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JOHN D. HEFFNER
(202) 742-8607
Direct Fax (202) 742-8697
John.Heffner@strasburger.com

VIA COURIER

Ms. Cynthia T. Brown
Chief of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423



RE: FD35582, Rail Term Corp. - Petition For A Declaratory Order - Petition For Reconsideration

Dear Ms. Brown:

I am enclosing for filing in the above-captioned proceeding an original and ten copies of a Petition for Reconsideration along with a filing fee check for \$250.00 and a copy of the filing on a computer disk in word format.

Please date stamp and return to our messenger one copy of this filing.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John D. Heffner".

John D. Heffner

Enclosure

FEE RECEIVED
December 13, 2013
Surface Transportation Board

FILED
December 13, 2013
Surface Transportation Board

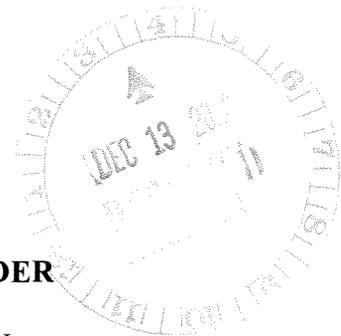
Strasburger & Price, LLP

1025 Connecticut Ave., N.W. Suite 717 | Washington, DC 20036 | 202.742.8600 tel | 202.742.8699 fax | www.strasburger.com
Austin | Collin County | Dallas | Houston | San Antonio | New York, N.Y. | Washington, D.C. | Mexico City - Strasburger & Price, SC

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35582

**RAIL-TERM CORP.
PETITION FOR A DECLARATORY ORDER
PETITION FOR RECONSIDERATION**



Submitted by

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Dennis M. Devaney
Varnum, LLP
39500 High Pointe Boulevard
Suite 350
Novi, MI 48375
(248) 567-7825

Dated: December 13, 2013

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 35582

**RAIL-TERM CORP.
PETITION FOR A DECLARATORY ORDER
PETITION FOR RECONSIDERATION**

I.
INTRODUCTION

Pursuant to 49 CFR §1115.3, Rail-Term Corp. (“Rail-Term”), a noncarrier and railroad industry vendor, files this Petition for Reconsideration of a decision issued by a majority of the Surface Transportation Board (“the STB”) on November 19, 2013 (hereafter the *November Decision*).¹ The STB “imputed” to Rail-Term a “rail carrier” status under §10102(5) of the I.C.C. Termination Act (“ICCTA”). The agency reasoned, in its own words, “that by performing an essential rail function on behalf of several short line railroads, Rail-Term has become a rail carrier under sec. 10102(5).” *Id.* at 2 and 7. The practical effect of the STB’s ruling is to subject this railroad industry vendor and potentially many other railroad industry suppliers to coverage under the Railroad Retirement Act (“RRA”) and the Railroad Unemployment Insurance Act (“RUIA”), a result clearly not intended by Congress. The *November Decision* is not only contrary to the plain language of the statute. It also reverses without legal justification a long

¹ Vice Chairman Anne Begeman dissenting.

line of STB and Interstate Commerce Commission precedent on the term “rail carrier” and draws conclusions without any basis in the record.

II.

BACKGROUND

Almost two years ago, on December 12, 2011, Rail-Term initiated this proceeding as a result of an Order issued by the United States Court of Appeals for the District of Columbia Circuit directing it to petition the STB to determine whether or not it is a “rail carrier” within the meaning of the ICCTA and therefore an “employer” under the RRA and RUIA. Rail-Term attaches a copy of the Court’s Order and Memorandum dated November 14, 2011² as Exhibit A.

By now the facts in this proceeding are well known and will only be repeated for the sake of clarity. Rail-Term is a small privately held Michigan corporation and a subsidiary of Canadian corporation Rail-Term Inc. Rail-Term Inc., and subsidiaries Rail-Term and Centre Rail-Control Inc., are engaged in a variety of business activities that support the railroad industry in both the United States and Canada. 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 and for VIA RAIL CANADA, Canada’s national passenger railroad. Rail-Term develops computer-based dispatching software and provides dispatching services for several American short line railroads from an office in Rutland, VT. In effect, Rail-Term’s rail carrier clients have contracted with Rail-Term to provide the dispatching functions that they could otherwise perform “in house.” Rail-Term currently employs 7 people in its US office and, along with its corporate parent and Canadian sibling, employs about 100 people overall. Rail-Term currently provides dispatching services in the United States for the

² Cited as “*November 14 Order and Memorandum.*”

Aberdeen Carolina and Western Railway Inc., Carolina Coastal Railway, St. Lawrence and Atlantic Railroad (a Genesee & Wyoming subsidiary), Royal Gorge Express, LC, Washington and Idaho Railway, and short line holding company, Omni-Trax, Inc., and its subsidiary railroads. 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.

Rail-Term does not own any lines of railroad, operate trains, hold itself out to the public 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. Rail-Term asserts that it is a “noncarrier” under any reasonable interpretation under the ICCTA and therefore not an “employer” for coverage purposes under the RRA and RUIA.

