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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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FD 35582

**RAIL-TERM CORP.
PETITION FOR A DECLARATORY ORDER
REQUEST FOR A PROCEDURAL SCHEDULE**

Submitted by

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Dated: January 20, 2012

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SURFACE TRANSPORTATION BOARD**

FD 35582

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INTRODUCTION

On December 14, 2011, and pursuant to direction from the United States Court of Appeals for the District of Columbia Circuit,¹ Rail-Term Corp. (“Rail-Term”) filed a Petition for a Declaratory Order² seeking a ruling from the Surface Transportation Board (“the STB”) that it is not a “rail carrier” within the meaning of the I.C.C. Termination Act (“ICCTA”), 49 U.S.C. 10102(5). Subsequently, the Railroad Retirement Board (“the RRB”) filed a letter with the STB on December 22, 2011, summarizing the procedural status of the appellate litigation at the Court, attaching a copy of the RRB’s decision under review, and stating its readiness to participate in

¹ The Court’s ruling was entitled the “November 14 Order and Memorandum.” A copy of that ruling is attached here as Exhibit A.

² Hereafter the 2011 Petition.

the instant declaratory order proceeding. On January 3, 2012, the American Train Dispatchers Association (“ATDA”), a railroad labor union, filed a statement in opposition.³ Rail-Term requests that the STB initiate a proceeding and set a schedule for the submission of comments or, alternatively, issue a ruling based upon these initial pleadings that Rail-Term is not a “rail carrier” within the meaning of the ICCTA.

BACKGROUND

The facts in this proceeding are very simple and will only be repeated for the sake of clarity. The STB will recall from the previous declaratory relief request submitted by Rail-Term on June 3, 2010, and from its 2011 Petition, that Rail-Term is a small privately held Michigan corporation and a subsidiary of Canadian corporation Rail-Term Inc. As relevant here, Rail-Term and its sister corporation in Canada, Centre Rail-Control Inc., provide dispatching software and dispatching services for short line and regional freight railroads in the United States and Canada. Rail-Term does not own any lines of railroad, operate trains, hold itself out to provide transportation for compensation, or own, lease, or operate any railroad locomotives or rolling stock, or hold any sort of license from the STB to operate as a rail carrier or common carrier by railroad in the United States.

³ To the extent the STB might regard this filing as a reply to a reply, Rail-Term requests that it be accepted in the interest of a complete record.

More specifically, Rail-Term develops computer-based dispatching software and provides dispatching services for several American short line railroads from an office in Rutland, VT, where it employs a total of 7 people for its United States operations. In effect, Rail-Term's rail carrier clients have "outsourced" to Rail-Term the dispatching functions that they could otherwise provide "in house." Neither Rail-Term, Rail-Term Inc., nor Centre Rail-Control Inc., own, are owned by, or are under common control with any rail carrier in the United States or Canada.

COMMENTS

The need for this declaratory ruling dates back to April 6, 2010, when Rail-Term received an initial decision (the "Initial Decision") from the RRB finding it to be a "carrier employer" under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (collectively "the Acts"). The RRB reasoned that Rail-Term could not be an "employer" subject to its jurisdiction under the second test for coverage of 45 U.S.C. §231 because Rail-Term is neither owned by nor under common control with a rail carrier. However, it found coverage under the first test, a carrier by railroad subject to the jurisdiction of the STB, despite the lack of any common carrier "holding out," operation of trains, ownership of railroad lines or equipment, or grant of operating authority from the STB or the

Interstate Commerce Commission. Instead it premised its finding on “the control that dispatchers have over the motion of trains.” Initial Decision at 3-4.

Thereafter Rail-Term sought reconsideration from the RRB and, after receiving a second adverse decision from that agency, filed an appeal with the District of Columbia Circuit. After reviewing briefs filed by all parties including the ATDA’s *amicus* brief and hearing oral argument, the Court determined that the STB’s views as to whether Rail-Term should be regarded as a “rail carrier” were so crucial to a resolution of its appeal, it referred this question to the STB under this agency’s primary jurisdiction.⁴ Because the “Opposition” filed by the ATDA contains arguments that are groundless, Rail-Term believes that the STB and the public generally would benefit from further briefing. The gist of ATDA’s position seems to be that efforts by the nation’s railroads to contract out to third parties services historically performed by the carriers “in house” threaten the viability of the Railroad Retirement and Railroad Unemployment systems. ATDA Opposition at 1. ATDA attempts to stretch the meaning of “transportation” and “services related” thereto under 49 U.S.C. §10102(9) far beyond the

⁴ There the Court stated, “interpretation of the Railroad Acts necessarily turns upon the interpretation of the ICCTA, as to which the STB is the agency with principal competence.”

language's statutory limits by claiming that the dispatching services that Rail-Term provides its customers constitute a service related to the movement of passengers of property under section 10101(9). Even more amazingly, it boldly asserts that the office containing its dispatching equipment, its computers and software, constitute "a facility, instrumentality, or equipment" within the meaning of transportation under section 10101(9). According to ATDA, dispatching is part of the "total rail common carrier service that is publicly offered" and that Rail-Term is "holding out its services via its railroad clients." ATDA comments at 8.

