

SURFACE TRANSPORTATION BOARD

DECISION

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: January 29, 2002

In a decision in this proceeding served on June 22, 2001 (the Crossing Decision), the Board determined that The Burlington Northern and Santa Fe Railway Company (BNSF) has a right under 49 U.S.C. 10901(d) to cross approximately 1,500 feet of trackage in Keokuk, IA, owned by the Keokuk Junction Railway Company (KJRY). The parties were ordered to negotiate compensation and other terms for the crossing. The Board stated that it would resolve any disputed issues if the parties could not agree on terms. On July 23, 2001, BNSF filed a petition indicating that the parties could not agree on terms and asking the Board to establish compensation and other terms for the crossing. KJRY replied on August 7, 2001.

In a decision served on September 12, 2001, the Board assigned the proceeding to an Administrative Law Judge for mediation.¹ The period specified for mediation was later extended by 30 days, until November 10, 2001.

In a letter filed on November 28, 2001, BNSF states that mediation has failed and requests issuance of a procedural schedule for resolving compensation issues. On November 30, 2001, KJRY filed a response in which it agrees with BNSF that there are unresolved issues for determination by the Board. KJRY also reiterates its view that, in addition to future compensation, the Board must also resolve (1) any issues as to refunds of amounts previously paid and (2) operational and liability issues.

KJRY has suggested a bifurcated procedural schedule, under which the parties would first submit simultaneous arguments on the appropriate methodology for calculating future compensation (with a subsequent round of pleadings addressing the application of that methodology to this case), and then later separately address the issues of liability, operations, and

¹ The decision also ordered that, pending settlement or a decision by the Board, BNSF pay an interim compensation for the crossing at the level that BNSF was paying KJRY prior to the instant dispute. The decision noted that KJRY's agreement to this level of interim compensation would not prejudice the outcome of this proceeding and that KJRY had not relinquished any rights or conceded any arguments in this regard.

the possibility of a refund. KJRY also requests that the Board postpone its consideration of these issues pending court consideration of KJRY's appeal of the Crossing Decision.² BNSF does not support the requested postponement.

Postponement of this proceeding pending judicial review of the Crossing Decision has not been justified, nor would it serve any useful purpose. Commercial certainty for the shippers BNSF serves by crossing this line, whose rates may be affected by the outcome of this dispute, will be achieved sooner if the Board does not postpone our consideration of crossing terms. Going forward with this proceeding should not unduly burden KJRY. Because KJRY can easily compile evidence concerning its own operations and costs as well as BNSF's activity on its track, it should be able to develop its case without undue expense.

Nor has any need been shown to bifurcate the evidentiary submissions in the way KJRY suggests. A separate round of pleadings directed solely to methodology in the abstract — with no explanation of how it would apply in the context of a specific crossing proposal with specific operational parameters — would not appear to be fruitful. Accordingly, the pleadings should address both the methodology to be used and its application in this case. Liability and operational issues can and should be included in the parties' initial pleadings.

The compensation and terms to be established in this proceeding must reflect the crossing that is taking place (here, over some 1,500 feet of the crossed carrier's track). The parties should address all of the relevant circumstances concerning the crossing operations conducted here. BNSF has the burden of demonstrating that its proposed compensation and other terms satisfy section 10901(d).³

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

It is ordered:

1. Opening statements addressing all of the issues to be resolved by the Board are due from both parties by March 1, 2002.

² KJRY has filed a petition for judicial review of that decision in the United States Court of Appeals for the District of Columbia Circuit. Keokuk Junction Ry. v. Surface Transp. Bd., No. 01-1305 (D.C. Cir. filed July 11, 2001).

³ See Chicago and North Western Railway Company—Construction and Operation Exemption—City of Superior, Douglas County, WI—Petition for Issuance of an Order Pursuant to 49 U.S.C. 10901(d), Finance Docket No. 32433 (Sub-No. 1) (ICC served Aug. 11, 1995), at 3-4 (“[The Board placed] the burden of proof on the crossing carrier as the proponent of the requested relief.”).

2. Reply statements from both parties are due by April 1, 2002.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary