

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36025

241051

**TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. &
TEXAS CENTRAL RAILROAD, LLC-
AUTHORITY TO CONSTRUCT AND OPERATE-
PASSENGER LINE BETWEEN DALLAS, TX AND HOUSTON, TX**

ENTERED
Office of Proceedings
July 6, 2016
Part of
Public Record

**REPLY IN OPPOSITION TO MOTION FOR LEAVE
TO FILE RESPONSE TO REPLIES**

Texans Against High Speed Rail, Inc. (“TAHSR”) files this Reply in Opposition to Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC’s (“TCR”) Motion for Leave to File Response to Replies as follows:

INTRODUCTION

TCR chose not to include any evidence to support its Petition for Exemption. In truth, it has little, if any, evidence to support this ill-fated Project. TCR is a woefully under-capitalized start-up with no known railroad experience. In a recent deposition, TCR's corporate representative admitted and publicly disclosed the following:

- (1) TCR does not have the money to buy any trains;
- (2) TCR does not even have a contract in place to buy any trains;
- (3) TCR does not have the money to purchase the necessary land; and
- (4) TCR does not have the financing in place to build the train.¹

Despite these facts, TCR has requested that the Board approve its \$12 to \$18 billion construction project that will create a 240-mile long barrier across Texas, based solely on the self-

¹ Exhibit A – Excerpts from Deposition of Shaun McCabe (taken June 23, 2016).

serving statement of its most recent CEO Tim Keith. As it stands, there is no question TCR's Petition is deficient.

Now, two months after filing its Petition, TCR requests leave to file a 39-page "reply to a reply," along with alleged supporting evidence that should have been included with its Petition. This is the second time TCR has attempted legal gamesmanship to supplement the record in violation of the rules. After multiple interested parties replied to TCR's Petition for Clarification, TCR filed "a reply to a reply" disguised as a "Rebuttal Brief in Support of Petition for Clarification."² TCR's Rebuttal breathed no life into its extraordinary request that it be allowed to begin condemnation proceedings before a final route is chosen and construction is approved, on property that ultimately may not be needed. As a result of the inconsequential statements in TCR's Rebuttal, TAHSR did not move to strike or otherwise respond.

In contrast, TCR's present attempt to untimely supplement the record is unfair and highly prejudicial to TAHSR and other interested parties. By making new, redacted arguments, rearguing those already made, and introducing alleged evidence under seal, TCR has deprived interested parties of the opportunity to fully and meaningfully respond, while also making the process extremely expensive and oppressive for its opponents. Under these circumstances, and as the representative of the thousands of Texans who will be adversely affected by this Project, TAHSR cannot turn a blind eye to TCR's tactics and its willful violation of the rules. Neither should the Board. TAHSR respectfully requests that the Board enforce its rules and deny TCR's Motion for Leave.

² TCR submitted its "rebuttal" pursuant to 49 C.F.R. §1171.1, but that rule concerns "Petitions." It does not even mention rebuttals, replies, or responses, let alone provide a basis for filing one.

ARGUMENT

I. TCR chose to file a deficient petition in violation of the rules, and it would be extremely unfair and prejudicial to allow TCR to fix that problem now.

Two separate rules mandate denial of TCR's Motion. First, 49 C.F.R. §1121.3(a) states that a "party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents *at the time it files its petition.*" (emphasis added). Rather than comply with this rule, TCR chose to file its Petition without any supporting documents or evidence. Likewise, TCR withheld portions of its "case-in-chief," choosing instead to introduce new, redacted arguments in "a reply to a reply." These are clear, inexcusable violations of §1121.3(a). Admittedly, TCR has been working on this Project for years.³ It had ample time and opportunity to form its arguments and gather its evidence *prior* to filing its Petition.

Second, 49 C.F.R. §1104.13(c) states that a "reply to a reply is not permitted." The Board has routinely enforced this rule in similar instances, and it should do so here.⁴ The rule is designed

³ According to TCR, the Federal Railroad Administration initiated the Project's environmental review in mid-2014, almost two years ago. Petition for Exemption at 3, n.5. Obviously, development of the Project began a considerable time before initiation of the environmental review.