The need for this declaratory ruling dates back to April 6, 2010, when Rail-Term received an initial decision from the United States Railroad Retirement Board (“RRBD”)³ finding it to be a “carrier employer” under the RRA and RUIA. According to the RRBD in its *Initial Decision*, there are two alternative statutory bases for that agency to find that an entity could be considered a covered “employer” subject to its jurisdiction. An entity could be considered an “employer” subject to the RRBD’s jurisdiction if it is either

- (1) [a] carrier by railroad subject to the jurisdiction of the [STB] or
- (2) [a] company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service...in connection with the transportation of passengers or property by railroad.”

³ Hereafter “the *Initial Decision*.” Management member Kever dissented stating that he did not believe that Rail-Term would be considered a carrier by the STB. Dissenting opinion of Management Kever at page 1, attached hereto as Exhibit B.

See, 45 U.S.C. §231(a) (1). The RRBD found that Rail-Term was not subject to its jurisdiction under the second test

[b]ecause Rail-Term is neither owned by nor under common control with a rail carrier, a majority of the Board finds that it does not fall within the second definition of an employer under the Acts.

Nevertheless, the RRBD found Rail-Term a carrier “employer” under the RRA and RUIA 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.

Since Rail-Term strongly disagreed with the *Initial Decision*, it petitioned the RRBD for reconsideration and an administrative stay. Inasmuch as the RRBD has frequently based its coverage decisions on rulings from the STB, Rail-Term also asked this agency, for a decision confirming that it is not a “rail carrier”⁴ as that term is used in the ICCTA.⁵ On October 12, 2010, the STB issued a decision denying its request stating that “the Board need not issue a declaratory order when another federal agency has ruled on the matter, and the matter has not been referred to the Board.”

The RRBD issued its decision on reconsideration on January 28, 2011,⁶ management member Keever dissenting. Once again it found coverage for Rail-Term as an employer as a “carrier by railroad” due to the majority’s view that dispatching would be an “inextricable part of the rail carrier’s fulfilling its common carrier obligation.” *Id.* at 5 and 6.

⁴ The ICCTA speaks in terms of a “rail carrier” whereas the RRA and RUIA use the term “carrier by railroad.” Rail-Term believes these terms are legally “fungible” and therefore uses them interchangeably.

⁵ By petition filed June 3, 2010.

⁶ Cited as the “*Reconsideration Decision*.”

Thereafter Rail-Term appealed the *Reconsideration Decision* to the United States Court of Appeals for the District of Columbia Circuit. After holding oral argument on November 14, 2011, the Court served its Order and Memorandum holding Rail-Term's petition for review in abeyance pending further order of the Court to allow Rail-Term to seek from the STB a determination as to whether it is a "rail carrier" under 49 U.S.C. §10102(5). Referring that issue to the STB, the Court stated, "interpretation of the Railroad Acts [the RRA and RUIA] necessarily turns upon the interpretation of the ICCTA, as to which the STB is the agency with principal competence." *See, November 14 Order and Memorandum.*

III.

SUMMARY OF ARGUMENT

The basis for reconsideration of an STB decision is whether (1) the prior action will be affected materially because of new evidence or changed circumstances or (2) the prior action involves material error. *See* 49 CFR §1115.3. The *November Decision* contains material error in the following respects: in finding Rail-Term a "rail carrier," the STB majority (1) ignored or misinterpreted the plain language of the statute, (2) failed to follow, misapplied, or reversed a long line of precedent without any rational explanation, and (3) attempted to make policy on matters outside its jurisdiction [railroad labor and employee benefits policies]. To add insult to injury, the STB even went so far as to suggest that Rail-Term should petition the agency to exempt itself from those provisions of the ICCTA that it believes are inapplicable and pay a substantial filing fee (over \$13,000) for the privilege of seeking such relief.

IV.

ARGUMENT

As the STB has itself conceded, the question referred by the Court – whether or not an entity providing dispatching services for rail carrier clients is a “rail carrier” under the ICCTA – is one of first impression. *November Decision* at 3. In making such a determination, the STB should be mindful of the implications of such a ruling. Taken to its logical extreme, the majority’s ruling could render *almost every* railroad industry vendor subject to the jurisdiction of the ICCTA, a result clearly not contemplated by the Congress. Accordingly, the STB should reconsider and overturn the *November Decision* as materially wrong. As Vice Chairman Begeman noted in her dissent “a decision finding Rail-Term to be a rail carrier is not supported by law or logic.” *Id.* At 14.

A. The STB majority’s ruling finding Rail-Term a “rail carrier” is contrary to the plain meaning of the statute, the ICCTA.

This proceeding involves a basic question of statutory construction: whether an entity that does not own or operate any rail lines or railroad equipment or hold itself out to provide any sort of railroad service but merely provides dispatching service under contract to railroad clients is a “rail carrier” under the ICCTA and therefore also subject to the RRBD’s jurisdiction under the RRA and RUIA.

Section 10102(5) clearly states as relevant:

“‘rail carrier’ means a person providing common carrier railroad transportation for compensation...”

While, as the STB admits, the statute does not define the phrase “common carrier,” it does define the term “transportation” as follows:

“(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property...”

