

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB Docket No. FD 35582

**RAIL-TERM CORP. –
PETITION FOR DECLARATORY ORDER**

**COMMENTS OF THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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Introduction

The American Short Line and Regional Railroad Association ("ASLRRA" or "Association") files these comments pursuant to a decision of the Surface Transportation Board ("Board") granting in part the petition of the ASLRRA seeking leave to intervene in the captioned proceeding.¹ ASLRRA supports the Petition for Reconsideration filed by Rail-Term Corp. ("Rail-Term") of the Board's decision served on November 19, 2013, in which it found Rail-Term to be a rail carrier.

ASLRRA is an international trade organization of approximately 1,100 members consisting of about 550 short line and regional small locally based railroads in 49 states and six Canadian provinces as well as approximately 550 suppliers and contractors. These railroads operate about 50,000 miles of track connecting largely less populated, rural areas to the national rail network. Those fifty thousand miles constitute 32 percent of the nation's rail system and short line and regional railroads participate in 40 percent of all carload movements but earn only five percent of the revenue generated on the national rail system. Class II and III railroads frequently provide the first and last mile of service on many rail movements.

¹ In a decision served February 12, 2014, the STB granted in part the "requests filed by ... ASLRRA...), allowing it and others to participate in this proceeding as *amicus curiae* notwithstanding the fact that ASLRRA filed a Petition to Intervene as a party in this proceeding pursuant to 49 C.F.R. § 1112.4 to support Rail-Term's petition. On February __, 2014, the Association filed an appeal to the decision, seeking full party status.

Background

On November 19, 2013, the Surface Transportation Board ("Board") issued a decision in the captioned proceeding finding that Rail-Term Corp. ("Rail-Term") was "a rail carrier performing rail transportation services that are subject to the jurisdiction of the Board." Docket No. FD 35582, Rail-Term Corp. – Petition for Declaratory Order, served November 19, 2013 ("November 19 Decision"), at 1 (Vice Chairman Begeman dissenting). For the first time, the Board concluded that a company providing dispatching services to rail carriers, but not performing any other transportation activities and not holding itself out to the public to do so, was itself a rail carrier as defined by 49 U.S.C. § 10102(5).

This case arose when Rail-Term filed a petition for an order from the STB declaring that Rail-Term is not a "rail carrier" as defined by the Interstate Commerce Act in 49 U.S.C. § 10102(5) as revised by the ICC Termination Act of 1995 ("ICCTA"). Rail-Term filed the petition as a result of an order from the United States Court of Appeals for the District of Columbia (the "D.C. Circuit") related to two decisions by the Railroad Retirement Board ("RRB") that found Rail-Term to be a covered employer under the Railroad Retirement Act, 45 U.S.C. §§ 231-231v and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-69) wherein the RRB found that Rail-Term is a rail carrier under the ICCTA because it provided outsourced dispatching services that rail carriers historically performed in-house and because the dispatchers had ultimate control over the movement of its railroad customers. Employer Status Determination - Rail-Term Corp., B.C.D. 10 – 33 (April 6, 2010), reconsideration denied, B.C.D. 11 – 14 at 6 - 7 (January 28, 2011).

Rail-Term sought judicial review in the D.C. Circuit and the D.C. Circuit held the case in abeyance to allow the Board to rule on the sole question of whether Rail-Term is a rail carrier under the ICCTA. The order referring this question to the Board did not request the Board to review any other aspect of the RRB decisions.

The November 19 Decision held that because Rail-Term performed an essential function on behalf of several short line railroads, it became a rail carrier under the ICCTA. November 19 Decision at 2. In summary, the majority said, "... the dispatching services that [Rail-Term] provides under contract with carriers are an essential part of the total rail common carrier services offered by its clients to the public." November 19 Decision at 2. The majority further determined that "... Congress intended for the regulation of these kinds of contracted dispatching

services to rest within [the STB's] jurisdiction and ... for railroad labor laws to apply to those employees who are performing these essential rail transportation services. November 19 Decision at 2. In effect, the Board imputed That Rail-Term was holding out itself as a common carrier because of the dispatching function Rail-Term provides rail carriers.

