

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 35680

233128

**ALL ABOARD FLORIDA – OPERATIONS LLC & ALL ABOARD FLORIDA –
STATIONS LLC – AUTHORITY TO CONSTRUCT AND OPERATE –
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901 – PASSENGER LINE
BETWEEN MIAMI, FL AND ORLANDO, FL**

MOTION OF PETITIONERS TO DISMISS THE PETITION FOR EXEMPTION

01 ENTERED
Office of Proceedings
OCT 09 2012
Public Record

**Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000**

***Attorneys for All Aboard Florida – Operations LLC
and All Aboard Florida – Stations LLC***

Dated: October 5, 2012

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35680

**ALL ABOARD FLORIDA – OPERATIONS LLC & ALL ABOARD FLORIDA –
STATIONS LLC – AUTHORITY TO CONSTRUCT AND OPERATE –
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901 – PASSENGER LINE
BETWEEN MIAMI, FL AND ORLANDO, FL**

MOTION OF PETITIONERS TO DISMISS THE PETITION FOR EXEMPTION

All Aboard Florida – Operations LLC (“AAF-O”) and All Aboard Florida – Stations LLC (“AAF-S”) (collectively, “Petitioners”) hereby file this Motion to Dismiss their concurrently filed Petition for Exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction and operation of a 230-mile intercity passenger railroad that will connect Orlando, Florida and Miami, Florida, with intermediate stations in Fort Lauderdale and West Palm Beach (the “All Aboard Florida Line”). Petitioners respectfully submit that their proposed construction and operation of the All Aboard Florida Line is not subject to the Board’s prior approval or exemption, because the subject rail lines will be located entirely within the state of Florida and will not be constructed or operated as “part of the interstate rail network.” 49 U.S.C. § 10501(a)(2)(A). The All Aboard Florida Line will provide only intrastate passenger service and will not offer any interstate service for either passengers or freight. Accordingly, the All Aboard Florida Line will not be part of the interstate rail network, and the Board lacks jurisdiction over it.

Petitioners are undertaking the two-step process of filing a Petition for Exemption and this Motion to Dismiss to ensure that the Board concurs that it lacks jurisdiction over the proposed construction and operation of the All Aboard Florida Line and – in the event that the Board disagrees – to provide the Board with sufficient information to proceed with an exemption for a passenger construction project that will provide a new, convenient, environmentally friendly, and cost-effective way to travel between Orlando and Miami, Florida.

Petitioners respectfully request that the Board resolve this Motion to Dismiss as soon as possible so that Petitioners may proceed to arrange the financing for the project and commence construction. *See* Petition for Exemption at 2 (explaining need for expedited Board action). Petitioners ask the Board to act on this Motion as soon as possible and in any event before December 31, 2012.

I. BACKGROUND

The Petition for Exemption and its attached Verified Statement of P. Michael Reininger detail the factual background of the All Aboard Florida Line and the public benefits that would result from construction and operation of that Line. Petitioners incorporate that factual discussion by reference into this Motion, and below summarize only those additional facts that are relevant to the jurisdictional issue presented in this Motion.

Petitioners plan to construct and operate the All Aboard Florida Line, which will provide scheduled passenger rail service between Orlando and Miami, with station stops at Fort Lauderdale and West Palm Beach. *See* Petition for Exemption Exhibit 1 (Map of All Aboard Florida Line).¹ The All Aboard Florida Line will operate primarily on tracks to be constructed

¹ AAF-O will construct and operate on the new passenger line; AAF-S will be responsible for developing and managing the passenger stations along the route. *See* Petition for Exemption, Verified Statement of P. Michael Reininger (“Reininger V.S.”) at 3. Both AAF-O and AAF-S are wholly owned subsidiaries of Florida East Coast Industries, Inc. (“FECI”). *See id.*