Similarly, Rail-Term is not a “railroad” which the ICCTA defines as

“(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;

(B) the road used by a rail carrier and owned by it or operated under an agreement; and

I a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation...”

49 U.S.C. §10102(9).

Insofar as Rail-Term is providing a service related to the movement of passengers or property, it may be directly “involved” in providing “transportation.” However, as the STB majority itself concedes, Rail-Term does not directly hold itself out to the public to provide interstate rail transportation services. *November Decision* at 2. Indeed, Rail-Term lacks the very assets needed to perform rail transportation as it owns no locomotives, rolling stock, or rail lines. It has no access to or operating rights over rail lines. It does not possess any STB operating authority and does not hold itself out to the public to provide rail freight or passenger service. Its only customers are railroads who engage its services. Accordingly, there is no way that Rail-Term could be considered a “railroad” or a “rail carrier” under the plain definitions of those words.

Where the statutory language is clear, as it is here, there is no need to defer to the agency’s interpretation. *See Chevron U.S.A. v. Natural Res. Def., Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984). But even under the agency’s case law cited in this very proceeding the STB

has no basis for concluding that Rail-Term is a “rail carrier.” After the STB majority concluded that Rail-Terms’ dispatching falls within the definition of “transportation,” the agency stated:

“...that is not enough to come within our jurisdiction. Rail-Term must be providing this transportation service as a “rail carrier”, i.e., as a “person providing common carrier railroad transportation for compensation.” 49 U.S.C. §10102(5). Applying that part of the definition has presented this agency on more than one occasion with a more complicated determination, as is the case here.”

“A common carrier railroad is “a well-understood concept arising out of common law, and it refers to 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.” *November Decision* at 7.

Insofar as Rail-Term does not hold itself out to the general public as being in the business of providing any sort of transportation for compensation, the majority’s finding is more than contrary to the plain language of the statute. It is downright ludicrous. The agency resolves this semantic conundrum by referencing “long-standing” Supreme Court precedent cited by no party. It asserts “we can impute a holding out... where... a company performs outsourced rail functions on behalf of railroads, and that we must look at what the entity does, not how its charter might read in determining whether an entity is a rail carrier.” *Id.* Rail-Term submits that interpretation is clearly erroneous.

B. The STB majority failed to follow or has misapplied its own precedent.

While the question of whether a contractor providing dispatcher services is a “rail carrier” may be one of first impression, the subject of what constitutes a “rail carrier” is one of longstanding and consistent agency precedent. The majority’s ruling expands that definition in a way that is contrary to legislative intent and common sense reality and does so without any rational explanation.

The STB has frequently cited its precedent in *B. Willis, C.P.A., Inc.*, FD 34013, served July 26, 2002, slip op. at 6, for the definition of a rail carrier:

“A person is not a rail carrier for purposes of the ICA unless it holds itself out to provide rail service to others.”

In *H&M International Transportation, Inc.-Petition for Declaratory Order*, FD 34277, STB served November 12, 2003, and cited by Rail-Term in its Declaratory Petition, the STB clearly identified the characteristics of a “rail carrier:”

To fall within the Board’s jurisdiction, the transportation activities must be performed by a rail carrier, and the mere fact that H&M moves rail cars inside the Marion facility does not make it a rail carrier. To be considered a rail carrier under the statute, there must be a holding out to the public to provide common carrier service. *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34013 (STB served Oct. 3, 2001), *aff’d per curiam*, *B. Willis, C.P.A., Inc. v. STB*, No. 01-1441 (D.C. Cir. Nov. 26, 2002), cert. denied, 72 U.S.L.W. 3235 (Oct. 7, 2003) (No. 02-1498); *Hanson Natural Resources – Non-Common Carrier Status – Petition for Declaratory Order*, Finance Docket No. 32248 (ICC served Dec. 5, 1994). Here, however, H&M’s operations are performed pursuant to agreements with UP that reserve for UP all common carrier rights and obligations and that, in fact, specifically bar H&M from providing common carrier service. Additionally, H&M has never received, nor sought, a license from the Board for common carrier freight rail operations under 49 U.S.C. 10901 (or an exemption from the licensing requirements pursuant to 49 U.S.C. 10502). Further, there is no evidence that H&M has provided any type of rail service to the public for compensation or otherwise, or held itself out as willing to do so. Indeed, the record shows that any rail-related activity performed by H&M is strictly in-plant, for H&M’s convenience and benefit, and in furtherance of its non-rail primary business purpose.

The STB also noted that there is no evidence that Union Pacific (“UP”) had control over H&M’s business operations, that all car movements within its facility were at the direction of, under the supervision of, and for the convenience of H&M, that the connecting carrier UP’s obligations and common carrier duty began and ended at the delivery tracks at the H&M facility, and that the movement of cars inside H&M’s facility could be considered an integral part of that railroad’s service.

At the opposite end of the rail carrier “spectrum” the STB has found an excursion passenger operator to be a “rail carrier.” In *American Orient Express Railway Company LLC-Petition for Declaratory Order*, FD 34502, STB served December 29, 2005, also cited in Rail-Term’s declaratory petition, the STB stated:

We next examine whether AOERC is a “rail carrier...”

...

“Accordingly, the issue is whether AOERC is a ‘common carrier.’ There is no statutory definition of the term ‘common carrier.’ However, as a general matter, the term ‘common carrier’ is a well-understood concept arising out of common law, and it refers to 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. Citations omitted. In determining whether there has been a holding out, ‘one must look to the character of the service of the party in relation to the public.’”

The STB has also frequently determined whether or not an entity is or is not a “rail carrier” in the context of preemption requests involving transloading terminals and *State of Maine* rail line acquisition proceedings. See, *November Decision* at 10-12. In the case of the former, the STB has found in a consistent line of cases that the operator of a transloading facility will not be entitled to the preemption normally accorded a rail carrier if performed by an entity independent of a rail carrier or by an independent entity not acting as an agent and under the control of a rail carrier. *Town of Babylon and Pinelawn Cemetery—Pet. For Declaratory Order*, FD 35057 (STB served Feb. 1, 2008), and *City of Alexandria—Petition. For Declaratory Order*, FD 35157, STB served Feb. 17, 2009, cited in the *November Decision* at 10. Conversely, the STB has ruled that it will not regard an entity, usually a public agency, that is acquiring railroad assets in a *State of Maine* transaction as a rail carrier subject to its jurisdiction if the common carrier obligation and rail service easement resides with or continues to be held by a railroad common carrier not under the acquiring entity’s control. *Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad*, 8 I.C.C. 2d 835, 836-37 (1991)

and other cases cited in the *November Decision* at 11. The agency has even held the acquiring entity's assumption of responsibility over dispatching will not render it a "rail carrier."⁷

While the RRA does not define the terms "rail carrier," "carrier by rail," or "common carrier," there are numerous judicial decisions cited by the majority in the *November Decision* construing one or more of these terms.⁸ For example, *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) cited in the *Mahfood* decision the STB referenced on page 8 of its *November Decision*, defines a common carrier by railroad as "one who operates a railroad as a means of carrying for the public..." *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 647 (5th Cir. 1967), also cited in *Mahfood*, identified four criteria for determining whether an entity should be regarded as a common carrier by railroad: 1) the actual performance of rail service; 2) the service is being performed as part of the total rail service contracted for by a member of the public; 3) the entity that is performing the service is doing so as part of a system of interstate rail transportation by virtue of either common ownership with the railroad or under a contract with the railroad; and 4) remuneration is being received for the services performed.

Rail-Term cannot be regarded as a "rail carrier" under longstanding and consistent STB precedent. It does not 1) own or use any facility related to the movement of passengers or property by rail; 2) provide common carrier transportation for compensation; 3) "hold out" to the public to provide transportation for compensation; or 4) hold any license or exemption from the STB to perform common carrier rail operations. Moreover, unlike transload facilities operated by contractors that enjoy federal preemption such as that in the *City of Alexandria* case cited by

⁷ *Metro Reg'l Transit Auth.—Acquis. Exemption—CSX Transp., Inc.*, FD 33838, STB served Oct. 10, 2003, and *Utah Transit Auth.—Acquis. Exemption—Acquis. from Union Pac. R.R.*, FD 35008 et al., STB served July 23, 2007 cited in *November Decision* at page 11, footnote 22.

⁸ At pages 7 and 8.

the majority at page 10 of its *November Decision*, the agreements between Rail-Term and its clients make clear that Rail-Term is an independent contractor, not subject to client control, responsible for its own actions and responsible to its clients for its liabilities or misdeeds. *See*, contract with Vermont Railway Corporation attached hereto as Exhibit C at pages 3-7.

Nor can Rail-Term be regarded as any sort of “common carrier” or “rail carrier” under judicial precedent such as *Lone Star*. As noted by both the STB and RRB, Rail-Term has no common control relationship with a rail carrier. *November Decision* text at 5 and citation to the RRB decision in footnote 10 on page 5. While Rail-Term provides service under contract with its carrier clients and receives compensation for its activities, it does not perform railroad service in the normal dictionary or common sense use of the phrase. Unlike some of the cases cited by the majority at pages 7- 8 of its *November Decision*, Rail-Term does not engage in loading or unloading of freight, terminal operations, stevedoring, or even intraplant switching of any sort. Furthermore, it does not provide dispatching as part of a total “package” of services any more than other non-railroad vendors provide functions such as track, signal, and equipment maintenance, freight car supply, and industrial development without any imputation of STB common carrier status or RRA jurisdiction. Even the “carrier” in the *Herzog* case cited by the RRB in its opinion and by the STB at page 12 of its *November Decision* was performing rail service handling passengers, albeit under contract to a public agency. Accordingly, it cannot be regarded as a “rail carrier” or “common carrier” under that case law.

The only basis for the STB majority’s finding that Rail-Term is a “rail carrier” is its undocumented statement at page two of the *November Decision* that “by performing an essential rail function on behalf of several short line railroads, Rail-Term has become a rail carrier” and

that “the overall scheme of regulation under ICCTA indicates that Congress intended for the regulation of these kinds of contracted dispatching services to rest within our jurisdiction.”

