

October 24, 2019

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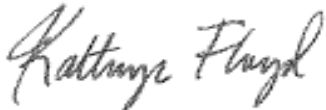
Re: Texas Central Railroad and Infrastructure, Inc. & Texas Central Railroad,
LLC—Authority to Construct and Operate—Petition for Exemption from 49
U.S.C. § 10901 and Subtitle IV—Passenger Rail Line Between Dallas, Tex.
and Houston, Tex., Docket No. FD 36025

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter are (1) Petitioners' Motion for
Leave to File Surreply and (2) Petitioners' Surreply to Replies to the Surface
Transportation Board's Request for Additional Information.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Kathryn Kusske Floyd

encl.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**PETITIONERS' MOTION FOR LEAVE TO FILE SURREPLY TO REPLIES
TO THE SURFACE TRANSPORTATION BOARD'S REQUEST
FOR ADDITIONAL INFORMATION**

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Dated: October 24, 2019

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**TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. &
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FOR ADDITIONAL INFORMATION**

Texas Central Railroad and Infrastructure, Inc. (“TCRI”) and Texas Central Railroad, LLC (“TCRR”) (collectively, “Texas Central”) respectfully move for leave to file the attached Surreply in support of their Response to the Surface Transportation Board’s Request for Additional Information in its Decision issued June 20, 2019.¹

The Board will permit a reply to a reply for “good cause.”² Texas Central has good cause to file such a response in this case. The extensive replies submitted by

¹ *Tex. Cent. R.R. & Infrastructure, Inc. & Tex. Cent. R.R., LLC—Auth. to Construct and Operate—Petition for Exemption from 49 U.S.C. § 10901 and Subtitle IV—Passenger Rail Line Between Dallas, Tex. and Houston, Tex.*, STB Docket No. FD 36025 (served June 20, 2019) (“2019 Decision”).

² Although 49 C.F.R. § 1104.13(c) indicates that “[a] reply to a reply is not permitted,” the Board has frequently waived that provision for good cause. *See, e.g., Sierra R.R. Co. v. Sacramento Valley R.R. Co., LLC*, STB Docket No. NOR 42133, at 1 n.1 (served Mar. 9, 2012); *Cross Oil Ref & Mktg., Inc. v. Union Pac. R.R. Co.*, STB Docket No. FD 33582, at 1 (served Oct. 27, 1998). *See generally* 49 C.F.R. § 1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”).

Texans Against High Speed Rail (“TAHSR”) and Delta Troy Interests, Ltd. (“Delta Troy”) in opposition to Texas Central’s Response to the Surface Transportation Board’s Request for Additional Information raise a variety of issues and arguments that mischaracterize important facts, make unsupported claims, and misinterpret Board and Supreme Court precedent. If the Board gives consideration to any of these contentions, it should grant Texas Central leave to file the attached Surreply. Doing so will afford Texas Central an opportunity to address the issues raised by the opponents and to provide the Board with a more complete record. The attached Surreply also does not raise any new arguments, but instead clarifies facts and legal precedent that will aid the Board in its decision-making process.

The Surreply should be allowed because it responds to TAHSR’s and Delta Troy’s factual mischaracterizations and misleading and unsupported claims. For example, TAHSR and Delta Troy misconstrue Board precedent to incorrectly claim that Board jurisdiction is dependent on a certain proportion of overall ridership.³ They also baselessly argue that Texas Central failed to provide sufficient details regarding its transfer service;⁴ distort the record in this proceeding and state court proceedings,⁵ and make unsupported personal attacks on Texas Central’s Chief

³ See Delta Troy Interests, Ltd. Reply to Petitioners’ Response and Additional Information, STB Docket No. FD 36025 at 2, 12-15 (filed Oct. 8, 2019) (“Delta Troy Reply”).

⁴ See Texans Against High Speed Rail, Inc. Factual Reply to Petitioners’ Response to the Surface Transportation Board’s Request for Additional Information, STB Docket No. FD 36025 at 25-29 (filed Oct. 8, 2019) (“TAHSR Reply”); Delta Troy Reply at 7-8.

⁵ See TAHSR Reply at 30-32, 49-50.

Investment Officer.⁶ Moreover, TAHSR and Delta Troy misread the legislative history of the ICCTA, ignore recent Board precedent, and disregard leading Supreme Court decisions.⁷ Such unfounded arguments warrant a response from Texas Central.

Texas Central's Response to the Board's Request for Additional Information demonstrated that the Texas Central Line will serve tens of thousands of interstate passengers and explained in detail how those passengers will move between Texas Central's Stations and Amtrak's. Texas Central could not have reasonably anticipated TAHSR's and Delta Troy's misleading and unsupported claims made in opposition to their Response to the Board's Request for Additional Information, including their mischaracterization of the ICCTA's legislative history and disregard for Supreme Court precedent. In circumstances where a movant could not have anticipated the arguments and claims of an opponent that could be central to the resolution of a case, the Board has found good cause for leave to file a reply.⁸

Affording Texas Central an opportunity to respond will provide the Board with a more complete record without material delay. A fuller, more complete record will facilitate the Board's decision-making process as it considers Texas Central's

⁶ See TAHSR Reply at 5-10.

⁷ See Delta Troy Reply at 19-24; Texans Against High Speed Rail, Inc. Jurisdictional Reply to Petitioners' Response to the Surface Transportation Board's Request for Additional Information, STB Docket No. FD 36025 at 5-10 (filed Oct. 8, 2019) ("TAHSR Juris. Reply").

⁸ See, e.g., *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.—Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 990 (I.C.C. Apr. 3, 1993) (finding good cause for a reply to a reply where a party "asserts that it could not have anticipated the arguments set out" in the reply when it filed its petition and the issue "is central to the resolution of this proceeding").

Response to the Board's Request for Additional Information and addresses the Petition to Reopen.⁹

CONCLUSION

For the forgoing reasons, Texas Central respectfully requests that the Board grant this Motion for Leave to File Surreply to Replies to the Surface Transportation Board's Request for Additional Information.

Respectfully submitted,



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Jay C. Johnson
Margaret Fawal

Raymond A. Atkins
Terence M. Hynes
Louis P. Warchot
Hanna M. Chouest

⁹ See *Texas Central Railroad and Infrastructure, Inc. & Texas Central Railroad, LLC—Petition for Exemption—Passenger Rail Line Between Dallas and Houston*, Tex., FD 36025 at 3 n. 5 (July 18, 2016) (allowing a reply to a reply “in the interest of compiling a more complete record.”); *Tongue River R.R. Co., Inc.—Construction & Operation—Western Alignment*, STB Docket No. FD 30186 (Sub-No. 3), at 4 (served June 15, 2011) (“In the interest of compiling a more complete record in this case, we will accept into the record the surreplies.”); *Union Pac. R.R. Co.—Abandonment—In Lancaster & Gage Ctys., NE, and Marshall Cnty., KS*, STB Docket No. AB-33 (Sub-No. 140), at 1 (served Dec. 22, 1999) (replies accepted “where they will contribute to a complete record without prejudicing any party or delaying the proceeding”); *City of Alexandria, Va.—Pet. for Declaratory Order*, STB Docket No. FD 35157, at 2 (served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”).

Counsel to Texas Central Railroad and
Infrastructure, Inc. & Texas Central
Railroad, LLC

Dated: October 24, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October 2019, I caused a copy of the foregoing Motion for Leave to File Surreply to Replies to the Surface Transportation Board's Request for Additional Information to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Jay C. Johnson

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**PETITIONERS’ SURREPLY TO REPLIES TO THE SURFACE
TRANSPORTATION BOARD’S REQUEST
FOR ADDITIONAL INFORMATION**

Texas Central Railroad and Infrastructure, Inc. (“TCRI”) and Texas Central Railroad, LLC (“TCRR”) (collectively, “Texas Central”), pursuant to the accompanying motion for leave, respectfully submit this Surreply in support of their Response to the Surface Transportation Board’s Request for Additional Information in its Decision issued June 20, 2019.¹

INTRODUCTION

Responding to the Board’s specific requests for more information, Texas Central demonstrated that the Texas Central Line will serve tens of thousands of interstate passengers and explained in detail how those passengers will transfer between Texas Central’s and Amtrak’s stations. Consistent with precedent—including the Board’s specific guidance in this proceeding—this information and Texas Central’s through ticketing agreement with Amtrak create the continuous movement of passengers in interstate commerce that makes the Texas Central Line

¹ *Tex. Cent. R.R. & Infrastructure, Inc. & Tex. Cent. R.R., LLC—Auth. to Construct and Operate—Petition for Exemption from 49 U.S.C. § 10901 and Subtitle IV—Passenger Rail Line Between Dallas, Tex. and Houston, Tex.*, STB Docket No. FD 36025 (served June 20, 2019) (“2019 Decision”).

part of the interstate rail network. Indeed, the Federal Railroad Administration (“FRA”) has granted Texas Central’s petition for a rulemaking to govern the operation of the Texas Central Line, a clear indication that the Line will be part of the general system of rail transportation. The replies filed by opponents of Texas Central’s project fail to support a contrary conclusion. Accordingly, Texas Central respectfully requests that the Board grant its petition to reopen this proceeding.

ARGUMENT

I. Amtrak’s interstate passenger estimates are accurate and Texas Central is relying on them.

The Board asked Texas Central to provide annual passenger transfer projections in the first, fifth, and tenth full year of operation with “Amtrak’s written concurrence.”² Texas Central went a step further. Its response includes through passenger projections developed by Amtrak itself, based upon its forecasting expertise and information regarding Texas Central’s proposed schedules and transfer service. Amtrak, as the rail carrier whose interstate passengers will transfer to and from Texas Central’s Line, “is in the best position to develop these annual projections.”³ Those projections show that, after a ramp up period, the Texas Central Line will carry tens of thousands of interstate passengers every year.⁴

Recognizing that the through movement of interstate passengers qualifies the Texas Central Line as part of the interstate rail network, project opponents Delta Troy Interests, Ltd. and Texas Against High Speed Rail, Inc. (“TAHSR”) submitted

² 2019 Decision at 3.

³ Exhibit 1, Verified Statement of Bruce T. Williams in Support of Petitioners’ Response to the Surface Transportation Board’s Request for Additional Information (“Williams V.S.”) ¶ 5.

⁴ Williams V.S. ¶¶ 12, 19.

Replies that tried to question Amtrak's projections.⁵ But no one is more qualified than Amtrak to make projections about Amtrak passengers. To develop its projections, Amtrak performed a ridership study of the Texas Central–Amtrak service, utilizing the same Long Distance Train Demand Forecasting Model that Amtrak employs in the normal course of business to estimate future ridership levels—including on long distance routes like the *Texas Eagle* and *Sunset Limited* and on shorter distance routes like the *Heartland Flyer*.⁶ Amtrak's projections are the best estimate of future Amtrak passenger ridership on the Texas Central Line, so Texas Central incorporated them into its Reply to the Board's request for ridership information.

II. Texas Central's response provides concrete plans concerning connections between its stations and Amtrak's.

Texas Central's response included a detailed description of the connecting transfer service that will be part of an interstate passenger's end-to-end through ticket, including travel times,⁷ bus schedules,⁸ and accommodations for late-arriving trains.⁹

As its response explains, Texas Central's connecting bus service schedules will be coordinated with the schedules for Amtrak's *Texas Eagle*, *Sunset Limited*, and

⁵ Delta Troy Interests, Ltd. Reply to Petitioners' Response to the Surface Transportation Board's Request for Additional Information, STB Docket No. FD 36025 at 2-3 (filed Oct. 8, 2019) ("Delta Troy Reply"); Texans Against High Speed Rail, Inc. Factual Reply to Petitioners' Response to the Surface Transportation Board's Request for Additional Information, STB Docket No. FD 36025 at 12 (filed Oct. 8, 2019) ("TAHSR Reply").

⁶ Williams V.S. at 5, ¶¶ 11, 14.

⁷ See Exhibit 2, Verified Statement of Timothy B. Keith in Support of Petitioners' Response to the Surface Transportation Board's Request for Additional Information ("Keith V.S.") ¶ 13.

⁸ Keith V.S. ¶¶ 14, 15.

⁹ Keith V.S. ¶ 17. TAHSR's unwarranted and inaccurate personal attacks on Mr. Keith, see TAHSR Factual Reply at 5-10, damage TAHSR's credibility, and lend no support to TAHSR's (meritless) legal position.

