

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 693

ORAL ARGUMENT

Decided: October 20, 2009

The Surface Transportation Board will hold oral arguments on Tuesday, October 27, 2009, at 9:30 a.m., in the Board's hearing room at the Board's headquarters located at 395 E Street, S.W., Washington, DC. The arguments will address two cases: STB Docket No. 42104, Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc. (Entergy v. UP & MNA); and STB Finance Docket No. 34914, DesertXpress Enterprises, LLC—Petition for Declaratory Order (DesertXpress). The oral arguments will be open for public observation, but only counsel for the parties will be permitted to present argument.

In Entergy v. UP & MNA, co-owners of a coal-fired utility plant seek the prescription of a through route (or routes) directing the Missouri & Northern Arkansas Railroad Company, Inc. (MNA) and/or Union Pacific Railroad Company (UP) to interchange traffic with a long-haul carrier other than UP in order to provide adequate and more economic or efficient transportation of coal from Powder River Basin mines to the utility plant near Newark, AR. MNA has filed a motion to dismiss Entergy's complaint and a motion to require Entergy to make the complaint more definite. The oral argument will focus on those two motions.

In DesertXpress, a private entity asked the Board to issue a declaratory order that the construction and operation of its proposed interstate, passenger-rail system between Victorville, CA, and Las Vegas, NV, would be within the Board's jurisdiction under 49 U.S.C. 10501(a) and therefore the federal preemption of 49 U.S.C. 10501(b) would apply and preempt most state and local laws. By decision served on June 27, 2007, the Board found that the proposed passenger-rail system would be within the Board's exclusive jurisdiction, would require Board authority under 49 U.S.C. 10901, and, if such authority were granted, federal preemption would apply. California-Nevada Super Speed Train Commission, a bi-state commission and an agency of the State of Nevada, and its private-sector partner, American Magline Group, jointly petitioned to intervene and reopen the 2007 declaratory order, arguing that, because DesertXpress's rail system would not transport any freight or connect to lines on which freight is transported, the Board erred in determining that the line would be part of the interstate rail network and thus subject to its jurisdiction. The oral argument will focus on the petition to intervene and reopen.

No additional written comments may be filed in connection with the oral arguments, as extensive written records on the issues to be argued have already been developed in these proceedings. Each party is encouraged to use its oral argument time to call attention to the points it believes are particularly important. The arguments will be in the style of an appellate court. Parties should prepare a short statement of their argument and be prepared to answer questions from the Board. The purpose of oral argument is not to restate the written arguments previously made, but to summarize and emphasize the key points of a party's case, and provide an opportunity for questions that the Board may have regarding any issue in the proceeding.

The first argument will be Entergy v. UP & MNA. The movant in Entergy v. UP & MNA (MNA) will have a total of 30 minutes of argument time and the complainants-respondents (Entergy Arkansas, Inc., Entergy Services, Inc., and Arkansas Electric Cooperative Corp.) will have a combined total of 30 minutes of argument time. MNA will open and may reserve part of its time for rebuttal if it so chooses. Board members may ask questions during the parties' allotted time.

The second argument will be DesertXpress. The petitioners/intervenors in DesertXpress (California-Nevada Super Speed Train Commission and American Magline Group) will have a combined total of 40 minutes of argument time and respondents (DesertXpress Enterprises, LLC; International Brotherhood of Teamsters Rail Conference; Brotherhood of Maintenance of Way Employees Division/IBT; and Brotherhood of Locomotive Engineers and Trainmen Division/IBT) will have a total of 40 minutes of argument time, with 30 minutes allotted for DesertXpress Enterprises, LLC and 10 minutes allotted for Brotherhood of Maintenance of Way Employees Division/IBT; and Brotherhood of Locomotive Engineers and Trainmen Division/IBT. Petitioners/intervenors will open and may reserve part of their time for rebuttal if they so choose. Board members may ask questions during the parties' allotted time.

Counsel for the parties should check in with Board staff in the Hearing Room prior to the argument.

A video broadcast of the oral argument will be available via the Board's website at <http://www.stb.dot.gov>, under "Information Center"/"Webcast"/"Live Video" on the home page.

#### Instructions for Attendance at Hearing

The STB requests that all persons attending the hearing use the Patriots Plaza Building's main entrance at 395 E Street, S.W. (closest to the northeast corner of the intersection of 4th and E Streets). There will be no reserved seating, except for those scheduled to present oral arguments. The building will be open to the public at 7:00 a.m., and participants are encouraged to arrive early. There is no public parking in the building.

Upon arrival, check in at the 1st floor security desk in the main lobby. Be prepared to produce valid photographic identification (driver's license or local, state, or federal-government identification); sign-in at the security desk; receive a hearing room pass (to be displayed at all times); submit to an inspection of all briefcases, handbags, etc.; then pass through a metal detector. Upon entering the hearing room, those presenting oral argument should check in with

the Board's Acting Secretary. Persons choosing to exit the building during the course of the hearing must surrender their hearing room passes to security personnel and will be subject to the above security procedures if they choose to re-enter the building. Hearing room passes likewise will be collected from those exiting the hearing upon its conclusion.

Laptops and recorders may be used in the hearing room, but no provision will be made for connecting personal computers to the Internet. Cellular telephone use is not permitted in the hearing room; cell phones may be used quietly in the corridor surrounding the hearing room, or in the building's main lobby.

The Board's hearing room complies with the Americans With Disabilities Act, and persons needing such accommodations should call (202) 245-0245, by the close of business on October 26, 2009.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Oral argument in this proceeding will be held on Tuesday, October 27, 2009, at 9:30 a.m., in the Surface Transportation Board Hearing Room, at 395 E Street, S.W., Washington, DC as described above.
2. This decision is effective on the date of service.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan  
Acting Secretary