Elaborating on this theme, the STB majority dredged up a few decisions predating World Wars I and II to find that it can “impute” a holding out to the public where, as here, a company performs outsourced rail functions on behalf of railroads and we must look at what the entity does to determine whether it is in reality a “rail carrier.” *November Decision* at 7. The only decision cited by the majority and the American Train Dispatchers Association (the only other party to this case other than the RRB itself) that is remotely relevant is the ICC’s decision in *Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut*, 8 I.C.C.2d 280, 294, 1992 ICC LEXIS 27 (cited as *P&C*) where the Interstate Commerce Commission ruled that a contractor which provided services to an affiliated railroad was a “rail carrier” and that common control authority was required. The ICC reasoned so long as the questioned service is part of the total rail common carrier service that is publicly offered, then the entity providing it for the offering railroad is deemed to hold itself out to the public.

But *P&C* is inapposite as it involved a terminal operator under common control with a rail carrier. Unlike Rail-Term, *P&C* owned and operated over railroad tracks, loaded and unloaded cargo for the railroad’s customers, owned and operated its own switching locomotives, and its services were bundled in the services provided by and invoiced by its affiliated rail carrier. Unlike *P&C*, Rail-Term does not conduct rail operations or “hold out” to serve the public. *Id.* 1992 ICC LEXIS at 21.

Rail-Term has reviewed each and every one of the other decisions cited by the STB majority⁹ and finds them clearly distinguishable. With the exception noted below, each involved

⁹ These cases were not cited by the American Train Dispatchers Association.

an inquiry as to whether the entity that was the subject of litigation was a “common carrier” for the purpose of either the Interstate Commerce Act (for Elkins Act or unauthorized common control violations, FELA liability, or Railroad Safety Act liability).¹⁰ Each of these entities involved an entity performing typical terminal railroad services including loading and unloading of freight (or animals in one case), stevedoring, train serving and switching, and similar activities. One or more of these entities owned terminal trackage and/or locomotives. But, as noted above, Rail-Term does not own any railroad equipment or track and does not load or unload freight and does not hold out to perform services as part of an overall “service package.” Rail-Term assumes that it is highly unlikely that customers of its rail carrier clients even know that Rail-Term exists.

C. By making pronouncements on railroad employee benefits, the STB majority exceeded its authority and usurped an issue for the Congress

The majority found that Rail-Term’s “operational and economic incentive” is to *displace essential in-house operations* [emphasis supplied] of its freight rail carrier clients in implementing transportation. *November Decision* at 13. It added that “Congress would intend for those services to fall within our jurisdiction and for the employees performing those dispatching functions to be subject to the various federal railroad labor-related laws and safety-related laws.” *Id.* Such statements exceed the STB’s proper jurisdictional reach as they involve policy issues of railroad benefits coverage and labor law. Accordingly, they are a subject for the legislature.

The majority appears to suggest incorrectly that Rail-Term had removed dispatchers from coverage under the RRA and RUIA. In fact, Rail-Term does not employ dispatchers that

¹⁰ *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949) involved the question of whether a steamship company operating as an agent of the United States was liable for a tort committed on a passenger by the company’s employee.

formerly worked for its rail carrier clients or railroads generally so it cannot be accused of removing employees from RRA and RUIA coverage. It is Rail-Term's clients, and not Rail-Term, that "outsourced" the dispatching function just as the rail industry has "outsourced" to contractors numerous other functions. The STB has not attempted to regulate those "outsourcing" decisions and it should not do so here. For it to do so is material error.

Similarly, the STB majority's decision rendering railroad industry vendors such as Rail-Term subject to the ICCTA would have bizarre and unintended results. Would Rail-Term be able to claim federal preemption against inconsistent state or local regulations if it painted its office in Rutland black instead of the shade of green required under Vermont's environmental code? Should Rail-Term decide to withdraw from the dispatching business, would it be required to seek discontinuance or abandonment authority including compliance with the necessary environmental and historic requirements? Such a ruling would have such sweeping implications that the STB majority's policy would clearly infringe on the legislative mandate of the United States Congress.

V.

CONCLUSION

As directed by the Court, Rail-Term requests that the STB grant its Petition for Reconsideration and find that it not a “rail carrier” under the ICCTA. Furthermore, Rail-Term requests expedited handling inasmuch as the Court is holding the appellate proceeding in abeyance pending the outcome of this proceeding.

Submitted by

John D. Heffner
Strasburger & Price, LLP
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607

Dennis M. Devaney
Varnum, LLP
39500 High Pointe Boulevard
Suite 350
Novi, MI 48375
(248) 567-7825

Dated: December 16, 2013

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the Petition for Reconsideration dated December 13, 2013, was sent by electronic mail and first-class, United States mail to the following parties:

Michael Wolly, Esq.
Zwerdling, Paul, Kahn & Wolly, P.C.
1025 Connecticut Avenue, NW
Suite 712
Washington, D.C. 20036-5429

Rachel Simmons, Esq.
United States Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611

/s/ John D. Heffner
John D. Heffner

Dated: December 13, 2013

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.

