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SCOTT M. ZIMMERMAN



May 22, 2002

BY HAND

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington D.C. 20423

ENTERED
Office of the Secretary

MAY 24 2002

Part of
Public Record

Re: *Alamo North Texas Railroad Corporation – Construction and
Operation Exemption – In Wise County, TX, Finance Docket No.
34002.*

Dear Secretary Williams:

Enclosed for filing in this proceeding are the original and ten copies of Petitioner Alamo North Texas Railroad's Reply To The Comments Of TXI Operations, LP. Also enclosed is a 3.5 inch computer disk containing the text of Alamo North's reply in WordPerfect 5.0 format.

Kindly date-stamp the enclosed extra two copies of the pleading and return them to our messenger. Many thanks for your assistance.

Sincerely,

Scott M. Zimmerman

cc: Rini Ghosh, Esq.
John Skogland, Esq.
C. Michael Loftus, Esq.
Glen H. Beard

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34002



ALAMO NORTH TEXAS RAILROAD CORPORATION — CONSTRUCTION
AND OPERATION EXEMPTION — WISE COUNTY, TX

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**PETITIONER ALAMO NORTH TEXAS RAILROAD'S
REPLY TO THE COMMENTS OF TXI OPERATIONS, LP**

Petitioner Alamo North Texas Railroad respectfully submits this brief reply to the comments submitted by TXI Operations, LP on May 10, 2002, ostensibly in response to the Environmental Assessment ("EA") in this proceeding served April 12, 2002.¹ In sum, TXI's comments are misplaced because they have nothing to do with environmental matters; moreover, the points TXI raises are insubstantial and provide no basis for the Board to delay or deny final approval of Alamo North's exemption.²

¹ Although the procedural schedule in this case does not expressly contemplate replies to comments on the EA, Alamo North submits that good cause exists to accept this reply for consideration and respectfully asks that the Board do so. As will be discussed further below, TXI's comments raise issues not related to environmental concerns or mitigation, and thus not properly before the Board at all. Moreover, TXI seeks extraordinary relief – not just different or additional environmental mitigation measures, but, apparently, outright rejection of Alamo North's exemption altogether. See TXI Comments at 8 (arguing that the project "should not be built."). As such, Alamo North submits that TXI's comments should be considered a pleading to which Alamo North may respond under 49 C.F.R. § 1104.13(a).

² The Federal Emergency Management Agency also commented on the EA, submitting a one-page letter asking that the floodplain administrator for Wise County be contacted with respect to the project. Should the Board grant final approval to Alamo
(continued on next page ...)

A. TXI's Comments Should Be Rejected Because They Do Not Pertain To Environmental Effects At All, But Rather Are An Untimely Attempt To Argue the Economic Merit of the Project.

First, TXI's comments should be rejected outright because they are not a proper response to the Environmental Assessment at all. TXI does not discuss the environmental impact of the proposed line construction nor the sufficiency of the EA's proposed mitigation measures. Instead, TXI improperly uses this opportunity to oppose the project outright, arguing (TXI Comment at 8) that the line "should not be built," not for reasons having anything to do with the environmental impacts, but solely because of the alleged competitive effect the project would have on TXI. In short, TXI is using the EA process to try, at the 11th hour, to block the project because it perceives that it will benefit its competitor, MMM Southwest.

The time for raising such arguments is long past. In its decision served November 16, 2001 ("November 16 decision"), the Board found that granting the requested exemption would promote the national rail transportation policy at 49 U.S.C. § 10101 by, among other things, "ensuring the development of a sound rail transportation system with effective competition among rail carriers and with other modes, fostering sound economic conditions in transportation, and reducing regulatory barriers to entry." November 16 decision at 2. The Board further found that the

(...continued from previous page)

North's exemption, Alamo North would not object to notifying the floodplain administrator before commencing construction. Alamo North submits, however, that given the extraordinary amount of government consultation that already has taken place at all levels (including with, among others, the North Central Texas Council of Governments, of which Wise County is a member), there is no reason for the Board to postpone or delay its final decision on the exemption pending such notification.

proposed transaction would enhance competition "by providing a rail service option to MMM Southwest . . ." *Id.*

Having made the foregoing findings, the Board conditionally approved Alamo North's exemption. In doing so, the Board did two things. First, the Board made clear that its final approval of the exemption was contingent only upon its "further consideration of the anticipated *environmental impacts* of the proposal." *Id.* at 3, ordering paragraph no. 1 (emphasis supplied). See also *id.* at 3 ("we will issue a further decision addressing *environmental issues*") (emphasis supplied). In short, the Board made clear that the issuance of an EA and the Board's consideration of the EA and comments related to it, were intended to address *environmental* matters, not provide a forum to reopen the Board's basic decision conditionally approving the exemption. Second, the Board gave public notice that interested parties *could* challenge the findings in the November 16 decision by petitioning to reopen that decision by December 6, 2001. See *id.*, ordering paragraph no. 4. The Board's Notice of Exemption, including the deadline for submitting petitions to reopen, was published in the *Federal Register* on November 16, 2001.

Despite the public notice of the Board's decision and the opportunity to challenge that decision by petitioning to reopen it, TXI failed to do so. Indeed, no party petitioned to reopen the November 16 decision. Having failed to seek to reopen the Board's November 16 decision within the permitted time, it is too late for TXI to try, in effect, to do so now, more than 5 months after the deadline, under the pretext of responding to environmental issues.

Both agency precedent and the Board's rules support that conclusion. For example, in *CSX Transportation, Inc. – Abandonment Exemption – In Sumter County, FL*, Docket No. AB-55 (Sub-No. 274X), 1989 ICC LEXIS 35 (ICC served Feb. 7, 1989), the ICC rejected a submission that purported to comment on an EA but did not address environmental issues. In *Midwest Generation, LLC – Exemption From 49 U.S.C. 10901 – For Construction In Will County, IL*, Finance Docket No. 34060 (served March 21, 2002) ("*Midwest Generation*"), the Board made clear that its "usual practice" is to issue a preliminary decision addressing "transportation-related issues" before completing the environmental review, and then issuing a decision "addressing *environmental issues*" thereafter, *id.* at 10 (emphasis supplied), and the Board refused in that case to deviate from that standard practice, *see id.* at 8-9. Moreover, the Board's regulations provide that the record that is to be considered by the Board when an EA is issued is to include comments on the EA "concerning *environmental, historic preservation, CZMA, and endangered species* issues" 49 C.F.R. § 1105.10(f) (emphasis supplied). Based in part on such comments, the Board is to decide "what, if any, *environmental or historic preservation* conditions to impose" *Id.* These regulations make clear that comments on the EA, and the Board's subsequent decision, are intended to address *environmental* issues, and are not intended to serve as a forum for relitigating, months after the reopening deadline, the basic justification for the proposed transaction itself.

B. On Their Merits, TXI's Complaints Are Insubstantial In Any Event, and TXI's Comments Actually Confirm The Reasons Why The Exemption Should Be Finally Approved.

Even if the Board decides to accept and consider TXI's comments, those comments are insubstantial and provide no basis for the Board to delay or deny final approval of Alamo North's exemption.

First, nothing in TXI's comments demonstrates that the Board's conclusions in the November 16 decision are incorrect. Indeed, the heart of TXI's complaint actually confirms that the Board was right to conclude that approval of the exemption would further the national rail transportation policy. The real crux of TXI's concern, and its motivation for seeking to block the Alamo North project, are revealed in a telling passage on page 8 of TXI's comments. There, TXI first admits that rail access as would result from the Alamo North project "has a cost advantage for accessing more distant markets" — that is, the efficiency of rail transportation makes it economically feasible to reach distant customers not practicably reachable by truck. Then, TXI complains that the Alamo North project will "usurp the incremental transportation benefit that TXI currently enjoys by virtue of its situs immediately adjacent to UP's rail line, and transfer that economic advantage to TXI's competitor, Martin Marietta." Thus, TXI reveals that it wants to stop Alamo North not out of any bogus concern over the project's environmental impact, but because the project will provide MMM Southwest, a competitor of TXI, a new rail service option that will make the transportation of MMM Southwest's products more competitive with TXI's. In other words, TXI admits that the project will do *exactly what the Board said it would do* — it will "promote [the national rail transportation policy] by providing a rail service option to MMM Southwest, ensuring the

development of a sound rail transportation system *with effective competition among rail carriers and with other modes*, fostering sound economic conditions in transportation, and reducing regulatory barriers to entry.” November 16 decision at 2 (emphasis supplied). In complaining about the improved transportation options resulting from the proposed project, TXI inadvertently confirms the reasons why the Board was correct and the exemption should be finally approved.

