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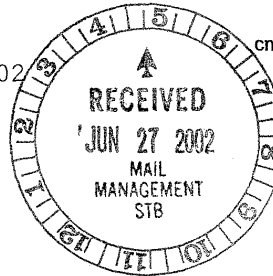
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June 27, 2002



VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street N.W., Room 711
Washington, DC 20423-0001

Re: STB Finance Docket No. 34013, B. Willis, CPA, Inc.
- Petition for Declaratory Order

Dear Secretary Williams:

On behalf of Public Service Company of Oklahoma (PSO) and The Burlington Northern and Santa Fe Railway Company (BNSF), we enclose for filing in the above-referenced proceeding an original and ten (10) copies of the Joint Reply of Public Service Company of Oklahoma and The Burlington Northern and Santa Fe Railway Company to Petition to Reopen Administratively Final Action. Also enclosed for filing is a disk containing the pleading in WordPerfect format.

Two extra copies of the filing (one for PSO, one for BNSF) are enclosed for date-stamping and return to our office. If you have any questions relating to this filing, please call me at the above-referenced telephone number or Linda S. Stein, counsel for BNSF, at (202) 429.8185. Thank you for your assistance.

Sincerely,

C. Michael Loftus

CML/alp

cc: William T. Dickson, Esq. - Counsel for Complainant
Linda S. Stein, Esq. - Counsel for Burlington Northern
and Santa Fe Railway Company
Kenneth E. McDonough, Esq., Assistant General Counsel,
American Electric Power Service Corporation

A circular postmark from the United States Postal Service. The outer ring contains numbers 1 through 10. The center text reads "RECEIVED", "JUN 27 2002", "MAIL MANAGEMENT", and "STB". A horizontal line is drawn across the middle of the circle. The number "4013" is visible on the left side of the image.

Docket No. 340

I. Preface and Summary of Argument

-2-

II. The Petition is Fatally Flawed on its Face

An interested party may petition to reopen and reconsider an action of the Board under regulations adopted by the Board. 49 U.S.C. § 722(c). "A petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances..." 49 C.F.R. § 1115.4. "The petition must state in detail the nature of and reasons for the relief requested." 49 C.F.R. § 1115.3(c). When a party seeks an opportunity to introduce evidence, the petition must briefly state the evidence which is sought to be introduced, demonstrate that the evidence is not cumulative, and explain why it was not previously adduced. Id. Willis' Petition fails to satisfy these standards and therefore must be denied.

A. The Proffered "Evidence" Is Not New.

Petitioner discusses three pieces of "new evidence"; an Oklahoma Official State Railroad Map (Exhibit 3 to Petition); a diagram of the track at issue showing six public road crossings (Exhibit 4 to Petition)¹; and a letter to the Federal Railroad Administration dated August 4, 1995 with attached documents (Exhibit 5 to Petition). In addition, Willis attaches as Exhibit 2 to the Petition an October 2, 1992 letter from PSO to Willis.

¹The date on Exhibit 4 is illegible, however, it is believed that it was created in 1993. The document was produced in another litigation in 2000.

None of the evidence presented by Willis is new. All items predate the filing of Willis' Petition for Declaratory Order.² The Railroad Map has been available since 2000. The track diagram, as noted above, appears to date back to 1993. The letter to the FRA dates back to Aug., 1995. The information contained in these exhibits relates to the route and crossings of the rail line. As the line was physically in place by 1995, this information cannot possibly be new evidence. The PSO letter to Willis is a 1992 document and was previously submitted to the Board as an exhibit in this proceeding.

All of these materials were reasonably available to Willis before he initiated his Petition for a Declaratory Order with this Board. Evidence that was reasonably available to the parties before the proceeding is not new evidence. Friends of Sierra Railroad, Inc. v. I.C.C., 881 F.2d 663, 667 (9th Cir. 1989) quoting Platnick Brothers, Inc. v. Norfolk & Western Railroad Co., 367 I.C.C. 782, 785 (1983).

B. The Petition Provides No Explanation For Why The Alleged New Evidence Was Not Previously Adduced.

In order to support a petition to reopen an administratively final action, the party seeking to introduce new evidence must explain why the evidence was not previously adduced. 49 C.F.R. § 1115.3(c); Bartlett Agri Enterprises, Inc.

