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April 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

APR 02 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 Reply 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 Reply Statement. In accordance with the STB Final Rule in Ex Parte 576, Electronic Access to Case Filings, the original is not bound, but clipped with no tabs; however, the ten copies enclosed for Board Member and staff review are stapled.

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,

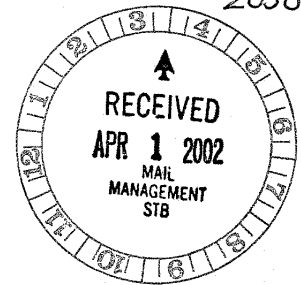
William A. Mullins

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
REPLY STATEMENT REGARDING
COMPENSATION AND OTHER TERMS**

**ENTERED
Office of the Secretary**

APR 02 2002

**Part of
Public Record**

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April 1, 2002

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PETITION FOR DECLARATION OR PRESCRIPTION
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**KEOKUK JUNCTION RAILWAY CO.'S
REPLY STATEMENT REGARDING
COMPENSATION AND OTHER TERMS**

INTRODUCTION

Keokuk Junction Railway Co. ("KJRY"), by its counsel, hereby files its Reply Statement Regarding Compensation and Other Terms. As KJRY demonstrated in its Opening Statement Regarding Compensation and Other Terms ("KJRY's Opening Statement"), the unique issues presented by the forced access granted to The Burlington Northern and Santa Fe Railway Company ("BNSF") require the Surface Transportation Board ("STB" or the "Board") to take a fresh review of the principles underpinning the Board's traditional assessment of compensation under 49 U.S.C. § 10901(d) ("Section 10901(d)"). Because KJRY has been ordered to allow BNSF to operate on its tracks, rather than merely cross its property, the Board needs to consider the following three principles when issuing its order in this proceeding:

Future Compensation: KJRY should be fully compensated for the value of the services it is providing to BNSF. Those services are in the nature of intermediate switching, and KJRY has shown that the \$85.00 it previously charged BNSF for transfer of its cars to the Mooar Line is

entirely reasonable and in line with other intermediate switching charges in the Midwest (and far lower than BNSF's standard \$300.00 per car intermediate switching charge).

Refund: KJRY should not be required to provide BNSF with a refund of any amounts previously paid to KJRY for switching services that KJRY provided to BNSF between the date of the lawful cancellation of the private agreements governing BNSF's operations (March 1, 1999) and the issuance of the Board's June 22, 2001 decision (the "Decision"). BNSF's right to use KJRY's tracks did not arise until the Board granted access rights in its Decision. Prior to that time, BNSF's rights were first governed by private agreements and later, after cancellation of those agreements, by KJRY's mandatory obligation to interchange BNSF's traffic between the two disconnected segments of BNSF track. KJRY's switching charge was a reasonable assessment for the services provided and no refund is due BNSF. Further, to order a refund would impose substantial financial hardship on KJRY. The magnitude of the refund sought by BNSF would plague KJRY with debt, potentially endangering essential services. KJRY did not put the charges collected from BNSF into a trust or escrow agreement, nor did it have reason to believe it should, but rather invested those funds in badly-needed track and equipment projects. KJRY simply does not have adequate funds to refund monies which it believed it was lawfully collecting.

Non-Compensation Issues: KJRY must be awarded complete indemnity for the presence of BNSF's trains on KJRY's tracks, in accord with other indemnity agreements the Board has imposed where one railroad is granted access to the tracks of another carrier. In addition, the Board's compensation order should establish that the compensation level is not immutable, but may be reopened by either party upon changed circumstances (as may the issue of operational interference caused by BNSF's trains operating through KJRY's terminal tracks).

BNSF's "Opening Statement Regarding Compensation and Other Terms" ("BNSF's Opening Statement") ignores these three principles and consistently manifests BNSF's belief that it is entitled to subsidized access to KJRY's plant and facilities. The Board should reject BNSF's arguments. Specifically, BNSF's invocation of the *CNW*¹ method of compensation, which is the standard compensation formula used in Section 10901(d) crossing proceedings where the crossing is effectuated via a diamond crossing, has no application to this proceeding because BNSF is actually conducting trackage rights operations over KJRY's tracks. Second, BNSF's continued insistence on a refund from KJRY ignores both KJRY's costs incurred in switching BNSF's trains to and from the Mooar Line and the fact that BNSF had no legal right (statutory or contractual) to operate on KJRY's tracks until the June 22, 2001 Decision. Finally, BNSF's refusal to be held accountable for all damages and costs KJRY will incur as a result of BNSF's operations on KJRY's tracks confuses the division of liability that a party might negotiate at arm's length with the minimum protections that should be accorded to any railroad that is forced to open its tracks to unrestricted access by another carrier.

In summary, an arrangement that had been governed by privately negotiated arm's length agreements has, as a result of the Board's Decision, now been converted to a government imposed right. As a result, KJRY no longer has any bargaining leverage and must rely upon the Board to treat it fairly by: (1) fully compensating it for the services it is required to render to BNSF under the Decision; (2) fully protecting it from the additional liability it must accept for BNSF's presence on its tracks; and (3) ensuring that KJRY's shippers do not suffer substantial hardships as a result of KJRY being ordered to pay a refund of legally collected switching fees.

¹ *Chicago and North Western Ry. Co. -- Construction and Operation Exemption -- City of Superior, Douglas County, WI -- Petition for Issuance of an Order Pursuant to 49 U.S.C. 10901(d)*, Finance Docket No. 32433 (Sub-No. 1), 1995 Lexis 205 (ICC served Aug. 11, 1995).

Anything less than these three standards would require KJRY to subsidize BNSF's access to its tracks, a result not justified in law or equity.

ARGUMENT

I. BNSF HAS FAILED TO EITHER ACKNOWLEDGE OR CARRY ITS BURDEN OF PROOF

As the Board stated in its January 20, 2002 order in this proceeding, the party seeking to impose crossing rights on another carrier bears the burden of "demonstrating that its proposed compensation and other terms satisfy Section 10901(d)." *See also CNW* at *7 ("[The ICC placed] the burden of proof on the crossing carrier as the proponent of the requested relief.").

