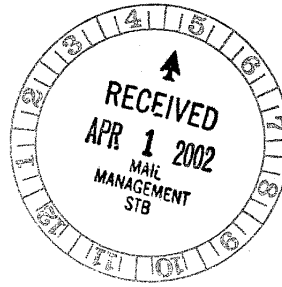
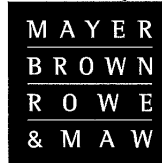


April 1, 2002



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BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of the Secretary

APR 02 2002

Part of
Public Record

Re: STB Finance Docket No. 33740 (Sub No. 1), The Burlington
Northern and Santa Fe Railway Company -- Petition for
Determination of Compensation and Other Terms

Dear Secretary Williams:

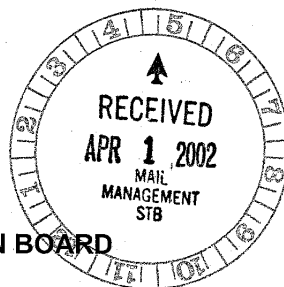
Enclosed for filing in the above-entitled proceedings are the original and ten copies of BNSF's Reply Statement Regarding Compensation and Other Terms. Also enclosed are three diskettes containing the Reply Statement in electronic format.

Sincerely yours,

Robert M. Jenkins III

RMJ/bs

2050 96



BNSF-6

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 33740 (Sub No. 1)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY –
PETITION FOR DETERMINATION OF COMPENSATION AND OTHER TERMS**

**BNSF'S REPLY STATEMENT
REGARDING COMPENSATION AND OTHER TERMS**

**ENTERED
Office of the Secretary**

APR 02 2002

**Part of
Public Record**

Michael E. Roper
THE BURLINGTON NORTHERN AND
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Attorneys for The Burlington Northern and Santa Fe Railway Company

Dated: April 1, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 33740 (Sub-No. 1)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY –
PETITION FOR DETERMINATION OF COMPENSATION AND OTHER TERMS**

**BNSF'S REPLY STATEMENT
REGARDING COMPENSATION AND OTHER TERMS**

Pursuant to the Board's Decision served January 30, 2002 in the above-captioned subdocket, The Burlington Northern and Santa Fe Railway Company ("BNSF") submits herewith its reply statement regarding compensation and other terms. Attached in support of BNSF's comments is the verified reply statement of David W. Howell ("Howell Reply VS") regarding crossing operations.

INTRODUCTION AND SUMMARY

The Board has issued a clear and unambiguous ruling that BNSF has a right to cross the tracks of the Keokuk Junction Railway Company ("KJRY").¹ Nevertheless, KJRY argues in its Opening Statement Regarding Compensation and Other Terms ("KJRY Opening Statement") that the Board should set compensation as if BNSF had no right to cross and KJRY had the right to assess switching charges against BNSF. The Board should reject KJRY's effort to relitigate its Crossing Decision. BNSF has the right to cross KJRY's tracks, and the law is clear that only the direct costs of the crossing may be considered in the Board's compensation decision.

¹ See The Burlington Northern and Santa Fe Railway Company – Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, Finance Docket No. 33740 (Sub-No. 1) (served June 22, 2001) ("Crossing Decision").

KJRY has begrudgingly made its own calculation of the direct costs attributable to BNSF's operation. Although KJRY arrives at numbers that are substantially higher than the parties' previous calculations, BNSF is not in a position, absent discovery, to second-guess most of KJRY's calculations of the track and maintenance costs. BNSF also has no desire to further prolong this proceeding. Accordingly, BNSF is prepared to stipulate to all of the cost estimates provided by KJRY in its Opening Statement in determining appropriate compensation for KJRY's maintenance, capital, and operating expenses. BNSF also continues to be prepared to compensate KJRY for the use of its land and will increase its estimate of the crossing's land value based on increased acreage figures provided by KJRY.

The resulting compensation (approximately \$10,800 annually) is still a fraction of the amount that KJRY required BNSF to pay to cross KJRY's tracks, while the Board's proceedings were pending, under the guise of its sham "interchange" operation. KJRY claims in its Opening Statement that it would be unjust for the Board to require KJRY to pay a refund because KJRY allegedly had little or no "notice" that it might be required to repay the money it was improperly taking from BNSF. KJRY's "notice" argument is patently untenable in light of BNSF's notice to KJRY that it was making its coerced payments under protest, BNSF's prompt initiation of proceedings at the Board to resolve the dispute and set new compensation terms effective as of the end of the parties' prior agreement, and the Board's nearly two years of proceedings over the propriety of KJRY's conduct. KJRY also misconstrues both language in the Board's Crossing Decision and legal precedent in arguing against a refund. KJRY even suggests that any Board-ordered refund should be \$0, based on the nonsensical and tautological

proposition that any refund of improper fees should be reduced by crossing compensation that is equivalent in amount to its improper fees. The Board should reject KJRY's arguments and order a refund of the money that KJRY obtained from BNSF through improper "interchange" fees (less reasonable crossing compensation as determined by the Board).

Finally, regarding non-compensation terms, KJRY has proposed a number of operating and liability provisions that are radically different from the operating and liability provisions that successfully govern the Keokuk crossing today. In most cases, KJRY fails even to discuss, much less justify, why such major alterations to the standard operating provisions that have worked well in the past are now necessary.

The Board should reject KJRY's suggestion that the parties be ordered to negotiate over these one-sided terms and should order the use of operating provisions that are substantially similar to the terms currently governing the crossing. Such terms can be found in BNSF's proposed crossing agreement, which is attached as Exhibit C to BNSF's Opening Statement Regarding Compensation and Other Terms ("BNSF Opening Statement").

ARGUMENT

I. THE BOARD SHOULD SET COMPENSATION ONLY FOR THE DIRECT COSTS INCURRED BY KJRY FOR THE CROSSING.

KJRY advocates the use of three alternative compensation theories. First, KJRY argues that it is owed an intermediate switch fee. Not coincidentally, KJRY asserts that an appropriate intermediate switch fee would be \$85 per car, which is the exact same fee that KJRY had coerced from BNSF during the two years it improperly charged for a sham "interchange" service. Alternatively, KJRY argues that it is entitled to all of the

money that BNSF “saves” by crossing KJRY’s track instead of interchanging with KJRY – which, of course, places BNSF into the financial position of having no crossing right at all. Finally, KJRY makes its own calculation of the direct maintenance, capital, and operating costs of the crossing. Although the figures proposed by KJRY are considerably higher than the parties’ prior calculations of KJRY’s costs, BNSF has determined to stipulate to all of KJRY’s numbers except its land valuation.

A. KJRY’s Argument For An Intermediate “Switch” Fee Is A Collateral Attack On The Board’s Crossing Decision.

In its June 22 decision, the Board unequivocally ruled that KJRY is not entitled to charge for an “interchange” or “switching” service. Nevertheless, KJRY argues that appropriate compensation would entail comparing BNSF’s crossing of KJRY’s track to a switching service. KJRY then asserts that the very \$85 per car charge that the Board had ruled was improper would be an appropriate switching charge and should therefore be applied as crossing compensation in this proceeding. See KJRY Opening Statement at 6-10.

KJRY’s assertion that it is entitled to switch fees as crossing compensation is nothing but a collateral attack on the Board’s Crossing Decision. As a matter of law, when BNSF crosses KJRY’s track, no “switch” occurs.² Essentially, KJRY is arguing here, as it is also arguing in the D.C. Circuit in its appeal of the Crossing Decision, that

² The authorities KJRY cites in its brief involve true intermediate switching, **not** crossings. See 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”); see also 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”). BNSF is crossing KJRY’s track in

the fact that BNSF must use some of KJRY's track to cross means that this is not really a crossing. See Petitioner's Initial Brief at 26-28, Keokuk Junction Ry. Co. v. STB, No. 01-1305 (D.C. Cir. filed July 11, 2001) ("Petitioner's Initial Brief").

It would be completely nonsensical for KJRY to be prevented from charging an \$85 switching fee for a sham interchange that involved the pretense of KJRY providing a service to BNSF (including attaching its locomotive to BNSF's trains as they crossed the Mooar Line), but to be permitted to charge an \$85 switching fee now that the pretense has been completely rebuffed.³ The Board should reject any argument by KJRY that it is entitled to compensation based on a comparison to switching charges.

B. KJRY's Argument That It Is Entitled To All Of The Money BNSF "Saves" Through Its Right To Cross KJRY's Track Is An Obvious Bootstrap.

KJRY alternatively argues that appropriate compensation for BNSF's crossing of KJRY's track would require BNSF to give KJRY all of the money that BNSF "saves" by not having to place duplicative train crews and power on the Mooar Line in order to interchange traffic with KJRY. According to KJRY, "[i]n 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." KJRY Opening Statement at 10. But BNSF does have a method to move its cars over KJRY track: its crossing

order to connect to its own Mooar Line. There is no switch, much less an intermediate switch.

³ KJRY cites the example of the Peoria & Pekin Union Railway Company ("PPU"), in which the PPU collects an intermediate switch charge for trains that it does not actually move, to argue that an intermediate carrier does not necessarily have to handle cars for a "switch" to occur. See KJRY Opening Statement at 8. But that is obviously irrelevant here, since no one has even asserted, much less demonstrated, that the railroads involved have **crossing** rights over the PPU's track.

rights pursuant to Section 10901(d). The unstated premise of KJRY's argument that BNSF should give up its "cost savings" is that BNSF has no right to cross KJRY's track, since BNSF's "cost savings" are defined by KJRY relative to the costs BNSF would incur if it had no crossing rights at all. Given that the Board has already determined that BNSF has a statutory right to cross KJRY's track,⁴ there is no basis for requiring BNSF to pay KJRY the value of its supposed "cost savings" as though BNSF had no crossing right at all.

Moreover, the Board has set crossing compensation at the minimum value guaranteed by the Taking Clause of the Constitution in order to advance Congress' procompetitive mandate in Section 10901(d). See Chicago and Northwestern Ry. Co. – Construction and Operating Exemption – City of Superior, Douglas County, WI – Petition for Issuance of an Order Pursuant to 49 U.S.C. 10901(d), Finance Docket No. 32533 (Sub-No. 1), 1995 ICC LEXIS 205, at *5-*7 (served Aug. 11, 1995). It would utterly defeat that purpose to base crossing compensation on a theory that a crossing carrier should pay a crossed carrier the value of the costs of stationing duplicative crews and power that are associated with a non-existent interchange.⁵

⁴ BNSF vigorously disputes KJRY's attempt to characterize as an "offensive weapon" BNSF's enforcement of its statutory rights under Section 10901(d). See KJRY Opening Statement at 10. BNSF has merely been enforcing its rights, pursuant to that statute and the parties' longstanding practice, to continue to cross KJRY's line in order to reach its shippers along the Mooar Line. It was only after KJRY's anticompetitive attempts to acquire the Mooar Line were spurned by BNSF that this dispute arose. KJRY offensively parked a rail car on the crossing, and KJRY offensively demanded an \$85 per car charge for a sham switching service that neither BNSF nor its shippers wanted or needed. BNSF was content to abide by the terms of the parties' crossing and supplemental agreements, as well as longstanding practice between the two railroads (and their predecessors) in the Keokuk area.

⁵ Needless to say, KJRY's proposal that the Board "order BNSF to file a summary report of its cost savings, allow KJRY to undertake discovery to verify BNSF's

C. BNSF Is Prepared To Compensate KJRY For Its Share Of The Direct Maintenance, Capital, Operating, and Real Estate Costs Associated With The Crossing.

KJRY finally proposes that the Board determine appropriate compensation based on an analogy to trackage rights compensation. See KJRY Opening Statement at 14-18. BNSF has already stated that it is prepared to pay its share of the direct operating, maintenance, and capital costs associated with the crossing. While the figures KJRY has presented for the costs are **much** higher than those to which the parties agreed in the past, BNSF is at a significant disadvantage in attempting to challenge KJRY's estimates without discovery, and BNSF has no desire to further prolong these proceedings. Thus, while BNSF disagrees with KJRY's proposed valuation of the land used for the crossing, BNSF is otherwise prepared to accede to KJRY's request for compensation pursuant to its analogy to trackage rights cases, including the use of most of KJRY's cost estimates and valuation formulas.

Specifically, BNSF is prepared to accede to KJRY's cost estimates regarding the following: tie value (\$32,000); turnout value (\$93,000); rail and other track material (\$15,800); and ballast (\$38,100). Moreover, BNSF is prepared to utilize KJRY's estimate for the amount of land used for the crossing of 45,760 square feet (using KJRY's estimate of a 1,430 feet crossing length multiplied by an average crossing width of 32 feet).

estimates, and then allow KJRY to file its proposed cost savings based upon BNSF's evidence and discovery" (KJRY Opening Statement at 12) would make matters even worse, by piling procedural expense and more delay on top of the purported "cost savings."

However, KJRY has failed to adequately substantiate its estimated land value for the crossing of \$1 per square foot. As a factual matter, KJRY's estimated land value is several orders of magnitude above prevailing land values in the Keokuk area. See generally Verified Statement of Terrell A. Honnold and attached Appraisal ("Honnold Appraisal"), attached to BNSF's Opening Statement. As a legal matter, KJRY's use of a land value estimate of \$1 per square foot for the crossing is unqualified, outdated, and based on hearsay. See Verified Statement of Richard J. Lane ("Lane VS"), attached as Exhibit B to KJRY Opening Statement, at 6 ("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**" (emphasis added)). Instead, BNSF proposes valuing the land used for the crossing at \$.15 per square foot (\$6,410 per acre), based on the independent appraisal of that land recently conducted by Terrell A. Honnold, MAI, SREA,⁶ for BNSF. See Honnold Appraisal at 3, 13. Accordingly, BNSF submits that the proper valuation of the land used in the crossing is \$6,864 (KJRY's estimate of 45,760 square feet of property multiplied by a land value of \$.15 per square foot).

Using KJRY's cost estimates, as adjusted by the independent appraiser's determination of the crossing's land value, yields a total estimated value of the crossing of \$185,764.⁷ BNSF will not dispute KJRY's pre-tax nominal cost of capital figure of 15.4%, yielding a return on investment of \$28,608 annually (\$185,764 multiplied by 15.4%).⁸ BNSF is similarly prepared to accede to KJRY's estimates for the costs of

⁶ Member, Appraisal Institute; Senior Real Estate Analyst.

⁷ This figure compares to KJRY's estimated crossing value of \$224,700.

⁸ This figure compares to KJRY's estimated return on investment of \$34,604 annually.

maintenance of the crossing (\$2,970), as well as the parties' proportional use of the crossing.⁹ As applied, BNSF's share of responsibility for the crossing would be \$10,803 per year (\$28,608 in annual return on investment, plus \$2,970 in annual maintenance costs, then multiplied by KJRY's estimate of BNSF's proportional use of the crossing of 34.21%). BNSF is willing to pay that sum to KJRY on an annual basis, subject to reasonable escalation provisions.¹⁰

II. THE BOARD SHOULD ORDER A REFUND.

During the two years the Board took to determine that BNSF has a right to cross KJRY's tracks, KJRY collected approximately \$663,000 in improper switching fees. Despite both the plain language of the Board's Crossing Decision and clear legal precedent, KJRY argues that it should not be required to refund the money it improperly coerced from BNSF by blocking the crossing and instituting a sham interchange service. Despite BNSF's having made its payments under protest and instituting these proceedings concerning the propriety of KJRY's "interchange" charges, KJRY now claims that it had no notice that it could be required to refund BNSF's money

⁹ KJRY estimates that BNSF moves 13 loaded cars per day over the crossing, whereas KJRY moves 50 cars per day over the crossing. See KJRY Opening Statement at 17. KJRY performs a prorate of the costs using those car proportions and an assumption that, on average, KJRY's cars use half of the track, while BNSF's cars use all of the track. See id.

¹⁰ BNSF proposes the use of the parties' prior escalation provision, which is found in the 1995 Supplemental Agreement (attached as Exhibit A to BNSF's Opening Statement). As applied to the parties' new compensation terms, 70% of BNSF's payment (representing maintenance and operating expense and depreciation) would be increased or decreased based on the Association of American Railroads Railroad Cost Recovery Index, West District (material prices, wage rates, and supplements combined, excluding fuel). The balance of BNSF's payment (30%), representing interest rental and taxes, would be fixed. Because the 1995 Supplemental Agreement's escalation provision contained a floor, under no circumstances would BNSF's annual payment be less than \$10,803.

and that it would be unfair or unjust to require it to do so. The Board should reject KJRY's arguments and order a refund.

A. The Plain Language Of The Board's Crossing Decision Supports A Refund.

In its Crossing Decision, the Board clearly explained that it "will order KJRY to **continue to allow BNSF to cross** KJRY's line in order to serve shippers on the Mooar Line." Crossing Decision, slip op. at 8 (emphasis added). Despite the Board's clear acknowledgement of BNSF's continuous crossing rights, KJRY argues that the Crossing Decision's language does not support granting a refund. KJRY's arguments, however, selectively misconstrue the Board's language in the Crossing Decision.

KJRY cites two passages of the Crossing Decision to argue that the Board "established" BNSF's rights for the first time when it released the Crossing Decision. KJRY first cites to page one of the Crossing Decision, in which the Board stated "we conclude that BNSF **has crossing rights** under 49 U.S.C. 10901(d) to access its Mooar Line via the involved KJRY line in Keokuk and we **grant the carrier that authority.**" *Id.* at 1 (emphasis added). From that passage, KJRY argues that the "[u]se 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." KJRY Opening Statement at 23. Of course, the Board never stated that it was "granting" BNSF a "right" to cross; instead, the Board clearly indicated that BNSF "has crossing rights" and, pursuant to those crossing rights, the Board issued an Order that "granted" BNSF the "authority" to cross. Simply stated, Board-ordered authority to cross pursuant to pre-existing crossing rights is an entirely different concept from the granting of those crossing rights in the first place.

KJRY's second attempt at linguistic gymnastics occurs when it analyzes the passage, found on page 8 of the Crossing Decision, in which the Board stated "we will order KJRY to continue to allow BNSF to cross KJRY's line in order to serve shippers on the Mooar Line." Crossing Decision, slip op. at 8. KJRY seems to claim that the language "will order" imposes only a future duty on KJRY to make its tracks available to BNSF. However, KJRY's argument flies in the face of the Crossing Decision's clear language concerning BNSF's continuous right to cross KJRY's track and conflicts with the Board's ruling that KJRY's termination of BNSF's crossing rights was unlawful under Section 10901(d). As a general matter, the Board concluded:

The purpose of a line construction in general, and crossing rights in particular, would be thwarted if a carrier could be required to allow its competitor to construct a crossing, but then – in a day, or a week, or years later – block the other carrier from operating over the crossing track to serve shippers in interstate commerce.

Id. at 6. The Board specifically **rejected** KJRY's argument that BNSF's crossing was not protected because the parties' cancelled crossing agreement had been voluntary pursuant to a line relocation. See id. at 7-8.

In this respect, KJRY's effort here to avoid the application of Section 10901(d) to its unlawful interference with BNSF's crossing is no different from the position it is taking in the D.C. Circuit, seeking outright reversal of the Board's decision. See Petitioner's Initial Brief at 33-39; Petitioner's Reply Brief at 9-16, *Keokuk Junction Ry. Co. v. STB*, No. 01-1305 (D.C. Cir. filed July 11, 2001). For all intents and purposes, KJRY's effort to avoid a refund – on the ground that BNSF did not have a statutory right to cross KJRY's tracks after KJRY cancelled the parties' agreement – is another collateral attack on the Board's decision. If, as KJRY suggests, a crossing right does not mature until

the Board issues a decision resolving a post-construction crossing dispute, then the floodgates will be opened for carriers to block competitors from operating over established crossings. If the Board fails to order KJRY to refund BNSF's money, then KJRY will have achieved exactly what the Board intended to prevent: the ability of a party to agree to a crossing and then, years later, block the crossing and extract an "interchange" fee from its competitor.

B. Board Precedent And Common Law Support A Refund.

BNSF enjoyed crossing rights over KJRY's track during the entire period of time for which BNSF seeks a refund. All that the Board granted in the Crossing Decision was specific authority for BNSF to perform the crossing, resolving a two-year-old dispute between the parties. KJRY nevertheless suggests that a refund would be improper because the Board's Crossing Decision involved a case of first impression and a "new and novel interpretation" of Section 10901(d). See KJRY Opening Statement at 19. On that basis, KJRY asserts that any application of the Board's decision to pre-Crossing Decision conduct "would constitute an impermissible retroactive application of the law." See KJRY Opening Statement at 28, citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); Brimstone R.R. & Canal Co. v. U.S., 276 U.S. 104 (1928). However, it is KJRY's approach to administrative law generally, and the Board's precedent specifically, that is "new and novel."

KJRY confuses **rulemaking**, in which retroactivity is disfavored by the law, see Bowen, 488 U.S. at 204 (agency lacked authority to promulgate retroactive rules); Brimstone R.R. & Canal Co., 276 U.S. at 117-23 (ICC lacked authority, pursuant to statute, to retroactively reset rates), with **adjudications**, in which "a court is to apply the

law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1974). Thus, “when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it.” Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081 (D.C. Cir. 1987). When the Board adjudicated the crossing dispute under Section 10901(d) it recognized BNSF’s continuous crossing rights. The Board should now apply its legal interpretation to find that BNSF is due a refund.

KJRY’s assertion that this dispute is a case of “first impression” and involves a “new and novel interpretation of a decades-old statute” does not help its argument. “Every case of first impression has a retroactive effect, whether the new principle is announced by a court or an administrative agency.” SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). In fact, “the circumstances in which a rule may be announced but not applied in an adjudication are few.” Gen. Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1061 (D.C. Cir. 1989).

Even when prior decisions are **overruled**, the law as developed in the case at hand is applied to that case. Thus, when the ICC overruled prior decisions and held that carriers may file tariffs containing charges for hauling empty, privately-owned cars to and from repair facilities, it applied its decision with retroactive effect. See Gen. Am. Transp. Corp. v. Ind. Harbor Belt R.R. Co., 3 I.C.C.2d 599, 618 (1987), petition for review denied, Gen. Am. Transp. Corp., 872 F.2d 1048 (affirming decision). Here, unlike General American Transportation Co., there was no prior decision for the Board

to overrule and no rule on which KJRY could rely. KJRY itself agrees with the Board that this is a case of "first impression."

Finally, to the extent KJRY compares the Board's Crossing Decision to a trackage rights case, the Board (and its predecessor) has consistently prescribed new trackage rights compensation retroactively from the time the old agreement was terminated. See, e.g., Atchison, Topeka & Santa Fe Ry. Co. – Operating Agreement – S. Pac. Co., 331 I.C.C. 367, 394 (1967), modified, 333 I.C.C. 342 (1968); see also North Carolina R.R. Co. – Petition to Set Trackage Compensation and Other Terms and Conditions – Norfolk S. Ry. Co., Norfolk and W. Ry. Co. and Atl. and E. Carolina Ry. Co., Finance Docket No. 33134, 1997 STB LEXIS 123, at *12-*15 (served May 29, 1997) (any difference between interim compensation assessed and ultimate compensation fixed by the Board must be recompensed). KJRY has acknowledged as much. See KJRY Opening Statement at 21 ("the Board has retroactively applied the new compensation and terms to the date that the trackage rights agreement expired"). Since KJRY terminated the parties' agreement on March 1, 1999, the Board should order a refund from that date.

C. Equity Supports A Refund.

Equitable considerations also support a refund. KJRY repeatedly claims that it had little or no notice that it could be required to repay the funds that it coerced from BNSF during the pendency of the Board's decision. See KJRY Opening Statement at 19, 22, 27. KJRY's equitable arguments, however, are undermined by caselaw, established principles of equity, and the facts of this proceeding.

Retrospective application of a new statutory interpretation enunciated in an agency decision is barred only when such an application would work a “manifest injustice.” See Gen. Am. Transp. Corp., 872 F.2d at 1061; Clark-Cowlitz Joint Operating Agency, 826 F.2d at 1081. Here, if anything, it would be **unjust not to require a refund**. KJRY knew that BNSF was making the \$85 per car payments under protest. Such protest provides “notice to the person to whom the payment is made that the person paying does not acquiesce in the demand for payment and thereby surrender up any right he or she may have to recover back the money.” 66 Am. Jur. 2d Restitution and Implied Contracts § 126 (2001).

However, even if the Board accepts KJRY’s argument that it “could never have foreseen” that Section 10901(d) could be held to apply to the Keokuk crossing as of March 1, 1999, BNSF’s filing of its petition on April 27, 1999 was as clear a signal as there could be that Section 10901(d) could be held to apply to the crossing and KJRY could be required to repay the money that it had improperly coerced from BNSF. See Gen. Am. Transp. Corp., 872 F.2d at 1061 (“for most of the period for which petitioners claim retroactive application of Indiana Harbor II is unfair, petitioners have been aware of Indiana Harbor I’s vulnerability. The parties’ reliance interest in Indiana Harbor I must be discounted accordingly.”). On that basis, BNSF would be entitled to a refund at least from April 27, 1999 to the date of the Board’s Crossing Decision.

KJRY’s other equity arguments also must be rejected. KJRY argues that BNSF gave no indication in its April 1999 petition that it would seek a refund. But BNSF specifically requested in the petition that new compensation be set as of the date of the termination of the parties’ prior agreement. See BNSF’s Petition for Declaration or

Prescription of Crossing, Trackage or Joint Use Rights and for Determination of Compensation and Other Terms, filed April 27, 1999, at 24-25. An explicit refund request was unnecessary, both because BNSF was already requesting that any compensation be set as of March 1, 1999, **and** because BNSF was making its payments under protest. See 66 Am. Jur. 2d Restitution and Implied Contracts § 126.

Alternatively, KJRY seems to argue that it detrimentally relied on the Board's failure to issue an "emergency order" pursuant to BNSF's request and its two-year delay in reaching a decision on the parties' crossing dispute. However, the Board's failure to issue an emergency order signaled KJRY that a refund was likely in the event of a ruling for BNSF, since an emergency order is akin to a preliminary injunction and would only be issued if there were a possibility of irreparable injury to the party seeking the order. Since an irreparable injury in these proceedings could only occur if BNSF prevailed but did not receive a refund, the Board's failure to issue an emergency order was a clear signal to KJRY that, should the Board ultimately rule for BNSF, a refund would be required.

Similarly, KJRY's argument that it is entitled to rely on the Board's delay in adjudicating the crossing dispute in order to avoid paying a refund would entitle any other party in an administrative proceeding or court case to avoid liability for past conduct whenever it took an agency or court a significant amount of time to resolve a dispute.¹¹ Obviously, this would unfairly penalize the prevailing party, and it would also

¹¹ KJRY cites to 28 Am. Jur. 2d Estoppel and Waiver § 78 (1966) and Kelley v. Maine Eye Care Associates, P.A., 37 F. Supp. 2d 47, 53 (D. Me. 1999), to make its detrimental reliance argument, yet neither of these authorities supports the proposition that a party may detrimentally rely on a delay in a court or administrative adjudication in order to avoid the consequences of that adjudication.

constrain that agency or court from taking whatever time it needs to adjudicate matters fairly and justly.

Finally, there is no basis for declining to order a refund because KJRY is "a very small railroad" or because KJRY has already invested the money it coerced from BNSF in "badly-needed capital and other projects." See KJRY Opening Statement at 26-27. KJRY's relative size (including the size of its much larger holding company, Pioneer Railcorp¹²) is irrelevant, as is its suggestion that it cannot repay BNSF because it improvidently invested BNSF's money in various rail projects. In fact, among the "badly-needed capital and other projects" in which KJRY invested its money was a very recent \$500,000 purchase of a twelve-mile portion of the Toledo, Peoria & Western Railroad between LaHarpe and Lomax, Illinois from RailAmerica, Inc. See attached News Release, RailAmerica, Inc., RailAmerica Completes \$2.2 Million in Asset Sales (Dec. 28, 2001). Significantly, KJRY's half-million dollar purchase of additional rail line was completed in **December 2001, over six months after the Board issued its Crossing Decision** and BNSF sought a refund. To that end, and ignoring all of the equitable arguments outlined above, there is no basis for KJRY to now claim that it made its new investments without knowledge that BNSF would seek a refund or to claim that such a refund is fundamentally unjust.

¹² By its own description, Pioneer Railcorp owns 15 separate railroad subsidiaries, with plans to eventually own and operate 20 separate railroads. According to the company's website, Pioneer Railcorp "has experienced management and is well positioned financially and logistically The Company has been consistently profitable since mid-1992 and anticipates this trend to continue." See Pioneer Railcorp: Company Profile, found at <http://www.pioneer-railcorp.com/CompanyProfile.html> (last visited Mar. 25, 2002).

KJRY's difficulties are of its own making. It unilaterally terminated the parties' agreements and blocked the Keokuk crossing only after its repeated and explicitly anticompetitive attempts to purchase the Mooar Line were rebuffed. BNSF made its payments under protest and promptly instituted these proceedings, yet KJRY claims that it had no idea that it could eventually be required to refund charges for its sham "switching" or "interchange" services. And, even after the Board ruled against KJRY in its Crossing Decision and BNSF filed a Petition that explicitly requested, among other things, a refund, KJRY spent \$500,000 to purchase new rail facilities. A failure to grant a refund would work a manifest injustice toward BNSF, would send a signal to other railroads that extortionary tactics may be rewarded (or at least may be cause for a two-year revenue gain), and would undermine this Board's ability in future cases to fairly and justly adjudicate disputes.

BNSF is not seeking damages from KJRY. It is merely seeking a refund of money that it was forced to improperly pay in order to continue to serve its Mooar Line shippers. Such refund would simply place the parties into the status quo ante position. Accordingly, the Board should order a refund of interchange fees paid by BNSF to KJRY from March 1, 1999 (or, alternatively, April 27, 1999) to the date of the Board's Crossing Decision, less the amount of the Board's determination regarding compensation.¹³

¹³ KJRY makes the tautological argument that, if the Board does order a refund of KJRY's improper switching charges, the proper measure of KJRY's reasonable compensation should be a switching charge of \$85 per car, yielding a refund of \$0. See KJRY Opening Statement at 29-30. KJRY's argument in this regard is facially absurd. If KJRY is correct that an \$85 per car switching charge is a reasonable switching fee to be applied in this case, then the Board would never have ruled against KJRY in the first place.

III. THE BOARD SHOULD RESOLVE THE PARTIES' DISPUTE OVER THE NON-COMPENSATION TERMS FOR THE CROSSING.

In addition to determining the appropriate level of compensation and whether BNSF is entitled to a refund, the Board will need to determine appropriate non-compensation terms for the crossing. KJRY has proposed that the Board order the parties to negotiate such terms, but a review of KJRY's proposed operating agreement (Exhibit C to KJRY's Opening Statement) indicates that the parties are too far apart regarding those operating terms for negotiation to be fruitful. BNSF therefore requests that the Board resolve the dispute over operating terms between the parties and determine appropriate operating provisions now, rather than granting KJRY's request for yet more delay.

In its Opening Statement, KJRY identifies certain "key provisions" that it believes are necessary in any crossing agreement. These are: (1) complete indemnification to KJRY for any costs, expenses and/or liabilities incurred by KJRY as a result of BNSF's presence at the crossing and (2) the right of KJRY to return to the Board to seek a revocation of BNSF's operations if such operations violate the elements of Section 10901(d).

BNSF has already outlined its objections to complete indemnification. See BNSF Opening Statement at 14. Because the crossing involves two freight railroads, each

Similarly, KJRY argues that the Board cannot simply subtract its compensation determination from the money improperly collected by KJRY because of the "real costs it incurred in moving BNSF's cars and locomotives." KJRY Opening Statement at 30 n.7. However, KJRY incurred those costs at its own expense and, as BNSF noted in its Opening Statement, there is no reason for BNSF to subsidize the costs of KJRY's anticompetitive conduct.

party should be held responsible for any liability arising from their own conduct. There is no basis for making BNSF KJRY's insurer.

Regarding KJRY's second "key provision," KJRY always has the right to seek to reopen the Board's compensation decision if it believes that circumstances have changed sufficiently to justify such a reopening. See 49 C.F.R. § 1115.4 (petitions to reopen administratively final actions); cf. Atchison, Topeka & Santa Fe Ry. Co. – Operating Agreement – S. Pac. Transp. Co., 8 I.C.C.2d 297 (1992) (granting, in part, petition to reopen). There is no justification for the Board to include a special provision in the agreement which may be construed as giving KJRY any special reopening rights.¹⁴

While KJRY identifies only two "key provisions" in its Opening Statement, several provisions of its attached proposed operating agreement (attached as Exhibit C to KJRY's Opening Statement) would radically change the operating terms of the Keokuk crossing. These new or changed provisions create numerous problems:

- Section 3 (Ownership, Maintenance and Use of Terminal Track) provides that BNSF "shall pay KJRY for all maintenance costs associated with maintaining the tracks to the standard KJRY deems appropriate for operations." BNSF has already agreed to pay its share of the crossing's maintenance costs, so there is no basis whatsoever to require BNSF to pay for "all maintenance costs."

¹⁴ BNSF has also proposed that the new terms include an arbitration clause that would permit disputes about operating or compensation issues to be resolved expeditiously, and could avoid any need for recourse to the Board. See Proposed Crossing Agreement § 10, attached as Exhibit C to BNSF's Opening Statement.

- Section 3 also provides that “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.” However, the crossing currently allows for 20 mph operation, see Howell Reply VS ¶ 2, which is necessary for BNSF to be able to ascend the steep grade at the beginning of the Mooar Line with many of its larger trains. Id. Because BNSF has agreed to pay for its share of the crossing’s current maintenance costs, as defined by KJRY’s own expert (see Lane VS at 2), there is no basis for KJRY to allow the crossing to deteriorate to below 20 mph operation.
- Section 6 (Elevation and Control of Tracks) provides that BNSF shall at its own cost and expense change the elevation of its tracks “if KJRY shall determine of its own accord to change the elevation of KJRY’s tracks.” While BNSF recognizes the potential necessity of changing the elevation of KJRY’s tracks due to an order from a governmental authority (and, in such event, is prepared to pay for the cost of changing the elevation of its own tracks), there is no basis for requiring BNSF to pay for the elevation of its tracks should KJRY unilaterally decide to change the elevation of the crossing.
- Section 7 (Term) requires BNSF to cease crossing KJRY’s track immediately upon the issuance of an order overturning the Crossing Decision, “regardless of the pendency of any subsequent appeal that might be taken” This provision would unnecessarily create operating difficulties for BNSF in the event that the Crossing Decision is overturned and subsequently appealed or remanded. Absent such a provision, both parties would continue to operate over the

crossing until all appeals are exhausted or proceedings are concluded, at which point a final determination will have been made as to BNSF's crossing rights.

- Section 8 (Limitation On Usage) provides that "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.**" (emphasis added). This anticompetitive provision would prevent BNSF from serving other shippers that may choose to locate along BNSF's own Mooar Line. There is no basis whatsoever for preventing BNSF from serving potential shippers along its own rail lines.
- Section 11 (Default) includes numerous objectionable provisions, including an unreasonably short time to correct any default, as well as fee-shifting provisions.
- Section 13 (BNSF Train Crews) requires that BNSF train crews utilizing the Keokuk crossing "shall be qualified on the KJRY book of rules" and that 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." BNSF train crews currently operate on a standardized book of rules and have been crossing at Keokuk without incident since 1995 (minus the two years KJRY performed its sham switching service). See Howell Reply VS ¶ 3. There is therefore no basis for requiring training in KJRY's book of rules for a quarter-mile long **crossing**. Moreover, because of the nature of BNSF's operations, training in KJRY's book of rules would create significant operational difficulties for BNSF. See Howell Reply VS ¶ 4. Finally, there is no basis for allowing KJRY to participate in any formal

investigation of BNSF employees, as such participation could have a significant chilling effect.

- Section 14 (Insurance) requires BNSF to have liability insurance in the amount of \$2,000,000 per occurrence. This is a non-standard provision and is unnecessary because BNSF is self-insured.

KJRY's proposed operating agreement is radically different both from the parties' 1996 Crossing Agreement and BNSF's proposed crossing agreement. To the extent that KJRY wishes to significantly alter the parties' operating terms, KJRY is obligated to justify why such changes are necessary. Absent such justification or explanation, the Board should apply a presumption that operating terms similar to those that were suitable to the parties in the 1995-96 agreements and that successfully govern the operation of the crossing today are appropriate non-compensation terms.

