

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36025

TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. & TEXAS CENTRAL
RAILROAD, LLC—PETITION FOR EXEMPTION—PASSENGER RAIL LINE BETWEEN
DALLAS AND HOUSTON, TEX.

Digest:¹ This decision grants the petition filed by Texas Central Railroad and Infrastructure, Inc., and Texas Central Railroad, LLC (collectively, Texas Central), to reopen a prior Board decision finding that a proposed rail line between Dallas, Tex., and Houston, Tex., was not subject to the Board’s jurisdiction and therefore did not require Board approval. Due to substantially changed circumstances, the Board now finds that the proposed rail line would be constructed and operated as part of the interstate rail network and therefore subject to Board jurisdiction. However, the Board denies Texas Central’s petition for exemption and finds that, should Texas Central wish to request Board authority for its project, an application process under 49 U.S.C. § 10901 would be required. The Board also notes that issues pertaining to eminent domain authority are matters of state law.

Decided: July 16, 2020

On May 4, 2018, Texas Central Railroad and Infrastructure, Inc. (TCRI), and Texas Central Railroad, LLC (TCRR) (collectively, Texas Central),² filed a petition to reopen this proceeding, alleging that substantially changed circumstances would materially affect a prior Board decision, served July 18, 2016, finding that a proposed rail line between Dallas, Tex., and Houston, Tex., did not require Board approval, as it would be constructed and operated entirely within the State of Texas and would not be part of the interstate rail network. For the reasons discussed below, Texas Central’s petition to reopen will be granted, but its petition for exemption to construct and operate the line will be denied, and any future request for construction and operation authority will need to be made by application.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² TCRI and TCRR are wholly owned subsidiaries of Texas Central Rail Holdings, LLC, which is a subsidiary of Texas Central Partners, LLC.

BACKGROUND

On April 19, 2016, Texas Central filed a petition under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate an approximately 240-mile high-speed passenger rail line between Dallas and Houston, with an intermediate stop in Brazos Valley serving Bryan-College Station, Tex., and Huntsville, Tex. (the Line). Texas Central stated that the Line would be constructed and operated on a totally dedicated, grade-separated, secure high-speed corridor. (Texas Central Pet. for Exemption 2, Apr. 19, 2016.) In its 2016 petition, Texas Central asserted that the Line would fill a gap in the route structure of the National Railroad Passenger Corporation (Amtrak), which operates certain trains with stops in Dallas and Houston but does not currently provide direct service between Dallas and Houston. (*Id.* at 9.)

At the time of filing the 2016 petition, exact locations for the Line's stations in Dallas and Houston had not been determined, with two locations under consideration in Dallas that would have been approximately a half mile from Dallas Union Station, where Amtrak trains arrive and depart, and a station site under consideration in Houston that would have been approximately seven miles from the Amtrak station in Houston. (Texas Central Reply 9, 11, June 20, 2016.) Texas Central stated that the potential sites for the Line's stations were being evaluated for their connectivity with existing passenger rail services, including Amtrak, and that pedestrian walkways and/or shuttle service could connect the Line's stations with Amtrak's existing train services. (Texas Central Pet. for Exemption 18, Apr. 19, 2016.)

In a decision served on July 18, 2016, the Board determined that the rail line as then proposed would not be part of the interstate rail network and, therefore, construction and operation of the Line would not be subject to the Board's jurisdiction under 49 U.S.C. § 10501. In making its determination, the Board explained that "[w]hether an intrastate passenger rail service is part of the interstate rail network is a fact-specific determination based on the totality of circumstances" and that "no one factor is controlling." Tex. Cent. R.R. & Infrastructure—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex. (July 2016 Decision), FD 36025, slip op. at 4 (STB served July 18, 2016); see also Cal. High-Speed Rail Auth.—Constr. Exemption—in Merced, Madera & Fresno Ctys., Cal., FD 35724, slip op. at 11-15 (STB served June 13, 2013) (with Board Member Begeman dissenting in part); All Aboard Fla.—Operations LLC—Constr. & Operation Exemption—in Miami, Fla. & Orlando, Fla., FD 35680, slip op. at 3-4 (STB served Dec. 21, 2012). The Board found that "[t]he proximity of a planned station near interstate transportation but with no concrete plans today for through ticketing and no direct connection to Amtrak or any other interstate passenger rail carriers does not make a proposed intrastate passenger service part of the interstate rail network." July 2016 Decision, FD 36025, slip op. at 4. Contrasting the case to California High-Speed Rail Authority, where it found "extensive interconnectivity with Amtrak," the Board determined that the project as proposed at the time had "attenuated 'connections' . . . not sufficient to make the Line part of the interstate rail network." July 2016 Decision, FD 36025, slip op. at 4. The Board also contrasted the project as proposed at the time with a prior case, where the petitioner sought a specific through-ticketing arrangement with Amtrak and the Board found jurisdiction. See July 2016 Decision, FD 36025, slip op. at 5 (citing Cape Cod & Hyannis R.R.—Exemption from 49 U.S.C. Subtitle IV, FD 30859 (ICC served Sept. 2, 1986)).

In its July 2016 Decision, the Board noted that the project as proposed at the time would have “no direct connection to Amtrak, such as a shared station or a clearly defined arrangement to connect passengers using through ticketing.” July 2016 Decision, FD 36025, slip op. at 5. The Board found that Texas Central’s 2016 plans to coordinate its services with Amtrak or work with other passenger rail providers outside of the State of Texas were “too speculative and undefined to make this intrastate line part of the interstate rail network.” Id. at 5-6. The Board further noted that parties may seek Board authority before all outstanding issues have been resolved, but that parties have done so when the record contained more concrete details and plans about direct linkage to the interstate rail network. Id. at 6. The Board stated, “[s]hould Texas Central develop concrete plans that would make the Line part of the interstate rail network, such as an actual through ticketing arrangement with Amtrak or a shared station with an interstate passenger rail line, Texas Central could seek Board authority at that time.” Id.

On May 4, 2018, Texas Central filed a petition to reopen this proceeding, alleging that changed circumstances would materially affect the Board’s July 2016 Decision.³ Texas Central states that it has entered into two new agreements with Amtrak: a Voluntary Coordination Agreement (VCA) and a Reservation and Ticketing Agreement (RTA). Under the VCA, the parties have agreed to work cooperatively in promoting through interstate passenger service on Amtrak and Texas Central trains. (Texas Central Pet. to Reopen 2, May 4, 2018.) Texas Central states that the VCA provides for a variety of joint initiatives to promote and enhance through passenger travel on their respective lines. (Id. at 4.) Texas Central states that the RTA would allow for passengers to purchase a single through ticket good for transportation on both the Texas Central and Amtrak portions of their journey. Texas Central states that the single through ticket issued by Amtrak would be good for travel on a “connecting transfer service” between the Amtrak and Texas Central stations in Dallas and Houston and would be operated by Texas Central. (Id. at 5 (citing id., Ex. 2, VCA ¶ 6).)

Texas Central asserts that these agreements constitute substantially changed circumstances that materially affect the Board’s initial decision and requests that the Board reopen this proceeding and assert jurisdiction over the construction and operation of the Line. (Id. at 4.) Texas Central argues that, through these agreements, both its operation of high-speed trains between Houston and Dallas and its provision of a connecting transfer service between the Texas Central and Amtrak stations would be “integral parts of an interstate through passenger service,” and therefore “part of the interstate rail network” and subject to the Board’s jurisdiction under 49 U.S.C. § 10501. (Texas Central Pet. to Reopen 6, May 4, 2018.)

³ In its petition to reopen, Texas Central also states that it is withdrawing its previously filed petition for clarification. (Texas Central Pet. for Clarification 7, May 4, 2018.) However, the Board dismissed Texas Central’s petition for clarification as moot in the July 2016 Decision. July 2016 Decision, FD 36025, slip op. at 6.

Numerous parties, as well as several federal, state, county, and local officials, filed comments in support of⁴ and in opposition to⁵ Texas Central's petition to reopen. On June 12, 2018, Texas Central filed a motion for leave to file a surreply, as well as its surreply. On June 20, 2018, Delta Troy filed a reply in opposition to Texas Central's motion for leave. On June 25, 2018, TAHSR filed a reply in opposition to Texas Central's motion for leave and a brief surreply.⁶

By decision served on June 20, 2019, the Board directed Texas Central to submit additional information to assist the Board in considering the petition to reopen. Tex. Cent. R.R. & Infrastructure—Pet. for Exemption—Passenger Rail Line Between Dallas & Houston, Tex. (June 2019 Decision), FD 36025 (STB served June 20, 2019). The Board sought additional information on the following: (1) projections relating to annual passenger transfers; (2) details on the physical connection for any transferring passengers who may choose to walk between the Texas Central and Amtrak stations in Dallas; (3) details pertaining to the proposed connecting transfer service between the Texas Central and Amtrak stations in Dallas and Houston; (4) relevant legal support for finding jurisdiction over transportation by a rail carrier in the freight or passenger context that involves a complete break or gap in physical rail assets; and (5) discussion of whether the proposed transfer service is similar to transfer, transload, or similar activities in the freight context that are, in some circumstances, subject to the Board's jurisdiction.

On August 21, 2019, Texas Central filed its supplemental information. In response to the Board's request for projections relating to annual passenger transfers between Texas Central and Amtrak systems, Texas Central estimates that between 5,100 and 5,700 passengers would transfer between Texas Central and Amtrak's Texas Eagle and Sunset Limited in the first full

⁴ U.S. Representatives Colin Allred, John Carter, Joaquin Castro, Lizzie Fletcher, Sylvia Garcia, Lance Gooden, Kay Granger, Al Green, Eddie Bernice Johnson, Sheila Jackson Lee, Van Taylor, Marc Veasey, and Roger Williams; former U.S. Representatives Jeff Denham, Gene Green, Ted Poe, Pete Sessions, and Bill Shuster; United States Chamber of Commerce; Metropolitan Transit Authority of Harris County; Texas Rail Advocates; Rail Passenger Association/NARP; Amtrak; Regional Transportation Council; TEXO ABC/AGC; Texas Association of Business; and numerous state, county, and local officials and individual citizens submitted comments in support of Texas Central's project or petition to reopen.

⁵ U.S. Representatives Kevin Brady, Louie Gohmert, and Ron Wright; JBJQ Ranch; Texans Against High Speed Rail, Inc. (TAHSR); Delta Troy Interests, Ltd. (Delta Troy); Bud Adams Ranches, Inc.; and several state and county officials and individual citizens, including landowners along the Line, submitted comments in opposition to Texas Central's project or petition to reopen.

⁶ In the interest of compiling a more complete record, the Board will accept Texas Central's and TAHSR's surreplies. See City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

year of operations,⁷ and by year 10 of operations, approximately 18,300-20,500 passengers would transfer between the Texas Central and Amtrak systems annually.⁸ (Texas Central Suppl. 7-8, Aug. 21, 2019.)⁹ Texas Central, noting that most passengers would likely use its transfer service between Dallas stations rather than choose to walk, provides some additional information on a dedicated pedestrian walkway and improved sidewalk access from the Texas Central terminal in Dallas to the Convention Center DART station, which Texas Central states would facilitate safe foot traffic to the DART line and to Dallas' Union Station served by Amtrak. (*Id.* at 13.) Texas Central provides additional details on the transfer service between the Texas Central and Amtrak terminals in Dallas and Houston. Texas Central states that it would fund and operate air conditioned, rubber-tire electric buses between the Texas Central terminal and Amtrak Union Station in Dallas, a roughly 0.8-mile, four-minute trip, and between the Texas Central terminal and Amtrak terminal in Houston, a roughly 7.4-mile, 14-minute trip. (*Id.* at 14-16.) Texas Central states that the transfer bus schedules would be tied to Texas Central's and Amtrak's respective train schedules and that tickets for transferring passengers would have a window no smaller than 90 minutes to allow for transfers between Texas Central and Amtrak terminals. (*Id.* at 17-20.)

