

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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RAIL-TERM CORP. – PETITION FOR DECLARATORY ORDER

**COMMENTS OF CSX TRANSPORTATION, INC. AS AMICUS CURIAE IN SUPPORT
OF RAIL-TERM CORP.'S PETITION FOR RECONSIDERATION**

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Pursuant to the Board's February 12, 2014 decision granting permission for parties to participate in this proceeding as *amicus curiae*, CSX Transportation, Inc. ("CSXT") hereby files comments in support of Rail-Term Corp.'s ("Rail-Term's") petition for reconsideration of the Board's decision in *Rail-Term Corp. – Petition for Declaratory Order*, Fin. Docket No. 35582 (Nov. 15, 2013) ("*Decision*"). CSXT submits these comments because of its desire to ensure that the Interstate Commerce Act is interpreted in a manner consistent with Congress's intent to eliminate unnecessary regulation of the rail industry. CSXT respectfully submits that the Decision's conclusion that a third-party dispatching contractor is a "rail carrier" subject to Board jurisdiction is irreconcilable with the language of the Interstate Commerce Act and Congress's expressed purpose "to minimize the need for Federal regulatory control of the rail transportation system." 49 U.S.C. § 10101(2). Moreover, the Board's new theory that companies providing "essential" rail services can be rail carriers subject to Board jurisdiction creates significant uncertainty about what actions will and will not be deemed "essential," and it will burden both the Board and the public with costly regulatory proceedings to determine what aspects of the Board's regulations should be applied to entities who are not common carriers in any ordinary

sense of the word. CSXT respectfully submits that the *Decision* is not consistent with either the law or with sound public policy, and the Board should reconsider and reverse it.

I. THE PLAIN LANGUAGE OF THE INTERSTATE COMMERCE ACT CANNOT SUPPORT A FINDING THAT RAIL-TERM IS A RAIL CARRIER.

The Board’s decision that Rail-Term—a company that possesses no rail equipment, track assets, or operating rights of its own—is nevertheless a “rail carrier” subject to Board jurisdiction because it provides dispatching services to several small railroads cannot be reconciled with the plain language of the Interstate Commerce Act. To be a “rail carrier” subject to the Board’s jurisdiction, an entity must be “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). Because Rail-Term is not a “common carrier” in any sense of the term, Congress plainly did not intend for the Board to exert jurisdiction over it.

It is significant that Congress chose to define “rail carrier” to mean a provider of “common carrier railroad transportation,” for “common carrier” is a term with a well-settled meaning. A common carrier is an entity that holds itself out or undertakes to carry persons or goods; the very term indicates that the entity carries persons or goods. *See United States ex rel. Chicago, New York & Boston Refrigerator Co. v. ICC*, 265 U.S. 292, 295 (1924) (defining “common carrier by railroad” to mean “‘one who operates a railroad as a means of carrying for the public’”).¹ Based on this definition, the *Boston Refrigerator* Court concluded that a manufacturer and lessor of refrigerator cars could not be a common carrier despite the fact that it earned compensation from the use of its cars,² reasoning that the lessor “carries nothing.” *Id.* The Supreme Court’s recognition that being a common carrier under the Interstate Commerce

¹ *See also Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187 (1920) (“‘common carrier by railroad’ . . . mean[s] one who operates a railroad as a means of carrying for the public.”).

² The lease payments were calculated on the basis of the number of car-miles for which each car was used. *See id.* at 293-94.

Act requires carrying goods was a well-established interpretation that Congress ratified when it last enacted § 10102(5) in ICCTA.³

The definition of common carrier that the Board initially states in the *Decision* is consistent with this principle, defining a common carrier railroad as ““a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation.”” *Decision* at 7 (quoting *Am. Orient Express Ry.—Pet. for Declaratory Order*, Fin. Docket No. 34502, at 4 (Dec. 29, 2005)). But the Board goes far afield when it claims that it also can “impute” a holding out to companies who “perform outsourced rail functions on behalf of railroads.” *Id.* None of the cases the Board cites at pages 7-8 of the *Decision* supports such a conclusion. Most of the cases the Board cites are instances where a terminal company or similar entity was providing “last-mile” delivery services and thus was effectively carrying goods in transportation service that “[i]n no respects . . . differ[ed] from that performed by the railroad companies.”⁴ Others involved companies that were jointly controlled and operated by common carriers.⁵ And indeed two of the cases the Board cited were

³ Leading general reference dictionaries and legal dictionaries at the time of ICCTA similarly indicated that “carrying” is a necessary part of being a common carrier. *See* WEBSTER’S THIRD NEW INT’L DICT. 458 (1993) (“one that undertakes for hire the carrying of goods, persons, or messages treating its whole clientele without individual preference or discrimination” (emphasis added)); BLACK’S LAW DICTIONARY 214 (6th ed. 1990) (“Common carriers are those that hold themselves out or undertake to carry persons or goods of all persons indifferently, or of all who choose to employ it.” (emphasis added)).

⁴ *United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296, 306 (1919) (company transported freight from its terminal to its dock and “[i]n no respects, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations.”); *see also United States v. California*, 297 U.S. 175 (1936) (“All the essential elements of interstate rail transportation are present in the service rendered” by the company deemed a common carrier).