Summary of the ASLRRRA Position

The Association submits the decision finding Rail-Term to be a rail carrier is not supported by the evidence of record, by the evidence submitted by Rail-Term before the Railroad Retirement Board, by the law, by Board precedent or by logic. The November 19 Decision, if not reversed, could have long lasting and potentially devastating results on both Class II and III railroads and the vendors and contractors serving them.

Many short line and regional railroads use companies such as Rail-Term to out-source services such dispatching, track maintenance, legal, accounting, and other services. The mere fact that those companies provide these kinds of services does not and cannot make them into rail common carriers.

The small railroads that outsource these services do not have the resources or personnel to undertake them in-house. The determination that contractors such as Rail-Term are rail carriers means that the contractors could be exposed to Federal Employers Liability Act ("FELA"), to FRA and other agency regulation and oversight – all of which would increase their cost of doing business, which would be passed on to the small carriers that can ill afford those increases. In the alternative, the small carriers would have to undertake the work in-house at substantial cost in terms of training, hiring, increased payroll, and related costs.

The Board's decision in this proceeding raises many practical issues. Many small Class III carriers do not have the resources to provide such services as dispatching and rely on companies like Rail-Term to provide those services. The finding by the Board in this case, if sustained, could mean that these small carriers that depend on contractors such as Rail-Term to provide certain services could not afford those services or would have to find resources to provide them internally. The net result of the action of the Board in this case could drive many small carriers under, leaving shippers without access to railroads to move their products.

And the question remains – where does the approach taken by the majority lead – to findings that outside accountants, lawyers, and similar providers of services through contracts are rail carriers. The logic used by the majority certainly does not preclude such an illogical

finding.²

The November 19 Decision must be reversed. It is grounded in bad law, bad reasoning, and illogical conclusions and could lead to disastrous results for short line and regional railroads and to the public. The governing statute is clear – for the Board to find that an entity is a rail common carrier, two tests must be met; namely, if the entity both held itself out to the public to provide rail transportation service and had the physical ability to do so. 49 U.S.C. § 10102(5). Rail-Term neither holds itself out to provide rail service to the public nor does it have the physical ability to do so.

Arguments of the Association

ASLRRRA submits the November 19 Decision is fatally flawed factually, legally, and logically in the following respects:

Factually: The undisputed facts in this case are as follows:

1. Rail-Term does not hold itself to provide rail freight common carrier services to the public;
2. Rail-Term does not possess any track, locomotives, rail cars, rail equipment, employees or materials by which it could provide any shipper rail service of any kind;
3. Rail-Term does not hold itself out to the shipping public to provide any services much less to provide transportation of freight;
4. Rail-Term does not hold itself out to provide rail transportation services to the railroads to which it provides dispatching services;
5. It is the railroads to which Rail-Term provides dispatch services that provide rail common carrier services; and
6. None of the railroads to which Rail-Term provides dispatch services holds Rail-Term out to the public as being able to provide rail services.

The Board's majority acknowledges that these facts are undisputed. November 19 Decision at 4. These facts alone conclusively show that the majority's decision cannot be sustained as Rail-Term cannot from a factual standpoint provide any aspect of the freight rail services a rail common carrier does and it does not hold itself out as being able to do so.

² In fact, the Board insinuates that this ruling could be extended to other outsourced services when it says, "...we must identify the point at which, even if outsourced, specific transportation functions are integral to the overall unity of a rail operator's common carrier obligations. November 19 Decision at 9.

The Board found that Rail-Term provides an "integral transportation service" and the "dispatching services provided by Rail-Term are plainly embraced within the broader transportation services its clients hold out to the general public." November 19 Decision at 8 - 9. These are not accurate statements. As the record in this case shows Rail-Term's contracts with its rail carrier customers as an independent contractor and is not acting as an agent of its customers. For example, Section 8 of its Dispatching Services Agreement with the Vermont Railway states as follows:

(a) Rail-Term is, and shall remain, an independent contractor and nothing herein shall be construed as inconsistent with that status. Rail-Term shall perform its obligations described herein in its own name, unless it has subcontracted portions thereof to a subcontractor permitted hereunder. . . .