Heartland Flyer routes¹⁰ and incorporate a transfer window sufficient to ensure passengers make their connections in the event of traffic or train delays.¹¹ Texas Central will use climate-controlled, rubber tire electric buses sized to accommodate connecting passengers and their luggage.¹² The buses will follow prescribed routes over existing roads¹³ on a schedule tailored to Amtrak's and Texas Central's train schedules.¹⁴

TAHSR suggests that Texas Central's response to the Board is somehow deficient because it did not specify "the type of electric buses, whether they will be purchased or leased, when they will be purchased or leased, or any other relevant details."¹⁵ This assertion is meritless - the Board did not ask for such minute details, which will be determined based on available options at the time of acquisition. In any event, the type, size and cost of the transfer buses is irrelevant to the Board's jurisdiction.

TAHSR also devotes a significant portion of its Reply to demonstrating why a connecting passenger is unlikely to walk between the Amtrak and Texas Central terminals in Dallas. Texas Central agrees that most passengers are likely to utilize the transfer service rather than walking.¹⁶ Still, for passengers who choose to walk

¹⁰ Keith V.S. ¶ 14. For example, the connector bus schedule for Dallas shows that the bus will be waiting when the Texas Eagle arrives at Dallas Union Station and is scheduled to depart 20-30 minutes later, allowing passengers a comfortable amount of time to detrain and embark on the bus.

¹¹ Keith V.S. ¶ 13.

¹² Keith V.S. ¶ 10.

¹³ See Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC Response to the Surface Transportation Board's Request for Additional Information, STB Docket No. FD 36025 at 15-16 (filed Aug. 21, 2019) ("Texas Central Response").

¹⁴ Texas Central Response at 17.

¹⁵ TAHSR Reply at 26.

¹⁶ Keith V.S. ¶¶ 18, 19.

between the stations in Dallas, Texas Central committed to working with the City of Dallas to install a dedicated pedestrian walkway and improve sidewalk access from the Texas Central terminal to the nearby DART station.¹⁷ The information provided by Texas Central fully addresses the Board's second request.

III. Texas Central is an interurban electric railway that will be operated as part of the general system of rail transportation.

Opponents of the Texas Central Line also make much of Texas Central's statements that it is an interurban electric railway company under Section 131.012 of the Texas Transportation Code, as if that somehow disqualifies the line from STB jurisdiction.¹⁸ Texas Central has covered this ground before.¹⁹ The fact that Texas Central fits within Texas' definition of "interurban electric railway" does not preclude Texas Central from also being a "rail carrier" for purposes of ICCTA.

As TAHSR acknowledges,²⁰ 49 U.S.C. 10102(5) defines a "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.*"²¹ The Texas Central Line, however, *is* part of the "general system of rail transportation." Otherwise, the FRA would not be exercising jurisdiction over it.²² As Texas Central advised the Board, FRA recently

¹⁷ Keith V.S. ¶ 19.

¹⁸ TAHSR Reply at 30-31.

¹⁹ See Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC Response to Replies to Petition for Exemption, STB Docket No. FD 36025 at 14-19 (filed June 20, 2016) ("Exemption Response").

²⁰ TAHSR Reply at 30.

²¹ 49 U.S.C. § 10102(5) (emphasis added).

²² See 49 U.S.C. § 20102(2)(B).

granted Texas Central’s petition for a rulemaking to “govern the railroad’s system and operations between Houston and Dallas, Texas.”²³

Texas Central will operate electric-powered trains between North Texas and Houston. Texas Central thus fits the definition of an “interurban electric railway company” under Texas state law.²⁴ Because the Line will also be operated as part of the general system of rail transportation and will carry interstate passengers, Texas Central is also a “rail carrier” subject to STB jurisdiction under ICCTA.²⁵

IV. The Board has broad jurisdiction over passenger rail transportation.

Relying primarily on out-of-context snippets of legislative history, TAHSR asserts that “ICCTA eliminated the Board’s general jurisdiction over rail passenger transportation.”²⁶ This novel argument is inconsistent with the plain language of the statute, its (full) legislative history, and prior Board decisions.

As an initial matter, the statutory definition of “transportation” refutes TAHSR’s argument. The Board “has jurisdiction over transportation by rail carrier.”²⁷ And “‘transportation’ includes . . . equipment of any kind *related to the movement of passengers or property, or both, by rail*” and “services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration,

²³ Letter from Ronald L. Batory, FRA Administrator, to Michael Finnegan, Texas Central Managing Director (Aug. 30, 2019) at 1.

²⁴ Exemption Response at 15; see Texas Transp. Code, Title 5, Subtitle D, § 131.011 (defining “interurban electric railway company” to include “[any] corporation chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state”).

²⁵ See, e.g., Exemption Response at 16-18.

²⁶ Texans Against High Speed Rail, Inc. Jurisdictional Reply to Petitioners’ Response to the Surface Transportation Board’s Request for Additional Information, STB Docket No. FD 36025 at 5 (filed Oct. 8, 2019) (“TAHSR Juris. Reply”).

²⁷ 49 U.S.C. § 10501(a)(1).

icing, ventilation, storage, handling, and interchange *of passengers and property*.”²⁸ Thus, as the Board has observed, “‘transportation’ can mean facilities or services related to the carriage of passengers only . . . and the ‘general system of rail transportation’ . . . can include passenger-only facilities and service.”²⁹ That is reason enough to reject TAHSR’s position.

TAHSR nonetheless contends that “[t]here is nothing in the legislative history to suggest that [Congress], by retaining the word ‘passenger’ within the definition of ‘transportation,’ intended *sub silentio* to reject the repeated goal of eliminating the Board’s rail passenger jurisdiction.”³⁰ TAHSR has it backwards. “Statutory interpretation . . . begins with the text” of the statute,³¹ and “silence in the legislative history . . . cannot defeat the better reading of the text and statutory context.”³²

In any event, TAHSR misreads the legislative history. TAHSR observes that both the House and the Senate versions of ICCTA amended the definition of “transportation” in Section 10102.³³ But it overlooks that Congress—faced with a choice between a Senate definition that eliminated reference to “passengers” and a House definition that retained it—deliberately retained the reference to “passengers”

²⁸ *Id.* § 10102(9) (emphasis added).

²⁹ *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, STB Docket No. FD 34914, 2010 WL 1822102, at *9 (May 6, 2010). *See also Oregon Coast Scenic R.R. v. Oregon Dep’t of State Lands*, 841 F.3d 1069, 1075 (9th Cir. 2016) (Board jurisdiction includes “facilities . . . related to the movement of passengers”); *Bos. Surface R.R. Co., Inc.—Petition for Partial Exemption from 49 U.S.C. Subtitle IV*, STB Docket No. FD 36043, 2016 WL 5904758, at *2 (Sept. 13, 2016) (“‘Transportation’ is defined, among other things, as services related to the movement of passengers, property, or both by rail.”).

³⁰ TAHSR Juris. Reply at 9.

³¹ *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016).

³² *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018).

³³ *See* TAHSR Juris. Reply at 8–9.

in the definition it enacted.³⁴ The excerpts from earlier in the legislative process upon which TAHSR relies cannot alter that reality.

The Board has already considered – and rejected – an argument very similar to that presented by TAHSR. In *DesertXpress*, the petitioner cited “a phrase in the Joint Explanatory Statement of the Committee of Conference for ICCTA that ‘regulation of passenger transportation is generally eliminated.’”³⁵ The Board explained that “this statement mainly refers to 49 U.S.C. § 10501(c)(2), which now specifically limits the Board's authority over mass transportation provided by a local governmental authority, a situation not present here . . . ICCTA’s legislative history shows that *the Conference Committee considered, but then expressly rejected, complete elimination of Board jurisdiction over passenger transportation* in favor of a more limited ‘curtailment’ of Board regulation of such transportation.”³⁶ That conclusion follows from the definition of “transportation”; “the statutory exception for local transit”; and “the statutory sections regulating passenger train discontinuance and special passenger rates—a significant reduction in (but not elimination of) the regulation of passenger transportation.”³⁷

Amazingly, TAHSR takes issue with *DesertXpress* for “focus[ing] briefly on the literal wording of section 10102(9)” and not considering “the entirety of the legislative history.”³⁸ But the “literal wording” of a statute is the best indicator of legislative intent.³⁹ Regardless, *DesertXpress* considered not only this definition, but also ICCTA’s legislative history more generally, including most of the language on which

³⁴ See H.R. Rep. No. 104-422, at 5 (1995) (Conf. Rep.).

³⁵ *DesertXpress*, 2010 WL 1822102 at *10.

³⁶ *Id.* (emphasis added).

³⁷ See *id.*

³⁸ TAHSR Juris. Reply at 10 n.19.

³⁹ *Ross*, 136 S. Ct. at 1856.

TAHSR relies here.⁴⁰ The Board correctly rejected the petitioner’s argument in *Desert Xpress*, and TAHSR offers no persuasive reason for the Board to revisit that decision here.

Finally, TAHSR’s claim that the Board has no jurisdiction over passenger transportation flies in the face of other recent decisions in which the Board exercised jurisdiction over a variety of rail passenger services.⁴¹ If TAHSR’s assertion that the Board lacks any jurisdiction over passenger service were correct, all of those cases would have been decided differently. As these precedents show, the Board frequently exercises jurisdiction over proposed passenger rail services, and it should do so here.

V. There is no minimum volume requirement for Board jurisdiction. However, Amtrak forecasts that a significant share of its passengers, including 27-30% of all *Texas Eagle* passengers, and 16-18% of all *Sunset Limited* passengers, will continue their journey via Texas Central’s Dallas-Houston Line.

Throughout their Replies, Delta Troy and TAHSR characterize the number of passengers who will transfer between Amtrak and Texas Central as “a tiny proportion of overall [Texas Central] ridership”⁴² That argument misses the point.

⁴⁰ *DesertXpress*, 2010 WL 1822102 at *10.

⁴¹ See, e.g., *The Pullman Sleeping Car Co., LLC—Petition for Exemption from 49 U.S.C. Subtitle IV*, STB Docket No. FD 35738, 2015 WL 480408, at *1 (Feb. 3, 2015) (Board has jurisdiction over a company providing sleeping car service and dining and lounge facilities on passenger trains); *Bos. Surface R.R. Co.*, 2016 WL 5904758, at *1 (a company seeking to provide passenger rail service on an existing route between Worcester, Mass., and Providence, R.I.); *Great Canadian Railtour Company Limited D/B/A Rocky Mountaineer—Petition for Exemption from 49 U.S.C. Subtitle IV*, STB Docket No. FD 35851, at 1 (June 3, 2015) (a company providing rail passenger service between Vancouver and Seattle); *Cal. High-Speed Rail Authority—Construction Exemption—In Merced, Madera & Fresno Ctys., Cal.*, STB Docket No. FD 35724, 2013 WL 1701795, at *1 (Apr. 18, 2013) (a dedicated high-speed passenger rail line between Merced and Fresno, California); *Cape Cod & Hyannis R.R., Inc.—Exemption from 49 U.S.C. Subtitle IV*, STB Docket No. FD 31229, 1988 WL 226127, at *1 (DCSS Mar. 21, 1988) (a seasonal passenger and tour railroad service between various points in Massachusetts).

⁴² TAHSR Reply at 16; Delta Troy Reply at 2.

Nothing in the statutory text or these decisions interpreting it suggests that a railroad must carry some minimum number of interstate passengers to fall within the Board's jurisdiction. Where—as here—a federal statute regulates interstate commerce “without reference to its volume,” there is “no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce.”⁴³ The Board has jurisdiction over rail transportation “between a place in a State and a place in the same State as part of the interstate rail network.”⁴⁴ The Board and the courts have construed this language “broadly to include (but not be limited to) facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight[] in interstate commerce.”⁴⁵ Delta Troy's proposed volume requirement is found nowhere in ICCTA and it ignores the relatively high percentage of Amtrak passengers who will ride the Texas Central Line on through tickets.

Delta Troy cites *Holland Indus., Inc.—Intrastate Operations—Petition for Declaratory Order*,⁴⁶ for the proposition that, where a carrier serves both interstate and intrastate passengers, “the interstate traffic is to be substantial in relation to the intrastate traffic” in order for the Board to have jurisdiction over the service.⁴⁷ But the requirement referred to in *Holland Industries* was based on the express language of 49 U.S.C. § 10922(c)(2)—which required “regularly scheduled interstate transportation service on the [same] route”—and the legislative history of that

⁴³ *NLRB v. Fainblatt*, 306 U.S. 601, 606–07 (1939) (discussing the National Labor Relations Act); *see also Yellow Cab*, 332 U.S. at 225 (because the Sherman Act reaches “‘any part’ of interstate commerce,” “the amount of interstate trade” at issue “is immaterial”).

⁴⁴ 49 U.S.C. § 10501(a)(2)(A).

⁴⁵ *Oregon Coast*, 841 F.3d at 1075 (quoting *DesertXpress*, 2010 WL 1822102, at *9).

⁴⁶ STB Docket No. MCC 30036, 1988 WL 226101, at *3 (I.C.C. Mar. 16, 1988).

⁴⁷ Delta Troy Reply at 14.

provision, which said that “the interstate service must be a substantial bona fide interstate service and it must involve actual service in more than one State.”⁴⁸ Section 10501 has no equivalent statutory language or legislative history.

Delta Troy’s reliance on *NLRB v. Laughlin* is equally misplaced. There, in explaining the boundaries of Congress’s Commerce Clause power, the Supreme Court noted that “[t]he question is necessarily one of degree.”⁴⁹ But the Court went on to explain that federal jurisdiction over “carriers who are engaged in both interstate and intrastate transportation” is “essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service.”⁵⁰ And as discussed below, the Court has held in many cases that rail service “performed wholly in one state” is “part of interstate carriage” if the railroad transports freight or passengers “for a substantial distance upon its journey in interstate commerce, under a through rate.”⁵¹ Under these cases, “[t]he test is, whether the railroad was being operated *solely* for the purpose of intrastate transportation of persons and property, or was a link in a continuous transportation from one state to another.”⁵² Even as it argues about the number of transferring passengers, Delta Troy acknowledges that Texas Central will not be “operated solely for the purpose of intrastate transportation.”

In any event, Delta Troy views the interstate ridership issue through the wrong lens. Texas Central plans to operate a total of 68 trains per day between Dallas and Houston. By contrast, Amtrak operates only one daily train serving those cities.

⁴⁸ *Holland Indus.*, 1988 WL 226101, at *3 (quoting H. R. Rep. No. 100-27, 100 Cong., 1st Sess. 241–242).

⁴⁹ *NLRB v. Laughlin*, 301 U.S. 1, 37 (1937).

⁵⁰ *Id.* at 37–38.

⁵¹ *E.g., United States v. Union Stock Yard*, 226 U.S. 286, 304–05 (1912).

⁵² *Dearing v. United States*, 167 F.2d 310, 311 (10th Cir. 1948) (emphasis added).

Thus, it is not surprising that Texas Central will serve many more passengers than Amtrak. However, the maximum number of passengers who transfer between Amtrak and Texas Central trains cannot be greater than the number of Amtrak (not Texas Central) passengers arriving or departing Dallas and Houston. Nevertheless, the number of passengers expected to travel on through tickets is substantial: Amtrak projects that approximately 20,000 passengers will utilize the joint rail service by the 10th year of operations. That represents 27-30% of total projected *Texas Eagle* ridership at Dallas, and 16-18% of total projected *Sunset Limited* passengers at Houston. Passengers traveling on Amtrak/Texas Central through-tickets will be undertaking continuous interstate rail journeys – thereby satisfying the essential requirement for Board jurisdiction.

VI. Supreme Court precedent governs the Board’s jurisdictional determinations and supports the Board taking jurisdiction.

Both TAHSR and Delta Troy dismiss the long line of Supreme Court decisions supporting Board jurisdiction here, in part because of the age of the cases.⁵³ But “[l]egal precedent does not come with an expiration date.”⁵⁴ Courts and agencies continue to treat these decisions as—in the ICC’s words—“lead case[s] in the area.”⁵⁵

⁵³ Delta Troy Reply at 19.

⁵⁴ *Chartis Specialty Insurance v. Queen Anne HS, LLC*, 867 F. Supp. 2d 1111, 1120 (W.D. Wash. 2012).

⁵⁵ *Napa Valley Wine Train—Petition for Declaratory Order*, 7 I.C.C. 2d 954, 970 n.19 (1991) (citing *United States v. Capital Transit Co.*, 338 U.S. 286 (1949), and *United States v. Yellow Cab*, 332 U.S. 218 (1947)); see also *Penn. Public Utility Comm’n v. United States*, 812 F.2d 8, 10–11 (D.C. Cir. 1987) (relying on *Yellow Cab* to determine the scope of the ICC’s jurisdiction); *Cape Cod & Hyannis R.R., Inc.—Exemption from 49 U.S.C. Subtitle IV*, No. 31229, 1988 WL 226127, at *1 (DCSS Mar. 21, 1988) (relying on *Capital Transit* to exercise jurisdiction over a passenger railroad located in one state).

Delta Troy declares that these cases were decided “long before the dramatic statutory changes that occurred with the 4R Act, the Staggers Act, and ICCTA,”⁵⁶ but it ignores that, under ICCTA, the scope of the Board’s “newly-explicit jurisdiction over *intrastate* transportation” remains “tied to *interstate* commerce” under the Commerce Clause.⁵⁷ The Board “may regulate intrastate rail traffic where that traffic substantially affects interstate commerce by virtue of its being part of an interstate rail network.”⁵⁸ The Amtrak/Texas Central through service, which will transport 27-30% of *Texas Eagle* passengers and 16-18% of *Sunset Limited* passengers arriving at and departing from Dallas and Houston, will clearly have a substantial effect on interstate passenger travel. The Supreme Court cases cited in Texas Central’s Response address the same question: Whether rail service “performed wholly in one state” is “part of interstate carriage” and thus subject to federal jurisdiction.⁵⁹

Finally, Delta Troy tries to distinguish these cases by saying that their “legal analysis . . . generally relies upon the fact that interstate or international commerce was actually occurring.”⁶⁰ Everyone agrees that Amtrak is engaged in interstate commerce when it carries passengers into Texas from other states. The question here is whether the continuous movement of those passengers by Texas Central pursuant to the through-ticketing arrangement means that Texas Central is *also* engaged in interstate commerce as “as part of the interstate rail network.”⁶¹ In the cases cited by Texas Central, the Supreme Court answered the same question in the affirmative: “When persons or goods move from a point of origin in one state to a point of

⁵⁶ Delta Troy Reply at 19–20.

⁵⁷ *DesertXpress*, 2010 WL 1822102, at *7.

⁵⁸ *Illinois Commerce Comm’n v. I.C.C.*, 749 F.2d 875, 878 n.4, 884 (D.C. Cir. 1984).

⁵⁹ *Union Stock Yard*, 226 U.S. at 304–05.

⁶⁰ Delta Troy Reply at 21.

⁶¹ 49 U.S.C. § 10501(a)(2)(A).

destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character.”⁶² The intrastate part of that movement “must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement.”⁶³

VII. Texas Central qualifies for an exemption under ICCTA.

Finally, the Board’s decision suggests that it may require a full construction application regarding the proposed Texas Central Line.⁶⁴ The Board states that “scrutiny under the application process may be appropriate given the magnitude of the project, the substantial public interest, and the potential impact on numerous, local-area landowners.”⁶⁵

The standards for exercising the Board’s exemption authority have been articulated clearly by Congress. Specifically, Congress directed the Board to use the exemption process “to the maximum extent” possible. 49 U.S.C. § 10502(a). As noted in the Board’s 2019 Decision, “the Board must exempt a proposed rail line construction from the detailed application procedures of 49 U.S.C. § 10901 when the Board finds that: (1) those procedures are not necessary to carry out the rail transportation policy of § 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power.”⁶⁶ Texas Central’s Petition for Exemption satisfies these statutory exemption criteria and should be granted. As a result, a full application is not required.

⁶² *Yellow Cab*, 332 U.S. at 228–29.

⁶³ *Id.*

⁶⁴ 2019 Decision at 4-5.

⁶⁵ 2019 Decision at 6.

⁶⁶ 2019 Decision at 5.

CONCLUSION

For the reasons discussed above, the Board should grant Texas Central's Petition to Reopen and assert jurisdiction over the Texas Central Line.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kathryn Kusske Floyd".

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Dated: October 24, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October 2019, I caused a copy of the foregoing Motion for Leave to File Surreply to Replies to the Surface Transportation Board's Request for Additional Information to be served on all parties of record electronically, by courier, or by first class mail, postage prepaid.



Jay C. Johnson



Kathryn K. Floyd