No. 02-1498

In the Supreme Court of the United States

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

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

ELLEN D. HANSON
General Counsel

CRAIG M. KEATS
Deputy General Counsel

ALICE C. SAYLOR
Attorney
Surface Transportation Board
Washington, D.C. 20423

QUESTION PRESENTED

Whether the Surface Transportation Board has jurisdiction to regulate private rail tracks.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is *reprinted in* 51 Fed. Appx. 321. The opinion of the Surface Transportation Board (Pet. App. 4a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2002. A petition for rehearing was denied on January 10, 2003 (Pet. App. 14a). The petition for a writ of certiorari was filed on April 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, the Surface Transportation Board (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), 10501(a)(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). Under 49 U.S.C. 10901(a), persons who are, or intend to become, rail common carriers must obtain authorization from the Board before constructing or operating a new or extended railroad line.

Before 1996, States played a limited role in regulation of intrastate rail operations. In the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress expanded the scope of federal preemption to directly preempt state regulation of all rail freight facilities and operations over which the Board has jurisdiction, even if the facilities are located in a single State. Under 49 U.S.C. 10501(b), "the jurisdiction of the Board over transportation by rail carriers," including "the construction" and "operation" of "spur" and "side tracks," is "exclusive" and "preempt[s] the remedies provided under Federal or State law."

2. The Public Service Company of Oklahoma (PSO) operates an electric power generating facility in Oologah, Oklahoma. Pet. App. 5a. At one time, the Union Pacific Railroad handled all coal deliveries to PSO. *Ibid.* In 1992, PSO filed a state law eminent domain proceeding to obtain a right-of-way across a tract of land owned by petitioner. *Ibid.* The purpose of obtaining the right-of-way was to construct railroad track that would connect PSO's electric power facility

to the main line of Burlington Northern and Santa Fe Railway Company (BNSF), enabling BNSF to deliver coal to PSO. *Ibid.*

In March 1994, PSO took possession of the right-of-way and constructed track connecting its Oologah plant to BNSF's main line. Pet. App. 5a. In March 1995, BNSF began using the track. *Ibid.* PSO constructed the track at its own expense, owns the track, and pays the cost of track maintenance. *Id.* at 8a-9a; Gov't C.A. Br. 7. BNSF conducts rail operations over the track pursuant to an agreement with PSO that does not permit service to any entity other than PSO. Pet. App. 9a; Gov't C.A. Br. 8.

3. In February 2001, six years after the track over petitioner's land was constructed, petitioner filed a petition with the Board seeking a declaration that the construction and operation of the track over petitioner's property was unlawful because it had not been approved by the Board under Section 10901. Pet. App. 4a. The Board denied the petition. *Id.* at 4a-11a. The Board reasoned that its jurisdiction extends only to track that is used for "common carrier service" and that the track over petitioner's land constituted "private track" that was not used for that purpose. *Id.* at 6a-7a. The Board held that "if 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 * * * Board authorization or approval." *Id.* at 10a.

4. In an unpublished per curiam opinion, the court of appeals denied the petition for review. Pet. App. 1a-3a. The court agreed with the Board's determination that its jurisdiction extends only to track used for common

carriage and that it therefore lacks jurisdiction over private tracks. *Id.* at 2a. The court rejected as "implausible on its face" petitioner's contention "that § 10501(b)(2) confers upon the Board jurisdiction over all track, regardless whether it is used for private or common carriage." *Ibid.*

ARGUMENT

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

1. Petitioner contends (Pet. 6-8) that the Board's jurisdiction extends to private operations conducted over private track. That contention is without merit. The Board "has jurisdiction over transportation by rail carrier." 49 U.S.C. 10501. The term "rail carrier" is defined, in relevant part as "a person providing *common carrier* railroad transportation for compensation." 49 U.S.C. 10102(5) (emphasis added). The Board's jurisdiction therefore extends only to track used for "common carrier" railroad transportation. Because a private operation conducted over private track is not used for "common carrier" transportation, it falls outside the Board's jurisdiction.

That conclusion follows from the plain meaning of the term "common carrier." That term derives its meaning from the common law. *American Trucking Ass'ns* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 406 (1967). Under the common law, a common carrier is an entity that holds itself out to provide service to the general public for hire. *United States* v. *California*, 297 U.S. 175, 182 (1936); *Atchison, Topeka & Santa Fe Ry.* v. *Kansas City Stock Yards Co.*, 33 I.C.C. 92, 100 (1915) ("The principal test of common carriage is whether

there is a bona fide holding out coupled with the ability to carry for hire."). Given that established common law meaning of the term "common carrier," the Board lacks jurisdiction over private rail operations conducted over private track. As the Board explained in this case, "if 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 * * * Board authorization or approval." Pet. App. 10a.

The legislative history of the ICCTA confirms that understanding. The Conference Report specifically states that "non-railroad companies who construct rail lines to serve their own facilities * * * are not required to obtain agency approval to engage in such construction." H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 179 (1995).

Petitioner contends (Pet. 12-14) that 49 U.S.C. 10501(b) gives the Board jurisdiction over private operations conducted over private track. But that provision simply specifies that "[t]he jurisdiction of the Board over transportation by rail carriers," including the construction and operation of "spur" and "side tracks," is "exclusive" and "preempt[s] the remedies provided under Federal or State law." 49 U.S.C. 10501(b). That preemption provision does not purport to expand the Board's jurisdiction beyond that set forth in Section 10501(a). As the court of appeals concluded, petitioner's view that Section 10501(b) expands the Board's jurisdiction so as to encompass track that is not used for common carriage "is implausible on its face." Pet. App. 2a. At the very least, the Board's interpretation of the extent of its regulatory authority is rea-

sonable and is therefore entitled to controlling weight. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984).

2. Petitioner asserts (Pet. 14-19) that the Board did not provide an explanation of the basis for its decision until oral argument in the court of appeals. But the Board's decision makes clear why the Board reached the conclusion that it did. In its decision, the Board explained that Section 10501(a) provides the exclusive source of its jurisdiction and that its jurisdiction is therefore confined to track used for common carriage. Pet. App. 6a-7a. The Board reiterated that position in its brief in the court of appeals. Gov't C.A. Br. 15-16. That brief also stated that, while petitioner had relied on the preemptive force of Section 10501(b), petitioner failed "to make any mention of section 10501(a)" and "wholly ignore[d] the limiting definition of 'rail carrier' in 49 U.S.C. 10102(5)." *Id.* at 16 n.15. Petitioner therefore had an ample opportunity to address the basis for the Board's decision before the court of appeals issued its decision in this case.

Petitioner contends (Pet. 24) that the Board has held in other cases that it has jurisdiction over private track that is not used for common carriage. In fact, however, all of the cases cited by petitioner address the preemptive effect of the Board's regulation of *common carrier* track.[1] None of those cases suggests that the

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[1] See *Fletcher Granite Co.—In re Declaratory Order*, STB Finance Docket No. 34020 (STB served June 29, 2001); *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer*, STB Finance Docket No. 33971 (STB served May 1, 2001); *Borough of Riverdale—In re Declaratory Order—The N.Y. Susquehanna & W. Ry.*, STB Finance Docket No. 33466 (STB served Feb. 27, 2001).

Board has jurisdiction over private track that is not used for common carriage.

3. Finally, petitioner contends (Pet. 25-29) that the Board's decision conflicts with decisions addressing the distinction between the construction and operation of "main line" track, which requires authorization under 49 U.S.C. 10901(a), and the construction and operation of "spur" track, which is subject to the Board's jurisdiction but exempt from Section 10901(a)'s authorization requirement.[2] Under those decisions, a carrier's use of common carrier track to extend its operations into an area served by another carrier is subject to the authorization requirement. Relying on those decisions, petitioner contends that BNSF must obtain a license to operate the track over petitioner's property because BNSF extended its operations into new territory by using PSO's track.

The question presented in this case, however, is not whether the track over petitioner's property is main line or spur track. Instead, this case raises the antecedent question whether the track over petitioner's property is "common carrier" track. See 49 U.S.C. 10901(a), 10102(5). The cases cited by petitioner simply do not address that issue.

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[2] *Texas & Pacific Ry.* v. *Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266 (1926); *Brotherhood of Locomotive Eng'rs* v. *United States*, 101 F.3d 718 (D.C. Cir. 1996); *Hughes* v. *Consol-Penn. Coal Co.*, 945 F.2d 594, 612 (3d Cir. 1991), cert. denied, 504 U.S. 955 (1992); *Illinois Commerce Comm'n* v. *ICC*, 879 F.2d 917 (D.C. Cir. 1989); *Railway Labor Exec. Ass'n* v. *City of Galveston*, 849 F.2d 145 (5th Cir. 1988); *Nicholson* v. *ICC*, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984); *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967); *ICC* v. *Memphis Union Station Co.*, 360 F.2d 44 (6th Cir.), cert. denied, 385 U.S. 830 (1966).

Similarly, petitioner's claim (Pet. 28) that BNSF was the moving force behind the construction of the track over petitioner's property is beside the point. The crucial facts are that PSO paid for all the construction costs of the track, PSO owns the track, and PSO does not provide, and has not authorized BNSF to provide, service over the track to any other shipper. In these circumstances, the Board reasonably concluded that the track at issue is not used for common carriage and that it therefore falls outside the Board's jurisdiction. In any event, that fact-bound conclusion, affirmed in an unpublished decision, does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ELLEN D. HANSON
General Counsel

CRAIG M. KEATS
Deputy General Counsel

ALICE C. SAYLOR
Attorney
Surface Transportation Board

JUNE 2003