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SERVICE DATE – MAY 7, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

Decided: May 6, 2010

Currently, there are a number of significant proposals to upgrade our nation's passenger rail network, with the goal of higher-speed and more efficient transportation. These proposals raise the important question of whether the Board has jurisdiction over the construction of new passenger rail lines.

In a decision served June 27, 2007 (2007 Decision), the Board issued a declaratory order finding that the planned construction and operation by DesertXpress Enterprises, LLC (DesertXpress) of a high-speed steel-wheel passenger rail line between southern California and Las Vegas, Nevada, would require Board approval under the Interstate Commerce Act (ICA) and would be subject to the federal preemption provided in 49 U.S.C. § 10501(b).

Petitioners California-Nevada Super Speed Train Commission (Train Commission) and American Magline Group (Magline), who are developing a competing proposal to build and operate a magnetic levitation transportation system largely along the same corridor, now ask us to reopen and reverse that finding. They contend that DesertXpress's project is not within our jurisdiction and that federal preemption therefore does not apply.

In this decision, we reaffirm our prior determination in the 2007 Decision that the project contemplated by DesertXpress falls within our jurisdiction. Petitioners have not identified any new evidence or changed circumstances, or demonstrated any material error, that would justify reopening that decision. The plain language of our statute embraces passenger rail construction projects of this sort. Moreover, federal regulation of rail transportation in interstate commerce is intended to avoid a patchwork of conflicting and parochial regulatory actions that impede the flow of people and goods throughout the nation. We have reviewed the statutory mandates that underlie the need for uniformity and consistency of interstate commerce regulation, and have concluded that these considerations require federal oversight of interstate passenger rail construction projects.

Accordingly, for the reasons discussed below, the Board will deny Petitioners' request to reopen. We reaffirm our prior assertion of jurisdiction over the DesertXpress interstate passenger rail construction project.

## BACKGROUND

The DesertXpress Project. DesertXpress, a privately financed group of companies, plans to construct and operate an approximately 200-mile passenger rail line extending from Victorville, California, to Las Vegas, Nevada. Approximately 40 miles of the proposed line would be in Nevada and the remainder in California. DesertXpress's rail line would consist of a double-track rail line, 2 passenger stations, and facilities for maintenance, storage, and operations (collectively referred to as the rail line). The planned route would be along, or within the median of, Interstate Highway 15 (I-15) for the majority of the route. Some portions of the route might operate within existing railroad rights-of-way, on private property, and over undeveloped federal property controlled by the Bureau of Land Management (BLM).<sup>1</sup> Although the planned rail line would not initially connect to any existing rail lines, DesertXpress has been in planning discussions with the California High Speed Rail Authority (CHSRA) to allow for DesertXpress to extend its rail line approximately 50 miles west to connect near Palmdale, California, with the planned CHSRA high-speed rail system.<sup>2</sup>

Declaratory Order Proceeding. DesertXpress's request for a declaratory order presented the question whether the Board would have jurisdiction over the construction and operation of this planned interstate passenger-only rail line. The Board initiated a proceeding by publishing a notice in the Federal Register and inviting interested persons to provide their views concerning the jurisdictional issue.<sup>3</sup> Two comments were filed. In the first, the International Brotherhood of Teamsters Rail Conference and its affiliated organizations, the Brotherhood of Locomotive Engineers and Trainmen Division/IBT and the Brotherhood of Maintenance of Way Employees Division/IBT (collectively, Rail Conference), supported DesertXpress's position that its proposed rail line would be within the Board's jurisdiction. In the second comment, the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission maintained that the Board should not issue a declaratory order or otherwise enunciate any general principles, because Petitioners had not shown a sufficient controversy to warrant Board action.<sup>4</sup> The New Jersey agencies took no position concerning the Board's jurisdiction over DesertXpress's planned rail line. DesertXpress replied to the comments.

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<sup>1</sup> See DesertXpress Pet. for Declaratory Order, July 24, 2006 4-5.

<sup>2</sup> DesertXpress Reply to Joint Pet. to Intervene & Reopen, April 28, 2009 (Reply) 4 and attached Verified Statement (V.S.) of Thomas J. Stone ¶ 4; Oral Argument Transcript Oct. 27, 2009 (Tr.) 57.

<sup>3</sup> 71 Fed. Reg. 51,885-86 (Aug. 31, 2006).

<sup>4</sup> The New Jersey agencies were concerned about any Board pronouncements on the scope of the preemption provisions of 49 U.S.C. § 10501(b) because they had been "confronted with claims by various parties that the preemption provisions preclude all state and local environmental and public health and safety oversight concerning the activities of railroads and

(continued . . . )

In the 2007 Decision, the Board concluded that construction and operation of DesertXpress's planned interstate passenger rail line would be within the agency's jurisdiction under 49 U.S.C. § 10501, because DesertXpress would be a rail carrier providing interstate common carrier rail transportation between a place in California and a place in Nevada.<sup>5</sup> The Board found that DesertXpress would need to seek Board authorization under 49 U.S.C. § 10901 to construct and operate its planned interstate rail line. Accordingly, the broad preemption provision at 49 U.S.C. § 10501(b) would attach, and environmental review would need to be conducted under the National Environmental Policy Act (NEPA)<sup>6</sup> and related federal environmental laws, in lieu of the individual laws and regulations of California and Nevada.<sup>7</sup>

The NEPA Process. In July 2006, the Federal Railroad Administration (FRA), which has primary authority over the safety aspects of rail operations, and acting as the lead agency, issued a Notice of Intent to prepare an Environmental Impact Statement (EIS) examining the anticipated environmental effects of constructing and operating DesertXpress's planned rail line.<sup>8</sup> In March 2009, the FRA issued a Draft EIS seeking public review and comment.<sup>9</sup> The FRA will issue a Final EIS responding to the comments and containing additional environmental analysis, as appropriate. The Board is participating as a cooperating agency on the EIS.<sup>10</sup> DesertXpress has stated that, upon completion of the EIS process, it intends to submit an application under section 10901 for Board authorization to construct and operate its planned rail line. When completed, the EIS should give the Board the environmental information it needs to take the requisite hard look at potentially significant environmental impacts related to the transaction when deciding whether to approve DesertXpress's application, deny it, or approve it with mitigation conditions.

