

BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 35582

RAIL-TERM CORP. – PETITION FOR DECLARATORY ORDER

APPEAL

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The National Railroad Construction and Maintenance Association, Inc. (“NRC”) files this appeal, pursuant to 49 C.F.R. § 1011.2(a)(7), from the February 12, 2014 decision of the Director, Office of Proceedings (“Director”), to the extent that it limited NRC’s participation in this proceeding to that of an amicus curiae.

In a Decision served November 19, 2013 (“*Rail-Term Decision*”), a majority of the Board found that Rail-Term Corp. (“Rail-Term”) was a rail carrier even though it does not hold itself out to be a carrier, possesses no ability to provide common carrier service, and does not meet the definition of rail carrier as that term has been historically applied by the Board and its predecessor, the Interstate Commerce Commission. The majority decision imputed Rail Term to be a “non-typical” carrier because it found that the service that Rail-Term contracted to provide rail carriers, dispatching, was essential to their ability to provide common carrier service. *Rail-Term Decision* at 13. The Board majority recognized that its decision presented a case of first impression. *Id.* at 3. Vice Chairman Begeman dissented.

Rail-Term filed a petition for reconsideration. Given that the Board’s *Rail-Term Decision* was an unexpected departure from the settled definition of rail carrier, the NRC filed a

Petition to Intervene and Request for an Opportunity for Public Comments on that *Decision*. The Association of American Railroads (“AAR”) and American Short Line and Regional Railroad Association (“ASLRRA”) filed similar petitions to intervene and requests for comment.

The Director in a decision served February 12, 2014 granted the petitions of AAR, ASLRRA, and NRC in part (“*Director Decision*”). The Director allowed the NRC, AAR and ASLRRA “to participate in this proceeding,” but only as “amicus curiae.” *Director Decision* at 1. The Director set dates for public comments in support of reconsideration and replies in opposition to reconsideration as, respectively, March 10, 2014 and March 31, 2014. The Director did not explain why participation was as amicus curiae rather than as interveners as had been requested by those filing petitions.

NRC is hopeful that the Board, after it considers Rail-Term’s petition and the comments in support and opposition to that petition, concludes that Rail-Term is not a rail carrier. There is however the possibility that the Board will not change its view. In that event, NRC could seek judicial review of the Board’s decision in the appropriate circuit court of appeals pursuant to 28 U.S.C. § 2344. Under Section 2344, “[a]ny party aggrieved by the final order may, within 60 days after its entry, file a petition to review...” The case law indicates that a person who has participated in the underlying agency proceedings that lead to the agency decision being challenged is considered a “party aggrieved” for purposes of judicial review under 28 U.S.C. § 2344. *See, e.g., National Ass’n of State Utility Consumer Advocates v. Federal Communications Comms’n*, 457 F.3d 1238, 1247 (11th Cir. 2006) (“A ‘party aggrieved’ is one who participated in the agency proceeding,” quoting *Ala. Power Co. FCC*, 311 F.3d 1357, 1366 (11th Cir. 2002)). The NRC believes that it will be a participant by virtue of its Petition to Intervene and Comments to be filed by March 10, 2014. *See also, e.g., Commonwealth v. U.S. Nuclear Regulatory*

Comm'n, 878 F.2d 1516, 1520 (1st Cir. 1989) (“The Nuclear Regulatory Commission cannot now claim that by refusing to grant the Commonwealth’s request to become a party, the Nuclear Regulatory Commission’s decisions are beyond review.”). Nonetheless, out of an abundance of caution, NRC is requesting that the Board amend the *Director’s Decision* to specify that NRC and others who filed Petitions to Intervene are full participants in these proceedings.

The Board has granted persons participant status in some proceedings and amicus status in others. In the decision cited by NRC in support of its Petition to Intervene, the Board allowed persons in a proceeding to become parties of record. *Union Pacific Railroad Co.—Petition for Declaratory Order*, Docket No. FD 35504 (served Dec. 12, 2011). See also, e.g., *Western Coal Traffic League—Petition for Declaratory Order*, Docket No. FD 35506 (served Sept. 28, 2011). Trade associations as well as individual companies have been allowed participant status. In other proceedings, the Board has allowed would-be interveners and others to participate as amicus curiae. See, e.g., *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. NOR 42121, 2013 STB LEXIS 400, * 4 n. 3 (served Dec. 19, 2013); *Arizona Public Service Co. v. Burlington Northern and Santa Fe Ry. Co.*, Docket No. 41185, 2003 STB LEXIS 639, * 7 (served Oct. 14, 2003). In these latter instances, the Board limited participation to amicus status in order not to broaden the proceeding or issues, prevent access to confidential information, or because the proceeding involved a private rate or service dispute. None of those considerations are present in this proceeding. This declaratory order proceeding principally involves narrow legal issues, does not involve any confidential information, and expansion of the statutory definition of rail carrier is obviously more than a private dispute between a carrier and shipper. Allowing NRC and others party status will not unduly broaden issues or delay the proceeding.

For these reasons, NRC requests that the Board modify the *Director's Decision* by specifying that persons filing comments are considered full participants in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Baker', written in a cursive style.

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I hereby certify that on February 24, 2014, I served a copy of the National Railroad Construction and Maintenance Association petition on the parties of record at the addresses below:

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