

EXPEDITED CONSIDERATION REQUESTED

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Part of
Public Record

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**

PETITION FOR CLARIFICATION

Petitioners Texas Central Railroad and Infrastructure, Inc. and Texas Central Railroad, LLC (collectively, "Texas Central"), respectfully petition the Surface Transportation Board (the "Board") to issue a clarifying order under 49 C.F.R. § 1117.1 as set forth below.

INTRODUCTION

Like any new railroad, Texas Central needs to acquire the property that will eventually be necessary to construct its proposed project—a 240-mile high-speed passenger line between Dallas and Houston. To that end, Texas Central has already begun negotiating with numerous landowners along its proposed right-of-way. If some of those negotiations reach an impasse, Texas Central plans to use its statutory eminent domain powers to establish the properties' condemnation value.

Texas Central will not take physical possession of any property through condemnation until it has authority from the Board to construct and operate its rail line. But to keep the project schedule, Texas Central will soon need to begin the state administrative process that sets the price of acquiring property rights from an owner unwilling to sell his interest. That administrative process does not constitute “construction” under the ICC Termination Act (“ICCTA”).

Texas Central is filing this petition for clarification because it anticipates that certain property owners will argue in state court that the Interstate Commerce Commission’s 1982 decision in *Nicholson v. Missouri Pacific R.R.* prohibits Texas Central from initiating the Texas administrative process to determine land value—even if Texas Central does not use that process to take physical possession of any land. Texas Central accordingly asks the Board to expeditiously rule that an administrative valuation is not “construction” under ICCTA, and that the ICC’s suggestion to the contrary in *Nicholson* does not apply to the circumstances in this case.

BACKGROUND

Texas Central exists to construct and operate a jurisdictional high-speed rail line between the Dallas and Houston, Texas metropolitan areas.¹ It has been working toward that goal for several years, including by participating in the initial phases of an ongoing National Environmental Policy Act review process being

¹ Petition for Exemption at 2.

conducted by the Federal Railroad Administration (“FRA”).² Now, with FRA having identified a set of alignment alternatives that it will use to prepare a Draft Environmental Impact Statement (“EIS”), Texas Central has filed a Petition for Exemption with the Board that seeks authority to build its proposed rail line.

The Texas Central Line will be constructed and operated on a totally dedicated, grade separated, secure corridor.³ Trains will operate at speeds up to 205 mph, enabling Texas Central to move passengers between Dallas and Houston in less than 90 minutes.⁴ What is more, while Amtrak currently provides service to both Dallas and Houston, it does not operate any route between those two major metropolitan areas.⁵ The Texas Central Line accordingly will create an important connection between several existing Amtrak routes, facilitating interstate rail travel and expanding the interstate rail network.⁶

Texas Central’s business model calls for it to begin construction in 2017, as soon as all the requisite environmental reviews are complete and all regulatory approvals are acquired.⁷ Texas Central plans to initiate passenger service by late 2021.⁸ The private financing of construction costs—estimated to be over

² Petition for Exemption at 3.

³ Petition for Exemption at 2.

⁴ Petition for Exemption at 2-3.

⁵ Petition for Exemption at 9.

⁶ Petition for Exemption at 9.

⁷ Verified Statement of Timothy B. Keith in Support of Petition for Clarification (“Keith V.S.”) ¶ 3.

⁸ Keith V.S. ¶ 3.

\$10 billion—is based on meeting key milestones within defined timeframes.⁹ Texas Central consequently must begin acquiring property rights along a 240-mile route as soon as possible.¹⁰

ARGUMENT

A. Proceedings to establish fair property values do not constitute construction under ICCTA.

Section 10901 of ICCTA prohibits the construction or operation of a new rail line in the absence of Board authorization.¹¹ Texas Central, of course, will not begin construction of its proposed rail line without Board approval. But in the event the Board decides to grant its Petition for Exemption, Texas Central must start construction almost immediately.¹² That means Texas Central must take every permissible step now to be ready for the Board's decision.

In addition to activities such as surveying and engineering work, Texas Central's pre-construction preparations include the acquisition of property rights along its proposed right-of-way.¹³ In many cases, that involves negotiating agreements with landowners who are willing sellers. Texas Central is already

⁹ Keith V.S. ¶¶ 3, 4.

¹⁰ Keith V.S. ¶¶ 4-6.

¹¹ 49 U.S.C. § 10901.

¹² Keith V.S. ¶ 3, 5.

¹³ Texas Central recognizes that it may acquire property rights in locations not ultimately identified as the final alignment. Texas Central is willing to accept this risk because its construction schedule is central to its business model. Keith V.S. ¶ 6.

beginning those negotiations.¹⁴ Inevitably, however, some landowners along the route will not be willing to sell, or even negotiate. When that happens, Texas Central 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.

Under Texas law, the eminent domain process occurs in two phases.¹⁵ The first phase is administrative in nature.¹⁶ After an eminent domain petition is filed, the trial court appoints three special commissioners who “assess the damages” of the owner of the property being condemned, and “file an award which, in their opinion, reflects the value of the sought-after land.”¹⁷ If the property owner or the condemning authority is dissatisfied with the commissioners’ award, either may file objections to the commissioners’ findings in the trial court.¹⁸ Such a filing triggers a second phase of the eminent domain process. In this phase, the commissioners’ award is vacated and the proceeding converts into a normal cause to be tried “in the same manner as other civil causes” in the trial court.¹⁹

If Texas Central cannot agree with the property owner on a purchase price, Texas Central will initiate phase one of the Texas eminent domain process to obtain

¹⁴ Keith V.S. ¶ 7.

¹⁵ *Blasingame v. Krueger*, 800 S.W.2d 391, 392 (Tex. App.-Houston [14th Dist.] 1990, no pet.).

¹⁶ Texas law requires several stages of negotiations and specific disclosures to landowners before a condemnation petition can be filed to begin the administrative phase. Tex. Prop. Code Ann. § 21.0113.

¹⁷ *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 242 (Tex. 1984); Tex. Prop. Code Ann. §§ 21.012, 21.014, 21.042 (West Supp. 2009).

¹⁸ Tex. Prop. Code Ann. § 21.018.

¹⁹ Tex. Prop. Code Ann. § 21.018(b).

an administrative assessment of the property's fair value. Once it obtains that assessment, Texas Central will not take physical possession of the property until the Board rules on its exemption petition.²⁰ Because the Texas administrative valuation process alone cannot conceivably qualify as "construction" under ICCTA, Texas Central should not be precluded from participating in it.

ICCTA nowhere defines the term "construct" as it is used in Section 10901. "When a term goes undefined in a statute," it should be "give[n] its ordinary meaning."²¹ The plain and ordinary meaning of "construct" when used to describe a "railroad line" is no mystery. The Random House Dictionary of the English Language says that "construct" means "to form by putting together parts; build; frame; devise."²² Webster's similarly defines "construct" as "to put together by

²⁰ Keith V.S. ¶ 8. Texas law allows the condemnor to elect to take physical possession of the property at any time after the first, administrative phase is complete, so long as the condemnor complies with certain statutory procedures. Specifically, a condemnor may take physical possession of the condemned property pending the results of further litigation if the condemnor does the following:

- (1) pays the property owner the amount of damages and costs or deposits that amount with the court subject to the order of the property owner;
- (2) deposits with the court either the amount awarded as damages or a surety bond in the same amount, conditioned to secure the payment of an award by the court in excess of the special commissioners' award; and
- (3) executes a bond approved by the judge and conditioned to secure the payment of additional costs that may be awarded by the trial court or on appeal.

Tex. Prop. Code Ann. § 21.021 (West 2004). Texas Central will not take physical possession unless and until the Board grants its exemption petition. Keith V.S. ¶ 8.

²¹ *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012).

²² "construct." Random House Dictionary of the English Language.

assembling parts.”²³ There is no sense in which administratively determining the value of property that may someday be the site of a rail line constitutes “building” that line. Engaging in the Texas administrative valuation process therefore does not require Board approval.

B. *Nicholson* does not apply to the Texas process that Texas Central will use to establish property values.

Despite the otherwise plain meaning of the term “construct” in section 10901, the Interstate Commerce Commission (“ICC”) in *Nicholson v. Missouri Pacific R.R. Co.* indicated that a “condemnation proceeding, if begun to construct a railroad line” qualifies as “‘construction’ within the meaning of section 10901.”²⁴ Properly understood, that statement does not apply in the present circumstances.