⁴ See, e.g., *Cal. High-Speed Rail Auth.—Petition for Declaratory Order*, FD 35861, slip op. at 5 (served Dec. 12, 2014) ("Our rules do not permit a reply to a reply."); *Peter Pan Bus Lines, Inc.—Pooling--Greyhound Lines, Inc.*, MC-F-20904, MC-F-20908, and MC-F-20912, at 2 (served Apr. 19, 2011) ("The alleged misstatements do not, however, constitute good cause for accepting a reply to a reply."); *Burlington N. R.R. Co. --Abandonment Exemption-- Between Klickitat & Goldendale, Wa Burlington N. R.R. Co. --Abandonment Exemption-- in Klickitat Cty., Wa*, AB-6 (SUB 335X), at 2 (served June 7, 2005) (denying leave where party presented no justification for the relief sought while the opposing parties showed prejudice); *E. W. Resort Transp., LLC, & Tms, LLC, d/b/a Colorado Mountain Express--Petition for Declaratory Order--Motor Carrier Transp. of Passengers in Colorado*, MC-F-21008, at 1 (served Apr. 8, 2005) (rejecting "a reply to a reply" submitted on the ground that the record was incomplete due to representations made in the opposing party's reply); *Capitol Materials Inc.—Petition for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry. Co.*, 42068, at 4, n.7 (served Apr. 18, 2002) (rejecting a reply consisting of a rehash of arguments); *Ocean Logistics Mgmt., Inc.*, WCC-102, at 2 (served Jan. 12, 2000) (rejecting a reply where "no persuasive showing" of good cause has been made); *Tongue River R.R. Co., Inc.—Acquisition & Operation Exemption—Tongue River R.R. Co.*, FD 33644, at 5, n.6 (served Nov. 9, 1998) (reply rejected as an effort to "further elaborate" on previously raised issues).

to prevent parties like TCR from “sandbagging” in their petition, which is exactly the strategy TCR has employed:

- (1) File a naked petition with no supporting evidence;
- (2) Cause your opponents to incur substantial legal expenses;
- (3) Draw out your opponents’ arguments and evidence;
- (4) Then, make new, redacted arguments and file your evidence for the first time; and
- (5) File the evidence under seal to prevent any meaningful response.

Allowing a party to proceed in this manner defeats the very purpose of the rule, resulting in unfairness and a high degree of prejudice to interested parties like TAHSR.

II. None of TCR’s authorities support its claim of “good cause.”

On the issue of good cause, TCR relies on three Board decisions. On Page 1, TCR cites to two cases for the proposition that “a reply to a reply” is permitted for good cause.⁵ TCR’s reliance on these cases is misguided, as both cases are easily distinguishable. In *Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, Sacramento Valley moved for a protective order. In its reply, Sierra did not oppose the protective order, but asked that it include a paragraph permitting disclosure of confidential material to a third party that Sierra had been negotiating with to purchase its railroad. Sacramento Valley moved for leave to file a response to Sierra’s reply. The Board found that good cause existed for “a reply to a reply” due to Sierra’s request for a significant modification to the protective order. No such facts or circumstances exist here.

In *Cross Oil Ref. & Mktg., Inc. v. Union Pac. R.R. Co.*, Union Pacific moved to dismiss Cross Oil’s complaint. Cross Oil replied, and Union Pacific then sought leave to file “a reply to a

⁵ *Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, NOR 42133, at 1, n.1 (served Mar. 9, 2012) and *Cross Oil Ref. & Mktg., Inc. v. Union Pac. R.R. Co.*, FD 33582, at 1 (served Oct. 27, 1998).

reply.” The Board found that good cause existed based in part on the fact that Union Pacific had “explained why it did not submit this information [contained in the reply] earlier.” More importantly, the Board noted that Cross Oil did not object to Union Pacific’s filing. The facts and circumstances are completely different here. TCR has provided no real explanation for its decision to withhold its new, redacted arguments, its “five independent studies,” or any of its other alleged evidence filed under seal. And, TCR’s Motion is opposed—by TAHSR and other interested parties—due to the fact that they have been deprived of the opportunity to fully respond.

Finally, on Page 3, TCR cites to *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 9 I.C.C. 2d 989 (1993) in support of its claim that “[w]here a movant could not have anticipated the arguments and claims of an opponent that could be central to the case... it has shown good cause for leave to file a reply.” In the *D&H* case, Conrail sought leave to file “a reply to a reply” on the basis that it could not have anticipated the claim that reciprocal switching rights were included in an application to acquire trackage rights, when the application omitted any mention of reciprocal switching rights.⁶ Contrary to the convoluted and highly complex situation in the *D&H* case, and as explained in detail below, TCR must have known that an unsupported Petition would draw enemy fire from the widespread opposition to the Project.

Furthermore, TCR’s request for leave to supplement the record in this exemption proceeding is fundamentally different than a request for leave to supplement a motion for protective order (*Sierra*), a motion to dismiss (*Cross Oil*), or a motion to vacate a prior Board decision (*D&H*). In those cases, the movant was not seeking leave to supplement the record with

⁶ As Commissioner Walden observed in his dissent, neither the Notice of Intent to File an Application, nor the Application itself, nor the Asset Purchase Agreement, nor the Related Applications document (including trackage rights), contained *any* reference to the reciprocal switching rights. 9 I.C.C. at 1007-1009. (emphasis in original).

information or evidence which the rules expressly require a party to submit at the time the motion (or petition) is filed. Rather, the movant was merely requesting leave to add to or clarify existing arguments related to a specific motion in an existing proceeding.

In stark contrast, TCR is requesting exemption from prior construction approval requirements for its “first of its kind,” multi-billion-dollar Project.⁷ As a petitioner seeking exemption, TCR was required to provide its case-in-chief and all supporting evidence and materials *at the time it filed its Petition*. 49 C.F.R. §1121.3(a). Deliberately choosing to violate this rule, only to attempt to come into compliance after the fact, has a much more severe impact than, for example, seeking leave to respond to a party’s request to add a provision to a protective order. The difference is, TAHSR and other interested parties are being deprived of a full and fair opportunity to respond to redacted arguments and sealed evidence that form the basis of the ultimate relief requested. TCR has cited no cases, and there are none, where good cause has been found to allow a party to fix an intentionally deficient petition for exemption through “a reply to a reply.” The Board should not create such a dangerous precedent here.

III. TCR cannot, and has not, demonstrated good cause to allow it to correct its deficient Petition.

The crux of TCR’s Motion is that good cause exists because it could not have anticipated TAHSR’s and Delta Troy’s arguments and “new evidence” submitted in their replies. The fact that TAHSR presented substantial evidence—while TCR presented none—does not make TAHSR’s evidence “new.” TCR claims further that affording it the opportunity to respond will provide the Board with “a more complete record” and that this “fuller, more complete record” will help the

⁷ Although the Project may be a “first of its kind” in the United States, similar ill-advised, deficit-laden projects are scattered throughout the world.

Board make its decision.⁸ As demonstrated below, this is just apologetic window-dressing. In reality, TCR wants a last-minute reprieve from its utter failure to create a sufficient record as required by the rules.

TCR spends the first fourteen pages of its Response rearguing jurisdiction. Of course, TCR knew jurisdiction would be an issue, which is why it devoted an entire section of its Petition to that very issue.⁹ Specifically, TCR claimed jurisdiction exists because its Project will be carried out as “part of the interstate rail network.”¹⁰ The notion that TCR could not have anticipated that interested parties might argue lack of jurisdiction over its “closed system,” especially considering there is no physical connection with the general system of rail transportation or the interstate rail network, is disingenuous at best. In addition, at the time TCR filed its Petition, it had at its disposal all the jurisdictional authorities it now wishes to discuss in detail through “a reply to a reply.” In fact, TCR discussed *DesertXpress*, *All Aboard Florida*, and *California High-Speed Rail Authority* in its Petition.¹¹ The Board should not allow TCR to reargue its interpretation of those decisions now.

TCR spends the next portion of its Response regurgitating its claim that the Project is “well-suited” to the exemption process, and that it has satisfied the exemption criteria.¹² These exact same arguments can be found at Pages 20-25 of TCR’s Petition, and there is no reason TCR should be allowed to argue them again.

Having reargued both jurisdiction and its suitability for exemption, TCR then attempts to convince the Board that 1) it provided all information required for an exemption, and 2) opponents

⁸ Motion for Leave at 3.

⁹ Petition for Exemption at 13-20.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 14-15, 18.

¹² Response at 19-26.

of the Project have not identified any issues warranting a full application.¹³ With respect to TCR's first argument, it is important to make perfectly clear what TCR is claiming in the context of its Motion for Leave. Even though TCR failed to attach a single supporting document, workpaper, or piece of evidence along with its Petition, it claims it could not have anticipated that an interested party like TAHSR might bring this total lack of evidence to the Board's attention. For this to be true, the Board must also believe TCR was completely unaware of the rule to begin with.