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( . . . continued)

entities tendering solid waste to" railroads. Comments of N.J. Dep't of Env'tl. Prot., et al., Oct. 16, 2007 at 2.

<sup>5</sup> 2007 Decision at 3-4.

<sup>6</sup> 42 U.S.C. §§ 4331 et seq.

<sup>7</sup> 2007 Decision at 4-5.

<sup>8</sup> Notice of Intent, EIS: DesertXpress High Speed Train Between Victorville, CA and Las Vegas, NV, 71 Fed. Reg. 40,176-78 (July 14, 2006).

<sup>9</sup> See FRA, Draft EIS, March 2009, available at [www.fra.gov](http://www.fra.gov): click on "Passenger Rail," then "Environment," then "Current Reviews," then "DesertXpress—Las Vegas to Victorville," and scroll to "View the Draft Environmental Impact Statement" (last visited Apr. 15, 2010). Comments on the Draft EIS were due on May 22, 2009.

<sup>10</sup> Agencies often cooperate in preparing another agency's EIS when they have statutory authority to review issues implicated by a project. Other cooperating agencies on the DesertXpress EIS are the Federal Highway Administration, National Park Service, and BLM.

An Alternative High-Speed Project for the Same Corridor. Train Commission, a bi-state Commission composed of members from Nevada and California, and an agency of the State of Nevada, was created in the 1980s to promote, develop, and issue a franchise to build, operate, and maintain a high-speed passenger train system in the I-15 transportation corridor between Anaheim, California, and Las Vegas over a 269-mile route.<sup>11</sup> Train Commission selected magnetic levitation technology (maglev)<sup>12</sup> for its project, now known as California Nevada Interstate Maglev Project (CNIMP). In 1996, Train Commission awarded a private joint venture, Magline,<sup>13</sup> the franchise to build, operate, and maintain CNIMP.

Petitioners state that, after Congress authorized a maglev transportation technology deployment program in 1998,<sup>14</sup> FRA designated CNIMP as one of seven projects eligible for funding under the program. According to Petitioners, over several years Congress appropriated to CNIMP approximately \$7.5 million,<sup>15</sup> which was used to prepare an environmental assessment and preconstruction studies, and in 2008 Congress furnished an additional \$45 million to perform studies on the first 40 miles (Nevada portion) of CNIMP.<sup>16</sup> Petitioners anticipate that additional funds will become available to CNIMP through 2 more recently enacted statutes: the Passenger Rail Investment and Improvement Act of 2008<sup>17</sup> and the American Recovery and Reinvestment Act of 2009.<sup>18</sup>

Pleadings and Oral Argument. In their Joint Petition to Intervene and to Reopen, Petitioners argue that there are changed circumstances (newly available funding) and new

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<sup>11</sup> Joint Pet. to Intervene & Reopen, Apr. 8, 2009 (Jt. Pet.) 8.

<sup>12</sup> Maglev has been defined as “transportation systems employing magnetic levitation that would be capable of safe use by the public at a speed in excess of 240 miles per hour.” 23 U.S.C. § 322(a)(1)(A)(3); 49 C.F.R. § 268.1. Maglev technology was created in the United States in the 1960s, and research continued in Germany and Japan.

<sup>13</sup> The partners in Magline are General Atomics, Parsons Transportation Group, Hirschfeld Steel Co., Inc., and M. Neil Cummings & Associates PLC. Jt. Pet. 8 and attached V.S. of M. Neil Cummings ¶ 2.

<sup>14</sup> See Transportation Equity Act for the 21st Century, § 1218, codified at 23 U.S.C. § 322.

<sup>15</sup> Also, according to Petitioners, the federal funds were matched with \$2.1 million in state, regional, and city funds. Jt. Pet. 9.

<sup>16</sup> SAFETEA-LU Technical Corrections Act of 2008, Pub. L. No. 110-244, 122 Stat. 1572, § 102.

<sup>17</sup> Pub. L. No. 110-432, Division B, 122 Stat. 4907 (2008).

<sup>18</sup> Pub. L. No. 111-5, 123 Stat. 115 (2009).

evidence (that the planned DesertXpress line would not connect to existing rail lines) that justify reopening this proceeding.<sup>19</sup> Petitioners also argue that the Board committed material error in the 2007 Decision in finding that DesertXpress's planned rail line would be within the Board's jurisdiction. Both DesertXpress and Rail Conference filed replies in opposition to Petitioners' request to reopen.<sup>20</sup> The Board held an oral argument on October 27, 2009, in which Petitioners, DesertXpress, and Rail Conference participated.

#### PRELIMINARY ISSUES

Request to Intervene. Petitioners seek leave to intervene in this proceeding under 49 C.F.R. § 1113.7. Their intent to build and operate a maglev system to transport passengers in the same corridor as DesertXpress's proposed rail line gives them a significant interest in this proceeding. In view of our disposition of their reopening request, granting intervention will neither broaden nor delay this proceeding. Accordingly, their request to intervene will be granted.