Texas Central states that its through-ticketing and transfer arrangements with Amtrak establish Board jurisdiction. Texas Central states that, in defining the Board's jurisdiction under § 10501(a)(2)(A), Congress sought to “clarify[] and expand[] the scope of the agency's jurisdiction over *intrastate* rail transportation” and to link the Board's jurisdiction over intrastate transportation to its power to regulate interstate commerce. (Texas Central Suppl. 21, Aug. 21, 2019 (quoting DesertXpress Enterprises, LLC—Pet. for Declaratory Order, FD 34914, slip op. at 9 (STB served May 7, 2010) (alterations original)).) Texas Central asserts that the Board and the courts have construed the Board's jurisdiction broadly to include facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce. (*Id.* at 22 (citing Or. Coast Scenic R.R. v. Or. Dep't of State Lands, 841 F.3d 1069, 1075 (9th Cir. 2016)).) Texas Central argues that court and agency precedent establish that: (1) a “common arrangement” with an interstate carrier for continuous travel can make an otherwise intrastate service part of the interstate rail network, and (2) this principle applies even where the interstate journey includes a transfer from one rail station to another that

⁷ According to the projections submitted by Texas Central, approximately 4,000 to 4,500 passengers would transfer in Dallas and approximately 1,100 to 1,200 passengers would transfer in Houston. (Texas Central Suppl. 8, Aug. 21, 2019.)

⁸ According to the projections submitted by Texas Central, approximately 14,400 to 16,100 passengers would transfer in Dallas and approximately 3,900 to 4,400 passengers would transfer in Houston. (Texas Central Suppl. 8, Aug. 21, 2019.)

⁹ Texas Central states that its projections are based on a ridership study of the Texas Central-Amtrak service performed by Amtrak, using the same Long Distance Train Demand Forecasting Model that Amtrak uses in the normal course of business to estimate future ridership levels. (See Texas Central Suppl. 9, Aug. 21, 2019.)

is some distance away.¹⁰ Texas Central asserts that its cited precedent applies a broad, flexible standard in finding jurisdiction when there is a “practical continuity of movement” across state lines, including finding jurisdiction over purely intrastate transportation that is part of a continuous stream of interstate travel. (Texas Central Suppl. 21-22, Aug. 21, 2019 (citing Walling, 317 U.S. at 569; Yellow Cab, 332 U.S. at 229-31; Abel, 631 F.3d at 1214).) Texas Central contends that courts and this agency have found that a “common arrangement” or through ticketing with an interstate carrier, like the one it has with Amtrak, is sufficient to find jurisdiction over an intrastate service, regardless of volume or physical connection. (Id. at 24-27, 30-35 (citing Cape Cod & Hyannis R.R.—Exemption from 49 U.S.C. Subtitle IV, FD 31229 (ICC served Mar. 21, 1988)).)

The June 2019 Decision permitted replies to Texas Central’s supplemental information, and, on October 8, 2019, replies were filed by Delta Troy and TAHSR. On October 24, 2019, Texas Central filed a motion to leave to file a reply to these replies and its surreply. On October 29, 2019, TAHSR filed reply in opposition to Texas Central’s motion for leave. On November 8, 2019, Delta Troy filed a reply in opposition to Texas Central’s motion for leave and a brief surreply.¹¹ The arguments and supplemental information contained in these filings are addressed below.

DISCUSSION AND CONCLUSIONS

A petition to reopen will be granted only if it presents material error, new evidence, or substantially changed circumstances. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. The alleged grounds for reopening must be sufficient to show that, if accepted, they would lead the Board to materially alter its prior decision. Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017), recons. denied (STB served Oct. 30, 2017), aff’d sub nom. Vill. of Barrington, Ill. v. STB, 892 F.3d 252 (7th Cir. 2018).

Under 49 U.S.C. § 10501(a)(2)(A), the Board has jurisdiction over transportation by a rail carrier (1) between a place in a state and a place in another state, and (2) between a place in a

¹⁰ (Texas Central Suppl. 21-32, Aug. 21, 2019 (citing Chi. v. Atchison, Topeka & Santa Fe Ry., 357 U.S. 77, 87 (1958); United States v. Cap. Transit Co., 338 U.S. 286, 290 (1949); United States v. Yellow Cab Co., 332 U.S. 218, 229-31 (1947), overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984); Walling v. Jacksonville Paper Co., 317 U.S. 564, 569 (1943); Nat’l Labor Relations Bd. v. Fainblatt, 306 U.S. 601, 606 (1939); United States v. Union Stock Yard & Transit Co. of Chi., 226 U.S. 286, 304-05 (1912); Cincinnati, New Orleans & Tex. Pac. Ry. v. ICC, 162 U.S. 184, 191-92 (1896); Norfolk & W. R.R. v. Pa., 136 U.S. 114, 119 (1890); Abel v. S. Shuttle Servs., Inc., 631 F.3d 1210, 1214 (11th Cir. 2011); Reich v. Am. Driver Serv., Inc., 33 F.3d 1153, 1155 n.3 (9th Cir. 1994); Pa. Pub. Util. Comm’n v. United States, 812 F.2d 8, 11 (D.C. Cir. 1987); Dearing v. United States, 167 F.2d 310, 311 (10th Cir. 1948); Ill. Com. Comm’n v. ICC, 749 F.2d 875, 878 n.4 (D.C. Cir. 1984)).)

