

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35302

BELL OIL TERMINAL, INC. v. BNSF RAILWAY COMPANY

Digest:<sup>1</sup> The Board is denying Bell Oil Terminal's request to require BNSF Railway to install and operate a switch connection between BNSF's rail line and Bell Oil's facility in Chicago, Ill. The Board is denying the request because Bell Oil has no existing side track to connect with BNSF's line, which, under the law, it must have before the Board may order installation of a switch.

Decided: November 3, 2011

On October 6, 2009, Bell Oil Terminal, Inc. (Bell Oil) filed a complaint against BNSF Railway Company (BNSF) under 49 U.S.C. § 11103, which requires a carrier to construct, maintain, and operate a switch connection under certain circumstances. The complaint alleges that Bell Oil submitted to BNSF an application for BNSF to construct, maintain, and operate a switch connection between BNSF's rail line and a private side track to be constructed by Bell Oil at its Pulaski Terminal in Chicago, Ill. (Pulaski Terminal) and that BNSF "effectively denied" the application, in violation of § 11103, by attaching unreasonable conditions to fulfilling Bell Oil's request.

On October 26, 2009, BNSF filed an answer and a motion to dismiss the complaint. In its motion to dismiss, BNSF contends that, under § 11103(a), construction by the requesting party of private side track to which BNSF can connect is a prerequisite to requiring BNSF to build a switch connection. BNSF argues that, because Bell Oil has not constructed private siding to which BNSF can connect, the complaint is premature and should be dismissed.

On November 16, 2009, Bell Oil requested that the Board hold the processing of the complaint in abeyance pending disposition of the motion to dismiss, and indicated that it was authorized to state that BNSF concurred in that request. On the same date, Bell Oil also filed a reply in opposition to the motion to dismiss (Reply), arguing that an existing side track is not a prerequisite to relief under § 11103(a); that BNSF's interest could be protected adequately with the imposition of a condition on any grant of relief to Bell Oil; and that in any event, the Board should first afford Bell Oil the opportunity to present evidence to show that its private sidetrack

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

was “effectively constructed” before its complaint was filed. Bell Oil also requested that, should the Board dismiss the complaint, it do so without prejudice to Bell Oil’s submitting a new complaint under § 11103 “after construction of a private side track.”

On May 19, 2010, Bell Oil and BNSF filed a joint request that the Board mediate their dispute and issue a 60-day “housekeeping” stay to permit the Board-supervised mediation. By decision served on June 4, 2010, the Board ordered a 60-day period for nonbinding mediation and held this proceeding in abeyance. The Board extended the mediation and abeyance period twice, most recently to December 1, 2010. On December 16, 2010, Bell Oil notified the Board that, despite their best efforts, the parties were unable to arrive at a mediated agreement, and Bell Oil requested that the Board rule on BNSF’s motion to dismiss.

As discussed below, the Board finds that the existence of a private side track to BNSF’s right-of-way is a prerequisite to relief under § 11103(a), and that Bell Oil has not shown that such a side track exists. Therefore, BNSF’s motion to dismiss the complaint will be granted without prejudice.

## BACKGROUND

Bell Oil owns and operates the Pulaski Terminal, which it uses for receipt, storage, and distribution of liquid asphalt. The Pulaski Terminal is certified to ship asphalt for state construction projects in Illinois, Indiana, Iowa, Michigan, and Wisconsin. It is located just north of BNSF’s Corwith Yard and parallel to BNSF’s southern transcontinental mainline. As recently as 2002, Bell Oil (or its predecessors) received liquid asphalt from BNSF on a BNSF-owned side track, which connected to the western part of the Pulaski Terminal property. In 2002, Bell Oil switched all of its traffic from BNSF to trucks. Subsequently, BNSF upgraded the rail corridor adjacent to the Pulaski Terminal as part of the Chicago Regional Environmental and Transportation Efficiency (“CREATE”) project. In connection with that upgrade, BNSF removed its side track. In 2006, due to increased demand for liquid asphalt, Bell Oil requested that BNSF resume rail service to the Pulaski Terminal at a different location than where the BNSF-owned side track was removed.