Taken to its logical extreme, any service provided by a railroad industry vendor to a railroad – fuel, track and signal equipment, railroad cars and locomotives, consulting and legal services, telephone and other utility services, even food provided to a railroad providing passenger service – could be regarded as "service provided in connection with a facility, instrumentality, or equipment" rendering the vendor subject to the Acts. Congress never intended for the ICCTA to be interpreted in such an expansive manner. In light of the ATDA filing, Rail-Term urges the STB to seek public comment.

PROPOSED COMMENT SCHEDULE

Rail-Term asks the STB to adopt the following schedule for submission of comments in this proceeding:

- Day 0 STB order instituting declaratory proceeding
- Day 30 Opening comments due from Rail-Term and its
 supporters
- Day 60 Reply comments by RRB, ATDA, and their supporters
- Day 75 Rail-Term rebuttal comments
- Day 135 Decision served

CONCLUSION

Accordingly, Rail-Term requests that the STB set a procedural schedule for soliciting public comments. Alternatively, it requests that the STB find that Rail-Term is not a "rail carrier" within the meaning of the ICCTA and dismiss this proceeding.

Respectfully submitted,



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Dated: January 20, 2012

CERTIFICATE OF SERVICE

I, John D. Heffner hereby certify that I mailed a copy of the "Request for a Procedural Schedule" in the above-captioned proceeding by first class United States mail and/or electronic transmission to all parties this 20th day of January, 2012.

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EXHIBIT A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1093

September Term, 2011

Filed On: November 14, 2011

RAIL-TERM CORP.,
PETITIONER

v.

RAILROAD RETIREMENT BOARD,
RESPONDENT

Before: GARLAND and KAVANAUGH, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*

ORDER

Upon consideration of the petition for review and the briefs and oral arguments of the parties, for the reasons explained in the accompanying memorandum, it is

ORDERED that the petition for review be held in abeyance pending further order of the court to allow Rail-Term to petition the Surface Transportation Board for a declaratory order on the question whether Rail-Term is a "rail carrier" under 49 U.S.C. § 10102(5).

Rail-Term is directed to submit a report to this court on the status of its filings with the Surface Transportation Board no later than 30 days from the date of this order. The parties are directed to file motions to govern further proceedings in this case no later than 30 days after the Surface Transportation Board issues a decision on Rail-Term's filings.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

MEMORANDUM

Rail-Term petitions for review of an Order of the Railroad Retirement Board (RRB) holding it is a "carrier by railroad" within the meaning both of the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.*, and of the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 *et seq.*, (hereinafter together referred to as the Railroad Acts) and holding in the alternative Rail-Term's dispatchers are "employees" of Rail-Term's client railroads under the same Acts. Because the former holding turns upon the resolution of a legal issue within the primary jurisdiction of the Surface Transportation Board (STB), we refer the issue to that agency. Pending the STB's resolution of the issue, we shall hold Rail-Term's petition for review in abeyance.

Rail-Term provides "outsourced" dispatching services that rail carriers historically have performed "in house." Rail-Term's client railroads provide daily scheduling orders to Rail-Term's Director of Rail Traffic Control, who then relays those orders to dispatchers employed by Rail-Term. Pursuant to those instructions, Rail-Term's dispatchers authorize the railroads' engineers and other employees, such as maintenance crews, to occupy particular tracks at specific times throughout the day.

The RRB held Rail-Term is an "employer" subject to the Railroad Acts because its "dispatchers have the ultimate control over the movement of the trains of its rail carrier customers." Both the Railroad Acts define an "employer" as a carrier by rail subject to "the jurisdiction of the Surface Transportation Board." *See* 45 U.S.C. § 231(a)(1)(i) (Railroad Retirement Act); 45 U.S.C. § 351(b) (Railroad Unemployment Insurance Act). The Interstate Commerce Commission Termination Act (ICCTA), which in turn prescribes the jurisdiction of the STB, defines a "rail carrier" as anyone "providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). In this respect, therefore, interpretation of the Railroad Acts necessarily turns upon interpretation of the ICCTA, as to which the STB is the agency with principal competence, *American Orient Exp. Ry. Co., LLC v. Surface Transportation Bd.*, 484 F.3d 554, 556 (D.C. Cir. 2007).

Because this case implicates an "issue within the special competence of an administrative agency," the doctrine of primary jurisdiction "requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993); *see Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1120 (D.C. Cir. 1992) (doctrine of primary jurisdiction based upon "concern for uniformity and expert judgment"). When an issue "requir[es] the exercise of administrative discretion," as does the issue whether a provider of outsourced dispatching services is a "rail carrier" within the meaning of the ICCTA, the "agenc[y] created by Congress for regulating the subject matter should not be passed over," *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574 (1952)).

Accordingly, we refer to the STB the question whether Rail-Term is a "rail carrier" under the ICCTA. We shall hold in abeyance Rail-Term's petition for review to allow Rail-Term to file with that agency a petition for a declaratory order on the matter pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721.

We do not reach the RRB's alternative holding that Rail-Term's dispatchers are "employees" of the railroads for which Rail-Term provides dispatching services. Whether Rail-Term is a proper party to challenge that alternative holding is unclear because the record does not indicate whether Rail-Term or the railroads for which it provides dispatching services would be required to contribute on behalf of those employees to the retirement and unemployment funds administered by the RRB. If the STB determines Rail-Term is not a "rail carrier," then we shall turn to the questions raised by the RRB's alternative holding and Rail-Term's standing to challenge it.