¹¹ In the interest of compiling a more complete record, the Board will accept Texas Central’s and TAHSR’s surreplies. See City of Alexandria, Va., FD 35157, slip op. at 2.

state and another place in the same state, as long as that intrastate transportation is “part of the interstate rail network.” See DesertXpress Enters., LLC—Pet. for Declaratory Order, FD 34914, slip op. at 9 (STB served May 7, 2010). Whether an intrastate passenger rail service is part of the interstate rail network is a fact-specific determination based on the totality of circumstances. July 2016 Decision, FD 36025, slip op at 4.; Cal. High-Speed Rail Auth., FD 35724, slip op. at 11-15; All Aboard Fla., FD 35680, slip op. at 3-4. The Board looks at multiple factors in making this decision, such as whether the proposed service has a through-ticketing arrangement or whether it shares a station with an interstate carrier, but no one factor is controlling. See, e.g., July 2016 Decision, FD 36025, slip op at 4; Cal. High-Speed Rail Auth., FD 35724, slip op. at 11-15; All Aboard Fla., FD 35680, slip op. at 3-4.

As noted above, the Board based its July 2016 Decision on the determination that the project’s connections to Amtrak proposed at the time were too attenuated to make it part of the interstate rail network and that Texas Central’s plans at the time to coordinate its services with interstate Amtrak lines were “too speculative and undefined.” However, the Board also noted that Texas Central could seek Board authority should it develop more concrete plans that would make the Line part of the interstate rail network, “such as an actual through-ticketing arrangement with Amtrak or a shared station with an interstate passenger rail line.” July 2016 Decision, FD 36025, slip op. at 5-6.

In light of the evidence presented on reopening, the Board now finds that the Line would be part of the interstate rail network and subject to the Board’s jurisdiction. First, the VCA and RTA that Texas Central has entered into with Amtrak constitute substantially changed circumstances that warrant reopening the Board’s July 2016 Decision. The VCA and RTA contain several provisions outlining cooperative efforts towards developing and enhancing interstate travel between the two systems, including shared services and joint advertising. (See, e.g., Texas Central Pet. to Reopen, Ex. 1, RTA ¶ 1 & Ex. 2, VCA ¶¶ 4 & 5, May 4, 2018.) Under the VCA, Amtrak and Texas Central have agreed to a through-ticketing arrangement, under which passengers traveling to Dallas or Houston on a Texas Central or Amtrak train, and connecting to a train operated by the other party, would be able to purchase a single through ticket for transportation on both the Texas Central and Amtrak portions of their journey. (See id., Ex. 2, VCA ¶ 1.) The RTA contains, among other things, detailed provisions relating to the development and implementation of the proposed Texas Central-Amtrak through service, including provisions for through tickets to be sold via Amtrak’s reservation and ticketing systems. (Id., Ex. 1, RTA ¶ 1.2.)¹²

Second, unlike the record before the Board in 2016, the record now provides additional information regarding Texas Central’s planned connections to Amtrak, which also bears on the

¹² The VCA also includes provisions related to the cooperative marketing of the connecting transfer service, as well as “Additional Services” to be offered by Amtrak and purchased by Texas Central, including the training of operating personnel; marketing, distribution, and sale services; and consulting with respect to project development, safety, security, and compliance with federal regulations. (Texas Central Pet. to Reopen, Ex. 2, VCA ¶¶ 4 & 8, May 4, 2018.)

Board’s determination on whether the proposed Line is part of the interstate rail network. The new single through ticket provides for a connecting transfer service operated by Texas Central that would transfer passengers between the stations served by Texas Central and Amtrak, bridging the physical gap between the two Dallas stations. (Texas Central Pet. to Reopen, Ex. 2, VCA ¶¶ 1, 6, May 4, 2018.) Texas Central states that, pursuant to the through-ticketing arrangement, passengers in Dallas would be able to transfer between the Dallas Union Station and the Texas Central terminal on an electric shuttle bus service funded and operated by Texas Central. Texas Central also provides additional detail on how passengers would connect; the bus transfer service would operate on a schedule coordinated with Texas Central’s and Amtrak’s respective train schedules and would involve only a roughly 0.8-mile, 4-minute shuttle ride. (Texas Central Suppl. 14-20, Aug. 21, 2019.)¹³

The Board has interpreted “interstate rail network” to include facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce. See DesertXpress, FD 34914, slip op. at 11. Together, the through-ticketing arrangement and planned bus transfer service would facilitate a practical and continuous movement of passengers in interstate commerce by allowing passengers to purchase a single ticket for both the Texas Central and Amtrak portions of their trip and by providing a connection between interstate Amtrak lines and the Texas Central Line via a transfer service between stations.¹⁴ See Yellow Cab, 332 U.S. at 231 (“interstate commerce is an intensely practical concept”); cf. Napa Valley Wine Train, Inc.—Pet. for Declaratory Order, 7 I.C.C.2d 954, 964-965 (1991) (finding no jurisdiction over a passenger excursion train that did not have an established agreement for through ticketing with Amtrak (only statements of future plans), that had a non-railroad-operated intervening bus service traversing 30 miles and requiring a separate ticket, and that had no evidence indicating that “any significant number of ex-Amtrak customers would actually be moving in interstate commerce”); see also infra p. 11-12 (discussing general system of rail transportation).¹⁵ While the connecting transfer service would be provided in both Dallas and Houston, the Board’s finding that the Line would be part of the interstate rail network is based on the connection in Dallas, where the distance between Amtrak and the Line is

¹³ By contrast, when the Board considered the issue in the July 2016 Decision, Texas Central’s petition lacked specific, concrete details as to how passengers would connect between the Texas Central and Amtrak stations in Dallas and Houston. See, e.g., July 2016 Decision, FD 36025, slip op. at 4 (noting that the proposed Line would “connect” passengers with Amtrak by walking a half mile from the Line’s station in Dallas).

¹⁴ The Board notes that under 49 U.S.C. § 24305(a)(3)(A), Amtrak can establish “thruway” bus services that connect with its intercity passenger rail routes. For example, Sunset Limited passengers can connect by bus at Houston to and from Galveston, Texas. A map of all of Amtrak’s thruway connecting services (showing the Houston-Galveston bus) is available at <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/Maps/Amtrak-System-Map-1018.pdf> (last visited July 16, 2020).

¹⁵ As discussed above, according to the projections submitted by Texas Central, by year 10, between 18,300 and 20,500 people annually will transfer between Texas Central’s and Amtrak’s lines.

less than a mile. (Texas Central Suppl. 14-20, Aug. 21, 2019.) The Board need not decide whether the connection in Houston, where the Amtrak and Texas Central stations would be over seven miles apart, (*id.*), is sufficient, given the findings pertaining to the Dallas stations.

Delta Troy and TAHSR assert that the RTA and VCA are insufficient to establish a connection to the interstate rail network because they do not contain an enforceable through-ticketing provision and lack essential terms relating to scope, price, and duration of services. Delta Troy and TAHSR further claim that the agreements do not require Texas Central to engage in through ticketing with Amtrak and signify nothing more than an agreement to agree. (Delta Troy Reply 4-8, May 31, 2018; Delta Troy Suppl. Reply 8-9, Oct. 8, 2019; TAHSR Reply 12-13, May 31, 2018; TAHSR Suppl. Factual¹⁶ Reply 27-28, Oct. 8, 2019.) The Board finds these arguments unpersuasive. The agreements constitute a “clearly defined arrangement” for through ticketing. See July 2016 Decision, FD 36025, slip op. at 5 (citing Cape Cod & Hyannis R.R., FD 30859). The VCA states that Texas Central and Amtrak “agree to offer through ticketing to passengers traveling between points on their respective rail systems” and provides for a transfer service to connect passengers between the two systems’ stations in Dallas and Houston. (Texas Central Pet. to Reopen, Ex. 2, VCA ¶¶ 1, 6, May 4, 2018.) The RTA contains provisions pertaining to the availability of through tickets via Amtrak’s reservation and ticketing channels, as well as terms governing the commission paid to Amtrak on through ticket sales. (*Id.* at Ex. 1, RTA ¶¶ 1.2, 2.2.)¹⁷ While Delta Troy and TAHSR point to specific terms in the agreements that remain outstanding, the Board does not require all outstanding issues to be resolved before seeking authority,¹⁸ and the terms of the agreements are sufficiently defined to permit a finding that the project would be part of the interstate rail network at this stage of the transaction.

Delta Troy argues that the proposed passenger rail project remains “insular and divorced from the interstate rail network” and has only the “barest, de minimis tangential relationship to the interstate rail network.” (Delta Troy Suppl. Reply 12, 13, Oct. 8, 2019.) However, the ridership projections submitted by Texas Central show 27-30% of total projected Texas Eagle passengers using the joint rail service at Dallas and 16-18% of total projected Sunset Limited passengers at Houston using the joint rail service by the tenth year of operations. (Texas Central

¹⁶ TAHSR’s October 8, 2019 reply contains two parts—a “factual” reply and a “jurisdictional” reply.

¹⁷ Moreover, in its reply to Texas Central’s petition to reopen, Amtrak states that it has entered into the RTA and VCA with Texas Central, which “provide for Amtrak to sell through tickets, via its reservation system and sales channels, to passengers traveling between points on Amtrak’s national route network and points on Texas Central’s Dallas-Houston high speed train route.” (Amtrak Reply 1.) Amtrak further notes that such agreements would extend the reach of Amtrak’s national network and describes the benefits it anticipates resulting from the through-ticketing arrangement with Texas Central, which would provide a new convenient, high-speed rail connection for passengers travelling on all three of the Amtrak routes that serve Texas. (*Id.* at 2, 6-8.)

¹⁸ See, e.g., Cal. High-Speed Rail Auth.—Constr. Exemption—in Fresno, Kings, Tulare, & Kern Cty.s., Cal., FD 35724 (Sub-No. 1), slip op. at 9, 11, 15 (STB served Aug. 12, 2014).

Suppl. Reply 12, Oct. 24, 2019.) These ridership projections are based on demand modeling tools regularly used by Amtrak that draw on survey responses, historical ridership data, and inputs that typify intercity transportation modeling, such as socioeconomic conditions, fares, travel times, and trip frequencies. While Delta Troy and TAHSR question the methodology and projections submitted by Texas Central, (see Delta Troy Suppl. Reply 3, Oct. 8, 2019; TAHSR Suppl. Factual Reply 10-21, Oct. 8, 2019), they do not present alternative ridership figures.¹⁹

Delta Troy additionally argues that Texas Central’s claim that Supreme Court precedent supports Board jurisdiction is “unfounded” because the cases it cites pre-date the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, and are distinguishable. (Delta Troy Suppl. at 19-24, Oct. 8, 2019.) However, while those pre-ICCTA cases are not identical to this case, they establish and apply longstanding general principles regarding what constitutes interstate rail or commerce. Those principles—including the principles that intrastate transportation that is part of a continuous interstate journey qualifies as interstate, and that the assessment of the interstate nature of transportation is a fact-specific inquiry—were not negated by ICCTA and continue to be relevant. See, e.g., Yellow Cab, 332 U.S. at 228-30 (whether a journey is interstate is a multi-factor determination made by looking at the end point of the entire journey and not each portion in isolation; overall journey was still interstate despite required transfer between rail stations of “some two blocks to two miles”); Cap. Transit, 338 U.S. at 289-90 (adhering to prior holding that the intrastate service was “part of a continuous stream of interstate transportation” because transfer passes connected the intrastate service to interstate service); Walling, 317 U.S. at 568 (when a halt or pause occurring between interstate travel and purely intrastate travel is merely an intermediate step in the process of getting the goods to a final destination, the goods remain in interstate transit).

Delta Troy also claims that finding jurisdiction is inconsistent with Board precedent. (Delta Troy Reply 10-12, May 31, 2018; Delta Troy Suppl. Reply 36-39, Oct. 8, 2019.) In the

¹⁹ On May 29, 2020, as supplemented June 24, 2020, Delta Troy filed a petition requesting that the Board require Texas Central to update its ridership projections and to address recent statements by Amtrak concerning its service to Dallas and Houston in light of the impact on passenger rail transportation due to the COVID-19 pandemic. On June 18, 2020, Texas Central replied to Delta Troy’s petition, asserting that Amtrak’s recent statements are not relevant to Texas Central’s projections for passenger service, which would commence in FY 2026, as Amtrak’s projected revenue shortfall due to the pandemic pertained to FY 2021, with no indication of any long-term impacts on passenger rail due to the pandemic. (Texas Central Reply 3-4, June 18, 2020.) Because Texas Central’s service is not scheduled to even begin until 2026, Delta Troy’s request will be denied. However, the Board is aware of recent announcements regarding cutbacks to long-distance Amtrak routes and expects that, should Texas Central file an application for Board authority to construct and operate its high-speed passenger rail project, it would include updated information about the project, including updated ridership projections, if necessary. The Board notes that there is no specific threshold number of passengers that would be required for Texas Central’s operations to be considered “part of the interstate rail network” under 49 U.S.C. § 10501(a)(2)(A); rather, as stated above, the Board makes a fact-specific determination based on the totality of circumstances.

cases Delta Troy cites, however, there were key distinguishing facts that rendered those rail lines insufficiently connected to the interstate rail network. In Napa Valley Wine Train, Inc.—Petition for Declaratory Order, 7 I.C.C.2d 954, 960-66 (1991), the intrastate passenger service did not have an established agreement for through ticketing with Amtrak (only statements of future plans); the connecting bus service required a separate ticket even if a through-ticketing agreement with Amtrak was reached; and bus service was not being provided by the railroad. Neither All Aboard Fla. nor Fun Trains, Inc.—Operation Exemption—Lines of CSX Transportation, Inc., FD 33472 (STB served Mar. 5, 1998), involved a through-ticketing arrangement with an interstate carrier or any other connection to interstate rail service. See All Aboard Fla., FD 35680, slip op at 3-4 (finding mere physical proximity to interstate travel modes without indicia of connection, physical or otherwise, to the interstate rail network to be insufficient to bring intrastate service into Board jurisdiction); Fun Trains, Inc., FD 33472, slip op. at 2-3 (STB served Mar. 5, 1998) (finding use of Amtrak personnel and equipment insufficient to make service interstate when there was no through ticketing arrangement or participation in interstate commerce). And while Delta Troy is correct that the Cape Cod & Hyannis Railroad proceeding involved shared stations and a physical connection, as well as a through-ticketing arrangement, (see Delta Troy Suppl. Reply 9, Oct. 8, 2019), nothing in that decision indicates that such physical connection is a controlling factor for jurisdiction.

TAHSR argues that ICCTA removed passenger rail from the Board’s jurisdiction, asserting that the legislative history shows congressional intent to curtail or eliminate the Board’s general jurisdiction over passenger rail transportation. (TAHSR Suppl. Jurisdictional Reply 5-8, Oct. 8, 2019.) The language in the statute, however, provides that “the Board has jurisdiction over transportation by rail carrier,” and “transportation includes . . . equipment of any kind related to the movement of passengers” and “services related to that movement.” 49 U.S.C. §§ 10501(a)(1), 10102(9); see DesertXpress Enters., LLC, FD 34914, slip op. at 1, 12.²⁰ The Board has previously found that ICCTA’s definitions of “rail carrier” and “transportation” expressly place passenger rail service within the Board’s “jurisdiction over transportation by rail carrier.” DesertXpress Enters., LLC, FD 34914, slip op. at 11-12. Moreover, if the statute were ambiguous, ICCTA’s legislative history shows that the Conference Committee expressly stated that it was curtailing but not eliminating the Board’s regulation of passenger transportation. H.R. Conf. Rep. 104-422, 167 (Dec. 18, 1995). While it cites to the Conference Committee Report, TAHSR focuses its argument on other committee reports relating to prior versions of the statute that contain language different from that ultimately enacted into law. The legislative history does not, in fact, support TAHSR’s argument any more than the language of ICCTA itself.

Delta Troy and TAHSR also argue that, because Texas Central argued in state court that it was an “interurban electric railway,” it is not subject to the Board’s jurisdiction under

²⁰ “[L]egislative history is not the law” and will not be used when statutory language is not ambiguous. Azar v. Allina Health Svcs., ___ U.S. ___, 139 S.Ct. 1804, 1814 (2019) (quoting Epic Sys. Corp. v. Lewis, 584 U.S. ___, 138 S.Ct. 1612, 1631 (2018)).

49 U.S.C. § 10102(5).²¹ (Delta Troy Reply 12-14, May 31, 2018; TAHSR Reply 6-7, May 31, 2018.) While Texas Central concedes that, under Texas state law, it is an “interurban electric railway company,” which is generally excluded from the Board’s jurisdiction pursuant to § 10102(5), it states that the Line will also be “operated as part of the general system of rail transportation” and is therefore a “rail carrier” under the exception to the exclusion in § 10102(5). (Texas Central Surreply 10-11, June 12, 2018; see also Texas Central Suppl. Reply 5-6, Oct. 24, 2019.) Neither Delta Troy nor TAHSR has demonstrated otherwise. TAHSR also contends that only transportation by rail is within the Board’s jurisdiction and that, because this service involves intermediate bus transfer service, it falls outside of that jurisdiction. (TAHSR Reply 5, Oct. 8, 2019.) However, the fact that the planned service requires a short transfer by bus does not mean that the proposed line is not part of the general system of rail transportation. Transportation under the statute includes all “services related to” the movement of passengers, including interchange of passengers. See 49 U.S.C. § 10102(9); see also Atchison, Topeka & Santa Fe Ry., 357 U.S. at 85-89 (finding that the Interstate Commerce Act’s obligation to move passengers between connecting lines placed intermediate car service transporting passengers between rail stations under the jurisdiction of the Board’s predecessor agency, the Interstate Commerce Commission (ICC), because the service was an “integral part of interstate railroad transportation authorized”); Cent. & S. Motor Freight Tariff Ass’n v. United States, 757 F.2d 301 (D.C. Cir. 1985) (upholding ICC finding that the motor carrier portion of a continuous intermodal movement could be subject to an exemption in the railroad regulatory statute); Improvement of TOFC/COFC Regulations, 3 I.C.C.2d 869, 874 (1987) (finding that trailer-on-flatcar and container-on-flatcar service is part of a continuous multi-modal rail and motor carrier movement).

Given the totality of circumstances presented here, including a clearly defined through-ticketing arrangement with Amtrak and a transfer service that would facilitate a practical and continuous movement of passengers in interstate commerce, and that the Line would be operated as part of the general system of rail transportation, the Board finds that Texas Central’s proposed Line would be constructed as part of the interstate rail network and, as a result, subject to the Board’s jurisdiction under 49 U.S.C. § 10501. Therefore, the Board will grant Texas Central’s petition to reopen, as Texas Central has presented substantially changed circumstances that warrant reopening the Board’s July 2016 Decision.

Eminent Domain. Certain filings with the Board refer to litigation in state court as to whether Texas Central is a “railroad company” with eminent domain authority. (See TAHSR Ltr. 2, May 16, 2019; Texas Central Ltr. 1, May 12, 2020.) Consistent with prior court and agency decisions, a finding of Board jurisdiction does not confer any federal power to take privately owned property, nor would future Board approval of the proposed Line, if it were to occur, confer such federal power. See Tongue River R.R.—Constr. & Operation—W. Alignment, FD 30186 (Sub-No. 3) et al., slip op. at 16 n.50 (STB served Oct. 9, 2007) (“Eminent domain proceedings are governed by state law. In rail construction cases, the Board determines

²¹ Section 10102(5) defines “rail carrier” as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.”

whether the proposed line is consistent with the [public convenience and necessity]. The applicant is responsible for acquiring the land necessary to build the line.”). See also Dakota, Minn. & E. R.R. v. South Dakota, 236 F. Supp. 2d 989, 1009 (D. S.D. 2002), aff’d in part, vacated in part, remanded, 362 F.3d 512 (8th Cir. 2004) (stating that Board approval does not confer any federal power to take land).²² Issues pertaining to eminent domain authority are matters of state law. See Tex. Cent. R.R. & Infrastructure, Inc. v. Miles, No. 13-19-00297-CV, slip op. at 10 (Tex. App. May 7, 2020).

Application Required. Delta Troy and TAHSR argue that the Board should deny Texas Central’s petition for exemption and require a full application in light of questions surrounding the financial feasibility of the proposed project. (Delta Troy Reply 17-18, May 31, 2018; Delta Troy Suppl. Reply 24-25, Oct. 8, 2019; TAHSR Reply 15, May 31, 2018; TAHSR Suppl. Factual Reply 31-32, Oct. 8, 2019.)²³

In support of their argument, Delta Troy and TAHSR note the increasing cost of the proposed project²⁴ and raise questions regarding Texas Central’s assertions regarding its funding sources for these costs, including the potential pursuit of public financing. (Delta Troy Reply 18, 22, May 31, 2018; TAHSR Reply 17-19, May 31, 2018; TAHSR Reply 1, June 9, 2020.) Delta Troy and TAHSR raise further questions concerning the sufficiency and availability of funds for the project and argue that an application process would allow the Board to substantiate funding sources, consider the financial feasibility of the proposed project, and determine the financial fitness of Texas Central. (Delta Troy Reply 21-22, May 31, 2018; TAHSR Reply 15, 20-22, May 31, 2018; see also Delta Troy Reply 13-15, May 31, 2016; TAHSR Reply 10-13, May 31, 2016; TAHSR Suppl. Factual Reply 46-49, Oct. 8, 2019.)

²² Cf. Allegheny Valley R.R.—Pet. for Declaratory Order—William Fiore, FD 35388, slip op. at 4 n.4 (STB served Apr. 25, 2011) (proof of ownership cannot be inferred from Board authority to acquire and operate); MVC Transp., LLC—Acquis. Exemption—P&LE Props., Inc., FD 34462 et al., slip op. at 6 (STB served Oct. 20, 2004) (acquisition authorization from the Board does not convey property rights to the carrier).

²³ Delta Troy and TAHSR advanced similar arguments in 2016 in response to Texas Central’s petition for exemption. (Delta Troy Reply 12, May 31, 2016; TAHSR Reply 5, May 31, 2016.)

²⁴ According to Delta Troy, the project was originally estimated to cost over \$10 billion and is now projected to cost approximately \$16.5 billion. (Delta Troy Reply 18, May 31, 2018.) TAHSR states that the project is now projected to cost over \$30 billion. (TAHSR Reply 1, Ex. 1, Ltr. from Drayton McLane, Jr., Texas Central, Chairman, to Hon. Robert Nichols (Apr. 8, 2020) (“The project has turned into a \$30B project . . .”), June 9, 2020.) On its website, Texas Central estimates the cost of construction to be approximately \$20 billion. See Texas Central, Learn the Facts, <https://www.texascentral.com/facts> (last visited July 16, 2020). (See also Ltr. from Members of the Texas Legislature Ben Leman, et al. (filed May 22, 2020) (asserting that Texas Central lacks the financial resources required for the project and that construction costs for the project are estimated to be over \$20 billion).)

In response to Delta Troy’s and TAHSR arguments, Texas Central asserts that these arguments are irrelevant to its petition to reopen and can be addressed in the context of its petition for exemption, should the petition to reopen be granted. (Texas Central Surreply 11, June 21, 2018.) Texas Central asserts that requiring a full application in this matter would be contrary to Congressional direction and Board precedent, which favor the more streamlined exemption process for new rail construction projects. (Texas Central Suppl. 43-45, Aug. 21, 2019; Texas Central Suppl. Reply 14, Oct. 24, 2019.) Texas Central also argues that the financial feasibility of the project can and should be determined by financial markets, rather than the Board. (Texas Central Suppl. 45-46, Aug. 21, 2019.)²⁵

Based on the record before it, the Board finds that, to seek Board authority to construct and operate the Line, Texas Central must file a full application under 49 U.S.C. § 10901 and 49 C.F.R. part 1150. Commenters here have raised significant questions surrounding the financial feasibility of the proposed rail project, namely the increasing projected cost of the project and the funding sources for these costs. (See Delta Troy Reply 17-18, May 31, 2018; Delta Troy Suppl. Reply 24-25, Oct. 8, 2019; TAHSR Reply 15, May 31, 2018; TAHSR Suppl. Factual Reply 31-23, Oct. 8, 2019.)²⁶ As the Board noted in its June 2019 Decision, an application here would provide the Board with additional information pertaining to the financial condition of the applicant and financial feasibility of the project that would assist the Board in considering the transportation merits of the project.²⁷ June 2019 Decision, FD 36025, slip op. at 6. See Tongue River R.R., FD 30186 (Sub-No. 3), slip op. at 14 (noting that such information serves to protect “affected communities from needless disruptions and environmental impacts if the applicant were to start construction but not be able to complete the project and provide the proposed service”); Ozark Mountain R.R.—Constr. Exemption, FD 32204, (ICC served Dec. 15, 1994); see also Great Lakes Basin Transp., Inc.—Rail Constr. & Operation—in Rock Cty., Wis., FD 35952, slip op. at 4 (STB served Aug. 31, 2017). While the Board has previously considered

²⁵ In 2016, in response to similar arguments made by Delta Troy and TAHSR, Texas Central argued that a full application is unnecessary and that an exemption may be sought before outstanding issues, including those pertaining to the financing of the project, have been finalized. (Texas Central Reply 29, 32-33, June 20, 2016.) Texas Central asserted that the Board should reject objections to rail construction projects based upon the lack of finalized financing arrangements, arguing that the ultimate determination of the financial feasibility of a project will be made by the financial markets. (*Id.* at 32-33 (citing, inter alia, Dakota, Minn. & E. R.R. Constr. into the Powder River Basin, 3 S.T.B. 847, 892 (1998)).)

²⁶ Delta Troy and TAHSR advanced similar arguments in 2016 in response to Texas Central’s petition for exemption. (Delta Troy Reply 12, May 31, 2016; TAHSR Reply 5, May 31, 2016.)

²⁷ While Texas Central states that the project will be “financed entirely by investors and entrepreneurs,” (Texas Central Suppl. 46, Aug. 21, 2019), Delta Troy and TAHSR assert that Texas Central intends to seek federal loans to finance the project, (Delta Troy Reply 22, May 31, 2018; TAHSR Reply 19, May 31, 2018), and TAHSR refers to an April 8, 2020 letter from Texas Central’s Chairman, in which he states that Texas Central hopes to receive infrastructure stimulus funding, (TAHSR Reply 1, Ex. 1, June 9, 2020).

high speed passenger rail projects through the exemption process and recognizes the role financial markets play in determining whether a rail construction project is ultimately funded, scrutiny under the application process here is appropriate given the magnitude of the project, the questions about increased costs and funding sources, the substantial public interest, and the potential impact on numerous local landowners. See, e.g., Ozark Mountain R.R., FD 32204, slip op. at 4-5 (finding that construction of a highly controversial passenger excursion train warranted the greater scrutiny afforded by an application). For these reasons, the Board finds that requiring the additional information on the financial feasibility of the project that would be required in an application is necessary here to carry out the rail transportation policy of 49 U.S.C. § 10101. See 49 U.S.C §§ 10502, 10101(4), 10101(5).²⁸

Accordingly, Texas Central's petition for exemption is denied. Should Texas Central seek Board authority to construct and operate its high-speed passenger rail project, it may do so by filing an application under 49 U.S.C. § 10901 and 49 C.F.R. part 1150.

It is ordered:

1. Texas Central's June 12, 2018 and October 24, 2019 motions for leave to file surreplies are granted, and the surreplies are accepted into the record.
2. TAHSR's June 25, 2018 surreply and Delta Troy's November 8, 2019 surreply are accepted into the record.
3. Texas Central's petition to reopen is granted, as discussed above.
4. Texas Central's petition for exemption is denied, as discussed above.
5. Delta Troy's petition requesting the Board require the filing of updated information is denied.
6. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.

²⁸ While requiring an application may not promote all of the rail transportation policy factors, (see, e.g., 49 U.S.C. § 10101(7) – reduce regulatory barriers to entry), the Board is persuaded, given the record here, that, on balance, the rail transportation policy factors favor requiring a full application.