

EXPEDITED CONSIDERATION REQUESTED

240802

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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May 27, 2016
Part of
Public Record

Finance Docket No. 36025

**TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. &
TEXAS CENTRAL RAILROAD, LLC
—AUTHORITY TO CONSTRUCT AND OPERATE—
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901 AND SUBTITLE IV—
PASSENGER RAIL LINE BETWEEN DALLAS, TX AND HOUSTON, TX**

REBUTTAL BRIEF IN SUPPORT OF PETITION FOR CLARIFICATION

Petitioners Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC (collectively, “Texas Central”) respectfully submit this rebuttal brief in support of their petition for a clarifying order under 49 C.F.R. § 1117.1.¹

INTRODUCTION

Texas Central’s clarification petition seeks guidance on one narrow question of federal law: Does 49 U.S.C. § 10901 require final Board authorization of a railroad line construction project before the proponent—having committed that it will

¹ Texas Central asks the Board to accept this rebuttal in the interest of having a complete record and to correct certain inaccurate statements regarding the scope of its request for clarification. Texas Central will not at this time address initial comments on the Board’s jurisdiction over this project, but will wait for the complete record, as comments on the petition for exemption are not due until May 31, 2016. The Board can assume *arguendo* that it has jurisdiction for purposes of resolving the motion for clarification, since 49 U.S.C. § 10901 plainly presents no bar to the use of Texas eminent domain procedures if this rail project is not “part of the interstate rail network.” Texas Central will respond to all challenges to jurisdiction once the comment period has lapsed, and hereby incorporates that response by reference.

not seek involuntary physical possession of any property—may initiate the administrative phase of a Texas condemnation proceeding? The answer turns on the plain language of the statute and the bedrock principle that “[t]he Board plays no role in any eminent domain proceedings and does not approve or disapprove any condemnation of private property under state law.”²

Contrary to the claims of project opponents, answering the *federal* question raised in Texas Central’s petition does not require the Board to interpret or apply Texas condemnation law. The Board’s order would neither dictate state procedures, nor change land owners’ rights and protections under state law. All questions relating to the use of eminent domain should, and will, be decided by Texas courts applying Texas law.

ARGUMENT

Under Board regulations, responses to Texas Central’s petition were originally due on May 9, 2016. When project opponents asked for an extension of that deadline, Texas Central consented. It is submitting this rebuttal to correct the fundamental mischaracterizations of its petition contained in those opponents’ responses.

A. The Board need not opine on Texas condemnation law.

If there is one thing about which all sides in this proceeding seem to agree, it is that the Board should not interpret Texas condemnation law.³ The opposition fil-

² *Tongue River R.R. Co., Inc.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, Mont.*, Docket No. FD 30186 at 13 (Mar. 22, 2013) (“Tongue River”).

³ *See, e.g.*, Texans Against High Speed Rail (“TAHSR”) Reply at 14; Delta Troy Reply at 11-12.

ings in this proceeding nonetheless focus heavily on the requirements of Texas condemnation law, which project opponents wrongly say that Texas Central is trying to circumvent.

As an initial matter, Texas Central’s petition does not require the Board to “instruct Texas state courts as to when eminent domain may or may not be used with respect to rail projects in Texas.”⁴ All questions related to Texas law and procedure should (and will) be decided by Texas state courts. In this vein, Texas courts have ruled that electric utilities do not need project approval from the Public Utilities Commission to exercise the power of eminent domain, thereby declining to layer an additional restriction on the exercise of eminent domain procedures beyond those imposed by the Texas legislature.⁵ Applying state condemnation decisions in the rail context is a pure question of state law for state judges.

Clarifying the meaning of the term “construct” in Section 10901 also will not affect the timeliness of eminent domain proceedings, or alter any rights or remedies that property owners may have under Texas state law.⁶ It remains for Texas courts to decide “when eminent domain can, and cannot, be utilized.”⁷ Even so, several parties object to the use of state condemnation procedures before Board approval on

⁴ TAHSR Reply at 14; *see* Delta Troy Reply at 12.

