City To St. Louis*, 1 I.C.C.2d 776 (1985). The fact that the Board has very different compensation formulas for the use of track and the crossing of property is strong evidence that the two concepts are recognized as distinct in regulatory matters. The Board's Decision improperly blurred that clear distinction.

BNSF contends that BNSF's use of KJRY's one-quarter mile of track essentially performs the same function as the now-abandoned crossing diamond, and that therefore BNSF's operation on KJRY's track constitutes a "crossing" under Section 10901(d). This argument impermissibly blurs the clear distinction between these two operations. Under the arrangement that existed until 1995, BNSF used all of its own track to reach the Mooar Line, crossing over KJRY's track and property by use of BNSF's own rails and a crossing diamond. BNSF did not operate on any portion of KJRY's track, but merely crossed over the track at the crossing diamond. Of its own volition, BNSF decided to operate on KJRY's tracks, moving off of its own rails and onto KJRY's for one-quarter mile. Only the original operation involved the type of crossing contemplated by Section 10901(d). KJRY's governance over which carriers may gain operational rights to use its tracks cannot be compromised by a statute allowing the Board to impose a crossing over those tracks.

If the Board were to accept the overly-expansive definition of a "crossing" proposed by BNSF under Section 10901(d), railroads will be allowed to force access over competitor's tracks

without incurring any of the costs of constructing a new track. While the length of KJRY's track opened to BNSF's use in this case is modest in comparison to the nation's rail system, nothing in that proposal limits Section 10901(d) to short stretches of track. Indeed, it is conceivable that other railroads that own short sections of disconnected track could petition the Board under Section 10901 (d) for access to those disconnected tracks by asking for the right to "cross" miles of track owned by another carrier that span the tracks and cite the same "need" claimed by BNSF in its filings in this matter. Such a system of forced access was never Congress' intent in enacting Section 10901(d), which exists solely to prevent a railroad from blocking new construction that will "cross its property."

BNSF's use of KJRY's terminal and yard tracks is simply beyond the scope intended by Congress when it enacted Section 10901(d). Indeed, but for the fact that the track at issue is outside of the Board's jurisdiction pursuant to Section 10906, BNSF would have been required to secure trackage rights authority to use KJRY's track. Such authority is necessary even for the use of relatively short sections of another carrier's tracks. *See, e.g., Canton RR. Co. -- Trackage Rights Exemption -- Norfolk Southern Ry. Co.*, 65 Fed. Reg. 54339 (Sept. 7, 2000) (notice of exemption authorizing trackage rights over 150 feet of another carrier's tracks).

Because Section 10901(d) provides no right for one carrier to use the tracks of another carrier, it would be error to allow BNSF to use KJRY's tracks pursuant to that statute in this proceeding.

V. CROSSING RIGHTS NOT JUSTIFIED

As detailed above the BNSF is not entitled to the issuance of a Certificate PCN as Requested. Since the request for a certificate should be denied it follows that there should be no declaration of crossing rights. BNSF claims the fundamental flaw in KJRY's argument is that

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." BNSF Petition at 20. Nothing could be further from the truth. As soon as BNSF Petitioned for trackage rights over the KJRY trackage to access the Mooar Line KJRY protested to the BNSF. At that time BNSF and KJRY concluded that the "rights in question were not trackage rights ..." BNSF Petition at 5. As the BNSF Petition to Withdraw Exemption stated "BN and KJ have an existing joint facility arrangement in place at Keokuk covering the use of trackage by BN and KJ which never has been subject to STB regulation. The trackage rights exemption is therefore unneeded and should not have been filed." Therefore, the Board should deny the request by BNSF for declaration of crossing rights.

VI. ESCROW OF INTERCHANGE FEES

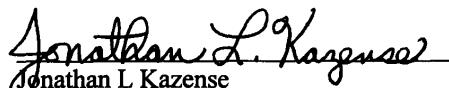
The BNSF began interchanging cars to KJRY for transportation to the Mooar Line on July 1, 2002. Although it is providing an actual service with its locomotives and crews it will place all monies received from BNSF into a separate escrow account until the Board rules in this matter. It should be pointed out that no matter how many times BNSF refers to the interchange as a "sham interchange" or "extortionate behavior" such is not the case. What the BNSF refers to as a sham is allowing the BNSF locomotive to remain attached to the train and not making the BNSF station a locomotive on the Mooar Line. This is done as a convenience to both the BNSF and the shippers located on the Mooar Line. The \$85.00 per car charge referred to by BNSF as extortionate only applies to loaded cars. This per loaded car interchange fee is less than the BNSF charges for the same service. The KJRY is confused as to how its interchange fee, which is less than the BNSF would charge for the same service, is extortionate behavior but is reasonable and proper when charged by BNSF.

CONCLUSION

The BNSF should not have received a Certificate PCN if it had Petitioned for one 1995 and it should not receive one in the year 2002. In 1995 the tracks at issue were terminal, switching, spur and yard tracks subject to Section 10906. The provisions of Section 10901 (d) were not applicable since the construction was a relocation project and not new track construction as required under Section 10901 for its application. There is no legislative history for the proposition that track constructed prior to the enactment of Section 10901 (d) is entitled to the status of new track under that Section. As detailed in this Reply the provisions of Section 10901 (d) only apply to a crossing by one railroad's tracks of another railroad's tracks. BNSF operates over one quarter mile of KJRY to access the Mooar Line and it does not cross the KJRY's tracks within the meaning of Section 10901 (d). Therefore, for all of the above reasons KJRY requests the Board deny BNSF's Petition for Issuance of a Certificate of Public Convenience and Necessity and Declaration of Crossing Rights.

Respectfully submitted,

July 19, 2002



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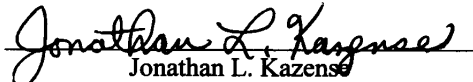
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Attorney for Keokuk Junction Railway Co.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Keokuk Junction Railway Co.'s
Reply to BNSF's Petition for Issuance of a Certificate of Public Convenience and Necessity and
Declaration of Crossing Rights" in STB Finance Docket No. 33740 was served this 19 th day of
July, 2002 by first class mail to all parties of record in this proceeding.


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