To begin with, the ICC in *Nicholson* held that the railroad’s planned activities were *not* “construction of a railroad line” within the meaning of section 10901.²⁵ Its preliminary determination that the railroad’s condemnation proceedings could qualify as construction was necessary only as a reversal of the agency’s prior finding that the entire complaint was unripe.²⁶ From that perspective, the ICC’s key finding was that the landowner had suffered a legally cognizable injury from the fact that the railroad “intend[ed] to commence

²³ “construct.” Webster’s II New College Dictionary.

²⁴ *Nicholson v. Missouri Pacific R.R. Co.*, 366 I.C.C. 69, 72 (1982).

²⁵ *Nicholson*, 366 I.C.C. at 72-73.

²⁶ *Nicholson*, 366 I.C.C. at 70-71.

construction as soon as the land [was] condemned.”²⁷ Thus, in *Nicholson*, condemnation and construction were effectively the *same thing*.

The situation here is completely different. Texas Central will not take physical possession of any condemned property—much less “commence construction”—until after the Board rules on its exemption petition.²⁸ What is more, the Louisiana condemnation process at issue in *Nicholson* did not have an administrative valuation phase like the process in Texas does.²⁹ So when the ICC referred to “the bringing of a condemnation proceeding” in *Nicholson*, it was speaking of a proceeding that was filed and directly prosecuted in a state court, and would have resulted in immediate possession of the condemned property upon judgment being rendered. The first phase of the Texas process, by contrast, merely establishes a value for the property at issue. Texas Central could take physical possession of property at the conclusion of the first phase of the eminent domain process if it complies with the statutory requirements, but is expressly agreeing not to do so.³⁰

For all of these reasons, nothing that the ICC said with respect to condemnation and construction in *Nicholson* should be applied to Texas Central.³¹

²⁷ *Nicholson*, 366 I.C.C. at 71.

²⁸ Keith V.S. ¶ 8.

²⁹ LA. REV. STAT. 19:2;19:4

³⁰ Keith V.S. ¶¶ 7-8.

³¹ The ICC in *Nicholson* approvingly cites language from a 1969 Fifth Circuit decision in which the Court of Appeals saw “no serious question that an attempt to condemn lands for the purpose of constructing new trackage . . . constitutes construction within the meaning of [the Interstate Commerce Act].” *Nicholson*, 366

- C. **Because the meaning of “construction” under section 10901 is likely to arise soon in Texas state court, the Board should act on an expedited basis.**

As noted above, Texas Central is operating on a strict schedule, with plans to begin construction in 2017 and to offer service to passengers as early as late 2021.³² It thus has no choice but to begin the daunting task of property acquisition now. And while Texas Central has every reason to hope that it will reach agreement on a sale price with many of the thousands of property owners along its proposed route, it is likely that some of those owners will not agree. To maintain its schedule and financing plan, Texas Central will need to initiate eminent domain proceedings against those owners in the near future.

Once Texas Central obtains administrative valuations in the first phase of the Texas condemnation process, any property owner who is displeased with his or her valuation can push forward into the second, judicial phase of the process. There, in all likelihood, some property owners will argue that the ICC's statements in *Nicholson* preclude Texas Central from acquiring property interests through condemnation unless and until it has authority from the Board to construct and operate its proposed rail line. Texas Central fully expects these arguments to be

I.C.C. at 71 (citing *Tampa Phosphate R.R. Co. v. Seaboard Coast Line R.R. Co.*, 418 F.2d 387, 393 (5th Cir. 1969)). Setting aside that the present issue apparently was not squarely presented, that case is even further afield. The railroad that was attempting to condemn land in *Tampa Phosphate* was inexplicably proceeding with condemnation even though the ICC had affirmatively found no public use for the project. Texas Central is in a completely different position.

³² Keith V.S. ¶ 3.

raised in Texas state court within the next three-to-four months.³³ Because these state courts will not be familiar with the Board's decisions, and would benefit from a clear statement interpreting the scope of "construction" under section 10901, Texas Central is asking the Board to rule expeditiously.³⁴

Without guidance from the Board, state court litigation of this issue could significantly slow down Texas Central's property acquisition process. Such delays would have a cascading effect on Texas Central's overall schedule, adding costs and potentially threatening the viability of this important project.³⁵ For this additional reason, Texas Central respectfully requests that the Board rule on this petition within 90 days, or as quickly thereafter as is feasible.

CONCLUSION

Because Texas Central's proposed high-speed rail line falls within the Board's jurisdiction, it cannot be constructed without Board authority. But that should not completely tie Texas Central's hands with respect to property acquisition. Obtaining an administrative valuation of property within a proposed right-of-way cannot constitute construction of a railroad line under section 10901, especially when Texas Central will not take physical possession of that property. To ensure that the plain meaning of the term "construct" is not obscured by the state courts, the Board

³³ Keith V.S. ¶ 9.

³⁴ Even if Texas Central prevails in phase two of the Texas condemnation process, it will not take physical possession of the land unless and until the Board grants its exemption petition. Keith V.S. ¶ 8.

³⁵ Keith V.S. ¶ 4.

should clarify that the administrative phase of the Texas eminent domain process does not by itself qualify as “construction,” and that the ICC’s statements in *Nicholson* do not apply here.

Respectfully submitted,



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Dated: April 19, 2016

Verified Statement of Timothy B. Keith In Support of Petition for Clarification

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**VERIFIED STATEMENT OF TIMOTHY B. KEITH
IN SUPPORT OF PETITION FOR CLARIFICATION**

1. My name is Timothy B. Keith. I am Chief Executive Officer (“CEO”) of Texas Central Partners, LLC (“TCP”), the parent company of Texas Central Railroad & Infrastructure, Inc. (“TCRI”) and Texas Central Railroad, LLC (“TCRR”) (hereinafter TCP, TCRI, TCRR, and other affiliates are referred to as “Texas Central”). I am separately submitting a Verified Statement in support of the Petition for Exemption concurrently filed by TCRI and TCRR seeking an exemption (i) from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate a high speed passenger rail line between Dallas and Houston, Texas, with an intermediate Brazos Valley stop serving Bryan-College Station and Huntsville, Texas (the “Texas Central Line”) and (ii) from regulation pursuant to Subtitle IV of Title 49 upon completion of construction and the commencement of operations.

2. I am submitting this Verified Statement in support of the Petition for Clarification filed by TCRI and TCRR (collectively, “Petitioners”) seeking clarification that initiating the Texas eminent domain procedures to obtain an

administrative valuation of property within a proposed right-of-way does not constitute “construction” of a rail line under 49 U.S.C. § 10901.

3. Texas Central’s business plan calls for it to begin construction in 2017, as soon as the requisite environmental reviews are complete and all regulatory approvals are acquired, and to initiate passenger service by late 2021. The total cost of civil construction and the core system is estimated to be over \$10 billion, which is being privately developed by Texas Central.

4. Meeting the deadlines set by Texas Central’s business plan is critical to obtaining the private financing for the project. Project delays add costs and will threaten the financial integrity of this project. Even small early delays on a project of this complexity can have a disproportionately large impact on cost overruns. Delays also add risk to a proposed project, potentially making it more difficult for Texas Central to recruit and retain investors.

5. As demonstrated in my Verified Statement in support of Texas Central’s Petition for Exemption, Texas Central has been taking steps to meet the deadlines in its business plan for several years. However, even though Texas Central expects to complete environmental reviews and secure regulatory approvals in 2017, construction of the rail line cannot begin immediately thereafter unless Texas Central has made substantial progress toward acquiring a continuous 240-mile right-of-way in addition to the land necessary for Texas Central’s infrastructure and stations.

6. Because acquiring this amount of land is a lengthy process, Texas Central must begin acquiring land along the proposed route as soon as possible. Although this may result in the acquisition of property in locations not ultimately identified as the preferred alignment, Texas Central is willing to accept this risk because its construction schedule is central to its business model.

7. Texas Central has already begun negotiating with landowners who are willing sellers. If a landowner is unwilling to negotiate or if a purchase price cannot be agreed upon, Texas Central intends to initiate the first phase of the process in Texas to obtain an assessment of the property's fair value.

8. Even if it initiates the first, administrative phase of the Texas eminent domain process, Texas Central will not take possession of any property through condemnation proceedings until after the Board rules on its Petition for Exemption.

9. Texas Central expects to initiate the valuation phase within the next 2-3 months. Given this schedule, Texas Central anticipates that certain property owners may challenge its authority to obtain an assessment of the property's value in Texas state court within the next 3-4 months.

VERIFICATION

I, Timothy B. Keith, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on this 19th day of April, 2016.



Timothy B. Keith