STB FINANCE DOCKET NO. 34013

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

Decided July 23, 2002

On petition to reopen, Board finds that Board authorization was not required for the construction and operation of approximately 10 miles of rail track owned by a power company, which was constructed and maintained at the power company's expense for service exclusively to that company, because neither the owner nor the operator offers service to any other shipper on that track. Accordingly, the Board finds that the service provided over the track is private carriage, not common carriage, even though it is conducted, under contract, by a railroad that also provides common carrier service to other shippers on other track.

BY THE BOARD:

This decision addresses the petition of B. Willis, C.P.A., Inc. (B. Willis or Petitioner), filed June 21, 2002, to reopen the decision served October 3, 2001 in this proceeding.[1] Petitioner states that its request is based on new evidence that demands a different result. However, the evidence Petitioner brings is not new evidence that was previously unavailable to it, nor does that evidence lead us to any different conclusion. Accordingly, Petitioner's request to reopen this administratively final decision will be denied.

BACKGROUND

1. *Board Licensing in General*. Before a person may construct or operate a new or extended rail line, it generally must obtain authorization from the Board. 49 U.S.C. 10901. There are, however, exceptions. Under 49 U.S.C. 10906, no Board authorization is required for construction or operation of spur,

[1] That decision was issued by the Director of the Office of Proceedings, to whom responsibility for deciding whether to institute a declaratory order proceeding has been delegated. 49 CFR 1011.8(c)(6).

industrial, team, switching, or side tracks (so-called "auxiliary tracks").[2] And, as discussed below and in our October 2001 decision, the Board has no jurisdiction over private track — track that is used exclusively by the track's owner for movement of its own goods (either by utilizing its own equipment or by contracting for service) and for which there is no common carrier obligation to serve other shippers that might locate along the line.

2. *This Case*. In February 2001, B. Willis filed a petition seeking a Board declaration that the Public Service Company of Oklahoma d/b/a American Electric Power Company (PSO) was required to obtain prior authorization from our predecessor, the Interstate Commerce Commission (ICC),[3] to construct and operate approximately 10 miles of rail track in Oklahoma that was built in 1994-95. That track connects PSO's Northeastern Generating Station, an electric power generating facility located at Oologah, Oklahoma (the power plant), with the main line of The Burlington Northern and Santa Fe Railway Company (BNSF). Prior to construction of the new track, the power plant could receive rail service at the power plant only from the Union Pacific Railroad Company (UP).

PSO had the track constructed for the sole purpose of providing the power plant with access to a second rail carrier. The rail track was constructed at PSO's expense, and PSO owns the track and pays the costs associated with its maintenance. Rail operations over the track, supplying trainloads of coal to the power plant, commenced in March 1995. The rail operations are conducted by BNSF under contract with PSO. BNSF uses the track pursuant to a license from PSO.

There are no other shippers located on the line, and neither PSO nor BNSF holds out the possibility for any other shipper(s) to obtain service over the line. To the contrary, BNSF's contractual agreement with PSO for use of the track does not permit service to any entity other than PSO's power plant, either now or in the future. Based on these facts that were on the record before us, our October 2001 decision determined that the track is private track, which falls

[2] The Board has jurisdiction over auxiliary tracks, which are part of the common carrier (i.e., regulated) rail network, but a Board license is not required to construct or operate them because of the 10906 exception. Thus, track classified as spur, industrial or side track has a regulatory status that private track does not share. *See United Transp. Union v. STB*, 183 F.3d 606, 612 (7th Cir. 1999).

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

outside the reach of the Board's statutory jurisdiction, and that prior agency authorization or approval was not required for its construction or operation.