For over 3 years, the parties negotiated over a switch connection and a lease of BNSF property to Bell Oil to construct a private sidetrack. In September 2008, Bell Oil submitted a letter application to BNSF requesting BNSF to construct, maintain, and operate a switch connection under 49 U.S.C. § 11103(a), between BNSF’s rail line and a private sidetrack “to be constructed” by Bell Oil. Bell Oil contends that, in November 2008, BNSF’s representatives agreed that a switch connection and a 10-car private side track could be constructed at a cost of less than \$250,000.<sup>2</sup> BNSF denies that an agreement was ever reached. In July 2009, BNSF offered Bell Oil a track configuration on BNSF property which, according to BNSF, would meet the needs of both parties, but the offer required Bell Oil to either contribute to the construction

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<sup>2</sup> See Compl. at 3.

cost or guarantee traffic volumes sufficient to allow BNSF to recoup its expenses.<sup>3</sup> Bell Oil rejected the conditions and, shortly thereafter, filed this complaint, arguing that BNSF's conditions for constructing a switch connection effectively denied Bell Oil's application and asking the Board to direct BNSF to construct, maintain, and operate, on reasonable terms, a switch connection to connect private side track to be constructed by Bell Oil.

## DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. 49 U.S.C. § 11701(b). Granting a motion to dismiss requires that all factors be viewed in the light most favorable to the complainant. See Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011); N. Am. Freight Car Ass'n—Protest & Petition for Investigation—Tariff Publ'ns of the Burlington N. & Santa Fe Ry., NOR 42060, et al., slip op. at 9 (STB served Aug. 13, 2004). A complaint is dismissed only when the Board finds that there is no basis upon which it could grant the relief sought. Grain Land Coop. v. Canadian Pac. Ltd., NOR 41687, slip op. at 2-3 (STB served Dec. 8, 1999).

BNSF's motion to dismiss raises the issue of whether § 11103 requires a shipper to complete construction of a side track before the Board may consider its complaint to require a rail carrier to construct, maintain, and operate a switch connection to that side track. A review of the statute and the relevant precedent leads us to conclude that any request for this Board to order a carrier to construct and maintain such equipment requires that the requesting shipper already has constructed the track to be connected with the carrier. Even construing the evidence in the light most favorable to Bell Oil, the motion to dismiss must be granted because Bell Oil has not shown that it has constructed the prerequisite private side track.

The statute governing switch connections and tracks, 49 U.S.C. § 11103(a), provides that

[o]n application of the owner of a lateral branch line of railroad, or of a shipper tendering interstate traffic for transportation, a rail carrier providing transportation subject to the jurisdiction of the Board under this part shall construct, maintain, and operate, on reasonable conditions, a switch connection to connect that branch line or private side track with its railroad . . . when the connection – (1) is reasonably practicable; (2) can be made safely; and (3) will furnish sufficient business to justify its construction and maintenance.

Bell Oil argues that § 11103(a) does not expressly state or imply that construction of a private track must be completed before a rail carrier can be ordered to construct a switch connection. The plain reading of the statute, however, presumes the existence of a branch line or side track to

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<sup>3</sup> See Mot. to Dismiss at 6. The complaint alleges that BNSF offered to provide a switch connection if Bell Oil would advance the cost of construction of the connection and related facilities and agree to maintain them. Compl. at 5.

which the carrier would connect: Section 11103(a) specifically refers to “the owner” of a branch line or a shipper “tendering traffic” and to the carrier constructing “a switch connection to connect *that* branch line or private side track” to the railroad’s line.<sup>4</sup> The reference to “that . . . side track” is to the side track over which an applicant shipper is “tendering interstate traffic for transportation” and thus, already exists.<sup>5</sup> (Similarly, the parallel reference to “that branch line” is to a branch line “owned” by an applicant, which also must already exist.) See Ralston Townsite Co. v. Mo. Pac. Ry., 22 I.C.C. 354, 356 (1912) (in the statute, “Congress intended to provide a methodology whereby . . . a shipper tendering interstate traffic for transportation *originating upon a private sidetrack*, may compel a carrier to install and operate a switch connection with *said . . . private sidetrack* when the same has been constructed . . .” (emphasis supplied)).

