

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35582

RAIL-TERM CORP.—  
PETITION FOR DECLARATORY ORDER

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**COMMENTS OF  
UNION PACIFIC RAILROAD COMPANY  
IN SUPPORT OF RECONSIDERATION**

GAYLA L. THAL  
LOUISE A. RINN  
JEREMY M. BERMAN  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179  
(402) 544-3309

*Attorneys for Union Pacific  
Railroad Company*

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Union Pacific Railroad Company (“UP”) submits these comments in support of Rail-Term’s petition for reconsideration of the November 19, 2013 decision finding Rail-Term’s provision of dispatching services to several short line railroads rendered Rail-Term into a rail carrier subject to ICCTA (“November Decision”). On February 12, 2014, the Board’s Office of Proceedings issued a decision allowing interested parties to participate in this proceeding as *amicus curiae* and requesting public comments. UP appreciates the Board’s willingness to consider comments on this important issue.

By finding Rail-Term to be a “rail carrier,” and thus subject to the Board’s jurisdiction, the November Decision created uncertainty where none had existed. UP relies on a predictable and consistent application of the term “rail carrier” when entering arrangements with third parties that involve many areas of UP’s operations. The November Decision upset this predictability by greatly expanding the definition of “rail carrier” and created uncertainty about how UP can arrange its dealings with its contractors and vendors so that those firms do not become “rail carriers” subject to ICCTA, and other regulations, merely because they provide a critical product or service. This expansion could have widespread and unanticipated

consequences on UP's ability to efficiently manage its railroad and provide the level of service that customers demand.

UP's comments begin by setting out the principles of earlier cases that rail carriers must hold themselves out to provide rail transportation and have physical means to do so.<sup>1</sup> The next part discusses how the overbroad November Decision could have unintended consequences. The last part explains how the November Decision will hinder efficient management of railroads.

***An entity does not become a "rail carrier" merely because it provides an "essential" service***

The decision that Rail-Term is a "rail carrier" rests on the fact that Rail-Term's dispatching services are essential to the movement of trains by short line railroads. November Decision at 13. In reaching this conclusion, the Board described dispatching services as "an inextricable part" of train movement and "integral" to a rail operator's common carrier obligation. *Id.* at 9. The inquiry should not end there. Prior cases looked at the totality of the circumstances to determine whether an entity was providing common carrier railroad transportation under 49 U.S.C. § 10102(5), and its predecessors. Rail-Term cannot be considered a "rail carrier" because it does not hold itself out to the shipping public to provide rail transportation and it neither owns nor controls assets needed to provide such rail transportation.

As the Board recognized, rail common carriage is a well-understood concept. *Id.* at 7. At common law and under § 10102 and § 11101, common carrier status requires more than mere participation in the movement of goods, no matter how integral such participation may be to the

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<sup>1</sup> UP joins the AAR comments filed today and generally endorses the arguments made by Rail-Term in its Motion for Reconsideration. Instead of repeating their legal arguments at length, our comments will briefly summarize our understanding of the law before the November Decision.

movement.<sup>2</sup> Most importantly, a common carrier must hold itself out to the public as providing common carrier transportation.<sup>3</sup> Id. at 7. The Board deemed Rail-Term to be holding itself out because Rail-Term's dispatching services are an "essential component" of common carrier transportation provided by Rail-Term's clients. Id. at 8. However, common carrier "holding out" to provide rail transportation requires more than agreeing to provide a component of transportation to rail carriers that actually market their services to shippers. Otherwise, any firm that sells any component or service that is essential to a rail carrier would become a rail carrier merely by transacting business with a rail carrier.

Under Board precedent, "for an entity to qualify as a rail carrier, it must (1) hold itself out as a common carrier for hire, and (2) have the ability to carry for hire." James Riffin--Petition for Declaratory Order, FD 35245, slip op. at 3 (STB served Sept. 15, 2009). In other words, holding out as a rail carrier requires that (i) the party offer to sell transportation to shippers,<sup>4</sup> and (ii) the party owns, controls or has the right to use assets needed to provide the rail transportation it sells.<sup>5</sup> Rail-Term maintains that it does not sell or try to sell any services to shippers and we are not aware of any evidence in the record that it has. The record is also clear that Rail-Term does

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<sup>2</sup> See Tews v. Renzenberger, Inc., 592 F. Supp. 2d 1331, 1340 (D. Kan. 2009) ("In other words, whatever service the noncarrier is providing—no matter how 'integral' to the rail carrier or whether the rail carrier exerts control over the non-carrier's operations—must be publicly available.")

