

# Strasburger

ATTORNEYS AT LAW

February 11, 2015

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**BY E-FILING**

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.,  
Washington, D.C. 20423-0001

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ENTERED  
Office of Proceedings  
February 11, 2015  
Part of  
Public Record

**RE: FD 35582, Rail-Term Corp.-Petition for Declaratory Order**

Dear Ms. Brown:

I am writing on behalf of Rail-Term Corp. ("Rail-Term") in connection with the above-captioned proceeding. The Board's order in this matter directed Rail-Term to file a copy of the Board's decision with the US Court of Appeals for the DC Circuit and to inform the Board that it has done so by letter filed in this docket and served on the parties to this case.

While Rail-Term promptly submitted a copy of the Board's decision along with a status report to the Court and served copies of its filing on all parties to the proceeding including the Board's Office of General Counsel, it inadvertently neglected to file a copy in the docket. By this letter, it is doing so now.

I apologize for this oversight.

Sincerely yours,



John D. Heffner

Enclosure

6589012.2/SP/24997/0101/021115

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

<b>RAIL-TERM CORP.,</b>	)	
	)	
<b>Petitioner,</b>	)	
<b>v.</b>	)	Appeal No. 11-1093
	)	
<b>UNITED STATES RAILROAD</b>	)	
<b>RETIREMENT BOARD,</b>	)	
	)	
<b>Respondent.</b>	)	

**REPORT**

To the Honorable, the Judges of the United States  
Court of Appeals for the District of Columbia Circuit:  
(Judges Garland and Kavanaugh, Circuit Judges, and Judge Ginsburg,  
Senior Circuit Judge)

The case manager has requested that Counsel for Rail-Term Corp. (“Rail-Term”), update the Court on the current status of this matter. As directed by the Court, Rail-Term’s Petition for Declaratory Relief was filed with the Surface Transportation Board (“the STB”) on December 14, 2011. On March 8, 2012, the STB served a decision instituting a declaratory proceeding directing both Rail-Term and the American Train Dispatchers Association (“ADTA”), the only other party to the STB’s proceeding, to supplement the record with their respective submissions to both the Railroad Retirement Board and the Court by March 28, 2012. The STB concluded that, with the receipt of this information, no further

briefings would be required. Rail-Term duly filed its comments on March 28, 2012, and ADTA filed nothing.

On November 1, 2012, the Court, Ken R. Meadows, Deputy Clerk, issued an order requiring that Petitioner Rail-Term file a status report by December 3, 2012, and at 30-day intervals thereafter. Thereafter on February 7, 2013, the Court, Michael C. McGrail, Deputy Clerk, issued an order requiring that Petitioner Rail-Term file a status report by May 31, 2013, and at 120-day intervals thereafter.

On November 19, 2013, the STB issued a decision<sup>1</sup> finding Rail-Term a rail carrier under 49 U.S.C. §10102(5) and that its dispatching services are subject to the STB's jurisdiction. Thereafter Rail-Term filed a petition for reconsideration with the STB on December 13, 2013, and simultaneously submitted a Motion to Hold Proceeding in Abeyance with the Court.

Finally, on December 30, 2014, the STB issued a decision<sup>2</sup> on reconsideration again finding Rail-Term a rail carrier subject to its jurisdiction. A copy of that ruling is attached to this Report.

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<sup>1</sup> Vice Chairman Begeman dissenting

<sup>2</sup> Vice Chairman Begeman again dissenting

Respectfully submitted,

RAIL-TERM CORP.

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Dated: January 27, 2015

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have sent a copy of the foregoing Status Report to the following parties to this proceeding by US Mail and electronic mail, this 27<sup>th</sup> day of January 2015:

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/s/ John D. Heffner  
John D. Heffner

Dated: January 27, 2015

SURFACE TRANSPORTATION BOARD  
DECISION

Docket No. FD 35582

RAIL-TERM CORP.—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> In this decision, the Surface Transportation Board denies a request for reconsideration of its decision finding that Rail-Term Corporation is a rail carrier within the definition at 49 U.S.C. § 10102(5), a finding that would lead to eligibility by Rail-Term’s employees for employee benefits under statutes administered by the Railroad Retirement Board. The Board affirms its finding that Rail-Term’s performance of dispatching on behalf of several short-line railroads makes Rail-Term a rail carrier subject to the Board’s jurisdiction.

Decided: December 30, 2014

Rail-Term Corporation (Rail-Term) filed a timely petition for reconsideration of the Board’s decision served November 19, 2013 (the Rail Carrier Decision), finding that it is a “rail carrier” as defined in the Interstate Commerce Act,<sup>2</sup> and, therefore, is subject to the Board’s jurisdiction. Because the Board did not commit material error in the Rail Carrier Decision, we deny reconsideration.

