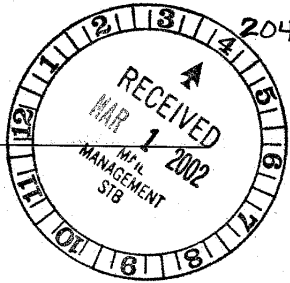


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March 1, 2002

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of the Secretary

MAR 04 2002

Part of
Public Record

Re: F.D. No. 33740 (Sub-No. 1), *The Burlington Northern And Santa Fe Railway Company-- Petition For Declaration Or Prescription Of Crossing, Trackage Or Joint Use Rights And For Determination Of Compensation And Other Terms*

Dear Secretary Williams:

Enclosed herewith are an original and eleven copies of the Keokuk Junction Railway Co.'s Opening Statement Regarding Compensation And Other Terms in the above captioned proceeding. Also enclosed are three 3.5-inch computer disks, each of which contains a copy of the enclosed brief. Though the new STB filing requirements do not take effect until March 8, 2002, we have filed this document in accordance with the STB Final Rule in Ex Parte 576, Electronic Access to Case Filings. Therefore, the original is not bound, but clipped with no tabs; however, the ten copies enclosed for Board Member and staff review are bound and tabbed.

Please date stamp the eleventh copy of the enclosed and return it to the messenger for return to me. If you have any questions about this matter, please contact me at your convenience.

Very truly yours,



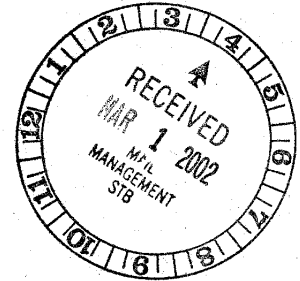
William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33740 (Sub-No. 1)



**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
PETITION FOR DECLARATION OR PRESCRIPTION
OF CROSSING, TRACKAGE OR JOINT USE RIGHTS AND FOR
DETERMINATION OF COMPENSATION AND OTHER TERMS**

**KEOKUK JUNCTION RAILWAY CO.'S
OPENING STATEMENT REGARDING
COMPENSATION AND OTHER TERMS**

**ENTERED
Office of the Secretary**

MAR 04 2002

**Part of
Public Record**

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March 1, 2002

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 33740 (Sub-No. 1)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
PETITION FOR DECLARATION OR PRESCRIPTION
OF CROSSING, TRackage OR JOINT USE RIGHTS AND FOR
DETERMINATION OF COMPENSATION AND OTHER TERMS**

**KEOKUK JUNCTION RAILWAY CO.'S
OPENING STATEMENT REGARDING
COMPENSATION AND OTHER TERMS**

BACKGROUND

In response to the Board's January 30, 2002 decision, Keokuk Junction Railway Co. ("KJRY"), by its counsel, hereby files this "Opening Statement Regarding Compensation and Other Terms" ("Statement").¹ In prior pleadings in the primary docket in this proceeding, the parties provided the Surface Transportation Board ("Board" or "STB") with a comprehensive historical perspective on the current dispute. KJRY refers the Board to KJRY's May 17, 1999 Reply filing for a more complete factual recitation. KJRY will not restate that entire history here, but will only touch upon those issues addressed in the Board's January 30, 2002 decision in this sub-docket.

Historically, The Burlington Northern Santa Fe Railway Company ("BNSF") accessed its 4.5 mile Mooar Line via a crossing diamond located on KJRY's main line track in Keokuk, Iowa. The crossing diamond allowed BNSF to traverse KJRY's property and cross over KJRY's

¹ KJRY's participation in this subdocket is without prejudice to its pending appeal of the Board's June 22, 2001 Order, currently pending before the Court of Appeals for the District of Columbia Circuit (*Keokuk Junction Railway Co. v. Surface Transportation Board*, No. 01-1305).

track without requiring BNSF to operate on any portion of KJRY's track. In recent years, BNSF's use of the crossing diamond was governed by a November 1, 1977 agreement ("1977 Agreement"). In the 1977 Agreement, the parties negotiated various provisions to govern the crossing diamond, including compensation levels, termination rights, maintenance obligations, and liability issues. The termination provision allowed either party to cancel the 1977 Agreement on three months' written notice. The 1977 Agreement was never submitted to the Interstate Commerce Commission ("ICC") for approval.

In 1995, BNSF elected to abandon its crossing diamond (again, without ICC authority) and access its Mooar Line via several sections of newly-constructed track and a new operation using a quarter-mile of KJRY's existing track, none of which received regulatory approval. BNSF's use of KJRY's track in order to access the Mooar Line was a result of voluntary negotiations between BNSF, KJRY, and Roquette America. KJRY was not required by any state or Federal agency or law to allow BNSF to use its tracks. BNSF's new Mooar Line access was thus accomplished as a result of a private agreement, which itself was a result of the normal give and take present in any business transaction. BNSF's new operations were documented in a Supplemental Agreement dated September 1, 1995 ("Supplemental Agreement"). Despite the opportunity to negotiate new cancellation provisions, BNSF elected to leave the three months' notice provision contained in the 1977 Agreement undisturbed.

BNSF initially sought ICC authority via a notice of exemption for a portion of its new operations on KJRY's track. *Burlington Northern Railroad Company; Trackage Rights Exemption; Keokuk Junction Railway*, 60 Fed. Reg. 50216 (1995). However, after consultation with KJRY, BNSF sought to withdraw its notice of exemption, telling the Board that BNSF has an "existing joint facility agreement in place at Keokuk covering the use of tracks by [BNSF]

and [KJRY] which never has been subject to STB regulation.” Petition to Withdraw Exemption, Finance Docket No. 32775, filed April 1, 1996, at 1. BNSF’s pronouncement of the absence of ICC/STB jurisdiction over its operation on KJRY paralleled a portion of the BNSF-KJRY March 13, 1996 Crossing Agreement, in which BNSF agreed that its right to use KJRY’s track in Keokuk is “in the nature of terminal crossing rights...not subject to the regulatory jurisdiction of the [STB].” Agreeing with BNSF’s assessment of the absence of need for regulatory approval of the Keokuk operations, the Board dismissed BNSF’s notice of exemption. *Burlington Northern Railroad Co. -- Trackage Rights Exemption -- Keokuk Junction Railway*, Finance Docket No. 32775 (STB served April 11, 1996).

After several years of operating under the referenced agreements, KJRY invoked its rights under the 1977 Agreement to give three months’ notice of its intent to cancel BNSF’s rights to use KJRY’s track. KJRY’s right to invoke the cancellation provision has not been contested in this or any other proceeding. In lieu of operating under the existing agreements, KJRY indicated its willingness to provide BNSF with switching or crossing rights under new terms. Ultimately, BNSF tendered its Mooar Line traffic via a switching arrangement pursuant to which KJRY attached a locomotive to a BNSF movement and piloted the cars (and any attached BNSF locomotives) across KJRY’s track. KJRY’s charge for the use of its crew, locomotive, tracks and property was \$85.00 per loaded car or locomotive (no charge was imposed for empties), a charge very much in line with prevailing intermediate switching charges in the Midwest and less than one-third of BNSF’s standard intermediate switching charge.

On April 28, 1999, BNSF commenced the instant proceeding. By Order served June 22, 2001 (“June 22 Order” or the “Order”), the Board chose to override the intent of the parties that BNSF’s operations were to be governed by a private agreement that was “not subject to the

regulatory jurisdiction of the STB.” Instead, the Board granted BNSF rights under 49 U.S.C. § 10901(d) to operate on KJRY’s track. In making this ruling, the Board essentially determined that once a railroad grants another railroad the right to use its property in a transaction deemed by both parties to be outside the Board’s jurisdiction, the Board nonetheless has the jurisdiction to compel the tenant’s continued operation on the track, despite both parties’ intent to make the rights cancelable. The parties were directed to negotiate appropriate compensation terms for BNSF’s forced access; turning a voluntary agreement into government mandated obligations. When the negotiations failed to produce an agreement, the parties were directed by the Board to brief all relevant issues pertaining to compensation.

Accordingly, at this stage of the proceeding, the issues that remain outstanding at the Board may be broken down into three distinct categories. First, the Board must determine what level of per car charge will be adequate to compensate KJRY for BNSF’s access to the Keokuk track. Second, the Board must deny BNSF any refund or rebate of the money paid to KJRY for switching BNSF’s traffic over KJRY’s tracks prior to the June 22 Order. Finally, the Board must determine what other operating terms (including liability provisions) should govern BNSF’s operations.

ARGUMENT

I. BNSF BEARS THE BURDEN OF ESTABLISHING REASONABLE COMPENSATION AND OTHER TERMS FOR USE OF KJRY’S TRACKS

When the Board has been called upon to set the terms for a forced crossing under Section 10901(d), it has determined that the party seeking the crossing bears the burden of proof to establish that the terms it proposes comport with the mandates of Section 10901(d). *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 August 11, 1995), at 3-4 ("*Superior*").

In its January 30, 2002 Order in this subdocket setting the current briefing schedule, the Board recognized that BNSF bears the burden of proof on these matters.

BNSF's burden of proof on the issue of compensation is two-fold. First, it must establish that the methodology it urges for calculating KJRY's compensation is appropriate, given the Constitutional taking manifested in Section 10901(d), the nature of its operations on KJRY's tracks, and the burden imposed on KJRY's operations as a result of BNSF's access to the Keokuk trackage. Second, once an appropriate methodology is determined, BNSF must establish that the terms it proposes under that methodology are fair and compensatory to KJRY. Although KJRY bears no burden of proof on these issues, it has nonetheless prepared a variety of comments going to both the appropriate methodology issue and the appropriate calculation under those methodologies. Clearly, KJRY will have more to say when it reviews what BNSF proposes on both points in its opening brief.

II. KJRY MUST BE FULLY COMPENSATED FOR BNSF'S OPERATIONS ON KJRY'S TRACKS

Currently pending before the Board is BNSF's request that the Board determine the appropriate level of compensation and other terms for BNSF's operation on KJRY's track. In ruling on this request, the Board is confronted with the fact that this proceeding is unique in STB and ICC annals. Never before, in the more than two decades that Section 10901(d) has existed, has the Board or the ICC ever used that statute to force one carrier to allow another carrier to operate on its tracks. At most, the statute has been invoked to force the imposition and subsequent use of a crossing diamond, or an overpass. Therefore, any precedent established under Section 10901(d) must be carefully examined to determine whether it is distinguishable on the basis that the operations imposed on KJRY here are far more onerous, and the benefits

provided to BNSF are far more advantageous, than have ever been found to exist under Section 10901(d). Indeed, because the June 22 Order issued by the STB was without precedent, the Board has conceded that this case presents issues of first impression.²

A. KJRY's Future Compensation Should Be Set At A Reasonable Intermediate Switching Rate For The Midwest

In determining what level of compensation KJRY should be paid for BNSF's access to KJRY's tracks at Keokuk, the Board should begin its analysis by considering the nature of the service that KJRY has been compelled to provide to BNSF. BNSF uses its new rights to connect otherwise disconnected segments of its track. Essentially, then, KJRY functions as a land bridge, facilitating connections for BNSF's trains from its main line to its (voluntarily) disconnected Mooar Line. This sort of connection is similar in virtually all respects to an intermediate switch of BNSF's cars, and it would therefore be appropriate for BNSF to compensate KJRY for its access at a rate commensurate with other intermediate switching rates in the Midwest.

Intermediate switching has long been an element of interstate rail transportation. More than 60 years ago, the Interstate Commerce Commission defined "intermediate switching" as:

[A] primary class of transportation switching service which includes all the elements of switching performed by a carrier which neither originates nor terminates the shipment nor performs a line haul on that shipment, the extent of the carrier's participation in the movement being only that of a connection between two other carriers.

Sioux City Terminal Ry. Switching, 241 I.C.C. 53, 90 (1940).

This seminal definition of intermediate switching is in line with earlier definitions of that same term. *See, e.g., Des Moines Union Ry. Switching*, 231 I.C.C. 631, 632 n.2 (1939)

("Intermediate switching is a kind of switching service which includes all the elements of

² "Joint Brief of Respondents Surface Transportation Board and United States of America," p. 2, dated February 14, 2002 in *Keokuk Junction Railway Co. v. Surface Transportation Board et al.*, Docket No. 01-1305, in the United States Court of Appeals for the District of Columbia Circuit.

switching performed by a carrier which neither originates nor terminates the shipment nor receives a line haul on that shipment.”); *Detroit Switching Charges*, 28 I.C.C. 494 (1913) (“The car may be transported by the switching road from a junction with one line to a junction with a second line. This is known as an intermediate switch and the switching line has nothing to do with the delivery of the car.”). In further discussing switching movements that included intermediate switching, the ICC held that such movements “need not satisfy a distance threshold, nor are they limited to train formation or other related classification activity.” *Association of P&C Dock Longshoremen v. The Pittsburgh & Conneaut Dock Company, et al.*, 8 I.C.C. 2d 280, 292 (1992). BNSF’s own Switching Book agrees with these definitions. See BNSF Switching Book 8005-A, Item 130, effective December 1, 2000 (“Intermediate switching - A switching movement of cars from the interchange tracks of one connecting carrier to the interchange tracks of another connecting carrier within the switching limits of the same station on which the switch carrier neither originates nor terminates the shipment nor receives a line haul.”).

KJRY’s role in the movement of BNSF’s cars between its main line and its Mooar Line squares with these definitions of intermediate switching. The cars at issue are transferred between two lines that do not otherwise connect. KJRY is not involved in the origination or termination of the cars. Nor does KJRY participate as a line-haul carrier in their movement. Instead, KJRY serves as the “connection” referenced in *Sioux City Terminal*, as BNSF would not otherwise have any method of directly transporting the cars to and from the Mooar Line. Likewise, as held in *P&C Dock*, the length of the haul on KJRY’s facilities is irrelevant to whether an intermediate switching service is being provided. The critical fact is that KJRY is used to connect lines that do not otherwise connect, in the role of an intermediary for BNSF’s traffic.

Although it is often true that an intermediate switching carrier is involved in actually handling the cars to be transferred between lines, that is not always the case. KJRY is aware of instances where railroads collect an intermediate switching charge without being directly involved in the actual movement of the cars. For example, about 150 miles from Keokuk, in Peoria, Illinois, the Peoria & Pekin Union Railway Company ("P&PU") operates a terminal railroad with connections to all of the major railroads serving Peoria, including CN, UP, BNSF, and NS. P&PU's operations include the intermediate switch of a coal train between BNSF and the Illinois & Midland Railroad ("I&M") during which BNSF leaves coal trains for I&M to pick up on P&PU's tracks for movement to a coal plant. P&PU never moves the trains themselves but nonetheless collects an intermediate switch charge. *See* Verified Statement of Catherine Busch, attached as Exhibit A, at 2. P&PU is also involved with another "handling free" intermediate switch, this time of a potash movement. *Id.* Thus, it is not necessary that a carrier actually participate in the movement of freight in order to collect an intermediate switching charge. All that is required is that the carrier's tracks be used to facilitate connections between otherwise disconnected rail lines.

Once it is established that KJRY should be compensated in line with standard intermediate switching charges, there is still the matter of determining an appropriate amount. The charges collected by railroads for intermediate switching service vary by the type of service provided, location, and other factors. However, it is clear that the previously-imposed charge of \$85.00 per car or locomotive charged by KJRY for BNSF's connection to and from its Moobar Line is well in line with (and usually far lower than) other intermediate switching charges prevailing in the Midwest. For example, BNSF's own intermediate switching charge across its system (other than in Chicago) is \$300.00 for both loaded and empty cars (BNSF Switching

Book 8005-A, Section 1, p. 34), over three and one-half times the amount so vigorously complained of in this proceeding by BNSF. Even BNSF's intra-terminal switching charges (charges that are generally lower than intermediate switching charges) for traffic at Keokuk, Iowa (ranging from a low of \$105.00 for movement of traffic to Roquette America's Commercial Warehouse to a high of \$435.00 for specified pig iron movements) all exceed KJRY's intermediate switch charge on BNSF's Keokuk movements. (BNSF Switching Book 8005-A, Section 1, pp. 94-95.) While BNSF would like to continue operating on KJRY's track at the very modest charge of less than 30 cents a car that had previously been agreed to between the parties, it is clear that BNSF's complaints about KJRY's \$85.00 switching fee are not justified when comparison is made to prevailing switching rates.

Moreover, KJRY's \$85.00 per car charge is not much different than those imposed by other railroads in the Midwest. For example, Norfolk Southern's standard intermediate switching charge fee is \$105.00 per car, loaded or empty (Freight Tariff NS 8001-A, effective March 1, 2000, Section 6, p. 183) with higher charges applying in such nearby locations as Chicago (\$242.00 per car) and East St. Louis (\$176.00 per car). CSX's standard intermediate switching charge is \$75.00 per car loaded or empty (CSXT 8100, effective July 27, 2001, p. IVB-3), but CSX also has many higher charges by exception, including a \$374.00 per car charge for certain traffic at Philadelphia. (CSXT 8100, p. IVB-4.) The flat rate for intermediate switching on the P&PU (including the movements previously referenced that P&PU does not actually handle) is \$77.00 per car, loaded or empty, and \$152.00 per locomotive. (PPU 8041-H, Item 400.)

As these charges indicate, the switching charge quoted by KJRY for BNSF's traffic at Keokuk (\$85.00 per car or locomotive) is not at all exceptional or extraordinary. Because BNSF

uses KJRY to connect otherwise disconnected portions of its rail system, an intermediate switching charge of \$85.00 per car would be the appropriate compensation for KJRY to receive from BNSF for traffic moving over KJRY's tracks at Keokuk. That amount, which is less than one-third of the intermediate switching fee imposed by BNSF as a default at many locations on its system, would adequately compensate KJRY and would compel BNSF to pay for the services it is using at a just and justifiable rate.

B. If KJRY Is Not Given An Intermediate Switching Rate, It Should Be Compensated For The Money Saved By BNSF In Operating Over KJRY's Tracks

As established above, BNSF's use of KJRY's facilities is most akin to an intermediate switching service between two disconnected rail lines, and KJRY is therefore entitled to be compensated in line with other intermediate switching carriers. However, KJRY is aware that this is a proceeding of first impression for the Board, and that therefore the Board may wish to consider a variety of potential methods of compensation before setting the precedent for its novel use of Section 10901(d). A secondary approach, which KJRY does not believe would fully compensate KJRY, involves setting the compensation paid to KJRY by estimating the cost savings that BNSF accrues by using KJRY's tracks and awarding those savings to KJRY. By setting compensation along these lines, the Board will not unfairly benefit BNSF at the expense of KJRY, and will establish a clear precedent should other railroads attempt to use Section 10901(d) as an offensive weapon, as BNSF has done in this case.

There can be little doubt that BNSF's operations over KJRY's tracks at Keokuk are saving BNSF very significant sums. In the absence of any method for BNSF to move the cars directly over KJRY's track, BNSF would have to interchange the cars to KJRY for movement to and from the Mooar Line. At a minimum, this operation would compel BNSF to station one

locomotive permanently on the Mooar Line (and possibly two locomotives, if BNSF's myriad complaints about getting up the grade just outside of Keokuk are to be believed (Verified Statement of David C. Wolter, p. 7, attached to BNSF's "Petition for Declaration or Prescription of Crossing, Trackage or Joint Use Rights and for Determination of Compensation and Other Terms," dated April 27, 1999)). The stationing of one or more locomotives on the Mooar Line is an expense BNSF saves through its current operations. Further, it is likely that BNSF would need an additional crew to operate the trains serving the Mooar Line. This crew is currently not needed because the same BNSF crew that operates trains into Keokuk can also handle service on the Mooar Line. Separate operation of BNSF's main line and Mooar Line trains would likely require the addition of another BNSF crew at Keokuk.

KJRY's claim for BNSF's savings should not be confused with the repeated requests made by BNSF's predecessor to be granted the profits secured by the party invoking Section 10901(d) in previous matters. In *Superior*, Burlington Northern Railroad ("BN") opposed construction by Chicago and North Western Railway Company ("C&NW") of a new line across BN's property to reach a coal transload facility served solely by BN. BN and C&NW also disagreed on the appropriate compensation BN should be paid. In setting the appropriate compensation (for a line which crossed over BN on a crossing diamond without need for C&NW to operate over BN's tracks), BN sought to be compensated on an annual basis for its "opportunity cost," described by the ICC as "the profit that C&NW will earn on the traffic it will haul" over the new track. Because BNSF's proposal was seen by the ICC as stifling competition by removing the incentive for parties to build new rail lines, BN's proposal was rejected. *Superior* at 4. Less than one year later, this Board rejected BN's efforts to claim a "variant" of its "opportunity cost" formula in *Omaha Public Power District -- Petition Under 49 U.S.C.*

§ 10901(d), Finance Docket No. 32630 (Sub-No. 1), Slip op. (STB served August 1, 1996) (“*Ohama*”). By contrast, this method does not award the profits BNSF will reap from traffic taken to and from Mooar Line shippers, but rather seeks only to transfer the expenses BNSF saves by not using duplicate crews and power to serve that traffic. These savings are entirely attributable to BNSF’s operations over KJRY’s tracks, and therefore they constitute one potential measure of compensation (although not a measure favored by KJRY).

Unfortunately, KJRY is not currently in possession of the information necessary for it to make any sort of reasonable estimate of the expenses saved by BNSF through its use of KJRY’s tracks. As a Class III carrier, KJRY’s cost structure is far different than BNSF’s, and so simple comparisons of crew expense and locomotive costs would be meaningless. Therefore, KJRY proposes that if the Board agrees with this approach, it should order BNSF to file a summary report of its costs savings, allow KJRY to undertake discovery to verify BNSF’s estimates, and then allow KJRY to file its proposed cost savings based upon BNSF’s evidence and discovery.

