

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36025

ENTERED
Office of Proceedings
May 18, 2016
Part of
Public Record

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

REPLY IN OPPOSITION TO PETITION FOR CLARIFICATION

My name is H. M. Davenport. I serve as the County Judge for Navarro County, Texas. I have reviewed the Petition for Clarification filed by Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC. ("TCR"). I have attended multiple meetings held in Navarro and other Counties over the last year. And the Navarro County Commissioners Court—the governing body of Navarro County—has passed multiple resolutions which oppose the Project. I have also reviewed the Scoping Report filed by the Federal Railroad Administration and various other materials that pertain to the proposed construction of the 240-mile-long high speed rail between Houston and Dallas, Texas (the "Project"). I am a duly authorized representative of Navarro County and wish to file this Reply on its behalf.

I. JURISDICTION

Navarro County is aware that Texans Against High Speed Rail, Inc. ("TAHSR") is filing a jurisdictional challenge to the Petition for Clarification filed by TCR in Finance Docket No. 36025. Rather than restate all those jurisdictional arguments herein, Navarro County joins in the jurisdictional challenge set forth by TAHSR. Subject to the jurisdictional challenge, Navarro County submits the following comments in Opposition to TCR's Petition for Clarification.

II. TEXAS COUNTIES ARE OPPOSED TO FAST TRACK – NEED A “HARD LOOK”

The Board should give no preference to TCR’s request for a fast-track decision based on its self-imposed deadlines that appear to impose an artificial starting date for construction at some point in 2017. This tactic appears intended to pressure the Board to rubberstamp TCR’s authority to construct, even though TCR has provided the Board with absolutely no objective, verifiable data supporting the feasibility of the Project. TCR also hopes the Board will overlook the adverse impacts resulting from construction, which cannot be fully assessed until the environmental review is complete. In no event should the Board allow its decisions to be dictated by artificial deadlines imposed by TCR, its Japanese investors, and its Irish investment advisor.

I am also concerned about the feasibility of the Project, and believe the Board should take a “hard look” to ensure it is consistent with the overall public convenience and necessity before approving construction. TCR has repeatedly refused to disclose basic information. For instance, I have never seen a business plan, backup data for TCR’s ridership projections, a firm estimate of construction costs (the estimates I have seen are constantly changing), backup data for construction costs, a construction schedule, proof of private financing, the amount of available financing, fare estimates, planned security measures, a total of how much land will be taken through eminent domain, estimated operating and maintenance costs, expected revenue, in addition to other critical information regarding the Project. This is important to Navarro County because the Project will in no way serve Navarro County or its citizens. And, perhaps more importantly, once the route is established and the Project constructed, it will remain as a scar on Navarro County—even if the HSR fails to generate sufficient revenues to pay its obligations. In essence, Navarro County will be stuck with the Project, once built, regardless of whether it is

feasible in the first instance. We prefer that the Board be convinced of the Project's long term viability BEFORE allowing it to be built.

III. TCR IS ATTEMPTING TO CIRCUMVENT EXISTING FEDERAL LAW

TCR appears to place very little faith in our Texas state courts when it says that the courts "will not be familiar with the Board's decisions, and would benefit from a clear statement interpreting 'the scope' of construction under sections 10901."¹ We have fine judges and skilled lawyers perfectly capable of determining the definition of "construction" in the relevant context. TCR is obviously afraid of a correct interpretation by Texas state courts of well-settled law, and that is why TCR is asking the Board, not a tribunal, to modify the law. TCR apparently fears that Texas courts will do their job, and prohibit TCR from prematurely beginning condemnation proceedings. Finally, TCR knows that Texas courts respect the private property rights of Texans. Texas Courts have consistently interpreted Article 1, Section 17 of the Texas Constitution to protect private property rights and that section was recently amended (2009) by the citizens of this state to further strengthen those rights. TCR is obviously trying to find any way around having to adjudicate these important issues in the proper forum, which is Texas state courts.

IV. LACK OF FINAL APPROVED ROUTE

My preliminary concern about the construction of the Project is based, in part, on the lack of specific details regarding the precise location of the tracks. It is my understanding that the potential alternative routes have been narrowed to two. However, no final route has been chosen, and no regulatory body has ruled on the actual alignment the Project will take. I reserve the right to provide the Board with additional comments regarding anticipated adverse impacts once the

¹ Petition for Clarification at 10.

final route has been identified. Until then, the County's concerns must be expressed in broad terms.

V. DISRUPTION TO COUNTY ROADS NETWORK

As a County Judge, I am well-acquainted with the system of federal, state and county roads that have been built at taxpayer expense throughout my county and the affected region. No matter the route chosen, the Project will cut through a significant portion of Navarro County. The Scoping Report makes it clear that the proposed "HSR system requires a completely grade-separated and dedicated right-of-way that is approximately 80 to 100 feet wide. It requires a 'closed' system, meaning that the train will run on dedicated HSR tracks for passenger rail service only and cannot travel on other rail lines." The construction of the "closed system" will serve as a barricade that will significantly impede east-west vehicular traffic along its entire 240-mile length, substantially affecting existing county roads and other infrastructure, and change the lives of thousands of citizens. In this county alone, it will impact a minimum of 20-30+ county roads and 5-7 highways. And, many of the county roads have been in existence for 100 years. Navarro County has spent a great deal of time and money over the years repairing and maintaining those roads. Many Navarro County citizens depend heavily on the viability of those roads to get to and from their homes, and to use their properties for productive agricultural uses.

In addition, the Project could permanently prevent farmers from moving specialized oversized farming equipment. While TCR has suggested that it will provide adequate means of passage, I am not aware of any written agreement or even a memorandum of understanding that provides details regarding the size, number or location of the grade separations that will be required. And there is no information about how many farmers will be affected.

Furthermore, while TCR has also claimed that it will bear the full cost of grade separations that would be required in order for it to operate safely, it has provided no verifiable information regarding who will determine whether a particular grade separation would or would not be required. And, with all due respect, Navarro County is not willing to simply delegate these important decisions to TCR. Doubtless, TCR will try to close county roads to lessen its costs. Such a determination cannot be left to TCR. Instead, if the Board were to somehow find that the Project is needed and approve the construction of this “closed system,” the Board should require, as part of TCR’s full application, for TCR to show binding contracts with each County in the affected corridor that would:

- (1) require TCR to bear the cost of construction of every grade separation;
- (2) require TCR to consult with appropriate county officials regarding the placement of grade separations; and
- (3) require TCR to pay for any future crossings as the county road system expands.

The first condition simply requires TCR to pay for the benefits that it alone will realize if the Project is approved. The second condition is of particular importance to ensure that TCR’s Project does not shred county roads, forcing people who use the existing roadways to go to hospitals, work, schools, and grocery stores to drive several additional miles to reach their destination. The Project will also force landowners to drive trucks, livestock, and tractors north or south to access the limited pass-throughs installed by TCR. We don’t know how any of this will play out because TCR will not tell us, and we don’t even know the final route. The third condition ensures that TCR’s “Great Wall” will not strangle future growth in our county.

This is not something that can or should be done after approval is granted. Instead, these important details should be worked out in advance, while the Board still has the necessary leverage to protect Navarro County citizens from arbitrary TCR decisions.

VI. EMINENT DOMAIN ABUSE

In its Petition for Clarification, TCR admits that it seeks to invoke condemnation proceedings and “accept” the risk that it “may acquire property rights in locations not ultimately identified as the final alignment.”² The Board should reject TCR’s cavalier and arrogant approach to condemnation and make it clear that the Board will not condone a premature resort to the strict condemnation procedures set forth under Texas law, especially considering the approach is based on apparent financing difficulties. In addition, such an attempt to condemn property that won’t be needed opens TCR up to constitutional challenges that may be brought by Texas landowners whose property is being unnecessarily taken. Texas law requires that property must be taken only for a public use, and that the property in question also be NECESSARY to satisfy that public use. Taking property that won’t be necessary for a public use will be unconstitutional. And, while individual landowners may have the ability to raise these issues, the cost of doing so, against a well-staffed group of TCR attorneys, shifts the entire burden to the individual landowners, who in many cases won’t be able to fund such intensive and serious litigation.

The premature institution of condemnation proceedings would require the thousands of families whose property may not ultimately fall within the approved right-of-way to bear the financial burden of hiring an attorney and an appraiser in order to preserve their rights under Texas law. The Texas Property Code contains a maze of requirements with respect to condemnation proceedings. Landowners affected by the Project will have no choice but to hire an attorney to guide them through the process. And while TCR may have unlimited funds from

² Petition for Clarification at 4, n. 13.

its Japanese partners to spend on an array of eminent domain attorneys, that is not the case for the citizens in my county. They should not be required to spend their limited time and resources on an attorney and experts when major uncertainty exists as to whether TCR will need the property it is trying to condemn. Despite TCR's public claim to being a good neighbor, this approach typifies TCR's utter disregard for private property rights.

I also take issue with TCR's statement that it "is preparing to use its eminent domain powers to establish the value—but not take physical possession—of the property rights it seeks to acquire."³ Even if this were true, it is still an abuse of process to bring condemnation proceedings against landowners before a final determination is reached as to whether the Project will be approved by the Board, and before a final route is chosen. It is my understanding that the Board's prior approval for the construction of a line of railroad has been a requirement since 1920. TCR should have been aware of this requirement when it created its undisclosed business plan and "key milestones," and the Board should hold TCR to it.