(c) Nothing in this Agreement shall be deemed or construed to constitute Rail-Term or any of its employees or sub-contractors as an employee or agent of VTR. . .

Agreement at 4 [R. 126]. Every other contract Rail-Term has with other railroads has this same provision.

Rail-Term's rail customers are totally responsible for their train operations. They decide how many trains to operate, their schedules, the shippers to be served, and the routes over which service will be provided. Rail-Term is not involved in these day-to-day aspects of railroad operations. The railroads view Rail-Term as performing essentially a ministerial function in connection with granting track authority to train assignments and performing the other tasks set forth in their dispatching service agreements with Rail-Term. The short line railroads do not hold out to their shippers as part of their transportation services the functions with which they contract with Rail-Term. Indeed, the short lines' customers are not even aware of Rail-Term.

Legally:

The sole and straightforward question referred to the Board by the D.C. Circuit was whether Rail-Term is a rail carrier under the ICCTA. In finding that it is, the Board's majority relied on the RRB's flawed reasoning, an incorrect interpretation of the ICCTA, a misapplication of Supreme Court cases, and ignored its own long-standing precedents interpreting when an entity is a rail carrier under the ICCTA.

In the RRB determination, the RRB found that because Rail-Term was performing a service historically performed by a railroad, it was thus a rail carrier subject to the jurisdiction of the Board. It did not (and could not) find that Rail-Term is directly or indirectly owned or

controlled by or under common control with a rail carrier – the alternative test to determine employer status under the relevant acts. *See, e.g.*, 45 U.S.C. § 231. However, in making this determination the RRB relied on tests used historically by the RRB to determine coverage under a different section of the act.³ The Board compounds this error by the RRB by using the same approach in its decision instead of simply looking at its own governing statute and precedent. This reliance is a prime example of circular reasoning – another agency used the wrong standard and since it used that wrong standard, we will, too.

The November 19 Decision is also inconsistent with the law governing the jurisdiction of the Board. While it is true that Congress has given the Board jurisdiction over transportation by rail carrier when the transportation is "part of the interstate rail network." 49 U.S.C. §§ 10501(a)(1)(A), the facts of this case as outlined above positively show that Rail-Term is not part of the interstate rail network. Contrary to what the Board states at page 7 of the November 19 Decision, there is a real debate whether dispatching falls within the statutory definition of transportation. The reality is that the Rail-Term and the interveners totally disagree with the position taken by the majority that dispatching falls with the statutory definition so of course there is a very real debate on this point.

Moreover, the governing statute further states that a rail carrier is an entity that provides common carrier rail service for compensation. 49 U.S.C. 10102(5). Rail-Term is not part of the interstate rail network as it does not possess any of the assets to provide rail service nor does it provide rail services for compensation. Under the plain language of the governing statutes, Rail-Term cannot be found to be a rail carrier.

In an attempt to bolster its position, the majority cites a string of pre-World War I and II Supreme Court cases it asserts are dispositive of the issue. November 19 Decision at 7, 8. A review of the cited cases shows that they are not supportive of the Board's position. First, all of the cited cases deal with situations where an entity is undertaking actual rail operations in order

³ The RRB found that Rail-Term's employees were covered employees since they provided services that are an integral part of operating a railroad and therefore cannot be contracted out. B.C.D. 10-33 at 7. That test is not one used under the section of the act under consideration here and the Board acknowledged that in the November 19 Decision. Moreover, the acts governing the RRB state that companies that contract to provide rail related services to rail carriers are not themselves rail carriers no matter how essential or integral the service to rail carriers unless the company is also "owned or controlled by, or under common control with, one or more..." rail carriers. 45 U.S.C. § 231(a)(ii). Rail-Term does not fit within this statutory definition.

to be found to be a rail common carrier. For example, the following shows the factual differences between Rail-Term and the cases cited: *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911) – (terminal company that owned tracks, was under common control with railroads, and was operated as an integrated transportation with its affiliated railroads providing switch services); and *U.S. v. Union Stock Yard & transit Co.*, 226 U.S. 286 (1912) – (stockyard company that owned track and leased them to a railroad affiliate, was under common control with a railroad, and provided switching services to the public); *U.S. v. Brooklyn Eastern District Terminal*, 249 U.S. 296 (1919) (terminal company that owned tracks and locomotives, switched railcars to connecting carriers, and operate wharves as part of a railway transportation system); and *United States v. California*, 297 U.S. 175 (1936) - (a terminal railroad company that owned tracks and locomotives). In each of these cases, unlike Rail-Term, the company was performing actual transportation services; that is, transporting freight by rail for compensation.

The November 19 Decision also does not comport with precedent established by the Board when it has defined a railroad as a common carrier as one that "...holds itself out to the general public as engaged in the business of transporting ... property from place to place for compensation." *See, e.g., Am. Orient Express Ry. v. STB*, 484 F.3d 554, 557 (D.C. Cir. 2007). It also ignores precedent that has concluded that the performance of dispatching services and other functions would not make an entity a rail carrier. *See, e.g., N.J. Transit Corp.—Acquis. Exempt.—Norfolk S. Ry.*, FD 35638 (STB Decision served March 27, 2013). The dissent in this case also rightly points out that the Board on numerous occasions found that dispatching and other services to be done by an acquiring non-carrier without that non-carrier becoming a rail carrier. (*See*, November 19 Decision at 15 for cited cases).

Logically:

The majority of the Board went to great lengths to determine that Rail-Term is a rail carrier notwithstanding the facts, the law, and precedent. It then suggests that it will accept petitions to exempt Rail-Term from the provisions of the ICCTA since Rail-Term could not provide the services of a rail common carrier if requested to do so by a shipper. Rail-Term and other contractors providing outsourced services do not have the wherewithal to provide the services yet the Board finds they still are a rail carrier and then says they can seek to avoid being one. This is at best a circular position and one that defies reason.

Indeed, as the dissent explains, the Board's apparent solution to this logical dead end, an invitation to file a Petition for Exemption from ICCTA, hardly solves the legal whirlwind the Board has unleashed. For example, a determination that Rail-Term is a common carrier by rail potentially subjects it to the unique and byzantine requirements of the Railway Labor Act. Adjusting to its provisions would be a business sea-change of enormous proportions for any contractor, large or small. Similarly, designation as a common carrier subject to Board jurisdiction may bring Rail-Term under the provisions of the FELA. This, too, would be a fundamental change in the business model of most railroad contractors, changing their relationship with their employees and moving from a low cost state no fault workers' compensation program to the vagaries and enormous litigation costs associated with the tort-liability based federal FELA. The application of these statutes is beyond the jurisdiction of the Board, and its attempt to limit these ridiculous consequences by hinting at an exemption from ICCTA is feckless.

Finally, the Board's contortions to try to shoe-horn Rail-Term into a common carrier is an artifice which will spawn unintended consequences sure to play havoc on the small railroad industry. Class II and Class III railroads are the primary customers of contractors like Rail Term. As a proportion of their business operations small carriers rely far more heavily on contractors than do large railroads. If contractors like Rail-Term are subject even to some of the consequences arising from the November 19 Decision, contractors will exit the business in droves. It is not just a matter of additional cost. The disruption to a contractor's business involved with the costs of RRB taxes versus Social Security, switching to the rules of the National Mediation Board instead of the National Labor Relations Board or moving from a state workers' compensation program to the unpredictable and litigious tort liability based FELA will drive many a contractor out of the railroad market. A shrinking population of contractors willing to do the work that small railroads cannot efficiently do for themselves will significantly disrupt and harm the operations and business model of small railroads.

Conclusion

It is plain that the Board incorrectly decided this case and should reverse the November 19 Decision. The decision is not supported by the facts, the law, Board precedent or logic. The failure to reverse this decision would impose great hardship on the members of the ASLRRRA and ultimately harm the public as it would increase the costs of small carriers and could drive small

rail carriers out of business, thus curtailing rail service to many small shippers in rural areas. ASLRRRA urges the Board to reverse the November 19 Decision and thereafter fine that Rail-Term is not a rail carrier.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Keith T. Borman". The signature is written in black ink on a white background.

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