In summary, there is little doubt that BNSF is realizing significant savings through its operations over KJRY’s facilities at Keokuk. As a result, it may be appropriate for the Board to consider awarding all expenses saved by BNSF in its operations on KJRY’s tracks, as compared to alternative means of serving the Mooar Line customers.

C. The Traditional Compensation Methods Imposed In Section 10901(d) Proceedings Must Give Way To A Method That Recognizes The Unique Factual Circumstance Of This Proceeding

1. *Superior and Omaha* Are Inappropriate In These Circumstances

As previously mentioned, the Board has stated that this case presents issues of first impression, and for this reason KJRY believes that the Board must approach the novel relief granted to BNSF with a fresh review of appropriate compensation. The Board’s traditional

approach to compensation in Section 10901(d) cases, originally established in *Superior*, clearly has no application under the unique factual circumstances of this dispute.

The first substantive discussion of the appropriate measure of compensation under Section 10901(d) was set forth in *Superior*. In that proceeding, the ICC considered various compensation proposals before accepting the constructing carrier's argument that the appropriate compensation for the crossed carrier would be "the fair market value of the rail property taken by the crossing carrier." *Superior* at 7. Asserting that such a measure of compensation "comports with the minimum value guaranteed by the taking clause of the Constitution," *Id.*, the ICC ordered C&NW to compensate BN only for the value of land which it was taking for construction of its new line (with application of a 95% easement factor to account for BN's reversionary interest in the property), plus the diminished value of any adjacent parcels owned by BN, if such diminished value could be established. This same standard was used by the Board (again over BN's claim that compensation should be based on a measure of lost profits) in *Omaha*.

The compensation standard adopted in *Superior* and *Omaha* has no application to the current factual setting. In both of those proceedings, the constructing party intended to conduct operations on its own (newly-constructed) track, using a crossing diamond to cross over the incumbent's existing track. Here, by contrast, BNSF is actually operating on a quarter-mile of KJRY's existing yard track, track that is used by KJRY for terminal switching operations. *Superior* and *Omaha* did not contemplate and were not designed for use in terminal trackage rights operations. Indeed, BNSF's operations impose very real costs on KJRY (including capital and maintenance expenses for track and seven switches) that are not present when carriers

merely operate over a crossing diamond that they themselves installed and maintain. *Superior* also provides no measure for return on KJRY's investment in track and other track materials.

The ICC's decision in *Superior* recognizes that the compensation standard announced therein might have no application to a situation such as the current facts:

We do not reach the question of whether BN should receive opportunity costs for the use of its property by C&NW because C&NW is not proposing to use BN's facilities. C&NW will use its own track, which it is building, to serve the MERC plant.

Superior at 9. Here, BNSF is not using its own tracks and is not using a crossing diamond, but is using KJRY's facilities. All of these factors make the use of *Superior* and *Omaha* inappropriate in this situation.

2. *SSW Compensation And A&M Bridge*

Under the current facts, BNSF is using KJRY's track and therefore a different measure of compensation must be considered. Because BNSF actually operates on and over KJRY's track, its operations are similar to standard trackage rights.³ Indeed, although the legal maneuvering through which BNSF gained its forced access to KJRY's tracks is far different than a typical trackage rights scenario, the operational result is the same: BNSF, using its own power and crews, enters KJRY's tracks and operates over them to reach the Mooar Line. In this sense, *SSW Compensation*, as modified in *A&M Bridge*, provide a useful analogy.⁴

In one very real sense, however, adoption of the *SSW Compensation/A&M Bridge* standard of compensation will fail to fully compensate KJRY in this proceeding. In cases such

³ BNSF's operations actually constitute terminal trackage rights and thus pursuant to Section 10906 are not subject to the Board's prior approval requirements contained in Section 11323(a)(6).

⁴ *St. Louis S.W. Ry. Compensation -- Trackage Rights*, 4 I.C.C.2d 668 (1988); 5 I.C.C.2d 525 (1989); 8 I.C.C.2d 80 (1991); 8 I.C.C.2d 213 (1991) ("*SSW Compensation*") and *Arkansas & Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C.2d 619, 621-622 (1990) ("*A&M Bridge*").

as *SSW Compensation*, where trackage rights were imposed on merging carriers to accommodate potential diminutions in competition, or in *A&M Bridge*, where the parties disputed the compensation due for the tenant's continued use of the bridge, the owner railroad had the ability to "opt out" of the trackage rights arrangement, either by refusing to consummate the permissive merger authority based on the trackage rights condition or by canceling the agreement pursuant to which the tenant operated on the owner's tracks and obtaining discontinuance authority. Thus, at least some measure of autonomy was retained by the owner. In this instance, KJRY is not free to rid itself of BNSF presence on its tracks (although that very remedy was previously negotiated by the parties), and if some arm's length arrangement could have been reached by the parties to satisfy KJRY with BNSF's continued presence on its tracks, it would have been reached long before KJRY incurred very real and (for it) very significant legal expenses litigating this matter before the Board and the appellate court. KJRY is thus in a worse position than the owners in *SSW Compensation* and *A&M Bridge* because it has no "opt out" option. It is for this reason that KJRY believes that an intermediate switch charge is the most appropriate charge to apply to BNSF's continued use of KJRY's property.

Nonetheless, KJRY has retained Richard Lane of Gohmann & Associates to calculate the amount of compensation due to KJRY if the Board were to adopt the *SSW Compensation/A&M Bridge* methodology. See Exhibit B, Verified Statement of Richard J. Lane, for a more expansive discussion of the compensation elements summarized below. The formula for compensating parties under *SSW Compensation* and *A&M Bridge* is relative straight-forward, amounting to the sum of three components:

- Variable cost incurred by owner due to tenant's use;
- Tenant's pro-rata share of maintenance and operating expense (track maintenance, property taxes, etc.); and
- Interest or rental component for use of capital invested in track.

Each of these three components represents a distinct cost to the landlord railroad for allowing the operation of the tenant on its tracks. The “variable costs incurred by the owner” is nothing more than a tally of expenses that the landlord would avoid but for the presence of the tenant, such as switching costs and mechanical services. These avoidable costs are clearly the responsibility of the tenant, because by definition they are incurred only because of its operations. The second element of the calculation (“pro-rata maintenance and operating expense”) is also easily calculable on a car-mile basis, and represents the fact that certain costs may not be directly attributable to any operator on the track, but are nonetheless borne by the owner as a result of use of the track and should be shared by the tenant. Finally, the interest or rental component represents the return on investment that any owner expects from the application of scarce capital. It is appropriate to make the tenant railroad pay a return on the owner’s investment because in the absence of such payment, the tenant benefits from the owner’s investment in facilities without having to invest any capital in such facilities itself. Together, the three elements that comprise the *SSW Compensation/A&M Bridge* standard for compensation are designed to put the owner and tenant railroads on an equal footing with regard to the use of the owner’s facilities. *Western Coal Traffic League v. STB*, 169 F.3d 775, 788 (D.C. Cir. 1999).

Consistent with the approach mentioned above, Mr. Lane began his analysis by calculating the value of KJRY’s track structure used by BNSF in accessing its Mooar Line. In addition to valuing the total track structure, Mr. Lane also valued the property used by BNSF. Based upon his estimates, the total value of the track structure and property used by BNSF is \$32,000.00 (tie value) plus \$93,000.00 (turnout value) plus \$15,800.00 (rail and OTM value) plus \$38,100.00 (ballast value) plus \$45,800.00 (land value), for a grand total of \$224,700.00.

Mr. Lane next undertook to determine the rate of return appropriate for the \$224,700.00 that KJRY has invested in track structure and property. Using a pre-tax nominal cost of capital of 15.4%, Mr. Lane determined that the return on KJRY's investment should be \$34,604.00 annually. Additionally, working with KJRY's system average maintenance expense of \$5,479.00 per mile and conservatively estimating that 1,430 feet of track that includes seven turnouts would require at least double that amount per linear foot, he estimated the total maintenance expense for the track used by BNSF at \$2,970.00.

Mr. Lane then needed to determine usage percentages for BNSF and KJRY on the applicable track. This calculation was not as simple as it may appear, because KJRY only uses a portion of the track used by BNSF. Estimating that KJRY uses approximately one-half (714 feet) of the track used by BNSF, Mr. Lane then took the average number of BNSF cars on the line per day (13 loads) and the average number of KJRY cars on the (portion of the) line per day (50 cars) to estimate percentage usages at 34.21% for BNSF and 65.79% for KJRY. Applying BNSF's percentage to the return on investment figure (\$34,604.00) and to the annual maintenance figure (\$2,970.00) yields BNSF's total responsibility under the *SSW Compensation/A&M Bridge* methodology of \$12,854.00 per year, or \$3.96 per car.

KJRY has been unflinchingly conservative in calculating the figure of \$3.96 per car for BNSF's usage of its track. That figure includes no estimate of the administrative time spent by KJRY in coordinating BNSF's use of the track, billing BNSF for its operations, etc. Nor does it include any claim for interference with KJRY's operations (a subject KJRY remains free to present to the Board at any time in the future, depending upon the level of interference presented by BNSF's prescribed rights). KJRY has attempted to value the rights as conservatively as possible, to eliminate any possibility for protracted disputes over the elements used in KJRY's

calculations. Thus, KJRY's calculation of \$3.96 per car presents an absolute floor or minimum expense incurred by KJRY for BNSF's intrusion onto its facilities. KJRY does not believe, however, that the Board should use the *SSW Compensation/A&M Bridge* approach. Instead, in this "case of first impression," the Board should establish a measure of reparations that would more accurately represent both the arm's length rate for the service provided by KJRY and the compelled nature of BNSF's operations (i.e., an intermediate switching charge).

III. BNSF IS DUE NO REIMBURSEMENT OR REFUND

Although it did not seek any refund in its initial pleading in this matter, BNSF has indicated in a subsequent pleading that it expects to be accorded a refund of some portion of the money it paid to KJRY as compensation for KJRY's switching services between March 1, 1999 (when BNSF's contractual right to use KJRY's tracks expired) and June 22, 2001 (the service date of the Board's Order). BNSF has not presented any valid basis for a refund. The money BNSF paid to KJRY for switching services was entirely reasonable and appropriate under the circumstances. BNSF has given the Board no reason to conclude otherwise.

