

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

IN THE MATTER OF:

DESERTXPRESS ENTERPRISES, LLC

PETITION FOR DECLARATORY ORDER
(DESERTXPRESS)

STB Docket
No. 34914

Tuesday,
October 27, 2009

Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on
for hearing, pursuant to notice, at 2:00 p.m.

BEFORE:

DANIEL R. ELLIOTT, III, Chairman
CHARLES D. NOTTINGHAM, Vice Chairman
FRANCIS P. MULVEY, Commissioner

Reporter: Chad Jackson

APPEARANCES:

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2:10 p.m.

CHAIRMAN ELLIOTT: Counsel for California/Nevada Super-Speed Train Commission and American Magline Group, you have 40 minutes.

Again, please introduce yourself for the record, indicate if you have reserved any time and then begin.

MR. VOM EIGEN: Chairman Elliott, Vice Chairman Nottingham, Commissioner Mulvey, good afternoon.

My name is Robert Vom Eigen and I represent the joint petitioners, the California/Nevada Super-Speed Train Commission and the American Magline Group. I refer to my clients in this argument as the Commission and AMG.

Joining me today is Joyce Gresko, who is a colleague at Foley & Lardner, and who assisted me in the preparation of the argument.

1 Cummings, who is the President of AMG.

2 I will reserve seven minutes for
3 my rebuttal argument.

4 The Commission is a 16 member by-
5 state commission, with eight members
6 representing California and eight members
7 representing Nevada. It is also a non-profit
8 public benefit corporation and a state agency
9 of Nevada, with statutory powers granted to
10 issue a franchise to a private sector partner,
11 to design, build, operate and maintain a
12 super-speed train system.

13 AMG was selected as that private
14 sector partner. AMG is a joint venture
15 comprised of General Atomic, Parsons
16 Transportation Group, Bridgefield Steel and
17 the law firm of M. Neil Cummings & Associates,
18 PFC. AMG is an exclusive contractual -- has
19 an exclusive contractual relationship with the
20 developers and owners of the Trans-Rapid
21 Maglev technology.
22

1 Commission and AMG in their joint petition
2 relates to the subject matter jurisdiction of
3 the Board.

4 The issue is, has Congress granted
5 the Board jurisdiction over passenger-only
6 rail carriers, operating over trackage that is
7 separate from, not connected to and therefore,
8 not part of the general system of rail
9 transportation or of the inter-state rail
10 network, as described by 49 USC Section 102 --
11 101, 102, 105 and 10501(a)2(a).

12 Congress has not done so and the
13 Board's June 27th decision did not reach the
14 right conclusion, in part, because it did not
15 have the complete facts about the DesertXpress
16 operation before it and in part, because the
17 entire thrust of the DesertXpress petition
18 will elicit the declaration related to the
19 scope of preemption under 10501(b), on the
20 presumption that the jurisdiction was
21 conferred by Section 10501(a).
22

1 in the slip opinion, there's a quote,
2 "DesertXpress argues that this project
3 presumptively falls within the Board's
4 exclusive jurisdiction." There are no facts
5 which justify presumption of jurisdiction in
6 this case.

7 We intend to cover the following
8 issues in my argument:

9 First, I will show that nothing in
10 the ICC Termination Act, which legislative
11 history supports that DesertXpress will lay in
12 contention that a separate and unconnected
13 high speed rail passenger-only rail line can
14 never the less be "part of" the interstate
15 rail network.

16 To the contrary, Congress
17 restricted the Board's role over passenger
18 transportation -- to a few limited
19 circumstances, which were conflicts between
20 freight and passenger operations requiring
21 Board resolution.
22

1 what the ICCTA does not say. I will attempt
2 to demonstrate that without further direction
3 from Congress, the Board is in no position,
4 under the existing statutory authority and its
5 regulations; to exercise exclusive
6 jurisdiction over the operations of passenger-
7 only inter-city rail entities.

8 Currently, FRA and the states have
9 jurisdiction over those operations and the STB
10 should not step in without further direction
11 from Congress to do so.

12 The decision that was served
13 yesterday by counsel for the Teamsters in the
14 Joseph Fox case, is of interest to me. I
15 don't quite know what the argument is going to
16 be, but if the suggestion is that this is a --
17 that passenger rail lines ought to be
18 considered in the same category as switching
19 tracks, spurs or team tracks, where the Board
20 has exclusive jurisdiction, but does not have
21 any authority to regulate, I think that would
22

1 So, in any event, we will make the
2 argument that the Board -- what the ICCTA does
3 not say is as important as what it does say.
4

5 I also will show that the
6 petitions to reopen under 49 CFR 115.4 may be
7 filed at any time, and the Board's June 27th
8 decision contains a material error.

9 Moreover, this joint petition has
10 resulted in DesertXpress admission of new
11 facts never before presented by the -- to the
12 Board, which justifies reopening this
13 proceeding to correct fundamental error, made
14 by the Board on the June 27, 2007 decision.

15 Finally, I will respond to the
16 procedural arguments made by DesertXpress and
17 Teamsters, which do not relate to the basis
18 for the Board to deny -- do not create a basis
19 for the Board to deny the Commission's and
20 AMG's joint petition to reopen and intervene
21 in this proceeding.

22 DesertXpress' investment in the

1 Board well knows, detrimental reliance does
2 not confer jurisdiction upon the Board if
3 Congress does not grant it such jurisdiction.
4

5 April 28, 2009 is a significant
6 date in this case, for it's the date upon
7 which its -- it received the DesertXpress
8 reply brief.

9 The STB learned for the first
10 time, in that brief, what rail operations
11 DesertXpress believes are encompassed within
12 the Board's jurisdiction.

13 In its reply to the joint
14 petition, DesertXpress states that the rail
15 tracks over which is going to hold itself out
16 to the rail passengers will not be connected
17 to the interstate rail network and with the
18 general -- or with the general system of rail
19 transportation, in its reply 10/11.

20 The reply states at the present,
21 physical connection is -- to the largest
22 system of rail lines is -- not a prerequisite

1 But in footnote four, waffles, by
2 suggesting that if the physical connection is
3 required, perhaps the continuous right-of-way
4 with no connecting tracks might be sufficient,
5 citing our joint petition.

6 Certainly, it is not our position
7 that a continuous right-of-way is sufficient
8 under the IC -- under ICCTA and the STB
9 presently.

10 The precedent shows that even if
11 the tracks of inter-urban electric railways
12 connect directly with the interstate rail
13 system, unless significant quantities of
14 freight are interchanged, there is no
15 jurisdiction under the Act and there are cases
16 cited in our pleadings, Piedmont and Northern
17 Railway versus ICC, Texas Electric Railway,
18 Railway Labor Executive Association versus
19 ICC.

20 The DesertXpress vision is a -- is
21 for a separate high speed passenger network.
22

1 as part of the nation's first true high speed
2 passenger rail network," at page 11.

3 The reply, at this point, is
4 speaking about its future plans to link with
5 the California high speed rail project, --
6 Armdale, California, which does not claim that
7 it is a rail carrier under ICCTA, and which is
8 complying with state law, in processing of
9 its rail project.

10 DesertXpress' vision is premised
11 upon having one or more separate high speed
12 rail passenger networks that do not serve
13 shippers along their routes or connect with
14 the interstate rail network of freight
15 railroads, but there is no support for this in
16 ICCTA.

17 DesertXpress contends that the
18 Board, "Is clearly the appropriate agency to
19 exercise jurisdiction over passenger-only rail
20 lines."

21 It also alleges that the theory
22

1 Board has no jurisdiction over the passenger-
2 only high speed rail network is simply -- it
3 simply, cannot be.

4 I have high regard for the
5 competency of this Board and the staff which
6 supports it. But until Congress --

7 VICE CHAIRMAN NOTTINGHAM: With
8 respect to your argument regarding the
9 passenger -- and as I understand your
10 argument, your argument is that we don't have
11 jurisdiction over the passenger service.

12 How do you reconcile that with
13 Section 10102 and Subsection 9, that refers
14 specifically to passenger service?

15 MR. VOM EIGEN: Well, there's no
16 question that the Board has jurisdiction over
17 transportation -- rail transportation that
18 includes passenger service, but it's only as
19 part of the interstate rail network.

20 VICE CHAIRMAN NOTTINGHAM: Okay,
21 so, you are conceding that we do have
22

1 MR. VOM EIGEN: No, you have
2 jurisdiction over passenger rail, in the
3 context, as long as it's provided as part of
4 the interstate rail network.

5 VICE CHAIRMAN NOTTINGHAM: And that
6 has to be on the freight system, is what
7 you're saying?

8 MR. VOM EIGEN: That's exactly what
9 I'm saying.

10 VICE CHAIRMAN NOTTINGHAM: Okay.

11 COMMISSIONER MULVEY: Well, the
12 exclusion that's quoted here is, does not
13 include street, suburban, inter-urban
14 electric, not operated as part of the general
15 system of rail transportation, collectively,
16 street railways.

17 Now, DesertXpress is not a street
18 railway, is it?

19 MR. VOM EIGEN: Well, I wouldn't
20 think it's a street railway, but I would say
21 it's an inter-urban electric railway, and
22

1 COMMISSIONER MULVEY: Part of an
2 electric railway --

3 MR. VOM EIGEN: Sure.

4 COMMISSIONER MULVEY: -- is the
5 intra-urban electric railway --

6 MR. VOM EIGEN: No, it's not. It's
7 inter-urban.

8 COMMISSIONER MULVEY: It's inter-
9 urban and you consider inter-urban, in this
10 case, to be --

11 MR. VOM EIGEN: I'm saying in one
12 of two cities, one of which is Victorville,
13 California, the other is Las Vegas.