²February 14, 2001.

v. Missouri Pacific Railroad Co., I.C.C. Decision No. 39799, 1987 WL 98431, at 2; cf., Silas v. Babbitt, 96 F.3d 355, 358 (9th Cir. 1996) citing I.N.S. v. Doherty, 502 U.S. 314, 323, 112 S.Ct. 719, 724 (1992). Where no reason is given, a reviewing court will not overturn a refusal to reopen. See, I.C.C. v. Parker, 326 U.S. 60, 73-74, 65 S.Ct. 1490, 1497 (1945).

Willis fails to explain why the evidence he now tries to rely on was not previously adduced. His statement that he "...had no reason to anticipate that PSO would deny that a common carrier obligation attached to the track..." (Petition at 6) is simply not credible. Willis had every reason to anticipate that PSO would deny that a common carrier obligation existed with regard to this trackage. PSO had specifically denied being a "common carrier" throughout the underlying state court litigation as well as in the previous federal litigation.

For example, PSO informed the Supreme Court of Oklahoma and Willis that, "In the previous federal court case, PSO showed that it is not a common carrier...." B. Willis, C.P.A., Inc. v. Goodpaster, Okla.Sup.Ct. Case No. 95,652 ("Brief in Response to the Application to Assume Original Jurisdiction and Petition for Writs of Mandamus and Prohibition," filed Jan. 10, 2001 at 13). (Excerpt attached as Exhibit 1.) In the very next sentence, PSO stated flatly that, "*PSO does not maintain a common carrier*

service on the spur and PSO paid for the construction of the track." Id.

As another example, in the state trial court, PSO discussed the previous federal litigation and stated, "...PSO is not a common carrier or railroad subject to the jurisdiction of the Interstate Commerce Commission...." Public Service Co. of Oklahoma v. B. Willis, C.P.A., Inc., Rogers County District Court Case No. C-92-507 (Brief In Opposition to the Defendant's Motion to Dismiss filed on November 3, 2002 at 2 ¶4, referring to B. Willis, C.P.A., Inc. v. Public Service Co. of Oklahoma and Burlington Northern Railroad Co., United States District Court for the Northern District of Oklahoma Case Nos. 96-CV-059E and 96-CV-172H, consolidated as 96-CV-172E). (Excerpt attached as Exhibit 2.) In a third example, PSO stated, "[t]he trackage at issue is a railroad spur and, as such, is exempt from ICC/STB regulation pursuant to federal law," (*id.*) (Sur-Reply to the Plaintiff's Motion to Dismiss filed on November 3, 2000, at 10 ¶2). (Excerpt attached as Exhibit 3.)

Even ignoring PSO's frequent statements made prior to the filing of Willis' Petition for a Declaratory Order before this Board, he unquestionably knew PSO's and BNSF's position after receipt of their replies to his Petition. Willis filed several new exhibits in response to these replies with his

"Replies to Motion to Dismiss," including the October 2, 1992 letter submitted here.

Willis also states that he had "no reason to anticipate...that the STB would adopt a position that contradicted the plain wording of 49 U.S.C. §10501 and all relevant prior decisions of both the I.C.C. and the STB" It is possible that Willis was unaware of the legal precedents governing the status of PSO's trackage as private track or an exempt spur. However, it is not reasonable to suggest that he had no reason to expect the Board's ruling. The Board's decision is entirely consistent with, not contradicted by, the statute and applicable precedent.

C. The Alleged "New Evidence" Is Merely Cumulative

The "new evidence" presented by Willis does not add anything of significance to the facts of the case. This is a piece of track that was constructed and is maintained at the expense and obligation of its owner, PSO. The track is not held out to the public for service and nothing Willis attempts to add alters the findings already made by the Board.

The October 2, 1992 letter (Exhibit 2) is clearly cumulative in that it was actually presented previously as evidence. The Oklahoma State Railroad Map (Exhibit 3) shows the existence of the line, a fact that has been well known for many years. The diagram of the track (Exhibit 4) and the letter to

the Federal Railroad Administration (Exhibit 5) both contain information related to crossings, whose existence was well known in 1995. In the case of Exhibit 4, an almost identical map showing the same crossings was attached to the Industrial Track and Operating Agreement, referred to by Willis on page 2 of his Petition. This document was attached as Exhibit 1 to the Verified Statement of Stephen C. Behn filed with The Burlington Northern and Santa Fe Railway Company's Reply in Opposition to B. Willis, C.P.A., Inc.'s Petition for Declaratory Order ("BNSF Reply").

III. Willis Has Raised No New Legal Arguments

In his petition, Willis spends a considerable amount of time relying on previously submitted evidence and rehashing arguments already considered and rejected by the Board. (See, Petition at 2-6.) He argues the substance of his position on the merits of his Petition for Declaratory Order for more than five pages before making any mention of why the "new evidence" was not submitted previously. As there is no demonstration of material error or new argument, PSO and BNSF will not burden the Board with a response to Willis on these points other than to refer the Board to the record. (See, Petition for Declaratory Order filed Feb. 14, 2001; Reply of Public Service Company of Oklahoma in Opposition to Petition for Declaratory Order filed Apr. 6, 2001 ("PSO Reply"); BNSF Reply; (Willis') Replies to Motions to

Dismiss filed on or about Apr. 13, 2001; (PSO's and BNSF's) Joint Motion to Strike Petitioner's "Replies to Motions to Dismiss" filed on Apr. 20, 2001; (Willis') Reply to Joint Motion to Strike filed on or about April 27, 2001; (Willis') Motion for Expedited Ajudication [sic] filed on or about Aug. 29, 2001; Joint Reply of Public Service Company of Oklahoma and The Burlington Northern and Santa Fe Railway Company to Motion for Expedited Ajudication (sic) filed Sept. 20, 2001; and STB Finance Docket No. 34013 B. Willis, C.P.A., Inc. - Petition for Declaratory Order (Oct. 3, 2001).)

IV. The "New Evidence," If Considered, Would Not Affect The Outcome

Administrative agencies generally should not grant reopening unless the evidence sought to be offered is material, was not available, and could not have been discovered or presented at the time of the original action. See, I.N.S. v. Abudu, 485 U.S. 94, 97-98 and 104-105, 108 S.Ct. 904, 908 and 912 (1988) (motion to reopen deportation proceeding.) As noted above, all of the evidence Willis seeks to introduce on reopening was available to Willis at the time he filed his Petition for Declaratory Order. The evidence is not material in that it would not change the Board's ruling that it does not have jurisdiction over a private industrial spur track.

Petitioner suggests that the Oct. 2, 1992 letter from PSO (Exhibit 2 to Petition³) references PSO as a common carrier. Even assuming the letter could fairly be read in this fashion, the letter was authored by an individual in the Real Estate Department of PSO. It is clear on the face of the letter that PSO was acting as PSO, an electric utility. PSO was not forming a railroad corporation. Given the nature of the Oklahoma statutory provisions which grant eminent domain power to a utility by referencing such powers given to railroads, it is not surprising that a layman would erroneously make such a reference. Such a reference cannot conceivably be viewed as a holding out to provide common carrier services.

Petitioner also cites Oklahoma law (Okla. Stat. Ann. tit. 66, §§ 7(5), and 51 to 60; Texas, Oklahoma and Eastern Railroad Company v. Campbell, 477 P.2d 705, 707 (Okla. App. 1970); Bromide Crushed Rock Co. v. Dolese Bros. Co. 247 P. 74 (Okla. 1926)) for the proposition that since the track at issue crossed "six public roads," PSO must be a "common carrier railroad company." However, nothing in the authorities cited indicates that only common carrier railroads may cross roads. The fact that the track at issue crosses roads does not by itself change the nature of the track. It is a virtual certainty that

³Previously Exhibit 15.

rail trackage the Board has found to be private in other proceedings also involved various road crossings.

PSO invoked its eminent domain power pursuant to Okla. Stat. Ann. tit. 27, §7 which allows public utilities to act under the same eminent domain statutes as railroads. A utility does not become a railroad simply because the legislature chose to define its condemnation authority by reference to the condemnation authority for railroads.

Any person, firm or corporation organized under the laws of this state, or authorized to do business in this state, to furnish light, heat or power by electricity or gas, or any other person, association or firm engaged in furnishing lights, heat or power by electricity or gas shall have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations by laws of this state.

Okla. Stat. Ann. tit. 27, §7.

PSO obtained the right of way from Willis by exercise of the eminent domain authority it possesses as an electric utility. PSO did not form a railroad corporation to obtain the right of way or to construct or own the track. It was at all times acting as an electric utility building a private track required for its utility functions.

Willis' reliance on Western Union Telegraph Co. v. Carter, 220 P. 635 (Okla. 1923) ("Western Union") as authority that PSO is a common carrier railroad is also misplaced. In that

case, the owner of telegraph lines voluntarily associated with a common carrier railroad to provide service for an extended period of time. The court held that the owner could not then complain of the regulatory burdens which it assumed absent sufficient legal or equitable grounds to withdraw the property from service. As the court stated in its syllabus to the case, "[w]hether or not private property shall be charged with a public use, and its consequent burdens, is ordinarily a matter of election on the part of the owner," (Western Union, 220 at 635.)