A. A Refund Would Be Improper As BNSF's Rights to Cross Did Not Mature Until the Board's June 22, 2001 Order Was Entered

Any discussion of a refund for BNSF implicitly assumes that BNSF had rights under Section 10901(d) to cross KJRY's tracks prior to the Board's June 22 Order granting such rights, notwithstanding the fact that BNSF's crossing and subsequent trackage operations were the product of a privately negotiated agreement for over a hundred years. While it may be, as the Board's decision held, that a carrier can invoke Section 10901(d) to operate over another carrier's tracks to effectuate a crossing, BNSF never operated under that assumption nor did KJRY grant BNSF operating rights pursuant to that statute. Indeed, it was not until the Board's Order that BNSF's operations converted from a private right to a statutory right. The Board

cannot now retroactively apply the compensation rate applicable to BNSF's statutory right to cross to BNSF's past crossing or to the subsequent intermediate switching operation when those operations were subject to private agreements and not regulations.⁵

As the Board itself admits in its Appellee brief, its use of Section 10901(d) to impose BNSF's operations on KJRY was a case of "first impression" and a new and novel interpretation of a decades-old statute. Because the right to operate over the tracks of another railroad under Section 10901(d) (as opposed to simply "cross" via a crossing diamond) did not exist (and indeed had never even been suggested by anyone, at any time), BNSF's crossing rights did not arise until the Board expanded the scope of Section 10901(d) on June 22, 2001. Prior to the Board's Order, the Board and its predecessor had never found that any railroad could operate over the tracks of another pursuant to Section 10901(d), other than over a simple crossing diamond or overpass. KJRY's investigation of the history of proceedings involving that statute indicates that not only had no carrier received operating rights over another carrier pursuant to Section 10901(d), but no party to any proceeding had ever even suggested that the statute could be invoked in such a manner.

⁵ Ever since the Board's June 22 Order, KJRY has allowed BNSF to operate over its tracks under the terms of the previous operating and crossing agreement and indeed, BNSF has not paid any compensation for such use, even though it was directed to do so by the June 22 Order. BNSF's operations, however, are only on the condition that such consent by KJRY did not prejudice its right to obtain a higher compensation and different terms. Indeed, the Board recognized that KJRY's rights were not prejudiced as a result of its consent to allow BNSF to operate over its tracks pending mediation and any further Board orders. *The Burlington Northern and Santa Fe Railway Company -- Petition for Determination of Compensation and Other Terms*, Finance Docket No. 33740 (Sub-No. 1) Slip Op. (STB served September 12, 2001). To be clear, however, KJRY has never agreed to apply whatever future compensation level is eventually imposed to BNSF's operations prior to the Board's Order. KJRY does not take issue, however, with the Board's right to apply the prescribed compensation level to operations that occurred after the Board's Order. KJRY only takes issue with BNSF's request to apply that rate to operations between the date of cancellation of the agreement and the Board's June 22, 2002 Order.

As a result, the Board's June 22 Order represents more than a grant of BNSF's rights. It represents a change in the law. Prior to that date, no statute, regulation, or precedent even hinted at the bold expansion of the law set out in the June 22 Order. Parties clearly felt that Section 10901(d) was an effective tool to construct new tracks, and the statute was invoked for that purpose at least a dozen times, but until the Board affirmatively held that Section 10901(d) could also be used to secure operating rights over the tracks of another carrier, the statute was limited to the more narrow setting for which it was known, i.e., to facilitate railroad construction and new entry.

The fact that parties had no right to use Section 10901(d) for operations on other carriers before June 22, 2001 is also manifested in the docket of this case. As the record reflects, the Board's Order of August 31, 1999 required the parties to file both opening and rebuttal arguments concerning the reasonableness of KJRY's interchange efforts. Both KJRY and BNSF engaged in this costly and time-consuming exercise. However, when the Board's judgment was issued (more than twenty months later), none of the evidence contained in the "interchange" filings was cited. In fact, it is unclear why those filings were required by the Board, as the reasonableness of KJRY's interchange (a fact conclusively established by KJRY) played no part in the Board's final determination. If in fact BNSF had statutory rights to cross KJRY's track prior to June 22, 2001, there would simply have been no need to require the parties to engage in this drafting exercise. The Board could have found BNSF to hold rights under Section 10901(d) (as BNSF requested in its original petition) without the need for these tangential filings. The only conclusion to be reached from the Board's diversion into interchange issues is that the Board itself must have, at some point, believed that KJRY had a right to establish interchange operations and that the only issue was whether such operations were reasonable. The fact that

the June 22, 2001 Order didn't even mention this issue and instead granted BNSF rights under Section 10901(d) indicates that the Board knew that it was creating new rights previously unknown to common carrier railroads.

The implications of the Board's decision to BNSF's suggestion of a refund are obvious. A refund would only be owed if BNSF had been operating under governmental approval, as is the case with trackage rights subject to Section 11323(a)(b), but no refund is due if BNSF had no statutory right to "cross" KJRY's track until the Board's June 22 Order. By way of analogy, in a normal trackage rights situation, the parties enter into a trackage right agreement that, as in this case, generally contains a termination provision. The parties then obtain regulatory approval for that agreement before operations can begin. Later, even if the burdened carrier (the landlord) terminates the trackage rights operations pursuant to the termination provision and desires to "kick off" the tenant railroad, the tenant is still allowed to continue the trackage rights operations until discontinuance authority (or adverse discontinuance) is granted, notwithstanding the provisions in the earlier approved trackage rights agreement that allowed the parties to terminate the agreement and operations. *Thompson v. Texas Mexican Railway Company*, 328 U.S. 133, 144-45 (1946); *Arkansas & Missouri Railroad Company v. Missouri Pacific Railroad Company*, 6 I.C.C. 2d 619 (1990). Indeed, even after a trackage rights agreement expires, the Board can impose continued operations by the tenant railroad, including compensation and other terms. In such situations, the Board has retroactively applied the new compensation and terms to the date that the trackage rights agreement expired. *Mexrail, Inc. v. Union Pacific Railroad Company and Missouri Pacific Railroad Company*, Finance Docket No. 32980 (STB served July 13, 2000); *See also A&M*.

However, the Board has never retroactively applied the new trackage rights rate to operations that occurred before the agreement expired or to operations that may have occurred prior to governmental approval of the operations. Here, the crucial difference between the trackage rights situation and the current situation is the fact that in the trackage rights situation, the trackage rights were always subject to government approval and regulation and the parties knew full well that the operations could not later be terminated without government regulation, even in the light of termination provisions contained in such trackage rights agreements. In the present situation, the “crossing” had never been subject to government regulation or approval and was always governed by a private agreement. Furthermore, no party to this proceeding had ever argued that the agreement required government approval before parties could terminate it and its operations, unlike the trackage rights situation. In other words, there was no “*Tex Mex* doctrine” for “crossing” operations or terminal trackage rights operations subject to Section 10906 or Section 10901(d). Given the state of the law, KJRY could never have foreseen that the agency would impose BNSF’s operations under Section 10901(d) and then, as BNSF attempts to do, apply whatever future compensation is imposed back to the day the private agreement expired. Viewed in this light, the only logical conclusion is that BNSF’s rights did not arise until the Board extended the scope of Section 10901(d) on June 22, 2001. Therefore, because BNSF was not operating over KJRY’s track pursuant to a statutory right or governmental authority prior to the Board’s Order, no refund is owed from KJRY.

B. The Board’s June 22, 2001 Order Does Not Support The Grant Of A Refund

In conjunction with the “expansion of law” established by the Board’s June 22 Order and discussed in Section II.B. *infra*, the actual language used by the Board in its June 22 Order makes clear that no refund is due BNSF in this proceeding. Again, any refund would be premised on

the notion that BNSF's rights to use KJRY's tracks pre-dated the June 22 Order. The plain language of that Order makes clear that prior to its effective date, BNSF had no such rights.

The Board's Order firmly establishes that the rights received by BNSF to use KJRY's tracks arose in that Order, and did not exist prior to that Order. In particular, two passages from the Order make clear that it did more than declare rights, it established them. Most clearly, on the first page of the Order, the Board stated "we conclude that BNSF has crossing rights under 49 U.S.C. 10901(d) to access its Moobar Line via the involved KJRY in Keokuk and we grant the carrier that authority" (emphasis added). Use of the word "grant" by the Board is critical because it establishes that the Order bestowed upon BNSF the right to use KJRY's tracks, a right that could not exist prior to the "grant" of such rights. If BNSF's rights under Section 10901(d) existed at some point prior to the service of the Board's Order, there would be no need for the Board to "grant" anything. The Board's grant of authority on June 22, 2001 makes clear that prior to that date, BNSF had no rights to operate on KJRY's tracks pursuant to Section 10901(d).

Black's Law Dictionary defines "grant" as follows: "To bestow, to confer upon some one other than the person or entity which makes the grant...To give a permit as a right of privilege; e.g., grant of route authority to a public carrier." Black's Law Dictionary, 629-30 (5th ed. 1979). The Board's use of the term "grant" in this context can only mean that until the date of the Board's June 22, 2001 Order, BNSF had no statutory right to operate over KJRY's trackage for the period between termination of the private agreement and the "grant" of the statutory right. Because prior to the Board's Order, BNSF's operations were governed by a private agreement or intermediate switch, no refund can be required.

A second passage of the Order also makes clear that BNSF's right to operate on KJRY's facilities did not arise until after issuance of the Order. Just prior to entering its findings, the

Board stated: "...[w]e will order KJRY to continue to allow BNSF to cross KJRY's line in order to serve shippers on the Mooar Line." Order at 8. This statement makes clear that prior to issuance of the Order, KJRY was not required to allow BNSF to use its tracks.⁶ It was only the command of the Board (an event that did not occur until the "Findings" portion of the Order, as indicated by the fact that the quoted passage states "will order") that imposed the duty under 10901(d) on KJRY to make its tracks available to BNSF. No refund can be required where no right to use the tracks was possessed.

The omission of certain language from the Order also makes clear that BNSF did not have rights to operate on KJRY prior to issuance of the Order. The Order nowhere states that the rights granted to BNSF were made effective "nunc pro tunc" to any particular date. The Latin phrase "nunc pro tunc" means "now for then," and is used to describe a situation where a certain action is found to have effect on a date earlier than the date on which the action is recognized or imposed. *Fiero v. Reno*, 217 F.3d 1, 4-5 (1st Cir. 2000); *Black's Law Dictionary*, 964 (5th ed. 1979). Although both the Board (*Brotherhood of Maintenance of Way Employees et al. v. Soo Line Railroad Company, et al.*, Finance Docket No. 32964 (Sub-No. 1), Slip. op. (STB served December 22, 2998)) and the ICC before it (*Canadian Pac. Ltd. et al. -- Trackage Rights -- Consolidated Rail Corp. et al.*, Finance Docket No. 31700, Slip op. (I.C.C. decided March 6, 1991) have issued orders nunc pro tunc in appropriate circumstances, no such finding was made here, nor was one requested by BNSF. In the absence of a nunc pro tunc finding, there is no "relation back" of the rights granted in the Order to the date that KJRY cancelled the agreement

⁶ Although the Board's use of the word "continue" in the cited sentence might be read to imply that BNSF's prior use of KJRY's tracks was pursuant to Section 10901(d), such a reading would be at odds with both the "grant" language cited earlier and with the historical fact that BNSF was not operating on KJRY's tracks at the time the Order was served. "Continue" in this context can therefore only refer to a continuation of operations previously governed by contract, but now prescribed by Section 10901(d).

and instituted intermediate switch operations. Moreover, the Order contains no finding of any particular date on which BNSF's rights allegedly arose. In fact, because BNSF had never invoked Section 10901(d) before the Order, such rights could never have arisen while the private agreement was in place. They arose, if at all, only after the contract was cancelled and the Board granted such rights pursuant to its Order. The absence of such a finding is consistent with the fact that the rights did not arise until the Order was issued. No refund can therefore be issued because the rights granted in the Order were not "back dated."

