

UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35106

**UNITED STATES DEPARTMENT OF ENERGY – RAIL
CONSTRUCTION AND OPERATION – CALIENTE RAIL LINE
IN LINCOLN, NYE, AND ESMERALDA COUNTIES, NEVADA**

**STATE OF NEVADA’S MOTION FOR LEAVE TO AMEND MOTION TO
REJECT DOE’S APPLICATION, or alternatively, TO REQUIRE RESPONSIVE
COMMENTS ONLY AFTER APPLICATION HAS BEEN FULLY COMPLETED
BY PROPER SUPPLEMENT and REQUEST FOR ORAL ARGUMENT.**

EXPEDITED CONSIDERATION REQUESTED

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I

MOTION FOR LEAVE TO AMEND MOTION TO REJECT DOE’S APPLICATION, or alternatively, TO REQUIRE RESPONSIVE COMMENTS ONLY AFTER APPLICATION HAS BEEN FULLY COMPLETED BY PROPER SUPPLEMENT and REQUEST FOR ORAL ARGUMENT

A. MOTION FOR LEAVE TO AMEND.

The State of Nevada (“Nevada”) moves the Board for leave to amend its original motion filed April 17, 2008 requesting the Board to reject as incomplete the Application of the United States Department of Energy (“DOE”) filed March 17, 2008 that seeks prior approval under provisions of 49 U.S.C. §10901 for the proposed construction and operation of a 300-mile rail line, commonly known as the Caliente Line, in Lincoln, Nye, and Esmeralda counties, in the State of Nevada (“Section 10901 Application” or “Application”).

Based on DOE’s April 22, 2008 Reply to Nevada’s original motion, Nevada now requests permission to amend its motion in two respects: *first*, to raise the absence of jurisdiction under 49 U.S.C. §10501 as a reason for the Board to reject DOE’s Section 10901 Application as filed, and *second* to include Pipeline and Hazardous Materials Safety Administration (“PHMSA”), Transportation Security Administration (“TSA”), and Federal Railroad Administration (“FRA”) as “cooperating agencies” with “lead agency” status for FRA on safety and security matters in any further proceedings

1. Jurisdiction.

While a jurisdictional issue may be raised at anytime by a party or the Board, Nevada’s motion for leave to do so is in timely response to DOE’s April 22 Reply to Nevada’s original motion in which DOE asserted for the first time that Board jurisdiction in this case is *based solely* on the fact of filing an Application under 49 U.S.C. §10901.

2. Cooperating/Lead Federal Agencies.

The Interim Final Rule, effective June 1, 2008, issued by PHMSA in coordination with FRA and TSA, on April 16, 2008 at 73 F.R. 20752, warrants inclusion of these Federal agencies as “cooperating agencies” with “lead agency” status for FRA for purposes of safety and security risk assessments under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§4321 *et seq.*, and prior approval consideration of DOE’s proposed transportation transaction under Section 10901.

A copy of the Nevada’s proposed Amended Motion accompanies this motion as *Exhibit A*.

B. REQUEST FOR ORAL ARGUMENT.

Not only is this a case of first impression for the Board, it presents the first and only opportunity for Federal transportation agencies to review and oversee DOE’s proposed transportation transaction that will implicate both Nevada’s and the Nation’s rail systems.

Because of the unique nature and scope of this proceeding, Nevada believes it would be beneficial for the Board, at the earliest appropriate opportunity, to hear oral argument on Nevada’s motion as amended designed to assist the Board in determining: *first*, whether there is a proper jurisdictional premise under Section 10501 for this Section 10901 proceeding; and if jurisdiction exists, then going forward as the “lead” transportation agency in determining, *second*, the appropriate status of and procedures for evaluating DOE’s Draft Nevada Rail Corridor Supplementary Environmental Impact Statement (“RC-DSEIS”) and Draft Rail Alignment Environmental Impact Statement (“RA-DEIS”) as environmental analysis and documentation, *Exhibit H*, (“EIS’s”) under

the Board's June 7, 2008 decision, consistent with the Board's *non-delegable* obligations under NEPA and applicable regulations, 40 C.F.R. §§1500 *et seq.* and 49 C.F.R Part 1105, *Idaho v. ICC*, 35 F.3d 585, 596-97 (D.C. Cir. 1994); *third*, the significance of the function and informative value of the operating plan requirements in Parts 1150 and 1105 for public evaluation and comment in this case, especially, the nature of the proposed rail operations and identity of the operator on the proposed line; *fourth*, the need for a Safety Integration Plan (SIP) under Part 1106 because of the scale of inter-operational activities among various transportation entities and modes that DOE's transportation proposals necessarily contemplate; and *fifth*, in a post-9/11 world, the need to recognize the jurisdictional responsibilities and expertise of other Federal agencies for rail safety and security assessments, and give appropriate consideration to the 27 risk analysis factors in the Interim Final Rule, effective June 1, 2008, issued by PHMSA in coordination with FRA and TSA, by including those agencies as "cooperating agencies" with "lead agency" status for FRA on safety and security matters, as a part of the Board's deliberations on and decisions for purposes of NEPA and prior approval under Section 10901.

Transportation safety and security risk assessments will not be subject to critical review by the Nuclear Regulatory Commission ("NRC") in processing DOE's License Application. Thus, because the STB will be the only Federal agency to review the Nevada and national impacts of DOE's transportation plans for approval purposes and given the presumptive nature of Section 10901, the Board must act to ensure an open and fair opportunity for public participation in these proceedings.

II

DISCUSSION IN SUPPORT OF MOTION TO AMEND AND REQUEST FOR ORAL ARGUMENT

A. MOTION FOR LEAVE TO AMEND.

In its April 22, 2008 Reply to Nevada's original motion, DOE relies solely on the filing its Application under 49 U.S.C. §10901 as the basis for the Board's jurisdiction in this case. *DOE Reply* p. 6 ("the plain language of 49 U.S.C. §10901 indisputably vested the Board with jurisdiction over DOE's Application when filed.") While the application process may begin when an application is filed, jurisdiction for a Section 10901 proceeding is based on the content of the application, which must satisfy jurisdictional criteria of Section 10501, by evidence of common carrier activity or common carrier obligation over the proposed new line.

Rather than credit Nevada's initial discussion of Section 10501 as the Board's jurisdictional predicate *only if* there will be requisite common carrier activity over the line, DOE does not assert jurisdiction under Section 10501. Nevada believes the reason is obvious: DOE now, as in the past, refuses to definitely state that this proposed rail line will in fact be used to provide common carrier service or obligation to the general public. See *State of Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006) ("STB jurisdiction comes into play only if DOE decides to operate the branch rail line as a common carrier.") DOE's Application and April 22 Reply continue the effort to mask DOE intentions.

In its Reply, DOE ignores the fact that its Application expressly states that decisions whether to construct and operate a railroad, within which corridor or alignment or to implement a shared-use option (common carrier service) have *not* been made and

will *not* be made until June 2008. See *Application* p. 10. And rather than in June, 2008, DOE now states its decisions are expected to issue in the “summer of 2008”. *DOE Reply* p. 5. Criticizing Nevada’s statement that for DOE common carriage remains merely a “contingency not a commitment”, DOE argues that Section 10901, a procedural statute, confers jurisdiction on the Board and that jurisdiction attaches merely upon the filing of a Section 10901 Application. *DOE Reply* p. 6-7.

DOE, a non-carrier, owns the commodities (spent nuclear fuel - SNF and high level radioactive waste - HLW) to be transported over the proposed DOE-owned rail line to the DOE-owned Yucca Mountain Repository. Without affirmatively committing and holding out that common carriage or common carrier obligation to the public will in fact exist over the proposed new rail line, the proposed construction and operation transaction for which DOE seeks prior approval is merely private carriage, even if that carriage is accomplished by a carrier, and is not within the Board’s jurisdiction for purposes of Section 10901. *B. Willis, C.P.A., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34013, 2001 WL 1168090, (served Oct. 3, 2001)(*B. Willis*)(“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.”), *aff’d sub nom. B. Willis, C.P.A., Inc. v. STB*, 51 Fed.Appx. 321 (D.C. Cir. 2002); see also *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248 (served Dec. 5, 1994). As filed, DOE’s Application is not subject to Board jurisdiction or approval, since there is no common carrier activity or obligation.

The STB’s decision in *B. Willis* is consistent with the legislative history of the ICC Termination Act of 1995 (ICCTA). 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).

In sum, the rail line to be constructed and/or operated must be “common carrier” track and common carrier obligations must exist on the line in order to establish Section 10501 jurisdiction for proceedings under Section 10901.

The foregoing precedents are sufficient reason to grant Nevada permission to amend its original motion to raise the absence of jurisdiction as ground for rejection of DOE’s Application as filed. As filed, DOE’s Application cannot be reasonably read as “holding out” that common carriage or common carrier obligation does or will exist over the proposed new rail line. Factually, the absence of definite common carrier service or obligation is a fatal flaw in DOE’s Application, and legally defeats STB jurisdiction required under 49 U.S.C. §10501 to proceed on DOE’s Section 10901 Application.

B. REQUEST FOR ORAL ARGUMENT.

Nevada believes oral argument on its motion as amended would assist the Board, now the “lead” agency for on transportation matters, in establishing procedures and schedules to implement Parts 1150 and 1105 to ensure that DOE’s Application, at the outset, is complete for purposes of facilitating public review and comment, and that the Board has adequate information to determine its jurisdiction and ascertain whether the proposed transaction is consistent with NEPA policies and satisfies prior approval criteria under Section 10901.

DOE's view that this Application is part of an "overall planning process". DOE Reply p. 7. DOE offers the Application as a placeholder in that process to be supplemented later as its plans become final or as the Board may require. DOE's approach stands Section 10901 "prior approval" proceedings on its head. In short, DOE seeks prior approval from the Board for a transaction not as yet determined or definite. Prior approval under Section 10901 is not merely part of a planning exercise for standby purposes, but applies to a concrete transaction that represents the culmination of the planning process and is subject to public scrutiny and comment as well as critical review by the Board.

In this case, DOE has had many years to conclude the planning process as it relates to transportation to the Yucca Mountain Repository. At best, DOE's Application is very like a petition for declaratory order, which though discretionary, nonetheless requires a jurisdictional premise for relief that is here lacking. At worst, DOE's Application as filed is an invitation to the Board to engage in piecemeal public review and comment as DOE over the coming months attempts to finalize its transportation plans for transporting SNF and HLW from origins throughout the US to the Yucca Mountain destination.

Finally, it is obvious that any event, directly or indirectly related to DOE's transport of SNF and HLW, that compromises the rail structure at any location, can compromise the entire rail system and traffic dynamics in today's constrained rail environment, not to forget the public health and safety. For that reason, DOE's proposed construction and operation plans must be definite in all essential elements, and not speculative.

III

Prayer for Relief

WHEREFORE, Nevada requests the Board grant permission to file the proposed Amended Motion, and in its discretion, grant the opportunity for oral argument.

Dated this 30th day of April, 2008, by _____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing document, and Exhibit A, were served on Parties or Counsel of Record and others identified below by (1) first-class U.S. mail, postage prepaid, (2) e-mail as shown, or (3) other expeditious method, this 2nd day of May, 2008:

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