**PROCEDURAL BACKGROUND**

The United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit or the court) has before it petitions by Rail-Term seeking judicial review of two decisions of the Railroad Retirement Board (RRB) finding that Rail-Term is a “carrier by railroad” subject to the Board’s jurisdiction under the Interstate Commerce Act, and that Rail-Term therefore is a covered “employer” under the Railroad Retirement Act, 45 U.S.C. §§ 231-231v (RRA), and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-69 (RUIA).<sup>3</sup> Because the RRB’s decisions interpreted the Interstate Commerce Act, the D.C. Circuit held that “the doctrine of

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The Interstate Commerce Act was substantially amended by the ICC Termination Act of 1995 (ICCTA). While the Rail Carrier Decision used the shorthand “ICCTA,” we will refer to the amended statute as the Interstate Commerce Act in this decision.

<sup>3</sup> Employer Status Determination—Rail-Term Corp., B.C.D. 10-33 (Apr. 6, 2010) (RRB 10-33), reconsideration denied, B.C.D. 11-14 (Jan. 28, 2011) (RRB 11-14).

primary jurisdiction required a referral to the Board for an administrative ruling” as to whether Rail-Term is a “rail carrier” subject to the Board’s jurisdiction.<sup>4</sup>

To implement the court’s referral, Rail-Term petitioned the Board for a declaratory order finding that it is not a rail carrier under the Interstate Commerce Act. The RRB and the American Train Dispatchers Association (ATDA) replied in opposition. The Board instituted a declaratory order proceeding under 49 U.S.C. § 721(a) and directed Rail-Term and ATDA to supplement the record by filing the pleadings, briefs, and other materials that constituted the record in the court case.

On November 19, 2013, the Board ruled, in a 2-1 decision (Rail Carrier Decision), that Rail-Term is a rail carrier under 49 U.S.C. § 10102(5) because it performs the essential railroad function of dispatching,<sup>5</sup> in which it controls the movement of trains on behalf of several short line railroads.<sup>6</sup> Rail-Term sought reconsideration, arguing that the Board committed material error in the Rail Carrier Decision. The Board, through its Director, Office of Proceedings, served a decision on February 12, 2014, permitting the Association of American Railroads (AAR), the American Short Line and Regional Railroad Association (ASLRRA), the National Railroad Construction and Maintenance Association, Inc. (NRC), CSX Transportation, Inc., John J. Gray,<sup>7</sup> and Union Pacific Railroad Corporation to participate as *amicus curiae*, and they filed comments supporting Rail-Term’s position.<sup>8</sup> The RRB and ATDA filed comments opposing the petition for reconsideration and supporting the Rail Carrier Decision.

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<sup>4</sup> Rail-Term Corp. v. RRB, No. 11-1093 (D.C. Cir. Nov. 14, 2011). The court expressly deferred ruling on the RRB’s alternative holding that Rail-Term’s employees were employees of Rail-Term’s rail carrier customers for purposes of the railroad employee benefit laws until this agency ruled on Rail-Term’s carrier status under the Interstate Commerce Act. Id., Memorandum at 3.

<sup>5</sup> Multiple trains operate over a given carrier’s system, and dispatchers coordinate their operations and direct the movement of trains, much in the way that air traffic controllers direct air traffic at a given airport.

<sup>6</sup> Then-Vice Chairman Begeman dissented with a separate expression.

<sup>7</sup> Mr. Gray states that he is the owner of Pacific Rail Services (PRS), which contracts with Class I railroads to operate intermodal ramps as an independent contractor. The RRB has ruled that PRS is not a “carrier by rail” and is not a covered employer under the RRA and the RUIA.

<sup>8</sup> ASLRRA and NRC appealed the Director’s decision because it limited their participation as *amici* and denied them party status as intervenors. Although this matter was before the RRB, in court, and at this agency for years before they sought to participate, ASLRRA and NRC say that they should have full party status so that they can appeal if they do not agree with the final decision. But the Board has long found that intervention is discretionary and has typically refused to grant intervenor status after the record is closed, and particularly when intervention is sought on reconsideration. See Knauf Fibre Glass GmbH v. Alton & S. Ry., NOR 39739 (ICC served May 9, 1986). Rather, the Board may (as it did here) allow

(continued . . .)

## THE RAIL CARRIER DECISION

Historically, rail carriers have conducted the physical operation and control of their trains with their own in-house employees.<sup>9</sup> Over the last several years, however, some rail carriers subject to STB jurisdiction have begun to shift to a fundamentally different business model in which they outsource aspects of the physical operation and control of their trains, such as dispatching, to third-party contractors like Rail-Term. This is a sharp break with historic practice. As noted in the Rail Carrier Decision, slip op. at 4-5, Rail-Term itself has said that “the current trend toward using contractors is so different [from past use of outside contractors] as to present the [Railroad Retirement] Board with a major new coverage issue.” (Quoting April 20, 2007 letter from Counsel for Rail-Term to the RRB, attachment to Rail-Term’s March 27, 2012 submittal to supplement the record, at 22-23). This new business model raises a fundamental question: how the practice of outsourcing of the physical operation and control of a rail carrier’s trains to third-party independent contractors fits into the railroad retirement, disability, and unemployment system administered by the RRB, and into the system of rail carrier regulation under the Interstate Commerce Act administered by the Board. In the Rail Carrier Decision, a majority of the Board decided that, in order to preserve the essential unity of rail carrier operations and prevent the creation of disaggregated rail carriers that have no operating employees, the functions involved in the physical operation and control of the carrier’s trains—in this case dispatching—constitutes transportation by rail carrier under 49 U.S.C. § 10102(5) when those functions are performed by independent third-party contractors.