<sup>3</sup> See New England Transrail, LLC--Construction, Acquisition and Operation Exemption, FD 34797, slip op. at 6 (STB served July 10, 2007) ("The fundamental test of common carriage is whether there is a public profession or holding out to serve the public."); American Orient Express Ry. v. STB, 484 F.3d 554, 557 (D.C. Cir 2007); and H&M International Transportation, Inc.--Petition for Declaratory Order, FD 34277, slip op. at 2 (STB served Nov. 12, 2003).

<sup>4</sup> American Orient Express, 484 F.3d at 557 (affirming Board decision that a rail common carrier holds itself out to the general public as engaged in the business of transporting persons or property from place to place.)

<sup>5</sup> In some cases, a rail carrier is organized first as a necessary step in obtaining the legal authority to buy, construct or operate rail lines, but the intent to obtain assets required to provide rail transportation is evident. Cf. James Riffin, FD 35245, slip op. at 4 (finding petitioner was not a rail carrier because he "has provided no rail service, nor is he capable of doing so.")

not own, lease or have the right to use any rail lines or rolling stock that could be used to transport freight.

Finding Rail-Term is a rail carrier based solely on the fact that it provides an integral service to several small railroads is directly contrary to the long line of cases finding that a party does not become a rail carrier merely because it provides goods or services needed by a rail carrier to meet the rail carrier's obligations. Tews, 592 F. Supp 2d at 1335 (rail crew transportation provider found not a rail carrier); Utah Transit Auth.--Acquisition Exemption--Union Pac. R.R. Co., FD 35008, slip op. at 5 (STB served July 23, 2007) (entity providing dispatching over a rail line found not a rail carrier); H&M, FD 34277, slip op. at 3 (intermodal facility operator found not a rail carrier); Town of Milford, Ma--Petition for Declaratory Order, FD 34444, slip op. at 3 (STB served Aug. 12, 2004) (rail/truck transloader found not a rail carrier).

By finding that a "rail carrier" must hold itself out as providing transportation service, provide a service that is essential to the transportation *and* have the means to actually transport freight (or be in the process of acquiring the means to do so), the Board can maintain the consistent, predictable application of the term "rail carrier."

***The decision is overbroad and will have unintended consequences***

As noted above, the primary basis for the November Decision was that dispatching is an "essential rail function." The decision accepted the Railroad Retirement Board's conclusion that Rail-Term must be a "rail carrier" because "without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers." November Decision at 9. The decision apparently assumed that it would be limited to Rail-Term and not incite widespread transformation of rail contractors or vendors into "rail carriers." To the contrary, if the Board

applies a similar standard going forward it is hard to imagine how many contractors and vendors could escape Rail-Term's fate.

Railroads depend on a large number and wide variety of critical components to provide transportation but the suppliers of such components are not considered rail carriers. The logical outcome of the November Decision would be either that suppliers of critical railroad goods and services become rail carriers or that railroads would stop purchasing and instead make or provide all critical components in-house. Neither outcome is desirable. Granting Rail-Term's petition for reconsideration avoids both.

Some of the more striking examples of essential components and services that rail carriers typically purchase from non-carrier third parties include:

***Locomotives.*** FRA regulations require locomotives to be constructed to certain standards and undergo various inspections before being operated. See 49 C.F.R. Part 229. Without an FRA-compliant locomotive, a train does not move. UP does not build locomotives – it must depend on third-parties to provide the power needed to move its trains. In some cases UP will use third-party contractors to conduct locomotive testing. It is also sometimes necessary to use specialized contractors from the manufacturer to service locomotive components. These locomotive contractors therefore provide critical, safety-enhancing, FRA-required services to UP. Without products and services of these third-parties, UP would be unable to meet its common carrier obligations but these suppliers have never been considered rail carriers.

***Fuel.*** UP often uses third-party contractors to provide locomotive fueling services, particularly in locations where UP does not have adequate facilities. Without a fueling contractor, a train cannot move and UP cannot fulfill its common carrier obligation to customers.

Fueling is an essential component of the UP's rail transportation. The logic of the November Decision calls into doubt the "rail carrier" status of UP's fueling contractors.<sup>6</sup>

*Crews.* FRA hours-of-service regulations limit the number of hours a train crew may work and require crews to rest before returning to work. 49 C.F.R. Part 228. When a crew hits its hours-of-service limit the train cannot move until it is recrewed. UP cannot always control the recrew location. Depending on the location, UP will use a third-party contractor to drive a fresh crew to the train. This contractor often drives the old crew to a hotel, operated by a third-party, to rest. FRA regulations also require that train crew members be tested for drugs and alcohol. 49 C.F.R. Part 219. Third-party contractors often collect samples for these tests and analyze the results. Employees who fail a test may be referred to an assistance program operated by a third-party. Every one of the contractors or suppliers involved in the crewing process is essential to UP's ability to provide common carrier rail service. If a contractor does not perform at any stage, a train will not have a crew at the intended time and freight will not move. The November Decision calls into doubt the "rail carrier" status of such contractors merely because the services they provide are important.

