

SERVICE DATE - OCTOBER 3, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34013

B. WILLIS, C.P.A., INC. —
PETITION FOR DECLARATORY ORDER

Decided: October 1, 2001

On February 15, 2001, B. Willis, C.P.A., Inc. (petitioner), filed a petition seeking a declaratory order that certain railroad track — constructed across its property by Public Service Company of Oklahoma d/b/a American Electric Power Company (PSO) and used by The Burlington Northern and Santa Fe Railway Company (BNSF) — is a line of railroad and as such cannot lawfully be constructed or operated without first obtaining authority from the Board under 49 U.S.C. 10901. Replies to the petition have been submitted by BNSF and PSO. On August 30, 2001, and September 4, 2001, petitioner filed motions for expedited adjudication to which PSO and BNSF have jointly replied. For the reasons discussed below, the petition will be denied and a declaratory order proceeding will not be instituted.

Preliminary Matter. Petitioner has tendered responses to the PSO and BNSF pleadings, claiming that those pleadings are actually motions to dismiss its petition. BNSF and PSO have jointly moved to strike the petitioner's tendered replies, on the ground that they are nothing more than replies to the replies and as such are prohibited under the Board's Rules of Practice at 49 CFR 1104.13(c).

Under 49 CFR 1104.13(a), parties can file replies or motions within 20 days after a pleading is filed. PSO and BNSF timely filed what each termed a "reply." Petitioner claims that, because those pleadings use terms such as "summarily reject," "forthwith to dismiss," and "decline . . . to reach the merits," they are actually motions to dismiss. There is no need to resolve this issue because, given the decision reached here on the petition for declaratory order, no party will be prejudiced by acceptance of petitioner's replies. The joint motion to strike will thus be denied.

Background. Petitioner owns a tract of land in Rogers County, OK. In October 1992 PSO filed an eminent domain proceeding pursuant to State law to condemn, inter alia, a right-of-way across this tract of land, for the purpose of constructing railroad track over which BNSF would move unit coal trains to and from PSO's electric power generating facility at Oologah, OK. (This facility is located on or adjacent to a main line of the Union Pacific Railroad Company, which handled coal deliveries until the track connection to BNSF's line was constructed.) PSO took possession of the right-of-way in March 1994 and constructed the railroad track, which connects the Oologah plant to BNSF's main line. BNSF began using the track in March 1995.

Petitioner is challenging PSO's use of eminent domain power to condemn its property in the State courts, on grounds, inter alia, that the condemnation was not for a lawful public purpose. The Oklahoma Supreme Court has remanded that matter to the Rogers County District Court for hearing on this issue. Public Service Company v. B. Willis, C.P.A., Inc., 941 P.2d 995

(Okla. 1997). PSO maintains that a shipper can build a private track without Board approval. BNSF also takes the position that the track is either private track or a spur and that in either event construction and operation of this track do not require Board authorization.¹

Discussion. Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty where the Board has subject-matter jurisdiction.² Here, the request for a declaratory order will be denied because the record indicates that the track at issue is private track and thus does not require authorization by the Interstate Commerce Commission (ICC) (prior to January 1, 1996) or the Board (on or after that date) for its construction or operation.³

Under the statute, the Board has jurisdiction over “transportation by rail carrier,” 49 U.S.C. 10501(a)(1), with the term “rail carrier” defined as “a person providing common carrier railroad transportation for compensation,” 49 U.S.C. 10102(5). The agency’s jurisdiction does not extend to private rail operations (those not operated for hire). This was also true of the ICC’s jurisdiction over rail carriers before passage of ICCTA.⁴

In other words, there is a category of rail operations that falls outside the Board’s statutory jurisdiction. It consists of private tracks, typically built and maintained by a shipper (or for a shipper at the shipper’s expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper’s own goods, so that there is no “holding out” to serve other shippers for compensation. Private tracks constitute a narrow, limited category of rail operations. But as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board’s jurisdiction.

Under 49 U.S.C. 10901(a), an extension to a railroad line or an additional railroad line may be constructed only with Board authorization. However, this applies only to railroad lines that are subject to the agency’s jurisdiction — not private tracks. See Hanson Natural Resources Company — Non-Common Carrier Status — Petition for Declaratory Order, ICC Finance Docket No. 32248 (ICC served Dec. 5, 1994) at 20-21 (Hanson).

