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SERVICE DATE - MAY 13, 2003

SURFACE TRANSPORTATION BOARD

CERTIFICATE AND 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

Decided: May 9, 2003

In Keokuk Junction Ry. Co. v. STB, 292 F.3d 884 (D.C. Cir. 2002) (Keokuk), the court vacated the Board's decision issued in June 2001 directing the Keokuk Junction Railway Company (KJRY) to permit The Burlington Northern and Santa Fe Railway Company (BNSF) to cross one-quarter mile of KJRY track, pursuant to 49 U.S.C. 10901(d),¹ so that BNSF can continue to access BNSF's customers on its Mooar Line, a 4.5-mile line in Keokuk, IA. The court ruled that the Board may not order the crossing unless it first issues to BNSF—which had built the Mooar Line over 120 years ago (prior to the advent of regulation)—a section 10901 line construction license that is the condition precedent in section 10901(d) for crossing rights.

This decision issues BNSF a certificate of public convenience and necessity under 49 U.S.C. 10901 for the construction and operation of the Mooar Line. We further find that BNSF is entitled under 49 U.S.C. 10901(d) to cross KJRY track in order to access the Mooar Line.

¹ Section 10901(d) provides that when a certificate has been issued by the Board under 49 U.S.C. 10901 authorizing the construction or extension of a rail line, no other rail carrier may block the carrier from constructing across its property so long as the construction and operation of the crossing do not unduly interfere with the operation of the crossed line and the crossing carrier compensates the owner of the crossed line. See Omaha Public Power District – Petition Under 49 U.S.C. 10901(d), STB Finance Docket No. 32630 (Sub-No. 1) (STB served Aug. 1, 1996).

BACKGROUND

BNSF regularly serves five shippers² located on the Mooar Line.³ BNSF can access the Mooar Line only by crossing KJRY track in Keokuk. From 1881 to 1999, BNSF and its predecessors⁴ accessed the Mooar Line via a crossing agreement with KJRY and its predecessor.⁵ For most of this period, BNSF crossed KJRY's line at a point to the west of Bloody Run Creek, a tributary of the Mississippi River. In 1993, however, flooding along the river caused considerable damage to a grain-processing facility operated by Roquette America, Inc. (Roquette), one of the principal shippers served by KJRY and BNSF at Keokuk. On September 1, 1995, to help Roquette implement a flood prevention plan in response to the 1993 flood, BNSF, KJRY and Roquette agreed to relocate the crossing so that BNSF's access to the Mooar Line was moved east of Bloody Run Creek. Whereas previously BNSF had crossed over KJRY property via a diamond-shaped crossover, the relocated crossing requires BNSF to enter KJRY track about one-half mile away via a new crossover over approximately one-quarter mile of KJRY trackage (a segment that includes seven switches and about 300 feet of KJRY main line).⁶ According to KJRY,⁷ implementation of this 1995 project involved the abandonment of about a mile of track, construction of new connecting track, and acquisition of a new right-of-way. Notwithstanding these changes, the parties agreed that BNSF's access to the Mooar Line from the substituted location continued to constitute a crossing.⁸

² KJRY may also serve the Mooar Line shippers through an arrangement with BNSF.

³ The Mooar Line, originally constructed in the middle of the nineteenth century, was 48 miles in length, running from Mount Pleasant, IA, to Keokuk. In 1931, CB&Q obtained ICC authority to abandon, and did abandon all but the 4.5-mile segment between Mooar and Keokuk. See Chicago, B. & Q.R. Co. Abandonment, 180 I.C.C. 65 (1931) (Chicago, B. & Q.).

⁴ The St. Louis, Keokuk and Northwestern Railway Company (SLKN) and the Chicago, Burlington and Quincy Railroad (CB&Q).

⁵ The Chicago, Rock Island and Pacific Railroad Company (Rock Island).

⁶ BNSF agreed to pay as compensation to KJRY one-half of the estimated annual cost of each switch, with 70% of the cost (representing operating and maintenance cost) indexed annually and 30% of the cost (representing interest rental and taxes) fixed.

⁷ KJRY Reply Brief filed Oct. 20, 1999, at 9.

⁸ BNSF had initially filed a notice of exemption with the ICC, which would have provided authorization in the event that trackage rights were involved. See Burlington Northern Railroad Company—Trackage Rights Exemption—Keokuk Junction Railway, Finance Docket No. (continued...)

The relocated crossing operation was conducted without incident until 1998, when the president of Pioneer Railcorp, the railroad holding company that owns KJRY, approached BNSF seeking to buy the Mooar Line. After BNSF declined to sell the line, KJRY notified BNSF of its intent to terminate the parties' Crossing Agreement. Despite some attempted negotiation between the parties, this termination became effective on March 1, 1999. Thereafter, KJRY physically blocked its track and cut off BNSF's access to the shippers on the Mooar Line.