Leave to File a Rebuttal to the Replies. A Board regulation, 49 C.F.R. § 1104.13(c), prohibits the filing of "replies to replies." Petitioners nevertheless seek leave to file a tendered rebuttal to the replies of DesertXpress and Rail Conference, claiming that the rebuttal responds to issues raised in the 2 replies that had not been addressed in the petition to reopen. Both DesertXpress and Rail Conference object to the filing of the rebuttal and ask, if we accept the rebuttal, that we permit them to respond.

In the interest of developing a full record on the issue of whether we would have jurisdiction over DesertXpress's planned rail line, we will grant Petitioners' request for leave and accept into the record their tendered rebuttal. In view of the opportunity for each party to present oral argument, denying the requests of DesertXpress and Rail Conference for leave to submit a reply to Petitioners' rebuttal will not prejudice them. Consequently, we will deny these requests.

Request to Deny Reopening as Untimely. Citing the need for administrative finality and alleged harm if reopening were to occur more than 2 years after the 2007 Decision, DesertXpress asks us to deny the petition to reopen solely on these grounds. DesertXpress claims that reopening the proceeding now would jeopardize the time, effort, and resources already expended by several federal agencies in preparing the Draft EIS for DesertXpress's proposed rail line. We reject DesertXpress's argument. Although we understand the need for administrative repose,

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<sup>19</sup> Jt. Pet. 4, 6.

<sup>20</sup> Additional pleadings will be discussed below.

subject matter jurisdictional issues generally can be raised in a petition to reopen.<sup>21</sup> Accordingly, we will not deny reopening on the ground that the request was made too late.

Congressional Letter. Petitioners also ask the Board to disregard a letter from U.S. Senate Majority Leader Harry Reid of Nevada to the then-Acting Chairman of the Board expressing the Senator's views on the petition to reopen this proceeding, on the ground that the letter had not been served on the parties.<sup>22</sup> The letter has been placed in the public record of this proceeding, curing any concern about its unavailability to the parties.<sup>23</sup>

## DISCUSSION

Under 49 U.S.C. § 722(c), a petition to reopen a Board decision will be granted only upon a showing that the prior decision involved material error or would be affected materially because of new evidence or changed circumstances. We discuss below each of Petitioners' claimed bases for reopening.

### Changed Circumstances

According to Petitioners, the recent provision of congressional funding for studies for their planned maglev system is a changed circumstance, within the meaning of 49 U.S.C. § 722, meriting reopening of the 2007 Decision. To justify reopening a final Board decision, however, a changed circumstance must be one that could materially affect the prior decision.<sup>24</sup>

In this instance, the availability of funding for a different passenger service project—here a maglev system that would require the use of the same corridor that DesertXpress plans to use—cannot affect the outcome of the 2007 Decision. The question is whether a project of the type DesertXpress proposes is within our jurisdiction under the ICA. In the 2007 Decision, the Board examined the nature of DesertXpress's planned rail line and service, as well as the text of the ICA, to conclude that DesertXpress would be a rail carrier providing interstate transportation and

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<sup>21</sup> See CSX Transp., Inc.—Aban. Exemption—Rocky Mount, Nash County, N.C., AB 55 (Sub-No. 562X), slip op. at 4 (STB served July 27, 2000). See also 49 C.F.R. § 1115.4 (permitting a person to seek reopening of an administratively final Board action at any time).

<sup>22</sup> Pet'rs' Rebuttal to Replies in Opp'n to Jt. Pet., May 11, 2009 (Rebuttal) 24-25.

<sup>23</sup> Congressional correspondence that is not served on parties to a proceeding and therefore does not constitute a formal filing is maintained in the Board's library and is available for inspection and copying upon request.

<sup>24</sup> See, e.g., Pioneer Indus. Ry.—Alternative Rail Serv.—Cent. Ill. R.R., FD 34917, et al., slip op. 8 (STB served Jan. 12, 2007) (reopening granted after the only shipper on a rail line changed position and opposed the discontinuance of rail service, which could materially affect the Board's analysis).

therefore subject to the Board’s jurisdiction.<sup>25</sup> Funding for some other passenger service, such as Petitioners’ planned maglev system, does not change either the nature of DesertXpress’s planned rail line, the plain text of the ICA, or the Board’s interpretation of its authority under that statute. Although the absence of adequate funding earlier might explain why Petitioners failed to present their arguments sooner—by participating in the declaratory order proceeding or promptly seeking reconsideration of the 2007 Decision—the recent availability of funding for CNIMP does not materially affect the analysis or outcome reached in that decision and therefore does not justify its reopening.

### New Evidence

Petitioners contend that, at the time of the 2007 Decision, the Board had not been informed that the DesertXpress’s planned rail line would not physically connect to existing rail lines. In this regard, Petitioners argue that DesertXpress did not furnish that information to the Board until the filing of DesertXpress’s reply to the reopening request. According to Petitioners, this information is therefore “new evidence” warranting the reopening of the 2007 Decision.<sup>26</sup>

To warrant reopening, evidence must be newly available.<sup>27</sup> The Board was aware before issuing the 2007 Decision that the proposed line would not initially physically connect to existing rail lines. The 2006 Notice of Intent to prepare an EIS reflects the understanding of FRA and its cooperating agencies—including the Board—that the planned rail line would not connect to any existing rail lines.<sup>28</sup> Thus, the evidence that Petitioners argue is new is not, and therefore cannot furnish the basis for reopening the 2007 Decision.

### Material Error

The crux of Petitioners’ request to reopen is the claim that the Board committed material error in the 2007 Decision for failing to consider the meaning of the phrase “as part of the

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<sup>25</sup> 2007 Decision at 3-4.

<sup>26</sup> Jt. Pet. 6-7, 14-15

<sup>27</sup> See Friends of Sierra R.R., Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989) (“*newly raised* evidence is not the same as *new* evidence” for purposes of reopening an administratively final decision) (emphasis in original); Canadian Nat’l Ry., Grand Trunk Corp., & Grand Trunk W. R.R. – Control – Ill. Cent. Corp., Ill. Cent. R.R., Chicago, Cent. & Pac. R.R., and Cedar River R.R., 6 S.T.B. 344, 350 (2002) (“‘new evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding”).

<sup>28</sup> See 71 Fed. Reg. 40,176-78 (July 14, 2006), which describes in detail the various possible alignments of the DesertXpress rail line and does not indicate any physical connections with existing rail lines.

interstate rail network” under 49 U.S.C. § 10501(a)(2)(A).<sup>29</sup> We conclude, however, that it was not material error for the Board not to have explicitly construed that provision, because it would not have materially affected the outcome of the decision.

Our rationale is twofold. First, the phrase “as part of the interstate rail network” in subsection 10501(a)(2)(A) is ambiguous, and the legislative history of the ICC Termination Act of 1995 (ICCTA)<sup>30</sup> supports the view that Congress did not intend it to restrict the Board’s preexisting jurisdiction over rail transportation that crosses a state line. Rather, Congress added that phrase as a necessary qualification to its contemporaneous *expansion* of the Board’s jurisdiction under section 10501(a)(2)(A) to apply to *intrastate* rail transportation: transportation between places in the same state would be within the Board’s jurisdiction as long as that transportation was related to interstate commerce—*i.e.*, performed “as part of the interstate rail network.” That phrase was not intended as a new limitation on the agency’s pre-ICCTA jurisdiction over interstate transportation; that DesertXpress’s project would cross a state line is enough, by itself, to bring the project under our jurisdiction, as it would have been prior to ICCTA.

Second, even if the phrase “as part of the interstate rail network” were read, as Petitioners read it, to impose some sort of new restriction or condition on the Board’s jurisdiction over projects that are inherently interstate to begin with, our construction of that term in this decision leads to the same result: the Board has jurisdiction over the construction and operation of DesertXpress’s proposed interstate passenger rail line because it would, in fact, be “part of the interstate rail network.”

Accordingly, for reasons discussed in more detail below, we reject Petitioners’ claims, based on our reading of the ICA as amended by ICCTA, the legislative history of ICCTA, case precedent, and public policy considerations.

A. The phrase “as part of the interstate rail network” does not apply here.

The ICA grants the Board general jurisdiction over “transportation by rail carrier” between, among other things, a place in “a State and a place in the same or another State as part of the interstate rail network.” 49 U.S.C. § 10501(a)(2)(A). Petitioners assert that we materially erred in the 2007 Decision because we failed to take into account the import of the phrase “as part of the interstate rail network,” in construing the statute.

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<sup>29</sup> Jt. Pet. 6-7, 22-29.

<sup>30</sup> Pub. L. No. 104-88, 1995-1 U.S.C.C.A.N. (109 Stat.) 803. In ICCTA, Congress created the Board to assume some of the functions of the former Interstate Commerce Commission (ICC), particularly those related to regulation of railroads.

We disagree. We do not believe that Congress intended that phrase to impose any new limitation on the agency's pre-ICCTA authority over rail transportation that crosses a state line. Instead, we conclude that that phrase was added in ICCTA as a necessary qualification to ICCTA's new, explicit statutory grant of jurisdiction to the agency over *intrastate* rail transportation. We reasonably construe subsection 10501(a)(2)(A) to mean that the Board has jurisdiction over (1) transportation by rail carrier between a place in a state and a place in another state, as it did prior to ICCTA (which indisputably covers DesertXpress's project here), as well as (2) transportation by rail carrier that is between a place in a state and another place in the same state, as long as that intrastate transportation is carried out "as part of the interstate rail network."

ICCTA's legislative history supports this view. Before ICCTA, § 10501(a)(2)(A) gave the ICC jurisdiction over transportation by rail carrier between a place in "a State and a place in another State"—that is, over any and all rail transportation that crosses a state line. 49 U.S.C. § 10501(a)(2)(A) (Supp. I 1995). At that time, however, the ICC did not have general jurisdiction over "the transportation of passengers or property . . . entirely in a State . . . and not transported between a place in the United States and a place in a foreign country . . ." 49 U.S.C. § 10501(b)(1). Thus, the ICC did not have general jurisdiction over *intrastate* rail transportation, either for passengers or freight.

Notwithstanding this statutory distinction, before ICCTA, disputes arose over the interstate or intrastate status of certain manufacturers' motor carrier shipments moving from warehouses to destinations.<sup>31</sup> Similar questions arose as to intrastate or interstate status for passenger transportation by rail and bus.<sup>32</sup> Congress responded in ICCTA by clarifying and expanding the scope of the agency's jurisdiction over *intrastate* rail transportation. The House version of the bill amended section 10501(a)(2)(A) to add the phrase "the same or" to give the agency jurisdiction over rail transportation between a place in "a State and a place in *the same or* another State,"<sup>33</sup> without qualification. The House bill also eliminated then-subsection 10501(c), which had permitted states, under certain circumstances, to require carriers to provide intrastate

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<sup>31</sup> See Tex. v. United States, 866 F.2d 1546, 1548 (5th Cir. 1989) (at a time that the statute contained comparable jurisdictional language for motor carriers, at 49 U.S.C. § 10521 (Supp. I 1995), noting 60 years of disputes whether warehouse-to-distribution transportation occurring within one state nevertheless was in interstate commerce because of the prior transportation between a manufacturing plant in a different state and a warehouse).