BNSF's Opening Statement fails to acknowledge that BNSF bears the burden of proof with respect to every issue relating to its crossing, including (but not limited to) compensation. BNSF therefore makes little effort to establish that it has satisfied its burden. The failure to carry the burden of proof requires that the Board reject BNSF's contentions and accept KJRY's positions. *Id.* ("[A]bsent probative evidence supporting the crossing carrier's cost estimates, the incumbent carrier's evidence will be accepted."). As the Board has previously recognized in a similar context:

In proceedings to set conditions and compensation, the burden of proof is on the offeror, as the proponent of the requested relief. (Citation and footnote omitted). Thus, in areas of disagreement, the offeror must present more detailed evidence or analysis or provide more reliable and verifiable documentation than that which is submitted by the carrier. Absent detailed evidence supporting the offeror's estimates and contradicting the rail carrier's estimates, we accept the carrier's estimates in a forced sale context.

1411 Corp. -- Abandonment Exemption -- In Lancaster County, PA, Docket No. AB-581X, Slip op. (STB served Oct. 18, 2001) (ruling on an Offer of Financial Assistance under 49 U.S.C. § 10904).

The requirement that the Board accept a competing position if the party bearing the burden of proof fails to satisfy its burden applies not just to setting appropriate compensation, but also to selecting an appropriate methodology for calculating compensation. *The Baltimore & Ohio Railroad Co., et al. -- Abandonment and Discontinuance of Service -- in Montgomery County, MD and the District of Columbia*, Docket No. AB-19 (Sub-No. 112) (ICC decided Aug. 12, 1988) (accepting land valuation methodology proposed by railroad where offeror's adjustments to methodology were not adequately explained); *Conrail Abandonment in the Shamokin Cluster in Northumberland County, PA -- In the Matter of a Request to Set Terms and Conditions*, Docket No. AB-167 (Sub-No. 989N), Slip op. (ICC decided May 4, 1987) (same).

In this proceeding, BNSF (as the party seeking crossing rights) had the burden of establishing a logical and fundamentally fair methodology for calculating compensation, an appropriate level of compensation, and appropriate terms for such matters as liability. BNSF's Opening Statement fails to carry BNSF's burden on every point. The Board is therefore required to accept KJRY's methodology and compensation formula, along with KJRY's provisions for non-compensation terms.

II. KJRY WOULD BE VASTLY UNDERCOMPENSATED IF THE BOARD ADOPTS BNSF'S PROPOSED COMPENSATION FORMULA

A. It Would Be Inappropriate To Utilize The CNW Methodology In This Case

The BNSF's Opening Statement invests approximately one-half page toward establishing that the Board should adopt a *CNW*-based compensation methodology for this case. BNSF's Opening Statement at 3-4.² BNSF's argument is hardly persuasive. The Board is not bound to use *CNW* simply because it has been employed in other proceedings under Section 10901(d).

² BNSF has not proposed any other compensation methodology.

Because BNSF's operations more closely resemble intermediate switching access, a rate in line with prevailing charges for intermediate switching in the Midwest should prevail.

BNSF's primary argument for adoption of the *CNW* methodology for calculating compensation is that the Board referred to *CNW* in a footnote in the Decision. Decision, Slip op. at 9 n.18. The entire footnote states:

If called upon, we will determine appropriate compensation based on the fair market value of KJRY's rail property. This standard comports with the minimum value guaranteed by the taking clause of the Constitution. See, e.g., [*CNW*].

As the footnote makes clear, the Board was not determining that *CNW* provides the appropriate compensation methodology. Rather, the Board was clarifying that whatever standard of compensation methodology is to be adopted in this case must not run afoul of Constitutional guarantees for the taking of property, a fact made clear by the Board's citation to *CNW* as an example ("e.g.").³

BNSF claims that *CNW* should be used because it "is the established compensation methodology for crossing cases." BNSF Brief at 3. That argument may be persuasive if this was a typical crossing case, but clearly it is not. No prior Section 10901(d) case has involved the forced access to operate over the tracks of another carrier. The *CNW* methodology for establishing compensation arose in a proceeding where one carrier attempted to build a line crossing the property of another carrier via a crossing diamond. In setting a compensation formula for the new line, the ICC borrowed the methodology used in condemnation actions, and provided that the constructing carrier should make a one-time payment to the crossed carrier

³ BNSF's claim that the Board has already determined that *CNW* provides the appropriate framework for determining compensation in this case is also belied by the language of the Board's January 30, 2002 scheduling order. In that order, the Board specifically directed the parties to brief the issue of "the methodology to be used" in this case, an admonition that would not be needed if the Board had already settled on a methodology.

based upon the value of the land used by the crossing carrier.⁴ No on-going or future payments were ordered. Obviously, the one-time payment contemplated in *CNW* will not adequately compensate KJRY. BNSF is operating on approximately a quarter-mile of KJRY's tracks, and is operating through seven high maintenance turnouts. BNSF's operations will impose much larger costs on KJRY than would be imposed by a crossing diamond.

Perhaps realizing the limitations of *CNW* to adequately compensate KJRY, BNSF proposes to compensate KJRY for a proportion of the costs of maintaining the seven switches on KJRY's terminal tracks, based upon cost estimates from seven years ago. BNSF's offer is deficient. BNSF has made no showing that the costs estimated in 1995 bear any relationship to maintenance costs today. BNSF's offer does not apportion the switch maintenance expense based upon usage, and BNSF's offer makes no allowance for maintenance of the quarter-mile of track on which BNSF operates (other than the portion that includes the turnouts). BNSF's efforts to shoe-horn the facts of this case into the one-time payment scheme envisioned by *CNW* should therefore be rejected.

As was established in KJRY's Opening Statement, BNSF's use of KJRY's tracks most closely approximates an intermediate switching operation. BNSF's traffic to and from its Mooar Line is switched via the use of KJRY's terminal tracks. BNSF could not connect its Mooar Line to the rest of its system without use of KJRY tracks and property. KJRY has also presented the Board with evidence of circumstances where various railroads (including BNSF) have determined that a negotiated intermediate switch charge would appropriately compensate a crossed carrier even where that carrier is not involved in physically moving the traffic at issue.

⁴ The parties had already agreed that the crossing carrier would bear all responsibility for expenses associated with installation, maintenance and repair costs for the crossing diamond.

An intermediate switch charge, and not compensation per *CNW*, would therefore be appropriate in this case.

Furthermore, the Board need not be concerned that the level of compensation paid by BNSF would cause BNSF to raise its rates to its shippers. Although the Board expressed concern in its January 30, 2002 order regarding the "commercial certainty" that will be provided to BNSF's Mooar Line shippers once compensation is decided in this case, that focus is misplaced. The rates BNSF charges to its shippers do not have to be adjusted for the switch charge paid to KJRY for use of its tracks. Switch charges are generally paid out of the overall line-haul rate. Thus, this issue is no different than the negotiation of divisions that always takes place between railroads: the "slice of the pie" retained by various carriers in an interline movement may change, but the rate paid by the shipper remains constant. Indeed, the rates BNSF charges are governed by contracts and cannot change until those contracts expire. BNSF's alleged concern about having to raise rates to shippers if it is required to pay KJRY more than a token rate is simply a subterfuge for the fact that BNSF does not want to take a lower division. The Board should see through BNSF's charade and understand what this case is really all about: an attempt by BNSF to gain forced access over KJRY's tracks and pay the lowest amount possible for that access, while charging the highest amount possible to its shippers.

Finally, any order regarding compensation should confirm that the level of compensation may be adjusted in the future if cost factors change. Nothing in Section 10901(d) dictates that the level of compensation set by the Board is cast in stone once it is established. BNSF's operations in the future may well impose greater expenses on KJRY than they currently impose, and KJRY should not be saddled with subsidizing BNSF's operations merely because the compensation level was previously determined to be appropriate by the Board. The Board should

therefore make clear that the level of compensation it sets in this proceeding is not immutable, but may be modified, either by agreement of the parties or, failing that, by Board order.

B. BNSF's Valuation Report Is Baseless and Otherwise Flawed

If the Board were to conclude that the *CNW* methodology should be employed in this case, a position KJRY contests, the Board should reject the values provided by BNSF for calculating compensation under *CNW*. BNSF's offer of a one-time payment for the value of the land used by BNSF in its operation of KJRY's tracks is premised upon the validity of a valuation report provided by Terrell A. Honnold, owner of American Real Estate, Ltd. in Davenport, Iowa. Mr. Honnold's opinion is based on the value of a "17' by 1000' strip of industrial land" in the vicinity of BNSF's operations. He uses the "across the fence" valuation method to determine that the land in question had a value of \$2,500.00 in March of 1999, and he opines that the \$2,500.00 value remains valid today. BNSF therefore offers KJRY a one-time payment of \$2,500.00 for use of its property.

The flaws with Mr. Honnold's report are many. As an initial point, Mr. Honnold provides no basis for his use of the 17' and 1,000' foot measurements. In its initial petition in this docket,⁵ BNSF stated that its trains "move through seven switches on approximately .25 miles of KJRY trackage in order to enter the Mooar Line." Petition, at 7. A quarter mile equals 1,320 feet. Mr. Honnold's use of 1,000 feet as the length of KJRY's track used by BNSF is without basis in the record, and well short of the estimate made by his client. Mr. Honnold also does not explain why he used 17' as the width of the right-of-way used by BNSF. The

⁵ "Petition for Declaration or Prescription of Crossing, Trackage or Joint Use Rights and for Determination of Compensation and other Terms," dated April 27, 1999 ("Petition").

measurement (which forms a crucial component of Mr. Honnold's \$2,500.00 valuation) has no basis in the record, and therefore cannot be used by the Board.

In addition to the baseless numbers used by Mr. Honnold in creating his estimate of the \$2,500.00 value for KJRY's land, his report contains other flaws. For example, although he claims to have provided a "limited appraisal, in restricted use report form," (Honnold Report, p. 12), his report does not appear to satisfy a number of the "binding requirements from which departure is not permitted" under the Uniform Standards of Professional Appraisal Practice.⁶ KJRY's purpose in pointing out these deficiencies is not to provide the Board with a primer on land appraisal, but merely to establish that even if KJRY is to receive only the minimal land value prescribed by *CNW*, BNSF has not done an adequate job of providing an estimate on which the Board may rely. Because of BNSF's failure to provide the Board with a conforming land appraisal, use of the *CNW* methodology would be inappropriate.⁷

In addition to the flat-rate fee BNSF proposes to pay KJRY for use of its property, BNSF also suggests that it would be appropriate to annually compensate KJRY for BNSF's use of KJRY's tracks. Unfortunately, like its proposed payment for land use, BNSF seeks to under-compensate KJRY for use of its tracks as well. BNSF asks the Board to impose an annual

⁶ The Report does not appear to conform to at least three standards: "State the extent of the process of collecting, confirming and reporting data or refer to an assignment agreement retained in the appraiser's workfile that described the scope of work to be performed" (Standard 2-2(c)(vii)); "State all assumptions, hypothetical conditions, and limiting conditions that affect the analysis, opinions, and conclusions" (Standard 2-2(c)(viii)); and "State and explain any permitted departures from applicable specific requirements of STANDARD 1..." (Standard 2-2(c)(xi)).