KJRY then proposed what it termed an "interchange" arrangement over the quarter-mile stretch of KJRY trackage used by BNSF to cross to the Mooar Line, under which KJRY would charge BNSF a switching rate of \$85 per car and an additional \$85 for hauling the BNSF locomotive.⁹ On March 2, 1999, BNSF, under protest, began tendering cars pursuant to this arrangement.¹⁰ Under the so-called interchange operations, BNSF would drive its trains up to KJRY's line, at which point KJRY would attach one of its locomotives to the back of the BNSF train and push the train and the BNSF locomotive across to the Mooar Line; on the return movement, the KJRY engine positioned itself immediately in front of the BNSF engine and pulled the train and the BNSF locomotive back across.¹¹

⁸(...continued)

32775 (ICC served Sept. 8, 1995). Subsequently, however, the parties jointly concluded that the rights in question continued to be crossing rights that did not require regulatory authorization. They memorialized their position in a "Crossing Agreement" dated March 13, 1996. Section 9 of that agreement stated:

The parties agree that the rights granted to [BNSF] in this Agreement and [prior 1977 and 1995 agreements] are in the nature of terminal crossing rights and do not grant any trackage rights, and the parties therefore believe that such rights are not subject to the regulatory jurisdiction of the Surface Transportation Board (STB). Accordingly, [BNSF] shall request dismissal with prejudice of the Verified Notice of Exemption it filed with the Interstate Commerce Commission.

The Board granted BNSF's request to withdraw the notice of exemption. See Burlington Northern Railroad Company—Trackage Rights Exemption—Keokuk Junction, Finance Docket No. 32775 (STB served Apr. 11, 1996).

⁹ Previously, BNSF had crossed KJRY track under its own power.

¹⁰ According to BNSF, the new charges for "interchange" were approximately 400 times the amount it was paying pursuant to its crossing agreement with KJRY prior to March 1996.

¹¹ In contrast, a typical interchange would entail one railroad passing its cars into the
(continued...)

On April 27, 1999, BNSF filed a petition for declaratory order asking that we: (1) determine that BNSF has the right to cross KJRY's track at the relocated crossing,¹² and (2) set compensation and other terms for the crossing.¹³ KJRY opposed the petition, and we received evidence and argument from both parties.

2001 DECISION

By decision served on June 22, 2001 (2001 Decision), we issued a declaratory order in which we concluded that BNSF had a right to continue crossing KJRY's track to access its Mooar Line at the relocated site. We explained that, so long as the crossing does not materially interfere with the operations of the crossed line,¹⁴ section 10901(d) prohibits a railroad from blocking another railroad from crossing its line to reach shippers that the crossing carrier has a common carrier obligation to serve. We analyzed the legislative history of section 10901(d),¹⁵ in which Congress had indicated that the section was intended to apply to some situations where no certificate had been previously issued, despite the literal wording of the statute. We noted that, in such cases, Congress had expressly indicated that there was no reason to obtain a certificate if the crossing railroad reaches a voluntary agreement to cross another carrier's line, and that a certificate should be issued "routinely" in the event of a crossing dispute, to assure the agency's jurisdiction under section 10901(d). We did not issue a certificate, however, because we concluded that the issuance of such a document in this case would be a mere formality that we did not believe was necessary.

¹¹(...continued)

account of another railroad, which would then transport the cars to a destination that the originating railroad does not serve.

¹² The original petition was supported by the five Mooar Line shippers that BNSF presently serves: ADM Milling Company, BTR Sealing Systems (Iowa Operations), Griffin Wheel Company, Midwest Carbide Corporation, and Smurfit-Stone Container Corporation.

¹³ This portion of the proceeding was docketed as STB Finance Docket No. 33740 (Sub-No. 1), The Burlington Northern and Santa Fe Railway Company—Petition for Determination of Compensation and Other Terms.

¹⁴ We found that KJRY had not previously contested BNSF's contention that the crossing raises no operational issues. See 2001 Decision at 8.

¹⁵ H.R. Rep. No. 1430, 96th Cong. 2d Sess. 116 (1980) (Conference Report).

THE COURT DECISION

KJRY sought judicial review of our decision before the United States Court of Appeals for the District of Columbia Circuit. In Keokuk, the court vacated the 2001 Decision on the sole ground that “the issuance of a certificate, formality or not, is the condition precedent the Congress prescribed.” 292 F.3d at 885. Specifically, the court held that we could not issue a ruling finding that KJRY must permit the crossing under section 10901(d) unless we issued “a certificate for construction and operation” (id.), after considering the merits of KJRY’s arguments that: (1) we lack authority under section 10901 to issue a certificate for track built before the enactment of section 10901; (2) the KJRY track at issue is switching track, and therefore, under 49 U.S.C. 10906,¹⁶ we do not have authority to enforce a crossing right over that track; and (3) BNSF’s trains operate over, rather than “cross,” KJRY’s tracks. Id. at 885-86.¹⁷

FILINGS ON REMAND

On July 1, 2002, BNSF filed a petition for issuance of a certificate and a declaration of crossing rights. BNSF seeks issuance of a certificate for the Mooar Line nunc pro tunc and a declaration that BNSF continues to have a right to cross KJRY’s track. BNSF argues that the KJRY track is not so-called “excepted” track under section 10906 because BNSF uses the track as part of its continuous movements on to and off of the Mooar Line. It adds that, in any event, we have jurisdiction to order a crossing here whether the KJRY track is excepted track or not. BNSF also urges us to reject the argument that BNSF’s operation over KJRY’s track is not a crossing.

On July 22, 2002, KJRY replied. KJRY argues that issuance of a certificate nunc pro tunc is inappropriate in this case. KJRY contends that its track is excepted from the licensing provisions of section 10901, by section 10906, because both parties use it for local switching and the parties have always regarded it as switching track. KJRY maintains that section 10901(d) is not applicable to excepted track, and in any event, only applies to new construction. Finally, KJRY contends that BNSF trains operate over, rather than cross, its tracks.

¹⁶ Under 49 U.S.C. 10906, a license is not needed to construct, operate, or abandon what are known as spur, industrial, team, switching, or side tracks. Nevertheless, we retain exclusive jurisdiction over such track under 49 U.S.C. 10501(b)(2). See United Transp. Union v. STB, 183 F.3d 606, 612 (7th Cir. 1999) (UTU/Effingham).

¹⁷ In this decision, we incorporate by reference the 2001 Decision on these other issues.

DISCUSSION AND CONCLUSIONS

The issue of broad transportation significance raised by this case is whether we have the authority to license rail lines that were constructed—as most of the major rail lines in the Nation were—before the licensing provisions in the statute were enacted. Based on our review of the statute and the parties’ evidence and arguments, we find that we can issue a certificate for the construction and operation of lines constructed prior to 1920, such as the Mooar Line, and that BNSF should be entitled under 49 U.S.C. 10901(d) to cross KJRY track in order to access the shippers on the Mooar Line.

I. Board Authority to Issue a Certificate for the Mooar Line.A. Certificate Requirements.

Under 49 U.S.C. 10901(a) the Board, like the ICC before it, has exclusive licensing authority for the construction and operation of rail lines. Under 49 U.S.C. 10901(c), we are directed to issue a license (a “certificate”) unless we find that such activities are inconsistent with the public convenience and necessity (“PC&N”), or we issue an exemption under 49 U.S.C. 10502 that relieves the railroad from going through the full section 10901 licensing process.¹⁸

When the Mooar Line was constructed in the mid-nineteenth century, there was no federal regulation of entry into the railroad industry. The ICC was not created until 1887, and initially had limited jurisdiction over interstate rail carriers. In response to the construction of many lines that were not economically viable,¹⁹ and in order to prevent future speculative

¹⁸ Although the statute does not define the term “public convenience and necessity,” historically a three-part test has been used to evaluate that term: whether an applicant is financially fit to undertake proposed construction and provide the proposed service; whether there is public demand or need for the proposed service; and whether the proposal is in the public interest and will not unduly harm existing services. The interests of shippers are accorded substantial importance in assessing PC&N in railroad construction applications. See, e.g., Dakota Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, 3 S.T.B. 847, 863 (1998). The PC&N standard has become less restrictive over the years as a result of the pro-competitive policies embodied in the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (Staggers Act), and the ICC Termination Act of 1995, Pub. L. No. 104-99, 109 Stat. 803 (1995) (ICCTA).

¹⁹ See MacVeigh, The Transportation Act of 1920, 220 (1923); Senate Hearings, Extension of Tenure of Government Control of Railroads, 65th Congress, vol. 1 (1919).

constructions in areas already overburdened with multiple rail lines,²⁰ Congress enacted the precursor to current section 10901 in the Transportation Act of 1920, 41 Stat. 474 (1920)²¹ (Transportation Act), which directed the ICC to allow the construction of a new rail line only if the PC&N required it.²²

²⁰ Section 402 of the Transportation Act of 1920 amended section 1(18) of the Interstate Commerce Act to direct the ICC to scrutinize rail construction proposals closely to prevent rail over-capacity, and the ICC was to issue a license only if it found that the PC&N “require” the construction. Chesapeake & Ohio Ry. v. United States, 243 U.S. 35, 42 (1931); New York Cent. R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (N.D.Ill. 1964), aff’d, 338 F.2d 667, cert. denied, 380 U.S. 954, reh’g denied, 381 U.S. 907; Chicago, R.I. & P.R. Co. v. Thompson, 135 F. Supp. 43 (D.C.Ark. 1955). As excess capacity in the national rail system was reduced throughout the twentieth century, this policy was gradually reversed to encourage rail constructions, and ICCTA now directs that we “shall” issue construction licenses “unless” we find a proposal “inconsistent” with the PC&N. 49 U.S.C. 10901(c).

