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SERVICE DATE - AUGUST 31, 1999

SURFACE TRANSPORTATION BOARD

DECISION

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

STB Finance Docket No. 33740 (Sub-No. 1)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY--PETITION FOR
DETERMINATION OF COMPENSATION AND OTHER TERMS

Decided: August 23, 1999

On April 27, 1999, The Burlington Northern and Santa Fe Railway Company (BNSF) filed a petition for: (1) a declaration or prescription of crossing, trackage, or joint use rights over a .25-mile segment of track in Keokuk, IA, owned by the Keokuk Junction Railway (KJRY), and (2) a determination of compensation and other terms for petitioner's continued crossing operation over the segment, pursuant to 49 U.S.C. 10903, 10901(d), 11102(a), 11101, and 11701.¹ KJRY filed a reply in opposition to the petition on May 17, 1999.

In its petition, BNSF avers that it has been accessing its 4.5-mile Mooar branch line by crossing over the line of KJRY and its predecessor. BNSF contends that, despite the maintenance of crossing agreements between the parties for more than a century, KJRY now refuses to allow petitioner to continue its crossing operations. According to BNSF, KJRY terminated their current agreement in March 1999 and physically blocked the track, cutting off service to five shippers. Subsequently, petitioner avers, KJRY added a "sham" interchange operation whereby KJRY uses its locomotive to power BNSF's train across the quarter mile of KJRY's trackage necessary to access the Mooar Line. KJRY charges \$85 per car and \$85 for hauling the BNSF locomotive. BNSF argues that the movement provides no additional or needed service and dramatically increases the amount of time needed to perform the crossing over KJRY's short length of track. BNSF further contends that KJRY's operation will have a direct, negative impact on BNSF's rates to shippers.

¹ The petition is supported by five shippers: ADM Milling Company, BTR Sealing Systems (Iowa Operations), Griffin Wheel Company, Midwest Carbide Corporation, and Smurfit-Stone Container Corporation.

BNSF argues in its petition three different legal theories that would allow it to cross the KJRY track. First, BNSF argues, 49 U.S.C. 10901(d) prohibits KJRY from blocking BNSF's crossing operations because the crossings do not materially interfere with KJRY's operations and BNSF is willing to compensate KJRY. Second, petitioner asserts that insofar as the rights enjoyed by it are trackage rights, they cannot be canceled absent Board approval, citing Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 144-45 (1946). Lastly, BNSF argues that the Board may prescribe the joint use of terminal facilities where "practicable and in the public interest" under 49 U.S.C. 11102(a) and Midtec Paper Corp. v. CNW et al., 3 I.C.C. 2d 171 (1986) (Midtec).

While the parties do not dispute the facts giving rise to this case, KJRY challenges petitioner's statement of the length of additional time that the interchange now requires. Contrary to BNSF's position, KJRY asserts that the interchange is necessary, safe, and efficient.

KJRY also challenges BNSF's legal analyses. In the first place, KJRY argues that the length of trackage at issue is excepted track under 49 U.S.C. 10906 and, thus, the Board lacks jurisdiction over the dispute. KJRY further contends that, if the Board does have jurisdiction, section 10901(d) crossing rights only apply when a certificate of public convenience and necessity authorizing construction (or a construction exemption under Section 10502) has been issued by the Board. That did not occur here. KJRY further disputes BNSF's characterization of its rights as trackage rights, and notes that the parties agreed, and that this Board concurred, that the rights at issue were not trackage rights. See Burlington Northern Railroad Co. - Trackage Rights Exemption - Keokuk Junction Railway, STB Finance Docket No. 32775 (STB served April 11, 1996). Lastly, KJRY argues that BNSF has failed to demonstrate anticompetitive conduct by KJRY and that therefore the standards of Midtec have not been met by petitioner. KJRY's position is that BNSF had a mere private contractual right to cross KJRY track which ended when KJRY terminated the parties' agreement pursuant to its terms.

The parties have sufficiently discussed the three legal theories pursuant to which BNSF has asserted that it may use KJRY's line to gain access to its own. Those issues, therefore, will be resolved on the present record in a subsequent decision. However, neither party has adequately addressed the issue of the reasonableness of KJRY's interchange operation. Section 10742 of the ICCTA requires that a rail carrier provide "reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivery of passengers and property to and from, its respective line and a connecting line of another rail carrier...." Our obligation under the rail transportation policy at 49 U.S.C. 10101(3) to promote an efficient rail transportation system requires that we consider whether KJRY's operations meet the standards of section 10742. We will seek further information regarding the reasonableness of this interchange operation from all interested parties. We will also afford all interested parties the opportunity to cross-reply.

It is ordered:

1. All interested parties shall submit written evidence and argument concerning the reasonableness of the parties' interchange operation under 49 U.S.C. 10742 by September 30, 1999.
2. All interested parties may submit written cross-replies by October 20, 1999.
3. This decision is effective on the date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary