

No. 16-875

In the Supreme Court of the United States

ALLIED INDUSTRIAL DEVELOPMENT CORPORATION,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Surface Transportation Board (Board) has jurisdiction to regulate railroad tracks located on land that petitioner owns.

2. Whether the Board properly declined to consider an affidavit presented to it for the first time with a petition to reopen the Board's final administrative decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 835 F.3d 548. The initial decision of the Surface Transportation Board (Pet. App. 34a-68a) is unreported. The decision of the Surface Transportation Board on reopening (Pet. App. 10a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. A petition for rehearing was denied on September 30, 2016 (Pet. App. 69a-70a). The petition for a writ of certiorari was filed on December 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, ch. 104, 24 Stat. 379, as amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, the Surface Transportation Board (STB or Board) has jurisdiction over “transportation by rail carrier” that is conducted over any “part of the interstate rail network.” 49 U.S.C. 10501(a)(1) and (2)(A). The term “rail carrier” is defined, in pertinent part, as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. 10102(5). The term “transportation” includes property or equipment “of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.” 49 U.S.C. 10102(9)(A).

Railroad track within the STB’s jurisdiction falls into two categories: railroad lines (also known as “main line track”) and excepted track (also known as “ancillary track”). See 49 U.S.C. 10901, 10906; see also *Nicholson v. Interstate Commerce Comm’n*, 711 F.2d 364, 367 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984); Pet. App. 3a. Railroad lines are tracks over which railroads provide point-to-point common-carrier service to shippers. *Nicholson*, 711 F.2d at 367. STB approval is required for the construction, operation, acquisition, sale, and abandonment of railroad lines. 49 U.S.C. 10901-10905, 11321 *et seq.* Excepted track, which includes “spur, industrial, team, switching, or side tracks,” 49 U.S.C. 10906, is track used for loading cars, switching, and other activities that are ancillary to main-line services. *Nicholson*, 711 F.2d at 367-368. Although excepted track is within the Board’s jurisdiction, see 49 U.S.C. 10501, such track is not subject to

the agency's licensing authority, 49 U.S.C. 10906. See Pet. App. 3a-4a.

The STB lacks jurisdiction over a third type of track known as "private track." See *B. Willis, C.P.A., Inc. —Pet. for Declaratory Order*, STB Finance Docket No. 34013, 2002 WL 1730018, at *1 (served July 26, 2002) (*B. Willis*), petition for review denied, *B. Willis, C.P.A., Inc. v. Surface Transp. Bd.*, 51 Fed. Appx. 321 (D.C. Cir. 2002) (per curiam), cert. denied, 540 U.S. 811 (2003); Pet. App. 4a. Track qualifies as private track if it is "used exclusively by the track's owner for movement of its own goods" and "there is no common carrier obligation to serve other shippers that might locate along the line." *B. Willis*, 2002 WL 1730018, at *1; see Pet. App. 4a.

2. In the early 1990s, petitioner acquired a parcel of land in Youngstown, Ohio, which contained railroad tracks known as the "LTV Tracks." Pet. App. 39a-40a. Respondent Mahoning Valley Railway Co. (Mahoning) used the LTV Tracks pursuant to a lease until 2001, at which time it acquired an easement to continue using the tracks. See *id.* at 17a, 40a. Mahoning used the tracks to serve third parties. *Id.* at 22a-23a, 40a. Mahoning also eventually used the tracks to stop, store, and stage rail cars. *Id.* at 41a.

3. Petitioner sued in state court, alleging that Mahoning's use of the tracks to stop, store, and stage rail cars violated the easement agreement. Pet. App. 46a. The court referred the case to the STB. *Id.* at 5a, 47a.

4. a. In the proceedings before the STB, petitioner "challenged the Board's jurisdiction, arguing that the LTV tracks were 'spur, side, or industrial tracks,' which echoes the description of excepted tracks in

49 U.S.C. § 10906.” Pet. App. 5a; see *id.* at 48a, 50a. The STB rejected petitioner’s jurisdictional challenge. *Id.* at 34a-68a. As relevant here, the Board concluded that its predecessor agency, the Interstate Commerce Commission (ICC), had authorized Mahoning to operate over the LTV Tracks in 1982. *Id.* at 55a-58a. The Board declined to resolve whether the LTV Tracks are main line tracks or ancillary tracks. *Id.* at 61a. The Board explained that resolution of that issue was unnecessary given its conclusion that Mahoning had authority to operate, and that petitioner had “failed to present a developed argument * * * concerning the characteristics of the tracks.” *Ibid.*

b. Petitioner filed a petition to reopen the Board’s final administrative decision, arguing that the Board had erred in concluding that the ICC had authorized Mahoning to operate over the LTV Tracks. Pet. App. 11a, 14a. Petitioner also sought to supplement the record with an affidavit from a former Mahoning employee, William Spiker, who discussed the history of the LTV Tracks as former steel-mill tracks. *Id.* at 11a, 15a. More than a year later, while the petition to reopen was still pending, petitioner “filed a motion seeking leave to ‘clarify’ its arguments.” *Id.* at 19a. In that motion, petitioner argued for the first time that the LTV Tracks are private tracks outside the Board’s jurisdiction and stated that petitioner in prior filings had “conflated ‘private track’ * * * with ancillary ‘excepted track.’” *Ibid.*

In response to petitioner’s motions, the STB reopened the proceedings and reversed the portions of its prior decision that had concluded that Mahoning had received authority to operate over the LTV Tracks. Pet. App. 18a; see *id.* at 10a-33a. The Board declined

to consider the Spiker affidavit because that affidavit did “not constitute new evidence.” *Id.* at 16a. But the Board agreed with petitioner that, while the ICC had licensed Mahoning to provide service in the area, it had never authorized Mahoning to operate on the LTV Tracks in particular. *Id.* at 16a-18a.

The STB denied petitioner’s motion to clarify its arguments because petitioner had “not demonstrated good cause, this late into the course of this proceeding, to recast its arguments.” Pet. App. 20a. The Board further found that petitioner had not shown that the LTV Tracks are private tracks. *Id.* at 21a. The STB explained that Mahoning had not used the tracks to serve its own facility or move its own goods, but rather had long used the tracks to provide common-carrier service by “serv[ing] multiple shippers.” *Ibid.*

The STB further concluded that the LTV Tracks are main line tracks rather than ancillary tracks. Pet. App. 21a-25a. The Board noted that Mahoning uses the tracks “as part of its route for moving traffic between points of shipment and delivery,” and that “[t]he physical characteristics of the LTV Tracks are also consistent with the conclusion that they are mainline.” *Id.* at 22a-23a. The Board observed that, “[b]ecause mainline operations require a license from the agency” and Mahoning “does not currently have authority to operate,” Mahoning was required to “obtain Board authorization” in order “[t]o provide common carrier service on the LTV Tracks going forward.” *Id.* at 25a.

5. Petitioner sought judicial review of the Board’s decision, and the court of appeals denied the petition for review. Pet. App. 1a-9a. As relevant here, the court identified two separate grounds for rejecting

petitioner's argument that the LTV Tracks are private tracks outside the Board's jurisdiction. *Id.* at 7a-8a. First, the court concluded that petitioner had "waited too long to make" the argument because it "did not argue that the tracks are private until five years after this litigation began, and more than a year after the Board" issued its original decision. *Id.* at 7a. The court found that the Board's refusal to permit petitioner to recast its argument at that time "was not arbitrary or capricious, and thus neither was the Board's decision on this point." *Ibid.* Second, the court concluded that the LTV Tracks are not private tracks because Mahoning "provides common-carrier service using" the tracks, which "fits the statutory definition of 'transportation by rail carrier . . . by railroad' and is thus within the Board's jurisdiction." *Id.* at 8a (citing 49 U.S.C. 10501, 10102(5), (6), and (9)).

The court of appeals further rejected petitioner's contention that the Board had erred in declining to consider the Spiker affidavit, which petitioner invoked as support for its argument that the LTV Tracks are private tracks. Pet. App. 8a. The court concluded that, because petitioner "could have presented the Spiker affidavit to the Board before it" issued its original decision, "the affidavit is not new evidence, and the Board properly refused" to consider it. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-20) that the court of appeals erred in upholding the Board's determination that it has jurisdiction over the LTV Tracks. Petitioner also argues (Pet. 20-23) that the Board should have considered the Spiker affidavit in determining whether the LTV Tracks are within the Board's jurisdiction. Those factbound arguments lack merit. The

decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly upheld the STB's determination that the LTV Tracks are not private tracks outside the Board's jurisdiction. See Pet. App. 7a-8a.

a. The court of appeals correctly found that petitioner had waited too long to raise the argument that the LTV Tracks are private tracks. Pet. App. 7a. Petitioner initially argued that the LTV Tracks "are not main line tracks, but instead are spur, side, or industrial tracks." *Id.* at 18a (citation omitted). The Board accordingly understood petitioner to argue that the LTV Tracks are excepted track within the meaning of 49 U.S.C. 10906, see Pet. App. 48a, which would mean that the tracks fall within the Board's jurisdiction but are not subject to the Board's licensing authority.

Petitioner contends (Pet. 17 n.7) that the Board should have understood it to be arguing that the LTV Tracks are private tracks. That factbound claim does not warrant this Court's review, and in any event it is inconsistent with the record. Petitioner "did not argue that the tracks are private until five years after this litigation began, and more than a year after the Board" had issued its final administrative decision. Pet. App. 7a. Because petitioner did not show good cause to recast its legal theory so late in the proceedings, the Board reasonably concluded that the private-tracks argument was untimely. See *id.* at 7a, 20a.

b. In any event, the STB reasonably determined that it has jurisdiction over the LTV Tracks. Petitioner does not dispute that Mahoning has long used

the tracks to provide common-carrier service. See Pet. App. 8a. When petitioner acquired the property containing the tracks, Mahoning was providing rail service to multiple customers. See *id.* at 40a; see also *id.* at 21a-25a (describing in detail Mahoning’s use of the tracks to provide common-carrier service). And the Board found no evidence that Mahoning “is using the LTV Tracks to provide freight rail service to its own facility, that [Mahoning] does not hold out to serve shippers, or that [Mahoning] uses the LTV Tracks exclusively for the movement of its own goods.” *Id.* at 21a. As the court of appeals recognized (*id.* at 8a), Mahoning’s use of the tracks accordingly fits within the broad statutory definition of “transportation by rail carrier.” 49 U.S.C. 10501(a)(1); see 49 U.S.C. 10102(5) and (9).

Petitioner contends (Pet. 14-15) that the LTV Tracks qualified as private track when they were constructed, and that Mahoning’s use of the tracks to provide common-carrier service could not “convert[] * * * in-plant tracks into lines of railroad” because Mahoning had never received Board authorization to operate on the tracks. The court of appeals correctly rejected that argument, observing that “[n]othing in the statute limits the Board’s jurisdiction to Board-authorized transportation or rail carriers,” and that petitioner’s interpretation of the statute would mean that “rail carriers could avoid the Board’s jurisdiction merely by operating without Board authorization.” Pet. App. 8a. Contrary to petitioner’s assertion (Pet. 16), the Board’s determination that it has jurisdiction over the LTV Tracks does not “authorize” Mahoning to use the tracks to provide common-carrier service without following the licensing requirements in 49 U.S.C.

10901. Rather, the Board's decision makes clear that, "[t]o provide common carrier service on the LTV Tracks going forward, [Mahoning] must obtain Board authorization." Pet. App. 25a.

Petitioner also contends (Pet. 13) that the court of appeals' decision conflicts with decisions in which this Court has recognized a "fundamental distinction" between private in-plant tracks and tracks that are "part of the interstate rail network." But the court of appeals acknowledged those two categories of railroad track before determining that the Board had acted reasonably in finding that the LTV Tracks are not private because they are used to provide common-carrier service. Pet. App. 3a-4a, 8a. That conclusion fits comfortably with this Court's precedent. See, e.g., *The Tapline Cases*, 234 U.S. 1, 23-25 (1914) (concluding that a rail carrier that was originally created by lumber companies to move their own traffic, but that later began to move traffic for third parties, was a common carrier).

Petitioner is also wrong to contend (Pet. 18-20) that the court of appeals' decision conflicts with decisions of the D.C. and Seventh Circuits. In *Illinois Commerce Commission v. United States*, 779 F.2d 1270 (1985), the Seventh Circuit vacated the ICC's determination that a particular track constituted main line track rather than ancillary spur track. See *id.* at 1273-1274. The court cited evidence concerning the use and characteristics of the track that indicated that it might qualify as spur track, and remanded for the agency to reconsider that issue. *Id.* at 1272-1274. In a subsequent phase of the case, after the agency had concluded on remand that the track qualified as ancillary spur track, the D.C. Circuit held that the track fell "within

the residual regulatory authority of the states.” *Illinois Commerce Comm’n v. Interstate Commerce Comm’n*, 879 F.2d 917, 924 (1989). Neither of those decisions conflicts with the court of appeals’ factbound decision in this case upholding the Board’s determination that the LTV Tracks are not private tracks.

2. The court of appeals also correctly held that the STB had “properly refused” to consider the Spiker affidavit because petitioner had not presented the affidavit to the Board until petitioner filed a motion to reopen the proceedings after the Board issued its final administrative decision. Pet. App. 8a. Petitioner observes (Pet. 20) that the STB’s original decision took official notice of certain documents that were not in the record. But petitioner is wrong to suggest (Pet. 20-23) that it was not given an adequate opportunity to respond to the Board’s reliance on those documents.

Although the Board declined to consider the late-filed affidavit, it agreed with petitioner that the ICC had not authorized Mahoning to operate over the LTV Tracks, and it therefore vacated and reversed the portion of its original decision that had reached a contrary conclusion. Pet. App. 16a-18a. Petitioner now argues (Pet. 22) that the Board should have considered the Spiker affidavit not only to show that Mahoning lacked ICC authorization, but also to find that the LTV Tracks are private tracks. Petitioner identifies no error, however, in the court of appeals’ determination that petitioner could have offered the affidavit for that purpose at an earlier stage in the proceedings. Petitioner’s factbound disagreement with the Board’s conclusion that the affidavit was not timely submitted does not warrant this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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