EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35724

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN MERCED, MADERA AND FRESNO COUNTIES, CALIFORNIA

MOTION TO DISMISS PETITION FOR EXEMPTION OF CALIFORNIA HIGH-SPEED RAIL AUTHORITY

233979

ENTERED
Office of Proceedings
March 27, 2013
Part of
Public Record

Linda J. Morgan
Kevin M. Sheys
Peter W. Denton
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for California High-Speed Rail Authority

Thomas Fellenz
Chief Counsel
California High-Speed Rail Authority
770 L Street, Suite 800
Sacramento, CA 95814

Dated: March 27, 2013

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35724

CALIFORNIA HIGH-SPEED RAIL AUTHORITY
— CONSTRUCTION EXEMPTION —
IN MERCED, MADERA AND FRESNO COUNTIES, CALIFORNIA

MOTION TO DISMISS PETITION FOR EXEMPTION OF CALIFORNIA HIGH-SPEED RAIL AUTHORITY

California High-Speed Rail Authority ("Authority") hereby moves the Surface Transportation Board ("Board") to dismiss the Petition for Exemption ("Petition") concurrently filed in this docket. The Petition requests an exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction by the Authority of a dedicated intrastate high-speed passenger rail line between Merced, CA and Fresno, CA (the "Project" or the "Merced to Fresno HST Section"). Because the Project will be located entirely within the State of California, will provide only intrastate passenger rail service, and will not be constructed or operated as "part of the interstate rail network," 49 U.S.C. § 10501(a)(2)(A), the Authority respectfully submits that the construction of the Merced to Fresno HST Section does not require Board's approval under 49 U.S.C. § 10901. Accordingly, the Board should dismiss the Authority's Petition in this docket.

As further detailed in the Petition,[1] the Authority respectfully requests that the Board expedite its consideration of this Motion and grant this Motion and dismiss the Petition effective by June 17, 2013, so that the Authority may award contracts in the

---

[1] *See* Petition at 13-14.

spring or summer of 2013 for commencement of construction of a 29-mile segment of the Merced to Fresno HST Section.

I. STATEMENT OF FACTS

The Petition details the factual background of the Merced to Fresno HST Section and the public benefits that would accrue from construction of that high-speed intrastate passenger rail line.[2] The Authority incorporates by reference that factual background into this Motion and highlights here facts relevant to this Motion.

The Merced to Fresno HST Section is the first of nine sections of the planned California High-Speed Train ("HST") System.[3] Each section will be planned and environmentally approved in separate Environmental Impact Report/Environmental Impact Statements ("EIR/EIS").[4] The Merced to Fresno HST Section (and the entire HST System) will be located in California only. The HST System will provide intercity, high-speed passenger rail service on more than 800 miles of rail line throughout California, connecting the major population centers of Sacramento, the San Francisco Bay Area, the Central Valley, Los Angeles, the Inland Empire, Orange County, and San Diego.

The Authority plans to contract with a passenger rail operator to commence HST System operations in 2022, once it has completed construction of the HST System sections between Merced and the San Fernando Valley (the "initial operating segment"

---

[2] *See* Petition at 3 to 13.

[3] While the Petition only requests authority for construction of the Merced to Fresno HST Section, this Motion describes anticipated operations over the Project and the HST System generally, so that the Board can make an informed jurisdictional determination at this time on the Motion.

[4] The Final EIR/EIS for the Merced to Fresno HST Section is referred to herein as the "Final EIR/EIS" and is available at http://www.cahighspeedrail.ca.gov/final-eir-m-f.aspx.

or "IOS," which includes the Project).[5] There are four sections within the IOS that will be planned and environmentally approved in separate EIR/EIS documents: Merced-Fresno; Fresno-Bakersfield; Bakersfield-Palmdale; and Palmdale-Los Angeles. In addition to those portions of the HST System that the Authority will construct as fully dedicated high speed train infrastructure, the Authority anticipates operating its HST System on existing rail lines owned and/or operated by other entities on the northern (generally from San Jose to San Francisco) and southern (generally from Los Angeles to Anaheim) "bookends" of the System.[6]

The Authority does not currently have any contracts, memoranda of understanding or any arrangements to permit through ticketing with Amtrak or any other passenger service to points beyond California in connection with the operations of the HST System, nor does it currently have offers for such arrangements.

In addition, the Authority does not currently have any contracts, memoranda of understanding or any arrangements to permit any entity providing interstate passenger service to utilize any Authority-constructed portions of the HST System (including, as directly pertinent here, the Project). The final environmental planning document for the Merced to Fresno HST Section states that the first construction on the IOS from north of Fresno to Bakersfield "will allow the immediate introduction of improved service for the [Amtrak] San Joaquin intercity line."[7] However, the same document also

---

[5] *See* the Authority's 2012 Business Plan at 2-29, available at http://www.cahighspeedrail.ca.gov/Business_Plan_reports.aspx ("2012 Business Plan").

[6] *See, e.g.*, 2012 Business Plan at 2-11. The Authority may decide in the future to construct fully dedicated high-speed rail infrastructure for the entire HST System rather than blending such dedicated tracks with existing systems. *See* 2012 Business Plan at ES-14.

[7] Final EIR/EIS at 1-29. Amtrak currently operates the San Joaquin intercity passenger rail service on existing track from the San Francisco Bay Area to Bakersfield through Sacramento, wholly within the State of California. Amtrak currently offers through ticketing

states that "[t]he interim use of the IOS [first construction track from north of Fresno to Bakersfield] for upgraded San Joaquin service could have environmental impacts that differ from those analyzed in this EIR/EIS. Service upgrades for the San Joaquin service and the potential for environmental impact would be appropriately assessed by the operating agency prior to service initiation."[8]

II. ARGUMENT

The construction of the Merced to Fresno HST Section does not require prior Board authorization under 49 U.S.C. § 10901 because the Project will be located entirely within the State of California[9] and will not be operated as part of the interstate rail network.

Under the Interstate Commerce Act, 49 U.S.C. § 10501, the Board has exclusive jurisdiction over "transportation by rail carrier,"[10] but only where such transportation is carried out, *inter alia*, "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." 49 U.S.C. § 10501(a)(2)(A).[11] Because the Merced to Fresno HST Section will lie entirely "between a place in a State and a place in the same . . . State," the Board would only have

---

over the San Joaquin service to points in Nevada through Amtrak's California Thruway Bus connecting service. *See infra* note 14.

[8] Final EIR/EIS at 1-30.

[9] The DesertXpress project by contrast involves a rail line that lies between "a place in a State and a place in . . . another State." 49 U.S.C. § 10501(a)(2)(A); *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, STB Finance Docket No. 34914, slip op. at 12-13 (STB served May 7, 2010) ("*DesertXpress*").

[10] The Authority stipulates that the Project will constitute "transportation by rail carrier," as understood by 49 U.S.C. § 10501. *See DesertXpress*, slip op. at 12-13 (finding that "transportation" can mean passenger carriage, and that "rail carrier" can mean a common carrier providing passenger-only service).

[11] *See All Aboard Fla. – Operations LLC & All Aboard Fla. – Stations—Construction and Operation Exemption—In Miami, Fla. and Orlando, Fla.*, STB Finance Docket No. 35680, slip op. at 3-4 (STB served Dec. 21, 2012) ("*All Aboard Florida*"); *DesertXpress*, slip op. at 11.

jurisdiction over the construction of the Project if operations on the Project will occur "as part of the interstate rail network." *Id.*[12] "The determination of whether an intrastate passenger rail service is part of the interstate rail network is a fact-specific determination."[13]

The Board has "jurisdiction over a railroad lying wholly within one state if the railroad participates in the movement of passengers from one state to another under common arrangements with connecting carriers, i.e., by means of through ticketing."[14] As noted above, the Authority does not currently have any contracts, memoranda of understanding or any arrangements to permit through ticketing, nor does it currently have offers for such arrangements.

The Board has jurisdiction over the construction of rail lines that will be used by entities providing passenger rail service as part of the interstate rail network, including entities other than the constructing party. 49 U.S.C. §§ 10501, 10901. As noted above, the Authority does not currently have any contracts, memoranda of understanding or any arrangements to permit any entity to utilize any Authority-constructed portions of the HST System for interstate passenger service (including, as directly pertinent here, the Project).

Intrastate passenger rail service on rail lines owned or operated by an interstate freight carrier "is not sufficient to bring the proposed Line under [the Board's]

---

[12] *See also DesertXpress*, slip op. at 9 ("We reasonably construe subsection 10501(a)(2)(A) to mean that the Board has jurisdiction over . . . transportation by rail carrier that is between a place in a state and another place in the same state, as long as that transportation is carried out 'as part of the interstate rail network.'").

[13] *All Aboard Florida*, slip op. at 3.

[14] *Fun Trains*, slip op. at 2-3.

jurisdiction."[15] Therefore, the Authority's plan to operate the northern and southern ends of the HST System on existing rail lines owned and/or operated by other entities would not trigger the Board's jurisdiction over the construction of the Merced to Fresno HST Section.

Further, an intrastate passenger carrier's use of the crews of an interstate carrier "would not be sufficient to make the proposed intrastate passenger rail operations part of the interstate rail network."[16] Therefore, any Authority contract with an interstate carrier to operate the intrastate HST System would not trigger the Board's jurisdiction over the construction of the Merced to Fresno HST Section.

The "proximity of a planned station at or near an airport does not make the proposed intrastate passenger service a part of the interstate rail network."[17] There will be airports and other interstate transportation facilities near the HST System, including the two stations on the Project. The proximity of Project stations to airports or other interstate transportation facilities would not trigger Board jurisdiction.

Like the rail lines in *All Aboard Florida* and *Fun Trains*, the Merced to Fresno HST Section (and, indeed, the entire constructed portion of the HST System) "is to be used solely as an intrastate passenger service."[18] The Authority or its contract operator "would transport passengers between stations on [the HST System] within the state of [California], with passengers boarding and deboarding at [up to 24] local stations for

---

[15] *All Aboard Florida*, slip op. at 4 (citing *Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441, at 443-44 (6th Cir. 1982), *aff'g Magner-O'Hara Scenic Ry.—Operation—In the State of Michigan*, FD 29161 (ICC served May 12, 1981)).

[16] *Id.* (citing *Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc. and Fla. Dep't of Transp.*, STB Finance Docket No. 33472 (STB served Mar. 5, 1998) ("*Fun Trains*")).

[17] *Id.*

[18] *Id.*

unspecified local travel purposes."[19] Therefore, the Board should determine that the construction of the Merced to Fresno HST Section does not require prior Board authorization.

III. COORDINATION WITH THE BOARD

Regardless of how the Board rules on this Motion, the Authority is prepared to provide the Board with periodic updates on the plans for construction and operation of the HST System, and the Authority will determine in consultation with the Board whether it needs authority (or additional authority) for construction of additional sections of the HST System.

IV. CONCLUSION

The Authority respectfully requests, for the foregoing reasons, that the Board dismiss the Petition for Exemption concurrently filed in this docket, in a decision effective by June 17, 2013.

---

[19] *Id.*

Respectfully submitted,

By: _____

Linda J. Morgan
Kevin M. Sheys
Peter W. Denton
Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006

Counsel for California High-Speed Rail Authority

Thomas Fellenz
Chief Counsel
California High-Speed Rail Authority
770 L Street, Suite 800
Sacramento, CA 95814

Dated: March 27, 2013