

STB FINANCE DOCKET NO. 33740¹

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY —
PETITION FOR DECLARATION OR PRESCRIPTION OF
CROSSING, TRACKAGE, OR JOINT USE RIGHTS

Decided June 20, 2001

The Board (1) grants a declaratory order finding that The Burlington Northern and Santa Fe Railway Company has a right under 49 U.S.C. 10901(d) to cross the line of Keokuk Junction Railway Company to access its Mooar Line, (2) denies as premature a BNSF petition for determination of compensation for the crossing, and (3) directs the parties to immediately begin negotiations on a new crossing agreement.

BY THE BOARD:

On April 27, 1999, The Burlington Northern and Santa Fe Railway Company (BNSF or petitioner) filed a petition seeking a declaration or prescription of crossing, trackage, or joint use rights over a one-quarter mile segment of track in Keokuk, IA, owned by the Keokuk Junction Railway Company (KJRY or respondent).² KJRY filed a reply in opposition to the petition on May 17, 1999.

Particularly given the long history of cooperation among the railroads involved at Keokuk, we do not see why the dispute brought before us could not have been resolved in the private sector without government interference. Nevertheless, we will exercise our declaratory order authority as requested under 5 U.S.C. 554(e). After reviewing the record and the law, we conclude that BNSF has crossing rights under 49 U.S.C. 10901(d) to access its Mooar Line via the involved KJRY line in Keokuk and we grant the carrier that authority.

¹ This decision embraces STB Finance Docket No. 33740 (Sub-No. 1), *The Burlington Northern and Santa Fe Railway Company — Petition for Determination of Compensation and Other Terms*.

² BNSF also sought a determination of compensation and other terms for operating over that track.

BACKGROUND

Since 1881, BNSF and its predecessors, the St. Louis, Keokuk and Northwestern Railway Company (SLKN) and the Chicago, Burlington and Quincy Railroad (CB&Q), have accessed a 4.5-mile branch line in Keokuk, known as the Mooar Line,³ via a crossing agreement with KJRY and its predecessor, The Chicago, Rock Island and Pacific Railroad Company (Rock Island). 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 Roquette America, Inc. (Roquette), one of the principal industries served by KJRY and BNSF at Keokuk. In response to the flooding, Roquette, which was a signatory to a 1977 agreement (*see supra* note 4) with CB&Q and Rock Island, implemented a comprehensive plan designed to prevent future damage from flooding. One aspect of the plan called for the relocation of the southernmost portion of the Mooar Line so that access to the Mooar Line would not require BNSF to cross over Bloody Run Creek.⁴

On September 1, 1995, in furtherance of Roquette's flood plan, BNSF, KJRY and Roquette entered into a "Supplemental Agreement"⁵ relating to BNSF's operations over KJRY's mainline track and BNSF's access to Roquette's facilities and to the Mooar Line. Under the terms of this agreement, BNSF's access to the Mooar Line was moved east of Bloody Run Creek. A new crossover was constructed to allow BNSF trains to enter KJRY's track at BN milepost 177.58 and move through seven switches over approximately one-quarter mile of KJRY trackage in order to enter BNSF's Mooar Line. Whereas previously BNSF had crossed over KJRY property via a diamond-shaped crossover, under the 1995 crossing arrangement its trains were required to travel approximately 300 feet on KJRY's main line and 1200 feet on a line connecting the KJRY main line and the Mooar Line. BNSF agreed to pay as compensation to KJRY one-half of the estimated annual cost of each switch, with 70% of the

³ The Mooar Line, originally constructed in the 1850s, was 48 miles in length, running from Mount Pleasant, IA to Keokuk. In 1931, CB&Q abandoned all but the segment between Mooar and Keokuk. *See Chicago, B. & Q. R. Co. Abandonment*, 180 I.C.C. 65 (1931) (*Chicago, B. & Q.*).

⁴ BNSF serves five shippers along the Mooar Line: ADM Milling Company, BTR Sealing Systems (Iowa Operations), Griffen Wheel Company, Midwest Carbide Corporation, and Smurfit-Stone Container Corporation. All of them support BNSF's petition.

⁵ As noted, CB&Q, Rock Island, and Roquette had previously entered into an agreement in 1977 regarding the use of track adjacent to and serving Roquette's facilities.

cost (representing operating and maintenance cost) indexed annually and 30% of the cost (representing interest rental and taxes) fixed.

There was apparently some confusion at the time regarding whether government approval was required for the various projects relating to the flood plan. BNSF originally filed a notice of exemption with our predecessor, the Interstate Commerce Commission (ICC), for authorization of the relocated crossing and overhead operations over KJRY's lines necessary to reach the Mooar Line. *See Burlington Northern Railroad Company — Trackage Rights Exemption — Keokuk Junction Railway*, Finance Docket No. 32775 (ICC served Sept. 8, 1995). Subsequently, however, the parties concluded that the rights in question were not trackage rights, but instead were 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 the [1977 Agreement] 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) (*Keokuk Junction*).

In 1998, 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 that it was exercising its right to terminate the 1977 agreement (*see supra* note 4), as supplemented and amended by the Supplemental Agreement and the Crossing Agreement. Despite some attempted negotiation between the parties, this termination became effective on March 1, 1999. Thereafter, KJRY physically blocked the track and cut off BNSF's service to the shippers on the Mooar Line.

KJRY then proposed what it termed an "interchange" arrangement over the quarter-mile stretch of trackage used by BNSF to cross to the Mooar Line, and to charge BNSF a switching rate of \$85 per car and an additional \$85 for hauling

the BNSF locomotive.⁶ On March 2, 1999, BNSF began tendering cars pursuant to this arrangement under protest. The operations consist of KJRY attaching one of its locomotives to the back of the BNSF train and pushing the train and the BNSF locomotive across the crossing. On the return movement, the KJRY engine positions itself immediately in front of the BNSF engine and pulls the train and the BNSF locomotive back across.

POSITIONS OF THE PARTIES

BNSF — which contends that this “interchange” arrangement is inefficient and costly to it and to the shippers — argues that 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.⁷

KJRY counters that the Board lacks jurisdiction over this dispute because the trackage to be crossed is excepted track under 49 U.S.C. 10906.⁸ KJRY argues that BNSF’s private contractual right to cross this excepted KJRY track ended when KJRY terminated the parties’ agreement pursuant to its terms and replaced that arrangement with an interchange operation.

KJRY further contends that, even if the KJRY track is determined not to be excepted track, section 10901(d) crossing rights apply only in conjunction with Board authorization to construct a new line. Because no agency approval was ever required for the construction of the Mooar Line or the relocation of the crossing, KJRY argues, section 10901(d) cannot apply.⁹

⁶ According to BNSF, the new charges for “interchange” are approximately 400 times the amount it was paying pursuant to its crossing agreement with KJRY prior to March 1996.

⁷ BNSF also raises two additional arguments: that, insofar as the rights enjoyed by it are trackage rights, they cannot be canceled absent Board approval; and 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 Corporation v. CNW et al.*, 3 I.C.C.2d 171 (1986) (*Midtec*).

⁸ Section 10906 provides that the Board does not have licensing authority under Chapter 109 (49 U.S.C. 10901-10907) over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or under Subchapter II of Chapter 113 (49 U.S.C. 11321-11328) over the joint ownership or joint use of such tracks.

⁹ KJRY also disputes BNSF’s characterization of its rights as trackage rights, noting that the parties agreed (and in *Keokuk Junction* the Board concurred) that the rights at issue were not trackage rights. It also argues that BNSF has failed to demonstrate any anticompetitive conduct by KJRY, a prerequisite under *Midtec* for obtaining competitive access relief under section 11102.

DISCUSSION AND CONCLUSIONS

The parties have raised a variety of issues in this proceeding, but, as we see it, the case raises one fundamental question: whether a railroad may block another railroad from crossing its line to serve shippers that the crossing railroad has a common carrier obligation to serve. We conclude that it does not matter if the track to be crossed is excepted track. Nor does it matter if a license was originally obtained for the crossing track or whether, as in this case, the crossing was constructed well over 100 years ago and has until recently been operated consensually. So long as the crossing does not materially interfere with the operations of the crossed line and is needed to reach shippers that the crossing carrier has an obligation to serve, it may not be blocked.

Our governing statutes, except as specified,¹⁰ require that anyone providing rail service as part of the interstate rail network must obtain a certificate of public convenience and necessity (that is, a license authorizing that service) from the Board. In particular, sections 10901(a)(1) and (2) require Board certification for construction of new lines or extensions of existing lines, while sections 10901(a)(3) and (4) and section 10902(a) require licenses to acquire or operate new or extended rail lines. As part of the licensing provisions, section 10901 also provides that a railroad may not prevent another railroad from building across the first railroad's property in order to serve shippers on the crossing railroad's own line(s). Specifically, section 10901(d)(1) provides:

When a certificate has been issued by the Board * * * 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.¹¹

The crossing provision of section 10901(d) was enacted as part of the Staggers Rail Act of 1980 (Staggers Act)¹² to promote competition among railroads by facilitating entry into the rail business. See H.R. Rep. No. 1430, 96th Cong., 2d Sess. 115 (1980) (Conference Report); H.R. Rep. No. 1035, 96th Cong., 2d Sess. 66-67 (House Report). Congress did that by clarifying that,

¹⁰ See *supra* note 7.

¹¹ Section 10901(d)(2) further provides that the Board will set the terms of operation or the amount of compensation for a crossing if the parties cannot agree.

¹² Pub. L. No. 96-448, 94 Stat. 1895 (1980).

under the Interstate Commerce Act, an existing carrier may not thwart its competitor by refusing to allow its competitor to build across its tracks to serve shippers.¹³

The language of the crossing provision focused on new entry, rather than on existing operations and crossing arrangements, because of a concern that 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, emphasis supplied (No railroad may refuse to let another cross its property, “provided the construction *and operation* do not materially interfere” with the crossed railroad’s operations). 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. Such a result would be particularly untenable in circumstances like those here, where continuing crossing operations by BNSF and its predecessors, and longstanding shipper expectations flowing from those operations, have been a fixed presence in the Keokuk area for over a century.

KJRY argues that our authority to order a crossing is narrow and that obtaining a license for new construction is a predicate to Board action under section 10901(d). But Congress made it clear that its policy was not limited to those situations where licensing was typically required. Indeed, in addressing crossing disputes involving new track that is not subject to Board licensing (*see supra* note 7), the Staggers Act conferees indicated that our authority is not

¹³ The crossing provision originated in the House bill. In explaining its purpose, the House explained (House Report at 66-67):

Where a rail carrier has been issued a certificate * * * and where the construction or extension of that line would cross another carrier, it is unclear whether the second railroad could block the construction by refusing to let the first railroad cross its property. The prevailing opinion is that, where the Commission has issued a certificate * * *, another regulated rail carrier cannot block construction. However, the issue has not been clearly settled. Thus, section 304 provides that, when a railroad has been issued a certificate * * *, no other railroad may block construction by refusing to let the first railroad cross its property, provided that the construction and operation do not materially interfere with the operation of the second railroad * * *.

confined to circumstances “[w]hen a certificate has been issued * * *.” The conferees stated that:

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.

Conference Report at 116.¹⁴

The operation involved here is far more pervasively regulated than a spur subject to section 10906. If BNSF were for the first time seeking to construct and operate a crossing over the KJRY line to link up with the Mooar Line and its shippers, it would require a new license. And if it had first constructed and operated a crossing over the KJRY line in, say, 1940, it would also have required a license. As it happens, there is no new construction involved and no new activity here. The original line was constructed as early as 1881, when there was no rail licensing. The Interstate Commerce Act of 1887, 24 Stat. 379 (1887), which gave our predecessor, the ICC, regulatory authority over interstate railroads, had not even been enacted when the crossing to the Mooar Line was first constructed, and there were no licensing requirements for line constructions until the passage of the Transportation Act of 1920, 41 Stat. 474 (1920). But the fact that BNSF’s predecessor-in-interest did not, and in fact could not, obtain a certificate for the original construction or operation of the line does not mean that the policies underlying section 10901(d) do not apply to BNSF, or that we could

¹⁴ Similarly, the ICC has intervened and issued certificates for operations that it had exempted under 49 U.S.C. 10505 (now 10502) from the certification process. See *Class Exemption for Rail Construction Under 49 U.S.C. 10901*, Ex Parte No. 392 (Sub-No. 3) (ICC served May 29, 1987); *Louisville & Jefferson Co & CSX Const. & Oper. Jeff. KY*, 4 I.C.C.2d 749 (1988) (“since Congress intended that section 10901(d) could be invoked and a PC&N certificate routinely issued in section 10907 transactions where we have no jurisdiction, then this same broad policy could be applied to proposals that this Commission had chosen to exempt.”). Simply stated, “[s]ection 10901(d) is not restricted by its terms from its application to constructions permitted by exemption. It merely requires the issuance of a certificate.” *Gateway Western Railway Co. — Construction Exemption — St. Clair County, IL. et al.*, Finance Docket No. 32158, et al. (ICC served May 11, 1993).

not, if we chose to do so, issue BNSF a certificate (a formality that, in a case such as this one, we do not believe is necessary).

Thus, the fact that a license was not issued for the 1995 relocation of the crossing east of Bloody Run Creek is of no consequence, because, as the parties agreed, no license was required. Many carrier improvements to existing systems do not require a new certificate;¹⁵ only the construction and operation of additional railroad lines, extensions of existing lines into new territories, or operations by a different carrier require a Board-issued certificate under 49 U.S.C. 10901 or 10902.¹⁶ Here, as the parties recognized in their 1996 agreement, the relocation of the crossing was neither an extension of an existing line nor the addition of a new one, and no different carrier or new market or territory was involved. Thus, BNSF, in using the substitute crossing, is entitled to any regulatory relief it could have secured when it was using the original crossing.

Finally, KJRY argues that we may not direct a crossing because the track to be crossed is itself excepted from licensing requirements under 49 U.S.C. 10906. But it does not matter whether the track to be crossed is excepted or not, because excepted track, while it may not require a license for construction, operation, or abandonment, is not otherwise beyond our regulatory reach. It may be that there is no Federal interest in whether a spur is constructed or abandoned, but there is a Federal interest in the actions of the owner of a spur to block an interstate carrier from conducting interstate operations to meet its common carrier obligations. Thus, we conclude that the status of KJRY's track does not divest us of authority to require a crossing.

Here, the record supports a finding that BNSF has met the requirements of section 10901(d)(1)(B) and (C).¹⁷ KJRY does not claim that BNSF's prior longstanding crossing operation interfered in any way with KJRY's operations. Respondent vaguely alludes (reply at 6) to "numerous factors and issues regarding" the relocated crossing, and (*id.* at 16) to the "intrusive effect" that the new crossing has on it, but the new crossing was apparently operated successfully for about 3 years until KJRY shut it down after its attempt to acquire the Moorar Line was rebuffed. KJRY does not seriously contest BNSF's assertion (petition

¹⁵ See, e.g., *City of Detroit v. Canadian National Ry. Co., et al.*, 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).

¹⁶ See *Texas & Pac. Ry. v. Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266 (1926).

¹⁷ Because there is no new construction, the provisions of section 10901(d)(1)(A) are not implicated here.

at 3) that the crossing raises “no operational issue.”¹⁸ Moreover, BNSF has always been willing to compensate KJRY for the crossing, as reflected in their numerous agreements, and although the current agreement has been terminated, BNSF states that the compensation to which the parties agreed in 1995 is “not immutable” and that it stands willing to negotiate further on the compensation to be paid to KJRY for crossing its line. For these reasons, and consistent with our authority under section 10901(d), we will order KJRY to continue to allow BNSF to cross KJRY’s line in order to serve shippers on the Mooar Line.

In sum, we conclude that BNSF has a right under 49 U.S.C. 10901(d) to cross KJRY’s line 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 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).¹⁹

Because we find that BNSF has crossing rights under 49 U.S.C. 10901(d), there is no need for us to discuss the remaining issues raised by the parties. Accordingly, we will not do so.

We find:

BNSF has a right to cross KJRY’s line to access its Mooar Line.

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 declaratory relief 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. BNSF’s petition for determination of terms is denied as premature.

¹⁸ Indeed, although there is a dispute over how long it takes to perform the new “interchange” that KJRY has required — BNSF has asserted that it takes up to 45 minutes, while KJRY has stated that it generally takes 10-15 minutes, although on rare occasions, it can take more than 20 minutes — it is not disputed that BNSF’s once-per-weekday and occasional weekend operations over the relocated crossing track took only about 5 minutes to complete.

¹⁹ If called upon, we will determine appropriate compensation based on the fair market value of KJRY’s rail property. This standard comports with the minimum value guaranteed by the taking clause of the Constitution. See, e.g., *Chicago and Northwestern Ry. Co. — 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).

4. The parties are directed to immediately begin negotiations on a new crossing agreement.

5. If the parties are unable to agree within 30 days of the service 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.

6. This decision is effective on June 22, 2001, the service date.

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