C. It Would Be Inequitable To Grant BNSF
A Refund Under These Circumstances

In order to understand why no refund can equitably be allowed in this subdocket, the Board must consider the situation presented to KJRY on March 1, 1999. As of that date, BNSF's contractual rights to use KJRY's tracks had been terminated by KJRY, an action of which BNSF does not complain. In other words, BNSF was without contractual claim of right to use KJRY's tracks. In addition, as BNSF had contracted for rights over KJRY's tracks without securing STB authority or an exemption therefrom, BNSF had no regulatory claim of right to use KJRY's facilities. Finally, no state or Federal law had ever been interpreted in a way that would allow BNSF any claim of right to operate on KJRY. Thus, as of March 1, 1999, KJRY was faced with a situation where its tracks connected two disconnected BNSF lines. KJRY clearly had an obligation to interchange traffic moving between those two portions of BNSF's tracks, but there was simply no claim, under any contract, statute, regulation or precedent, that would give BNSF any greater right than as a connecting carrier.

In light of this circumstance, it is instructive to note how KJRY handled its obligation to interchange cars. If one is to believe BNSF, KJRY, a small Class III carrier, exerted enormous leverage over it, luring BNSF into signing a cancelable contract, then snatching BNSF's

operating rights from under it, only to extract huge sums from BNSF while damaging shipper service. The record flatly belies each of these points. KJRY could have conducted what BNSF might think of as a "normal" interchange, allowing BNSF to deposit cars on an interchange track, to be moved to the other end of KJRY's yard tracks when KJRY's crews got around to it, and then interchanged back to BNSF at the Mooar Line. Such an interchange would normally not involve the movement of BNSF's locomotives, unless locomotives were a part of the consist that was moving as freight to be delivered. An interchange under these circumstances would then require BNSF to await delivery of cars to or from the Mooar Line, at which time BNSF would reconnect its locomotive, fill the trains' brake line with air and perform all necessary brake tests, and then proceed with the cars. KJRY would have also been entitled to receive a division of the line haul.

KJRY, of course, did not impose this "normal" interchange on BNSF. Instead, KJRY allowed BNSF to leave its operating locomotives on the cut of cars, with the crews still manning the locomotives, thereby saving BNSF the uncoupling and coupling time and the delay associated with air brakes. KJRY promptly responded to BNSF's requests for movements across KJRY's tracks, not letting BNSF wait for hours or even days, as often occurs with "normal" interchange. KJRY promptly instituted the equivalent of an intermediate switch and moved BNSF's cars across the intervening portion of KJRY's tracks; changing a minimal \$85.00 switch charge where BNSF was charging up to \$300.00 for a similar service at nearby locations.

BNSF may indeed be disappointed that it was not allowed to continue its subsidized ride across KJRY's tracks, as had occurred under the 1977 Agreement and its amendments. But BNSF had no right to continue that operation, and KJRY did everything reasonable to accommodate BNSF's access to its Mooar Line. Moreover, unlike BNSF, KJRY is a very small

railroad, operating less than one five-hundredth of the track miles operated by BNSF. The money collected by KJRY for movement of BNSF's daily interchange at Keokuk (approximately \$650,000.00) has already been invested in other areas of the railroad. A refund of the money collected by KJRY under such circumstances would work a substantial injustice to and hardship on KJRY and its shippers. KJRY is a small carrier and cannot simply refund over \$650,000.00 when it has already used those dollars in its operations and capital programs.

To require a refund now, when KJRY had no warning or knowledge that it may have to pay such a sum back, would be fundamentally unjust. KJRY did nothing more than exercise a right to cancel an operating agreement, then provide prompt switching services at a reasonable intermediate switching rate. Indeed, when BNSF petitioned the Board, it requested the Board to issue an "emergency order" preventing KJRY from barring BNSF from KJRY's tracks. The Board issued no such emergency order nor did any court, agency, or other forum. Indeed, the Board's Order was not issued for approximately two years. During this period and because the Board had not ordered KJRY to stop collecting the \$85 charge, KJRY had no reason to believe that it might someday be required to refund the fee to BNSF. To force KJRY to pay back the money collected for its services under these circumstances is not called for on these facts and would be contrary to the principle of detrimental reliance, which provides equitable relief for a party that prejudicially changed its position based upon the actions or inactions of another. 28 Am.Jur.2d *Estoppel and Waiver* § 78 at 717 (1966); *Kelley v. Maine Eye Care Associates, P.A.*, 37 F.Supp.2d 47, 53 (D. Maine 1999). In this instance, BNSF gave no indication that it would seek a refund of money paid to KJRY until the filing of its petition in this subdocket in July of 2001. KJRY, therefore, did not sequester the funds collected from BNSF, but rather applied those funds to badly-needed capital and other projects. KJRY also reasonably relied upon the

fact that the STB and its predecessor had never before granted relief under the circumstances presented by this case, and the fact that the Board did not accede to BNSF's request for prompt action, but rather waited over two years before determining that BNSF's claims merited relief. Therefore, KJRY can hardly be blamed for assuming that the \$85.00 per car charge would be its to keep, and it would violate established principles of equity to compel KJRY to repay that money now.

D. Precedent Establishes That The Board
Cannot Retroactively Apply Any New Rate
To Operations Before The Order

Any attempt by the Board to apply its expanded interpretation of Section 10901(d) to rail operations taking place before June 22, 2001 would constitute an impermissible retroactive application of the law. Although under certain select circumstances an agency's interpretation of a statute may be given retroactive effect, retroactivity is not favored in the law (*Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)), and "the power to require readjustments for the past is drastic. It...ought not to be extended so as to permit unreasonably harsh action without very plain words." *Brimstone Railroad & Canal Co. v. U.S.*, 276 U.S. 104, 122 (1928). Certainly requiring a small railroad such as KJRY to pay back almost \$650,000 would be an "unreasonably harsh action" that KJRY never could have foreseen.

KJRY's switching of BNSF's cars was entirely reasonable and appropriate under the law as it had been interpreted by the ICC and the STB prior to March 21, 2001. Under such circumstances, a "carrier may not be penalized for actions consistent with the regulatory body's expressions...The carrier may not be made retroactively liable." *Cap On Mileage Allowances For Use Of Privately Owned Tank Cars*, Docket No. 39909, Slip op. (ICC served February 9, 1987).

Moreover, the Board has given recognition to the ICC's policy that "compensation awards should be applied retroactively to the effective date of the order requiring access." *Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(A) -- Order To Require Service And Set Compensation Terms*, Finance Docket No. 32911, Slip op. (STB served April 30, 1996). *See also Application of the National Railroad Passenger Corp. Under 49 U.S.C. § 24308(A) -- Union Pacific Railroad Company et al.*, Finance Docket No. 33469, Slip op. (STB served Sept. 30, 1997). In this instance, BNSF's access to KJRY's tracks was not secured until June 22, 2001, the date the Board granted new rights under Section 10901(d). It would therefore be impermissible to apply any reimbursement formula prior to June 22, 2001.

E. If A Refund Is Due, Its Measure Should Be An Intermediate Switching Rate

As the above discussion makes clear, no credible claim for a refund can possibly be established on this record. Nevertheless, if despite the record and the law, the Board is inclined to calculate a refund of some portion of the money paid by BNSF to KJRY for its switching services provided between March 1, 1999 and June 22, 2001, the appropriate measure of the refund should take into account the train movement services provided by KJRY's for BNSF's movements across KJRY's track. Because such movements most closely resembled an intermediate switching operation, prevailing rates for intermediate switching moves would be a suitable measure for a reasonable fee for KJRY's services. KJRY therefore requests that if any refund is owed BNSF, that refund should be calculated as the difference between KJRY's \$85.00 per car charge and a reasonable intermediate switching charge for Midwestern rail operations.

KJRY has previously established that its transport of BNSF's cars and locomotive(s) across the KJRY yard tracks fits all of the relevant parameters of intermediate switching. The cars at issue were moved from one connection on KJRY's system to another, by a railroad

that neither originated nor terminated the traffic. KJRY has also established that the \$85.00 per car charge it collected for its services was entirely in line with other intermediate switching fees prevailing in the Midwest, and is in fact less than one-third of the intermediate switching fee routinely imposed by BNSF on other carriers seeking its intermediate switching services.

Although BNSF has complained about the level of KJRY's charge, in fact the evidence shows that the charge was entirely reasonable and comparable with the intermediate switching fees charged by other carriers. BNSF's argument rings hollow when compared to other intermediate switch charges of Class I carriers, including BNSF's own \$300 charge.

In light of this evidence, if the Board determines to award BNSF some measure of a refund, the refund should be calculated as the existing \$85.00 charge, less the amount determined by the Board to be a reasonable switching fee. If, as KJRY strongly believes, the \$85.00 charge is in fact a reasonable intermediate switching fee, then the amount of the refund should be calculated as \$0.00.⁷

IV. NON-COMPENSATION ISSUES SHOULD ALSO BE ADDRESSED

A. BNSF and KJRY Should Be Accorded A Short Period To Negotiate Non-Compensation Terms

In addition to the rate issues outlined above, the Board must also determine the remaining terms of an appropriate operating agreement for BNSF's use of KJRY's facilities. In order to

⁷ The Board cannot simply subtract whatever amount the Board sets for BNSF's future operations over KJRY's tracks from the \$85.00 switching fee collected by KJRY because such a method would not compensate KJRY for the real costs it incurred in moving BNSF's cars and locomotives. It is undisputed that KJRY incurred very real expenses in moving BNSF's Moovar Line trains over KJRY's tracks. It is appropriate that KJRY be compensated for its services. Furthermore, because BNSF's operations at present, which involves moving the Moovar Line traffic under BNSF power, are far different than the operations that existed between March 1, 1999 and June 22, 2001, the Board cannot simply use its prescribed rate as the appropriate rate to apply during this period.

assist the Board, KJRY has drafted a proposed operating agreement, and attached a copy of that agreement to this brief as Exhibit C.

Virtually all of the negotiations that have taken place between KJRY and BNSF regarding BNSF's use of KJRY's tracks have (including those undertaken pursuant to the Board's mediation session) involved the compensation to be paid to KJRY and the demand by BNSF for a complete refund. Clearly, the non-compensation terms of the agreement will also be of great importance to both KJRY and BNSF. However, to date, no significant opportunity has been presented for discussion or resolution of these issues.