⁵ *Baird v. Sam Houston Elec. Co.*, 627 S.W.2d 734, 736-37 (Tex. App. 1981); *Sam Houston Elec. Coop. v. Baird*, 1991 Tex. App. Lexis 1853, 1991 WL 130877 (Tex. App. 1991).

⁶ *See, e.g.*, Delta Troy Reply at 12-13 (arguing that Texas Central does not qualify as a railroad under state law); Navarro County Reply at 6 (arguing that the taking of property is not necessary); TAHSR Reply at 17 (arguing that condemnation is unripe before the Board rules on Texas Central’s exemption petition).

⁷ Delta Troy Reply at 14.

the grounds that Texas Central could acquire property it does not need, or create an unwarranted cloud on titles.⁸ Any entity exercising the power of eminent domain in Texas must be able to demonstrate that there is a public necessity under Texas law for acquiring the property.⁹ A ruling on Texas Central’s clarification petition would not change that. Rather, it would address only the federal law question of whether Board authorization is necessary before Texas Central initiates the administrative valuation phase of the state condemnation process, where it has committed not to seek physical possession of any property involved in that process. It would not require the Board to embroil itself in state law legal and equitable questions.

B. Property valuation proceedings are not construction under Section 10901.

Recognizing that state law questions will be addressed in state court, Texas Central’s petition raises a straightforward statutory interpretation question. The ICC Termination Act (“ICCTA”), 49 U.S.C. § 10901(a), prohibits “construct[ion]” of “an additional railroad line” without Board authorization. Because Texas Central may initiate condemnation proceedings—but not to seek possession of any condemned land—before it has the Board’s approval to construct and operate its line, it seeks clarification that doing so will not qualify as “construction” under Section 10901.

The term “construct” in Section 10901(a) is not among those terms that ICCTA specifically defines. But the absence of a statutory definition for a word as

⁸ Delta Troy Reply at 14-15; TASHR Reply at 17-18; Navarro County Reply at 6-7.

⁹ *Whittington v. City of Austin*, 174 S.W.3d 889, 897-98 (Tex. App. – Austin 2005, pet. denied).

clear and commonplace as “construct” should be no surprise. When the meaning of a word is unambiguous, and Congress intends to use that meaning, there is no need for a statutory definition. Congress accordingly drafts laws, and courts interpret them, with the understanding that any words left undefined should have their “ordinary meaning.”¹⁰

As Texas Central explained in its petition, the ordinary meaning of the term “construct” includes “putting together” and “building.”¹¹ Applied to a railroad line, construction thus means the physical act of building the line. Here, Texas Central will *not* build its proposed railroad line *unless and until* the Board grants its exemption petition. In the meantime, it is asking the Board to clarify that initiating the administrative property valuation process—the first phase of an eminent domain proceeding—without seeking physical possession of the property, would not fall within the ordinary meaning of the term “construct” in Section 10901.¹²

Opponents of Texas Central’s project argue that the ordinary meaning of the term “construct” is “not probative,”¹³ suggesting that under U.S. Supreme Court

¹⁰ *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012); *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994); *cf. Hospital Textile Sys., Inc. Foreign Motor Carrier Certificate of Registration*, Docket No. MX 248233, 1991 WL 280489, at *2 (Dec. 27, 1991) (citing other “widely accepted sources,” including Black’s Law Dictionary, to define a term not specifically defined in a statute).

¹¹ Pet. for Clarification at 6-7 (citing Random House Dictionary of the English Language; Webster’s II New College Dictionary).

¹² As explained in its petition for clarification, Texas Central will not seek to take physical possession of any property subject to these administrative proceedings until the Board rules on its exemption petition. Pet. for Clarification at 6 (citing Keith Clarification V.S. ¶ 8).

¹³ Delta Troy Reply at 6 n.21; *see* TAHSR Reply at 13.

precedent, ICCTA is a “remedial statute” whose words should be given a “broader and more liberal interpretation.”¹⁴ This argument fails on two fronts.