14 COMMISSIONER MULVEY: Well, most of
15 the -- all inter-urban's were a little more
16 proximate than almost a 200 mile --

17 MR. VOM EIGEN: So, you have 100 --
18 in the --

19 COMMISSIONER MULVEY: -- than a
20 160 mile stretch.

21 MR. VOM EIGEN: Excuse me, Mr.
22

1 The one case involving inter-urban
2 railway in the Sprauge v. Sprauge case was 117
3 miles. We've got a 200 mile railway here.
4 That was a case decided -- these earlier cases
5 were decided when the Board didn't have
6 jurisdiction over intra-state transportation.

7 Clearly, it does today, under
8 10501(a)1(a).

9 COMMISSIONER MULVEY: One-hundred-
10 seventeen mile case with what railway?

11 MR. VOM EIGEN: There was a rail
12 line for downtown Chicago to Elgin, Illinois.

13 COMMISSIONER MULVEY: All within
14 the State of Illinois?

15 MR. VOM EIGEN: All within in the -
16 - 17

18 COMMISSIONER MULVEY: But this is
19 interstate --

20 MR. VOM EIGEN: But as long as it's
21 not --

22 COMMISSIONER MULVEY: -- not in

1 MR. VOM EIGEN: I understand.

2 COMMISSIONER MULVEY: As opposed to
3 inter-urban railway, who also, by the way,
4 looks to me, though, it would include Maglev.
5

6 Now, wouldn't Maglev -- if the
7 Board were to decide that, indeed, it did have
8 jurisdiction over DesertXpress, wouldn't that
9 also include Maglev, that the Board should
10 also exercise jurisdiction over Maglev?

11 MR. VOM EIGEN: No, I don't believe
12 that's the case and I think the state -- I
13 think the interstate rail network is not --
14 and it could not be operated as part of the
15 interstate rail network because it cannot
16 interchange freight with the freight
17 railroads, and it would not inter-connect with
18 them.

19 So, I just don't believe it's part
20 of the general system of freight
21 transportation -- or rail transportation and
22 it's not part of the interstate rail network.

1 has been declared to be a railroad, at least
2 with respect to FRA rules and regulations --

3 MR. VOM EIGEN: That's correct,
4 it's a rail --

5 COMMISSIONER MULVEY: -- and RLA
6 and FELA and the rest. It has been declared
7 to be a railroad operation. Theoretically
8 Maglev could also be configured to handle
9 freight.

10 My understanding is, there is
11 research looking at freight Maglev systems, as
12 well as passenger ones, is that not correct?

13 MR. VOM EIGEN: I'm not familiar
14 with that research, Commissioner --

15 COMMISSIONER MULVEY: Down at Old
16 Dominion University, they are looking at that,
17 slow speed Maglev's, which would also be for
18 freight, and of course, in that case, the
19 freight could be interchanged. In fact, what
20 it actually envisions is moving freight out of
21 port areas, by a Maglev, much more quietly,
22

1 the city, where it would then be trans-loaded
2 into --

3 MR. VOM EIGEN: And that's a
4 different --

5 COMMISSIONER MULVEY: -- onto a
6 freight train.

7 MR. VOM EIGEN: That's a different
8 scenario than we're dealing with here, where
9 the admission is that it's a passenger-only
10 railroad and that's certainly the plan for AMG
11 and the California/Nevada Super-Speed Train
12 Commission.

13 They are planning a passenger-only
14 rail segment between Las Vegas and Anaheim,
15 California.

16 COMMISSIONER MULVEY: What if an
17 interchange occurred at Los Angeles, for
18 example, with Amtrak trains, so that people
19 could transfer from the Amtrak trains to the
20 Maglev, wouldn't that make it part of the
21 overall --
22

1 COMMISSIONER MULVEY: -- interstate
2 rail network?

3 MR. VOM EIGEN: No, because it's
4 not the freight network. My own view is -- or
5 our position is that the cases are clear, that
6 unless you have freight involved, this is not
7 the -- either the general system of rail
8 transportation and it's not the interstate
9 rail network.

10 The cases all point -- I mean,
11 they looked at these inter-urban systems back
12 in the -- or in 1930's and more recently, and
13 that they look at these systems to determine
14 whether or not they are interchanging freight.

15 One, first of all, it has to have
16 a connection and then they have to find out
17 whether a significant portion of that activity
18 relates to freight.

19 If it is, it is a rail carrier,
20 under
21 the Railway Labor Act, and under the
22

1 But in the current circumstances,
2 the passenger-only railroad, with no
3 connection with the interstate rail network,
4 you don't have jurisdiction over that
5 circumstance.

6 VICE CHAIRMAN NOTTINGHAM: Mr. Vom
7 Eigen, what would your position be if the rail
8 carrier DesertXpress amended its business plan
9 to carry some parcels for the Postal Service?
10

11 MR. VOM EIGEN: Well, I think that
12 gets -- first of all, it's not -- well, still,
13 it's not connected to the interstate freight
14 network.

15 I mean, if it decided to bring a
16 truckload of express shipments, I don't
17 believe that would be regarded and satisfy the
18 Board's standards.

19 VICE CHAIRMAN NOTTINGHAM: And when
20 you -- you're referenced the interstate
21 freight network several times. Where are you
22 -- is there a citation there? Is there a --

1 VICE CHAIRMAN NOTTINGHAM: -- a
2 document that Congress references? Is there --
3 where would one look, to, I guess, -- and I
4 guess the related question, where
5 historically, has Congress looked for answers
6 to what is or is not part of the national rail
7 transportation system? Where does that
8 expertise lie?

9 MR. VOM EIGEN: Well, I believe the
10 legislative history we cited from ICCTA is
11 helpful in that regard.

12 They basically said that the
13 freight railroad -- that ICCTA totally removed
14 the freight -- the jurisdiction -- the
15 passenger jurisdiction from the Service
16 Transportation Board, because the only inter-
17 city passenger service at the time was Amtrak
18 and that that was regulated under a separate
19 statute, which is the Rail Passenger Service
20 Act of 1970.

21 VICE CHAIRMAN NOTTINGHAM: But
22

1 familiar with this agency and our capability
2 to play a constructive role vis-a-vis
3 passenger rail?

4 For example, as recently as the
5 FRA re-authorization and Passenger Rail Bill
6 of last year, we were granted significant new
7 authorities to resolve disputes on --
8 regarding service between Amtrak and freight
9 railroads.

10 MR. VOM EIGEN: That's absolutely
11 correct, Vice Chairman Nottingham.

12 But those are specific enactments
13 that direct the Board to look at the conflicts
14 between passenger rail and freight rail and it
15 only could happen on the freight network.

16 Congress has not enacted any
17 statute that gives you a jurisdiction in any
18 other particular content.

19 VICE CHAIRMAN NOTTINGHAM: Let me
20 ask you about that, because transportation, in
21 Subsection 9 of 10102, is defined as related
22

1 both, by rail.

2 I couldn't imagine a more clear
3 authorization. Are you saying that Congress -
4 - that was a -- that it was a mistake of the
5 pen, that we should just go ahead and correct,
6 because we're wiser than the Congress or what
7 is your assertion there?

8 MR. VOM EIGEN: I don't believe --
9 I believe that -- I think, that's not a
10 mistake. I think it is transportation, within
11 the Board's jurisdiction, if it occurs on the
12 interstate rail network and the Board has made
13 clear, in the State of Maine cases and all
14 that follow it, if the passenger rail
15 operation has some ability to conflict with
16 the freight rail, Congress -- performance of
17 the common carrier obligations of the freight
18 railroads, then under those circumstances, the
19 Board will assert jurisdiction and it should,
20 and that's the reason that that language is in
21 the Bill -- enacted today, and was retained in
22

1 Here, it was a statute that was
2 written -- 501(c) was written and totally
3 revised by ICCTA and in the legislative
4 history of it says that we intended to get
5 them out of the railroad business, so -- and
6 if it's -- if these operations are to be
7 regulated, they would be regulated, if at all,
8 at the state or regional level.

9 CHAIRMAN ELLIOTT: Can I follow-up
10 on Mr. Nottingham's, Vice Chairman
11 Nottingham's point?

12 With respect to that language that
13 he cited in 10102(9), do you think that
14 language is clear, that it takes away the
15 jurisdiction from us, with respect to
16 passenger, only on a freight system, or do you
17 think that language was ambiguous?

18 MR. VOM EIGEN: I think if you read
19 it with the jurisdictional language that the
20 Board -- that 10501(a)2(a) and in there it
21 cites, you have to have a rail carrier,
22

1 I don't think DesertXpress is a
2 rail carrier, but I do think they're providing
3 transportation on the interstate rail network,
4 but they are not part of the interstate rail
5 network, because they do not connect with it.

6 I think the -- there is no doubt,
7 that Congress -- in my judgment, there is no
8 doubt that Congress was referring to the
9 general system of rail freight transportation,
10 which is over a network.

11 I looked up the definition of --
12 that network is not defined in the statute.
13 I looked up the definition in the new
14 Webster's dictionary the other day, and it
15 basically speaks in terms of connectivity.

16 I can read the exact quote for
17 you, but it basically -- Webster's dictionary
18 states, that network is "a system of roads,
19 canals, veins, et cetera, that connect with or
20 cross one another."

21 The term network, that notes a
22

1 contiguous right-of-way does not cut under
2 that definition.