KJRY believes that given the opportunity, it can come to an agreement with BNSF on all, or virtually all, of the non-compensation terms. Although there is by no means a "standard" operating or trackage rights agreement, such agreements do tend to contain similar provisions. Identification and resolution of these issues would narrow the number of remaining items for Board determination, and would be consistent with the Board's oft-stated preference for the private resolution of disputes. *See Arbitration -- Various Matters Relating To Its Use As An Effective Means Of Resolving Disputes That Are Subject To The Board's Jurisdiction*, Ex Parte No. 586, Slip op. (STB served October 26, 2001); *CSX Corp. and Norfolk Southern Corp. et al. -- Control And Operating Leases/Agreement -- Consolidated Rail Corp. et al.*, Finance Docket No. 33389 (Sub-No. 69), Decision No. 133, Slip op. (STB served November 4, 1999) (withholding action to determine certain trackage use conditions and recognizing that "cooperation among carriers is particularly critical in situations such as this one, where track and terminal facilities must be shared.").

Therefore, KJRY requests that the Board grant the parties thirty days to resolve all non-compensation terms for the operating agreement. The parties can return to the Board after the

completion of the thirty day period for resolution of all unresolved non-compensation terms. Pending agreement of such terms, KJRY is willing to accept the terms that previously governed BNSF's agreed use of KJRY's tracks, without concession that such terms are appropriate given the changed nature of BNSF's rights to use KJRY's facilities.

B. Any Operating Agreement Must Contain Certain Key Provisions

Several principles must govern any operating agreement adopted in this proceeding. Foremost, BNSF must provide full and complete indemnity (including defense) to KJRY for any costs, expenses and/or liabilities KJRY incurs as a result of BNSF's presence on KJRY's tracks, as set out more fully in the attached agreement. BNSF is not operating on KJRY's facilities through KJRY's acquiescence, and its presence certainly provides no benefit to KJRY. Therefore, KJRY should not be forced to subsidize BNSF's presence on the tracks by assuming some risk of liability arising from BNSF's operations. Under such circumstances, BNSF should provide complete indemnity to KJRY. *Application of the National Rail Passenger Corp. Under 49 U.S.C. § 24309(A) -- Springfield Terminal Ry. Co. et al.*, Finance Docket No. 33381, Slip op. (STB served May 29, 1998). Full and complete indemnity for KJRY is especially appropriate given KJRY's relatively small size. *Amtrak and Wisconsin Central Ltd. -- Use of Tracks and Facilities and Establishing Just Compensation*, Finance Docket No. 31306, Slip op. (I.C.C. decided July 29, 1988).

Second, any order that the Board ultimately enters concerning BNSF's use of KJRY's tracks must make clear that KJRY has the right to return to the Board and seek a revocation of BNSF's rights under Section 10901(d) if BNSF's operations constitute a violation of the elements of that statute. The only means through which KJRY may exercise some autonomy

over its own tracks is if it is made clear that BNSF's operations remain subject to the "material operating interference" and "adequate compensation" elements of Section 10901(d).

Both the language of Section 10901(d) and common sense dictate that the tests imposed under Section 10901(d) are not designed as a one-time assessment of the impact of the forced crossing. Rather, Section 10901(d)(1)(B) prevents the owning carrier from blocking the crossing carrier's crossing of its tracks if the crossing carrier's operation "does not materially interfere with the operation of the crossed line." The language of the statute is in the present tense, and while it is appropriate to make a determination of operational interference prior to the construction of the new rail line, the statute is intended to go further and cover crossing operations once they are undertaken. BNSF's operations on KJRY's tracks must therefore continue to be subject to scrutiny under the "material interference" language of Section 10901(d)(1)(B). *Cf. Missouri-Kansas-Texas Railroad Co. v. Kansas City Terminal Ry. Co.*, 198 I.C.C. 4, 7 (1933) (Holding that under the predecessor of 49 U.S.C. § 11102 governing terminal trackage rights, the right to operate on the terminal tracks of another carrier "is not a permanent right, maintainable as long as petitioner continues to operate its railroad, as in a condemnation proceeding, but a right to be exercised only so long as it may be exercised 'without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business'.").

Additionally, the Congressional intent manifested in Section 10901(d) would be frustrated if the statute had no application past the initial inquiry into the proposed operations. While BNSF's operations on its Moar Line are relatively static, no one can say that future operations will not increase dramatically, resulting in more and longer trains operating on KJRY's tracks. Alternatively, it is possible that BNSF might downgrade the locomotives

assigned to operate the Moor Line train, resulting in longer operating delays on KJRY's tracks. KJRY might also experience increased costs from BNSF's operations that are not currently anticipated. Because these and many other possibilities cannot accurately be assessed at this time, the language of Section 10901(d) should be accorded its plain and ordinary meaning, and the Board should include in any order it enters a provision stating that KJRY may at any time petition the Board to reconsider the matters addressed in Section 10901(d) with respect to BNSF's operations on its tracks.

CONCLUSION

The Board's June 22 Order was unprecedented and created a new right for common carriers: the right to invoke Section 10901(d) to impose non-consensual operations over another carrier. While KJRY does not agree with the Board's decision, that decision is not now the issue. What is now at issue is (1) what should the proper per-car charge be for BNSF's forced access over KJRY's property; and (2) how should the Board deal with BNSF's request to have the Board order a refund of the fees collected and invested by KJRY during the pendency of this proceeding, a sum approximating \$650,000.

Given the non-consensual nature of BNSF's operations, the Board should reject any attempt by BNSF to have the Board impose a charge similar to the charge that applied during the period when BNSF's operations were consensual. Because KJRY is, in effect, serving as an intermediate switch carrier that facilitates BNSF's service to its Moor Line shippers, the most appropriate charge is the imposition of such a switch fee. The \$85.00 per loaded car intermediate switch fee that had been charged by KJRY during the pendency of this proceeding (a fee that is substantially lower than the \$300 per car (loaded and empties) that BNSF charges

for similar intermediate switch operations) is more than reasonable and should be adopted by the Board as governing this arrangement.

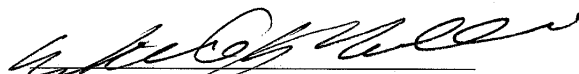
Likewise, for the Board to order KJRY to refund to BNSF the monies that KJRY collected from BNSF during the pendency of this proceeding would unjustly enrich BNSF and create an undue hardship upon KJRY. Indeed, because BNSF had no legal right to use KJRY's property until the Board granted BNSF such a right in the June 22 Order, the Board has no legal basis for ordering a refund for operations that occurred before the Board's Order. To do so would be inequitable, an illegal retroactive action, and contrary to the principles of detrimental reliance. Nonetheless, if a refund is ordered, the amount calculated should be the difference between what KJRY collected and what the Board determines to be a reasonable intermediate switch charge.

In summary, the Board needs to recognize that for over a hundred years, the relationship between BNSF and KJRY in Keokuk has been governed by private agreements. This relationship has never been subject to regulation by the ICC or the STB. Now, as a result of the Board's June 22 Order, that relationship is no longer consensual and will be subject to government regulation and oversight. KJRY should be adequately compensated for such a holding and should not have to refund what was legally imposed and collected before the Board's Order.

Respectfully submitted,

Jonathan L. Kazense
Keokuk Junction Railway Co.
1318 S. Johanson Road
Peoria, IL 61607-1119
Tel: (309) 697-1400
Fax: (309) 697-8486

March 1, 2002



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Attorneys for Keokuk Junction Railway Co.

EXHIBIT A
VERIFIED STATEMENT OF CATHERINE BUSCH

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33740 (Sub-No. 1)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
PETITION FOR DECLARATION OR PRESCRIPTION
OF CROSSING, TRackage OR JOINT USE RIGHTS AND FOR
DETERMINATION OF COMPENSATION AND OTHER TERMS**

**VERIFIED STATEMENT OF CATHERINE BUSCH IN SUPPORT OF KEOKUK
JUNCTION RAILWAY CO.'S
OPENING STATEMENT REGARDING
COMPENSATION AND OTHER TERMS**

My name is Catherine Busch. I have been in charge of Marketing for Keokuk Junction Railway Co., since October 1997. I give this Verified Statement on personal knowledge in support of the Keokuk Junction Railway Co.'s Opening Statement Regarding Compensation and Other Terms.

1. Prior to my current employment at Keokuk Junction Railway I was employed by Toledo, Peoria and Western Railway Corporation (TPW) in a marketing position.
 2. In my marketing position at TPW I got to know a number of the train crew operating personnel.
 3. In addition to contacts at the TPW I also have contacts at the Peoria and Pekin Union Railway (PPU) because of the amount of business the TPW did with the PPU.
 4. Since leaving TPW I have stayed in touch with my contacts at both TPW and PPU.
-

5. My contacts at PPU have informed me on a certain move that comes into the tracks of the PPU that the PPU does not physically touch or handle the cars but still receives its intermediate switch charges.

6. That arrangement is currently taking place with BNSF coal trains. The BNSF brings coal trains destined for the Commonwealth Edison Powerton Plant in Pekin, Illinois. The BNSF leaves the coal trains on tracks designated by PPU. The coal trains are then picked up by the Illinois & Midland Railroad who handles the coal train to the Powerton Plant. On this move to the Powerton Plant the PPU train crews do not touch the coal train and PPU still receives an intermediate switch charge. PPU's intermediate switch charges at the present time are \$77.00 each way, in and out.

7. The PPU has also not physically handled other cars in the past and still received its intermediate switch. Unit trains of potash came onto the PPU. Its train crews did not handle the potash trains and PPU still received its intermediate switch.

VERIFICATION

I, Catherine Busch, verify under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this statement.

Executed this 28th day of February, 2002

A handwritten signature in cursive script, reading "Catherine Busch", written in black ink.

EXHIBIT B
VERIFIED STATEMENT OF RICHARD LANE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33740 (Sub-No. 1)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
PETITION FOR DECLARATION OR PRESCRIPTION
OF CROSSING, TRackage OR JOINT USE RIGHTS AND FOR
DETERMINATION OF COMPENSATION AND OTHER TERMS**

**VERIFIED STATEMENT OF RICHARD J. LANE, SR., IN SUPPORT OF KEOKUK
JUNCTION RAILWAY CO.'S
OPENING STATEMENT REGARDING
COMPENSATION AND OTHER TERMS**

My name is Richard J. Lane, Sr. I give this Verified Statement on personal knowledge in support of the Keokuk Junction Railway Co.'s Opening Statement Regarding Compensation and other Terms.

