

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

Statement of Timothy Strafford, Staff Attorney, Office of Proceedings

Good morning Chairman Nober and Commissioner Morgan.

The draft decision before you is the result of a remand by the U. S. Court of Appeals for the District of Columbia Circuit. In Keokuk Junction Ry. Co. v. STB, 292 F.3d 884 (D.C. Cir. 2002), the court vacated a June 2001 Board decision that directed 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), so that BNSF could continue to access BNSF's customers on its 4.5-mile Mooar Line near Keokuk, IA. Even though the line was built over 120 years ago, prior to the advent of regulation, the court ruled that the Board may not order the crossing unless it first issues to BNSF a section 10901 license that the court found to be a condition precedent in section 10901(d) for crossing rights.

BNSF regularly serves five shippers located on the Mooar Line, which it can access only by crossing KJRY track in Keokuk. From 1881 to 1999, BNSF and its predecessors accessed the Mooar Line via a crossing agreement with KJRY or its predecessor at a point to the west of Bloody Run Creek, a tributary of the Mississippi River. In 1995, as part of a shipper-sponsored flood prevention plan, BNSF and KJRY agreed to relocate the crossing, which moved BNSF's access to the Mooar Line east of Bloody Run Creek. Whereas previously BNSF had crossed the KJRY line at right angles, the relocated crossing requires BNSF to traverse one-quarter mile

of KJRY trackage.

KJRY terminated the parties' Crossing Agreement in March of 1999. Thereafter, KJRY physically blocked its track and cut off BNSF's access to the shippers on the Mooar Line. KJRY then imposed what it termed an "interchange" arrangement, under which a KJRY locomotive literally hauled the BNSF train – locomotive and all – across the quarter mile segment, charging BNSF a switching charge of \$85 per car and an additional \$85 for hauling the BNSF locomotive.

BNSF then sought a declaratory order from the Board stating that it has the right to cross KJRY's track at the relocated crossing. KJRY opposed the petition. In its June 2001 decision, the Board held that, so long as the crossing does not materially interfere with the operations of the crossed line, 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. The Board concluded that it was not necessary to issue a certificate to BNSF, because to do so would have been a mere formality for a line that was already in place and had been operating for over 120 years.

On review, the Court of Appeals held that "the issuance of a certificate, formality or not, is the condition precedent the Congress prescribed." Therefore, BNSF filed a petition for issuance of a certificate for the Mooar Line and for a declaration that it continues to have a right to cross KJRY's track.

The draft decision before you finds that enforcement of crossing rights for lines built before 1920 is part of the Board's authority under section 10901(d), and the decision issues BNSF a certificate for the construction and operation of the Mooar Line. The decision further finds that BSNF is entitled, under section 10901(d) to cross KJRY's track to access the Mooar Line; that the KJRY track at issue is not excepted switching track because BNSF uses the track as part of its continuous movements on to and off of the Mooar Line; and that the operation at the new location on KJRY's track is a crossing. Therefore, pursuant to the Board's authority to compel crossings under section 10901(d), the draft decision orders the parties to negotiate compensation and other terms for the crossing. If the parties cannot agree, the Board remains available to set the terms.

We would be happy to answer any questions that you may have.