¹ BNSF also argues that the petition filed with the Board is untimely, violating the doctrine of laches, and is a collateral attack on the State court condemnation proceeding. These arguments need not be reached in view of the substantive conclusions here regarding the status of the line.

² The responsibility of whether to institute requested declaratory order proceedings has been delegated by the Board to the Director of the Office of Proceedings. See 49 CFR 1011.8(c)(6).

³ In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress abolished the ICC and transferred the remaining rail regulatory responsibilities to the Board, effective January 1, 1996.

⁴ The ICCTA Conference Report explains, at 166: “To clarify that only providers of rail transportation for compensation are within the scope of the statute, the definition of ‘rail carrier’ is limited to persons providing *common carrier* rail transportation.” H.R. Rep. No. 422, 104th Cong., 1st Sess. (1995) (Conference Report).

Operations over private tracks can be conducted by the shipper/owner itself, or the shipper/owner of the private track may arrange for a contractor to conduct operations over the track. As noted in Hanson, in New York Cent. R. Co. v. Southern Ry., 226 F. Supp. 463 (N.D. Ill. 1964), aff'd, 338 F.2d 667 (7th Cir. 1964), cert. denied, 380 U.S. 954 (1965), reh'g denied, 381 U.S. 907 (1965) (New York Central), the court indicated that a common carrier operating over private track would not fall under the statutory requirements of what is now section 10901 with respect to those operations, so long as it does not perform common carriage service on the private track and it does not maintain that track with its own funds.⁵

Here, PSO submitted a verified statement stating that it paid all of the construction cost of the track and owns it. It also asserts that it has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service over the line to any other shipper. V.S. Cox at 4-5. Moreover, under the New York Central analysis, PSO states that BNSF does not own the line in fee or through an easement, does not spend its funds to maintain the line, and serves only PSO, which is the only shipper that is able to receive shipments on the line.

Petitioner asserts that, under the Supreme Court's decision in Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926), the construction of an extension to a rail line, or an additional rail line, that enables a railroad to penetrate or invade new territory falls under the agency's jurisdiction under section 10901. The "invade new territory" test, however, is not applicable to private track, which is outside the agency's jurisdiction.

Petitioner cites Public Service Company of Colorado – Construction Exemption – Pueblo County, CO, STB Finance Docket No. 33862 (STB served Aug. 23, 2000), where track constructed by the Public Service Company of Colorado (PSCo) was found to come under the Board's section 10901 jurisdiction. In that proceeding, however, the Board noted, at 4, that "[w]hile PSCo will be the only shipper served by the line, PSCo states that other shippers would be permitted to use the rail line in the future should a demand arise." Thus, PSCo was holding out potential service to other shippers, and thus the track was not private track.

Finally, petitioner quotes Nicholson v. Missouri Pacific Railroad Company, 366 I.C.C. 69 (1982) (Nicholson), aff'd sub nom. Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984), for the proposition that a condemnation proceeding triggers the

⁵ Petitioner cites United States v. B. & O. R. Co., 333 U.S. 169 (1947), for the proposition that the ICC/Board's jurisdiction applies even when noncarriers construct track that is used in interstate commerce. That case is distinguishable because the common carrier railroad served shippers other than the owner of the track, and thus the track could not be considered private. Also, petitioner claims, citing Staten Island Rapid Transit Op. Auth. v. ICC, 718 F.2d 533 (2d Cir. 1983) (SIRTOA), that, because BNSF controls the PSO track, it is a BNSF line under ICC/Board jurisdiction. SIRTOA is not on point. It involved a determination as to whether an entity providing passenger service was a carrier within the meaning of the Railway Labor Act. It did not involve the distinction between private track and common carrier lines.

licensing requirements of section 10901. However, the ICC in that proceeding was examining operations that were subject to its jurisdiction.⁶ Nicholson has no application to private track.

Fundamentally, the controversy between petitioner and PSO is a question of eminent domain powers under State law, and not an issue for the Board. The question of whether PSO, as a public utility, may exercise eminent domain powers under the laws of the State of Oklahoma to construct a private line to serve its own facility is a question that arises, and must be answered, under State law. But as far as this agency is concerned, if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval.

Conclusion. Accordingly, the declaratory relief requested will not be granted and a proceeding will not be instituted.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a declaratory order is denied.
2. The joint motion to strike is denied.
3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

⁶ In Nicholson, the ICC ultimately concluded that its authorization was not needed for construction of the track because it was yard track, which came within the licensing exception of former 49 U.S.C. 10907 (now 49 U.S.C. 10906).