

TEXAS HOUSE OF REPRESENTATIVES
Land and Resource Management Committee
Interim Study – Charge 1
May 3, 2006

TESTIMONY OF MCEAA, INC.—DISCUSSION

1. The state limits its delegation of eminent domain to “common carrier” railroads.

The right of eminent domain granted by the constitution resides in the legislature, and the legislature may declare the conditions of its use. Tex. Const. Art. 1, § 17; *Imperial Irr. Co. v. Jayne*, 138 S.W. 575 (1911). A power of eminent domain that has been delegated may be revoked or modified by subsequent legislation. *Houston B. & T. Ry. Co. v. Hornberger*, 143 S.W.2d 272, 279 (Tex.Civ.App.—Houston 1911).

Texas law delegates certain eminent domain powers to railroad corporations. “If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate . . . such corporation may acquire such property by condemnation thereof.” TEX. CIV. STAT. ANN. Art. 6336 (Vernon).

Art. 1, § 17 of the Texas Constitution states that “No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.”

In order to satisfy the “public use” provision of Art. 1, § 17 of the Texas Constitution, Texas courts have long interpreted Art. 6336 to apply only to “common carrier” railroads. *Houston B. & T. Ry. Co. v. Hornberger*, 143 S.W.2d 272, 279 (Tex.Civ.App.—Houston 1911).

Amendments to Government Code Chapter 2206 were passed by the 79th Legislature in Senate Bill 7 during the second called session in August 2005. Senate Bill 7 maintains the status quo, leaving in place those exercises of eminent domain power by railroad corporations “authorized by law,” and neither adding previously unauthorized eminent domain powers nor limiting those already in existence.

2. The federal government has exclusive jurisdiction over rail construction by common carriers.

The Texas Railroad Commission no longer regulates any part of rail construction or operation. The Texas Department of Transportation is now the delegated state program under the Federal Rail Safety Act overseen by the Federal Railroad Administration. Congress has federally preempted all other state regulatory functions and delegated them to the federal Surface Transportation Board (STB). The jurisdiction of the STB over rail transportation and construction is exclusive. 49 U.S.C. § 10501(b) (2000).

The STB is now the sole entity with the power to say what a common carrier is. Any common carrier activity relating to rail transportation or construction lies solely within the regulatory jurisdiction of the STB. *Id.*

The first sentence of Article I, § 10 of the Texas Constitution (“Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways, and railroad companies, common carriers.”), as well as TEX. CIV. STAT. ANN. Art. 6316 (“Any railroad corporation shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States.”) are void and of no effect in the face of the preemptive power of 49 U.S.C. § 10501(b) (2000).

3. The federal government concedes it has no power to force a state to grant eminent domain power.

It is well settled “that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory . . . [of] any of the new states; except for temporary purposes, to execute trusts” created, in most cases, by the Property Clause of the U.S. Constitution, Art. IV, § 3, and that clause’s power to create, hold, and dispose of Territories as public lands. *Pollard v. Hagan*, 44 U.S. 212, 221 (1845). “The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, except in the cases in which it is expressly granted.” *Id.* at 223.

The statutes authorizing and delegating powers to the Surface Transportation Board (STB) neither mention nor vest that agency with eminent domain or the power to delegate eminent domain to railroad corporations. *See* 49 U.S.C. § 722 (2000) (powers of the STB); 49 U.S.C. § 10901–10907 (2000) (STB licensing jurisdiction for common carrier rail transportation).

Indeed, the STB has acknowledged that eminent domain is a question of state law and a railroad is responsible for obtaining the land necessary to complete the project. *Dakota, Minn. & Eastern R.R. v. South Dakota*, 236 F.Supp.2d 989, 1009 (D.S.D. 2002). “Thus STB approval of the [rail] project does not carry with it any federal power to take the land to complete the project. For such authority, [the railroad] is wholly dependent upon the State.” *Id.*

In Board-approved rail construction cases, the applicant is responsible for the acquisition of land necessary to implement the approved project. Condemnation (also known as eminent domain) of property needed to complete a Board-approved line occurs in accordance with the state’s railroad condemnation law.

Draft Environmental Impact Statement, STB Finance Docket No. 34284, Southwest Gulf Railroad—Construction and Operation Exemption—Medina County, Texas, at 4-65 (Nov. 5, 2004); *see also* Amicus Brief of the Surface Transportation Board, *Burlington*

Northern and Santa Fe Ry. Co. v. City of Houston, 2003 WL 23571201, No. 14-03-01311-CV (Tex.App.—Houston [14th Dist.]).

However, unlike cases that implicate whether a state’s use of eminent domain power is preempted by federal law—see e.g., *Dakota, Minn. & Eastern R.R. v. South Dakota*, 236 F.Supp.2d 989 (D.S.D. 2002); *Burlington Northern and Santa Fe Ry. Co. v. City of Houston*, 171 S.W.3d 240 (Tex.App.—Houston [14th Dist.] 2005)—the federal government clearly has no power to require the state Legislature to *grant* eminent domain to private railroad corporations constructing spur tracks for their sole private use; regardless of whether those private railroad corporations style themselves as common carriers before a federal agency.

4. Under state law, private spur lines are not common carriers and therefore do not have eminent domain power.

While the federal government has exclusive *jurisdiction* over spur tracks, 49 U.S.C. § 10501(b) (2000), it does not *license* them, 49 U.S.C. § 10906 (2000).¹

Because spur tracks are not licensed as common carriers, they are not public uses eligible to use eminent domain within the meaning of Art. 1, § 17 of the Texas Constitution.

Existing Texas law on the issue of spur track construction is out of date and inoperative, failing to account for major revisions to federal law in 1978, 1980, and 1995 that gave the federal government exclusive jurisdiction over common carriers and conclusively removed any regulatory role for the state agencies such as the Texas Railroad Commission. See Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1359; Pub. L. 96–448, title II, § 214(c)(3)–(5), Oct. 14, 1980, 94 Stat. 1915; Pub. L. 103–272, § 4(j)(15), July 5, 1994, 108 Stat. 1369; Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 807; last

¹ After reviewing the Legislative History of the 1995 Interstate Commerce Commission Termination Act (ICCTA), Pub. L. 104–88, 109 Stat. 807, the relationship between 49 U.S.C. § 10906 and § 10501(b) has been clarified as follows:

The ICCTA by its terms makes it clear that the STB has exclusive jurisdiction over the abandonment of tracks, including wholly intrastate spur and side tracks. Chapter 109 of the ICCTA, entitled “Licensing,” governs the process of STB approval over a railway carrier's decision to add to or to extend its rail lines, to acquire rail lines or to abandon or discontinue use of its rail lines. Section 10906 of the ICCTA, entitled “Exception” provides, in pertinent part, that “[t]he Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks.” The Court does not interpret this provision of the statute to mean that the types of tracks mentioned therein are outside the jurisdiction of the STB. Instead, this provision simply provides that STB approval is not required prior to the construction, acquisition, operation, abandonment or discontinuance of these types of tracks.

Cedarapids, Inc. v. Chicago, Central & Pacific R. Co., 265 F.Supp.2d 1005, 1023 (N.D. Iowa 2003).

amended by Pub. L. 104–287, § 5(21), Oct. 11, 1996, 110 Stat. 3390 (defining federal rail licensing jurisdiction in 49 U.S.C. § 10501(b)).

As an example, state law on the books does expressly provide railroad corporations with the power to construct spur lines to private land, and to condemn land for their route. TEX. CIV. STAT. ANN. Art. 6316a (Vernon 1926); *Texas & N. O. R. Co. v. Schoenfeld*, 146 S.W.2d 724, 725–26 (Tex. 1941). Today, however, neither the STB nor the state licenses these spurs, because they are not common carriers. Yet because the STB still has exclusive jurisdiction over spurs, there is no longer an applicable state definition of “common carrier” that would operate to bring spurs within the realm of public uses. Rather, in nearly all cases, they are intended to serve one private facility and one private facility only. Therefore, they are not public uses within the meaning of the state or federal Constitutions. Tex. Const. Art. 1, § 17; U.S. Const. Amend. V.

5. A loophole in state law potentially permits private, non-rail entities constructing private spur lines to claim common carrier status at the federal level and then return to a state forum to take land, frustrating the intent of state eminent domain law.

In passing Senate Bill 7 last term to remedy the egregious *Kelo v. City of New London* decision by the U.S. Supreme Court, the Legislature intended to halt private takings and private takings conducted under a public pretext. See TEX. GOVT CODE § 2206.001(b) (2006). Specifically, the Legislature prohibited any use of eminent domain that:

- (1) confers a private benefit on a particular private party through the use of the property;
- (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party;

Id.

There is no serious debate that when a private entity forms a rail corporation that it controls, in order to build a rail spur to solely serve a facility (shipper) that it also controls, any use of eminent domain by that railroad corporation will be “a pretext to confer a private benefit,” if not an explicit “private benefit.”

A problem arises, however, when a private railroad corporation, formed by a non-rail entity to build an essentially private, sole-service spur to its own facility, makes an end run around state eminent domain law by applying to the federal government (the STB) for a common carrier license.

These “paper railroads” are able to easily evade the test of whether they are spurs within the meaning of 49 U.S.C. § 10906 by making a bare promise to operate as common carriers.²

The problem is, that by presuming common carrier status in the federal forum, the STB permits private “paper railroads” to return to a state forum and assert powers—such as eminent domain for public use—that they would otherwise be denied under state law. This clearly frustrates the intent of Senate Bill 7 and its limitations on delegations of eminent domain for private benefit and pretextual public uses. *See* TEX. GOVT. CODE § 2206.001(b) (2006).

6. The existing loophole in state law should be closed with a narrow control test that will still allow legitimate uses of eminent domain by true common carriers.

The solution is to close the loophole on the narrowest grounds possible, by clarifying what MCEAA, Inc. believes is already existing law:

First, that any railroad corporation delegated eminent domain power for public use must be a common carrier. *See e.g., Houston B. & T. Ry. Co. v. Hornberger*, 143 S.W.2d 272, 279 (Tex.Civ.App.—Houston 1911).

Second, that eminent domain cannot be delegated for public use to a non-rail entity that is controlled by the sole facility to be served. This will stop the practice of non-rail entities forming “paper railroads” under their own control, which they then use to claim common carrier status in a federal forum, only to then return to a state forum and attempt to assume eminent domain power for what is clearly a private benefit, or, at minimum, a pretextual public use.

Policy Question: Effect on Federal-State rail framework

MCEAA, Inc. has studied this issue extensively in order to draft a proposal on the narrowest possible grounds. MCEAA’s proposal deliberately does not implicate preemptive powers of the federal government or attempt to otherwise regulate rail construction and operation. Rather, MCEAA’s proposal rests wholly on state law

² Note that the STB assumes that “paper railroads” will be common carriers. To the STB, the question is whether an entity holding itself out as a common carrier would otherwise need to obtain a license.

To determine whether a particular common carrier rail track would be “auxiliary track,” [a spur within the meaning of 49 U.S.C. § 10906] and thus could be constructed without a license, the [STB] and the courts look at relevant “indicia” of the track itself (such as the track’s length, the weight of rail, etc.), as well as the track’s use and, most importantly, whether the track would open up new service territory for the operating rail carrier.

Testimony of Roger Nober, STB Chairman, House Committee on Transportation and Infrastructure, Subcommittee on Railroads, March 5, 2004, at 4. .

grounds—the state’s grant of eminent domain power itself—which the federal government concedes it has no power to commandeer or alter.

Policy Question: Effect on legitimate common carriers

MCEAA’s proposal does not affect the ability of any existing common carrier railroad, such as Union Pacific or Burlington Northern Santa Fe, to exercise eminent domain power, even when building spurs to a single facility. Nor will any future common carrier, including switching operations, have their eminent domain power stripped.

To the extent that any true common carrier, existing or proposed, will be impacted by this proposal, it will only be on their present ability, sanctioned by federal regulators, to distort the marketplace through pricing power and hold Texas shippers captive, as discussed in the next question.

Policy Question: Captive Shippers

Captive shippers are either industries seeking rail service for which the cost of obtaining rail access is prohibitive, or industries with rail service that, for various reasons, are at the mercy of monopolistic pricing practices of one rail carrier and are seeking alternate rail access.

For new industrial projects, rail access is a factor in site selection. Alternatively, existing industrial sites may grow and seek to build out to obtain rail access.

MCEAA’s proposal allows for almost any conceivable corporate means of obtaining rail access while employing eminent domain, except for one controlled by a facility to be solely served. The only way to strike a proper balance between a facility to be solely served and other property owners between it and an existing rail line is to require land acquisition to occur on a willing seller, willing buyer basis, in those cases where the solely served facility will control the “paper railroad” corporation exercising eminent domain.

To hold otherwise is to delegate state power to the solely served facility to condemn land, solely for its own benefit. That is not a public use.

The abuse of eminent domain is made worse in such instances by the prostration of state property law to federal policy convenience. The only claim to eminent domain power that a railroad corporation controlled by the same entity as the facility it seeks to serve can ever have is as a common carrier, which it plainly is not and will likely never be. Yet the federal government permits non-rail entities to form “paper railroads” and make bare assertions of common carrier status, in order to avoid resolving more fundamental pricing power issues that restrict access to rail service for industrial shippers nationwide.

The Legislature, by stating affirmatively what we believe to be the existing law—that eminent domain is not available to railroad corporations controlled by the same entity as the facility they seek to serve—will, by asserting its right to limit eminent domain to true public uses, help to positively affect real change for industrial shippers at the federal level. That debate has been stalled in Congress for the past 10 years.

Policy Question: Legislative Resolution of Controversial Project

It is also clear, from MCEAA’s own experience with the Vulcan Materials Corporation, that abuse of eminent domain by non-rail entities does not aid industrial shippers, captive or otherwise, in their attempt to obtain rail access.

The Vulcan Materials quarry-rail proposal, which has been in existence for nearly 7 years, is almost uniformly opposed in Medina County. Tragically, eminent domain was never the only solution. More specifically, the ability to form a private railroad and purchase an easement on a willing seller, willing buyer basis, was always available, assuming environmental impacts of the project were adequately disclosed, analyzed, and mitigated.

The notion that eminent domain under state law is the “only option” for shippers who, for pricing power or other reasons, lack rail access, is a false choice pushed by the major railroads, who wish to avoid a reassessment of their pricing power by Congress at the federal level. Moreover, MCEAA’s proposal merely clarifies what we believe is existing law, that a certain class of “paper railroad” corporations controlled by non-rail entities cannot use eminent domain for their sole, private benefit.

In Medina County, a win-win is still possible, in areas further to the west that support rail access and have adequate aggregate supplies.

However, the Legislature would not be resolving this controversial project by passing MCEAA’s proposal. Vulcan has stated that it would truck material from the quarry if it did not obtain a rail easement through condemnation. Draft Environmental Impact Statement, STB Finance Docket No. 34284, Southwest Gulf Railroad—Construction and Operation Exemption—Medina County, Texas, at 2–14 (Nov. 5, 2004); *see also* Finance Docket No. 34284, EI-793 (letter from counsel for Vulcan Materials stating same). The difference would be a project of lesser depth, scale and environmental impact (the quarry lies directly over the Edwards Aquifer recharge zone), as well as the foreclosure of any exercise of state power under Texas law by Vulcan, an Alabama-based corporation, to take land from private citizens solely for its own benefit.

MCEAA, Inc. appreciates the Committee’s time and consideration and will follow up this testimony with additional supporting materials in the coming weeks.