EXHIBIT B

**MANAGEMENT MEMBER KEVER'S DISSENT
RAIL-TERM COPORATION**

A majority of the Board found Rail-Term to be a covered employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). ~~While I may agree with the majority that dispatching is an "inextricable part" of railroad operations, I can not agree with the majority that Rail-Term is itself a carrier under our Acts.~~

The Railroad Retirement Act (45 U.S.C . § 231 (a) (1)) (substantially the same as the RUIA) defines a covered employer as:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49; United States Code;
- (ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph....

The majority finds Rail-Term to be a covered employer under subsection (i) above. Further, the majority cites Southern California Regional Rail Authority (SCRRRA) B.C.D. 02-12 and Herzog Transit Services, Inc. B.C.D. 09-53 (Decision on Reconsideration - Management Member Kever Dissenting) as precedent supporting their conclusion. Because I do not believe that Rail-Term would be considered a carrier by the Surface Transportation Board (STB) under Part A of title 49 and also do not find the above cited decisions applicable to this case, I must dissent.

The Board's decision outlines the nature of dispatching and its relationship to other railroad operations. It also presents examples of how dispatching is regulated by federal agencies including the Federal Railroad Administration. However, the decision does not provide a basis upon which Rail-Term could actually be found to be an entity regulated under the jurisdiction of the STB. In American Orient Express Railway Company, v. Surface Transportation Board, 484 F3d 554 (D.C. Circuit 2007) the Court did not disturb the STB's finding that an entity that did not own tracks or utilize its own employees for movement of passenger trains could still be considered a railroad carrier where it provided its own rail cars and contracted with AMTRAK to move its passengers. Rail-Term may participate in directing car movements by dispatching, but it has not provided rail cars nor participated in interchange agreements or other arrangements to move freight.

The majority decision also cites two prior Board decisions in SCRRA and Herzog Transit Services as support for its determination. These decisions present facts very different than the instant case since both applied factors from the Board's decision in Railroad Ventures, Inc. B.C.D. 00-47. In the initial Board decision on Herzog Transit Services, B.C.D. 09-02, the Board summarized the SCRRA decision and concluded that since SCRRA had assumed the responsibility for part of the railroad operations (dispatching for both intrastate and interstate carriers) that it became covered consistent with the Railroad Ventures' analysis. The Board's initial determination of Herzog goes on to analyze Herzog Transit under the Railroad Ventures factors and concludes that Herzog, as operator for DART, became covered upon their assuming the dispatching function which includes interstate passenger and freight trains. Unlike SCRRA and Herzog, Rail-Term does not own track nor provide train operations over leased track as in Herzog's case. Providing dispatching services by SCRRA and DART/Herzog changed their covered status because they owned track upon which interstate rail traffic moved along with their intrastate commuter operations. This is a very different factual situation than exists in Rail-Term.

While the majority certainly had the authority to find dispatching to be an integral part of railroading that could not be contracted out similar to engineers and conductors (see Rail-West, Inc. B.C.D. 95-51), the majority also chose to find Rail-Term itself to be a carrier which I do not believe is supportable under the Acts; therefore I dissent.

Note - Reference to the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers in footnote (2) of the majority opinion is not relevant since rail unions are subject to coverage under different statutory provisions than rail carrier employers under the RRA and the RUIA.

Original signed by:

Jerome F. Kever
March 26, 2010

EXHIBIT C

DISPATCHING SERVICES AGREEMENT

This Dispatching Services Agreement ("Agreement") is executed as of February 18th, 2005 by and among Rail-Term Corp., a Michigan corporation ("Rail-Term"), and Vermont Railway Incorporated, a Vermont corporation ("VTR"). Rail-Term and VTR shall be individually referred to in this Agreement as a "Party" and collectively referred to in this Agreement as the "Parties."

RECITALS

WHEREAS, Rail-Term is in the business of providing Dispatching Services (as hereinafter defined); and

WHEREAS, VTR desires to utilize the Dispatching Services from Rail-Term; and

WHEREAS, the Parties desire to establish the terms and conditions by which Rail-Term will provide Dispatching Services to VTR.

NOW THEREFORE, for the consideration herein recited and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties hereto agree as follows:

1. Term. The term ("Term") of this Agreement shall commence on March 1st, 2005 ("Effective Date") and shall conclude on February 28th, 2015. Both parties shall give notice to the other party at least one year before the end of the term, stating whether such party desires to extend the Term of the Agreement, or to enter into a new agreement for the provision of Dispatching Services, such that the parties may negotiate terms of an agreement without the disruption of services.