²¹ During World War I, the railroads were run directly by the federal government. The Transportation Act of 1920 returned the operations of the railways to private control and for the first time required the ICC to license the construction and abandonment of rail lines.

²² Section (1)(18) of the Interstate Commerce Act was amended to read:
After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the public convenience and necessity permit such abandonment.

Most of what today constitutes the national rail system was already in place in 1920 when Congress provided for ICC licensing.²³ Congress did not require existing rail carriers to perfect any grandfather rights by seeking certificates for these existing lines, but that is because there was no need to do so.²⁴ The track and ties were already in place. The ICC's jurisdiction already attached to carriers engaged in interstate transportation by rail. The regulation of carriers operating on existing lines was identical to that over lines constructed after the certificate requirement. That the PC&N was served by the existence of these lines was not questioned. Indeed, entry licensing and exit licensing are flip sides of the same coin (see former section (1)(18)) and if a carrier wanted to abandon a line—even a line such as the Mooar Line that had been built before the licensing requirement was adopted—after 1920 it had to come to the ICC and demonstrate that the PC&N allowed the abandonment. See, e.g., Chicago & B&O, supra (ICC licensed abandonment of part of the Mooar Line). Thus, in enacting the Transportation Act, Congress did not intend to create a practical, legal, or regulatory distinction between lines built prior to enactment of the certificate requirement and those constructed after 1920.²⁵ From a regulatory standpoint, all of these lines are treated in exactly the same manner, because both pre- and post-1920 lines serve equally important roles in the national transportation system.

²³ The interstate rail system reached its peak mileage in 1916. Interstate Commerce Commission, *Statistics of the Railways in the United States (years 1888-1953)*; Interstate Commerce Commission, *Transport Statistics in the United States (years 1954-1990)*.

²⁴ In contrast, when Congress provided for licensing of motor carriers, in section 206 of the Motor Carrier Act of 1935, Pub. L. No. 255, 49 Stat. 543 (1935) (Motor Carrier Act), existing carriers had to perfect “grandfather” rights by filing documents with the ICC. See, e.g., Alton R.R. Co. v. United States, 315 U.S. 15 (1942); United States v. Rosenblum Truck Lines, Inc., 315 U.S. 50 (1942). The reason for the different treatment of rail and motor carriers is that motor carrier licenses at the time were very narrowly drawn, and there was strict enforcement by the ICC of the geographic boundaries of licenses that were coveted by others. Requiring the perfection of grandfather rights assured that motor carriers would not provide operations that exceeded the scope of their authority. Moreover, in contrast to rail operations, there is no exit licensing requirement for motor carrier operations.

²⁵ In fact, the ICC determined that no certificate would be required for lines that were in the process of construction when the licensing provisions in the Transportation Act became effective. See, e.g., Detroit Terminal R. Co. v. Pennsylvania-Detroit R. Co., 4 F.2d. 705 (E.D.Mich. 1925). That—and Congress’ decision to require a license only for constructions proposed “ninety days after” the effective date of section 1(18)—indicates that Congress did not intend to make any distinction in how carriers’ lines constructed before and after the Transportation Act were to be regulated.

B. Relevance of Certificate Requirement To This Crossing Dispute.

The only part of the statutory scheme governing rail carriers where the distinction between lines built before and after 1920 could arguably be relevant is a crossing dispute under section 10901(d). This is because of the introductory clause of section 10901(d): “[w]hen a certificate has been issued by the Board. . . authorizing the construction or extension of a railroad line. . . .” Because a certificate was never issued for the Mooar Line and because there is no request for new construction pending here, KJRY argues that section 10901(d) is inapplicable. However, as next discussed, we find that it would be incongruous to not issue a certificate for the Mooar Line simply because it was built before 1920. BNSF is already required to obtain our approval should it wish to either extend or abandon the Mooar Line, but without the formality of a certificate, as the court in Keokuk construed section 10901(d), BNSF does not have a continuing right to cross KJRY track to access that line. If BNSF is required to follow all current regulatory requirements on its pre-1920 Mooar Line, then BNSF should also be entitled to the benefits and protections—including continuing crossing rights—that derive from the statute.