Turning now to the main points specifically asserted by TXI, it is readily apparent that none of them are substantial.

First, TXI argues that the Board should discount Alamo North’s common carrier status in assessing the benefits of the project. TXI Comments at 4. There is, however, no basis to do so. TXI does not dispute that Alamo North will hold itself out to the public and thus will be a common carrier and assume a common carrier obligation. TXI does not dispute that, as the Board found, Alamo North “would be available to serve other existing quarries in the area as well as other industries that might locate there in the future.” November 16 decision at 1. Rather, TXI simply asserts, in effect, that even if Alamo North makes itself available to provide common carrier service, there are no shippers on the line now (other than MMM Southwest) that will want to use the Alamo North line. But that is irrelevant. As the Board has held, “whether or not there are existing shippers waiting for service over the proposed line is not dispositive of whether the track would be private track or a line of railroad.” *Midwest Generation* at 4 n.7. Rather, the relevant issue is whether the carrier “would *make the line available* as a common carrier to any shippers that might request service.” *Id.* (emphasis supplied). As just discussed, it is undisputed that Alamo North will do so. Furthermore, TXI cannot

possibly presume to predict what new industry might locate along the line in the future or what requests for service Alamo North might receive. Those things, of course, TXI does not and cannot know. The fact of the matter remains that Alamo North will be a common carrier holding itself out to the public. The creation of a new common carrier option for the future — a future that TXI cannot possibly predict — is indisputably a public benefit.

Next, TXI points out that the statement at page 5-2 of the EA, that “[t]he entire right-of-way for the proposed new rail construction would be within an existing railroad easement,” is not correct. See TXI Comments at 4-5. That is true; indeed, Alamo North pointed out this misstatement in its own comments on the EA, noting that nearly all of the proposed route will be on property owned or leased by MMM Southwest or Union Pacific Railroad, but as for the remaining few hundred yards, the proposed right-of-way would be *adjacent to* the existing rail easement. As stated in the Petition For Exemption, Alamo North intends to acquire the few hundred yards of right-of-way, or an easement over it, either by purchase or by eminent domain. See Alamo North Comments at 2-3; Petition For Exemption at 3.

This minor inaccuracy in the EA provides no basis for the Board to reconsider the November 16 decision conditionally granting the exemption, because that decision did not assume that the Alamo North right-of-way would lie within the existing rail easement. Quite the contrary; the November 16 decision expressly recites the *correct* state of affairs, as set forth in the Petition For Exemption — namely, that with respect to the short stretch of right-of-way not owned or leased by MMM Southwest or UP, Alamo

North intends to acquire that stretch, or an easement over it, by purchase or by eminent domain.

TXI also points out more generally that the Alamo North line will bisect TXI's Dozier tract. See TXI Comments at 6-7. TXI asserts that bisecting the tract will "dramatically increase TXI's cost of production" and "decrease the amount of quarryable materials, thus decreasing TXI's production revenues and net income." *Id.* at 6. TXI further asserts that the proposed rail line "may . . . also prevent TXI from going forward with planned improvements to its rail facilities . . ." *Id.* at 6-7 (emphasis in original); and, finally, that acquisition of a new rail easement by Alamo North would "further exacerbat[e] the negative economic impact of the proposal on the viability of TXI's future quarry." *Id.* at 7.

TXI's professed concerns are not persuasive. First, TXI's speculation about possible future consequences to it is just that – sheer, unsupported speculation. TXI's comments in this regard are entirely conclusory, unquantified, and unsupported by any actual evidence whatsoever. For example, TXI presumes to assert that the acquisition of an easement by Alamo North would "exacerbate[e] the negative economic impact of the proposal" even though it is not known yet how Alamo North ultimately will access the right-of-way – whether by acquiring the right of way or an easement over it, by purchase or by eminent domain – or on what economic terms.

More significantly, however, the EA already discusses the issue of property severance and provides a proposed mitigation condition fully sufficient to address it. Specifically, the EA calls for a condition requiring that, "[w]here construction of the proposed rail line would cause unavoidable property severance, Alamo North shall

negotiate with the appropriate land owner and *provide access to the severed property.*"

EA at 6-3 (emphasis supplied). This condition, which TXI utterly ignores, is fully sufficient to address TXI's concerns, and renders TXI's comments on this issue moot.

TXI also quarrels with the conclusion, see EA at 1-3, that approximately 83,300 truckloads would be removed from the road per year if the Alamo North project is completed. See TXI Comments at 7. But that objection is nothing more than semantic gaming. TXI asserts that "no truck trips will be eliminated," *id.*, since 4 million tons per year now travel by truck, and it is estimated that 4 million tons will travel by truck after the rail line is in place and the existing and new quarries are both operational. What that ignores, of course, is that in the future, the total annual output of the quarries is estimated to be 6 *million* tons, 2 million of which (roughly 83,300 truckloads) would be carried by rail. Thus, the rail line will, indeed, haul the equivalent of approximately 83,300 truckloads of material per year *that otherwise would be on the roads in the future*. Whether TXI wants to call that an "elimination" of truck trips or not, the essential conclusion is undisputed.

Finally, TXI includes a two-page attachment of "additional comments" in bare outline form. Most of these merely rehash points made in the main text of TXI's submission, and are adequately addressed above. Two items not mentioned elsewhere merit just a brief response here. First, TXI apparently asserts that the per ton-mile cost estimates of truck transport and rail transport noted at page 1-3 of the EA are "misleading." See TXI Comments at 11. Even taking, for the sake of argument, that conclusory and unsupported comment at face value, TXI does not dispute the essential fact demonstrated by the figures: that, particularly as distances increase, rail

transportation of aggregates is more cost efficient than truck transportation. Indeed, TXI itself admits that very fact, when it acknowledges that “rail access has a cost advantage for accessing more distant markets.” *Id.* at 8.

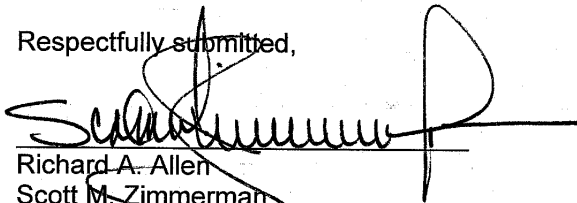
Second, on a related point, TXI disputes that “truck transportation is inefficient and uneconomical for distances above 50 miles,” asserting that TXI’s average distance for delivery by truck is 75 miles and is a “very efficient means” of delivery. *Id.* at 12.

First, TXI misquotes the EA. The EA’s statement is not absolute, but relative: It says that truck transportation is “*becoming increasingly* inefficient and uneconomical for distances above 50 miles,” a statement not inconsistent with TXI’s asserted ability to deliver by truck at 75 miles. Second, even assuming, for the sake of argument, that truck transportation were a fully satisfactory method for transporting MMM Southwest’s products, that would not justify denying the exemption. See, e.g., *Midwest Generation* at 9 (explaining that a showing that existing service is inadequate is not necessary to obtain authority to construct a competing rail line.) Finally, again, TXI misses the real point. The point at which truck deliveries become too inefficient and uneconomical — be it 75 miles, or 50, or something in between — is a matter of degree and circumstance, and is not the real issue. The central issue is that, as distance increases, rail enjoys a cost advantage (which, as noted above, TXI admits), and the new rail service to be provided by Alamo North will permit MMM Southwest to sell beyond its current market, which now is largely limited to a 70-mile radius. See EA at 1-2. TXI does not like that fact, but cannot dispute it; indeed, the creation of that new and more efficient transportation option is the very reason why TXI opposes the exemption — and why, despite TXI’s opposition, it should be approved.

CONCLUSION

For the foregoing reasons, TXI's comments provide no substantial reason for the Board not to approve the recommendations in the EA (as amended in the one respect discussed in Alamo North's own comments) or for the Board to delay or deny final approval of Alamo North's exemption.

Respectfully submitted,



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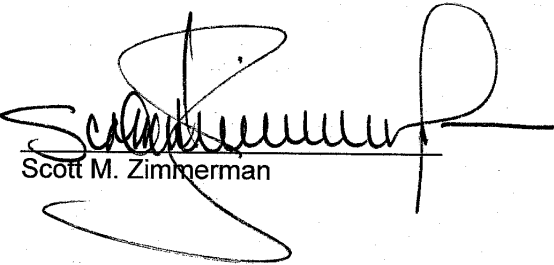
Dated: May 22, 2002

CERTIFICATE OF SERVICE

I certify that on May 22, 2002, "Petitioner Alamo North Texas Railroad's Reply To The Comments Of TXI Operations, LP" was served, by the methods indicated below, on:

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