First, opponents offer no good reason to think that the term “construct” should include the administrative property valuation phase of a condemnation proceeding like the one used in Texas, no matter how liberally it is interpreted. They merely ask the Board to ignore the ordinary meaning of “construct” because they hope to delay condemnation proceedings until the Board has authorized the project under Section 10901.¹⁵ But, as discussed above, the propriety of a condemnation proceeding is a question of state law that should be addressed in Texas state courts, not through an interpretation of Section 10901. The Board has rightly declined to address such issues in its past decisions.¹⁶

Second, the Supreme Court has expressed serious reservations about departing from a “statute’s text and structure” in favor of a presumption that “remedial statutes should be interpreted in a liberal manner.”¹⁷ “Congressional intent,” the Court has instructed, “is discerned primarily from the statutory text.”¹⁸ The ordinary meaning of the statutory text in this case could hardly be clearer. Under Section 10901, Board authorization is a prerequisite to building a new railroad line. By the same token, Board authorization is not needed for activities short of “construc-

¹⁴ *DesertXpress Enters., LLC—Petition for Declaratory Order*, Docket No. FD 34914, Decision at 15 (May 6, 2010) (quoting *Piedmont & N. Ry. v. ICC*, 286 U.S. 299, 311 (1932)).

¹⁵ TAHSR Reply at 13.

¹⁶ *Tongue River* at 13.

¹⁷ *CTS Corp. v. Waldenburger*, 134 S. Ct. 2175, 2185 (2014).

¹⁸ *Id.*

tion,”¹⁹ including the administrative property valuation phase of Texas condemnation proceedings.

To make it crystal clear that it will not engage in construction without Board authorization, Texas Central committed to the Board that it would not try to take physical possession of any property through the condemnation process until the Board had finished reviewing its exemption petition. This commitment will prevent the use of condemnation to facilitate unauthorized construction activities. It also distinguishes the facts of this case from those presented in *Nicholson*, where the railroad’s ongoing condemnation proceedings were tantamount to construction because the railroad had publicly disclosed its intent to start construction without ICC approval,²⁰ and from *Tampa Phosphate*, where a railroad was attempting to condemn property despite the fact that the ICC had affirmatively *denied* it permission to construct.²¹

Finally, the plain meaning of the term “construct”—and *Nicholson*’s inapplicability outside of its immediate context—is underscored by the fact that the Board has at least tacitly accepted the use of eminent domain to acquire property before granting Section 10901 construction approval. In *Norfolk Southern Corp.*, a 2003 decision involving the construction of a new rail line in Pennsylvania, project opponents claimed—and Norfolk Southern did not dispute—that some of the prop-

¹⁹ See *U.S. Rail Corp.—Construction & Operation Exemption—Brookhaven Rail Terminal*, Docket No. FD 35141 at 3-4 (June 9, 2010).

²⁰ *Nicholson v. Missouri Pacific R.R. Co.*, 366 I.C.C. 69, 72 (1982); see Pet. for Clarification at 7-8.

²¹ *Tampa Phosphate R.R. Co. v. Seaboard Coast Line R.R. Co.*, 418 F.2d 387, 391 (5th Cir. 1969).

erty for the route had already been acquired by eminent domain.²² In granting construction authority, the Board expressed no concern with the railroad having availed itself of state condemnation proceedings prior to obtaining authority to construct.²³ If Section 10901 applied as broadly as the opponents of Texas Central’s project contend, Norfolk Southern’s pre-approval use of condemnation would have been prohibited.

CONCLUSION

It bears repeating that “[t]he Board plays no role in any eminent domain proceedings and does not approve or disapprove any condemnation of private property under state law.”²⁴ Texas Central fully agrees. The narrow federal question presently to the Board hinges on the meaning of the term “construct” in Section 10901. Because that term cannot reasonably be interpreted to include the administrative property valuation phase of a Texas condemnation proceeding—especially where the railroad has committed not to seek physical possession until the Board has approved the project—federal law should play no role in deciding whether, and when, Texas Central can initiate such proceedings.

²² *Norfolk Southern Corp. & Norfolk Southern Ry. Co.—Construction and Operation—Indiana Cty., Penn.*, Docket No. FD 33928 at 5 (May 16, 2003).

²³ *Id.* at 12.

²⁴ *Tongue River* at 13.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of this document on all parties of record listed on the Board's website by first-class U.S. Mail, postage prepaid.

/s/ Jay C. Johnson

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