Moreover, by attempting to introduce evidence now, TCR is implicitly admitting it *did not* provide the required evidentiary support at the time it filed its Petition. TCR's untimely introduction of evidence has prevented interested parties from fully responding. This prejudice is heightened by the fact that TCR redacted the entire description and explanation of its alleged evidence, and then filed it under seal. As a result, TAHSR is left only to imagine what this evidence is and why TCR believes it supports its Petition.

As for TCR's second claim, it was well-aware of the issues surrounding TAHSR's request that TCR be required to file a full application and disclose information related to the Project. For years, TAHSR has been hounding TCR for information. TAHSR has made direct requests to TCR and its attorneys, in addition to open records requests to the Texas Department of Transportation ("TxDOT") and Texas Comptroller's Office. TAHSR even filed suit against TxDOT and the Texas Attorney General to obtain information TCR provided to TxDOT. In a full application process, TCR would be required to disclose the information it has been hiding for years. For this reason, TCR's claim that it could not have anticipated that TAHSR would inform the Board of its ongoing campaign of non-disclosure and lobby for a full application requiring full disclosure strains credulity.

¹³ *Id.* at 27-39.

In sum, the only thing that has changed between the time TCR filed its Petition and now is that TAHSR and other interested parties laid bare the deficiencies in TCR's Petition, challenged the Board's jurisdiction, and introduced substantial, convincing evidence demonstrating the need for the Board to take a "hard look" at this Project. None of these events constitute good cause for "a reply to a reply," nor has TCR proven any exists.

IV. Even if the Board grants leave, TCR's Response says nothing to change the fact that the Board lacks jurisdiction.

Contrary to TCR's position, which it has now argued twice, the Board lacks jurisdiction over the construction of TCR's Project, a proposed rail line that will transport passengers between two points in the State of Texas. Because TCR's "closed system" does not cross over any state boundary lines into Louisiana, Arkansas, Oklahoma, or New Mexico, it is nothing other than an *intrastate* line of railroad that will not be part of the general system of rail transportation within the definition of a "rail carrier" under 49 U.S.C. §10102(5). Rather, TCR's sworn statements confirm that it plans to operate an "interurban electric railway" wholly within the State of Texas.

A. TCR's statements in its Response confirm the Board's lack of jurisdiction.

TCR attempts to avoid the plain wording of 49 U.S.C. §10102(5) by referencing the Supreme Court's holding in *Piedmont Northern Ry Co. v. Interstate Commerce Commission*, 286 U.S. 299 (1932).¹⁴ In *Piedmont*, the Court affirmed the ICC's finding that Piedmont's "interurban electrical railway" operations had evolved from primarily passenger service to the point that it had, in effect, become part of the general system of rail transportation. The Court described Piedmont's business as "pre-eminently interchange *interstate freight traffic of national character*, in all essential respects conducted as is the business of steam freight carriers in the territory service. The

¹⁴ Response at 17.

differences in construction, equipment, operation, and handling are incidental merely to the use of electric motive power in lieu of steam.”¹⁵ (emphasis added).

The facts here present a far different situation, as confirmed by the following statements in

TCR’s Response:

- “[A] physical connection between the Texas Central Line and tracks operated by other interstate carriers would serve no purpose”;
- “A connection with an interstate freight railroad makes no practical sense because Texas Central will not provide freight service”;
- “Nor is a physical connection with Amtrak practicable”;
- “The Texas Central Line will be designed, constructed and maintained specifically to accommodate high-speed train operations based on the state-of-the-art Shinkansen N700 Bullet train technology”;¹⁶ and
- “It would be neither technologically feasible nor prudent (from a safety standpoint) to introduce conflicting train movements by Amtrak or any other railroad over Texas Central’s dedicated corridor or, conversely, for Texas Central to operate its trains over rail lines that have not been specifically designed to support the N700 Bullet train.”¹⁷

In short, TCR’s own description of its proposed operations demonstrates that the Project fits squarely within the literal wording of 49 U.S.C. §10102(5), which deprives the Board of jurisdiction over interurban electric railways that are not operated as part of the general system of rail transportation.

Furthermore, TCR’s statements confirm that its passenger service will not involve any direct connection with the tracks of any other rail carrier operating as part of the general system of rail transportation. Simply put, TCR’s isolated intrastate rail line will not be part of the “interstate

¹⁵ 286 U.S. at 311.