<sup>32</sup> See, e.g., Cape Cod & Hyannis R.R.—Exemption From 49 U.S.C. Subtitle IV, FD 30859 (ICC served Aug. 25, 1986) (Cape Cod) (because of through ticketing from points out of state, rail transportation of passengers within Massachusetts was interstate transportation); Gray Lines Tour Co. v. ICC, 824 F.2d 811 (9th Cir. 1987) (affirming ICC finding that passenger bus tours starting and ending in Nevada and crossing briefly into Arizona were interstate commerce because of a legitimate, economic reason for the Arizona stop).

<sup>33</sup> H.R. Rep. No.104-311 at 3 (1995) (emphasis added).

service. The goal of these changes clearly was to curtail state jurisdiction over intrastate rail transportation—indeed, to “reflect the direct and complete pre-emption of State economic regulation of railroads.”<sup>34</sup> Similarly, although the Senate bill did not include the same proposed changes, the Committee Report on the Senate bill makes clear that the goal of that body was to limit state regulation, noting that the rail industry relies “on a nationally uniform system of economic regulation,” and that “[s]ubjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry’s ability to provide the ‘seamless’ service that is essential to its shippers and would weaken the industry’s efficiency and competitive viability.”<sup>35</sup>

The Conference Committee bill tracked the House bill in amending section 10501(a)(2)(A) and eliminating then-section 10501(c), thus endorsing the shift of jurisdiction over intrastate rail transportation away from the states.<sup>36</sup> The Conference Committee also, for the first time, added the phrase “as part of the interstate rail network” to subsection 10501(a)(2)(A). The Conference Report does not specifically discuss that addition. Given the clear intent of the House to shift jurisdiction over intrastate transportation away from the states and the clear intent of the Senate to ensure national uniformity of rail regulation, however, we conclude that Congress most likely was seeking to avoid possible constitutional infirmity as to the Board’s newly-explicit jurisdiction over *intrastate* transportation by ensuring that it would be tied to *interstate* commerce—*i.e.*, carried out “as part of the interstate rail network.” Petitioners’ interpretation—that the phrase “as part of the interstate rail network” also imposed some kind of new, limiting condition that *narrows* pre-ICCTA federal jurisdiction over *interstate* transportation—not only is not supported by the legislative history, but is directly contrary to Congress’s express goals in amending section 10502(a)(2)(A).

This conclusion is bolstered by the absence of any similar phrasing elsewhere in subparagraph 10501(a)(2). Subparagraphs 10501(a)(2)(E) and (F) establish Board jurisdiction over rail transportation between the United States and another place in the United States through a foreign country, and between the United States and a foreign country, respectively. In neither case, however, did ICCTA add any qualification suggesting that rail transportation between the United States and Canada or Mexico, for example, is subject to Board jurisdiction only if it is undertaken “as part of the international rail network.” That the phrase was added only to the subparagraph of section 10502(a)(2) in which new *intrastate* authority also was added supports the view that it was targeted solely at the newly-added intrastate provision unique to that subparagraph.

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<sup>34</sup> Id. at 95, reprinted in 1995-2 U.S.S.C.A.N. 807.

<sup>35</sup> S. Rep. No. 104-176 at 6 (1995).

<sup>36</sup> H.R. Rep. No. 104-422, 104th Cong., 1st Sess. at 1, reprinted in 1995-2 U.S.S.C.A.N. 850 (ICCTA Conference Report).

B. DesertXpress's project would be part of the "interstate rail network" in any event.

Were we to assume, for the sake of argument, that the phrase "as part of the interstate rail network" must be read as modifying the Board's authority over transportation that already is inherently interstate because it crosses a state line, the question becomes whether construction and operation of a passenger-only rail line that provides transportation between one state and another, but does not physically connect with any other rail line, would constitute "transportation by rail carrier . . . between a place in a State and a place in another State" as "part of the interstate rail network." We conclude that it would.

The ICA does not define the term "interstate rail network," as used in § 10501(a)(2)(A), and so we have discretion to interpret the term in a reasonable manner.<sup>37</sup> According to Petitioners, the phrase "interstate rail network" must be read restrictively as meaning rail lines on which freight is transported or passenger-only lines that nevertheless are physically connected to freight-carrying lines.<sup>38</sup> Petitioners assert: "ICCTA . . . effectively eliminated Federal economic regulation of interstate passenger rail service that is not performed by Amtrak or performed by carriers on lines that are part of the interstate rail network *which also serve freight shippers.*"<sup>39</sup> At oral argument, counsel for Petitioners repeatedly continued to place this restrictive gloss on the nature or scope of the term "interstate rail network."<sup>40</sup> Petitioners therefore urge the Board to find that it lacks jurisdiction over a newly constructed, high-speed passenger-only rail line, even one that will operate between 2 or more states, if it is not proposed to connect to existing freight-carrying rail lines.

We disagree. The heart of Petitioners' argument—that to be subject to our jurisdiction, a passenger line either must also serve freight shippers or must be physically connected to a line that serves freight shippers—is nowhere reflected in the plain language of the ICA. Accordingly, we reject Petitioners' restrictive construction as unsupported and contrary to the language of the statute.

Instead, we reasonably interpret the term "interstate rail network" more broadly to include (but not be limited to) facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce. Under this

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<sup>37</sup> See, e.g. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) (where legislative delegation to an agency on a particular question is implicit, a reviewing court should not overturn an agency's reasonable interpretation of statute it administers).