3 CHAIRMAN ELLIOTT: But doesn't the
4 word "network" have to start somewhere?

5 MR. VOM EIGEN: The network does
6 start. It's 150,000 miles of rail freight
7 track in the country.

8 CHAIRMAN ELLIOTT: With respect to
9 high speed passenger service?

10 MR. VOM EIGEN: Oh, I believe that
11 it will -- those networks will start. I think
12 they're starting today in California. They
13 will start in -- there will be a network
14 started in -- between Las Vegas and
15 California.

16 CHAIRMAN ELLIOTT: And if they
17 start connecting to that line, all over the
18 country and at that point, would you figure --
19 do you feel that that was part of an
20 interstate network?

21 MR. VOM EIGEN: Well, that's a
22

1 railroads and railroad carriers, under 20102,
2 and they would be regulated by the Federal
3 Railroad Administration and state and regional
4 agencies, until Congress passed a law, to give
5 you direction on how -- I think it would be
6 relevant Board for jurisdiction -- to the
7 Board, to give you instructions exactly, on
8 what basis do you issue a new permit?

9 Are you going to issue more than
10 one permit in a given market? That's the rule
11 under freight situations today. Is there's
12 going to be a special rule for passengers,
13 where you're concerned about the viability of
14 these passenger routes? That's one policy to
15 that question.

16 What about -- what relevance does
17 opportunity cost, stand-alone costs, have to
18 decisions about freight -- passenger rail --
19 excuse me, passenger railroads?

20 Your system is set up for
21 abandonments of freight railroads, for rates
22

1 carrier obligation that applies to every inch
2 of the interstate rail network, to serve
3 shippers.

4 These new common carriers you're
5 talking about, over this new passenger rail
6 network, which DesertXpress is talking about,
7 can't move a pound of freight.

8 COMMISSIONER MULVEY: It also
9 applies to new construction. I think what
10 we're talking about here is whether or not the
11 Board's jurisdiction applies to certifying
12 railroads for new construction and if any part
13 of the existing rail passenger service --
14 mostly operate over the freight network and
15 the presumption would be that at some point,
16 the DesertXpress or Maglev, as part of its
17 overall operating plan, would be interacting
18 with the rest of the overall Amtrak and other
19 freight railroad -- part of the freight
20 railroad network.

21 MR. VOM EIGEN: You asked a
22

1 modal connectors. Anaheim is designing one
2 today for the -- for the Chicago -- excuse me,
3 the California/Nevada interstate Maglev
4 project, which AMG and CNSST are developing.
5

6 That would intersect with the
7 metro link. It would -- which is a commuter
8 rail, which would intersect with -- but
9 they're not actually connections. Those are
10 basically serving a terminal.

11 COMMISSIONER MULVEY: You use the
12 term inter-modal. We just said before that
13 Maglev has been designated a railroad mode of
14 transportation, that is not to be considered
15 differently from railroads in general, even
16 though the technology is different, the
17 Congress has said that it is a railroad.

18 Whether you think that's the
19 correct designation or whether it is not,
20 something -- it is not one of the exceptions
21 to being part of the railway network, nor is
22 it another mode of transportation like buses

1 considered to be a railroad.

2 So, it's not really an inter-modal
3 connection. It is an intra-modal connection
4 with regard to Amtrak, say, for example.

5 MR. VOM EIGEN: Well, I think the -
6 - well, Amtrak is different than the freight
7 railroads. It was, at one time, considered a
8 rail carrier under the Interstate Commerce
9 Act. It's now clearly not. It's a railroad
10 under 20102 of Title 49.

11 I think what we're talking about
12 is systems that will not be able to
13 interconnect. You cannot operate a high
14 speed, passenger rail only train on a -- I
15 believe, even in the corridor, where you've
16 got a freight right-of-way and I think the
17 freight right-of-way, the administrators of
18 the freight right-of-way are raising those
19 issues today, through testimony we've studied
20 in our joint petition by the Chairman of the
21 BNSF rail.

22

1 train, which DesertXpress is planning to
2 build. It just cannot co-habit with a freight
3 right-of-way in our -- excuse me, with the
4 freight train line, in a right-of-way, that is
5 owned by the freight railroads.

6 COMMISSIONER MULVEY: Those are
7 operational limitations because of the
8 interaction between the two and the
9 possibility of accidents, the absence of PTC
10 and what have you, but theoretically, of
11 course, you could. But, in the case of
12 Maglev, it's not even theoretically possible
13 because the technologies are different.

14 But is that sufficient to remove
15 it from the rail network?

16 MR. VOM EIGEN: I think physics
17 presents -- prevents it too. I think that's
18 Mr. Rose's argument, that the -- and so have
19 to be much different. You can't have them
20 occupying the same railway.

21 I think there is some concern
22

1
2 VICE CHAIRMAN NOTTINGHAM: Mr. Vom
3 Eigen, if I could return to the actual statute
4 at hand, 10102 Subsection 5, "Rail carrier
5 means a person providing a common carrier
6 railroad transportation for compensation,"
7 then moving forward to Subsection 9,
8 "Transportation includes any kind related to
9 the movement of passengers or property or
10 both, by rail."

11 So, there is this linkage and
12 there has no -- pretty much, hasn't there
13 always been an interstate commerce area
14 between what is deemed as rail transportation,
15 also goes hand-in-hand with the common carrier
16 obligation?

17 Are you suggesting by following
18 your logic that DesertXpress would not have a
19 common carrier obligation? They could tell
20 people with red suitcases that they're not
21 allowed to travel to Las Vegas because that's
22 corporate policy or what? Are you just --

1 VICE CHAIRMAN NOTTINGHAM: -- maybe
2 we should of -- pick and choose and decide --
3 I mean, ignore some parts of the statute, but
4 not others?

5 MR. VOM EIGEN: I don't think they
6 could -- well, first of all, I don't believe
7 they qualify under the definition of rail
8 carrier, not because they're not a common --
9 they're not in a position to hold out --
10 themselves out, without discrimination, to all
11 the public.

12 I think it's because they're not
13 operated as part of the general rail system of
14 rail transportation, and that is the second
15 element of the test for what constitutes a
16 rail carrier.

17 I don't think you could ignore
18 that. The June 27th decision did, and I think
19 that's the error. It ignored the second half
20 of the definition of rail carrier and it
21 didn't even mention 10501(a)(2)(a), but the
22

1 interstate network, and the decision doesn't
2 even discuss it.

3 VICE CHAIRMAN NOTTINGHAM: Well, on
4 the question of whether or not this is
5 interstate rail service, couldn't one argue
6 that historically, Congress has looked to this
7 agency, for the expertise in that area and we
8 got a fair amount of difference and here, we
9 have a railroad, purporting to seek to serve
10 the public with a common carrier obligation,
11 operating among two states, in two states.

12 I would hazard a guess, they would
13 not have a system of national interstate rail
14 service if -- when the first one got started,
15 an opponent had come, such as yourself, and
16 said, "It's not connected to all states for
17 all 50,000 miles. It's just the two states."

18 I mean, you've got to start
19 somewhere, following up on the --

20 MR. VOM EIGEN: Well, first of all,
21 they are starting up the rail network and you
22

1 each state and build the rail network.

2 Now, the STB doesn't -- has
3 competence certainly within the rail
4 transportation area, but I would suggest that
5 the current statute doesn't give any direction
6 on what to do in passenger rail context.

7 In 1995, this -- the -- Congress
8 was telling you that you were getting out of
9 the rail regulation. They stripped provisions
10 relating to rate making, with respect to
11 abandonment of rail services. Those things
12 were taken out of the statute for good reason.
13 They didn't think there was any relevance to
14 it.¹⁵

15 Now, that circumstance may well
16 change and may be changing now, and if -- and
17 that's admission for Congress, but not for
18 this Board, to start filling the gaps with no
19 standards, really, no standards.

20 You don't -- we don't have -- you
21 know, the decision on 10901, Commissioner
22

1 rules would be different. You would have to
2 try to make a decision, is this the best
3 service in that corridor?

4 You would have to make different -
5 - ask different kinds of questions, than you
6 ask a private for-profit freight railroad,
7 where it's going -- but it's going to invest
8 its worn money, therefore, it's going to take
9 its own risks and you don't second-guess those
10 judgments.

11 You take a look at whether or not
12 it -- if it improves competition, that's a
13 good thing.

14 Whereas, in the passenger rail
15 network, you're not -- you're going to have a
16 different question, are you going to affect
17 the viability of the better -- and do you have
18 to -- should you permit a second railroad in
19 a particular passenger corridor?

20 There may be some that you can,
21 but I'm just saying, those standards are not
22

1 that issue.

2 VICE CHAIRMAN NOTTINGHAM: Mr. Vom
3 Eigen, I would hazard to guess that -- and
4 speaking just as one Commissioner, this Board
5 is open for business.

6 If you or another railroad would
7 like to bring us a construction application or
8 a declaratory order on that issue, I don't
9 think we've made any statement that we have a
10 favorite preferred rail project between
11 California and Nevada.

12 Generally, this Board is -- you
13 know, likes rail transportation and the more,
14 the better and coincidentally, we have a
15 President of the United States who seems to
16 agree right now.

17 We have a major national
18 initiative going on, which -- it's hard not to
19 think about, that macro policy question, when
20 you look at the legislative history, the same
21 reasons that brought us the strong preemption
22

1 your logic, would not apply to passenger rail
2 right at the very time when arguably, it's
3 needed most --

4 MR. VOM EIGEN: Well, the --

5 VICE CHAIRMAN NOTTINGHAM: -- to
6 get this economy back going and to accomplish
7 the President's vision for moving forward on
8 these important passenger rail projects,
9 without having to get 100 percent sign-on from
10 every state agency and local agency that might
11 have a desire to add five or six or seven
12 stops, not make it so high speed.