1. I was contacted by the Keokuk Junction Railway Co., (KJRY) to perform a calculation of the compensation for the Burlington Northern Santa Fe Railway Company (BNSF) to access its Mooar Line by using the tracks of the KJRY to bridge that distance between the BNSF main line and its Mooar line.
2. I work as a consultant in the railroad industry. Please find attached hereto as Exhibit "1" my Resume detailing my education and professional experience.
3. The first thing I did was to calculate the estimated valuation of the KJRY track that BNSF used to access the Mooar Line. My calculations included estimates on the number of ties, weight of rail, switches, other track material, ballast and right of way. The total of my

calculations is \$224,700.00. Attached hereto as Exhibit "2" is my summary of those calculations and assumptions made.

4. I then applied the pre-tax cost of capital method approved by the Interstate Commerce Commission in a decision dated March 23, 1990 in Finance Docket No 31281 Arkansas & Missouri Railroad Co. v. Missouri Pacific Railroad. A&M Bridge Method.
5. The pre-tax nominal cost of capital figure I used was 15.4%. I arrived at that figure by applying a combined Federal and state income tax rate of 37% to the 2000 after cost of capital finding of 11% determined in Railroad Cost of Capital 2000, STB Ex Parte No. 558 (Sub No.4) (Served July 2, 2001).
6. The A&M Bridge Method produced an annual rate of \$34,604. This figure did not include normal annual maintenance expense.
7. The annual maintenance expense on this segment of track is estimated to run at least twice KJRY's system average of \$5,479 per mile. The 1,430 feet of track involved in this situation (0.271 mile) produces estimated annual maintenance costs amounting to \$2,970 per year ($2 \times \$5,479 \times 0.271$).
8. The number of cars moved over the subject trackage has been estimated at 13 cars per day for the BNSF based upon 1999, 2000 and 2001 actual figures. The number of cars moved over the trackage by KJRY is estimated at 50 cars per day.
9. Since the KJRY cars move over the trackage for a maximum of about 980 feet and a minimum of 450 feet (dependent upon which yard track they are moved into), an average of 715 feet per move for those cars versus the entire 1,430 feet for the BNSF cars, I have given each of the KJRY cars a 0.5 count.

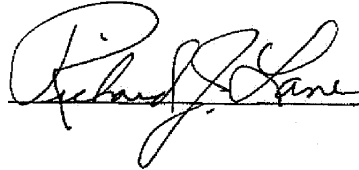
10. KJRY cars amount to a count of $(50 \times 250 \times 0.5)$ or 6,250 while BNSF cars amount to a count of (13×250) or 3,250. BNSF percentage would thus be 34.21%.

11. Adding the RCNLD cost of \$34,604 to the annual maintenance cost of \$2,970 and multiplying that total by 34.21% produces a total of \$12,854 per year that BNSF would owe under the A&M Bridge Method to KJRY. Based upon the BNSF car count of 3,250 that equals \$3.96 per car.

VERIFICATION

I, Richard J. Lane, Sr., verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified to file this statement.

Executed this 1st day of March, 2002



RICHARD J. LANE
RAILROAD CONSULTANT
12110 COACH ROAD
PALOS HEIGHTS, ILLINOIS 60463

(708) 448-0596

Exhibit 1

RESUME - RICHARD J. LANE

EDUCATION: BS Degree in Civil Engineering from West Virginia University, January 1950.
International Correspondence Schools course in Business Law, 1956.
Advanced Management Program at Harvard University, School of Business, 1968.

POSITIONS HELD:

August 1985 to date - Independent consultant. Clients have included Class I, Regional and Short Line railroads; bankruptcy trustees; law firms; lending institutions; insurance companies; consulting firms; industrial firms; etc., all in connection with railroad matters.

June 1984 to August 1985 - Director-Rail Assets Disposition for Chicago Pacific Corp. (successor to CRI&P RR) in liquidation of remaining railroad assets.

January 1980 to June 1984 - Director-Assets Analysis, Director-Staff Coordination and Director-Staff Coordination & Rail Assets Disposition for Trustee in liquidation of properties of CRI&P RR.

November 1951 to January 1980 - Various positions in Operating and Engineering Depts. of Chicago, Rock Island & Pacific RR Co., including Officer Trainee, Assistant Engineer, Acting Roadmaster, Assistant Division Engineer, Special Representative to VP-Operations, Assistant to VP-Operations, Manager-Operations Administration, Assistant Chief Engineer, Senior Operating Assistant, Assistant General Manager-Staff, Assistant Vice President-Staff and Director-Operations Planning.

February 1950 to November 1951 - Construction Engineer for U.S. Department of Interior-Bureau of Reclamation.

During college years worked as construction laborer, restaurant cashier, student assistant. Served in U.S. Army, November 1944 to August 1946.

OTHER: Life Member of American Railway Engineering & Maintenance Association.

Exhibit 2

ESTIMATED VALUATION OF KJ TRACKAGE JOINTLY USED BY BNSF

Scaling from maps indicates a total length of such track (up to the south line of 3rd. Street) as approximately 1,430 ft. Included in that distance are six #9 and one #11 turnouts. Each #9 turnout occupies 72.29 ft. and includes 63 switch ties. The #11 turnout occupies 91.85 ft. and includes 78 switch ties. 1,430 track-feet with tie spacing of 21 in. (1.75 ft.) would require approximately 817 ties, of which $[(6 \times 63) + 78]$, a total of 456, are taken up by the switch ties, requiring only 361 track ties. Track ties, installed new about 6 years ago, are estimated to have a current value of \$20 each. Thus, estimated value of track ties = $361 \times \$20$, or \$7,220. I have a quote on switch ties of \$850 per 1,000 board feet. Switch ties for a #9 turnout = 4,041 fbm, while for a #11 turnout = 4,935 fbm. Thus, switch ties for the trackage in question = $\$850 \times [(6 \times 4.041) + 4.935]$, or \$24,803. Thus total tie value is estimated at $\$24,803 + \$7,220$, or \$32,023. To nearest \$100 = \$32,000.

Estimated turnout values (not including switch ties, per the above), per data furnished by a major trackwork manufacturer, are \$13,000 per #9 and \$15,000 per #11 turnout., or $(6 \times \$13,000) + \$15,000$, a total of \$93,000.

Rail and other track material (OTM) for the remaining 904 track-feet $[1,430 - (6 \times 72.29) + 91.85]$ includes top quality 132# relay rail, currently valued at \$330 per ton, to which an added 20% for value of OTM produces a total of \$396. Approximately 40 tons of rail $[(132 \text{ lbs./yard} \times 2 \text{ rails} \times 904/3 \text{ yards}) \text{ divided by } 2,000 \text{ lbs./ton}] = 39.776 \text{ tons}$. At \$396 per ton (including OTM) this amounts to \$15,751, or to the nearest \$100, \$15,800.

Ballast, based on an average cross-section of 24 sq. ft. over the entire 1,430 ft. length produces a volume of approximately 1,271 cu. yds. $[(1,430 \text{ ft.} \times 24 \text{ sq. ft. x-section}) / 27 \text{ cu. ft./cu. yd.}]$. At 1.5 tons per cu. yd. (an average figure, exact weight per cu. yd. would require precise weighing which may, or may not, have taken place when the ballast was delivered) this amounts to 1,906 tons. At an average price of \$20 per ton this produces a total of \$38,120. To nearest \$100 = \$38,100.

Right of way width varies from 14 to 50 feet, thus an average width of 32 ft. is used for purpose of valuation estimate. 1,430 ft. x 32 ft. average width equals 45,760 sq. ft. I have used a value of \$1.00 per square foot, which I understand was provided KJ's previous management by a local realtor several years ago. While that rate may not be current I know of no major changes which would affect real estate values in the area. At that rate the right of way value to the nearest \$100 would be \$45,800.

Total estimated value of the jointly-used property would thus be: $\$32,000 + \$93,000 + \$15,800 + \$38,100 + \$45,800$, or \$224,700.

R. J. Lane
2/28/02

EXHIBIT C
TERMINAL OPERATING AGREEMENT

TERMINAL OPERATING AGREEMENT

THIS AGREEMENT, made and entered into this ____ day of _____,
2002 by and between KEOKUK JUNCTION RAILWAY CO., an Iowa corporation
(hereinafter "KJRY") and THE BURLINGTON NORTHERN SANTA FE RAILWAY
COMPANY, a Delaware corporation ("hereinafter "BNSF"),

WITNESSETH THAT:

WHEREAS, the Surface Transportation Board (STB or Board) has found that
BNSF has a right to use the tracks of KJRY to access its Mooar Line in a decision served
June 22, 2001 in Finance Docket No. 33740, The Burlington Northern Santa Fe Railway
Company – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use
Rights; and

WHEREAS, BNSF will use approximately 1500 feet of KJRY track to access it's
Mooar Line; and

WHEREAS, the STB in its June 22, 2001 decision ordered the parties to negotiate
compensation and other terms by which BNSF will access the Mooar Line.

NOW THEREFORE, it is mutually agreed by and between the parties as follows:

Section 1. Terminal Operating Tracks.

BNSF shall be allowed to operate over the tracks of the KJRY from the crossover
at BNSF mile post 177.58 to the east line of Third Street (terminal track) all within the
limits of the City of Keokuk, Iowa as set forth on the print attached hereto as Exhibit "A"
solely for the limited purposes specified in this Agreement.

Section 2. Compensation.

To be determined by the Board. Said compensation shall be due and payable on the 15th day following the end of each month this Agreement shall remain in effect.

Section 3. Ownership, Maintenance and Use of Terminal Track.

KJRY shall own the terminal track that BNSF uses to access its Mooar Line at all times that this Agreement is in effect. Both KJRY and BNSF shall use the terminal track for their respective railroad operations with KJRY trains having priority over BNSF trains in the use of the track. As the junior railroad with respect to the terminal tracks, BNSF shall pay KJRY for all maintenance costs associated with maintaining the tracks to the standard KJRY deems appropriate for operations. KJRY shall have management control over maintenance policies, standards, and track conditions, including but not limited to permissible track operating speeds. BNSF will be responsible for any costs for additional safety appliances or other requirements that may be imposed by the Federal Railroad Administration or any other government authority solely because of BNSF's operations.

BNSF hereby accepts the condition of KJRY's tracks in "AS IS, WHERE IS" condition. BNSF shall have no right to request increased or improved maintenance of said tracks as long as the condition of said tracks allows for continuous 10 mph operation over said tracks by BNSF. BNSF shall have no right to request additional tracks, appurtenances or other improvements on KJRY's property. BNSF maintenance of way crews shall have no authority to go onto KJRY's terminal operating tracks for any reason other than to pick up a derailment of a BNSF train.

Section 4. Non-Interference.

BNSF, in its use of the tracks of the KJRY to access the Mooar Line, shall not cause or permit any nuisance, hindrance or unreasonable interference with the operation of KJRY, and shall prior to using such tracks to access the Mooar Line, obtain the approval of the General Manager of the KJRY or other appropriate person designated by KJRY and KJRY agrees that such approval shall not be unreasonably withheld.