⁵ *United States v. Union Stock Yard & Transit Co. of Chicago*, 226 U.S. 286, 306 (1912) (“[T]hese companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce. . . .”); *S. Pac.*

ones where the court made no finding that the entity in question was a common carrier.⁶ In short, none of these cases the Board cites supports the proposition that common carrier status can be “imputed” to an unrelated third party contractor who does not hold itself out to “carry” persons or goods.

The Board is certainly right that when determining whether an entity is a common carrier it is important to look to “what the entity does.” *Decision* at 7. But “what the entity does” necessarily must include transporting persons or goods. An entity that cannot transport persons or goods and does not hold itself out as being able to do so cannot provide “common carrier railroad transportation.” Congress specified that the Board could only exercise jurisdiction over common carriers, and the Board does not have the authority to redefine the meaning of that well-settled term in order to expand its jurisdiction to entities that do not hold themselves out as “carriers.”

In this case, Rail-Term plainly does not “hold out to the general public that it provides interstate rail transportation for persons or property.” *Decision* at 14 (Begeman, V.C., dissenting). On the contrary, Rail-Term merely provides dispatching services. Indeed, Rail-Term lacks “track, locomotives, or freight cars and crews, and it does not otherwise have access to or operate a line of railroad.” *Id.* By the plain language of the statute, therefore, Rail-Term is not a rail carrier. It is incapable of providing common-carrier service because it lacks the necessary equipment, personnel, and operating authority. As the Supreme Court put it, Rail-

Terminal Co. v. ICC, 219 U.S. 498, 521 (1911) (“There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company.”); *Greene v. Long Island R.R. Co.*, 280 F.3d 224 (2d Cir. 2002) (addressing whether a common carrier’s corporate parent is also a common carrier).

⁶ See *Mahfood v. Cont’l Grain Co.*, 718 F.2d 779 (5th Cir. 1983) (company not found to be a common carrier); *Burnside v. Railserve*, 2012 U.S. Dist. LEXIS 152026 at *8 (W.D. Ark. 2012) (“The “question whether Defendant is a common carrier is an open one. The particular facts governing the question need tending and careful attention.”).

Term “carries nothing,” and thus it is not a common carrier. *Boston Refrigerator*, 265 U.S. at 295.

The Board’s reliance on *American Orient Express Railway Company v. STB*, 484 F.3d 554 (D.C. Cir. 2007), provides no support for its assertion of jurisdiction over Rail-Term. In *American Orient*, the American Orient Express Railway Company (“Orient Express”) provided passenger service in its own railcars, which were moved through arrangements the company made with Amtrak. The Court of Appeals found that on those facts Orient Express plainly operated as a common carrier because it held itself out as providing passenger service to the general public, regardless of the fact that it provided that service using tracks or equipment operated by another entity. *See id.* at 557. In other words, the *American Orient* Court held that Orient Express’s use of other parties to assist with transportation that Orient Express held itself out as providing to the public did not affect the fact that Orient Express was a common carrier. This case presents the completely different question of whether an entity that is not holding itself out as providing transportation service and that does not possess the means to provide such service can be deemed a common carrier. Under the plain language of the statute, the answer to that question is no.

As Vice-Chairman Begeman pointed out in her dissent from the *Decision*, a further reason why Rail-Term is not a rail carrier providing common carrier service is that it could not respond to a request for transportation service pursuant to 49 U.S.C. § 11101. The fact that it is impossible for a third-party contractor like Rail-Term “to respond to reasonable requests for common carrier service” is a powerful indicator that Rail-Term cannot be a rail carrier. 49 U.S.C. § 11101. Indeed, since § 11101 necessarily contemplates that “common carriers” be entities that are able to respond to requests for service, the use of the same term “common

carrier” in § 10102(5) similarly must be limited to entities that have the ability to provide service upon request. *United States Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993) (“Presumptively, identical words used in different parts of [the] same act are intended to have the same meaning”) (internal quotation marks omitted).

The Board’s new position is further undermined by its holdings in the *State of Maine* context that the provision of dispatching services does not make an entity a common carrier. *See Decision* at 15 (Begeman, V.C., dissenting); *see, e.g., Mass. Dep’t of Transp. – Acquisition Exemption – Certain Assets of CSX Transp., Inc.*, Fin. Docket No. 35312, at 10 (May 3, 2010); *Metro Reg’l Transit Auth. – Acquisition Exemption – CSX Transp., Inc.*, Fin. Docket No. 33838 at 2 (Oct. 10, 2003). The Board says that its *State of Maine* holdings that dispatching can be separated from common carrier service only concern “public entities” and thus that they can be distinguished from a private entity like Rail-Term. *See Decision* at 12. But since the Board has applied the *State of Maine* doctrine to transactions involving private entities as well as public entities, the Board’s attempted “harmonization” of its *State of Maine* precedent with the *Decision* is not a reasonable justification for its change in course. *See, e.g., Midtown TDR Ventures LLC – Acquisition Exemption – American Premier Underwriters*, Fin. Docket No. 34953 (Feb. 12, 2008) (private non-carrier acquired an interest in a rail line and *State of Maine* applied because the common carrier rights and obligations remained with the carrier parties); *Florida Dep’t of Transp. – Acquisition Exemption – Certain Assets of CSX Transp., Inc.*, Fin. Docket No. 35110 at 5, n.8 (Dec. 15, 2010) (Board acknowledged that “under certain unique circumstances [it has] applied the *State of Maine* doctrine to the sale of physical assets in a rail line to a private entity.”).