As we explained in the 2001 Decision at 6-7, Congress included section 10901(d) in the Staggers Act to clarify that an existing carrier may not thwart competition by refusing to allow another carrier to build across its tracks to serve shippers. See Conference Report at 115; H.R. Rep. No. 1035, 96th Cong., 2d Sess. 66-67 (House Report). Section 10901(d) provides that, when a certificate has been issued 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, so long as certain conditions are met.²⁶ But there is no evidence that Congress meant anything by this language other than that if the rail line at issue is subject to Board regulation, then regardless of whether it was built in 1985, 1931, 1919, 1881, or 2003, another carrier may not thwart the rail service by refusing to allow a crossing.

Nothing in the plain language of the statute or the Staggers Act’s legislative history supports KJRY’s argument that Congress intended that section 10901(d) crossing authority would only be available prospectively.²⁷ As we stated in the 2001 Decision at 6:

The language of the crossing provision focused on new entry, rather than on existing operations and crossing arrangements, because of a concern that

²⁶ We have already concluded that the record supports a finding that BNSF has met those conditions here. See 2001 Decision at 8.

²⁷ Indeed, if carried to its logical conclusion, that interpretation could have the perverse effect of encouraging carriers to build new, redundant tracks for the sole purpose of engaging section 10901(d) crossing rights. To require such pointless new construction would be wasteful.

incumbent carriers might seek to block new constructions to protect their franchises. But Congress indicated a concern not just that new construction not be blocked, but also that the crossed carrier not prevent subsequent crossing operations. See House Report at 67. . . . The 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 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. Thus, there is no reason why Congress would have given the agency the authority to require a carrier to allow another carrier to construct a crossing, but then deny the agency the authority to ensure that the carrier be able to operate over it at any subsequent time.

Accordingly, we reaffirm here our previous finding that enforcement of crossing rights for existing lines is part of our authority under section 10901(d).²⁸

This reading of the statute is confirmed by legislative history clarifying that crossing rights were not to be limited to only those situations where a license is typically required. In our prior decision, we noted the following statement by the Staggers Act conferees (Conference Report at 116) indicating that our crossing authority is not confined to circumstances where a certificate is normally issued:

If the construction or extension of a line of railroad would be otherwise exempt under 49 U.S.C. 10901, there should be no reason to obtain a certificate of public convenience and necessity even if the constructing railroad reaches a voluntary agreement to cross another carrier's line. Only if a [crossing] dispute is submitted to the Commission would there be a need to obtain a certificate of public convenience and necessity [for constructing the otherwise excepted track]. This certificate could be sought at the same time as the dispute is submitted to the Commission. The Conferees wish to emphasize that if a certificate would not otherwise be required under section 10907 [now 10906], the certificate should be issued routinely and that its purpose is: (1) to assure Commission jurisdiction under 10901(d) and (2) to assure that the crossing carrier has its right to serve a shipper sanctioned by the Commission.

²⁸ As we explained in the 2001 Decision, the purpose of the crossing provision would be thwarted if a carrier could be required to allow its competitor to construct a crossing but then later block the competitor from using the crossing. Allowing a crossed carrier unilaterally to block a crossing years after it is constructed would chill new construction, in contravention of the pro-construction bent of section 10901(a) and the rail-to-rail competition that Congress sought to promote. 49 U.S.C. 10101(4), (7). Indeed, section 10901(d)(1)(B) makes clear that the crossing provision is addressed not simply to the construction of a crossing, but also to its operation.

Thus, the conferees explicitly recognized the authority of the ICC, and now the Board, to issue a certificate to resolve a crossing dispute, even if the crossing dispute involved existing trackage.²⁹

The fact that the crossing here was originally constructed before section 10901(d)—or any of what is now section 10901—was enacted is not a basis for withholding the crossing rights mandated by that section. As discussed above, PC&N certificates have been required under section 10901 and its precursor since 1920, and Congress knew that there were many crossings already in place when it enacted the crossing provision in the Staggers Act in 1980. (One of the reasons that Congress enacted the provision was to confirm its view of existing law—that one carrier could not unreasonably interfere with another’s crossing—and to designate a single forum (the Board) in which the crossing carrier could vindicate its crossing rights. See 2001 Decision at 5-6, citing House Report at 66-67).