<sup>38</sup> Jt. Pet. 24, 27; Tr. 10-11.

<sup>39</sup> Jt. Pet. 22 (emphasis supplied).

<sup>40</sup> Tr. 12, 14, 20, 21, 42, 44, 95. Petitioners' counsel stated that not only would the DesertXpress line have to interconnect with a freight line, but there would have to be "significant quantities of freight . . . interchanged." Id. at 11.

interpretation, DesertXpress’s proposed construction and operation would be subject to the Board’s jurisdiction. Our interpretation is supported by: 1) the language of the ICA; 2) the legislative history of ICCTA; 3) case precedent; and 4) public policy considerations. We discuss each in turn below.

1) Other provisions in the ICA. Although the ICA does not define the phrase “interstate rail network,” other terms defined by Congress play an important role in interpreting the meaning of that phrase.<sup>41</sup> Here, the definitions of “transportation” and “rail carrier” help to shed light on the meaning of “interstate rail network.”

The ICA broadly defines “transportation” to include “a locomotive, car, . . . property, facility, instrumentality, or equipment of any kind related to the movement of *passengers or property, or both*, by rail . . .” and “services related to that movement . . .” 49 U.S.C. § 10102(9) (emphasis added). The disjunctive “or” conveys that “transportation” includes facilities and services that can be used: for passengers only; for freight only; or for some combination of the two. This definition supports the view that a passenger-only operation having no connection with any freight operation is within the Board’s jurisdiction. DesertXpress clearly would be providing “transportation” under section 10501 through its proposed construction and operation of a passenger-only rail line.<sup>42</sup>

The broad definition of “transportation,” in turn, is incorporated within the definition of “rail carrier.” With the exception of street railways, a rail carrier is “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). Because “transportation” can mean facilities or services related to the carriage of passengers only, DesertXpress would be a “rail carrier” under the ICA,<sup>43</sup> and the “general system of rail

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<sup>41</sup> See Bower v. Fed. Express Corp., 96 F.3d 200, 208-09 (6th Cir. 1996) (“[E]ven facially ambiguous provisions can have their meanings clarified and rendered unambiguous by reference to the statute’s structure or to other unambiguous terms in the statute”), citing K Mart Corp. v. Cartier, Inc. 486 U.S. 281, 291 (1988) and Bethesda Hosp. Ass’n v. Bowen, 485 U.S. 399, 403-05 (1988).

<sup>42</sup> Petitioners’ assertion (Jt. Pet. 22 n.21) that the definition of “transportation” in section 10102(9) is inapposite because “these references do not purport to convey jurisdiction to the Board—for that is done only in Section 10501” is baseless. The very purpose of the definitions in section 10102 is to lend meaning to terms used in Part A of Subtitle IV of Title 49, including section 10501. See § 10102.

<sup>43</sup> “Common carrier,” although not defined in the ICA, means “one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally.” Kieronski v. Wyandotte Terminal R.R., 806 F.2d 107, 108 (6th Cir. 1986), quoted in Willard v. Fairfield S. Co., 472 F.3d 817, 821 (11th Cir. 2006). Thus, a common carrier can be a carrier of passengers only, and there is no dispute in this case that DesertXpress would “hold out its services to the public generally.”

transportation” referred to in section 10102(5) can include passenger-only facilities and service, unconnected and unrelated to any transportation of freight.

Taken together, the definitions of “transportation” and “rail carrier” strongly support the view that a passenger-only line that crosses a state boundary is within the Board’s jurisdiction “as part of the interstate rail network” without being connected to the provision of freight rail service.

2) Legislative history of ICCTA. The legislative history of ICCTA also supports our interpretation of “interstate rail network.” Before ICCTA, the ICC possessed jurisdiction over interstate passenger rail (other than Amtrak, street railways, and certain local transit) for: construction and operation (49 U.S.C. § 10901 (Supp. I 1995)); common carrier obligation and use of facilities (*id.* at §§ 11101 *et seq.*); special passenger rates (*id.* at §§ 10722-24); mergers and other combinations among carriers (*id.* at §§ 11341 *et seq.*); passenger train discontinuance (*id.* at §§ 10908-09); and abandonment of rail lines (*id.* at § 10903). Petitioners cite a phrase in the Joint Explanatory Statement of the Committee of Conference for ICCTA that “regulation of passenger transportation is generally eliminated.”<sup>44</sup> We agree with DesertXpress (Reply at 12) that this statement mainly refers to 49 U.S.C. § 10501(c)(2), which now specifically limits the Board’s authority over mass transportation provided by a local governmental authority, a situation not present here.

More generally, ICCTA’s legislative history shows that the Conference Committee considered, but then expressly rejected, complete elimination of Board jurisdiction over passenger transportation in favor of a more limited “curtailment” of Board regulation of such transportation.<sup>45</sup> The bill that was reported out of the Committee and ultimately enacted: (1) explicitly retained the definition of “transportation” in 49 U.S.C. § 10102(9)(A) (discussed above), which includes facilities and services solely for the movement of passengers; (2) expanded the statutory exception for local transit;<sup>46</sup> (3) repealed the statutory sections regulating passenger train discontinuance and special passenger rates—a significant reduction in (but not elimination of) the regulation of passenger transportation; and (4) clarified that the few “local governmental authorities” providing “mass transportation” that remain under Board jurisdiction may invoke 49 U.S.C. §§ 11102 and 11103 (governing access to terminal facilities of, and switch connections to, other carriers, respectively).

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<sup>44</sup> ICCTA Conference Report 167, reprinted in 1995-2 U.S.C.C.A.N. 852.

<sup>45</sup> Id.

<sup>46</sup> Compare current 49 U.S.C. § 10501(c) with former 49 U.S.C. § 10504(b) (Supp. I 1995), which had exempted mass transportation provided by a local governmental authority only if the fares were “subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided”—a significant limitation for any commuter operations provided by a regional, multi-state authority, as may occur in metropolitan areas that cover more than one state.

None of these actions stripped the Board of its powers over the type of activity in question here. To the contrary, as previously discussed, Congress's intent in ICCTA was to *broaden* the preemptive scope of STB regulation of railroad operations described in section 10501(b). As the Ninth Circuit has observed: "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations."<sup>47</sup>

Petitioners argue further that "[t]he explicit limitation of the Board's jurisdiction over mass transportation provided by commuter rail operators in § 10501(c)(2) does not lead to the inference that other forms of passenger operations are somehow intended to be subject to the [Board's] jurisdiction. Congress simply has not provided the Board with the tools to do so."<sup>48</sup> The reverse is the case, however. Prior to ICCTA, the Board possessed the requisite jurisdiction over a case such as this, and not only has Congress not seen fit to remove it, it has expanded the agency's jurisdiction, as noted above. Nor does the legislative history support Petitioners' argument that ICCTA's explicit retention of jurisdiction over certain passenger transportation was an "oversight."<sup>49</sup> Such an inference would be a slender reed upon which to abdicate statutory obligations.

Indeed, at the time ICCTA was enacted, Congress was addressing then-prevailing possibilities for passenger-only transport, *i.e.*, Amtrak for interstate service, or passenger service "which is now purely local or regional in nature."<sup>50</sup> There is no basis, however, for concluding that Congress also anticipated and carved out—much less eliminated—from the scope of the Board's jurisdiction any and every other form of interstate passenger operations that might arise in the future as part of the nation's general system of rail transportation. As the Supreme Court has observed in construing the Clean Air Act, "without regulatory flexibility, changing circumstances and scientific developments would soon render" any statute "obsolete[.]" and the "fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth[.]"<sup>51</sup>

3) Case law. Contrary to Petitioners' contention, the cases on which they rely<sup>52</sup> actually support the Board's interpretation of "interstate rail network" as encompassing passenger-only

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<sup>47</sup> City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp., Inc. v. Ga. Public Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

<sup>48</sup> Jt. Pet. 34.

<sup>49</sup> Rebuttal 5 n.4

<sup>50</sup> ICCTA Conference Report 167.

<sup>51</sup> Massachusetts v. EPA, 549 U.S. 497, 532 (2002) (Massachusetts), quoting Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998).

<sup>52</sup> Jt. Pet. 26-27.

rail lines. In Piedmont & N. Ry. v. ICC, 286 U.S. 299, 311 (1932), the Supreme Court held that the ICA, as remedial legislation, “requires a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress.” Accordingly, the Supreme Court, like the ICC, construed narrowly the exemption from the ICA for street railways. Id. at 311-12. Likewise, in Texas Elec. Ry. v. Eastus, 25 F.Supp. 825, 830 (N.D. Tex. 1938), aff’d per curiam, 308 U.S. 512 (1939), in reviewing whether the ICC had ruled correctly that a rail line was not an interurban electric railway, the court pointed out that “the ordinary significance of the word ‘interurban’ is not helpful.” Instead, the court examined all of the services provided over the rail line and affirmed the ICC’s ruling.<sup>53</sup>

And in Ry. Labor Executives’ Ass’n v. ICC, 859 F.2d 996 (D.C. Cir. 1988) (RLEA), also cited by Petitioners, the court affirmed the ICC’s ruling that a company transporting passengers only between places in Staten Island did not operate as part of a general steam-railroad system. Id. at 998. In contrast, DesertXpress would be transporting passengers between 2 states, in interstate commerce, and for that reason the RLEA decision is inapposite.

Petitioners’ reliance on the more recent Me., Dep’t of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R., 8 I.C.C.2d 835 (1991) (State of Maine) to support their interpretation of “interstate rail network” is misplaced. State of Maine held that transferring the ownership of real property, including rail assets, from a carrier to a noncarrier does not require agency authorization if it would not impinge upon the continued ability of the rail carrier to provide common carrier service over the rail line that is part of the interstate rail network. Here, there is no claim that DesertXpress would not provide common carrier service.

Petitioners also argue that a statement in RLTD Ry. v. STB, 166 F.3d 808 (6th Cir. 1999), conflicts with the Board’s interpretation of the interstate rail network in the 2007 Decision.<sup>54</sup> The statement requiring a link to the interstate rail network may have been correct in the context of RLTD, but does not support Petitioners’ position here. In RLTD, the abandonment of the only connecting rail line was cited as a reason that a short, “orphaned” right-of-way *solely within Michigan* was no longer part of the interstate rail network. Here, of course, DesertXpress’s proposed rail line would itself be an interstate line. Indeed, if there were an active, “orphaned” rail line segment used to transport freight between states, that rail line would be a part of the interstate rail network, even under Petitioners’ view that the interstate rail network is a freight-based system.

We thus find unconvincing Petitioners’ argument that precedent requires a rail carrier providing passenger service to operate on, or connect to, freight-carrying rail lines in order to fall under the ICA. Indeed, in the only post-ICCTA court decision to date concerning passenger rail

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<sup>53</sup> The ICC and the court were construing the similarly worded exemption for street railways in the Labor Board and Tax Acts.

