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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 20-0393

In the
SUPREME COURT OF TEXAS

James Fredrick Miles,

Petitioner,

v.

Texas Central Railroad & Infrastructure, Inc. and Integrated Texas Logistics, Inc.,

Respondents.

On Petition for Review from the Court of Appeals
Thirteenth District of Texas, Corpus Christi-Edinburg, Texas
Case No. 13-19-00297-CV

PETITIONER'S MOTION FOR REHEARING

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INTRODUCTION

About a decade ago, a group of wealthy businessmen decided that Texas needed a high-speed rail between Dallas and Houston (the "Project"). They partnered with Central Japan Railway Company and the Japan Bank of International Cooperation and began promoting the Project.

Among other things, they needed the land for the Project. Purchasing it would cost too much and some landowners might not sell. Asking the Legislature for help would be too risky. So, these businessmen decided they would try to take the land from their fellow Texans whether the landowners liked it or not. They formed Respondent Texas Central Railroad & Infrastructure, Inc. ("TCRI") and falsely claimed it was operating a railroad in Texas and that it had the power to exercise eminent domain. Armed with nothing more than these false claims, TCRI began threatening landowners in an effort to survey their private property and sued those (like Petitioner Miles) who refused.

The trial court ruled in Miles's favor. The court of appeals reversed and proceeded to dole out eminent domain like it was candy. Miles then petitioned this Court trusting that it would correct what the court of appeals had gotten wrong.

Despite its recognition that, in Texas, protection of property rights "is essential to freedom itself," this Court denied review. Given what has transpired and is at stake, Miles respectfully requests that the Court reconsider its decision.

BACKGROUND

A. Six days after incorporating, TCRI falsely claims it is operating a railroad in Texas and that it has the power to exercise eminent domain.

TCRI incorporated on December 20, 2012. (CR119) Six days later, TCRI wrote a letter to the Comptroller to comply with a law requiring any entity claiming eminent domain authority to submit a letter by December 31, 2012 stating that the entity is authorized to exercise eminent domain and identifying each provision of law granting that authority. TEX. GOV'T CODE § 2206.101(b). If an entity failed to comply, any eminent domain authority it had would expire on September 1, 2013. TEX. GOV'T CODE § 2206.101(c).

In its letter, TCRI claimed to be "authorized by the State of Texas to exercise the power of eminent domain." (2dSupp.CR300) This was false, as TCRI had existed for only six days. TCRI also claimed it was "operating a railroad in the State of Texas." (2dSupp.CR300) TCRI used these magic words because, in Texas, a "railroad company" may exercise the power of eminent domain, but in order to be a railroad company, an entity must be "operating a railroad." TEX. TRANSP. CODE § 81.002(2). This claim was also false. TCRI has never owned any trains or tracks, nor has it transported any person or thing anywhere. (Op.9) It was not operating a railroad on December 26, 2012, nor is it operating one now.

Other than statutes relating to railroad companies, TCRI did not identify any other provision of law granting it eminent domain authority. (2dSupp.CR300-04)

B. Two years later, TCRI falsely claims it was chartered to construct and operate an "interurban electric railroad."

On January 21, 2015, TCRI claimed in its amended incorporation papers that its purpose was to "plan, build, maintain and operate an interurban electric railroad." (CR120) Once again, TCRI used these magic words because, in Texas, an entity "chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway" has the power to exercise eminent domain. TEX. TRANSP. CODE § 131.012. Once again, this claim was false. TCRI has never had any intention of constructing or operating a mode of transportation that has been extinct in Texas since 1948—namely, one of these:

TCRI now had two shots at the eminent domain apple. If and when it found itself in a courtroom, it could falsely claim it is operating a railroad now and that it plans to construct and operate an interurban electric railway in the future.

C. TCRI threatens and sues landowners.

In late 2015, TCRI began sending letters to landowners requesting surveys of their property for a "privately-developed high-speed rail system." (CR30) Some landowners acquiesced. Others, like Miles, who kept asking TCRI for proof of eminent domain authority but never got any (2dSupp.CR31), did not. Having grown tired of being harassed, Miles sued TCRI for a declaration that it did *not* have the power to exercise eminent domain. (CR27)

TCRI filed a counterclaim alleging that, as both a "railroad company" and an "electric railway," it is "vested with the power of eminent domain." (CR104,107) TCRI filed 40 more lawsuits against more than 100 other landowners in six counties alleging the same thing. (CR239-56) TCRI hoped it might find an unrepresented landowner and a trial court that would sign off on its false claims of eminent domain authority. It never did.

D. TCRI makes up new arguments.

As the statewide litigation wore on, TCRI stayed nimble. Initially, TCRI stuck with the story it told to the Comptroller on December 26, 2012—summed up by its corporate representative:

> But I would like to just ask you the question as it's written here: On what day do you claim TCRI began operating a railroad?
>
> A. The day that it was incorporated as a railroad.

(CR1623)

Once TCRI's "operating a railroad on the day it incorporated" argument crumbled at the courthouse, it started claiming that it began operating a railroad at some later point in time, after performing some "railroad activities." (Resp.Br.29)

TCRI's "railroad activities" argument did not play well either, so it began claiming that, because "words in the present tense include the future tense" (TEX. GOV'T CODE § 311.012(a)), it is "operating a railroad" now because it "will operate" a railroad in the future. (CR1000) Not only does this argument rely on a mangling of proper grammar, interpreting "operating" to mean "will operate" or "will be operating" would render other provisions of the Transportation Code nonsensical. (Pet.Br.29-32, Pet.Reply.Br.10-15) It would also require adding words to the statute itself: "entity operating a railroad" necessarily becomes "entity *that will* operate a railroad" or "entity *that will be* operating a railroad." *See Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015) ("A court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written.").

Worse yet, TCRI never pleaded these conflicting arguments in the alternative. Instead, it claimed that it: (1) began operating a railroad on the day it incorporated; (2) began operating a railroad later, after performing some railroad activities; and (3) will operate a railroad in the future. Meanwhile, TCRI also claimed that it plans to construct and operate an interurban electric railway. TCRI has never attempted to explain how all these claims can be true at once.

E. After back-to-back court losses, TCRI drops its remaining lawsuits.

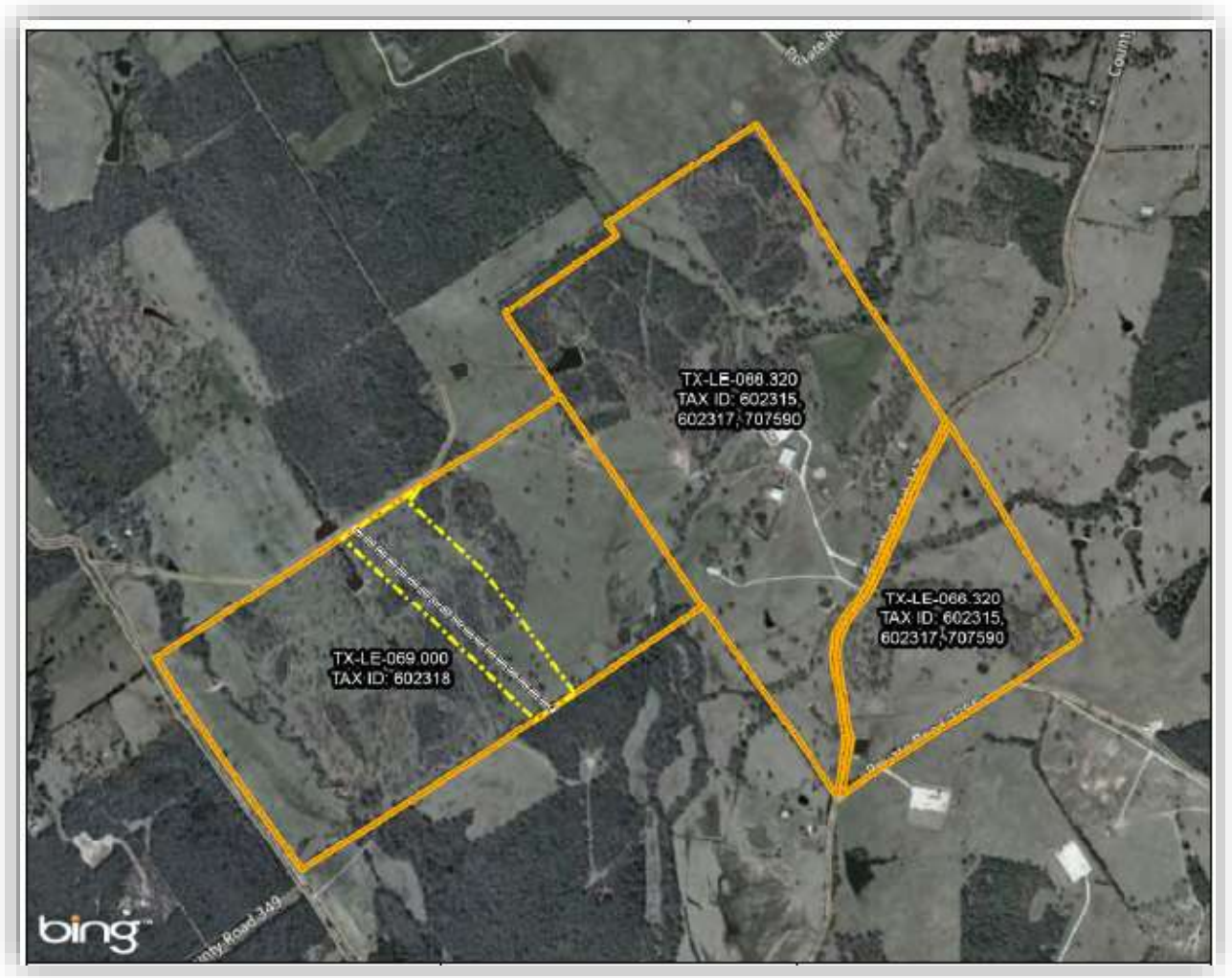
In September 2016, TCRI was dealt its first loss in Harris County when it withdrew its request for a temporary injunction in the middle of the hearing. (CR270) In December 2016, the same Harris County court denied TCRI's motion for summary judgment in its entirety. (CR296)

Two months later, TCRI dropped its remaining lawsuits (including its counterclaim against Miles) "to allow it to work with all landowners on an amicable approach to permission to survey." (2dSupp.CR57-58)