Unlike the Western Union case, PSO had no agreement to provide common carrier service jointly with the railroad. The record is clear that PSO has not held out at any time to provide common carrier services. See e.g. Verified Statement of L. Paul Cox at 4, (attached to PSO Reply).

In short, it is clear that the rail line at issue here is a private line of track as found by the Board. BNSF and PSO also note, however, that even if this were not so, the line would still be classified as an industrial spur and therefore would be exempt from Board jurisdiction under 49 U.S.C. §10906. See, BNSF Reply at 8.

The remaining exhibits presented in the Petition similarly provide no basis for modifying the Board's decision. The Oklahoma Railroad Map (Exhibit 3 to Petition) proves nothing about the line. Willis offers no authority for his statement

that "this official state map does not show spur lines, industrial tracks or private tracks, but just common carrier railroads." (See Petition at 9). In fact, the statement is clearly incorrect. This Official State Railroad Map was produced in 2000 and is widely distributed by the Oklahoma Department of Transportation. The DOT, which produces this map, has no statutory authority to regulate railroads or determine ownership or carrier status.⁴

Likewise, the diagram at Exhibit 4 "showing six (6) public road crossings" fails to add anything to the case. The fact that Willis discovered a map showing road crossings does not make the information contained therein new evidence. Finally, the FRA letter (Exhibit 5) is simply further evidence that the crossings exist; again, a fact that was well known in 1995.

V. Conclusion

None of the "new" evidence presented by Willis is in fact new; all of it contains information that was either known or should have been known by Petitioner during the initial

⁴Attached as Exhibits 4 and 5 are letters dated April 2, 2001 and April 13, 2001, from the Oklahoma Department of Transportation to Jay M. Galt. Mr. Galt is an attorney for PSO who had inquired concerning the state rail map on behalf of PSO. Those letters explain, *inter alia*, that "ODOT does not make any determination as to rail operators' status as common carriers or actual ownership" (Exhibit 5) and "On our map, we...include trackage to power stations, such as Public Service Company of Oklahoma and Western Farmer's Electric Co-op. These two track designations were just recently added to our 1998 and 2000 maps to identify location only." (Exhibit 4.)

proceeding. Petitioner does not satisfy the standards set forth in 49 C.F.R. §1115.4 and 49 C.F.R. §1115.3 (c) and (d) to briefly set forth non-cumulative evidence and state why such evidence was not previously adduced.

Indeed, Willis has presented no credible explanation, much less justification, for failing to submit this evidence previously. In any event, even if the Board were to consider the evidence presented, the conclusion would remain the same.

For all of the foregoing reasons, Mr. Willis' Petition to Reopen should be denied.

Respectfully submitted,

Linda S. Stein/CML

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Certificate of Service

I hereby certify that I have this 27th day of June 2002, caused copies of the foregoing Joint Reply of Public Service Company of Oklahoma and The Burlington Northern and Santa Fe Railway Company to Petition to Reopen Administratively Final Action to be served upon all parties of record, by first class mail.


C. Michael Loftus, Esq.

IN THE DISTRICT COURT OF ROGERS COUNTY
STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Plaintiff,

v.

B. WILLIS, CPA, INC.,

Defendant.

Case No. C-92-507

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COURT CLERK

DEPUTY

BRIEF IN OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS
FILED ON NOVEMBER 2, 2000

COMES NOW the Plaintiff, Public Service Company of Oklahoma, and offers the following Brief in Opposition to the Defendant's (Defendant or Willis) Motion to Dismiss filed on November 3, 2000.

PROCEDURAL HISTORY OF THE CASE

1. In the exercise of its power of eminent domain, Public Service Company of Oklahoma (Plaintiff or PSO) filed a petition in 1992 to condemn property belonging to B. Willis C.P.A., Inc. (Defendant or Willis).

2. Following an appeal of an earlier ruling of this Court, this case is now before the Court on Remand from the Supreme Court of Oklahoma with the instruction that this Court is to determine the necessity for the taking of the Defendant's property. The Supreme Court observed that this Court's determination of necessity "will not be overturned on appeal where there is evidence to support such findings." *Public Service Co. v. B. Willis, C.P.A., Inc.*, 1997 OK 78 ¶18, 941 P.2d 995, 1000. Additionally, the Supreme Court held that "a valid declaration of necessity by the appropriate body will be viewed as conclusive by the courts in the absence of a showing of actual fraud, bad faith, or an abuse of discretion by the condemning authority." *Id.*, 1997 OK 78 ¶20, 941 P.2d at 1000.

3. While this case was pending before this Court and the Supreme Court of Oklahoma, on March 5, 1996 the Defendant filed an action in the United States District Court for the Northern District of Oklahoma entitled *B. Willis, C.P.A., Inc. v. Public Service Company of Oklahoma and Burlington Northern Railroad Co.*, Case No. 96-CV-172H (later consolidated with 96-CV-059E), in which the Defendant alleged, *inter alia*, that PSO's rail spur "has been constructed contrary to Federal law under the rules and regulations of the ICC [Interstate Commerce Commission]" *Id.*, ¶24 of the Complaint (attached as Exhibit "A").

4. PSO then filed a dispositive Motion to Dismiss on the merits of the Consolidated cases (Case Nos. 96-CV-172E and 96-CV-059E) arguing, in pertinent part, that PSO is not a common carrier or railroad subject to the jurisdiction of the Interstate Commerce Commission, which was replaced by the Surface Transportation Board (ICC/STB) and that PSO's rail spur is not an extension of a through line sufficient to come within the jurisdiction of the ICC/STB. *Defendant Public Service Company of Oklahoma's Motion to Dismiss and Brief in Support*, filed April 11, 1996 (Exhibit "B"). The court later converted the Motion to Dismiss into a Motion for Summary Judgment pursuant to Rule 12(b), Fed.R.Civ.Proc., and proceeded to dispose of the entire case pursuant to Rule 56, Fed.R.Civ.Proc.

5. In an Order dated April 8, 1997, Judge James O. Ellison addressed in a footnote the issue of the need for ICC/STB approval stating:

Claims of trespass, and that the rail spur required approval of the ICC were apparently dropped by Willis inasmuch as he failed to respond to the motion to dismiss regarding these claims. Nevertheless, the trespass claim, at least, depends on the issue to be resolved here. (Emphasis added)

B. Willis, C.P.A., Inc. v. Public Service Company of Oklahoma and Burlington Northern Railroad Co., Case No. 96-CV-172E, Order of April 7, 1997, p.3 fn. 1 (Attached as Exhibit "C").

6. On May 12, 1997, Judge Ellison entered an additional order clarifying that his Order of

IN THE DISTRICT COURT OF ROGERS COUNTY
STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Plaintiff,

v.

B. WILLIS, CPA, INC.,

Defendant.

Case No. C-92-507

FILED IN THE DISTRICT COURT
ROGERS COUNTY, OKLAHOMA
DEC -8 00
CANDICE A. GILLY, CLERK
DEPUTY

SUR-REPLY TO THE DEFENDANT'S MOTION TO DISMISS
FILED ON NOVEMBER 3, 2000

COMES NOW the Plaintiff, Public Service Company of Oklahoma (Plaintiff or PSO), and offers the following Sur-Reply to the Defendant's (Defendant or Willis) Motion to Dismiss filed on November 3, 2000.

OVERVIEW

Distilled to its essence, Willis' argument is that PSO was required to obtain approval from the Interstate Commerce Commission (now the Surface Transportation Board, hereafter ICC/STB) before it could exercise its eminent domain powers. Willis argues, further, that it is PSO's burden to show that it has obtained the approval of the ICC/STB. PSO has offered the following responses, each of which are independent of the others and each of which defeats the Motion to Dismiss:

- I. Defendant's Motion to Dismiss is not a proper pleading under Oklahoma Law.
- II. Willis' claim that PSO was required to obtain authorization from the Interstate Commerce Commission before constructing its railroad spur is barred by a previous federal court action.
- III. Under the doctrine of "primary jurisdiction", Willis must first seek relief from the appropriate federal administrative agency.
- IV. As PSO successfully argued more than four years ago, PSO is not required to obtain approval from the ICC/STB in order to build a railroad spur.

III.

Under the doctrine of “primary jurisdiction”, Willis must first seek relief from the appropriate federal administrative agency.

Willis responds to this contention by stating that PSO, not Willis, must go to the ICC/STB and obtain a permit for the construction and operation of the trackage at issue in this case. *Willis Brief*, pp. 6-7. Willis concedes that “there is no requirement for a certificate of Public Convenience and Necessity for a spur line. Spur lines are explicitly exempted from coverage of 49 U.S.C., [Section] 10901 and Willis has never claimed otherwise.” *Willis Brief*, p. 3. The disagreement between PSO and Willis is then made clear in the very next sentence where Willis says, “The fundamental issue under federal railroad law is whether the track running across Willis’ property is a railroad line under federal jurisdiction or a spur line exempt from federal jurisdiction.” *Id.*

Whether or not the trackage at issue in this case is or is not a spur line is more properly addressed under Issue IV: “As PSO successfully argued more than four years ago, PSO is not required to obtain approval from the ICC/STB in order to build a railroad spur.” For the purposes of resolving the issue of which forum has primary jurisdiction, we need only say that this Court is clearly not the proper forum, regardless of whose responsibility it is to find the proper forum and go there.

In addition, there is nothing in the federal law which requires PSO to obtain a declaration from the ICC/STB that PSO was *not* required to obtain a permit. If a man never drives a car, he does not need a driver’s license and he need not obtain a declaration from the Department of Public Safety that he *does not* need a driver’s license. Only if he intends to drive a car must he first obtain a license. If PSO never builds or operates a through line, it does not need a permit to build or operate one.

There is also nothing in the federal law which prevents Willis from complaining to the

need not concern itself with that issues or the consequences for PSO. In any event, this Court is not the proper forum for resolution of this federal administrative law question. If PSO is required to obtain federal authorization for this trackage, the forum having primary jurisdiction is the ICC/STB.

IV.

As PSO successfully argued more than four years ago, PSO is not required to obtain approval from the ICC/STB in order to build a railroad spur.

Willis continues to argue that the trackage at issue in this case is a "railroad line", "extension", or "through line" which requires the approval of the ICC/STB pursuant to 49 U.S.C.A., Section 10901, *et seq.* PSO contends that the trackage is a rail spur which is specifically exempt from ICC/STB approval under 49 U.S.C.A., Section 10906. The statutory exemption for rail spurs provides as follows:

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the [ICC/STB], a rail carrier providing transportation subject to the jurisdiction of the [ICC/STB] under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The [ICC/STB] does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

49 U.S.C.A.(2000), Section 10906 (formerly 49 U.S.C.A.(1992), Section 10907). *See also*, 49 C.F.R. (2000), Section 1150.1, *et seq.*

Admittedly, "spur" is not defined. If this Court reaches this issue, PSO contends that it must find that the available authorities indicate that this trackage is indeed a rail spur and exempt from ICC/STB jurisdiction.

In *New York Central Railroad Co. v. Southern Railway Co.*, 226 F.Supp. 463 (N.D.Ill.), *aff'd*, 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954, 13 L.Ed2d 971 (1965), the court held that "a carrier has not undertaken an extension of line where it operates over private track to serve a shipper, unless the carrier (1) maintains a common carrier service thereover, or (2) pays for the use

or maintenance of the track” *Id.*, 226 F.Supp. at 474. Here, Burlington Northern is the carrier and it neither maintains a common carrier service on the spur nor pays for the use or maintenance of the track.

In *Hughes v. Consolidated-Pennsylvania Coal Co.*, 945 F.2d 594 (3rd Cir. 1991), the court found that the track was a spur rather than an extension and observed that it was only 14.5 miles in length, was located wholly intra-state, was used solely to unload and transfer shipments to a single customer, and was used by a single railroad company. *Id.* Here, the line is relatively short (approximately 13 miles), is located wholly intra-state (entirely within Rogers County), is used for shipments to a single customer (PSO), and is used by a single railroad company (Burlington Northern).

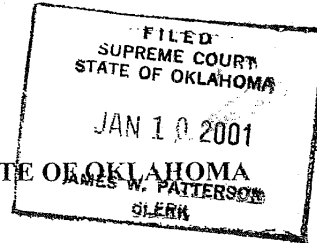
The trackage at issue in this case is a railroad spur and, as such, is exempt from ICC/STB regulation pursuant to federal law. 49 U.S.C.A., Section 10906.

V.

Relitigation of this issue is barred by laches.

The equitable doctrine of laches is available in equity as a defense where the party asserting its rights has delayed in doing so for an unreasonable period of time, with knowledge or on notice of relevant facts, to the detriment of the other party. *State ex rel. Dept. Of Highways v. Martin*, 1977 OK CIV APP 57, 572 P.2d 611, 615 (condemnation action).

Willis has apparently forgotten that it raised the issue of ICC/STB approval in its federal court litigation. There, Willis stated in its pleading that it was entitled to relief because PSO had failed to obtain ICC/STB approval for this project. *B. Willis, C.P.A., Inc. v. Public Service Company of Oklahoma, et al.*, Case No. 96-CV-172H, ¶24 (Complaint) (N.D.Okla.)(attached as Exhibit “A”) Any claim that Willis could not have known whether PSO had complied with ICC/STB requirements



IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

Case No. 95,652

The Honorable JAMES D. GOODPASTER,
District Judge of Rogers County, Oklahoma,

Respondent.