<sup>54</sup> Jt. Pet. 28-29.

service (excluding Amtrak), the court analyzed the term “rail carrier” and determined that the Board had jurisdiction over an entity providing luxury passenger rail service without any reference to whether the entity operated on rail lines also used to transport freight.<sup>55</sup> Nor did the underlying Board decision rest upon the distinction that freight also was transported on the tracks at issue.<sup>56</sup>

4) Public policy. The Board’s assertion of jurisdiction over DesertXpress’s proposed project also is consistent with considerations of sound public policy. In essence, Petitioners claim that the development of passenger-only high-speed rail lines like that proposed by DesertXpress can occur only as a network separate and independent from the existing freight network. But relegating interstate passenger-only rail lines to contrasting and inconsistent regulation by the various states—as Petitioners’ interpretation concededly would do<sup>57</sup>—likely would impede both the construction of these lines and commerce among the states. Congress has implemented its constitutional power to require federal regulation of transportation in interstate commerce in order to avoid a patchwork of conflicting and parochial regulatory action that impedes the flow of people and goods throughout the nation. The fact that Petitioners and DesertXpress each present proposals that would employ much of the same route and right-of-way highlights the potential for state conflicts. The exercise of federal jurisdiction could help to identify and avoid such conflicts. Thus, we reject as unfounded Petitioners’ interpretation that Congress intended to create a federal regulatory gap over the construction of high-speed passenger-only rail lines (at least those not constructed by Amtrak), and to rule out federal oversight from the Board’s mission “to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public[.]”<sup>58</sup>

Finally, Petitioners argue that FRA’s oversight is sufficient federal regulatory involvement over DesertXpress’s proposed rail line.<sup>59</sup> FRA is primarily responsible for railroad safety regulation and is the lead agency on the EIS for the DesertXpress project. The fact that

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<sup>55</sup> See Am. Orient Express Ry. v. STB, 484 F.3d 554 (D.C. Cir. 2007).

<sup>56</sup> Am. Orient Express Ry.—Pet. for Declaratory Order, FD 34502, slip op. at 3 (STB served Dec. 29, 2005). The Board’s post-ICCTA analysis in this decision was similar to the ICC’s earlier reasoning that it had jurisdiction over a rail carrier providing interstate transportation of passengers—a result also reached without discussing whether the carrier operated over lines that were used to transport freight. See Cape Cod (noting that a passenger-only rail carrier operated over tracks owned by the Commonwealth of Massachusetts without mentioning whether there were any freight operations on those tracks).

<sup>57</sup> Tr. 8, 25, 36, 41 (indicating Petitioners’ view that the states would regulate construction and operation of high-speed passenger-only rail lines).

<sup>58</sup> 49 U.S.C. § 10101(4).

<sup>59</sup> Jt. Pet. 32-33; Tr. 8.

another federal agency may also have some policy or regulatory role touching a project, or that subsequent legislative enactments may have conferred tandem responsibilities on other agencies,<sup>60</sup> has no bearing on our statutory jurisdiction. See Massachusetts (referring to overlap in jurisdiction between the Environmental Protection Agency and the Department of Transportation in regulating greenhouse gas emissions): “[W]e have no difficulty reconciling Congress’ various efforts to promote interagency collaboration and research . . . with the agency’s preexisting mandate to regulate ‘any air pollutant’ that may endanger the public welfare. Collaboration and research do not conflict with any thoughtful regulatory effort; they complement it.”<sup>61</sup> As the Court went on to explain, “[t]he two obligations may overlap, but there is no reason to think the agencies cannot both administer their obligations and yet avoid inconsistency.”<sup>62</sup>

In short, Congress retained after ICCTA the requirement in 49 U.S.C. § 10901 that a person must obtain authority to construct and operate a railroad line that will be used to transport passengers in interstate commerce, and that provision applies to a passenger rail line (other than used by Amtrak, local transit, or a street railway), whether or not any freight would be transported over the line or the line would connect to an existing rail line on which freight is transported. Nowhere in the statute or its legislative history has Congress defined the interstate rail network as essentially or exclusively freight-based. Petitioners’ efforts to read such a restriction into the statute when none exists on its face are unpersuasive. Indeed, the plain language of the statute, as well as the public policy behind federal regulation of interstate transportation, militate against that interpretation.

Procedural advantage. Petitioners put forth a final material error argument: that the jurisdictional finding in the 2007 Decision improperly confers a procedural advantage on DesertXpress by exempting it from state environmental review. Even if this argument were correct, it would not be relevant to the Board’s determination of whether the agency has jurisdiction to authorize the construction and operation of the railroad line planned by DesertXpress. As it is the statute itself that preempts the operation of state laws in cases involving the construction and operation of rail lines that are part of the interstate rail network, our interpretation of the scope of our jurisdiction under the ICA cannot be contingent upon any perceived effects of that finding on competing transportation plans.

## CONCLUSION

The Board’s assertion of jurisdiction in the 2007 Decision comports with the definitions in the ICA, ICCTA’s legislative history, case precedent, and sound public policy. The Board’s

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<sup>60</sup> Jt. Pet. 16-17.

<sup>61</sup> 549 U.S. at 530 (citations omitted).

<sup>62</sup> Id. at 532.

interpretation is a reasonable one, and Petitioners have not demonstrated changed circumstances, new evidence, or material error warranting reopening.

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

It is ordered:

1. Petitioners' requests to intervene in this proceeding and for leave to submit a rebuttal are granted.

2. The requests of DesertXpress and Rail Conference for leave to reply to the tendered rebuttal are denied.

3. Petitioners' request to reopen the 2007 Decision is denied.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.