Thus, Congress did not limit the crossing provision to lines built after 1980. Congress also did not restrict the Board’s power to enforce crossing rights to lines built after 1920, and it makes no sense to interpret the crossing provision as so limited in its force and effect. Lines built before 1920 are a vital part of the national rail system and are regulated identically to post-1920 lines. In short, the Mooar Line stands in no different position than a line built in 1981, or 1921. While the statute does not clearly address the issue, it would be inconsistent with the overall statutory scheme to place all lines built before 1920 (or 1980) beyond the reach and protection of section 10901(d).³⁰ A certificate is required under section 10901 for both construction and operation of a rail line, and where, as here, the ongoing operation of a line requires the formality of a certificate to allow the crossing carrier to enforce section 10901(d) in order to continue to serve its shippers directly, a license should be routinely issued. For all of the reasons discussed above, we can and will issue a PC&N certificate to BNSF for the Mooar Line.

²⁹ Additionally, as we pointed out in the 2001 Decision at 7, n.13, the ICC, on a number of occasions, issued certificates for operations that it had previously exempted under former 49 U.S.C. 10505 (now section 10502) from the certification process. In these cases, a certificate was issued after the actual construction was authorized by exemption.

³⁰ The courts have recognized that we have the expertise to interpret the statutes that we administer to reach a result that is consistent with the overall statutory scheme. Buffalo Crushed Stone v. STB, 194 F.3d 125, 129 (D.C. Cir. 1999). Accord ICC v. American Trucking Ass’ns, 467 U.S. 354, 355, 367 (1984).

II. Board Jurisdiction Over KJRY's Track and Authority to Enforce BNSF's Crossing Right.

KJRY also argues that KJRY's track at the relocated crossing is excepted switching track under 49 U.S.C. 10906 and therefore we have no regulatory authority over the track.³¹ In support of this contention, KJRY makes five specific claims: (1) the parties refer in their private agreements to the KJRY track as "Joint Industry Track" over which they would perform their own switching services; (2) BNSF uses KJRY's track for switching; (3) BNSF's petition to withdraw its request for a trackage rights exemption in 1995 was based on its view that the KJRY track is excepted track not subject to regulation; (4) neither BNSF nor its predecessors requested operating authority to use the KJRY track; and (5) BNSF abandoned the original crossing without first obtaining authority from the Board, and neither party obtained construction authority, connecting track authority, or joint relocation authority for the new arrangement. As discussed below, none of these arguments shows that we lack authority over KJRY's track or that section 10901(d) relief is unavailable to BNSF here.

Even assuming, for purposes of argument, that the KJRY track is excepted track under section 10906, we do not lack "jurisdiction" over the track, as KJRY claims. Section 10906 simply provides that a Board license is not needed to construct, operate over, or abandon excepted track. It therefore addresses the "authority" of the Board only as to particular types of licensing actions, not the agency's general jurisdiction over such track. See UTU/Effingham, 183 F.3d at 612.³² This is confirmed by 49 U.S.C. 10501(b)(2), which expressly provides that our jurisdiction over excepted track is exclusive.³³

³¹ KJRY makes this argument despite the fact that when section 10901(d) was enacted, Congress specifically addressed the interplay between sections 10901(d) and 10906 (then 49 U.S.C. 10907) and made clear that section 10906 does not trump section 10901(d). See Stagers Conf. Rpt. at 116 (notwithstanding that a license "would not otherwise be required," the agency has "jurisdiction under [section] 10901(d) . . . to assure that [a] crossing carrier has a right to serve" its shippers).

³² Sometimes, the courts and the agency have used the term "jurisdiction" loosely to refer to the Board's authority under a particular provision of the statute. But disputes involving excepted track under section 10906 are "not about whether the Board has jurisdiction, but about under which provision of the statutes administered by the Board it exercised jurisdiction." UTU/Effingham, 183 F.3d at 612. As that court recently observed "the section 10906 no-authority language means no *authority*, not no *jurisdiction*." Id. (emphasis in original).

³³ In ICCTA, Congress specifically committed jurisdiction over spur, industrial, team, side, and switching track (even if located entirely in one state) exclusively to the Board, carrying out its policy of federally "occupying the entire field of economic regulation" of the Nation's rail
(continued...)

The section 10906 exception to our licensing authority allows carriers regulatory flexibility for track incidental to their interstate common carrier service. But as we stated in our prior decision, although there may be no Federal interest in whether a spur is constructed or abandoned, there is a Federal interest in the actions of the owner of a spur that block a regulated carrier from conducting interstate operations to meet its common carrier obligations. 2001 Decision at 8. We thus concluded there, and reiterate here, that this Federal interest allows us to make section 10901(d) relief available to BNSF, regardless of the status of KJRY's track.

