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SERVICE DATE - AUGUST 21, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33877

ILLINOIS CENTRAL RAILROAD COMPANY—CONSTRUCTION AND OPERATION
EXEMPTION—IN EAST BATON ROUGE PARISH, LA

Decided: August 15, 2001

Illinois Central Railroad Company (IC) has petitioned for an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct and operate an approximately 3.2-mile line of railroad in East Baton Rouge Parish, LA. The Kansas City Southern Railway Company (KCS) filed a reply to the petition, to which IC responded. In a decision served March 9, 2001, the Board instituted a proceeding under 49 U.S.C. 10502(b) to consider IC's petition and the issues raised in KCS's reply.

As pertinent here, KCS served extensive discovery requests relating primarily to environmental issues. IC opposed the discovery request. In a decision served May 25, 2001, the Secretary denied a motion by KCS to compel discovery responses and for a declaration of admissions. The Secretary concluded that, in rail construction cases, environmental issues can be raised and considered by the Board's Section of Environmental Analysis (SEA) during the environmental review process.¹ The Secretary also found KCS's discovery requests pertaining to public need for the project not to be relevant to the Board's review of rail construction projects under 49 U.S.C. 10901.² On June 4, 2001, KCS filed an appeal of the Secretary's denial. On June 14, 2001, IC replied.

¹ SEA issued an Environmental Assessment (EA) in this case for public review and comment on July 20, 2001. SEA will consider all comments received in response to the EA, including any comments that might be filed by KCS, in making its final recommendations to the Board. We will then consider the EA, SEA's final recommendations, and the environmental comments in deciding whether to approve the construction as proposed, approve it with conditions, or deny the construction exemption.

² Under the ICC Termination Act, construction proposals are to be approved unless they are inconsistent with the public interest. 49 U.S.C. 10901(c). The statute provides: "The Board shall issue a certificate authorizing [the construction] unless the Board finds that [the construction is] inconsistent with the public convenience and necessity." Also see the implementing regulations at 49 CFR 1150.

DISCUSSION AND CONCLUSIONS

The Secretary acted under a delegation of authority from the Chairman pursuant to 49 CFR 1011.7, et seq. Accordingly, KCS's appeal is governed by 49 CFR 1011.7(b)(1), which states that, "[a]ppeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." Our review of the record leads us to conclude that KCS has failed to demonstrate the presence of exceptional circumstances warranting reversal of the Secretary's decision. Accordingly, KCS's appeal will be denied.

KCS appeals on the ground that the Secretary took an impermissibly restrictive view of the role of commenters in the environmental review process by denying discovery and effectively restricting interested parties' participation to commenting on the draft environmental documents prepared by SEA. KCS also contends that the Secretary's decision reflects substantive policy rulings that exceed the scope of his delegated authority.³ Neither claim has merit.

KCS's arguments regarding participation in the Board's environmental review process amount to expressions of dissatisfaction with, and collateral attacks on, our long-established rules at 49 CFR part 1105 implementing the National Environmental Policy Act (NEPA). See also Policy Statement on Use of Third-Party Contracting in Preparation of Environmental Documentation, STB Ex Parte No. 585 (STB served Mar. 19, 2001) at 9-10 (describing extensive opportunities for both public participation and input from agencies with specialized expertise during the Board's environmental review process to ensure that the environmental document will reflect multiple points of view).⁴ Contrary to KCS's claims, there is nothing in the Secretary's decision that is inconsistent with Board rules and policies.

The Secretary's decision properly recognizes that — unlike our consideration of substantive transportation issues, where litigants use discovery to develop an adequate evidentiary record and we render a decision based on the parties' presentations — SEA prepares an independent environmental review of those construction proposals for which an environmental review is required by NEPA. In accordance with NEPA, SEA conducts extensive public outreach to ensure public awareness of construction proposals before the Board and of the opportunity to participate in the Board's process. Also, SEA issues every EA or Environmental Impact Statement in draft form first for public review and comment, and, throughout the process, SEA consults with appropriate Federal, state, and local agencies. SEA then prepares a final

³ Under 49 CFR 1011.7(c)(3), the Secretary is delegated authority "to dispose of routine procedural matters in proceedings assigned for handling under modified procedure."

⁴ The courts have affirmed our handling of environmental issues in various cases. See, e.g., City of Auburn v. United States, 154 F.3d 1025, 1031-1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); Missouri Mining v. ICC, 33 F.3d 980 (8th Cir. 1994).

environmental document responding to the comments and setting forth SEA's ultimate environmental recommendations to the Board. We then consider the entire environmental record in deciding whether to approve a construction as proposed, deny the construction, or approve the construction with conditions, including environmental conditions.

As noted above, see n. 1, supra, SEA recently issued its EA in this case. KCS, like any other interested party, will have the opportunity to raise any environmental concerns it might have during the comment period. There is nothing before us to suggest that, without discovery, KCS somehow has been shut out of the process or that SEA will not be able to adequately analyze the potential environmental impacts in order to satisfy the necessary "hard look" required by NEPA.

There is no merit to the remaining arguments that the Secretary exceeded the scope of his delegated authority. KCS has asserted that the Secretary made an improper substantive evaluation of the case in finding that requests for information pertaining to public need are irrelevant to our review of the construction petition under pertinent statutory provisions. We disagree. Because the Board has already determined that "public need" is not a relevant consideration under 49 U.S.C. 10901 and 10502,⁵ the Secretary's decision to disallow any discovery related to that issue in this case merely conformed to the plain language of the statute and reiterated agency policy and precedent and, as such, amounted to a procedural ruling.

Finally, KCS has argued that the Secretary inappropriately set policy in finding that the timing of the discovery requests was improper. Again we disagree. The Secretary did not purport to set any time frame for initiating discovery, nor did he refer to KCS's discovery as "late-filed." Rather, he simply noted⁶ that "[t]he lateness of KCS's filings here tends to impeach its representations that it needs the information it seeks. KCS served its informational requests on IC 10 weeks after IC had filed its petition and more than 7 weeks after KCS had filed a detailed reply to IC's petition." As the Secretary explained, the timing of KCS's filings simply undermines KCS's assertion that its discovery request was motivated by a need to elicit information to reply to the petitioner's case in chief, which is the essential purpose of discovery.

For all of these reasons, we find no merit in KCS's request for discovery, and its appeal is denied.

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

⁵ See, e.g., Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin, Finance Docket No. 32407 (STB served December 10, 1998), slip op. at 15-16.

⁶ Secretary's Decision at p.3.

It is ordered:

1. The appeal is denied.
2. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary