

Via electronic filing

November 8, 2019

Cynthia Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
November 8, 2019
Part of
Public Record

Re: STB Finance Docket No. 36025, Texas Central Railroad and Infrastructure, Inc. & Texas Central Railroad, LLC – Authority to Construct and Operate – Petition for Exemption from 49 U.S.C. § 10901 and Subtitle IV – Passenger Rail Line Between Dallas, TX and Houston, TX

Dear Ms. Brown:

Pursuant to 49 C.F.R. § 1104.13(a), Delta Troy Interests, Ltd. (“Delta Troy”) hereby replies in opposition to the Motion for Leave to File Surreply to Replies (“Motion”), which was filed by Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC (collectively, “TCR”) on October 24, 2019. The Surface Transportation Board (“Board”) should reject both the Motion and the accompanying “Surreply” filed on the same day by TCR. The Board’s regulations clearly prohibit replies to replies, and TCR has not shown good cause to deviate from that rule. See 49 C.F.R. § 1104.13(c). Instead, TCR seeks merely to have the last word by rearguing “facts and legal precedent”¹ previously described by TCR in its filing on August 21st. Such a “rehash” of previously-made arguments should be rejected.²

There is no justification for TCR’s second attempt to interpret and characterize the facts and precedent already offered by TCR on August 21st. The Surreply is not needed in order for the Board to rule on TCR’s Petition to Reopen, and the Board is fully capable of evaluating any divergent interpretations of the relevant facts and any cited legal precedent made by TCR, Delta Troy, and others. Given that there has been “no persuasive showing” that a waiver of 49 C.F.R. § 1104.13(c) is appropriate, the Board should deny the Motion.³ Denial is also warranted because the Motion represents a continuation of TCR’s unfortunate habit of

¹ Motion at 2.

² Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company, STB Docket No. 42068, slip op. at 3 (n. 7) (served April 19, 2002).

³ Ocean Logistics Management, Inc. v. NPR, Inc. and Holt Cargo Systems, Inc., STB Docket No. WCC-102, slip op. at 3 (served Jan. 14, 2000).

November 8, 2019

Page 2

repeatedly flouting the Board's procedural rules and schedules by tendering extra filings.⁴ The Board should reject this repeated and impermissible "effort to have the last word."⁵

As justification for the Surreply, TCR claims that Delta Troy exhibits a "disregard for Supreme Court precedent."⁶ This could not be further from the truth. Delta Troy carefully addressed the Supreme Court opinions cited by TCR with direct quotations and spot citations, explaining that these opinions do not support Board jurisdiction over TCR's rail construction proposal.⁷ The mere fact that TCR disagrees with this analysis is no reason for a "surreply," as the Board itself can evaluate the governing law and make its own determination regarding relevance and applicability.

Nonetheless, if the Board grants TCR's Motion and accepts the Surreply into the record, the Board should also consider the points described in the remainder of this letter. Under the procedural schedule issued on June 20th and revised on July 15th, the Board invited interested parties to file reply comments regarding the responsive information submitted by TCR. Therefore, fairness requires that, if the Board accepts TCR's latest Surreply, the Board should also consider the brief reply set forth herein.

The Surreply is rife with unfounded assertions. Perhaps most egregiously, TCR claimed that "Delta Troy acknowledges that Texas Central will not be 'operated solely for the purpose of intrastate transportation'" (Surreply at 11), but this claim is plainly not true. TCR fails to provide a citation for this quotation attributed to Delta Troy because there is none. Delta Troy was very clear in its recent filing that the TCR proposal is "wholly intrastate, with all construction and operations wholly within one state, unconnected to the national rail network and incompatible with the national rail network."⁸ In fact, Delta Troy has repeatedly emphasized this fact from the very beginning of this proceeding. Three-and-a-half years ago, Delta Troy stated that:

TCR's proposed rail line would operate wholly intrastate, providing passenger train service only between Dallas and Houston. The rail line would not connect physically with any other rail line that is part of the national rail system, and it would not use the same stations as any other passenger rail service

⁴ See, e.g., "Rebuttal Brief in Support of Petition for Clarification" (filed May 27, 2016), "Motion for Leave to File Response to Replies" (filed June 20, 2016), and "Motion for Leave to File Response to Replies" (filed June 12, 2018).

⁵ FMC Wyoming Corp. v. Union Pacific Railroad Co., STB Docket No. 42022, slip op. at 1 (n. 2) (served Jan. 8, 1999).

⁶ Motion at 3.

⁷ See Reply of Delta Troy Interests, Ltd. to Petitioners' Response and Additional Information, pages 19-24 (filed Oct. 8, 2019) (hereinafter, "Delta Troy Reply").

⁸ Delta Troy Reply, page 26 (filed Oct. 8, 2019).

November 8, 2019

Page 3

provider....No matter how many times TCR uses variations of the word “connect” in its Petition for Exemption, no such connection would exist.⁹

In commenting on the Petition for Exemption back in 2016, Delta Troy similarly stated that “the Board should dismiss the Petition for lack of jurisdiction because the Project would involve the construction and operation of a wholly intrastate passenger rail line that neither connects with existing rail lines nor utilizes any existing passenger rail stations”.¹⁰ Throughout this entire case, Delta Troy has been unwavering in its position that the proposal is purely intrastate,¹¹ and the Board should give no credence to TCR’s unsupported assertion otherwise.

TCR also claimed that Delta Troy “ignores” the phrase “tied to interstate commerce” in evaluating the scope of Board jurisdiction over intrastate rail transportation. See Surreply at 13. Again, this is incorrect. Delta Troy has previously provided a comprehensive analysis of the relevance of this phrase to the jurisdiction of the Board.¹² Finally, TCR also continues to conflate Federal Railroad Administration jurisdiction with Board jurisdiction.¹³ Delta Troy previously showed that they are not the same.¹⁴

Ultimately, the TCR bus service does not cause TCR’s proposed rail construction project to be swept into Board jurisdiction. The bus service cannot create Board jurisdiction because, to do so, it would necessarily rely on faulty circular reasoning.¹⁵ Moreover, even under the best-case scenario represented by the tenth year of Amtrak’s overly optimistic estimates, only 0.5% of TCR passengers are expected to use the bus service.¹⁶ The exceedingly small scale of this estimate is an important factor in the “totality of the circumstances” test for Board jurisdiction.¹⁷ As previously explained by Delta Troy, and supported by reference to precedent, the Board should consider scale, scope, and proportion in its jurisdictional determination due to the fact that a rail construction project is an all-or-nothing, one-time decision.¹⁸ Without consideration of scale, scope, and proportion, the use of a bus service to

⁹ Delta Troy’s Reply in Opposition to Petition for Clarification, pages 2-3 (filed May 19, 2016) (emphasis and citation omitted).

¹⁰ See Delta Troy Reply in Opposition to Petition for Exemption, page 4 (filed May 31, 2016).

¹¹ See, e.g., Delta Troy’s Reply in Opposition to Petition to Reopen, page 2 (filed May 31, 2018) (“TCR’s proposed intrastate passenger rail line would not be part of the national rail network. It would be a completely closed, insular system, with no track connections to other railroads and no use of Amtrak stations.”).

¹² Delta Troy Reply in Opposition to Petition for Exemption, pages 5-9 (filed May 31, 2016).

¹³ Surreply at 2 and 5-6.

¹⁴ Delta Troy Reply, page 15 (filed Oct. 8, 2019).

¹⁵ Delta Troy Reply, pages 18-19 (filed Oct. 8, 2019).

¹⁶ Delta Troy Reply, page 4 (filed Oct. 8, 2019).

¹⁷ Delta Troy Reply, pages 10-12 (filed Oct. 8, 2019).

¹⁸ Delta Troy Reply, pages 12-15 (filed Oct. 8, 2019).

November 8, 2019

Page 4

extend Board jurisdiction would usurp our federal system of government and eviscerate the role of states in having a say in matters that occur entirely within their borders.

Delta Troy refers the Board to its Reply filed on October 8, 2019 for the remainder of its response to TCR's Surreply. As described in that Reply and the other filings made by Delta Troy in this proceeding, the Petition to Reopen should be denied.

Sincerely,



Karyn A. Booth

David E. Benz

Attorneys for Delta Troy Interests, Ltd.

cc: Counsel for TCR (via electronic mail and U.S. mail, postage prepaid)
All other parties on service list (via U.S. mail, postage prepaid)