¹⁶ Consequently, unless any future United States high-speed rail projects also utilize N700 Bullet train technology, TCR would be prevented from connecting with those new lines.

¹⁷ Response at 7-8.

rail network.” Because the Board, pursuant to 49 U.S.C. §10501(a)(1), only has “jurisdiction over transportation by rail carrier,” and because that jurisdiction applies only to transportation that is “part of the interstate rail network,” the Board has no jurisdiction over TCR’s proposed project, which involves only transportation of passengers in intrastate commerce within the State of Texas.

B. The Board should take caution: TCR has taken substantial liberties in citing to Board precedent.

In relying on Board precedent to support its jurisdictional argument, TCR has made several strategic redactions from quotations lifted out of those precedents. For example, in citing to *DesertXpress*, TCR states that its Project illustrates the need for “‘federal regulation of rail transportation’ that will ‘avoid a patchwork of conflicting and parochial regulatory actions that impede the flow of people and goods throughout the nation.’”¹⁸ However, TCR conveniently removed a critically important phrase from the Board’s full statement: “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.”¹⁹ (emphasis added). By deleting the phrase “in interstate commerce,” TCR has purposely distorted the Board’s decision.

TCR used this tactic more than once. On Page 2 of its Response, TCR states, “[R]elegating’ *lines like Texas Central’s* ‘to contrasting and inconsistent regulation by the various states... likely would impede both the construction of these lines and commerce among the states’”²⁰ (emphasis added). The first portion of the Board’s statement in *DesertXpress* states in full, “relegating *interstate passenger-only rail lines* to contrasting and inconsistent

¹⁸ Response at 2, citing *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, FD 34914, at 1 (served May 7, 2010)

¹⁹ *DesertXpress* at 1.

²⁰ Response at 2, citing *DesertXpress* at 16.

regulations...” (emphasis added). By replacing “interstate passenger-only rail lines” with “lines like Texas Central’s,” TCR has again purposely distorted the holding in *DesertXpress*. These subtle but intentional maneuverings cannot change the undisputed fact that unlike the rail line in *DesertXpress*, which was to be run through California and Nevada, TCR’s proposed rail line is wholly intrastate.

In addition to craftily omitting and replacing language from Board precedent, TCR ignores the statement in the *Joint Explanatory Statement of the Committee of Conference* that under the Senate’s proposed amendment to 49 U.S.C. §10501, “[t]he Board’s rail jurisdiction would be limited to *freight* transportation, because rail passenger transportation today (other than service by Amtrak, which is not regulated under the Interstate Commerce Act) is now purely *local or regional in nature and should be regulated (if at all) at that level.*”²¹ (emphasis added). In discussing the *Conference substitute*, the Committee also makes the statement that “[t]his provision [§10501] adopted by the Conference changes the statement of agency jurisdiction to reflect curtailment of regulatory jurisdiction in areas such as passenger transportation.”²² In short, neither the explicit statutory language nor the legislative history supports TCR’s argument that the Board has jurisdiction over the construction and operation of its purely intrastate rail line.

In *DesertXpress*, the Board largely ignored the comments in the Conference Report pertaining to passenger transportation by focusing on the House bill and linking the asserted “clear intent of the House to shift jurisdiction over intrastate transportation away from the state and the clear intent of the Senate to ensure national uniformity of rail regulation.”²³ As the Board stated, “we conclude that Congress most likely was seeking to avoid possible constitutional infirmity as

²¹ H.R. Rep. No. 104-422, at 167 (1995).

²² *Id.*

²³ *DesertXpress* at 10.

to the Board’s newly-explicit jurisdiction over *intrastate* commerce – *i.e.*, carried out ‘as part of the interstate rail network.’”²⁴ While the Board’s reasoning unquestionably applies to freight rail, and may apply in some passenger rail cases such as *DesertXpress*, it cannot be said to apply in this case where there is no link to the interstate rail network.

Given the particular facts in this case, there is nothing that remotely supports TCR’s argument that the Board has jurisdiction over isolated tracks that are not part of the general railroad system of transportation or the interstate railroad network. If TCR seeks to construct a high-speed line of railroad between Dallas and Houston, it must obtain authority to do so from the State of Texas. Although TCR insists that relegating its line “to contrasting and inconsistent regulation by the various states” would impede the construction of its line, its proposed line will not cross into another state. Therefore, unlike the situation in *DesertXpress*, no other state’s regulations would impact this purely intrastate matter.

C. The present facts are easily distinguishable from those in *CA High-Speed Rail*.

In California, voters who approved the creation of a costly high-speed rail system then witnessed construction costs balloon from \$33 billion to approximately \$80 billion. Here, Texans have not yet been allowed to cast their vote. Should the citizens of Texas, with full knowledge of the financial disaster in California, choose to vote for high-speed intrastate rail service, the State of Texas will undoubtedly respond to any such public desire.²⁵ Presently, however, there is no

²⁴ *Id.*

²⁵ As noted on Page 10 of TAHSR’s Reply to Petition for Exemption, a previous proposal to create a 600-mile intrastate network in Texas collapsed when the company failed to meet the first financial milestone imposed by the former Texas High-Speed Rail Authority. Such milestones were installed to ensure that taxpayers did not end up saddled with a half-built project. TAHSR respectfully submits that the State of Texas has a sovereign right to protect its taxpayers from high-risk intrastate rail proposals that are woefully under-capitalized and will likely require state subsidies to cover costs.

basis for the Board to assert jurisdiction over this intrastate passenger rail line that will operate only between two cities.

In relying on *CA High-Speed Rail*, TCR ignores three important facts:

- 1) from the beginning, California's High-Speed Rail was designed to link to Amtrak's existing interstate passenger operations;
- 2) the Board's jurisdictional decision in *CA High-Speed Rail* turned on this interconnectivity with Amtrak, which was an integral component of the project; and
- 3) TCR admits interconnectivity of its proposed rail line with Amtrak is impracticable.

Although TCR touts *potential* arrangements with Amtrak, such arrangements are certainly not integral components of its plans. The fact that Amtrak discontinued direct service between Dallas and Houston in 1995 is a clear indication that there is no real demand. Likewise, given TCR's public comments that its system is designed to attract Texas citizens who either fly or drive between Dallas and Houston, it is safe to assume TCR will not market to the insignificant number of Amtrak passengers who might choose to trek from the Amtrak station to a point nearly a half a mile away in Dallas or several miles away in Houston.²⁶

The State of Texas has an unquestionable right to protect the interests of its citizens. Because TCR's proposed 240-mile barrier will impact a substantial percentage of those citizens and the communities in which they live, the State's interests cannot be ignored. Additionally, there is the question of whether the proposed line is consistent with the public convenience and necessity in Texas, and that question should be left to the State to answer. If TCR wishes to proceed, it should be required to work with the State of Texas to obtain the State's approval of the Project.

²⁶ As demonstrated on Page 31 of TAHSR's Reply to Petition for Exemption, Dallas and Houston have an unusually low percentage of transit usage.

D. The Board’s decision in *Alaska R.R. Corp.* is irrelevant.

As TCR readily admits, the physical connection or interchange that connects the Alaska R.R. with railroads located in the lower 48 states depends on interstate water carriage that provides the moveable tracks used to transfer railroad cars to and from the docks, where the railcars are then transferred to and from the vessels. Unlike the Alaska R.R., TCR has conceded there is no physical connection whatsoever between TCR’s “closed system” and the national rail network, and that any such connection is impracticable.²⁷ And while TCR suggests that a “human” connection is achievable by walking a half mile from Amtrak’s facility to the end of TCR’s proposed line in Dallas, it fails to take into account luggage, the weather, or the age and physical condition of the traveler who will be compelled to make the half-mile trek.

In its discussion of *Alaska R.R.*, TCR misleadingly claims that its proposed station locations “were specifically chosen to facilitate” connectivity for interstate travelers.²⁸ In fact, according to the Federal Railroad Administration’s *Alignment Alternatives Analysis Report*, there were only “[t]wo potential route alternatives [that] were proposed to extend east to downtown Houston,”²⁹ where Amtrak’s Houston Station is located. These were the only route alternatives that arguably could have been chosen to facilitate connectivity with Amtrak.³⁰ However, the FRA rejected both alternatives due to their “potential to create significant environmental impacts, thereby resulting in higher per mile costs... they do not meet the economic viability of the Project purpose and need.”³¹ In short, TCR did not “specifically choose” its current proposed station

²⁷ Response at 7-8.

²⁸ *Id.* at 11.

²⁹ FRA, *Alignment Alternatives Analysis Report*, dated November 6, 2015, at 18.