Section 11103 and its predecessors consistently have been interpreted for over 80 years as requiring, in the case of a shipper, a functional side track to be in place as a prerequisite to a shipper seeking relief. In Cleveland, Cincinnati, Chicago & St. Louis Railway v. United States, 275 U.S. 404, 413 (1928) (Cleveland), the Supreme Court noted that Congress, in 49 U.S.C. § 1(9), the predecessor of § 11103(a),<sup>6</sup> provided a number of safeguards to unnecessary expenditures by carriers, including the requirement that “the railroad cannot be ordered to build the switch until after the shipper has built the private siding” [citations omitted]. Although Bell Oil asserts that this language was merely dicta because that case involved an existing side track, in Cleveland, the Supreme Court noted a number of cases in which the ICC had held that construction of side track to a railroad’s right-of-way is a prerequisite to considering a complaint for a switch connection. See Ralston Townsite Co., 22 I.C.C. at 356 (stating that “while it is the function of the Commission, upon complaint, to investigate and determine all questions as to safety, practicability, justification, and compensation involved in the construction, maintenance, and operation of [a] switch connection, it is a condition precedent to the exertion of the power of the Commission that such lateral railroad or private sidetrack should be actually constructed . . . .”); Va. Coal & Fuel Co. v. Norfolk & W. Ry., 55 I.C.C. 61 (1919) (dismissing a § 1(9) complaint because a shipper had no private track with which a connection could be made); Schlicher v. Dir. Gen., 62 I.C.C. 181, 187 (1921) (a shipper must construct his sidetrack before the carrier is obliged to grant a switch connection); Certain-Teed Prods. Corp. v. Chi., Rock

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<sup>4</sup> 49 U.S.C. § 11103(a) (emphasis supplied).

<sup>5</sup> In its reply to the motion to dismiss, Bell Oil paraphrases the statute so as to obscure the meaning of § 11103(a)—that the statute’s reference to “that” side track means the side track over which a shipper is presently tendering traffic (and which therefore must already exist)—by changing the phrase “that track” to read instead “[a] track.” See Reply in Opposition to Mot. to Dismiss at 5.

<sup>6</sup> Former § 1(9) stated, in pertinent part: “any common carrier subject to the provisions of this Act upon application of . . . any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any . . . private sidetrack which may be constructed to connect with its railroad . . . .”

Island & Pac. Ry., 68 I.C.C. 260, 263 (1922) (a carrier’s duty to construct, maintain, and operate a switch connection does not arise until the shipper has provided the sidetrack).

We find unpersuasive Bell Oil’s argument that former § 1(9) and the ICC decisions interpreting it are inapposite due to changes in the statute’s language over time. Bell Oil argues that the phrase “which may be constructed to connect with its railroad,” in former § 1(9) more strongly implied that a shipper’s private sidetrack must be constructed to connect with a rail carrier’s line of railroad before the carrier could be ordered to install a switch, whereas the current § 11103 includes no such language and thus carries no such implication. However, the legislative history demonstrates that when the Interstate Commerce Act was recodified in 1978, the phrase “which may be constructed to connect” in § 1(9) was replaced with “a switch connection to connect” in the new § 11104 only “for clarity,” and not to change substantive law. H.R. Rep. No. 95-1395, at 137-38 (1978) (Conf. Rep.), reprinted in 1978 U.S.C.C.A.N. 3009. When § 11104 later became the current § 11103 in the ICC Termination Act of 1995, the operative language remained the same. See also H.R. Rep. No. 104-422, at 184 (1995) (Conf. Rep.), reprinted in 1995 U.S.C.C.A.N. 793, 869 (stating that, in replacing former § 11104, § 11103 “retains existing law”). Thus, the original meaning of the statute has remained unchanged.

Moreover, in recent cases under the current § 11103, the Board has reaffirmed that a shipper is required to construct or restore a side track before the Board can order a railroad to construct a switch connection. See Battaglia Distrib. Co. v. Burlington N. R.R., 2 S.T.B. 323, 328 (1997) (Battaglia) (stating that, if the side track were private, then the shipper would still be obligated to restore it to an operable condition before a switch connection could be required); Valley Feed Co. v. Greater Shenandoah Valley Dev. Co., NOR 41068, slip op. at 15 (STB served Dec. 11, 1998), citing Battaglia (same). This precedent reflects that a shipper building a side track may rely on a statutory guarantee that if the applicable standard is met, its investment in a side track will be rewarded because, by statute, the railroad will be required to build a switch connection.