In short, the Board’s dramatic expansion of its jurisdiction over the third-party contractors that it euphemistically calls “non-typical rail carriers” is irreconcilable with Congress’s purpose “to ‘build[] on the deregulatory policies that have promoted growth and stability in the surface transportation sector.’” *Elam v. Kansas City Southern Ry. Co.*, 635 F.3d 796, 804 (5th Cir. 2011) (*quoting* H.R. Rep. No. 104-311 at 93 (1995)). Neither ICCTA’s plain language nor Congress’s desire to “minimize the need for Federal regulatory control of the rail transportation system” can justify the Board’s decision to assert jurisdiction over a new class of alleged “rail carriers” who do not have the ability to provide common carrier railroad transportation within the meaning of § 10102(5).

II. THE BOARD’S DECISION INCREASES REGULATORY UNCERTAINTY IN A WAY THAT UNNECESSARILY BURDENS THE AGENCY AND THE PUBLIC.

The *Decision* is not only irreconcilable with the limits on the Board’s statutory jurisdiction, it also creates substantial doubt about which companies are and are not within the Board’s jurisdiction. Rail-Term is certainly not the only company that provides services by contract to railroads that are “an essential component” of freight rail service. *Decision* at 8. Many companies perform similarly essential work—ranging from track maintenance to car repair to information technology—but these companies have never before been thought to be rail carriers. The uncertainty created by the *Decision* likely will lead to much litigation over the status of these entities that will needlessly tax the resources of both the Board and the public.

The Board claims that it would not find every outsourced rail service to be covered by its jurisdiction, but it is not clear where or how the Board can draw a line between actions that will make a contractor a rail carrier and those that will not. The Board’s statement that it will base determinations on who qualifies as a “non-typical rail carrier” on whether an entity provides services that are “essential components” of common carrier rail transportation does not help

matters, for a wide variety of services are “essential” to providing rail service. *Decision* at 8, 13. The Board’s logic that Rail-Term is a rail carrier because its dispatching is “‘required’ for provision of common carrier service by its customers” could in theory be applied to everything from track maintenance to fueling locomotives to loading cars to revenue accounting to customer service. *Id.* at 8-9. Virtually anything a railroad does could be characterized as “essential” to its provision of common carrier service, because railroads are striving to increase productivity in a competitive marketplace and have strong incentives to not spend money on functions that are not essential. The *Decision* effectively allows the Board to assert jurisdiction over any and all of these functions.

The likely result of the *Decision* thus will be rounds of regulatory litigation to determine the status of many entities in the rail industry that have never before been considered to be rail carriers. This litigation would burden both the public and the Board itself, which would have to make difficult judgment calls to determine what functions are sufficiently “essential” to make contractors “non-typical rail carriers” like Rail-Term.

This increased regulatory burden is only exacerbated by the Board’s suggestion that Rail-Term could petition for an exemption from “all or part of ICCTA’s provisions.” *Decision* at 13. Requiring Rail-Term and similarly situated entities to file petitions for exemption from regulations designed for “rail carriers” would only further burden those parties and the Board with regulatory filings that can be costly and complex.

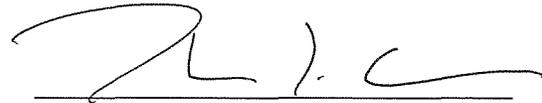
In sum, the flood of litigation that could be triggered by the *Decision* should give the Board serious pause before it undertakes such a significant expansion of its jurisdiction. And the Board should consider that this litigation would be particularly burdensome for the contractors who could potentially be deemed to provide “essential components” of rail service, for many of

those contractors are small businesses that would be affected acutely by the expense of regulatory litigation.⁷

CONCLUSION

For the reasons set forth above, the Board should grant Rail-Term's Petition for Reconsideration and conclude that Rail-Term is not a "rail carrier" within the meaning of the Interstate Commerce Act.

Respectfully submitted,



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⁷ Indeed, the *Decision* does not address the effect that the Board's expansive new assertion of jurisdiction would have on small businesses. While the Board has chosen to announce its new assertion of jurisdiction in an adjudication rather than a full notice-and-comment rulemaking, the effect of the Board's action on small businesses is no different than if it had acted through a rulemaking. Accordingly, the Board should consider the impact that its new assertion of jurisdiction will have on small entities and analyze effective alternatives that may minimize the regulatory burdens that the Board is imposing on small entities. *Cf.* Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2014, I caused a copy of the foregoing Comments of CSX Transportation, Inc. as Amicus Curiae In Support of Rail-Term Corp.'s Petition for Reconsideration to be served by first class mail upon all parties listed on the Board's service list for this proceeding.


Matthew J. Warren