³⁰ One of the alternatives, DH-1, would have terminated near Amtrak’s Houston Station. The other alternative, DH-2, would have terminated near UPRR’s Hardy Yard.

³¹ *Id.* at 22.

location to facilitate connectivity with Amtrak. Rather, TCR was forced to resort to those locations (miles away from Amtrak's Houston Station) after the FRA rejected its other alternatives.

CONCLUSION

When enforced, the rules at issue ensure that interested parties like TAHSR are given a full and fair opportunity to respond. The Board should not make an exception to those rules at the expense of the thousands of landowners who will be affected by TCR's Project. If TCR had arguments to make or evidence to present, it should have done so *at the time it filed its petition*. The fact that TCR is attempting to submit redacted arguments and alleged evidence under seal further solidifies the unfairness and prejudice to TAHSR, while highlighting TCR's complete lack of transparency regarding its Project. For these reasons, TAHSR requests that the Board deny TCR's Motion for Leave and strike its Response and accompanying documents filed on June 20, 2016.

Should the Board find it has jurisdiction and grant TCR's Motion for Leave, TAHSR respectfully requests sufficient time to file a Sur-reply, but only after receiving an unredacted version of TCR's Response and a copy of its alleged evidence filed under seal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served all parties of record in this proceeding with this document by United States mail or by e-mail on July 6, 2016.

/s/ Richard H. Streeter

Exhibit A

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CAUSE NO. 16-0137CV

JAMES FREDERICK MILES,)	IN THE DISTRICT COURT OF
)	
Plaintiff,)	
)	
VS.)	LEON COUNTY, TEXAS
)	
TEXAS CENTRAL RAILROAD &)	
INFRASTRUCTURE, INC.,)	
)	
Defendant.)	87th JUDICIAL DISTRICT

ORAL/VIDEO DEPOSITION OF
 TEXAS CENTRAL RAILROAD & INFRASTRUCTURE, INC.
 THROUGH ITS CORPORATE REPRESENTATIVE
 SHAUN McCABE
 JUNE 23, 2016

ORAL/VIDEO DEPOSITION OF SHAUN McCABE, produced as
 a witness at the instance of the Plaintiff, was duly
 sworn, was taken in the above-styled and numbered cause
 on JUNE 23, 2016, from 10:11 a.m. to 4:44 p.m., before
 Chris Carpenter, CSR, in and for the State of Texas,
 reported by machine shorthand, at the offices of Jackson
 Walker, 100 Congress Avenue, Suite 100, Austin, Texas
 78701, pursuant to the Texas Rules of Civil Procedure
 and the provisions stated on the record or attached
 hereto.

1 Q. TCR and New Magellan?

2 A. Correct.

3 Q. Okay. And so you would agree with me that on
4 December of 2012, TCRI did not yet have the ability to
5 construct the high-speed rail?

6 A. Correct.

7 Q. Okay. It didn't have -- it -- TCRI knew at
8 that time that it would cost upwards of \$10 billion to
9 construct and it hadn't -- it hadn't raised any
10 significant investment towards that, correct?

11 A. That's right.

12 Q. Okay. And so Texas Central -- strike that.

13 TCRI contends in this case that, even
14 though it did not have the financing to build a train,
15 it still had eminent domain authority, true?

16 A. Correct.

17 Q. Okay. And that was by virtue of the words on
18 its -- copies of this -- on its certificate of
19 formation, true?

20 MR. NEBLETT: Objection. To the extent
21 that that seeks a legal answer, I'm going to object that
22 it's -- it's objectionable, and I'm going to instruct
23 you not to answer, Mr. McCabe.

24 MR. BECKHAM: Is there a stapler in this
25 room? Were you saying just don't -- instruct him not to

1 to the legal aspect of this question.

2 Q. (By Mr. Beckham) You may answer.

3 A. Could you re-ask the question?

4 Q. Yes. Is it your understanding that as a
5 factual matter, Texas Central must be able to
6 demonstrate that it can -- well, let me back up.

7 Texas Central does not -- and I'm meaning
8 all of the companies together, they don't have the money
9 to build the rail today, true?