⁷ KJRY is not proffering evidence of its own to directly contradict BNSF's *CNW* methodology evidence because there is simply no basis for implementing the *CNW* methodology in this case of "first impression." If the Board determines that *CNW* is the appropriate methodology, KJRY specifically requests the Board to use the land, track, and other values that KJRY set forth in its March 1 Opening Statement for use in applying the *SSW Compensation/A&M Bridge* methodology in order to determine an appropriate *CNW* value.

compensation rate agreed to by BNSF and a prior owner of KJRY. However, the low rate contained in the now-terminated agreements was a prime reason why the agreements were cancelled. KJRY does not believe that \$1,050.00 per year begins to cover the expenses it incurs in providing BNSF with 24 hour a day access to its Mooar Line. Moreover, the rate in question only covers the seven switches that comprise a portion of BNSF's route to the Mooar Line. No allowance is made for the use of KJRY's rails (other than those that comprise a portion of the switches). Finally, the Board should note that the 1995 agreement that BNSF seeks to invoke was negotiated by a prior owner of KJRY. The agreement in question was lawfully canceled, in large measure because of the non-compensatory rate contained therein. KJRY does not believe that a now-terminated rate negotiated by a prior owner should somehow continue to bind KJRY to a deficient payment for BNSF's operations.

As a result of all of these issues, the Board should reject BNSF's suggestion that compensation be set under the *CNW* methodology. Instead, the Board should set a fee comparable to an intermediate switch fee for BNSF's access to KJRY's tracks.

III. BNSF SHOULD NOT BE GRANTED A REFUND

The bulk of BNSF's brief is dedicated to arguing that BNSF is entitled to a refund of approximately \$660,000.00 paid by BNSF to KJRY for switching services between March 1, 1999 (when BNSF's contractual rights to operate on KJRY's terminal track were canceled) and June 22, 2001 (when the Board served its decision granting BNSF's rights under Section 10901(d)). BNSF's quest for a refund ignores a fundamental truth: in the time period referenced above, BNSF had no right (contractual, statutory, or otherwise) to cross KJRY's tracks. The request for a refund is premised on BNSF having some right to operate on KJRY's tracks after its contractual rights were canceled. The record in this case clearly demonstrates that BNSF had no

such rights. In fact, the Decision did not indicate that it was retroactive to the cancellation date.

As a pure matter of law, BNSF's request for a refund must therefore be denied.

Additionally, the Board must take into account the impact that a refund of the magnitude sought by BNSF would have on a company of KJRY's modest proportions. KJRY's annual budget for capital and maintenance would be obliterated if KJRY were forced to write a check for \$660,000.00 plus interest. Deferred maintenance would become an ever-present reality for KJRY's customers. Essential services would clearly be put at risk. Further, a refund could not be paid through increased rates charged to KJRY's customers, as most of KJRY's traffic base is committed for the next five years under a long-term contract, and the remainder of KJRY's traffic is too truck- and barge-competitive to withstand any significant rate increase.

In determining whether KJRY should be required to pay any refund to BNSF, KJRY urges the Board to consider both the absence of any legal basis for imposition of a refund and the impact that a staggering refund would have on KJRY's shippers. Both of these standards, standing alone, militate strongly against a refund. In combination, they leave little doubt that the Board must deny BNSF's request for a refund.

A. The Board's Decision Does Not Support a Refund

BNSF claims that the Board's Decision supports its request to require KJRY to pay BNSF approximately two-thirds of a million dollars, plus interest. BNSF supports this claim by citing to one phrase in the Decision, wherein the Board held that "KJRY [shall] continue to allow BNSF to cross KJRY's line..." (Decision at 8). BNSF claims this passage means that the Board's Decision "did not create any new crossing rights." BNSF's Opening Statement at 6. A more plausible explanation for that phrase is that the Board was indicating that BNSF might resume operations on KJRY's tracks. If the Board had intended to indicate that it was

confirming pre-existing rights held by BNSF, it would not have conveyed that intent with the cryptic "continue" passage. The statement cannot be read to indicate that the Board was "reaffirming" Section 10901(d) rights.

BNSF's interpretation of the "continue" statement requires that another portion of the Decision be ignored. Specifically, the Board indicated that it was "hereby grant[ing]" BNSF rights to use KJRY's tracks (Decision at 1). Far from the general "continue" language relied upon by BNSF, the "grant" language is clear and unmistakable proof that BNSF's rights under Section 10901(d) did not arise until the Decision was served. If BNSF's crossing rights existed prior to issuance of the Decision, then there would be no need for the Board to grant anything. BNSF has no explanation for the "grant" language because the Board's grant of rights in 2001 is fatal to BNSF's claim that it has always had Section 10901(d) rights. The Decision did not reaffirm Section 10901(d) rights, it granted them. It would therefore be improper for BNSF to be given a refund for amounts paid to KJRY for a time when BNSF had no right to use KJRY's tracks.

BNSF asserts that a railroad has no right to collect charges for a service it had no right to perform (BNSF's Opening Statement at 7), and as a general matter KJRY agrees with this principle. However, BNSF has missed the point. KJRY had a right to perform the service it performed. Indeed, KJRY had a statutory obligation under 49 U.S.C. § 10742 ("Section 10742") to provide the service. If KJRY had not provided BNSF with switching services, BNSF would not have been able to get its traffic to and from the Mooar Line after March 1, 1999, and KJRY would have been in violation of Section 10742. The contract rights BNSF previously held to move that traffic with its own locomotives and crews were lawfully terminated. Upon that termination, BNSF held no certificate, license or other indicia of authority from the Board or the

ICC to operate on KJRY's tracks. Both BNSF and KJRY had operated under the uncontroverted assumption that BNSF's operations were conducted outside the auspices of the Board's regulatory scheme. Indeed, BNSF had previously informed the Board that its operation on KJRY's track "never has been subject to STB regulation."⁸ Thus, until June 22, 2001, Section 10901(d) had never been asserted as the means by which BNSF effectuated its access to the Mooar Line, nor had that Section ever been construed to allow one railroad to operate over the tracks of another railroad. In short, KJRY was not required to provide BNSF with access to its tracks until the Board established new law under Section 10901(d). Accordingly, far from having "no right to perform" the switching service as claimed by BNSF, KJRY had a statutory obligation to move BNSF's traffic to and from its Mooar Line (which KJRY did via an intermediate switch). KJRY should be compensated for that service. Ordering a refund would deny KJRY such compensation, and penalize KJRY for performing its mandatory interchange obligations under Section 10742.

Finally, BNSF once again dredges up its tired arguments about KJRY's motivations in canceling its operating rights (BNSF's Opening Statement at 7-8). The simple fact remains that BNSF is either entitled to a refund or, as KJRY has established, it is not. KJRY's motivations for canceling BNSF's operating rights cannot provide the basis for a refund, and nothing in the Board's Decision suggests otherwise.

B. Agency Precedent Does Not Support A Refund

BNSF asserts (BNSF's Opening Statement at 8-9) that the precedent established by the Board and the ICC is consistent with the award of a refund to BNSF in this case. BNSF claims

⁸ BNSF's "Petition to Withdraw Exemption," filed in *Burlington Northern Railroad Co. -- Trackage Rights Exemption -- Keokuk Junction Ry.*, Finance Docket No. 32775, Slip op., filed March 29, 1996, at 1.

that a refund is supported by several trackage rights decisions in which the Board both determined compensation and ordered that the level of compensation be made retroactive to the date that the trackage rights agreement expired. Yet, the cases cited by BNSF are inapposite. They arose from trackage rights situations where the regulatory authority to operate the trackage rights survived the termination of the contractual arrangement governing those rights. In stark contrast to that situation, there never was any regulatory authority governing BNSF's operations on KJRY's terminal tracks, and there were no regulatory protections surviving the cancellation of the private agreements between KJRY and BNSF, until the Board's Decision. It is true that under *Thompson v. Tex Mex Ry. Co.*, 328 U.S. 134 (1946) ("*Tex Mex*") a tenant may continue to operate the previously authorized trackage rights arrangement, even if the agreement itself has expired on its terms. In that situation, the track owner may not discontinue the tenant's operations without Board authority, and the Board has the authority to fix the terms and conditions of the trackage rights arrangement. The Board has the authority to make the terms and conditions retroactive to the date the agreement expired. *Arkansas & Missouri R. Co. v. Missouri Pacific R. Co.*, 6 I.C.C. 2d 619, 630, *clarified*, 7 I.C.C. 2d 164 (1990).

Here, by contrast, the parties did not seek Board approval for BNSF's use of KJRY's trackage in the first instance and thus did not need Board authority for the cancellation of those rights. Accordingly, there were no *Tex Mex* protections when the agreement was cancelled. At that point, BNSF had no regulatory authority to operate over KJRY's tracks during the time between cancellation of the agreements and issuance of the Board's Decision.⁹ Because BNSF

⁹ If BNSF's rights over KJRY's tracks had been submitted to the Commission and approved in the first instance, KJRY could not have prevented BNSF from operating over KJRY's tracks once the agreement was cancelled. In that situation, the Board clearly would have had authority to set future terms and conditions and make those terms retroactive to the date the agreement was cancelled. However, that is not the factual situation in this proceeding.

had no regulatory right to operate over KJRY's tracks until the Board's Decision, the Board has no legal basis to retroactively apply any compensation level to the date of the cancellation of the agreement. The Board can only apply that compensation level back to the date of its Decision, *i.e.* the date regulatory authorization took effect.

The cases cited by BNSF do not contradict this principle, but merely reiterate the longstanding *Tex Mex* doctrine. For example, in *Atchison, Topeka & Santa Fe Ry. Co. -- Operating Agreement -- Southern Pacific Co.*, 331 I.C.C. 367 (1967); *modified* 333 I.C.C. 342 (1968) ("*ATSF/SP*"), the tenant railroad's rights to operate were established in the 19th Century. When the agreement between the track owner and the tenant expired, neither party sought to discontinue those rights, an action that would have required regulatory review. However, the parties could not agree on compensation, and the dispute was submitted to the ICC for the establishment of appropriate compensation terms. In setting the new compensation, the ICC determined that the new rate should be retroactive to the date of termination of the private agreement, consistent with the *Tex Mex* doctrine. *ATSF/SP*, at 394. Similarly, in *North Carolina Railroad Co. -- Petition to Set Trackage Compensation and Other Terms and Conditions*, Finance Docket No. 33134, Slip op. (STB served May 29, 1997) ("*NCR*"), no party disputed that the tenant's trackage rights remained authorized when the contract prescribing the terms and conditions of those rights expired. The existence of the underlying regulatory authority to continue to operate the trackage rights allowed the retroactivity of the new rate in both cases because the regulatory right to operate over the track did not lapse with the privately negotiated contractual arrangement.¹⁰

¹⁰ Furthermore, the two cases primarily relied upon by BNSF, *ATSF/SP* and *NCR*, are distinguishable on another basis: in each of those cases, the carriers appearing before the Board were not contesting the regulatory rights of one carrier to operate over the tracks of the other,

Likewise, *Southern Ry. Co. v. Louisville & Nashville R.R. Co.*, 185 F. Supp. 645 (W.D. Ken. 1960), *aff'd*, 289 F.2d 934 (6th Cir. 1961) does not support BNSF's position. In that case, Southern was collecting tariff charges notwithstanding the presence of a private contract that prohibited either carrier from collecting such charges from each other. There, the court found that Southern's conduct was improper and thus it could not keep the charges it had collected. Here, BNSF does not dispute that KJRY lawfully cancelled the agreement that allowed BNSF to operate over KJRY's tracks, nor has the Board held that KJRY acted improper in canceling that agreement. As such, until such time as the Board invoked Section 10901(d), KJRY was acting entirely within its right to prevent BNSF from trespassing over its property.

Accordingly, when KJRY terminated its various contracts with BNSF, BNSF lost all rights to operate on KJRY's tracks. Until the Board granted BNSF the right to operate over KJRY's track, BNSF's access to its Mooar Line was limited to switching by KJRY over KJRY's tracks. This case is thus more factually similar to proceedings under 45 U.S.C. § 24308(a) ("Section 24308(a)"), formerly 45 U.S.C. § 562(a), pursuant to which the National Railroad Passenger Corporation ("Amtrak") secures rights to operate over the tracks of uncooperative freight railroads, and the Board sets appropriate compensation for said use. Under Section 24308(a), the level of compensation set by the Board is made retroactive only to the entry of the Board's order forcing access to the freight carrier's tracks, even if Amtrak's access predated that order.

they merely sought a determination of compensation and other terms. By contrast, KJRY has vigorously objected to BNSF's continued presence on KJRY's terminal tracks. The fact that adjustments to compensation have been made when the parties seek such adjustments is hardly precedent in a situation such as this, where one party has consistently pursued its rights to be free of the intruding carrier.

A prime example of the application of Section 24308(a) is contained in *National Railroad Passenger Corp. and Terminal Railroad Association of St. Louis, et al., Use of Tracks and Facilities and Establishment of Just Compensation*, 348 I.C.C. 901 (1977) ("*TRRA*"). In *TRRA*, Amtrak commenced operations on a terminal carrier in St. Louis on May 1, 1971, the first day of Amtrak's nationwide operations, pursuant to a private agreement. The private agreement expired July 1, 1973. Amtrak continued to operate on the terminal carrier's tracks, but when Amtrak was faced with attempted eviction because the parties could not come to agreement on compensation, it filed a Section 24308(a) petition at the ICC on July 3, 1975. The ICC ordered the continuance of operations, with an investigation of appropriate compensation, eleven days later. The parties disputed how far back the compensation should be made retroactive. The terminal carrier argued that the retroactivity should extend back to the date the private agreement expired (July 1, 1973). Amtrak argued that the new compensation should only reach back to the time that operations were imposed by law (July 14, 1975), because the ICC did not have jurisdiction over the operations until it imposed them on the unwilling carrier. The ICC agreed with Amtrak, holding that because the pre-July 14, 1975 operations were not conducted pursuant to regulatory authority, the ICC had no jurisdiction to impose compensation terms prior to that date. *TRRA*, at 912.

The precedent of *TRRA* is directly on point. Indeed, in holding that compensation may be made retroactive only to the date of ICC jurisdiction over the operations in question, the ICC explicitly distinguished trackage rights cases such as those cited by BNSF. *TRRA*, at 11. With trackage rights, agency authority is secured before the rights may be operated, and therefore retroactive compensation may be awarded back to the time of termination of the underlying agreement because the operations are always governed by the agency's regulatory approval.

However, Amtrak conducts operations without regulatory oversight, only resorting to the Board for authority when the freight carrier is unwilling to negotiate terms acceptable to Amtrak. The Board's award of retroactive compensation can only cover the period of time when Amtrak conducts operations pursuant to STB order under Section 24308(a). In this case, BNSF had no regulatory authority to operate over KJRY's tracks until issuance of the Decision. Thus, the Board has no legal authority to make the compensation level retroactive to the period when those operations were subject to a private agreement. The new compensation terms should not be imposed prior to the Board's establishment in the Decision of BNSF's Section 10901(d) rights to use KJRY's tracks.

In summary, Board precedent does not bolster BNSF's refund argument. On the contrary, the Board has historically refused to impose a refund during periods when the operations in question were conducted outside of the parameters of the Board's regulatory oversight, as BNSF's operations were in this case until entry of the Decision. BNSF's request for a refund should therefore be denied.

C. Common Law Does Not Support A Refund

BNSF's final plea for a refund is premised upon common law, citing to cases that hold that money paid under "coercion" may be recovered. BNSF has not proven any facts constituting coercion. KJRY's termination of BNSF's operating rights does not amount to legal "coercion" so as to require the repayment of funds. BNSF's decision to accept KJRY's offer of switching services was a business decision, reached after its preferred method of operation (a direct connection to the Mooar Line) was lawfully terminated. It is not entitled to a refund.

BNSF's "coercion" claim is predicated on the belief that once KJRY invoked its right to halt BNSF's operations on KJRY's tracks, BNSF was unable to serve its Mooar Line shippers, a

result, BNSF claims, that would have “resulted in shut factories and injured shippers.” BNSF’s Opening Statement at 11. As KJRY has established from the commencement of this case, BNSF is flat wrong. At no time did KJRY prevent BNSF from serving its Mooar Line shippers and at no time did any Mooar Line shipper go without service or have its access to BNSF’s network denied. KJRY did prevent BNSF from operating trains on KJRY to directly connect to the Mooar Line (through invocation of a cancellation provision that BNSF explicitly agreed to), but that action did not cut off service to shippers.¹¹

BNSF could have continued to access all of its Mooar Line shippers with its own engines and crews from operations stationed on its Mooar Line, a situation no different than that faced by other carriers that operate disconnected segments of track, and KJRY would have been required to interchange BNSF cars to and from the BNSF lines. As it was, it was more efficient for both parties to implement an intermediate switch operation whereby BNSF’s locomotives and cars were switched across KJRY’s property.¹² BNSF’s decision to transport a locomotive and crew every day across KJRY’s terminal tracks (and to pay the intermediate switch fee) may have been operationally expedient for BNSF, but KJRY did not mandate that operation. KJRY could have satisfied its interchange obligations by moving cars from the Mooar Line interchange to the interchange with the remainder of the BNSF system. Instead, KJRY provided BNSF with more efficient service than a traditional interchange operation by allowing BNSF to leave its

¹¹ Indeed, BNSF’s David C. Wolter stated that using KJRY’s interchange service, BNSF was “generally able to provide timely service to shippers located along the Mooar Line (with)...relatively smooth operations.”

¹² Where direct connections between lines cannot be effected, separate crews and locomotives are generally utilized to serve shippers, with some other method used to “bridge the gap” between the disconnected lines, such as interchange, haulage, or an intermediate switch.

locomotives and crews attached to the cars to be interchanged. To say that such actions were “coercion” is insulting to KJRY’s operating personnel, who worked very hard to effectuate an efficient intermediate switching operation.

Taken as a whole, the facts as established by the parties did not amount to coercion. KJRY was under no legal obligation to allow BNSF to continue to operate on its property. BNSF’s shippers suffered no loss of service as a result of KJRY’s actions. BNSF had numerous means to continue to serve its Mooar Line shippers and it was not “coerced” into paying KJRY an intermediate switch charge. As it has been stated:

The rule allowing a person to recover money paid on the ground that the payment was under compulsion applies only where there is no other means of immediate relief, and therefore no avenue of escape from the threatened injury other than by making the payment. Where a dispute arises and the debtor, who pays under protest, has at hand reasonable means of immediate and adequate relief other than by making the payment, his act is not one done under coercion. Thus, where a person has time and opportunity to relieve himself from his predicament without making such a payment, by resort to ordinary legal methods, but nevertheless pays the money, the payment will be deemed voluntary, and he cannot recover it.

66 Am. Jur. 2d *Restitution and Implied Contracts*, § 114 (2002).

The actions complained of by BNSF simply do not rise to the level of “coercion” that the law will recognize to afford a remedy. “‘Business compulsion’ is not established by proof that a payment was made merely under the stress of pecuniary need or the pressure of financial circumstances.” 66 Am. Jur. 2d *Restitution and Implied Contracts*, § 107 (2002). BNSF’s complaint amounts to nothing more than its concern that its access to its Mooar Line shippers was made more expensive once KJRY lawfully cancelled the various agreements. That form of “coercion” is not recognized to allow the award of a refund.

Finally, BNSF points out that it made its payments to KJRY “under protest.” BNSF’s Opening Statement at 11. However, “if a payment is otherwise voluntary, the fact that the person

making a payment files a written protest at the time does not change its character.” 66 Am. Jur. 2d *Restitution and Implied Contracts*, § 95 (2002). BNSF’s protest would have relevance only if the protested payment was made under coercion, which it was not.

D. A Refund Would Severely Cripple KJRY’s Financial Situation

The Board should also be mindful of the impact that a decision awarding BNSF some \$660,000.00 (plus interest) will have on KJRY’s finances. KJRY is a Class III carrier with gross revenues less than \$1.5 million and a maintenance budget of \$260,000. To pay a sum of money of the magnitude sought by BNSF would consume almost 50% of KJRY’s available cash flow, severely limit KJRY’s ability to make capital improvements, result in a reduction of maintenance, and adversely affect KJRY’s ability to provide efficient and reliable rail service to its shippers.

Moreover, because there was simply no basis at law for BNSF to conduct operations on KJRY’s tracks after the agreements governing those rights were terminated, KJRY did not establish a trust fund or other escrow device to anticipate payment of a large retroactive award to BNSF. KJRY had no reason to believe such a sinking fund would be necessary, and instead invested its limited resources in plant and equipment, to better serve its shippers. A company the size of KJRY is just too small to be able to afford to place two-thirds of a million dollars in the bank while badly needed capital and maintenance projects languish. At all times, KJRY has acted in the best interests of its shippers, and those shippers should not now be punished for KJRY’s efforts to provide them with improved competitive options.

While BNSF postures that KJRY has “profited” from its payments to KJRY, the fact is that KJRY has invested that money back into its facilities. The capital-intensive nature of railroading means that the return KJRY will receive from these investments will not be realized

for a number of years, and will be received in the nature of reduced derailment expenses and similar savings.

The Board has previously indicated an understanding of the hardship that a large retroactive compensation award might work on a carrier, and it should likewise do so here. *See, e.g., North Carolina Railroad Company -- Petition to Set Trackage Compensation and Other Terms -- Norfolk Southern Railway Company, et al.*, Finance Docket No. 33134, Slip op. (STB served May 29, 1997) ("NS cannot reasonably be expected to provide rail service indefinitely at current freight rates while NCRR seeks a lease compensation prescription at a significantly higher level and requests that it be made retroactive to the expiration of the lease agreements."). Certainly, if the Board understands the impact that a large retroactive award of compensation can exert on a Class I carrier, Class III KJRY is entitled to at least as much deference.

In short, KJRY cannot simply "cut a check" for the refund that BNSF seeks without compromising service to its customers, reducing capital improvements, and severely limiting maintenance and operating practices. As a result, requiring KJRY to pay such a refund would be in direct contradiction of the Board's statutory obligation to allow rail carriers to earn adequate revenues. *See* 49 U.S.C. § 10101(3) ("Section 10101(3)"). Indeed, the Board specifically cited to the importance of Section 10101(3) in its order served in this docket on August 31, 1999, seeking information on the reasonableness of KJRY's interchange operations. *See also Arkansas & Missouri Railroad Co. v. Missouri Pacific Railroad Co.*, Finance Docket No. 31281, Slip op. (ICC decided Nov. 13, 1990) ("The attainment of revenue adequacy and the ability to attract capital are important goals or relevant considerations in numerous sections of the Interstate Commerce Act."); *Review of Rail Access and Competitive Issues*, Ex Parte No. 575, Slip op.

(STB served May 4, 1998) (denying an allegation that the Board considered revenue adequacy to be of a lower priority than competitive access).

E. KJRY Cannot Raise Rates To Pay A Refund

In determining whether a refund should be ordered in this proceeding, the Board might be tempted to conclude that KJRY can simply charge its shippers higher rates in order to cover the refund payment. Such a conclusion might be warranted in a situation where a railroad has a broad and diverse client base with few competitive options, so that rates can be adjusted without a significant loss of business.

Unfortunately, the conclusion that KJRY can simply raise rates to cover the costs of a refund has no basis in fact. Unlike many larger railroads, KJRY has no overhead or bridge business (other than BNSF's newly-imposed operations), so it cannot negotiate higher divisions. Moreover, roughly three-quarters of KJRY's revenues are derived from movements to and from the Roquette America, Inc. ("Roquette") plant in Keokuk. The traffic in and out of that plant is currently moved under a long-term contract that is still five years away from renegotiation. Although the contract has an escalation clause, the escalation is tied to an index that does not change because of a shift in KJRY's underlying cost structure. The Roquette traffic is thus locked in for five years, and rates cannot be raised to pay for a refund.