2. Dispatching Services.

(a) As of the Effective Date, Rail-Term agrees to provide VTR with those Dispatching Services (the "Dispatching Services") more fully described on Exhibit A of this Agreement, which such Exhibit may be amended from time to time by mutual written consent of the Parties:

(b) At the request of VTR, as of the Effective Date, up to forty (40) hours per week of Dispatching Services (the "VTR Dispatching") will be performed by John Geho, a VTR employee (the "VTR Employee"), and the rate of compensation will be adjusted to reflect this arrangement, as more fully described in Exhibit B. While the VTR Employee is performing the VTR Dispatching, the employee will be subject to the sole control of VTR. While the VTR Dispatching is performed, the VTR Employee will be expected to deliver the Dispatching Services in accordance with the present Agreement. VTR shall indemnify Rail-Term for any failure of the VTR Employee to perform the

to retain its approval of such agents or subcontractors until such time as it is satisfied that such insurance is in place:

- (ii) VTR as an additional insured solely with respect to the operations of the named insured;
- (iii) Coverage for Rail-Term employees and agents;
- (iv) Blanket written contractual liability or an endorsement specifying that coverage under the policy applies to this Agreement;
- (v) Cross liability and severability of interests clauses;
- (vi) Contingent employer's liability;
- (vii) Personal injury;
- (viii) Pollution; Names Perils Form;
- (ix) Products and completed operations.

5. Indemnification.

(a) To the extent permitted by law, Rail-Term shall indemnify, guarantee and save harmless VTR, its officers, directors, employees, representatives, and agents (collectively the "VTR Indemnitees") from and against all actions, causes of actions, proceedings, claims and demands for any direct losses, costs, damages or expenses suffered or incurred by VTR and/or VTR's Indemnitees by reason of any damage to property or injury, including injury resulting in death to persons, including the employees, servants, agents, licensees or invitees of VTR, caused by, resulting from or attributable to any failure of Rail-Term or any of its sub-contractors or agents to observe or perform any of the obligations of Rail-Term contained in this Agreement, except to the extent that such liability, damage or injury is contributed to, caused by, results from or is attributable to the acts or omissions of VTR and except with respect to indirect or consequential damages or loss of revenue and anticipated profits.

(b) To the extent permitted by law, VTR shall indemnify, guarantee and save harmless Rail-Term, its officers, directors, employees, representatives, and agents (collectively the "Rail-Term Indemnitees") from and against all actions, causes of actions, proceedings, claims and demands for any direct losses, costs, damages or expenses suffered or incurred by Rail-Term and/or Rail-Term's Indemnitees by reason of any damage to property or injury, including injury resulting in death to persons, including the employees, servants, agents, licensees or invitees of Rail-Term, caused by, resulting from or attributable to any failure of VTR or any of its sub-contractors or agents to observe or perform any of the obligations of VTR contained in this Agreement, except to the extent that such liability, damage or injury is contributed to, caused by, results from or is

attributable to the acts or omissions of Rail-Term and except with respect to indirect or consequential damages or loss of revenue and anticipated profits.

6. Hardware and Software. Rail-Term will be responsible for providing the necessary computer and ancillary machines or equipment and related computer programs used in the performance of its obligation hereunder, except for VTR's control system, which will be made available by VTR for its use by Rail-Term. Rail-Term will be responsible for the necessary changes, the maintenance, the updates, the upgrades and the fixes to the control system, and VTR shall be responsible for the cost associated with VTR's specific requests for changes. Rail-Term shall be required to obtain the written consent of VTR prior to using VTR's control system to provide services to another railroad, VTR, which consent shall not be unreasonably withheld, and for a fee to be determined by mutual agreement of the Parties. VTR's control system will remain the property of VTR.

7. Accident and Incident Investigation. The Parties agree that it is imperative to determine the root cause of all accidents/incidents. Accordingly, VTR agrees to provide Rail-Term with the documentation regarding the appropriate protocol to follow related to the investigation of accidents ("Protocol"). The Protocol shall address the procedures, rights and roles of the respective parties in such investigations. In addition, VTR may request the assistance of Rail-Term in the conduct of VTR's internal investigations of operational matters.

* 8. Independent Contractor.

(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.

(b) Rail-Term may sub-contract the performance of any or all of its obligations hereunder to any third party upon the prior written approval of VTR, which approval shall not be unreasonably withheld.

(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. Except as provided for in Section 5, VTR shall not assume any responsibility or liability for vacation, work accidents, sickness or lost time incurred by Rail-Term's employees, whether as a result of the performance of their obligations or otherwise.

(d) Except as provided for in Section 5, any disputes between Rail-Term and any of its employees or subcontractors shall be resolved directly between them, without any liability on the part of VTR.

9. Default by Rail-Term.

(a) Events of Default. Rail-Term shall be in default under this Agreement upon the occurrence of any of the following events ("Rail-Term Event of Default"):

(i) If Rail-Term fails to perform the services to be provided hereunder in a timely manner, fails to observe or perform any of its other obligations in this Agreement.

(ii) If Rail-Term ceases to carry on its business;

(iii) If Rail-Term becomes insolvent, bankrupt, files an assignment for the benefit of creditors, or if a petition in bankruptcy is filed against Rail-Term or steps are taken by or against Rail-Term seeking liquidation, winding-up or dissolution of Rail-Term;

(iv) If a receiver, receiver and manager or trustee is appointed in respect of Rail-Term; or

(v) If the holder of a security interest takes possession of all or a substantial part of Rail-Term's property or undertaking which diminishes Rail-Term's performance of this Agreement.