Part of the track was built across a parcel of land owned by B. Willis. PSO exercised its power of eminent domain as an electric generating company pursuant to Oklahoma state law after it failed to reach agreement with B. Willis to purchase a right-of-way easement across a corner of B. Willis' property.[4] B. Willis continues to object to the taking and has sought judicial review of our October 2001 decision in the United States Court of Appeals for the District of Columbia Circuit.[5]

On June 21, 2002 — shortly before its opening brief was due to be filed in court — B. Willis filed a petition to reopen this administratively final action pursuant to 49 CFR 1115.4, asserting "a need to introduce new evidence that shows that there was material error in the Board's prior decision."[6] The purported new evidence consists of copies of the following documents issued between 1993 and 2000: (1) the Oklahoma Official State Railroad Map; (2) a diagram of PSO's track indicating 6 crossings of public roads; and (3) a letter from an Oklahoma Department of Transportation (ODOT) official to the Federal Railroad Administration (FRA) reporting the assignment of 12 crossing inventory numbers[7] related to PSO's track.

On June 27, 2002, PSO and BNSF filed a joint reply. They oppose reopening, on the grounds that the proffered evidence is not new; that B. Willis has not explained why this evidence was not submitted to the Board previously; that the evidence is merely cumulative; and that it would not affect the outcome. PSO and BNSF emphasize that the petition to reopen simply reiterates arguments B. Willis had already made.

DISCUSSION AND CONCLUSION

Under our Rules of Practice, a petitioner seeking to reopen an administratively final decision must "state in detail the respects in which the

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[4] The condemnation action was filed by PSO in October 1992. PSO took possession of the easement in March 1994 and thereafter had the track constructed.

[5] *B. Willis, C.P.A., Inc. v. STB and USA*, No. 01-1441 (D.C. Cir. filed October 9, 2001).

[6] Petition to reopen at 1.

[7] The National Highway-Rail Crossing Inventory is maintained by the United States Department of Transportation (U.S. DOT) with the cooperation of state departments of transportation and the Association of American Railroads (AAR). The national crossing inventory consists of a uniform national numbering system in which a unique designation, consisting of a 6-digit number followed by a letter, is assigned to every highway-rail crossing in the nation.

proceeding involves material error, new evidence, or substantially changed circumstances." 49 CFR 1115.4. Where new evidence is involved, that evidence "must not appear to be cumulative, and an explanation must be given why it was not previously adduced." 49 CFR 1115.3(c). B. Willis has not satisfied these criteria.

The limitations in our rules against the introduction of new evidence reflect the need for finality in the administrative process. A party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce that evidence.[8] The evidence B. Willis now seeks to introduce was all clearly available at the time it filed its petition at the Board in February 2001. The Oklahoma Official State Railroad Map has been available since 2000; the diagram of PSO's track apparently dates from 1993;[9] and the ODOT letter to FRA dates from August 1995.[10] B. Willis asserts that it did not submit these materials earlier because it could not have known that PSO would claim not to be a common carrier (or that the Board would agree). As PSO has asserted its noncarrier status for years, B. Willis' claim is not credible. In short, Petitioner has not satisfactorily explained why it did not submit this evidence until now.

In any event, the newly proffered evidence does not in any way undermine the October 2001 decision. While PSO's track is shown on the Oklahoma Official State Railroad Map, the State of Oklahoma issues its railroad maps solely for informational purposes. Inclusion of a particular piece of track on the Oklahoma Official State Railroad Map indicates the track's existence and location within Oklahoma's borders, but does not convey any judgment as to whether particular track is for common carrier freight service or not, and thus is not determinative of whether that track is subject to our jurisdiction under the revised Interstate Commerce Act (ICA), at 49 U.S.C. Subtitle IV. PSO and BNSF attached to their joint reply a copy of an April 2001 letter from Mr. John E. Dougherty, Branch Manager of the Rail Programs Division of

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[8] *See, e.g., S.R. Investors, Ltd., Doing Business as Sierra Railroad Company — Abandonment — In Tuolumne County, CA*, Docket No. AB-239X (ICC served January 26, 1988), slip op. at 7, *aff'd sub nom. Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663 (9th Cir. 1989).

[9] *See* PSO/BNSF joint reply at page 3, note 1: "The date on [the track diagram] is illegible, however, it is believed that it was created in 1993."