10 A. That's true.

11 Q. They don't have the money yet to buy the land,
12 true?

13 MR. NEBLETT: I'm going to object to the
14 question as being beyond the scope of the deposition
15 notice.

16 Q. (By Mr. Beckham) You can answer.

17 MR. NEBLETT: No. I'm going to instruct
18 the witness not to answer.

19 MR. BECKHAM: We asked about finances.

20 MR. NEBLETT: And we -- and we
21 specifically said we're not designating any witness as
22 to those matters.

23 MR. BECKHAM: Well, that doesn't mean it's
24 beyond the notice.

25 MR. NEBLETT: Well --

1 Q. Okay. So the answer is --

2 MR. MCSHAN: It's part of that.

3 MR. BECKHAM: Yeah. Counselor, Number 9
4 is the basis for TCRI's claim of the \$10 billion cost
5 estimate, so the cost of the train would clearly be
6 within that. I don't know why you're trying to block so
7 many questions.

8 MR. NEBLETT: Well, I asked you, because I
9 was looking for it, I asked you to show me the basis for
10 it.

11 MR. BECKHAM: So I have.

12 MR. NEBLETT: I do see that Number 9 reads
13 something relating to cost, so restate your question.

14 MR. BECKHAM: Sure.

15 Q. (By Mr. Beckham) How much does one train set
16 cost?

17 A. Approximately 40 million.

18 Q. Okay. And how many train sets are going to be
19 in your starter kit?

20 A. As provided in our environmental impact
21 statement, we have 15 train sets as our initial
22 operating plan.

23 Q. Okay. So -- and you said 40?

24 A. Correct.

25 Q. So 15 times 40 is 600 million?

1 A. Correct.

2 Q. Okay. And so TCRI does not have or all of
3 Texas Central doesn't have 600 million to buy the trains
4 now, true?

5 A. That's true.

6 Q. Okay.

7 MR. NEBLETT: Objection, and I'll instruct
8 the witness not to answer.

9 Q. (By Mr. Beckham) There is currently no contract
10 in existence between TCRI -- strike that -- any Texas
11 Central entity and the manufacturers for the purchase;
12 there are negotiations but there's no contract, true?

13 A. True.

14 Q. Okay. And TCRI has not -- does not have --
15 financing security in writing to buy the trains, true?

16 MR. NEBLETT: Objection, and I'm going to
17 instruct the witness not to answer. It's beyond the
18 scope of this deposition. This witness has not been
19 designated for such testimony.

20 MR. BECKHAM: Well, that's part of the
21 cost estimate.

22 MR. NEBLETT: No, it's not.

23 MR. BECKHAM: Sure it is.

24 MR. NEBLETT: No, it's not.

25 Q. (By Mr. Beckham) Okay. How much has Texas

1 Central budgeted for land acquisition costs as part of
2 the \$10 billion?

3 A. Several hundred million.

4 Q. How many several?

5 A. Approximately 300.

6 Q. Okay. 300 million. And do you know roughly
7 how many acres are going to be taken?

8 A. I do.

9 Q. How many is that?

10 A. Approximately 7,000 acres. That number is
11 still under revision because we're working on
12 engineering of elevating the train on the viaduct, which
13 narrows its footprint.

14 Q. So it may be 10 percent either way or be a
15 bigger variance or you don't -- or do you know?

16 A. I believe that to be on the upper end. It
17 could come down. We're working to elevate the train in
18 additional sections --

19 Q. Okay.

20 A. -- which results in a smaller footprint on the
21 ground.

22 Q. And with respect to -- I've looked at your
23 website and seen things about viaduct and seen things
24 about elevated tracks and berms and pass-throughs,
25 et cetera. If we're talking -- are you generally

1 owns and operates trains. We operate a railroad.

2 Q. You don't own --

3 A. We don't --

4 Q. No, hold on --

5 A. -- have physical trains.

6 Q. No, no, stay with that.

7 A. Yeah.

8 Q. Do you own trains?

9 A. Not currently.

10 Q. Do you operate trains?

11 A. We're setting rules -- yes, in part. No, we
12 don't physically have trains --

13 Q. You don't have any to operate.

14 MR. NEBLETT: Wait, wait, he didn't finish
15 his answer.

16 A. We don't have the physical trains. We are
17 making commitments on how those trains will run. That's
18 operating a train. With this committing to what the
19 service is with regard to what the Federal Railroad
20 Administration Office of Safety to approve what that
21 operating schedule is and how we will operate.

22 Q. Sir, you don't even have a contract to buy a
23 train yet, right?

24 MR. NEBLETT: Objection, form.

25 A. Correct.