Section 5. Liability And Indemnity.

BNSF SHALL DEFEND, PROTECT, INDEMNIFY, AND HOLD HARMLESS KJRY AND ITS OFFICERS, DIRECTORS, MANAGEMENT, AGENTS, EMPLOYEES, INSURERS, SUCCESSORS AND ASSIGNS (WHICH FOR PURPOSES OF THIS SECTION 5 ARE REFERRED TO COLLECTIVELY AS "KJRY"), IRRESPECTIVE OF ANY NEGLIGENCE, STRICT LIABILITY, OR FAULT OF KJRY FOR ALL DAMAGE OR FOR LIABILITY FOR PERSONAL INJURY, WRONGFUL DEATH, OR PROPERTY DAMAGE WHICH WOULD NOT HAVE BEEN INCURRED BUT FOR THE OPERATION OF BNSF ON THE RAIL LINE OF KJRY. KJRY WILL PROMPTLY TENDER TO BNSF THE DEFENSE OF ALL CLAIMS INVOLVING PERSONS AND PROPERTY FOR WHICH BNSF HAS AGREED TO DEFEND, INDEMNIFY AND SAVE HARMLESS KJRY. NOTWITHSTANDING THE PRECEDING PROVISIONS OF THIS SECTION 5 OF THIS AGREEMENT, FOR THAT DAMAGE, INJURY OR DEATH WHICH WAS CAUSED BY ACTS INVOLVING WILLFUL AND WANTON MISCONDUCT ON THE PART OF KJRY, BNSF

**SHALL NOT BE OBLIGATED TO DEFEND, INDEMNIFY AND SAVE
HARMLESS KJRY.**

(b) All indemnification authorized by this Section 5 shall include, but shall not be limited to, reasonable attorney fees, expenses, and court costs.

(c) In case suit shall at any time be brought against KJRY asserting a liability against which BNSF agrees under this Agreement to indemnify and save harmless KJRY, BNSF shall, at its own cost and expense and without any cost or expense whatever to KJRY, defend such suit and indemnify and save harmless KJRY against all costs and expenses thereof and promptly pay or cause to be paid any final judgment recovered against KJRY. Each party shall furnish to the other all such information relating to claims made for injuries, deaths, losses, damage or destruction of the type covered by this Section 5 as such other party may from time to time request. KJRY shall cooperate fully in the defense of claims for which BNSF is responsible pursuant to this Section 5 with respect to activities conducted pursuant to this Agreement, including furnishing witnesses, documents, and other relevant information requested by BNSF.

Section 6. Elevation And Control Of Tracks.

BNSF shall maintain the surface of the rails of its tracks which connect with the terminal tracks on KJRY's right of way at the presently established top of rail grade of KJRY's tracks. If it becomes necessary due to a lawful order of a federal, state or local governmental authority having jurisdiction to require a change in the elevation of KJRY's tracks by which BNSF accesses the Mooar Line, or if KJRY shall determine of its own accord to change the elevation of KJRY's tracks, then BNSF at its sole cost and expense shall change its tracks to the newly established top of rail grade of KJRY's tracks.

Nothing herein shall prevent KJRY from modifying, changing, or relocating any facility or any segment of its tracks, provided that the continuity of the tracks is retained. KJRY retains the right to merge, or to sell all, or substantially all, of its entire rail system (including the tracks used by BNSF), or any portion of that system excluding the tracks used by BNSF, and to admit other freight or commuter passenger railroad tenants to the tracks used by BNSF. KJRY shall also have the right to sell its tracks, in whole or in part, to any entity.

Section 7. Term.

This Agreement shall be effective as of March 1, 1999, and shall remain in full force and effect until the Board grants adverse abandonment authority or until a Court of competent jurisdiction overturns the Board's June 22, 2001 decision, at which point all of the provisions of this agreement (other than compensation owed pursuant to Section 2 of this Agreement, and indemnity and defense owed pursuant to Section 5 of this Agreement) shall be null and void. BNSF hereby agrees to cease its operations over KJRY's tracks immediately upon being informed of the issuance of any valid order overturning the STB's June 22, 2001 decision regardless of the pendency of any subsequent appeal that might be taken of said order.

Section 8. Limitation On Usage.

BNSF's use of KJRY's tracks is limited to providing BNSF with access to serve customers directly served by rail from BNSF's Mooar Line as of March 1, 1999. BNSF may not use KJRY's tracks to access the tracks of Roquette America or any other shipper not encompassed in the preceding sentence for any reason. Under no circumstance will

BNSF operate, or allow or assign the right for any other party to allow the operation of, passenger trains on KJRY's tracks.

Section 9. Successors and Assigns.

BNSF's rights under this Terminal Operating Agreement may not be assigned, in whole or in part, except with the prior written consent of KJRY; provided, however, that either party hereto may assign any receivables due them under this Terminal Operating Agreement (which assignment shall not relieve the assignor of any rights or obligations under this Agreement). Subject to the limitations hereinabove, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

Section 10. Revocation.

If at any time during the term of this Terminal Operating Agreement BNSF's operations constitute a violation of 49 U.S.C. § 10901(d), then KJRY shall have the right to petition the Board to seek a revocation of the rights the Board granted BNSF pursuant to 49 U.S.C. § 10901 (d) in its June 22, 2001 decision. KJRY shall be under no obligation to engage in arbitration, mediation or any other form of alternative dispute resolution prior to commencing an action for revocation at the Board once BNSF's actions on KJRY's track constitutes a violation of 49 U.S.C. § 10901(d).

Section 11. Default.

If BNSF shall fail to pay the compensation determined pursuant to Section 2 of this Agreement, or fail to fulfill the defense and indemnity obligations of Section 5 of this Agreement, then BNSF shall be deemed to be in default of this Agreement. BNSF shall have seven (7) days from the receipt of notice of default to correct said default or KJRY shall be entitled to commence an action at the Board to seek revocation of BNSF's rights

granted in the June 22, 2001 decision by the Board. Notwithstanding the previous sentence, KJRY is under no obligation to provide said notice to BNSF prior to undertaking any action allowed pursuant to the terms of this Agreement and applicable law. If KJRY is successful in its action to revoke BNSF's rights under 49 U.S.C. § 10901(d), then BNSF shall pay KJRY reasonable attorney fees and expenses incurred by KJRY in seeking revocation of BNSF's rights. Said payment shall be made within 14 days of presentment of an invoice for said attorneys and expenses.

Section 12. Labor Agreements.

Each party agrees that it will not require the performance of services hereunder by the other in a manner which would cause the other to violate the terms of or incur penalties in connection with any then-current labor agreements between that other party and any organization representing any of its employees.

Section 13. BNSF Train Crews.

All BNSF train crews operating on and over the terminal tracks of the KJRY to access the Mooar Line shall be qualified on the KJRY book of rules. All such crews shall remain employees of BNSF while operating on KJRY's tracks. KJRY may, for cause, require that any person performing services pursuant to this Agreement be prohibited or removed from performance of such services, subject to the requirement that KJRY shall support any action defending such prohibition or removal. KJRY shall have the right to attend and participate in the formal investigation of any BNSF employee being investigated for the possibility of having committed a rules violation while operating on KJRY's tracks

Section 14. Insurance.

BNSF shall have in place at all times during the term of this Agreement liability insurance in the amount of \$2,000,000.00 per occurrence covering railroad operations. Further said insurance shall name Keokuk Junction Railway Co. as an additional insured on said policy or policies of insurance. BNSF shall provide a certificate of insurance to KJRY once each year during the term of this Agreement in the month of January.

Section 15. Prior Agreements.

KJRY and BNSF hereby agree that any and all previous agreements between themselves and their predecessors have previously been cancelled and other than this Agreement there are no agreements in place regarding the use by BNSF of KJRY tracks to access the Mooar Line.

Section 16. Choice of Law.

This Terminal Operating Agreement shall be governed, construed and enforced in accordance with the laws of the State of Iowa. Any litigation arising out of or in any way connected with this Agreement shall be instituted, maintained and heard in the state or federal courts in the State of Iowa only, and the parties consent to jurisdiction over their person and over the subject matter of any such litigation in those courts, and to service of process issued by such courts. Notwithstanding the prior sentence, any petition to revoke the rights granted BNSF to operate over the tracks of KJRY pursuant to 49 U.S.C.

§ 10901(d) shall be commenced at the STB or its successor agency.

Section 17. Force Majeure

The obligations of the parties hereunder, other than payment, shall be subject to force majeure (which shall include strikes, riots, floods, accidents, Acts of God, trees and

similar large obstructions on the Rail Line, and other causes or circumstances beyond the reasonable control of the party claiming such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

Section 18. Severability.

If any part of this Agreement is determined to be invalid, illegal or unenforceable:

1) such determination shall not affect the validity, legality, or enforceability of any other part of this Agreement; 2) the remaining parts of this Agreement shall be enforced as if such invalid, illegal, or unenforceable part were not contained herein; and 3) the parties will attempt in good faith to negotiate a provision to replace the part of this Agreement which was held invalid, illegal or unenforceable.

Section 19. General Provisions.

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any rights in any third party to recover by way of damages or otherwise against either of the parties hereto.

(b) All sections headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement

(c) This Agreement contains the entire agreement of the parties hereto with respect to BNSF access to its Mooar Line.

(d) No term or provision of this Agreement may be changed, waived, modified except by an instrument in writing signed by both parties to this Agreement.

(e) The termination or expiration of this Agreement will not relieve either party hereto from any obligations or liabilities accrued as of the time of such termination or expiration.

Section 20. Notices.

Any notice, request, consent, demand, report or statement which is given to or made upon either party hereto by the other party hereto under any of the provisions of this Agreement, shall be in writing and shall be treated as duly delivered when the same is either (a) personally delivered to the President or Vice President of the respective party hereto, or (b) deposited with a reputable overnight delivery service or in the United States mail, postage fully prepaid, and properly addressed as follows:

If Notice is to KJRY: Keokuk Junction Railway
President
1318 S. Johanson Road
Peoria, Illinois 61607

If Notice is to BNSF: Burlington Northern Santa Fe Railway Company
Director Contracts and Joint Facilities
2600 Lou Menk Drive
P.O. Box 961034
FT. Worth, Texas 76161-0034

IN WITNESS WHEREOF, the parties hereto have caused this Terminal Operating Agreement to be executed in duplicate as of the day and year first written above.

KEOKUK JUNCTION RAILWAY CO.

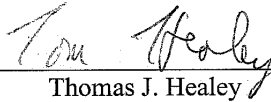
Name:
Title:

THE BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY

Name:
Title:

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "Keokuk Junction Railway Co.'s
Opening Statement Regarding Compensation And Other Terms" in STB Finance Docket
No. 33740 (Sub-No. 1) was served this 1st day of March, 2002 by first class mail to all parties of
record in this proceeding.



Thomas J. Healey
Attorney for Keokuk Junction Railway Co.