VII. UNNECESSARY EMINENT DOMAIN CASES CLOG COURT SYSTEM

In addition to causing citizens unnecessary expense and burden, these premature condemnation proceedings will clog the courts in Navarro County and require the needless expenditure of limited judicial resources. I do not understand why the courts and citizens of my county have to bear this burden just so TCR can reach its undisclosed "key milestones within defined timeframes."⁴ This is not, and cannot be, how the system is supposed to work. There is only a single county court at law in Navarro County, and a single District Court as well. Both are courts of general jurisdiction and are already operating at maximum capacity. Texas law requires that cases be directed to the County Court at Law, and that they be litigated on an

³ Petition for Clarification at 5.

⁴ Petition for Clarification at 4.

expedited basis. That will simply not be possible here, especially for cases that will not pertain to property that is actually necessary to serve a public use.

VIII. ANY ALLEGED ECONOMIC BENEFITS DO NOT OUTWEIGH THE SUBSTANTIAL HARM TO THE COUNTY AND ITS PROPERTY TAX BASE

TCR has bandied about certain figures on the alleged economic benefits to the affected corridor and Texas as a whole, but I am hard-pressed to understand where they will come from. And those economic benefits, if any, do not inure to Navarro County. I am certain any alleged benefits will not outweigh the adverse impacts resulting from the Project. It may be true that a few construction jobs here and there may become available to some residents of Navarro County during the time it will take to construct the Project though the county. However, construction of the Project will have substantial detrimental environmental impacts that cannot even be measured at this time, because no environmental review has been completed. Then there is the impact felt by families who will be forced to sell a part of their property, and be burdened by 68 trains whizzing by their front porch at 200 miles per hour every day. There is no question the Project will fracture our rural lifestyle without direct economic or transportation benefits to our communities, families, and businesses.

And while it may be true that some tax revenue will be generated through construction and operation of the Project, that tax revenue is not significant given the negative impacts of the Project. A few jobs and some added tax revenue will not make up for the thousands of acres of property in my county that will be devalued up to 75%. County costs are not going to decrease, so the landowners whose property is unaffected will be forced to pay increased property taxes to make up for the decrease in land value to affected property. In other words, all landowners in my county will be paying for this Project in some form or fashion.

In addition, lower property values mean lower property taxes for the county and its schools. Not to mention that school boundaries and student allocation, and future expansion plans, will all be affected. We will not be able to build schools, churches, hospitals, residences, libraries, museums, courts, parks, or outdoor pavilions anywhere near the rail line. I hope the Board takes into account all of these adverse impacts, while keeping in mind that the rail line will not even stop in Navarro County. We are going to be burdened with the negatives, and enjoy none of the alleged benefits.

IX. FINANCIAL INSTABILITY OF TCR

The fact that TCR chose to design a timetable for its private financing based on meeting “key milestones within defined timetables” should have no impact on the Board’s review. TCR has not even disclosed its business plan, so there is no way for the Board to verify these “key milestones,” even if they were dispositive. Many concerned citizens and organizations in Navarro County have specifically asked TCR for information regarding its alleged private financing and business model. But TCR has refused to disclose the information, leading me to believe all of TCR’s claims regarding its financing are unsupported. It appears TCR is just saying what it believes people want to hear, in general terms, so the public will get behind the Project. Navarro County will not get behind the Project, especially when it is being deprived of the necessary information to understand how the Project will ultimately impact life here in Navarro County for years to come.

Due process to a county and its citizens is much more important than these undisclosed, self-imposed deadlines. The Board should not allow TCR’s self-important interests to override the public interest. If the Project is as financially strong as TCR claims, the rewards will be there whether construction starts in 2017 or 2020.

CONCLUSION

The Petition for Clarification is an ill-disguised attempt to circumvent the Board's policy of refusing to adjudicate the merits of a rail construction project prior to completion of the environmental review process. There is nothing about this Project that would justify the Board deviating from this policy. The Board should not retreat from precedents holding that construction includes condemning land by eminent domain. After all is said and done, no pressing need has been demonstrated for the immediate institution of high-speed rail service between Houston and Dallas. We already have a good highway system for travel and multiple airplanes leave both airports in both cities, bound for the other, every hour. The Board should take whatever time is necessary to weigh the competing interests and reject TCR's request.

For the reasons above, I do not think the Board has sufficient information to make an informed decision at this time. This Project is too costly and complicated, and will affect too many citizens and communities, to fast-track TCR's request before requiring TCR to make full disclosures and then taking a "hard look" at all aspects of the Project. If the Board determines it has jurisdiction, I urge the Board to deny TCR's Petition for Clarification, require TCR to file a full application, and create a procedural and evidentiary schedule following the completion of the environmental review that would allow counties and individuals who will be adversely impacted to file additional comments and seek additional mitigation from TCR.

Navarro County

By: 
H. M. Davenport, County Judge

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.

/s/ H.M. Davenport

May 18, 2016