Bell Oil suggests that, even if the existence of a side track is a prerequisite to a carrier being required to install a switch, the Board should order a switch connection conditioned upon Bell Oil’s first having to construct its private side track, and that the financial interests of both parties would, thereby, be protected. Our plain language interpretation of § 11103, however, precludes that approach as the existence of a private side track is a prerequisite not merely to the Board’s ordering a switch connection to be built, but to the filing of a complaint in the first instance. As discussed above, under § 11103(a), an application to a railroad to construct a switch connection may be filed by a shipper tendering interstate traffic over “that” private side track—i.e., over a side track that already exists. Under § 11103(b), if the carrier fails to install and operate a switch connection after such an application is made, a complaint may be filed by “the” shipper—that is, the same shipper referred to in subsection (a) that tendered traffic over an existing side track and filed the application with the carrier. Thus, because the record here does not show that a side track exists (and indeed, Bell Oil’s complaint alleges that the track is yet “to be constructed”), Bell Oil is not a “shipper” authorized to file an application under § 11103(a) or a complaint under § 11103(b).

Bell Oil's reliance on the fact that BNSF agreed to lease it land to construct a side track on BNSF property and to construct a switch connection<sup>7</sup> is unpersuasive. In its reply to BNSF's motion to dismiss, Bell Oil acknowledges that BNSF had no legal obligation to lease its land to Bell Oil. See Nat'l Indus. Traffic League v. Aberdeen & Rockfish R.R., 61 I.C.C. 120, 123 (1921) (it is not part of the common carrier obligation to enter into a contract to lease a railroad siding to a shipper). In any event, Bell Oil's argument has no bearing on the statutory requirement that construction of a side track must occur prior to the Board's entertaining a complaint seeking installation of a switch connection.

Nor do we find persuasive Bell Oil's argument that, even without an agreement, BNSF waived the safeguard of the statute when it offered to provide a switch connection at the Pulaski Terminal without regard to the existence of a side track.<sup>8</sup> Just as the agency will not require a railroad to lease side track on its property, it will not interpret offers made in private negotiations as a tacit waiver of statutory safeguards. See Revision of Aban. Regulations, 367 I.C.C. 831, 843 (1983) (stating that information included in a party's attempt to negotiate a compromise or settlement may not be used against the negotiator, citing Fed. R. Evid. 408).

Finally, we reject Bell Oil's argument that a more complete evidentiary record is required to decide this legal issue, and that it should have the opportunity to show that the side track effectively has been built.<sup>9</sup> Bell Oil has already had the opportunity, in responding to the motion to dismiss, to show that its side track has been built to BNSF's right-of-way. Even viewing its response and the material contained therein in the light most favorable to it, Bell Oil has only shown that engineering drawings of a side track have been completed and that a prefabricated panel of track has been placed somewhere on the Pulaski Terminal property. Those facts do not show that a side track has been constructed to BNSF's right-of-way and, therefore, are insufficient to overcome BNSF's motion to dismiss.

In sum, the statute and governing precedent are clear that a carrier may be ordered to construct switch connections and tracks under § 11103 only if a branch line or private side track to which the carrier would connect already exists. Here, the facts as alleged by Bell Oil are insufficient to show that a side track to BNSF's line has been completed. Accordingly, exercising our authority under 49 U.S.C. § 11701(b), we will dismiss this complaint as it fails to state reasonable grounds for investigation and action. Our decision to dismiss the complaint is without prejudice to Bell Oil's right to file a request with this Board following the construction of a side track.

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<sup>7</sup> See Compl. at 3.

<sup>8</sup> See Reply at 8-9.

<sup>9</sup> Id. at 9-10.

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

It is ordered:

1. BNSF's motion to dismiss is granted.
2. Bell Oil's complaint is dismissed without prejudice.
3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.