PUBLIC SERVICE COMPANY OF OKLAHOMA,

Real Party in Interest.

BRIEF IN RESPONSE TO
THE APPLICATION TO ASSUME ORIGINAL JURISDICTION AND
PETITION FOR WRITS OF HABEAS CORPUS AND PROHIBITION

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Attorneys for the Real Party in Interest, Public Service
Company of Oklahoma

January 9, 2001

agencies prior to acquiring the land.⁴¹

Regarding a statute regulating federal highway funds, the Tennessee Court of Appeals found:

The enforcement of [Section] 128(a), 23 U.S.C. is not the responsibility of a state court in eminent domain proceedings, but rather that of federal agencies disbursing federal funds and, if necessary, that of the federal courts by injunctive control of such agencies.⁴²

The Kentucky Supreme Court has similarly found that a Port Authority could condemn land without Corps of Engineers approval if it acted "in good faith with reasonable assurance that the project will come to pass."⁴³

The present case is even more clear. There is no federal statute requiring prior approval for construction of a railroad spur because such trackage is exempt from ICC/STB approval.⁴⁴ If it is later determined that ICC/STB approval was required, this court need not concern itself with that issue or the consequences for PSO. In any event, this Court is not the proper forum for resolution of this federal administrative law question.

D. As PSO successfully argued more than four years ago, PSO is not required to obtain approval from the ICC/STB in order to build a railroad spur.

Willis argues that PSO is prohibited by federal law from building or operating an extension to a railroad line without first obtaining permission from the ICC/STB.⁴⁵ Willis seems to have wholly failed to consider the statutory exemption for track and other facilities owned by someone other than a common carrier which provides as follows:

⁴¹ *Chambers v. Public Service Company of Indiana* 265 Ind. 336, 355 N.E.2d 781, 785 (1976).

⁴² *County Highway Comm'n of Rutherford Cty. v. Smith*, 61 Tenn.App. 292, 454 S.W.2d 124 (1969), *cert. denied*.

⁴³ *Northern Kentucky Port Auth. v. Cornett* 625 S.W.2d 104, 105 (Ky. 1982).

⁴⁴ 49 U.S.C.A., Section 10906.

⁴⁵ Willis cites 49 U.S.C.A.(1992), Section 10901(a)(4) and 11901(d) and 49 U.S.C.A.(2000), Section 10901(a), respectively.

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the [ICC/STB], a rail carrier providing transportation subject to the jurisdiction of the [ICC/STB] under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The [ICC/STB] does not have authority under this chapter over construction acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.⁴⁶

In the previous federal court case, PSO showed that it is not a common carrier and that the spur is not “an extension” of Burlington Northern’s line. PSO does not maintain a common carrier service on the spur and PSO paid for the construction of the track. Burlington Northern neither pays for the use nor maintenance of the track. The spur is within the Section 10906 exception and is *not* required to comply with ICC/STB regulations.

In the federal court case, PSO relied on *New York Central Railroad Co. v. Southern Railway Co.*⁴⁷ In that case, a coal mining company built a private spur track between its mine and Southern Railway’s main line. Another railroad brought suit against Southern claiming, like Willis, that the spur was in fact an extension of Southern’s line and, therefore, required prior approval of the ICC/STB. The court disagreed holding that “a carrier has not undertaken an extension of line where it operates over private track to serve a shipper, unless the carrier (1) maintains a common carrier service thereover, or (2) pays for the use or maintenance of the track

...⁴⁸

In *Hughes v. Consolidated-Pennsylvania Coal Co.*,⁴⁹ the United States Court of Appeals for the Third Circuit addressed many of Willis’ concerns. In that case, a spur was constructed to

⁴⁶ 49 U.S.C.A.(2000), Section 10906 (formerly 49 U.S.C.A.(1992), Section 10907).

⁴⁷ 226 F.Supp. 463 (N.D.Ill.), *aff’d*, 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954, 13 L.Ed2d 971 (1965)

⁴⁸ *Id.*, 226 F.Supp. at 474.