F. TCRI makes false claims in an effort to get Miles's claims dismissed.

In February 2017, soon after dropping its remaining lawsuits, TCRI moved to dismiss Miles's claims. (CR143) TCRI argued there was no longer any controversy because it "is not certain at this time" whether the Project's proposed line "will travel through" Miles's property. (CR192) At the hearing, TCRI's

corporate representative said the same thing. (2dSupp.RR70) This was false. As shown in TCRI's counterclaim, the Project will bisect Miles's 600-acre property:



(CR123)

To this day, the proposed line has not moved an inch. Instead of dismissing Miles's claims, the court stayed the case until "a final decision is made as to whether … the proposed rail line impacts [Miles's] property." (2dSupp.CR67)

G. During the stay, TCRI creates ITL.

In the Harris County case that TCRI lost in 2016, the landowner argued, among other things, that even if TCRI ever had eminent domain authority as an interurban electric railway, its authority expired on September 1, 2013 due to its failure to identify, by the statutory deadline of December 31, 2012, Transportation Code § 131.012 (granting eminent domain authority to interurban electric railways) as a provision of law granting it authority. (2dSupp.CR398-400)

TCRI did not want to lose this argument again. Plus, it had time on its hands because it had convinced the trial court to stay the case. So, on September 26, 2017, TCRI created a new entity—Respondent Integrated Texas Logistics, Inc. ("ITL"). (CR907) Because ITL was created *after* December 31, 2012, it was not subject to the same reporting requirements that had doomed TCRI in Harris County. TEX. GOV'T CODE § 2206.101(a). In theory, ITL could falsely claim to be an interurban electric railway without Miles (or any other landowner) claiming that its alleged eminent domain authority as an interurban electric railway had expired.

H. The trial court lifts the stay.

After forcing Miles to both file and set an opposed motion to lift the stay (2dSupp.CR3), TCRI relented (2dSupp.CR27). On April 20, 2018, the trial court granted Miles's motion, lifted the stay, and the case resumed. (CR472)

I. Hours after Miles moves for summary judgment, ITL intervenes out of nowhere and sues Miles, and TCRI sues Miles again.

On Friday, May 4, 2018 at 1:23 p.m., Miles filed his motion for summary judgment seeking a declaration that TCRI does not have the power of eminent domain as a railroad company or an interurban electric railway. (CR519)

At 5:58 p.m. that same day, ITL filed a petition in intervention against Miles, claiming he had "denied that TCRI—and, by extension, ITL—has the statutory right to enter his property and has refused permission to do so." (CR504-05) But ITL had never requested permission to survey Miles's property; in fact, it had not contacted or communicated with Miles in any manner. (2dSupp.CR290)

Like its creator TCRI, ITL sought a declaration that it is a "railroad company" and an "electric railway" with the power of eminent domain. (CR516) Inexplicably, ITL also requested that Miles pay its attorneys' fees. (CR516)

At 6:05 p.m., TCRI filed an amended counterclaim in which it alleged the same claims it had dropped in 2017. (CR473)

On May 7, 2018 (the following Monday), TCRI *and* ITL jointly moved for partial summary judgment against Miles. (CR866)

J. In a panic, TCRI sues more landowners in Ellis County.

On May 9, 2018, the trial court set the parties' motions for summary judgment for hearing on August 9, 2018.

Five days later, TCRI and ITL sued landowners Darren Eagle and William Getzendaner in Ellis County. (CR1346,1328) TCRI and ITL made the same allegations and sought the same relief as in Miles's case. (CR1351-58,1334-41)

TCRI and ITL then filed joint motions for summary judgment against Eagle and Getzendaner (CR1380,1441), and set the motions for hearing on July 31 and August 1, 2018—just days before the scheduled August 9 hearing in this case.

Eagle and Getzendaner filed opposed motions to continue the summary judgment hearings. (CR1503,1511) TCRI and ITL responded that Eagle's "other grounds for a continuance, a vacation … and the birth of a grandchild, do not justify" the requested continuance. (CR1517) On July 23, 2018, the Ellis County court granted both landowners brief continuances. (CR1535,1549)

K. TCRI returns to Leon County and makes more false claims in an effort to avoid the summary judgment hearing in this case.

On July 30, 2018, a week after opposing continuances of the summary judgment hearings in Ellis County, TCRI and ITL moved for a continuance of the summary judgment hearing in this case. (CR1052) The trial court set the motion to be heard the morning of the August 9 summary judgment hearing.

TCRI and ITL had to quickly come up with some reason explaining why they had tried to expedite the summary judgment hearings in Ellis County, only to turn around a week later and seek a continuance of the summary judgment hearing in this case in Leon County. Among other false claims, they told the court that Ellis

County "is where we're going to build the test track, and its related facilities. And, we need to begin on that. And, so Ellis County is a higher priority for Texas Central than Leon County is in terms of getting started." (RR14) This was false. There is no "test track." Three years have passed and neither TCRI nor ITL is even close to breaking ground in Ellis County or anywhere else. (*See* County.Br.4-7)

The trial court saw through this gamesmanship and denied the motion for continuance. (RR35-36) The court held the hearing on the parties' motions for summary judgment and said it would take them under advisement.

L. As the trial court deliberated, TCRI and ITL are dealt summary judgment losses in Ellis County.

Fearing the trial court might not rule in their favor, TCRI and ITL rushed back to Ellis County hoping to find better luck there. They did not. On January 25, 2019, after a consolidated hearing, the Ellis County court denied TCRI and ITL's joint motions for summary judgment against Eagle and Getzendaner, and another landowner, Ronny Caldwell, whom TCRI had sued twice.

M. The trial court grants summary judgment in Miles's favor.

On February 8, 2019, the trial court issued its ruling granting Miles's motion for summary judgment and denying TCRI and ITL's joint motion for summary judgment. (CR1727) The court signed a Final Judgment declaring that neither TCRI nor ITL is a railroad company or an interurban electric railway. (CR1773)

N. The court of appeals reverses, and this Court denies review.

On May 7, 2020, the court of appeals reversed, holding that *both* TCRI and ITL are railroad companies *and* interurban electric railways. (Op.19) Miles has already detailed the court of appeals' errors. (Pet.Br.15-18) On June 18, 2021, this Court denied Miles's Petition for Review with seven justices participating.

ARGUMENT

I. In Texas, private property rights are supposed to mean something.

"Private property ownership pre-existed the Republic of Texas and the constitutions of both the United States and Texas." *Severance v. Patterson*, 370 S.W.3d 705, 709 (Tex. 2012). "Both constitutions protect these rights in private property as essential and fundamental rights of the individual in a free society." *Id*. Preservation of property rights is "one of the most important purposes of government." *Tex. Rice Land P's, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 204 (Tex. 2012) (quoting *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex.1977)). This Court, in particular, has "repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to 'freedom itself.'" *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 804 (Tex. 2016) (quoting *Denbury*, 363 S.W.3d at 204).

For good reason, this Court has never been shy about stressing the importance of protecting private property rights. But its decision not to even review the court of appeals' opinion renders these principles meaningless. Miles

respectfully requests that the Court stand behind its own words, apply its well-founded precedent to the facts of this case, and grant his Petition.

II. In Texas, if there is any doubt about eminent domain authority, courts must rule in favor of the landowner.

In *Denbury*, this Court held that the legislative grant of eminent-domain power must be strictly construed in two regards. 363 S.W.3d at 198. First, strict compliance with all statutory requirements is required. *Id*. Second, in "instances of doubt as to the scope of the power, the statute granting such power is strictly construed in favor of the landowner." *Id*. While it is clear that neither TCRI nor ITL have strictly complied with all statutory requirements, *at the very least* there are instances of doubt as to the scope of the power they seek to invoke.

TCRI knew its creation of ITL would raise eyebrows, so TCRI and ITL tried to explain themselves. At first, they each claimed in footnotes that ITL was created to "erase any question" as to TCRI's *and* ITL's alleged eminent domain authority:

[2] Integrated Texas Logistics, Inc. was created out of an abundance of caution after Miles alleged that TCRI did not have eminent domain powers as an electric railway. While TCRI and ITL believe this argument is without merit, as discussed in their declaratory judgment action below, ITL was created to erase any question as to TCRI's and ITL's authority to enter onto and survey the Property, as well as other properties related to the Project. ITL's Verified Petition in Intervention and Application for Injunctive Relief was filed on May 4, 2018.

[2] *See* Certificate of Formation attached hereto as Exhibit "A." ITL was created out of an abundance of caution after certain property owners related to the Project alleged that TCRI did not have eminent domain powers as an electric railway. While TCRI and ITL believe this argument is without merit, as discussed in their declaratory judgment action, below, TCRI and ITL created ITL to erase any question as to their authority to enter onto and survey the Property, as well as other properties related to the Project.

(CR473 – TCRI's footnote, CR505 – ITL's footnote)

This made no sense. Why would the creation of ITL have any bearing on whether TCRI had eminent domain authority? Nevertheless, both TCRI and ITL repeated these footnotes in their amended petitions, conceding that doubt existed as to the scope of their claimed authority. (CR920,890)

Soon after, TCRI's and ITL's Vice President Travis Kelly testified that ITL was created to erase any question as to TCRI's (but not ITL's) alleged authority:

> A. ITL was created out of an abundance of caution after allegations were made, that we disagree with, that TCRI had waived its right of eminent domain and was not a railroad, was not an interurban electric railway -- railway. ITL was incorporated and -- and fulfilled those -- the obligations that were in question with TCRI.

(CR1684)

To be fair, Kelly didn't know who made the decision to create ITL or whom to ask to find out who did. (CR1685) He didn't participate in any discussions regarding the decision to create ITL, nor did he know who did. (CR1685) Kelly didn't even know how he learned of the purpose for which ITL was allegedly created. (CR1686) He simply could not speak to ITL's "origins." (CR1687)

After Kelly's telling admissions, TCRI and ITL amended their pleadings again, with the only change being the wording of the footnotes:

[2] Integrated Texas Logistics, Inc. was created out of an abundance of caution after Miles alleged that TCRI did not have eminent domain powers as an electric railway. While TCRI and ITL believe this argument is without merit, as discussed in their declaratory judgment action below, ITL was created to erase any question as to ITL's authority to enter onto and survey the Property, as well as other properties related to the Project. ITL's Original Verified Petition in Intervention and Application for Injunctive Relief was filed on May 4, 2018.