(b) Rights Upon Default. If a Rail-Term Event of Default occurs, VTR may give notice to Rail-Term which describes the Rail-Term Event of Default relied upon, and which further provides that:

(i) Unless such Rail-Term Event of Default is waived by VTR; or

(ii) Should Rail-Term fail to propose and immediately undertake all necessary corrective actions to remedy the Rail-Term Event of Default within an initial 10 day period; or

(iii) Should Rail-Term not remedy the Rail-Term Event of Default within a reasonable time.

VTR shall have the right to terminate this Agreement, reserving for itself all available legal recourse against Rail-Term for damages arising in consequence of the Rail-Term Event of Default. Notwithstanding the foregoing, VTR shall pay Rail-Term for all amounts accrued prior to such Rail Term Default.

10. Default by VTR.

(a) Events of Default. VTR shall be deemed to be in default under this Agreement upon the occurrence of any of the following events ("VTR Event of Default");

(i) If VTR fails to make payment of any of the compensation to Rail-Term as provided for hereunder when due;

(ii) If VTR fails to observe or perform any of its other obligations in this agreement;

(iii) If VTR ceases to carry on its business;

(iv) If VTR becomes insolvent, bankrupt, makes a proposal, files an assignment for the benefit of creditors, or if a petition in bankruptcy is filed against VTR or steps are taken by or against VTR seeking liquidation, winding-up or dissolution of VTR;

(v) If a receiver, receiver and manager or trustee is appointed in respect of VTR;

(vi) If the holder of a security interest takes possession of all or a substantial part of property or undertaking of VTR which diminishes VTR's performance of this Agreement.

(b) Rights upon Default. If a VTR Event of Default occurs, Rail-Term may give notice to VTR which describes the VTR Event of Default relied upon, and which further provides that:

(i) Unless such VTR Event of Default is waived by Rail-Term;

(ii) Should VTR fail to propose and immediately undertake all necessary corrective actions to remedy the VTR Event of Default within an initial 10 day period; or

(iii) Should VTR not remedy the Default within a reasonable time.

Rail-Term shall have the right to terminate this Agreement, and shall be relieved of any further performance of its obligations hereunder, reserving for itself all available legal recourse against VTR for damages arising in consequence of the VTR Event of Default.

11. Force Majeure. No liability shall result to any party from delay in performance or from non-performance caused by circumstances beyond the control of the party affected, including but not limited to acts of God, fire, flood, explosion, war, binding action or order of governmental authority, accident, labor disputes, strike, inability to obtain power or equipment, but each of the parties hereto shall be diligent to attempting to remove such cause or causes and shall promptly notify the other party of its extent and probable duration.

12. Confidentiality.

(a) Each of the parties shall treat the provisions of this Agreement and all amounts payable hereunder as confidential and shall not disclose such information to any person unless required to do so by any governmental authority having jurisdiction or the prior written consent of the other parties shall have been obtained. This obligation shall survive the termination of this Agreement.

(b) Each of the parties, its directors, officers, employees, agents and representatives further undertake to maintain this Agreement and all information pertaining to the other Party and its business acquired in the course of performance of this Agreement's obligations and all reports, specifications, drawings and other documentation produced thereunder, confidential, and shall not disclose or use same for any purposes other than for the performance of the obligations of this Agreement, except for information which is part of the public domain.

13. **Compliance with Laws.** During the Term, Rail-Term shall comply with, and shall ensure that its employees, contractors and agents, comply with all Laws applicable with respect to the performance of the Dispatching Services and its other obligations hereunder. Rail-Term shall comply at all times with applicable Federal Railroad Administration ("FRA") rules and regulations. In order for Rail-Term to comply with FRA, VTR will be responsible for keeping Rail-Term informed of all rules and regulations changes put forward by the FRA and applicable to VTR. Penalties arising from the failure of Rail-Term to comply with FRA rules and regulations as communicated in writing by VTR to Rail-Term from time to time, will be the responsibility of Rail-Term. The preceding is subject to the provisions of Sections 5, 6, 7, 9, 10 and 11.

14. **Notices.** Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be given by prepaid first-class mail, by facsimile or other means of electronic communication or by hand-delivery as hereinafter provided. Any such notice or other communication, if mailed by prepaid first-class mail at any time other than during a general discontinuance of postal service due to strike, lockout or otherwise, shall be deemed to have been received on the fourth business day after the post-marked date hereof, or if sent by facsimile or other means of electronic communication, shall be deemed to have been received on the first business day following the day on which it was sent, or if delivered by hand to the applicable address noted below either to the individual designated below or to an individual at such address having apparent authority to accept deliveries on behalf of the addressee shall be deemed to have been received on the date of delivery. Notice of change of address shall also be governed by this section. In the event of a general discontinuance of postal service due to strike, lockout or otherwise, notice or other communications shall be delivered by hand or sent by facsimile or other means of electronic communication and shall be deemed to have been received in accordance with this section. Notices and other communications shall be addressed as follows:

If to Rail-Term: 10,765 Cote De Liesse, Suite 201
Dorval, Quebec, H9P 2R9
Attention: François Prénovost
Fax: 514-422-8225