Even the relatively few shipments that comprise the remainder of KJRY's traffic will not bear a sudden rate increase. KJRY's traffic base consists largely of agricultural products (primarily fertilizer and grain), much of which is moved to and between local processing facilities. Unlike coal, which moves many hundreds of miles from mine head to utility by rail with few modal alternatives, farm-related freight moves shorter distances, rendering it subject to truck competition across the well-maintained road system that dominates Illinois. Keokuk is also

located on the Mississippi River, providing Keokuk shippers with excellent access to barge competitors. KJRY currently prices its traffic to remain competitive with trucks and barges, taking into account the inherent differences in the two modes. If this traffic were amenable to a significant price increase, KJRY would have already found a means to implement that increase.

F. Any Refund Should Be Delayed Until The Appeal Is Determined

If the Board determines that some refund is due BNSF, the payment of the refund should be delayed until after the Appellate Court has ruled upon the merits of KJRY's appeal of the Decision (*Keokuk Junction Railway Co. v. STB et al.*, No. 01-1305, United States Court of Appeals for the District of Columbia Circuit). In fact, the equities of this matter clearly favor a deferment of any refund award. The Board should therefore delay enforcing any refund until the appeal is concluded.

KJRY believes that it has a significant possibility of prevailing on the merits of its appeal. As the Board has recognized, this case presents an issue of first impression.¹³ Further, the Board's determination that Section 10901(d) may be used to compel one carrier to open its tracks to operations by another railroad represents a significant expansion of the law, and one that is premised on an expansive reading of the existing statute. While KJRY obviously does not expect the Board to agree about KJRY's chances of success on appeal, the Board should recognize that, at a minimum, the unprecedented nature of this case means that the Appellate Court's decision could well go against the Board.

Although the Board has previously ruled in this case that it would not delay consideration of future compensation pending resolution of KJRY's appeal (*see* January 30, 2002 Order), the

¹³ "Joint Brief of Respondent Surface Transportation Board and United States of America," filed in Case No. 01-1305, *Keokuk Junction Ry. Co. v. STB, et al.*, dated February, 2002.

two reasons stated by the Board for denying KJRY's request do not apply to a delay in payment of any refund. The Board's first reason for proceeding with the compensation portion of this case was that a delay would not promote "commercial certainty" for shippers because their rates might be impacted by the compensation paid by BNSF to directly access the Mooar Line. The rates BNSF charges to its shippers, however, will not be affected by a refund, which will only concern financial arrangements between KJRY and BNSF. The Board's second rationale (that KJRY could easily compile evidence concerning an appropriate rate for on-going compensation) also has no application to the refund issue, because the payment of two-thirds of a million dollars will certainly not be "easy" for a fifty mile long railroad and could well jeopardize KJRY's essential services. If the Board does conclude that some refund of money by KJRY is required, the date for repayment of those funds should be delayed until after the Appellate Court has ruled on the merits of KJRY's appeal.¹⁴

IV. KJRY SHOULD BE FULLY INDEMNIFIED FOR BNSF'S OPERATIONS

As BNSF notes (BNSF's Opening Statement at 14), KJRY has requested that BNSF provide full and complete defense and indemnity to KJRY for all damages and costs incurred by KJRY as a result of BNSF's operations on its tracks (other than for KJRY's gross negligence or intentional actions, actions that ordinarily may not be indemnified). As KJRY has previously stated, BNSF's presence on its tracks provides KJRY with no benefit. BNSF is able to use KJRY's tracks only because the Board has ordered KJRY to allow such operations. In light of

¹⁴ Alternatively, KJRY suggests that if a refund is owed, the Board should allow KJRY to pay the refund through a waiver of the on-going charges assessed to BNSF for use of its tracks until the amount of the refund has been recouped by BNSF. BNSF's payments to KJRY were not made in one lump sum, but were spread out over the course of several years, and if KJRY must pay any refund at all, it would be equitable for KJRY to repay BNSF in a similar fashion.

the forced access imposed by the Board, KJRY should not be required to subsidize any portion of BNSF's operations, included the added burden of risk of loss.

BNSF dedicates one page of its Statement to arguing that it should not have to fully compensate KJRY for all of the exposure arising from its presence of KJRY's tracks. In so arguing, BNSF attempts to distinguish *Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a) - Springfield Terminal Railway Co., et al.*, Finance Docket No. 33381, Slip op. (STB served May 29, 1998) ("*ST*") by pointing out that the present case involves freight operations that were formerly conducted pursuant to a contract, whereas *ST* involved new operations of a passenger train. That distinction is irrelevant to the value of the *ST* precedent. In that case, the Board established that a railroad forced to accept the operations of another carrier on its tracks should not be required to subsidize those operations by paying damages that it would not incur but for the mandated operations.

Moreover, BNSF's efforts to avoid responsibility for expenses incurred by KJRY for BNSF's operations directly contradicts the position taken by one of BNSF's predecessors in a previous Section 10901(d) case. In *Omaha Public Power District -- Construction Exemption -- In Otoe County, NE*, Finance Docket No. 32630, Slip op. (ICC served Nov. 30, 1995) ("*Omaha*"), Burlington Northern Railroad ("*BN*") opposed the construction of a new rail line that would cross its tracks. In discussing the terms that BN believed should be imposed on the crossing carrier's operations, BN argued that the crossing carrier should be required to "execute BN's standard 'right of entry' form, releasing BN from liability when third-party contractors enter BN's property." *Omaha*, at 3. BNSF has not suggested any reason why its predecessor should be released from liability when the predecessor is being crossed, but BNSF should receive more favorable terms when it is the crossing carrier. Therefore, it is appropriate that BNSF fully

indemnify and defend KJRY for all liability faced by BNSF as a result of BNSF's presence on KJRY's tracks.

CONCLUSION

In summary, KJRY asks the Board to assess BNSF's compensation in line with other intermediate switching operations, deny BNSF any refund of amounts paid to KJRY for use of KJRY's switching services between March 1, 1999 and June 22, 2001, and provide KJRY with complete indemnity against damages sustained from BNSF's operations on its tracks.

Respectfully submitted,

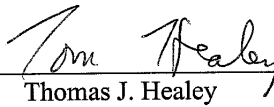
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CERTIFICATE OF SERVICE

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



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