on an existing right-of-way along the east coast of Florida (the “FEC Corridor”) that is owned by Florida East Coast Railway, L.L.C. (“FECR”).² *See* Petition for Exemption, Verified Statement of P. Michael Reininger (“Reininger V.S.”) at 2. AAF-O currently holds an easement to construct and provide passenger service along FECR’s rail corridor. *See id.* at 3. Approximately 200 miles of the new AAF passenger line – the segment between Miami and Cocoa – will be built on the FEC Corridor, alongside the existing FECR tracks. *See id.* Rights to any additional land needed for the remainder of the All Aboard Florida Line would be obtained through (1) the acquisition of minor segments of land where required to optimize travel time; and (2) for the east-west segment of the All Aboard Florida Line connecting Cocoa and Orlando, through the negotiation of leases and/or other rights to use certain rights-of-way owned by the Florida Department of Transportation (“FDOT”) and the Orlando Orange County Expressway Authority (“OOCEA”).

The All Aboard Florida Line is a stand-alone intrastate passenger rail system that will not be part of the national passenger or freight rail network. The All Aboard Florida Line will not connect with the lines of Amtrak or any other interstate passenger rail service provider. *See* Reininger V.S. at 5. Rather, Petitioners will operate exclusively intrastate passenger trains, and the transportation services that will be offered will be passenger transportation between points in Florida. Petitioners have no current plans to provide through ticketing with Amtrak or any other interstate passenger service provider to points beyond Florida. *See id.* While the All Aboard Florida Line’s tracks may physically cross over, or connect with, the adjacent tracks on the FECR freight corridor, Petitioners will not participate in any intrastate or interstate freight

² FECCI and FECR are owned by equity funds that are controlled by Fortress Investment Group LLC and its affiliates. *See* Reininger V.S. at 3.

movements. *See id.* The All Aboard Florida Line's tracks will not connect with the tracks of any freight railroad other than FECR. *See id.*

AAF-O contemplates entering into an agreement with FECR pursuant to which AAF-O would obtain the right to operate passenger trains over portions of FECR's existing tracks, and FECR would gain the right to operate freight trains over those newly-constructed AAF tracks. *See Reininger V.S.* at 5. Such an arrangement would enhance the efficiency of both passenger and freight service offered by AAF-O and FECR, respectively. *See id.* at 5-6. FECR would, to the extent required, seek STB authorization or exemption for those future arrangements prior to implementing them.

II. THE BOARD DOES NOT HAVE JURISDICTION OVER THE CONSTRUCTION AND OPERATION OF THE ALL ABOARD FLORIDA LINE.

A. Under the Interstate Commerce Act, the Board Does Not Have Jurisdiction Over Intrastate Rail Transportation Unless It Is Part of the Interstate Rail Network.

The Board does not have jurisdiction over the proposed construction and operation of the All Aboard Florida Line because the Interstate Commerce Act does not grant the Board jurisdiction over rail lines that are located entirely in one state and that are not operated as part of the interstate rail network. Specifically, 49 U.S.C. § 10501(a)(2)(A) provides that the Board has jurisdiction over "transportation by rail carrier" for "transportation in the United States between a place in a State and a place in the same or another State as part of the interstate rail network." The Board has construed this language "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 well as (2) transportation by rail carrier that is between a place in a state and another place in the same state, so long as that intrastate transportation is carried out 'as part of the interstate rail network.'" *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, STB Fin. Docket

No. 34914, at 9 (May 6, 2010) (“*DesertXpress*”); see *State of Maine – Petition for Declaratory Order*, STB Fin. Docket No. 35440, at 2 (Dec. 10, 2010) (“The Board does not have jurisdiction over intrastate rail transportation that is not part of the interstate rail network.”).

Under the statute, the key question when determining whether intrastate rail transportation is subject to the Board’s jurisdiction is whether the intrastate transportation is “part of the interstate rail network.” To be part of the interstate rail network, rail facilities must be both “part of the general system of rail transportation” and “related to the movement of passengers or freight in interstate commerce.” *DesertXpress* at 11. The test is a functional one – an intrastate rail line does not become part of the “interstate rail network” simply because it is connected physically to a rail line that is used to provide interstate rail service. Rather, an intrastate rail line (or service) is subject to the Board’s jurisdiction only if the “rail transportation” provided by the line is “performed” or “carried out” as part of the interstate rail network. *DesertXpress* at 8, 9.