13 The history books are full of
14 problem areas in that regard, that gave rise
15 to the preemption and what do you have to say
16 about that?

17 MR. VOM EIGEN: I think we're a
18 nation of laws and rules and I think we have
19 to follow them.

20 I think you were not given the
21 jurisdiction to do what you just described,
22

1 to have you regulating a separate interstate
2 rail passenger network. If they had -- they
3 would have said that, if they meant it.

4 The word `passenger' appears four
5 times in -- between chapters -- in four
6 sections of the chapters -- all the chapters
7 in part A of sub-title four, and not one of
8 them gives you the suggestion -- that right.

9 One relates to emergencies -- if
10 Amtrak closes down, what do you do for
11 commuter railroads? It says you have to -- if
12 you're on the general system of freight
13 service, you're to require carriers to provide
14 a system for interchange, which is all
15 consistent, if you have a freight -- a four
16 passenger railroad, operating on the general
17 system of rail transportation, I believe you
18 have jurisdiction there.

19 Where I differ is that you don't
20 have jurisdiction in the context of a new
21 railroad, and what's wrong with regional or
22

1 appropriate?

2 They can get together in contacts
3 and make joint decisions. The Commission that
4 is set up under Nevada law, kind of plays
5 participation by the state and the process and
6 the Governors of the two states just recently
7 signed a deal to work out the details of the
8 California/Nevada interstate Maglev project.

9 So, my own view is that the -- and
10 our clients' position is that we -- that the
11 Board was not given this jurisdiction and that
12 there's nothing in the Act itself, that
13 authorizes it, that the June 27, 2007 decision
14 failed to make key findings, relating to the
15 connectivity to the interstate rail network,
16 and it's both a component of the rail carrier
17 definition and it's a component of the broad
18 jurisdiction of the Board, under 10510(a)2.

19 CHAIRMAN ELLIOTT: I noted in what
20 Vice Chairman Nottingham was mentioning
21 earlier, with respect to 10102(9),
22

1 and then, with respect to 10501, Congress
2 clearly carved out an exception for local
3 authorities and mass transportation.
4

5 My concern here is that there
6 doesn't seem to be a clear cut exception for
7 this type of transportation that you're
8 referring to, and if Congress has gone ahead
9 and made that effort, who are we to judge
10 whether or not they made this exception also,
11 that's already been clearly written?

12 MR. VOM EIGEN: Well, I think if
13 it's transportation on the interstate rail
14 network, the freight network, which was -- I
15 believe was what's referred to in that
16 language, and there is no evidence anywhere,
17 that I can find, in your jurisprudence or in
18 the legislative history that would suggest
19 that that refers to a separate passenger
20 network that doesn't connect with the general
21 system of rail transportation.
22

VICE CHAIRMAN NOTTINGHAM: Mr. Vom

1 would be helped through a +rule making
2 process, if the Federal Railroad
3 Administration and the Surface Transportation
4 Board jointly received comment on the
5 question, recognizing that there seem to be a
6 number of new and prospective high speed rail
7 project blooming across the country with the
8 availability of significant funds now, public
9 funds?

10 We could just do a rulemaking and
11 presumably take the statute and fill in any
12 gaps and have guidance out there, would that
13 address your concern?

14 MR. VOM EIGEN: No, because I don't
15 believe that you were given the jurisdiction
16 to do that, if it's not part of the interstate
17 freight work.

18 I don't believe that you're a rail
19 carrier, under ICCTA, unless you're part of
20 that network and I don't believe you have
21 jurisdiction under 10501(a)2(a), unless you
22

1 and that's what the language says.

2 I don't think there's any doubt,
3 what the Congress was talking about in 1995.

4 COMMISSIONER MULVEY: Well, we're
5 talking about -- as Vice Chairman Nottingham
6 mentioned, a lot of new construction of higher
7 and high speed rail.

8 MR. VOM EIGEN: Yes.

9 COMMISSIONER MULVEY: And you're
10 suggesting that there should be a distinction
11 between higher speed rail, where we're talking
12 about say, extensions on to the existing
13 freight railroad network, in order to provide
14 a higher speeds trains and that connect in
15 other places.

16 That would also operate over the
17 existing freight and rail network and then
18 hold new construction off, like, say, for
19 example, the California corridor, San
20 Francisco down through to Los Angeles, and you
21 would view it as completely separate and --
22

1 COMMISSIONER MULVEY: -- one is
2 part of the interstate system of railroads and
3 one is not. So, one would be subject to Board
4 approval for new construction and the other
5 would not. Is that your view?

6 MR. VOM EIGEN: That's my view --
7 the California rail high speed rail system is
8 developing exactly that way. They don't
9 consider themselves a rail carrier under ICCTA
10 and they -- and they're not seeking preemption
11 of state and local laws.

12 They're complying with all the
13 state environmental regulations, and that's
14 part of the process.

15 COMMISSIONER MULVEY: In this case,
16 it's purely an intra-state operation, as well
17 as inter-state.

18 MR. VOM EIGEN: They are the --

19 COMMISSIONER MULVEY: The
20 California/Nevada -- the one that you're
21 supporting here, I mean, I'm very familiar
22

1 than 20 years ago.

2 It's been around for a long time,
3 and has the fact that it does not have
4 preemption, has that been in any way
5 detrimental to the development of this or has
6 it always been simply a matter of money?

7 MR. VOM EIGEN: Well, it's a matter
8 of money. It's been a matter of getting
9 Congress to pass laws that permit us to go
10 forward.

11 But it's not -- the preemption is
12 -- the compliance with state and local law has
13 not been an obstacle.

14 COMMISSIONER MULVEY: Well, part of
15 it did get some funding when it was
16 designated, at least the part from Las Vegas
17 to Primm, was designated as one of the three
18 experimental routes for Maglev and that's
19 quite a while ago now, right, but no progress
20 has been made on that either, right?

21 MR. VOM EIGEN: Well, that's not
22

1 -- first of all, since June 2008, to get the
2 language cleaned up, so that money could be
3 expended and then, our -- the AMG -- the
4 investors at AMG had to put up the local
5 match, after exhausting a remedy there, trying
6 to get the states to put up the money.
7

8 But with the economic downturn,
9 they didn't have the funds. So, now, we've
10 got that money.

11 Now, we're waiting for FRA to give
12 us a cooperative agreement. They promised to
13 give it, but we don't have it yet and we're
14 waiting for it. We could begin that work
15 tomorrow, if they would sign the law, that was
16 allocating the money to the AMG -- the
17 California/Nevada interstate Maglev project.

18 COMMISSIONER MULVEY: Thank you.

19 VICE CHAIRMAN NOTTINGHAM: Mr. Vom
20 Eigen, you referenced FRA. It is your position
21 that Maglev transportation operations are
22 subject to FRA oversight and jurisdiction, but

1 the type of regulation the STB handles?

2 MR. VOM EIGEN: I believe that's
3 the case. I don't believe the Board has a
4 structure in place to regulate these entities
5 and I don't think it's been given the
6 authority to do that.

7 VICE CHAIRMAN NOTTINGHAM: But it's
8 basically rail -- you go to the Federal
9 Railroad Administration because you're
10 operating something that's basically a
11 railroad.

12 MR. VOM EIGEN: It's a railroad
13 under their statute. They have special
14 regulations to govern the operation of these
15 high speed systems, and it's -- they have a
16 structure there to deal with these entities.

17 VICE CHAIRMAN NOTTINGHAM: You're
18 not arguing that this a whole new mode, you
19 know, it's not -- it's neither aviation nor
20 barge, nor trucking, nor railroading. It's --
21 you're saying it falls within railroading for
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- 2
MR. VOM EIGEN: Well, I mean --

VICE CHAIRMAN NOTTINGHAM: -- has
some oversight over --

MR. VOM EIGEN: The FRA is -- I
think Maglev is a new technology that does --

VICE CHAIRMAN NOTTINGHAM: New
technology that's --

MR. VOM EIGEN: Yes, and it
operates at -- doesn't touch the steel. It
goes up 10 percent grades. That's the reason
it goes over the Cajon Pass, and it goes to
300 miles an hour. Those are all new factors.

VICE CHAIRMAN NOTTINGHAM: But all
modes have new technologies.

MR. VOM EIGEN: Yes.

VICE CHAIRMAN NOTTINGHAM: I mean,
commercial aviation is a little different
today than it was 30 years ago, as are most of
the modes.

MR. VOM EIGEN: But I don't believe

1 extended to these entities.

2 CHAIRMAN ELLIOTT: Thank you.

3 MR. VOM EIGEN: Thank you.

4 CHAIRMAN ELLIOTT: DesertXpress,
5 please. Counsel, you have 30 minutes.

6 MS. MORGAN: Thank you. Good
7 afternoon, Chairman Elliott, Vice Chairman
8 Nottingham, Commissioner Mulvey.

9 I am Linda Morgan and I'm here as
10 counsel, representing DesertXpress
11 Enterprises, LLC.

12 I'm joined at the table by Charles
13 Vance, nicknamed Chip, who has been working
14 with me on this project, and also I have in
15 the room, Thomas Stone and Andrew Mack, who
16 are officials with DesertXpress.

17 The specific question before the
18 Board today is whether it erred, including in
19 2007, that it has jurisdiction over
20 DesertXpress.

21 We submit that the Board did not
22

1 based on accurate and relevant facts, and
2 nothing has changed that, that would call your
3 decision into question.

4 This oral argument today is about
5 more than a petition to reopen in a particular
6 proceeding.

7 With the heightened interest in
8 high speed passenger rail, the nation is
9 embarking upon an exciting new level of
10 advancement in rail transportation, that will
11 be felt throughout the country.