In any event, KJRY has not shown that the track at issue in this case is excepted track, at least when it is used by BNSF. The mere fact that the parties referred to the KJRY track as "Joint Industry Track" in their agreement is not determinative of whether the track is excepted. Instead, it has long been established that the determination of whether a particular track segment is a "railroad line" (requiring regulatory authorization for the construction, operation, or abandonment), or is instead a "spur, industrial, team, switching, or side" track (excepted from the entry and exit licensing requirements pursuant to section 10906), turns on the intended use of the track segment, not on the label or cost of the segment. Texas & P. Ry. v. Gulf Colo. & S.F. Ry., 270 U.S. 266, 278 (1926) (Texas & Pacific); Nicholson v. ICC, 711 F.2d 364, 367-68 (D.C. Cir. 1983). Even track that would otherwise be considered mere switching track can be subjected to the requirement for a license when it is used by another carrier to expand its operations to reach new territory and markets, or when it is essential to the through movement of traffic by a carrier between points of shipment and delivery. Texas & Pacific, 270 U.S. at 278. See UTU/Effingham, 183 F.3d at 613; Brotherhood of Locomotive Eng'rs v. STB, 101 F.3d 718, 727-28 (D.C. Cir. 1996).

Here, while KJRY asserts that BNSF has admitted that the track at issue is excepted track and that BNSF switches cars on KJRY's property,³⁴ the BNSF statements that KJRY points to do not prove that the track is excepted. Rather, BNSF utilizes 300 feet of KJRY main line and 1200

³³(...continued)

transportation system. See H.R. Rep. No. 311, 104th Cong. 1st Sess. 95-96 (1995). In so doing, Congress preempted other Federal or state "statutory, common law, and administrative remedies that may have been previously available and placed exclusive remedial authority concerning such track solely with the Board." Id. at 95.

³⁴ KJRY points to BNSF's alternative argument in its original petition for declaratory order to the effect that, if BNSF did not have crossing or trackage rights, the Board should prescribe joint use of terminal facilities pursuant to 49 U.S.C. 11102. BNSF petition at 21. Because we found in the 2001 Decision that BNSF has a continuing right to cross KJRY's property, we did not reach the joint use argument. Nor is there any reason for us to address it here.

feet of connecting track and seven switches³⁵ to cross from its main line to the Mooar Line to reach five shippers. In this case, these activities are not simply incidental to BNSF's service to and from the Mooar Line. Instead, as the record here shows, BNSF crosses KJRY track as part of its continuous movement to serve the shippers on the Mooar Line.³⁶ Because BNSF uses KJRY's track as part of its continuous movements onto and off of the Mooar Line, the Keokuk track is not excepted track for the purposes of this case.

KJRY's remaining arguments also lack merit. Our grant of BNSF's petition to withdraw its earlier request for a trackage rights exemption reflected the fact that a relocated crossing does not ordinarily require a license unless it extends an existing line or adds a new line that would allow the carrier to reach new territories and markets. See City of Detroit v. Canadian R.R. Co., 9 I.C.C.2d 1208 (1993), aff'd sub nom. Detroit/Wayne County Port Authority v. ICC, 59 F.3d 1314 (D.C. Cir. 1995) (Detroit River Tunnel). It also reflected the fact that neither the parties nor the Board believed that trackage rights were involved here. BNSF did not seek operating authority over KJRY track because all it does is cross KJRY's track, and BNSF did not originally seek crossing authority because the line was built before the ICC was created and it was able to access its shippers via a voluntary agreement.

KJRY's next argument—that BNSF's failure to obtain abandonment authority for the previous crossing, or construction, joint relocation, or connecting track authority for the new arrangement somehow indicates a lack of Board jurisdiction—misses the point. Although BNSF's predecessor did have to seek abandonment authority when it abandoned part of the Mooar Line in 1931 (Chicago, B&Q), the relocation of the crossing in 1995 to serve the same shippers did not trigger the agency's abandonment licensing requirements. Detroit River Tunnel. However, the fact that no authority was required before or after the relocation is not determinative of whether the track at issue is excepted track for purposes of this case.

Finally, KJRY argues that this is a matter governed by private agreements and that, because KJRY gave a termination notice, we should not have become involved. KJRY is correct

³⁵ Simply because a BNSF train traverses through switches on KJRY's track does not mean that BNSF is engaged in switching operations.

³⁶ BNSF states that it pulls its cars destined for the Mooar Line east along BNSF's main line to the crossover to KJRY's main line. BNSF runs its locomotive around the cars, then pulls the cars back west through the crossover onto the KJRY main line. The BNSF train travels approximately 300 feet along the KJRY main line, through KJRY switches, and then crosses through four switches on a KJRY line extension before reaching the Mooar Line. Once the BNSF train reaches the Mooar Line, it must travel approximately 2 miles up an extremely steep grade before reaching the industries that are located approximately 3 miles up the Mooar Line. Wolter Verified Statement at 5.

that we encourage railroads to resolve between themselves (without Board intervention) the terms of such inter-carrier arrangements.³⁷ But there is no authority for KJRY's proposition that, once having entered into a crossing agreement, a carrier cedes or otherwise has no statutory rights under section 10901(d) to cross track if the crossed carrier later withdraws its consent. Such a proposition would discourage private agreements, because it would leave crossing railroads—and in turn their shippers—vulnerable to coercion from crossed railroads in a manner directly contrary to the pro-competitive results that Congress intended through section 10901(d). It also ignores the Board's exclusive remedial authority.