Thus, when considering whether an intrastate passenger line is part of the interstate rail network, the agency’s inquiry typically focuses on whether or not the intrastate operations are used for interstate movements. See, e.g., *Cape Cod & Hyannis R.R., Inc. – Exemption from 49 U.S.C. Subtitle IV*, ICC Fin. Docket No. 31229, available at 1988 WL 226127, at *1 (Mar. 21, 1988) (“*Cape Cod & Hyannis*”) (“We . . . have jurisdiction over a railroad lying wholly within one State if it participates in the movement of passengers from one State to another under common arrangements with connecting carriers or in the movement of freight in interstate commerce” (internal citations omitted)).³

³ See also *Magner-O’Hara Scenic Ry. v. ICC*, 692 F.2d 441, 445 (6th Cir. 1982) (affirming unpublished ICC decision that it lacked jurisdiction over intrastate passenger railroad because it

One important element of the jurisdictional analysis is whether through service or through ticketing is contemplated. An intrastate passenger operator that maintains through ticketing arrangements with other passenger rail providers for interstate travel may be deemed part of the interstate rail network.⁴ On the other hand, an intrastate line that does not participate in such through ticketing arrangements is typically not part of the interstate rail network and is not subject to the Board's jurisdiction.⁵

B. The All Aboard Florida Line Is Not Part of the Interstate Rail Network.

When the statutory language and the agency's precedents are applied to this case, the construction and operation of the All Aboard Florida Line is plainly outside the Board's jurisdiction, for it will be a purely intrastate rail service that is not part of the interstate rail network.

First, there is no question that the All Aboard Florida Line will be located entirely within the State of Florida. *See* Petition for Exemption Exhibit 1 (map of All Aboard Florida Line). The fact that the All Aboard Florida Line will be confined to a single state distinguishes this case from recent passenger cases like *DesertXpress*, in which the Board's finding of jurisdiction was

would "lie entirely within the state of Michigan [and] [n]o connections to any other common carrier railroads are contemplated").

⁴ *See, e.g., Cape Cod & Hyannis*, 1988 WL 226127, at *1 (finding jurisdiction over passenger railroad located entirely in Massachusetts because railroad had "through ticket arrangements with Amtrak, a carrier providing interstate service").

⁵ *See, e.g., State of Maine—Petition for Declaratory Order*, STB Fin. Docket No. 35440, at 2 (Dec. 31, 2010) (finding "no evidence in the record at this time that exercise of these [intrastate] passenger rail operating rights would fall within the Board's jurisdiction over transportation," where petitioner's "current passenger rail service plans do not contemplate, for example, the provision of service beyond state lines, either on its own or by through ticketing arrangements with another carrier"); *cf. Napa Valley Wine Train, Inc. – Petition for Declaratory Order*, 7 I.C.C.2d 954, 964 (1991) ("*Napa Valley*") (finding that intrastate carrier was outside ICC jurisdiction despite the existence of potential through ticketing with Amtrak, where the through ticketing arrangement was cumbersome and would require passengers to connect via an intervening bus service).

predicated on the fact that the proposed passenger rail line crossed state lines. *See DesertXpress* at 8 (“that DesertXpress’s project would cross a state line is enough, by itself, to bring the project under our jurisdiction”).

Second, the All Aboard Florida Line will not be operated as part of the interstate rail network. The All Aboard Florida Line will not connect with Amtrak or any other interstate passenger rail operator, and Petitioners will not offer through ticketing in conjunction with any other rail provider. A passenger traveling on an All Aboard Florida train therefore will not be “mov[ing] . . . from one State to another under common arrangements with connecting carriers.” *Cape Cod & Hyannis*, 1988 WL 226127, at *1. Rather, AAF-O’s services can be used by passengers only for rail travel *within* the State of Florida. Such intrastate rail travel is not subject to the Board’s jurisdiction. *See State of Maine—Petition for Declaratory Order*, STB Fin. Docket No. 35440, at 2 (Dec. 31, 2010) (Board has no jurisdiction when “current passenger rail service plans do not contemplate, for example, the provision of service beyond state lines, either on its own or by through ticketing arrangements with another carrier”); *see also Magner-O’Hara Scenic Ry.*, 692 F.2d at 445; *Napa Valley*, 7 I.C.C.2d at 964-67 (Commission had no jurisdiction over intrastate railroad whose service was “essentially local”).