[10] B. Willis also attached as an exhibit a copy of a 1992 letter from a PSO employee (written long before the track was constructed) that B. Willis construes as an admission by PSO that it is a common carrier. But that letter — which provides no basis on which to conclude that PSO holds out freight service to the general public — had already been submitted to the Board earlier in this proceeding.

ODOT, to an attorney representing PSO, who had inquired regarding what tracks are included on the Oklahoma Official State Railroad Map.[11] The ODOT official explained: "On our map, we include trackage to power stations, such as Public Service Company of Oklahoma and Western Farmers Electric Co-op. These two track designations were just recently added to our 1998 and 2000 maps to identify location only." Another letter from ODOT's Mr. Dougherty further explains: "ODOT does not have statutory authority to regulate railroad companies or their operations. ODOT also does not make any determination as to rail operators' status as common carriers or actual ownership."[12] Thus, inclusion of track on the Oklahoma map does not reflect any opinion on the part of ODOT as to common carrier status.[13]

Similarly, the diagram of PSO's track, indicating that it crosses several roads, is not relevant to our determination that this track is private track. Any track approximately 10 miles in length is bound to cross a few public roads or highways, even in a remote rural area such as this. Crossing public roads where necessary does not turn otherwise private track into a regulated rail line. B. Willis' petition to reopen cites various authority for the proposition that common carrier railroads are allowed to cross state roads, and asserts that this somehow proves that private rail track cannot do so.[14] But that conclusion — which assumes the point it is attempting to prove — is neither logical nor correct. There are many situations in which private track crosses public highways, and the mere existence of such crossings does not provide a basis for bringing such track under our regulatory jurisdiction.

Finally, the 1995 ODOT letter to FRA, indicating that PSO's crossings are included in the national highway-rail grade crossing inventory, is likewise not indicative of common carrier status. That national inventory assigns to every U.S. highway-rail grade crossing a unique numeric identifier, so that data about all crossing incidents and accidents in the country — not just those involving common carrier railroads — can be accurately collected, tabulated and analyzed. The U.S. DOT utilizes broad definitions to specify which crossings should obtain crossing inventory numbers and report accidents and incidents at those crossings to the FRA. "*Highway-rail grade crossing* means a location where a public

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[11] PSO/BNSF joint reply, Exhibit 4.

[12] *Id.*, Exhibit 5.

[13] Indeed, the highlights of the text accompanying the Oklahoma rail map focus not on rail freight service, but on the resumption of Amtrak passenger service in Oklahoma in 1999 after an absence of nearly 20 years.

[14] Petition to reopen at 7-8.

highway, road, street, or private roadway, including associated sidewalks and pathways, crosses one or more railroad tracks at grade." 49 CFR 225.5. "*Railroad transportation* means any form of non-highway ground transportation that runs on rails or electro-magnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area * * * without regard to whether they use new technologies not associated with traditional railroads." *Id*. These broad definitions capture all crossings of roads or highways by tracks of any kind, whether tracks of a common carrier freight railroad, tracks of a passenger or commuter operation, or private rail tracks. Assignment of crossing inventory identifier numbers is thus simply not relevant to our determination under the ICA of whether or not track constitutes a common carriage rail line.

On the basis of the purportedly new evidence, B. Willis reiterates arguments already made on the record and already considered in reaching the October 2001 decision. But these arguments are no more persuasive than they were when first presented. A person is not a rail carrier for purposes of the ICA unless it holds itself out to provide rail service to others. *See* 49 U.S.C. 10102(5) ("'rail carrier' means a person providing common carrier railroad transportation for compensation"); 49 U.S.C. 10501(a)(1) ("the Board has jurisdiction over transportation by rail carrier").[15] Thus, as the October 2001 decision correctly concluded (at 4), where, as here, "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."

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

It is ordered:

1. The petition to reopen is denied.
2. This action is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

[15] B. Willis seeks a broader reading of our jurisdiction based upon the language of 49 U.S.C. 10102(6) ("'railroad' includes * * * the road used by a rail carrier and owned by it or operated under an agreement"), but that section must be read in conjunction with sections 10102(5) and 10501(a)(1).