III. Why This is a Crossing.

KJRY argues that BNSF does not have section 10901(d) crossing rights because BNSF's operation over KJRY's track is not a crossing. KJRY claims that section 10901(d) can only apply to a crossing that is accomplished by means of the traditional "diamond" or "frog" configuration originally utilized here. But the fact that the typical crossing uses a diamond configuration does not mean that there is only one form that a crossing can take.³⁸ Nor is there any requirement that a crossing can only involve a certain amount of track. In fact, there are all sorts of configurations in the rail network that serve as crossings.³⁹ Thus, the term "crossing" must be viewed pragmatically, as we (and KJRY for several years after the crossing was relocated) did here.

³⁷ Section 10901(d) is a statutory command to crossed carriers that is normally executed by an agreement between the two railroads. However, as section 10901(d)(2) recognizes, when a crossing dispute cannot be resolved by the parties, Board action may be needed to enforce the statutory command.

³⁸ For example, in Public Service Company of Colorado—Petition for Crossing Authority Under 49 U.S.C. 10901(d), STB Finance Docket No. 33862 (Sub-No. 1) (STB served Mar. 22, 2001), we noted that the crossing carrier would cross BNSF's track by means of a double turnout configuration, rather than a diamond, so as to minimize interference with perpendicular traffic. Similarly, in STB Finance Docket No. 34178 (Sub-No.1), Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern Railroad Corporation, Union Pacific Railroad Company discussed a situation at Owatonna, MN, where a diamond crossing was replaced by a two-turnout configuration. In that instance, a badly deteriorated diamond crossing was replaced by a pair of switches, though no change in the parties' relationship was affected. See Comments of Union Pacific Railroad Company, filed November 14, 2002, at 39-40.

³⁹ A configuration other than a diamond crossing can be beneficial to the railroads involved because of the generally higher cost of maintaining that type of crossing.

In this case, BNSF's movement over the new configuration serves the same function as the movements over the old configuration. Moreover, the amount of control that KJRY has to exercise is also the same. Additionally, BNSF is not using KJRY's property to attract new business, to reach new territories, markets, or customers, or to extend the scope of its operations; nor does it serve customers or switch cars on KJRY's track. Rather, as before, BNSF is merely utilizing the KJRY line as part of a continuous movement from BNSF main line track to BNSF main line track to access its own shippers on its own line.

The record here shows that, when BNSF and KJRY agreed to move the crossing, the parties did not set out to, nor did they accidentally, abolish the crossing rights. As previously indicated, the purpose and effect of the pre- and post-flooding crossings are the same. BNSF and KJRY designated their new agreement a "Crossing Agreement." That agreement, signed by both carriers, specifically stated that BNSF's rights to access the Mooar Line would continue to be "crossing rights," that the KJRY track used by BNSF "to cross KJRY are covered by the original Agreement, as supplemented;" that BNSF will be "crossing at grade by means of . . . KJRY's two turnouts connected by a series of switches . . . hereinafter called the 'Crossing';" and that "KJRY shall own and maintain the Crossing." In these circumstances, we find that the operation at the new location on KJRY's track is a crossing.

IV. Conclusion.

We have authority to now issue a certificate for the construction of the Mooar Line, and will do so. Moreover, we find that the operation at the new location on KJRY's track is a crossing. Finally, we conclude that BNSF is entitled, under 49 U.S.C. 10901(d), to cross KJRY's track in order to access the Mooar Line. Therefore, pursuant to our authority to compel crossings under that section, we will order the parties to negotiate compensation and other terms for the crossing. If the parties cannot agree on terms, we will decide any disputed issues within 120 days after they are submitted to us for determination under 49 U.S.C. 10901(d)(2).

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's request for issuance of a certificate pursuant to 49 U.S.C. 10901 is granted, as set forth above.
2. KJRY, pursuant to section 10901(d), must allow BNSF to cross KJRY's line to reach the Mooar Line.
3. The parties are directed to immediately begin negotiations on a new crossing agreement.

4. If the parties are unable to agree within 30 days of the effective date of this decision on compensation or other crossing terms, either or both parties shall submit the matters in dispute to the Board, which will make a determination within 120 days thereafter.

5. This decision is effective June 12, 2003.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary