

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35381

RAIL-TERM CORP.—PETITION FOR DECLARATORY ORDER

Decided: October 8, 2010

The Board is denying the petition of Rail-Term Corp. (RTC) for an order declaring that it is not a “rail carrier” within the definition at 49 U.S.C. § 10102(5), because issuing a declaratory order or instituting a proceeding at this time would interfere with a related proceeding before another federal agency, the Railroad Retirement Board (Retirement Board).

BACKGROUND

RTC and Related Corporations. RTC, a privately held Michigan corporation, and its Canadian corporate sibling, Centre Rail-Control Inc. (Rail-Control), are subsidiaries of a parent company, Rail-Term Inc. (Rail-Term), a Canadian corporation. RTC employs 8 people who develop computer-based dispatching software and provide dispatching services for small rail carriers in the United States.¹ RTC states that it, Rail-Control, and Rail-Term are not owned by, or under common control with, any rail carrier in the United States or Canada.

Retirement Board Ruling. The Retirement Board, a federal agency, determines coverage of employers and employees under the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.* (Retirement Act), and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.* (Insurance Act). In its recent Board Coverage Decision 10-33, the Retirement Board held that RTC is a “covered employer” under the Retirement and Insurance Acts.

As explained in the Retirement Board’s decision, a “covered employer” under the Retirement Act is defined in part at 45 U.S.C. § 231(a)(1)(i) as “any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code” (the rail provisions of the Interstate Commerce Act, as amended by the ICC Termination Act (the Interstate Commerce Act)).² Under the Interstate Commerce Act, “rail

¹ According to Rail-Term, the small rail carriers are: Vermont Railway System and its affiliates; the Buffalo & Pittsburgh Railroad; and the subsidiary railroads of short line holding company, OmniTRAX, Inc.

² The Insurance Act contains a substantially similar definition. The Retirement Board found that RTC does not come within an alternative definition of covered employer, at 45 U.S.C. § 231(a)(1)(ii): “any company which is directly or indirectly owned or controlled by, or under

carrier' means a person providing common carrier railroad transportation for compensation . . . [.]”³

This Petition. RTC states that it disagrees with, and intends to seek reconsideration of, the initial coverage decision before the Retirement Board. If RTC does not prevail in its reconsideration request, it intends to seek judicial review of the coverage ruling. Notwithstanding its intention to pursue redress before the Retirement Board, RTC nonetheless separately asks this agency to declare that RTC is not a “rail carrier” under the Interstate Commerce Act.

DISCUSSION AND CONCLUSIONS

The Board has broad discretion to issue declaratory orders to terminate a controversy or remove uncertainty. 5 U.S.C. § 554(e); 49 U.S.C. § 721. But the Board need not issue a declaratory order when another federal agency has ruled on the matter, and the matter has not been referred to the Board.

In two other instances involving Retirement Board coverage decisions, this agency has ruled on whether an entity is a rail carrier within the meaning of the Interstate Commerce Act: H& M International Transportation, Inc.—Petition for Declaratory Order, FD 34277 (STB served Nov. 12, 2003) (H&M); and American Orient Express Railway Co.—Petition for Declaratory Order, FD 34502 (STB served Dec. 29, 2005) (Orient Express). However, as explained in both H&M and Orient Express, the Retirement Board in effect referred to this agency the issue of rail carrier status.⁴ In both of those cases, the Retirement Board stayed its proceedings on reconsideration of an earlier coverage decision expressly to permit the parties to ask this agency to rule on the question of rail carrier status under the Interstate Commerce Act.

In contrast, here there has been no referral from the Retirement Board, nor has RTC indicated that it has sought reconsideration of the Retirement Board’s coverage decision. Thus, it is not surprising that the Retirement Board has not stayed its processes to permit RTC to seek this agency’s ruling. The Retirement Board is the federal agency charged with determining coverage under the Retirement and Insurance Acts. The Board will not address an issue already addressed by the federal Retirement Board in this case, unless and until the Retirement Board has been given the opportunity to stay its processes to permit RTC to seek this agency’s views or otherwise refer the issue to this agency, or the issue is presented to a reviewing court.

(. . . continued)

common control with, one or more employers as defined in [subsection i, quoted above], and which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property by railroad * * *.”

³ 49 U.S.C. § 10102(5).

⁴ See H&M, slip op. at 1 n.2; Orient Express, slip op. at 2.

Another factor counsels in favor of deferring to the Retirement Board's processes. In its coverage decision on RTC, the Retirement Board relied in part on its earlier ruling in Trinity Railway Express—Train Dispatching—Herzog Transit Services, Retirement Board Coverage Decision 09-53, Oct. 28, 2009 (Trinity Railway), which is pending review in the United States Court of Appeals for the Seventh Circuit.⁵ The court's forthcoming decision concerning Trinity Railway could affect the Retirement Board's future decision on reconsideration of the RTC coverage decision.

For these reasons, the Board will not at this time entertain this petition for a declaratory order. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a declaratory order is denied.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

⁵ Herzog Transit Services v. Railroad Retirement Board, No. 09-3945 (7th Cir.). The court heard oral argument in the case on May 26, 2010.