12 As the agency to which Congress
13 has entrusted broad jurisdictional authority
14 over the nation's rail transportation system,
15 the Board, clearly, should have a role in this
16 initiative.

17 The 2007 decision is consistent
18 with Congressional intent and should be
19 upheld.

20 Having reasonably relied on this
21 sound decision, DesertXpress would be unfairly
22

1 later, were to grant this petition to reopen
2 and intervene. We urge you to deny this
3 petition.

4 At this point, I would like to
5 address some of the questions that you all
6 have asked, because I think the dialogue today
7 has been very important in the context of
8 today's oral argument.

9 First of all, I differ with the
10 petitioner. The ICCTA statute and precedent
11 gives you the jurisdiction over this matter.

12 I know that the petitioner has
13 argued that it does not, but we disagree, and
14 we disagree because ICCTA reflects the broad
15 jurisdiction over rail transportation that
16 Congress intended for this agency to have.

17 If you look at the statute itself,
18 and there's been discussion here today about
19 the statute and the words of the statute,
20 there are specific examples of Congressional
21 intent, regarding the expansiveness of the
22

1 ICCTA, For example, granted
2 jurisdiction, even where lines are entirely in
3 one state, under 10501(a)2. The definition of
4 rail carrier is broad, as you -- as this
5 agency reflected in the American Orient
6 Express case, which you cited in your 2007
7 decision.

8 Both passenger and freight are
9 included in the definition of transportation
10 and again, I will repeat the section that has
11 been discussed earlier, which is 10102-9,
12 transportation is defined to include equipment
13 and services related to the movement of
14 passengers or property or both.

15 Passengers are clearly included
16 within the jurisdiction of this agency, under
17 ICCTA.

18 Preemption under ICCTA is
19 expansive and this agency has dealt with that
20 issue quite extensively and I will just cite
21 in one case, the CXX case, involving the
22

1 been cited in other documents submitted.

2 There's a quote that says, "It is
3 difficult to imagine a broader statement of
4 Congress' intent to preempt state regulatory
5 authority over railroad operations."

6 Furthermore, with respect to
7 preemption, under ICCTA, even where the
8 statute specifically exempts certain rail
9 lines from the exercise of certain regulatory
10 jurisdiction, case law has made it clear that
11 preemption still exists, and that's Section
12 10906, which refers to spur, side tracks and
13 so forth.

14 The fifth point about the
15 expansiveness of the statute and of ICCTA is
16 the express exclusions are few.

17 Mass transit is specifically
18 excluded and we've cited that statutory
19 provision today, the inter-urban electric
20 railway exclusion and then finally, private
21 track, which has been excluded in the context
22

1 So, again, if you look at ICCTA,
2 expansive jurisdiction over passenger and
3 freight, few exclusions, expansive preemption
4 and if you look at the case law in this area,
5 you will see that the Courts have embraced
6 this notion of expansion.

7 Again, I refer to the CSX Georgia
8 Public Service Commission case, in which the
9 Court talked about transportation by rail
10 carriers as being all-inclusive.

11 In the Norfolk Southern Austell
12 decision, which again, is cited in materials
13 that you have before you, there again, the
14 Court talked about the breadth of ICCTA
15 preemption and it -- the Court -- a quote in
16 that decision, that talks about ICCAT's grant
17 of exclusive jurisdiction over the majority of
18 all matters of rail regulation to the STB.

19 So, again, ICCTA, in our view
20 provides the basis upon which you can exercise
21 jurisdiction in this area.
22

1 the statute or the precedent that precludes
2 the STB from exercising jurisdiction in this
3 area.

4 Of course, as we all know, many of
5 these cases are fact specific and the Board
6 has looked at a variety of factual situations
7 and looked at a variety of factors and
8 depending upon the case, a particular factor
9 may become more important than another factor.

10 The case that was -- that the
11 petitioner cited earlier, regarding intra-
12 state traffic transportation, obviously, the -
13 - not having a connection was important in
14 that case.

15 Furthermore, we've talked a lot
16 about the connection issue, the issue of
17 connectivity and if you look at the cases,
18 existing connection is a factor, but it is not
19 the only factor and it is not necessarily
20 dispositive, and again, the Fox case that was
21 mentioned earlier is one example, several
22

1 So, again, an important issue, but
2 not the only issue and not the despositive
3 factor, and I might say, in -- with respect to
4 the connection issue, that it is possible that
5 DesertXpress will connect with the California
6 Federally designated high speed rail corridor
7 at some point, and that's been -- you know,
8 discussed about in the press.

9 So, again, I think that you -- in
10 your decision in 2007, you properly analyzed
11 the jurisdictional issues. You made the right
12 decision. It is consistent with ICCTA and
13 there is nothing in that statute that
14 precludes your exercising jurisdiction.

15 Now, if you were to embrace the
16 petitioner's argument about jurisdiction, in
17 our view, that would lead to a result that is
18 inconsistent with Congressional intent.

19 In essence, the petitioners would
20 have you conclude that no Federal agency would
21 oversee the construction and operation of high
22

1 This result, in our view, is
2 clearly inconsistent with the Congressional
3 intent to give this agency broad jurisdiction
4 over rail transportation.

5 Again, mentioning that earlier
6 case, CSX Georgia Public Service Commission,
7 in which a 3rd Circuit case is cited, US v.
8 Bishop, the Court talked about Congress'
9 interests in regulating interstate commerce
10 and talked about railroads being
11 instrumentalities of interstate commerce.

12 Congress has given this agency
13 expansive jurisdiction over the nation's
14 railroad network, as indicated by the words of
15 the statute we have discussed here today and
16 the precedent that is in the materials and
17 that we have also discussed.

18 High speed rail will be part of
19 interstate commerce. It will be part of the
20 rail network, the instrumentality of
21 interstate commerce and the STB should have
22

1 I also think that the petitioners
2 would have you decline jurisdiction because
3 this particular type of project is not
4 specifically spelled out in the statute as
5 being covered.

6 Again, I have talked about how I
7 do not believe -- we do not believe that the
8 statute precludes the exercise of jurisdiction
9 here and that ICCTA gives you the expansive
10 jurisdiction that you can exercise in this
11 case.

12 But I think the petitioners are
13 asking you to interpret the statute in a very
14 narrow way.

15 The STB's jurisdiction over high
16 speed rail is a matter of first impression.
17 High speed rail is a matter of first
18 impression, and that's why we're here today.

19 But statutes breathe, they're
20 intended to breathe. Congress passes laws
21 with the hope that the agencies who are
22

1 accommodate the law to the circumstances as
2 they change and we view this situation as just
3 one of those cases.

4 It would be appropriate for this
5 Board to apply its expansive jurisdiction to
6 the DesertXpress matter.

7 Let me also say that there has
8 been discussion here about who would be harmed
9 by this decision, and I've heard that the
10 petitioners feel that they have been
11 disadvantaged by the 2007 decision, and I find
12 that hard to imagine.

13 As was stated here earlier, the
14 petitioner, as have we, can seek your
15 jurisdiction. They can seek whatever
16 permissions are needed, through the exercise
17 of your jurisdiction and this case has -- is
18 not about preventing them from using the
19 jurisdiction here like anyone else.

20 As a matter of fact, I think that
21 if this 2007 decision were overturned, the
22

1 because they have relied on this decision
2 since 2007. It was an informed decision.

3 Obviously, this Board takes time
4 to issue decisions and looks at precedents,
5 before making decisions. It was an informed
6 decision, and DesertXpress has relied upon
7 that decision and it -- in the interest of
8 finality, particularly when the petitioners
9 have not met the burden of reopening the --
10 DesertXpress would be clearly disadvantaged by
11 a reopening.

12 COMMISSIONER MULVEY: The right-of-
13 way that DesertXpress intends to build --
14 construct this line over, is very, very
15 similar to the right-of-way, I think, that the
16 American Maglev wants to use and I believe
17 that parallels the I-15 corridor.

18 MS. MORGAN: Yes.

19 COMMISSIONER MULVEY: Isn't much of
20 that land through BLM territory and it's
21 basically Federal land --
22

1 COMMISSIONER MULVEY: -- at lot of
2 it, isn't it?

3 MS. MORGAN: Yes, that's correct.

4 COMMISSIONER MULVEY: So, has
5 DesertXpress been working with the BLM and
6 other Federal agencies, in terms of the
7 environmental impacts?

8 MS. MORGAN: Yes, DesertXpress has
9 been working very diligently with all of the
10 agencies, as part of the environmental review
11 process. They have been working with BLM in
12 particular, because, as you mentioned, their
13 land is affected -- will be affected by this.

14 I heard the petitioner earlier,
15 indicate that the motive here is to seek
16 preemption from state, local and environmental
17 laws, which of course, that is the operation
18 of the statute.

19 But that said, DesertXpress has
20 been meeting, not only with Federal agencies,
21 but also, with state and local individuals, in
22

1 environmental area.

2 VICE CHAIRMAN NOTTINGHAM: Ms.

3 Morgan, you asked -- you mentioned that this -
4 - that STB jurisdiction over high speed rail
5 is a case of first impression.

6 Can you think of any other
7 examples, where a regulatory regime was put in
8 place, but then eliminated or was rendered
9 non-workable because the mode of
10 transportation got more efficient over time?
11 I'm just trying to --

12 I understand your point of first
13 impression in one sense, but it's not unique
14 at all, that in the history of transportation,
15 that regulated modes of transportation have
16 matured and developed efficiencies and every -
17 - in fact, I think every single mode one can
18 think about is -- has accomplished that.

19 Arguably, it has taken the
20 railroad industry a little longer than some
21 others, in recent decades to make that leap,
22

1 economic regulation and regulation of
2 construction and preemption to be superseded
3 just by efficiencies being realized, and
4 improved technology?

5 MS. MORGAN: Well, I think if you
6 look at the history of this agency and the
7 precedent, you will see evolutions on many
8 issues, which I think is -- speaks to the fact
9 that Congress passes a law and then creates an
10 agency that then has the authority to alter
11 the implementation of the law, to reflect the
12 changing circumstances.

13 I mean, efficiencies are going on
14 all the time, in transportation, in rail
15 transportation.

16 So, if you look at the specifics
17 of the statute, transactions, exemptions from
18 the statute to accommodate efficiencies in the
19 transportation network, you know, that's what
20 this Board has been about and the ICC before
21 it.22

1 question, the immediate example that came to
2 my mind and -- when I speak it, people will
3 know why it would immediately come to my mind,
4 was when we were involved in many mergers in
5 the freight rail industry and we got to a
6 point where the existing regulatory
7 administrative regime was not reflecting the
8 circumstance in the market place, that we were
9 now coming to a critical point, with respect
10 to mergers.

11 And so, this body issued a
12 moratorium and then issued a set of new
13 regulations and that's a good example of, you
14 reach a point where what has been in place
15 does -- no longer reflects the circumstance
16 that this agency is faced with.

17 But that does not mean that you do
18 not have jurisdiction to deal with it. It's
19 just means that you alter how you approach it.

20 I would say also, on that point,
21 that the petitioner indicated that high speed
22

1 work that now exists with respect to freight
2 railroads, and all I would say on that is that
3 well, there -- you know, this body has
4 exemptions where part of something is
5 regulated and the other part is not.

6 Even if you're not regulating it,
7 you still have jurisdiction over it. So,
8 there are a lot of ways that you could
9 responsibly exercise your jurisdiction in this
10 area.

11 VICE CHAIRMAN NOTTINGHAM: If I
12 could follow up on that. Are you aware of any
13 statutory definition of high speed rail,
14 either in statute or regulation, what defines
15 it to fit --

16 MS. MORGAN: I don't know that I --
17 I mean, I would have to, you know, double
18 check that, because it may be, and I just
19 don't recall it right now, but I don't
20 remember that there was a specific definition
21 of high speed rail.
22

1 conversations about levels of high speed rail
2 and when is something super high speed and so
3 forth.

4 VICE CHAIRMAN NOTTINGHAM: That's
5 my understanding. In fact, I read in a
6 reputable journal recently, the remarks of the
7 Federal Railroad Administrator, to the effect
8 that high speed rail may mean one thing in one
9 market, perhaps taking 15 mile an hour
10 passenger rail up to 90 or 110, would qualify
11 for some of the new Federal money that FRA is
12 administering.

13 In another market, it could be
14 even a faster level of service, depending on
15 track conditions and distances between
16 stations and what have you.

17 So, I don't -- I believe there is
18 no set definition. It's just passenger rail,
19 a little faster, maybe a lot faster.

20 If I could ask you a follow up
21 question.
22

1 as a Congressional staffer and elsewhere. If
2 this is a -- if this was an error, the
3 statutory reference to the movement of
4 passengers, being part of the definition of
5 "transportation," which is built into the act
6 of the law here, wouldn't the -- in your
7 opinion, the California and Nevada
8 Congressional delegations be well situated to
9 correct that and aren't there proposed and --
10 or at least, discussions of proposed vehicles,
11 let's say vehicles, that may be moving in the
12 near future, in Congress, that would be
13 perfectly, a natural opportunity to correct
14 such a mistake, if in fact, that was a
15 mistake?

16 MS. MORGAN: You mean, a mistake,
17 meaning that passenger was not --

18 VICE CHAIRMAN NOTTINGHAM: A
19 mistake, yes.

20 MS. MORGAN: Yes, well, I --

21 VICE CHAIRMAN NOTTINGHAM: It's
22

1 do we have to -- do we ignore it or deem it
2 some kind of an error or perhaps, agree with
3 Mr. Van Eigen's assertion, that what it really
4 means, is don't move freight interstates
5 transportation.

6 But Congress has -- and
7 particularly in California delegations and I
8 think about who was on those delegations and
9 the leadership roles -- they have every
10 ability to correct such a situation, if they
11 thought it was interfering with the interest
12 of either of the states.

13 MS. MORGAN: They certainly do have
14 that ability, sure.

15 COMMISSIONER MULVEY: Then there's
16 high speed rail and there's higher speed rail
17 and it is a -- it is a difficult one and I
18 want to ask you, we're dealing here with two
19 different technologies.

20 DesertXpress is conventional --
21 steel rail technologies, similar to what is
22

1 Whereas, Maglev is a whole new
2 technology, but it's also been classified a
3 railroad.

4 The Maglev -- the American Magline
5 and the Maglev Commission suggest that
6 DesertXpress is high speed rail, not connected
7 to the national network and therefore, should
8 not be under our jurisdiction.

9 On the other hand, you've argued
10 that it is part of the national network or
11 could be part of the national network and then
12 it should be part of the jurisdiction.

13 Wouldn't the same arguments that
14 would apply to -- however we decided, wouldn't
15 the same conclusion that we reach, with regard
16 to DesertXpress also apply with the same
17 force, to a Maglev system, since even though
18 the technologies are different, the
19 classification of it as a railroad puts it
20 under most of the railroad rules and
21 regulations of FRA and FELA and RLA and the
22

1 MS. MORGAN: Well, that's my
2 position. That's our position and we --

3 COMMISSIONER MULVEY: So, that
4 would be --

5 MS. MORGAN: -- referred to that
6 in the --

7 COMMISSIONER MULVEY: -- Maglev
8 should also be coming to us, for authority to
9 build its operation between Anaheim and Las
10 Vegas, just as you are between Victorville and
11 Las Vegas, correct?

12 MS. MORGAN: My position is that
13 they are -- they've -- you know, as I said
14 earlier, they feel disadvantaged, that
15 somehow, we're getting some advantage by
16 coming here, that they can't have, and I don't
17 see that disadvantage.

18 They can come here and pursue it,
19 as they wish.

20 COMMISSIONER MULVEY: If they had
21 started to actually begin constructing this
22

1 have come before the Board, asking us to
2 intervene and to say, "Hey, you've got to come
3 before us."

4 That's speculative, of course, but
5 so, you feel strongly that, this is certainly
6 something that we should be --

7 MS. MORGAN: Yes, I think the where
8 -- I think the way that I would answer that is
9 to say that DesertXpress has been proceeding
10 to get its own project in order.

11 It has spent a tremendous amount
12 of time working through issues, working at the
13 state and local level and coming here for
14 guidance. That's what the 2000 decision was
15 all about, is coming here to make sure that we
16 were proceeding appropriately and legally.

17 So, this has been about -- this is
18 about DesertXpress and DesertXpress proceeding
19 ahead responsibly and legally.

20 Whatever Maglev is doing, they're
21 doing.

22

1 VICE CHAIRMAN NOTTINGHAM: Ms.

2 Morgan, if we decided that we wanted to
3 clarify that this agency does have
4 jurisdiction over magnetic levitation
5 transportation along corridors that look like
6 rail corridors and in vehicles that look like
7 trains and much more natural fit, in view of
8 the existing FRA regulatory jurisdiction, that
9 the Maglev party here concedes, wouldn't it be
10 the case, that someone such as American Maglev
11 could -- would fall -- would have the
12 opportunity to avail themselves of the Federal
13 preemption, but at the same time, could make
14 a business, or strategic, or community
15 affairs, or community relations-based
16 decision, not to avail themselves of that.

17 They may want to win the
18 Sacramento citizen of the year award or
19 whatever other -- or seek -- have a better
20 chance of getting state funding, perhaps, if
21 they earn the good will of state officials by
22

1 the authority to.

2 Is that a fair statement? Did I
3 get that correct, in your view?

4 MS. MORGAN: Yes.

5 VICE CHAIRMAN NOTTINGHAM: So, it's
6 not mandatory, in other words, they don't --
7 just because they have the availability of
8 preemption, they are not required to ignore
9 state agencies or --

10 MS. MORGAN: And I think for all of
11 us who have worked in -- around these issues,
12 understand that the preemption exists, with
13 respect to the environmental laws.

14 However, there is a tremendous
15 amount of cooperative effort that goes into
16 preparing an environmental document for final
17 approval and -- with this agency and other
18 agencies.

19 VICE CHAIRMAN NOTTINGHAM: Now,
20 turning to sort of the business dynamics at
21 work here, this is a very competitive
22

1 There is significant Federal money
2 that's been made available. There is some
3 state money that's been made available,
4 particularly in California. There is private
5 money that's possibly being looked at and it's
6 competitive all the way around, right?

7 You're not just competing with a
8 Maglev proposal. You're competing with the LA
9 to Sacramento line or the Chicago to Saint
10 Louis line that's proposed or Orlando to
11 Tampa.

12 I mean, there are some 40+, if I
13 read the press correctly, applications that
14 have come in for a piece of this eight to \$11
15 billion, depending how it's added up, and it's
16 extremely competitive all the way around.

17 It is -- do you view that we've
18 done anything that's put any particular
19 project at an competitive advantage or
20 disadvantage, that's going to actually alter
21 which of those projects gets selected for
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MS. MORGAN: I don't believe so.
DesertXpress isn't pursuing any stimulus
money.

As you know, they have invested a
lot of their own private capital and they
continue to look at, you know, for private
capital in the market place, as this project
proceeds ahead.

So, they are not looking for
grants or any stimulus money.

But I think that, you know, this
agency has jurisdiction. It should exercise it
and the funding issues will get resolved on
another path.

VICE CHAIRMAN NOTTINGHAM: I have
no further questions, Mr. Chairman.

CHAIRMAN ELLIOTT: All done?

MS. MORGAN: That's all I have.
Thank you.

CHAIRMAN ELLIOTT: Thank you. Mr.
Edelman, you have 10 minutes.

1 afternoon, Chairman Elliott, Vice Chairman
2 Nottingham, Commissioner Mulvey.

3 I'm here on behalf of the IBT Rail
4 Conference and its affiliate, the Brotherhood
5 of Maintenance Weigh Employees Division and
6 the Brotherhood of Locomotive Engineers and
7 Training.

8 I represent other rail unions.
9 They have not joined this case because those
10 other unions were not parties to this case
11 when it started, just like the punitive
12 interveners. They weren't parties. Those
13 other unions aren't here. They shouldn't be
14 here either.

15 The Rail Conference Union
16 represent maintenance and weigh employees and
17 engineers and trainmen on the major railroads.
18 They have a strong interest in protecting
19 standard wages, benefits and rights of
20 railroad workers and ensuring that entities
21 that are involved in railroad operations are
22

1 Interstate Commerce Act.

2 This is because most of the laws
3 that apply to railroad workers, like the
4 Railway Labor Act, the Railroad Retirement
5 Act, depend on the ICA definition of carrier.

6 If an entity is not a carrier,
7 under the ICA, it is not a carrier under those
8 laws and its employees are not covered by
9 those laws.

10 If a several hundred mile line is
11 not classified as a carrier, then several
12 hundred people who work on that line, are not
13 covered by the railroad laws covering
14 employees, even though they're doing railroad
15 work.

16 Now, you've heard punitive
17 interveners earlier say that there are -- they
18 think they are railroad under the FRA, but not
19 under the ICA.

20 Well, in that scenario, their
21 employees doing railroad work, building this
22

1 be covered by the Railway Labor Act and
2 Railroad Retirement Act.

3 COMMISSIONER MULVEY: Is that your
4 understanding, that they are not, because it
5 was my understanding that Maglev, because it
6 was declared to be a railroad, that Maglev
7 would operate under the Railway Labor Act,
8 under the FELA and under Railroad Retirement?
9

10 MR. EDELMAN: If they're taking the
11 position that they are not covered by the ICA,
12 then they're taking the position they are not
13 covered by the Railway Labor Act and Railroad
14 Retirement Act.

15 If they want to make -- clarify
16 that and say they are, I'm glad to hear it,
17 but I don't think that's what they've said and
18 if you look at the statutory definitions and
19 in the RLA and the ICA, they refer to this
20 statute.

21 Now, additionally, rail workers
22 have been victimized by sham-transactions and

1 long time and we have an interest in making
2 sure that that doesn't happen.

3 We have an interest in making sure
4 that parties don't manipulate or evade STB
5 jurisdiction. Those are our interests,
6 specific to us.

7 We agree with DesertXpress, that
8 the punitive intervention and petition to
9 reopen two years after the decision was
10 rendered for the purpose of challenging the
11 carrier status of somebody else is grossly
12 improper and the petition should be rejected
13 on that basis and the supposed excuses they've
14 offered are frankly, frivolous.

15 The punitive interveners made a
16 calculated business decision not to get
17 involved in this when they knew it was going
18 on. They made a calculated business decision
19 not to get involved with this when, a week
20 after the decision they came out, they were
21 formally notified and they didn't seek to
22

1 Now, they've made a calculated
2 business decision to do something else, to get
3 themselves involved and take a different
4 position.

5 But this is really -- they call
6 this about jurisdiction. This is really a
7 change in their assessment of the competitive
8 environment, whatever it is, and I would point
9 out that the Rail Conference and two transit
10 agencies in New Jersey felt it was in their
11 interest to participate in this proceeding
12 when it was ongoing. They knew it was
13 ongoing. The New Jersey guys, they felt that
14 -- they weren't even involved in this. They
15 got themselves involved.

16 So, I'll also note, unions
17 regularly participate in proceedings before
18 this Board, to protect their member's
19 interests.

20 Sometimes, we have to decide, are
21 we going to get involved? When do we get
22

1 The petition here is as if
2
3 someone's got authority to buy a rail line
4
5 under 10901, went through the process, no
6
7 union opposed, got a decision, the Board
8
9 approved the sale and then later, when we
10 found out they weren't going to hire any of
11 our people, we said, "Wait a minute, we want
12 to get involved now and reopen it," it's
13 really 11323 transaction or you know, we
14 thought Congress was going to get involved and
15 then they didn't.

16 We came in. We would be time-
17 barred. They should be time-barred.

18 On the merits, we agree with
19 DesertXpress, that it will be a rail carrier.
20 We want to respond to several different
21 points.

22 Again, and I think as we've heard
23 Commissioner Mulvey, you mentioned the
24 exception for inter-urban, you know, electric
25 railways, is about, as you pointed out, you

1 This is inter-state. You can call
2 it -- I mean, hell, you could say that
3 something running between New York and Chicago
4 is between two cities. That doesn't mean it's
5 inter-urban within the meaning of the statute.

6 In essence, they're saying that
7 DesertXpress is going to be a several hundred
8 mile long inter-state trolley or subway.
9 That's just ridiculous.

10 The Staten Island Railway decision
11 on which they've relied is irrelevant because
12 there, there was a line. The line was
13 entirely intra-state and owned by the City of
14 New York. It's connection to the inter-state
15 system was relevant because that's where there
16 was the interstate connection. Otherwise, the
17 rest of it was intra-state.

18 So, it was a carrier, as long as
19 that went on. Once the inter-state movements
20 stopped, and that ceased, then they were only
21 an intra-state operation. That decision
22

1 to take here.

2 Similarly, the Sprauge case, which
3 I was handed just before we got here, and I've
4 taken the liberty with the advice to turn off
5 the phones, I did check Google. All of the
6 cities that are listed there are in the State
7 of Illinois.

8 The key to that decision, where
9 they refer to interstate movements and
10 connection was important because otherwise, it
11 was entirely intra-state.

12 DesertXpress is interstate, and we
13 cited to you, the Fox case and the reason we
14 did is they're an intra-state yard track,
15 disconnected from the interstate system, by
16 removal of a switch, was held still to be
17 within the Board's jurisdiction, and among
18 other things, the Board said, "Well, they
19 might sell that track to somebody else," and
20 that the switch could be restored.

21 So, here, if an intra-state yard
22

1 interstate system, but could be reattached and
2 is within the Board's jurisdiction, then we
3 think clearly an interstate line must be
4 within the Board's jurisdiction.

5 I would also just like to point
6 out, I kept hearing some phrases like the
7 interstate general freight system. You
8 notice, that doesn't appear in the statute.

9 Now, the absurdity of the position
10 that's being advocated by punitive interveners
11 is demonstrated, but let's think about some
12 situations, some of which I think the Board
13 members have alluded to already.

14 Suppose the LA to Las Vegas line
15 was extended to Phoenix, and then to
16 Albuquerque and then to Denver. There would
17 be common carrier passenger service across
18 four states, but under their theory, it
19 wouldn't be a rail carrier under the Act.

20 Well, then who would regulate it?

21 Would each state? Would they have
22

1 Vice Chairman Nottingham noted, that would
2 happen, and that sounds exactly like what they
3 had in the early 1800's, which is why the
4 Interstate Commerce Act was passed, where
5 states were played off against one another, or
6 they had a conflicting set of regulations.
7

8 It was the very reason why this
9 statute was put into place, or maybe they want
10 no regulation at all.

11 You know, they're magnetic. So,
12 there's no regulation at all that takes us
13 back to the early 1800's, and you know, and
14 that's sort of what I thought I heard earlier,
15 and well, what's wrong with the state doing
16 this?

17 Well, I think the history is, that
18 was a problem, that was a problem. Well, take
19 another scenario. Suppose there's a Los
20 Angeles to Las Vegas line and then someone
21 else makes another passenger-only line that
22 doesn't connect with the freight line, from

1 east side of the city?

2 Then someone else builds a Denver
3 to Albuquerque line, and then someone else
4 wants to go from Phoenix to Albuquerque.
5

6 Well, that's the sort of
7 patchwork, inefficient, non-integrated system
8 in World War I, that led to amendment of the
9 Act, after World War I.

10 Again, you know, and Vice Chairman
11 Nottingham referred to the Board's interesting
12 help with efficiency and effectiveness of rail
13 operations. That's part of the history of
14 this Act, and I think, you know, somehow, I'd
15 submit, -- so, I got this notion that
16 fundamentally, we've got new technology, so,
17 they -- so, its competitors should be excluded
18 too.

19 Well, that's not a basis for the
20 Board to make this decision and I think that -
21 - and it occurred to me, as I heard some of
22 the questions, you know, when railroads went

1 doesn't have any jurisdiction anymore, and
2 when you talk about electric, you know, on the
3 northeast corridor, there's overhead lines
4 that provide electric power. It didn't make
5 them not a railroad.

6 So, I think that those are
7 specious distinctions.

8 Just one last thing, and I've
9 alluded to this in my brief, to the extent
10 that they rely on the State of Maine and their
11 decisions, I think one, they're
12 distinguishable, primarily because all of
13 those were intra-state.

14 Two, we respectfully submit, those
15 decisions were wrongly decided. We have
16 challenged that doctrine elsewhere and all I
17 want to say at this point is to say that, we
18 think they were wrong then. There's no such
19 concept as an operating easement. They
20 shouldn't be perpetuated, but they certainly
21 shouldn't be extended.
22

1 glad to sit down, I'll be glad to -- any
2 questions you would like me to answer.

3 CHAIRMAN ELLIOTT: Thank you, Mr.
4 Edelman. We'll deal with those cases later.
5 Rebuttal?

6 MR. VOM EIGEN: Yes, first, I want
7 to say that once again, we're not here to
8 avoid labor -- the coverage of the Railway
9 Labor Act. We're here to make the point that
10 the Congress did not contemplate a separate
11 passenger-only rail network, being subject to
12 the jurisdiction of the --

13 CHAIRMAN ELLIOTT: With respect to
14 Mr. Edelman's point, is it your position if,
15 the Board so rules in favor, that you're --
16 hypothetically, if the Maglev goes forward,
17 your employees would not be covered under that
18 Railway Labor Act or Retirement FELA?

19 MR. VOM EIGEN: I believe that does
20 only apply to rail carriers under the
21 Interstate Commerce Act. I think he's right
22

1 is -- would be an effect of it, and we're
2 subject to the National Labor Relations Act
3 and they're public agencies, like the transit
4 authority. They would be regulated at the
5 state level in a different ways, as public
6 employees.

7 But that -- that's not what we're
8 talking about here. We're saying that here,
9 there is no jurisdiction.

10 COMMISSIONER MULVEY: At some of
11 the public transit systems, for example, say
12 for example, employees who work for the PATH,
13 are considered to be railway employees and
14 PATH workers are subject to RLA and some of
15 the others, is that not correct?

16 MR. VOM EIGEN: That's true, and
17 those are many -- over the freight rail
18 network, that would be often the case. In
19 fact, I represent metro and that is the case
20 with metro.

21 COMMISSIONER MULVEY: But they're
22

1 the freight rail network. They're now
2 separate from the freight rail network, but
3 they're still under RLA.

4 My understanding is that that was
5 one of the issues that was considered when
6 Maglev was declared to be railway, one of the
7 issues was that because it's a railway, it's
8 going to be under the rules that govern
9 railroads, and not -- because the Federal
10 Employees Liability Act is an Act separate
11 from the Interstate Commerce Act and the
12 Railway Labor Act and the others.

13 So, it's hardly a matter of
14 Federal law, that they would not be under
15 these requirements, no?

16 MR. VOM EIGEN: I'm not familiar
17 with the issue. It's not -- our point of view
18 here, I really can't tell you that, but I
19 might -- my understanding is that the Railway
20 Labor Act is triggered by it being a rail
21 carrier under the Interstate Commerce Act.
22

1 Edelman is correct.

2 The point I do want to make though
3 is that first of all, this notion that the
4 Board should fill this gap on its own, it
5 would be -- it's one thing to stop a rail
6 merger guidelines that were set out by the
7 Board in implementing a specific area of
8 jurisdiction that this Board has to look over
9 control cases and consolidations of railroads,
10 to say, "Hey, we had a couple of disasters."
11 Let's take a look at them, before you approve
12 any others.

13 That's an evolution that should
14 occur and that is certainly is part of the
15 Board's discretion, to change it's policies.

16 But here --

17 VICE CHAIRMAN NOTTINGHAM: What
18 about to Mr. Edelman's point about if this did
19 run from -- hypothetically, from Los Angeles
20 to Saint Louis and went through various
21 states, that each different state would be
22

1 workable?

2 MR. VOM EIGEN: I think it's
3 absolutely workable. We've seen it in
4 California and Nevada, where the state and
5 local communities are very supportive of
6 getting this service.

7 The cities that have endorsed it,
8 they're opening their arms to this kind of
9 service. They want to see this happen.

10 I don't think it's a foregone
11 conclusion, we're going to have problems here.

12 If there is, then, we can come
13 back and face them and get Congress to enact
14 the laws necessary and instructions from you,
15 how to resolve these questions.

16 My concern is that you declare the
17 preemption under 501(b) as being broad, and
18 that was the whole purpose of the original
19 decision.

20 It wasn't -- they didn't come --
21 DesertXpress didn't come in and ask whether or
22

1 shipper service, that is not connected to the
2 freight rail network is part of the rail
3 network. That wasn't the questions that were
4 asked.

5 The question is, how broad is
6 10101(b)1 and (2)? That wasn't even a
7 controversial issue at that time, but that's
8 the question they asked and the Board
9 presumptively assumed that the other issues
10 had been taken care of and I just don't think
11 that -- I don't think Vice Chairman
12 Nottingham, I don't think the word
13 transportation is mistaken in the Act.

14 It's part of the definition of the
15 Board's jurisdiction. It certainly applies in
16 the context of passenger service on freight
17 right-of-way, which is the predominant model
18 we have today and gives you jurisdiction on
19 that context.

20 VICE CHAIRMAN NOTTINGHAM: Well,
21 with all due respect, it does not say freight
22

1 "related to the movement of passengers or
2 property or both by rail."

3 MR. VOM EIGEN: I understand that,
4 but I think that the 10501, going back to the
5 word, that does give you jurisdiction is
6 10501(a)2(a), that says it's part -- you have
7 to be part of the interstate rail network and
8 what I'm saying that a disconnected passenger-
9 only railroad is not part of that network,
10 because it does not connect and it does not
11 interchange freight, which is -- there's
12 numerous decisions cited in our case, cases
13 that do hold that unless -- even in the cases
14 where there is connections between entities
15 that provide passenger service and the freight
16 rail network, that unless they engage in the
17 transfer of that, it's not part of the
18 jurisdiction of the old ICC or the STB.

19 CHAIRMAN ELLIOTT: Going back to my
20 earlier question, isn't it at best, that
21 ambiguous?
22

1
2 CHAIRMAN ELLIOTT: With respect to
3 whether or not it's covered under the Act,
4 whether the passenger has to be on the
5 freight transportation system, the language
6 that you're referring to?

7 MR. VOM EIGEN: Well, I think the -
8 - there's no controversy about the Board's
9 jurisdiction over passengers on the interstate
10 rail network, and I think the definition of
11 rail carrier requires you to make a finding as
12 to whether or not the service provided by
13 DesertXpress in fact, is part of that network,
14 and I don't think you made that decision --
15 and have you looked at the issue in the June
16 17, 2007 decision.

17 I think the connectivity to the
18 rail network has -- in the cases that were
19 cited by DesertXpress are not -- are
20 supportive of our position. So, that's all.

21 VICE CHAIRMAN NOTTINGHAM: Mr. Vom
22 Eigen, turning to the -- some of the

1 optimal distance between stops, to achieve the
2 most efficient methods?

3 For example, if you had a 200 mile
4 corridor, would you want to stop 20 times, 10
5 times? Between four and seven?

6 These are the issues that of
7 course, historically, that have led to Federal
8 preemption, because states are -- find it very
9 difficult to tell localities within their
10 state that they're just not going to get the
11 stop.

12 Everybody wants a stop,
13 presumably, on the -- on a high quality
14 transportation mode, but to keep it high
15 quality and fast, by definition, not everyone
16 can get a stop and there -- isn't it
17 completely predictable, that an improved
18 national system of higher speed rail and/or
19 Maglev rail cannot work if each and every
20 state gets to stop it, alter it, and regulate
21 it?22

1 certainly something that could be regulated at
2 the state level, as well as at the Federal
3 level.

4 I think we, as a carrier, of -- or
5 railroad carrier, could make the point that
6 that would be inefficient for us to stop.

7 Now, we're talking about seven
8 stops along the right-of-way between Anaheim
9 and Las Vegas and we think that's optimal. We
10 have the support of the communities that will
11 be served by it.

12 We have not been -- with proposals
13 to have other stops.

14 VICE CHAIRMAN NOTTINGHAM: And when
15 would your line be up and running, according
16 to your current plans?

17 MR. VOM EIGEN: Well, there is a
18 petition in our case, before the Federal
19 Railroad Administration, that was submitted by
20 the Governor of Nevada and Nevada DOT, to fund
21 the -- to Las Vegas segment, and then to also
22

1 fund the engineering for the California
2 portion of the route between Anaheim and --
3 so, that would be --

4 VICE CHAIRMAN NOTTINGHAM: And that
5 would be over what time period, assuming you
6 got whatever funding you needed to get?

7 MR. VOM EIGEN: Well, the studies -
8 - that would be the final environmental
9 project impact statements would be done and
10 the engineering would then be -- we would go
11 finance it at the conclusion of that.

12 VICE CHAIRMAN NOTTINGHAM: We're
13 talking about three years, 10 years, nine
14 years, 20 years? When do you anticipate, if
15 you get funding you need, when you need it,
16 that you'll have people experiencing Maglev
17 between that corridor, between Anaheim and
18 Las Vegas?

19 MR. VOM EIGEN: Well, I think the
20 development of the -- this was going to take
21 longer than people would want.
22

1 case, that if these environmental processes
2 could be completed in two years or three
3 years, then construction could begin at that
4 point, and there would be definitely, would be
5 service over both segments of the system and
6 the final link would be the link between --
7 and the --

8 CHAIRMAN ELLIOTT: Any further
9 questions?

10 COMMISSIONER MULVEY: No further
11 questions.

12 MR. VOM EIGEN: Thank you.

13 CHAIRMAN ELLIOTT: Thank you very
14 much, for all of your excellent arguments and
15 for your attendance today, and our next oral
16 argument will be on November 23, 2009, barring
17 any unforeseen consequences, and hopefully,
18 now, this meeting of the Board is now
19 adjourned. Thank you.

20 (Whereupon, the above-entitled
21 matter concluded at approximately 3:40 p.m.)
22

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