

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35582**  
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**PETITION OF RAIL-TERM CORPORATION  
FOR A DECLARATORY ORDER**

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**COMMENTS OF  
AMERICAN TRAIN DISPATCHERS ASSOCIATION  
IN OPPOSITION TO PETITION FOR RECONSIDERATION**

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**COMMENTS OF AMERICAN TRAIN DISPATCHERS ASSOCIATION  
IN OPPOSITION TO PETITION FOR RECONSIDERATION**

This matter originally came before the Board for a singularly limited purpose. The U.S. Court of Appeals for the District of Columbia Circuit was presented with a petition to review a determination of the Railroad Retirement Board (“RRB”) that Rail-Term Corporation is a covered employer under the statutes the RRB administers, the Railroad Retirement Act (“RRA”) and the Railroad Unemployment Insurance Act (“RUIA”). The Court stayed its consideration of that petition so that Rail-Term could “petition [this] Board for a declaratory order on the question whether Rail-Term is a ‘rail carrier’ under 49 U.S.C. 10102(5).” Rail-Term did so and this Board, after reviewing Rail-Term’s operations and their relationship to the carriage of freight by rail in interstate commerce, answered that question “yes.” The Board’s Decision does not control any other potential employer under the RRA, RUIA, or any other federal statute; it is limited to Rail-Term. Nevertheless, when Rail-Term filed a petition for reconsideration, entities with far broader interests sought to intervene, unabashedly admitting their intent to seek judicial review should this Board not reverse itself, regardless of what Rail-Term decides to do. This Board wisely denied them party status as intervenors but permitted those other entities to comment as *amicus curiae*.

ATDA previously filed a brief in these proceedings because its members have a vital interest in assuring that contractors and their employees who perform train dispatching services integral to the interstate transportation of passengers and freight are covered by the same laws and regulations that apply to the carriers’ own dispatchers when they are providing the exact same services. Neither ATDA nor Rail-Term sought Board consideration of issues beyond the question the Court of Appeals invited Rail-Term to present for the Board’s consideration - is

*Rail-Term's train dispatching service* sufficient to deem it a carrier under the 49 U.S.C. § 10102(5)? It is ATDA's position that the Board correctly answered that question in the affirmative, that the pending petition for reconsideration should be denied, and that the attempts by the various rail carriers and industry associations to broaden and then undermine the Board's decision as too far-reaching should be rejected.

The Board has always recognized that decisions as to "carrier" status are fact-driven and *sui generis*. In this case, the Board succinctly summarized its decision this way:

We find here that, by performing an essential rail function on behalf of several short line railroads, Rail-Term has become a rail carrier under § 10102(5). Although Rail-Term does not directly hold itself out to the public as providing interstate rail transportation services, the dispatching services that it provides under contract with carriers are an essential part of the total rail common carrier services offered by its clients to the public. The overall scheme of regulation under ICCTA indicates that Congress intended for the regulation of these kinds of contracted dispatching services to rest within our jurisdiction and, consequently, for the railroad labor laws to apply to those employees who are performing these essential rail transportation services.

Decision of November 29, 2013 ("*Decision*") at 2. Rail-Term challenges this finding on four grounds: that the result, which it says will also subject "potentially many other railroad industry suppliers to coverage under the [RRA] and the [RUIA] was (1) "clearly not intended by Congress," (2) is "contrary to the plain language of the statute," (3) "reverses without legal justification a long line of STB and Interstate Commerce Commission precedent on the term 'rail carrier,'" and (4) draws conclusions without any basis in the record."<sup>1</sup> Its industry supporters harp on the same claims, though with far more hyperbole.

The undeniable fact is that train dispatching is a distinct and unique function of rail

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<sup>1</sup> Rail-Term devotes no part of its filing to its fourth ground and identifies no factual conclusion of the Board that lacks an evidentiary foundation.

transportation and that the Board's *Decision* is premised on that fact. The *Decision* does not (and had no reason to) address other services for which railroads employ vendors. The Board explicitly addressed and rejected these concerns: "[W]e do not suggest that every outsourced rail service should be found to be covered by our jurisdiction and its preemptive effect. However, as the industry evolves to take advantage of greater outsourcing opportunities, we must identify the point at which, even if outsourced, specific transportation functions are integral to the overall unity of a rail operator's common carrier obligations." *Decision* at 9.

Notwithstanding the sharp, nearly hysterical rhetoric of those who seek reconsideration<sup>2</sup>, this is a case about train dispatching only and its immediate and direct connection to the actual movement of trains and transportation of freight. By limiting the scope of its ruling to "these kinds of contracted dispatching services," the Board acknowledged that train dispatching is significantly different from any other service provided by subcontractors. Train dispatching is not akin to the run-of-the-mill support service that other subcontractors who have been found not to fall within the "carrier" definition provide. Rail-Term's train dispatchers (like those employed by every rail carrier) maintain actual control over the movement of trains carrying the goods of shippers. The service they perform is far more highly specialized and discretionary in nature (which is likely why so few carriers have it done out of house) than any other for which a railroad might contract. Certainly, every vendor purveying rail-related services to carriers describe what they do as "essential." But that alone would not cause them to fall within the scope of, or be

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<sup>2</sup> See, e.g., Comments of American Short Line and Regional Railroad Association at 9 ("The Board's contortions...is an artifice which will spawn unintended consequences sure to play havoc on the small railroad industry...[C]ontractors will exit the business in droves"); Comments of CSX Transportation, Inc. at 8 ("the flood of litigation that could be triggered...should give the Board serious pause.")

affected (in their minds adversely) by, the Board’s holding.<sup>3</sup>

The *Decision* does not subject every other rail contractor to “carrier” status. As the Board explained, “[t]he question referred by the court...presents a case of first impression for this agency *in terms of the specific dispatching arrangement provided by Rail-Term.*” *Decision* at 3. (Italics added). We presume, as should all of the commentators, that the Board will continue to make carrier determinations on a case-by-case basis. Nevertheless, Rail-Term and its supporters clamor that the *Decision* implicitly sweeps all others in because an argument can be made for the inextricability or integrality of any and every function for which a railroad contracts with a third party. Rail-Term Petition at 6, 15. (“Taken to its logical extreme, the majority’s ruling could render *almost every* railroad industry vendor subject to the jurisdiction of the ICCT A” and “would have bizarre and unintended results.”). See also, e.g. Comments of NRCMA at 8 (“every component and facet of railroad operations is embraced within the services held out to the public.”). They go so far as to say that the *Decision* has far-reaching and adverse consequences for all of the railroads’ subcontracting decisions. See, e.g., Comments of Union Pacific at 2-3 (“upset predictability ...and created uncertainty”; “could have widespread and unanticipated consequences on UP’s ability to efficiently manage its railroad and provide the level of service that customers demand.”). They are simply wrong. The Board did not opine on other types of contracted services, and it should not do so now. If deemed necessary, the Board can reiterate the narrowness of its ruling when it rejects reconsideration.

The factual foundation for the *Decision* was this:

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<sup>3</sup> If the Board does revise its *Decision*, it should do no more than to confirm that future cases will be decided on their own facts and that this ruling addresses only the entity and services at issue here.

Rail-Term's central business function is to provide dispatching service as an operational arm of the client carriers on an outsourced basis (with some related computer software development), and thus the rail service provided for the rail carrier's customers is its core business. Similarly, the carriers who are Rail-Term's customers initiate the outsourcing for the core purpose of substituting it for in-house dispatching, which must be provided one way or the other in order for physical common carrier transportation operations of the carriers' systems to occur.

Operationally, Rail-Term's client railroads submit their daily train schedules and intra-day changes to Rail-Term's Director of Operations (a Rail-Term employee located in Rutland), who then gives general directions to the dispatchers employed by Rail-Term. Those dispatchers, in turn, give the operating personnel of the client railroads authority to occupy track. Rail-Term states that its employees do not report directly to any carrier supervisor, but rather to supervisors within Rail-Term. Nor, according to Rail-Term, do the employees of the carriers report directly to any supervisors at Rail-Term....

In short, while the final physical act of interstate rail transportation is performed by Rail-Term's clients, Rail-Term employees, by the company's own words, provide an indispensable link in implementing the key function "required" each time one of the carriers moves its cars.

*Decision 4-5* (internal footnotes omitted).

The *Decision* is well-supported by precedent from the Supreme Court, lower federal courts, the Interstate Commerce Commission, and the STB itself. *Decision* at 7-10. Those seeking reconsideration assert that such reliance is misplaced because the Board has not adequately discerned differences between the facts in the other cases and what Rail-Term presents here.<sup>4</sup> But the Board's *Decision* does go to considerable lengths to demonstrate why, under that precedent, Rail-Term is a "carrier" while others who provide different services by subcontract are not and why Rail-Term is more akin to those entities who have been deemed to

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<sup>4</sup> We will not here undertake a case-by-case review of the precedent on which the Board relied. Other than to say that we believe the Board's considered analysis of that precedent is correct, we refer the Board to our initial brief in opposition to Rail-Term's request for a declaratory order.

be “carriers” than those who have not. The broad authority vested in the agency by Congress to determine “carrier” status, confirmed by the Courts, enables the Board to “pull back the curtain” and determine what really is the case on the ground and how those facts fit (or don’t) within the statutory definition. The Board’s exercise of that authority to find Rail-Term to be a “carrier” should not be disturbed.

Rail-Term and its supporters say that it cannot be a “carrier” because it does not hold itself out to the public as an entity that will or can transport freight or passengers. The Board specifically addressed this argument and found it wanting in light of the fact that the carriers who use Rail-Term’s services do hold those services out as part of their own offerings to the public. The movement of freight is what the railroads tell their customers they do; for the shippers who engage Rail-Term’s clients, Rail-Term controls the movement of their freight. Because Rail-Term stands in the shoes of those railroads, Rail-Term properly can be deemed a “carrier” too.