The resolution of the parties' disagreement over the crossing's operating terms is ripe for the Board's review. Because the parties hold fundamentally different viewpoints regarding the operation of the crossing, BNSF does not believe that private negotiation over crossing terms would be fruitful. Accordingly, BNSF respectfully requests that the Board resolve all remaining and outstanding disputes regarding operation of the crossing.

CONCLUSION

For the foregoing reasons, BNSF respectfully requests that the Board issue a decision that (1) compensates KJRY for its direct maintenance, capital, operating, and real estate costs, (2) orders KJRY to issue BNSF a refund of the improper interchange fees it collected between March 1, 1999 and the issuance of the Board's Crossing Decision (or between April 27, 1999 and the issuance of the Board's Crossing

Decision), less reasonable compensation as determined by the Board, and (3) imposes the operating terms suggested by BNSF in its proposed crossing agreement, attached as Exhibit C to BNSF's Opening Statement.

Respectfully submitted,

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Dated: April 1, 2002

HOWELL REPLY VERIFIED STATEMENT

Reply Verified Statement of David W. Howell

1. My name is David W. Howell. I am a yardmaster for The Burlington Northern and Santa Fe Railway Company ("BNSF"). I have already testified in this matter in BNSF's Opening Statement Regarding Compensation and Other Terms, filed March 1, 2002. My reply testimony addresses Keokuk Junction Railway Company's ("KJRY") proposed "Terminal Operating Agreement," which I have reviewed.

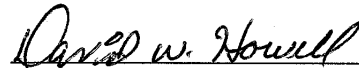
2. The track used in the Keokuk crossing currently allows for 20 m.p.h. operation by both BNSF and KJRY trains. 20 m.p.h. operation is necessary for many of BNSF's larger and heavier trains to be able to ascend the steep grade at the beginning of the Mooar Line.

3. KJRY proposes that BNSF train crews utilizing the Keokuk crossing be qualified on the KJRY book of rules. However, qualifying BNSF train crews on KJRY's book of rules is unnecessary because BNSF train crews are already qualified on BNSF's own, standardized book of rules. BNSF train crews have safely and successfully crossed KJRY's track since 1995 without having been qualified on KJRY's book of rules.

4. Requiring BNSF train crews to be qualified on KJRY's book of rules would create substantial operational difficulties for BNSF because no single train crew is assigned to operate on the Mooar Line. While certain train crews regularly operate on the Mooar Line, the crews may vary due to holidays, vacations, and changes in personnel. Therefore, to require BNSF train crews crossing KJRY's track to be qualified on the KJRY book of rules would essentially require all BNSF train crews operating in the West Quincy, Missouri Seniority District to be qualified on the KJRY book of rules.

VERIFICATION

I, David W. Howell, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on March 29, 2002.



David W. Howell

EXHIBIT

RailAmerica, Inc. (ticker: RRA, exchange: New York Stock Exchange) News Release - 28-Dec-2001

RailAmerica Completes \$2.2 Million in Asset Sales

BOCA RATON, Fla., Dec 28, 2001 /PRNewswire via COMTEX/ -- RailAmerica, Inc. (Nasdaq: RAIL), the world's largest operator of short line and regional freight railroads, today announced that it has completed two asset sale transactions totaling \$2.2 million. The proceeds from these transactions will be used to reduce the Company's long-term debt and for general working capital purposes.

In the first transaction, RailAmerica Equipment Corporation, a subsidiary of RailAmerica, has sold its fleet of railroad tank cars to The CIT Group/Equipment Financing, Inc., a subsidiary of Tyco Capital, for \$1.7 million. In the second transaction, the Company sold a 12-mile portion of its Toledo, Peoria & Western Railroad located between LaHarpe and Lomax, Illinois to Keokuk Junction Railway Company, Inc. for \$0.5 million.

RailAmerica, Inc. (www.railamerica.com), the world's largest short line and regional railroad operator, currently owns 39 short line and regional railroads operating approximately 11,000 route miles in the United States, Canada, Australia and Chile. In North America, the Company's railroads operate in 22 states and six Canadian provinces. Internationally, the Company operates an additional 4,300 route miles under track access arrangements in Australia and Argentina. In October 2001, RailAmerica was ranked 85th on Forbes magazine's list of the 200 Best Small Companies in America; in July 2001, the Company was named to the Russell 2000(R) Index.

DISCLAIMER REGARDING FORWARD-LOOKING STATEMENTS: This press release contains forward-looking statements regarding future events and the performance of RailAmerica that involve risks and uncertainties that could cause actual results to differ materially including, but not limited to, fuel costs, foreign currency risks, failure to successfully integrate acquisitions, failure to service debt, failure to successfully market and sell non-core/non- strategic properties and assets, failure to accomplish new marketing initiatives, economic conditions, customer demand, increased competition in the relevant market, and others. In particular, forward-looking statements regarding earnings and EBITDA of entities to be acquired are subject to inherent economic, financial and operating uncertainties, including changes in economic conditions, realization of operating synergies, the ability to retain key customers and the impact of unforeseen costs and liabilities of such entities. We refer you to the documents that RailAmerica files from time to time with the Securities and Exchange Commission, such as the Form 10-K, Form 10-Q and Form 8-K, which contain additional important factors that could cause its actual results to differ from its current expectations and from the forward-looking statements contained in this press release.

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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2002, I caused copies of the foregoing Reply Statement Regarding Compensation and Other Terms to be served on the following individuals by the methods shown below:

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