[2] *See* Certificate of Formation attached hereto as Exhibit "A." ITL was created out of an abundance of caution after certain property owners related to the Project alleged that TCRI did not have eminent domain powers as an electric railway. While TCRI and ITL believe this argument is without merit, as discussed in their declaratory judgment action, below, ITL was created to erase any question as to its authority to enter onto and survey the Property, as well as other properties related to the Project.

(CR970 – TCRI's footnote, CR955 – ITL's footnote)

This statement—that "ITL was created to erase any question as to ITL's authority"—is as circular as it gets. Before TCRI created ITL, there was no question about ITL's authority because it did not even exist.

But the absurdity of these footnotes is beside the point. What matters is this: Both TCRI *and* ITL admit that a question—*i.e.*, an instance of doubt—exists as to TCRI's alleged authority. And by creating ITL, TCRI raised only more doubt.

TCRI and ITL wrestled mightily with other instances of doubt. Depending on which argument they felt like floating on any particular day, they claimed to be:

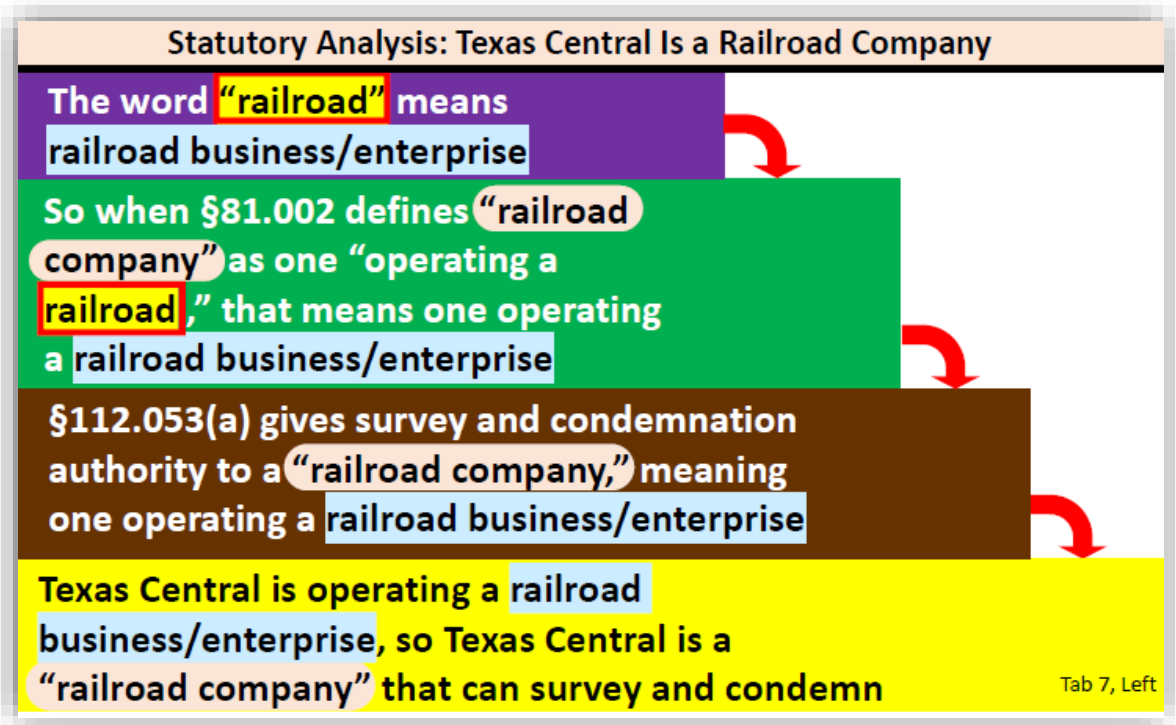
- A "railroad" (2dSupp.CR300,304);
- An "interurban electric railroad" (Supp.CR11);
- A "high-speed rail line" (CR104);
- A "privately-developed high-speed rail system" (CR30);
- An "electric railroad" (CR104);

- A “railroad company” (CR104);
- An “electric railway” (CR104);
- An “interurban electric railway company” (Resp.Br.5,15);
- “Lines of electric railway” (Supp.CR15);
- A “high-speed passenger train” (CR866);
- A “high-speed passenger train system” (CR867);
- A “high-speed train line” (CR871);
- A “high-speed electric passenger train” (CR884);
- A “high-speed passenger railway” (Supp.CR4);
- A “high-speed passenger railroad” (Supp.CR1097);
- The “Texas Bullet Train” (Supp.CR1098);
- A “high-speed railroad” (Supp.CR1098);
- A “high-speed electric-powered passenger train” (Resp.Opening.Br.2,11);
- A “high-speed rail system” (Resp.Opening.Br.9);
- An “electric rail service” (Resp.Opening.Br.16,58);
- A “high-speed interurban electric railway company” (Resp.Opening.Br.15);
- A “high-speed train” (Resp.Br.1);
- A “high-speed railway” (Resp.Opening.Br.53);
- A “high-speed interurban electric railway” (Resp.Opening.Br.57);
- A “modern, 200-mile-per-hour electric train” (Resp.Reply.Br.10);

- A “new modern, electric high-speed train” (Resp.Reply.Br.11);
- A “high-speed, electric train” (Resp.Reply.Br.16); and
- A “modern electric high-speed train” (Resp.Br.54).

According to TCRI and ITL, they were operating all these things on the day they incorporated. (CR1623) Or, perhaps, they began operating all these things after doing some “railroad activities” (Resp.Br.29), even though they have not performed the same activities (Pet.Br.7). Or, perhaps, they “will operate” or “will be operating” all these things in the future. (*Compare* CR1000 *with* Resp.Br.40)

As for how a train-less, track-less, station-less entity can be deemed to be presently “operating a railroad,” TCRI and ITL put their clear-as-mud argument on full display in this head-scratching demonstrative in the court of appeals:



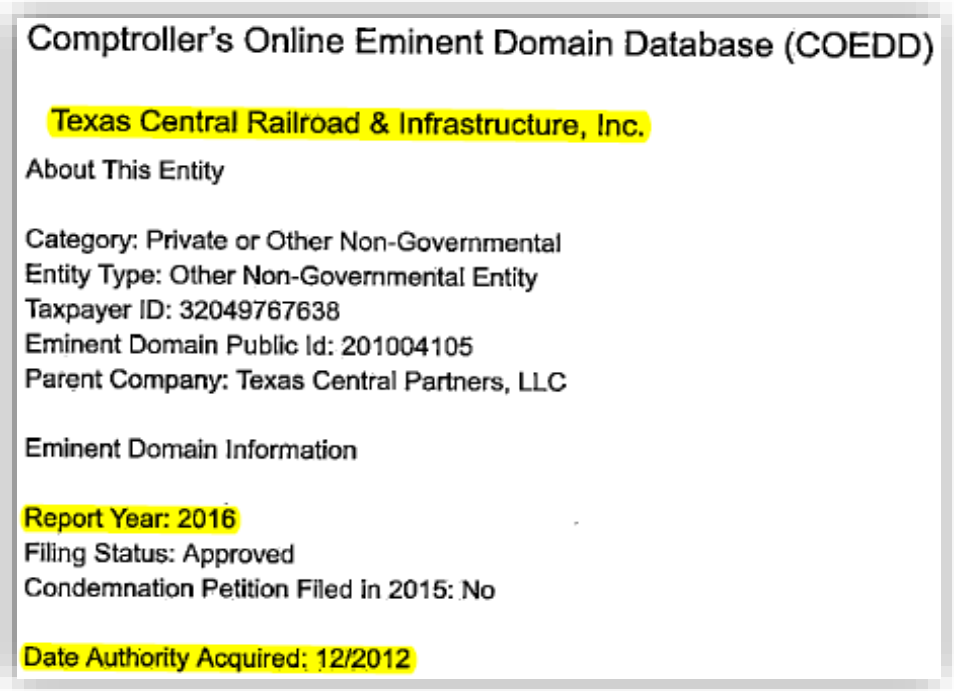
(Resp.Oral.Arg.Ex.Tab7)

Earlier this year, TCRI and ITL were *still* trying to reduce this mess of an argument to writing in their 38-page surreply. But they *still* cannot answer this question: If the Legislature intended "operating a railroad" to mean "operating a railroad enterprise," why didn't it just choose those words instead? *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("We presume the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.").

This record is littered with other instances of doubt. Before this litigation, TCRI filled the record with doubt by making false claims to the Comptroller and later by falsely claiming to be something (an interurban electric railway) it is not. During the litigation, TCRI heaped more doubt into the record as it pivoted from one inconsistent argument to another. During the stay, TCRI formed ITL in a last-ditch effort to erase the doubt it had created, resulting only in more doubt. If there are instances of doubt, a court must strictly construe the statute in favor of the landowner. *Denbury*, 363 S.W.3d at 198. The court of appeals did not.

III. As it stands, anybody with $300 and a pen can obtain eminent domain authority in Texas immediately upon incorporation.

To this day, both TCRI and ITL claim to have acquired eminent domain authority on the day they each incorporated. In 2016 and every year since, TCRI has reported that it acquired eminent domain authority in December 2012:



Comptroller's Online Eminent Domain Database (COEDD)

Texas Central Railroad & Infrastructure, Inc.

About This Entity

Category: Private or Other Non-Governmental
Entity Type: Other Non-Governmental Entity
Taxpayer ID: 32049767638
Eminent Domain Public Id: 201004105
Parent Company: Texas Central Partners, LLC

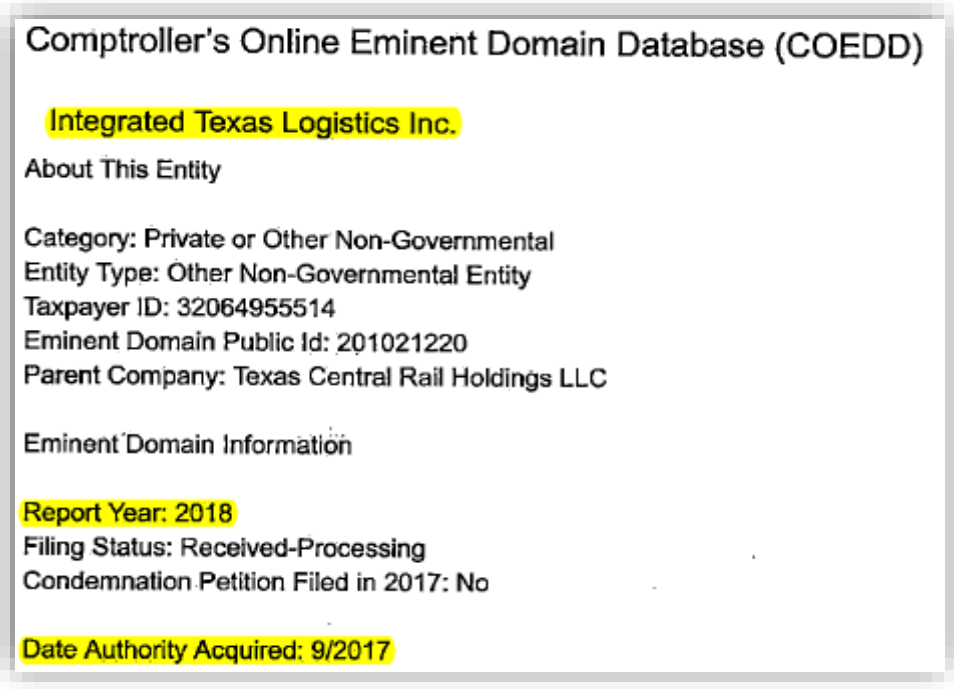
Eminent Domain Information

Report Year: 2016
Filing Status: Approved
Condemnation Petition Filed in 2015: No

Date Authority Acquired: 12/2012

(Supp.CR20)

Likewise, in 2018 and every year since, ITL has reported that it acquired eminent domain authority in September 2017:



Comptroller's Online Eminent Domain Database (COEDD)

Integrated Texas Logistics Inc.

About This Entity

Category: Private or Other Non-Governmental
Entity Type: Other Non-Governmental Entity
Taxpayer ID: 32064955514
Eminent Domain Public Id: 201021220
Parent Company: Texas Central Rail Holdings LLC

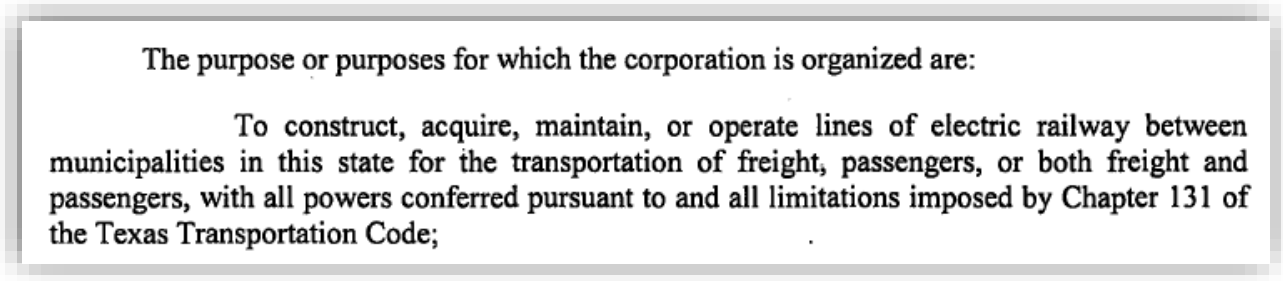
Eminent Domain Information

Report Year: 2018
Filing Status: Received-Processing
Condemnation Petition Filed in 2017: No

Date Authority Acquired: 9/2017

(Supp.CR27)

According to TCRI and ITL, all an entity must do to acquire the power of eminent domain in Texas is put these magic words in its incorporation papers:



The purpose or purposes for which the corporation is organized are:

To construct, acquire, maintain, or operate lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both freight and passengers, with all powers conferred pursuant to and all limitations imposed by Chapter 131 of the Texas Transportation Code;

(CR496)

That is what TCRI and ITL argued: "Nothing more is required to meet Section 131.011's unambiguous definition of interurban electric railway companies." (Resp.Opening.Br.15) And that is what their Comptroller reports reflect.[1]

The court of appeals agreed, holding that because TCRI's and ITL's charters parroted section 131.011's requirement that a corporation be chartered "'to conduct and operate an electric railway between two municipalities in this state'" (Op.11, quoting TEX. TRANSP. CODE § 131.011), this statement alone was enough to invoke eminent domain authority (*id*.). Unless this Court grants Miles's Petition, this dangerous precedent will be the law in Texas.

[1] TCRI's and ITL's most recent reports are available in the Comptroller's Online Eminent Domain Database at https://coedd.comptroller.texas.gov/.

IV. With respect to high-speed rail, the Legislature had made its intentions clear.

The last time a private entity tried to build a high-speed rail in Texas, the Legislature enacted a special statute defining "high-speed rail" for that purpose. *See* Acts 1989, 71st Leg., ch. 1104, § I, eff. June 16, 1989 (repealed by Acts 1995, 74th Leg., ch. 165, § 24(a), eff. Sept. 1, 1995). It also created the Texas High-Speed Rail Authority ("Authority") and charged it with awarding a franchise "to the private sector" for the construction of a high-speed rail if it would serve "public convenience and necessity." TEX. CIV. STAT. art. 6674v.2, §§ 2(a)(1), 3 (repealed).

The Texas TGV Consortium ("Texas TGV") and one other applicant submitted applications, which triggered the hearing process under the Authority's rules. (CR1217) Texas TGV, the other applicant, and intervenor Southwest Airlines pre-submitted testimony. (CR1217) The hearing lasted 17 days. (CR1217) 78 witness and 14 advisors testified, and over 160 exhibits were introduced, filling over 4,000 pages of transcript. (CR1217) In accordance with the Hearing Examiner's decision, the Authority awarded a franchise to Texas TGV. (CR1218)

Importantly, the terms of the Franchise Agreement placed the power of eminent domain with the Authority, not the franchisee. (CR1191) Texas TGV could request that the Authority exercise eminent domain to acquire property, but the Authority could refuse to do so until Texas TGV could prove it had "obtained Debt Financing Commitments and Equity Financing Commitments … which will

allow construction of the Facility." (CR1191) No steps could be taken to acquire *any* property until Texas TGV had met these financing commitments. (CR1191)

Why didn't Texas TGV just falsely claim to be a railroad company or an interurban electric railway to acquire eminent domain authority for its private high-speed rail project? Would that not have been much easier than enduring a state-sanctioned hearing process, only to then enter into an agreement with the Authority requiring that Texas TGV meet financial milestones (CR1230), maintain abandonment bonds (CR1175), and routinely submit income statements and balance sheets (CR1195), in addition to its other safeguard provisions designed to ensure the protection of Texas and its citizens and landowners? And why did the Legislature deem it necessary for the Authority to retain the power of eminent domain rather than grant that extraordinary power to Texas TGV? The answers are obvious, and underscore the mischief the court of appeals' opinion enables.

More recently, in 2017, the Legislature recognized the threat *this* Project posed and the improper "encroach[ment] on private property rights" it represents. *See* Tex. B. Ann., 2017 Reg. Sess., S.B. 977, *1 (May 16, 2017). Due to this threat, the Legislature passed a law preventing *any* state money from going to "high-speed rail operated by a private entity." TEX. TRANSP. CODE § 199.003(b)(1). And it defined "high-speed rail" as "intercity passenger rail service that is reasonably expected to reach speeds of at least 110 miles per hour." *Id*. § 199.003(a).

In short, the Legislature has always defined and treated "high-speed rail" as a distinct mode of transportation, and a "high-speed rail" is precisely what TCRI admits it wants to build:

> 13. TCRI, along with its affiliated entities, is in the process of planning, surveying, and acquiring the right-of-way necessary for a 240 mile long high-speed rail line that will connect the two largest metropolitan areas in the State of Texas, with a planned intermediate stop to be located in Grimes County (the "Project").

(CR105)

But the Legislature wisely chose *not* to grant the power of eminent domain to private promoters of high-speed rail projects. TCRI should have accepted this reality and attempted to purchase the land on the open market, or it could have asked the Legislature for its blessing. Instead, TCRI searched through the Transportation Code for anything with the word "rail" in it that has eminent domain authority. It found "railroad company" and later "interurban electric railway" and has been falsely claiming to be *both* of these modes of transportation simultaneously ever since. Unless review is granted, TCRI (and ITL) are going to get away with this ruse, blazing a path for others to follow.

V. Miles's Petition for Review presents an important question of state law that should be resolved by this Court.

In support of their false claim that the Project "has received significant regulatory approvals," TCRI and ITL have cited to the Final Environmental Impact

Statement ("Final EIS") issued by the Federal Railroad Administration. (Resp.Br.7) ITL is not even mentioned in this 11,512-page document. More importantly, TCRI and ITL ignore what it says about "Land Use" impacts.

According to the Final EIS, over 99% of the "Land Ownership Crossed" is private.[2] Within the Project's "limits of disturbance" are 680 agricultural structures, 696 residences, 534 commercial buildings, and 21 community facilities.[3] Over 1,700 landowners will have their parcels taken from them.[4] The Project will require permanent conversion of 7,000 acres of private property, including 5,251 acres of agricultural and 3,534 acres of special status farmland.[5]

In essence, the Project would convert over 240 miles of Texas's rural landscape into a 40-foot-high electrified fence with no grade crossings. It would permanently alter the lives of tens of thousands of Texans and the communities in which they live. (County.Br.13-16) For these and many other reasons, the question whether TCRI and ITL are allowed to exercise the power of eminent domain to acquire the land needed for the Project is vitally important and deserves to be resolved by this Court. TEX. R. APP. P. 56.1(a)(6).

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[2] Final EIS, Table 3.13-2.

[3] Final EIS, Table 3.13-7.

[4] Final EIS, Table 3.13-17.

[5] Final EIS, Tables 3.13-10, 3.13-12.

PRAYER

Petitioner requests that the Court grant this Motion for Rehearing and his Petition for Review.

Respectfully submitted,

/s/ M. Patrick McShan

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of TEX. R. APP. P. 9.4(i)(2)(D) because it contains 4,500 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9 .4(i)(1).

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/s/ M. Patrick McShan

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Petitioner's Motion for Rehearing was served by electronic transmission on the following counsel for Respondents on July 29, 2021.

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