⁴⁹ 945 F.2d 594 (3rd Cir. 1991).

serve a coal mine. The railroad exercised its power of eminent domain on behalf of the coal company which was to hold ownership to the spur in trust. Even though this arrangement was found to be fraudulent because the property owners were not told who the true owner of the easement would be, the court nevertheless found that ICC/STB approval was not required for the construction of an intra-state spur. Quoting *Nicholson v. I.C.C.*,⁵⁰ which is also quoted by Willis, the court found that the track was a spur rather than an extension and observed that it was only 14.5 miles in length, was located wholly intra-state, was used solely to unload and transfer shipments to a single customer, and was used by a single railroad company.⁵¹ Other cases have also refused to require ICC/STB approval of spur tracks.⁵²

E. Relitigation of this issue is barred by laches.

The doctrine of laches is available in equity as a defense where the party asserting its rights has delayed in doing so for an unreasonable period of time, with knowledge or on notice of relevant facts, to the detriment of the other party. *State ex rel. Dept. Of Highways v. Martin*.⁵³ Willis has delayed some eight years in seeking relief under federal law and more than four years since it last raised the issue in federal court. This is clearly an unreasonable amount of time.

An instructive case in this regard is *Woida v. U.S.*⁵⁴ in which landowners objected to condemnation of their property for a power line on the basis of federal environmental laws and

⁵⁰ 711 F.2d 364, 368 (D.C.Cir. 1983).

⁵¹ *Id.*

⁵² See e.g. *Louisiana & Arkansas Ry. Co. v. Missouri Pacific Railroad Co.*, 288 F.Supp. 320 (E.D.La. 1968), *aff'd*, 415 F.2d 751, *cert. denied* 396 U.S. 1060, 90 S.Ct. 757, 24 L.Ed.2d 754; *Chicago, M., St.P. & P.R.Co. v. Chicago & E.I.R.Co.*, 198 F.2d 8 (7th Cir. 1952); and *Fox River Valley RR. Corp. v. Escanaba & Lake Superior R. Co.*, 182 Wis.2d 490, 527 N.W.2d 398, Westlaw 93-2354 (Wis.App. 1994) (Unpublished Opinion).

⁵³ 1977 OK CIV APP 57, 572 P.2d 611, 615 (condemnation action).

⁵⁴ 446 F.Supp. 1377 (D.C.Minn. 1978).



OKLAHOMA DEPARTMENT OF TRANSPORTATION

200 N. E. 21st Street

Oklahoma City, OK 73105-3204

April 2, 2001

Mr. Jay M. Galt
White, Coffey, Galt, Fite, P.C.
6520 North Western, Suite 300
Oklahoma City, OK 73116

Dear Mr. Galt:

In response to your March 19, 2001, letter and specifically your inquiries on page two, the Oklahoma Department of Transportation produces the official State Railroad map, which is revised every two years.

It is our intention to indicate on this map all railroad lines currently in place in Oklahoma. These rail lines are color-coded matching the legend, indicating in most cases, the owner of said line. This is true in all cases of the Class I roadroads and in nearly all cases of the Class III railroads. On our map, we also 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. We are not certain of the owners in these two cases. The known operators and owners are pictured on the reverse side of our map for easier identification for those using our map.

If you desire additional information, please feel free to contact me at 405-521-2771.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Dougherty".
John E. Dougherty
Branch Manager
Rail Programs Division

JED:gb

06/24/02 15:54 FAX 405 840 9890
04/13/2001 09:07 FAX 405 522 0890

WHITE, COFFEY, GALT, FITE
DOT RAIL PROGRAMS

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OKLAHOMA DEPARTMENT OF TRANSPORTATION

200 N. E. 21st Street
Oklahoma City, OK 73105-3204

April 13, 2001

Mr. Jay M. Galt
White, Coffey, Galt, Fite, P.C.
6520 North Western, Suite 300
Oklahoma City, OK 73116

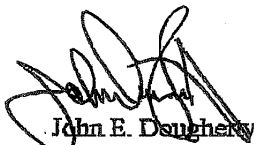
Dear Mr. Galt:

The Rail Programs Division of the Oklahoma Department of Transportation (ODOT) owns railroad trackage and monitors most aspects of all rail operators in Oklahoma. 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.

ODOT does combine information related to rail operations (physical location in the State) and public crossings, inventory data provided by the rail operators, and to produce the official State Rail Map.

If you desire additional information, please contact me.

Sincerely,


John E. Dougherty
Branch Manager
Rail Programs Division

JED:gb

"The mission of the Oklahoma Department of Transportation is to provide a safe, economical, and effective transportation network for the people, commerce and communities of Oklahoma."

AN EQUAL OPPORTUNITY EMPLOYER