Moreover, the November Decision did not weigh the implications if a number of suppliers to railroads were deemed subject to regulation under ICCTA based on the importance of the good or service they provide. For example, if a fueling contractor is deemed a "rail carrier," what, if any, operating authority will the contractor need? Would abandonment authority be required whenever a railroad changes contractors of essential services or goods? The November Decision also expands the number of entities that could potentially claim preemption from state and local law under ICCTA. If a contractor providing an "essential" railroad service

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<sup>6</sup> The fuel itself is also an essential component of rail transportation. By extension, the refineries that process locomotive fuel are integral to rail transportation.

becomes a rail carrier as a result then all of that contractor's activities necessary to provide the service would come within ICCTA's broad preemption provisions. UP seeks only to draw the Board's attention to the far-reaching effects the November Decision would have if it is allowed to stand. We believe such an expansion of STB regulatory authority is unwarranted and detrimental to the public interest. Conversely, granting the petition for reconsideration would restore a definition of rail carrier under ICCTA that has worked well.

***The decision will hinder UP's ability to safely and effectively manage its railroad***

Unless the November Decision is reversed, it could interfere with UP's ability to manage its operations in the lowest cost, most efficient manner.<sup>7</sup> UP has an obligation to its stakeholders, including its customers, to run its railroad in the safest, most efficient, most economical way. If a contractor would be deemed a "rail carrier" and subject to the panoply of railroad regulations it may be forced to change—or in the worst case cease—its operations. This introduces an unacceptable level of uncertainty into UP's ability to manage its railroad efficiently.

The November Decision may be most detrimental to capital-intensive operations for which UP does not have a full-time need and therefore cannot justify maintaining in-house resources. UP must use specialized cars to test its track infrastructure to ensure FRA compliance. In that sense they are "integral" to rail operations yet such specialized cars are often owned and operated by a third-party contractor. When a car is needed, UP will schedule an inspection with the contractor. UP does not need to own and maintain certain cars full-time. If UP owned one of these cars it would sit idle when not in use—as much as fifty weeks out of the year. A third-party, on the other hand, is able to keep a car in use a greater percentage of the time by offering

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<sup>7</sup> The National Transportation Policy is "to encourage honest and efficient management of railroads." 49 U.S.C. § 10101(9).

services to multiple railroads. The result is an efficient use of time and resources for multiple entities.

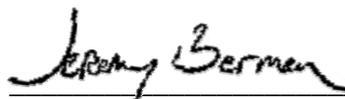
Emergency derailment services are often provided in the same way. Third-party contractors respond to derailments across UP's system. They are able to return tracks to service safely and quickly because they have the specialized equipment and experienced employees to do the work deployed in many locations. They provide similar services to other railroads. It would be very difficult for UP to replicate this service in-house due to sporadic and unpredictable need across the network. If UP's contractors are suddenly deemed "rail carriers" the benefits of these shared assets could be lost.

As the Board has suggested in several rate cases, using contractors is often the most cost-effective, efficient way to run a railroad. See e.g., W. Fuels Ass'n, Inc., & Basin Elec. Power Coop., Docket No. 42088, slip op. at 51 (STB Served Sept. 10, 2007) and Duke Energy Corp., Docket No. 42069, slip op. at 64 (STB served Nov. 6, 2003). The November Decision risks upsetting such cost-effective practices that have provided tremendous benefits to all of the parties involved. Railroads and contractors can no longer be certain which contractors may be deemed a "rail carrier." This uncertainty will reduce the railroads' ability to make the choices necessary to operate a safe, efficient and flexible rail network.

### ***Conclusion***

For the foregoing reasons, UP requests that the Board grant Rail-Term's petition for reconsideration and find that Rail-Term is not a "rail carrier" under the ICCTA.

Respectfully submitted,



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GAYLA L. THAL

LOUISE A. RINN

JEREMY M. BERMAN

Union Pacific Railroad Company

1400 Douglas Street

Omaha, Nebraska 68179

(402) 544-3309

*Attorneys for Union Pacific  
Railroad Company*

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