The Board’s test of relying upon “how integral the service is to the rail carrier’s underlying common carrier services that are being held out to the public” (*Decision* at 10) is eminently reasonable. Here, the Board recognized the significant difference between train dispatching and the other functions for which some carriers contract. Applying the test to Rail-Term, the Board found that “the dispatching services are embraced within the interstate common carrier services held out to the public by Rail-Term’s clients, without which their common carrier services across their system simply could not be executed.” *Id.* The proponents of reconsideration do not dispute that factual finding, they simply argue that it should be reconsidered because it could lead to other industry contractors being subject to similar determinations. But, as we noted earlier, that is for another day. A fact-bound determination

should not be set aside merely because it could affect a ruling in some other future dispute involving other parties and other transportation functions.<sup>5</sup>

Finally, the Board has amply shown why its *Decision* does not offend the doctrine created in *Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad*, 8 I.C.C. 2d 835, 836-37 (1991) (“*State of Maine*”). In *State of Maine*, the ICC held that public entities acquiring a freight line for use in commuter operations would not become “carriers” simply because they take on an obligation to maintain the line and dispatch freight operations over it for the selling carrier that retains an easement to operate on the line. The Board explained:

In such cases, although the public entity would in fact be engaging in dispatching of freight carriers (as is Rail-Term), that would be neither its primary nor sole purpose (unlike Rail-Term). To the contrary, such an arrangement is designed to enable the public entity on the scene to manage its *non-common carrier* business—commuter rail. As a public entity, it does not dispatch freight trains for the sake of a freight carrier, and does not operate solely as an arm of the freight rail’s operations.

*Decision* at 12. Unlike those cases, the Board explained, “where the joint dispatching is *simply incidental* to commuter rail operations, and where asserting jurisdiction would undercut the two important public purposes[,] the facts and policy considerations here are quite different.” *Id.* at 12. Emphasis added. There can be no legitimate dispute that, as the Board found, the differences between the two situations are stark.

The freight railroads for which Rail-Term provides dispatch services are railroads where, in each instance, the dispatching is provided exclusively as an extension

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<sup>5</sup> The Board has allowed that the atypical circumstances here could justify an exemption for Rail-Term from the Board’s otherwise broad oversight. Rail-Term responds that it would have to “pay a substantial filing fee (over \$13,000) for the privilege of seeking such relief.” The Board, of course, could exercise its discretion to waive or reduce this fee.

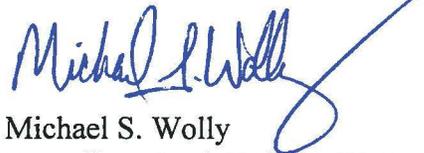
of, and replacement for, the dispatching that railroad would perform, outside of any other transactions or public policy considerations, and its dispatching services are an integral component of the interstate freight operations held out to the public by these freight carriers. Rail-Term's operational and economic incentive is specifically to displace essential in-house operations of its freight rail carrier clients in implementing transportation, rather than as an incidental step in a State of Maine public entity transaction. Unlike under our State of Maine cases, there is no public policy that would be furthered by finding that Rail-Term is not a rail carrier under ICCTA despite its assumption of dispatching services on behalf of its rail carrier clients. To the contrary, finding that Rail-Term is a rail carrier under ICCTA affords the protections of the RRA and RUIA to its employees and affords federal preemption from unreasonably burdensome state and local laws to Rail-Term as well as its carrier clients.

The argument that the Board should reconsider its holding that Rail-Term is a "carrier" because of the *State of Maine* line of cases is not well-taken.<sup>6</sup>

#### CONCLUSION

For all these reasons, Rail-Term's Petition for Reconsideration should be denied. The Board's holding that Rail-Term is a rail carrier under ICCTA Section 10102(5) should stand.

Respectfully submitted,



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<sup>6</sup> The Board's cogent explanation of why its *Decision* is consistent with how it has treated transloading cases also withstands the challengers' attacks. NRCMA maintains (Comments at 13-15) that had the Board applied the Rail-Term test in *City of Alexandria*, STB Finance Docket No. 35157 (February 17, 2009), the outcome would have been different and suggests that shows a failing in the Board's logic. However, NRCMA's position ignores the fact that that case involved unloading a commodity, not actually moving the train itself, a crucial and significant distinction.

CERTIFICATE OF SERVICE

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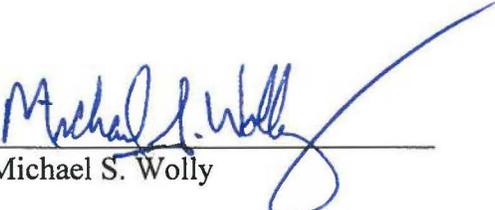
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