To be sure, it is possible that some passengers might travel on the All Aboard Florida Line as part of a multimodal interstate journey (*e.g.*, traveling by airplane or bus to Orlando and then on to Miami by AAF-O train, or traveling to Ft. Lauderdale via AAF-O service after arriving in Miami aboard a cruise ship). But such multimodal passenger travel does not give the Board jurisdiction over Petitioners’ operations, because 49 U.S.C. § 10502(a)(2)(A) requires intrastate rail service to be performed or carried out as “part of the interstate rail network” to

trigger STB jurisdiction. A hypothetical nexus to potential interstate travel via non-rail modes is not sufficient.⁶

Furthermore, the facts that the All Aboard Florida Line might cross or physically connect with FECR's freight rail lines, and that AAF-O and FECR may agree that AAF-O trains may operate on FECR tracks do not change the fact that the passenger services operated by Petitioners will not be part of the interstate rail network. Indeed, both the Board and the ICC have held that they lacked jurisdiction over intrastate passenger rail operations even where those passenger operations were conducted over the lines of a freight railroad.⁷ Here, the fact that the All Aboard Florida Line may connect in some places with parallel FECR tracks and the fact that AAF-O trains may sometimes operate over portions of those FECR tracks plainly does not change the essentially intrastate nature of Petitioners' operations.

* * *

In conclusion, the passenger rail line that Petitioners propose to construct and operate upon will be located entirely within the State of Florida and will be used only to provide passenger transportation within the State of Florida. The All Aboard Florida Line will not

⁶ This conclusion is not affected by *Napa Valley*. The petitioner in *Napa Valley* argued initially that its plan to offer through ticketing with a bus service made its operations an interstate passenger service. See *Napa Valley*, 7 I.C.C.2d at 961. But upon reopening the *Napa Valley* petitioner failed to provide information about through ticketing arrangements with motor carriers, see *id.* at 961 n.21, and the ICC never considered the argument (likely deeming it to have been waived). Most importantly, *Napa Valley* predated ICCTA and the current statutory language restricting the Board's jurisdiction to intrastate operations that are part of the interstate rail network. Under current law, an intrastate railroad's through ticketing arrangement with a non-rail mode does not give rise to STB jurisdiction.

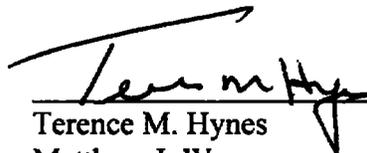
⁷ See, e.g., *State of Maine—Petition for Declaratory Order*, STB Fin. Docket No. 35440, at 2 (Dec. 31, 2010) (finding that proposed intrastate passenger rights were not within Board's jurisdiction even though they were operating rights over the lines of a freight railroad that is part of the interstate rail network); *O'Hara Scenic Ry. v. ICC*, 692 F.2d 441, 445 (6th Cir. 1982) (ICC lacked jurisdiction over intrastate passenger railroad that would operate using trackage rights "over existing track owned by three interstate freight carriers").

connect physically with the lines of any interstate passenger service provider, nor do Petitioners plan to offer any through ticketing arrangements in conjunction with other railroads. Because the All Aboard Florida Line will neither “participate[] in the movement of passengers from one State to another under common arrangements with connecting carriers” nor participate “in the movement of freight in interstate commerce,” *Cape Cod & Hyannis* at *1, the Board does not have jurisdiction over the construction and operation of the All Aboard Florida Line, and the Petition for Exemption should be dismissed.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Board dismiss the Petition for Exemption for want of jurisdiction.

Respectfully submitted,



Terence M. Hynes
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Attorneys for All Aboard Florida – Operations LLC
and All Aboard Florida – Stations LLC*

Dated: October 5, 2012