As the Rail Carrier Decision explained, the essential facts are not in dispute. Rail-Term is a small, privately owned company that provides contract dispatching services to short-line railroads. Rail-Term’s owners are not affiliated with any of its client rail carriers. Rail-Term owns its own dispatching computer software system and operates out of its dispatching office in Rutland, Vermont. Rail-Term does not have its own track, trains, conductors, signalmen, engineers, or maintenance-of-way employees, and Rail-Term does not directly offer to transport

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(. . . continued)

participation as *amicus curiae*, see Total Petrochemicals & Refining USA, Inc. v. CSX Transp. Inc., NOR 42121 (STB Served Dec. 19, 2013); Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, Ohio & Darlington, Penn., AB 556 (Sub-No. 2X) (STB served Dec. 15, (2005); Ariz. Pub. Serv. Co. v. Burlington N. & Santa Fe Ry., 7 S.T.B. 69, 71-72 (2003); Midtec Paper Corp. v. Chi. & N.W. Transp. Co., NOR 39021 (ICC served July 22, 1986). Or it may deny intervention as a party or *amicus*. Nat’l R.R. Passenger Corp. & Consol. R. Corp.–Application Under § 402 of the R. Passenger Serv. Act for an Order Fixing Just Compensation, NOR 32467 (ICC served Mar. 24, 1995); B.J. Alan Co. v. United Parcel Serv., Inc. MC-C-30093 (ICC served Sept. 8, 1989). ASLRRRA and NRC argue that they will not broaden the issues, and NRC says that it wants to be a party because it did not expect the Board to rule that Rail-Term is a rail carrier. These arguments, however, do not support overturning the Director’s decision. Therefore, the appeals are denied.

<sup>9</sup> See Pet. for Decl. Order at 3-4 (Rail-Term acknowledging that the dispatching services it performs for rail carriers historically have been performed in-house by rail carrier employees).

freight by rail for the public. Rather, the physical movement of freight is performed by Rail-Term's clients, many of whom are licensed rail carriers subject to STB jurisdiction, and who hold themselves out as the direct providers of the interstate transportation. These facts, viewed in isolation, might suggest that Rail-Term is not a rail carrier. Yet Rail-Term's central business function is to provide dispatching service, which is crucial to the safe movement of trains, as an operational arm of the client carriers on an outsourced basis. Thus, the dispatching service that Rail-Term provides for its customers is its core business.

The Rail Carrier Decision explained that Rail-Term's customers do not control Rail-Term's operations. Rather, Rail-Term's dispatchers give directions to the operating personnel of the client railroads regarding the movement of trains. Rail-Term states that its employees do not report directly to any carrier supervisor, but rather to supervisors within Rail-Term. The Rail Carrier Decision noted, slip op. at 5, that, "while the final physical act of interstate rail transportation is performed by Rail-Term's rail carrier clients, Rail-Term employees provide an indispensable link in implementing the key function 'required' each time one of the carriers moves its cars."<sup>10</sup>

Based on these undisputed facts, the Board agreed with the RRB's assessment that Rail-Term is a rail carrier because it has the ultimate control over the movement of the trains of its rail carrier customers. The Board found that Rail-Term is providing rail "transportation" within the meaning of 49 U.S.C. § 10102(9). And because of the integral transportation service Rail-Term provides, the agency found that it could impute to Rail-Term the holding out of its client rail carriers (regardless of the contractual arrangement between Rail-Term and those rail carriers), thereby making Rail-Term a provider of "common carrier railroad transportation" under 49 U.S.C. § 10102(5). In so holding, the Board relied on longstanding precedent in which the Supreme Court imputed a holding out to companies that performed outsourced rail functions on behalf of railroads and found that the entities were rail carriers.<sup>11</sup> The Board also relied on its predecessor agency's decision in Association of P&C Dock Longshoremen v. Pittsburgh &

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<sup>10</sup> Id.

<sup>11</sup> See United States v. Brooklyn E. Dist. Terminal, 249 U.S. 296, 303-04 (1919) (terminal company providing switching services for its rail carrier customers held to be a common carrier for purposes of HSA); United States v. Union Stock Yard & Transit Co., 226 U.S. 286, 305 (1912) (stockyard company performing switching services for other rail carriers held to be a common carrier subject to the Interstate Commerce Act); S. Pac. Terminal Co. v. ICC (SP Terminal), 219 U.S. 498, 523 (1911) (terminal company that operated wharves as part of a railway transportation system held to be a rail carrier subject to the Interstate Commerce Act); United States v. California, 297 U.S. 175 (1936) (terminal railroad found to be a common carrier subject to the Railroad Safety Appliance Act, one of the laws administered by DOT). That precedent has been followed by the lower courts. See, e.g., Burnside v. Railserve, 2012 U.S. Dist. LEXIS 152026 (W.D. Ark. 2012); Green v. Long Island R.R., 280 F.3d 224 (2d Cir. 2002); Mahfood v. Cont'l Grain Co., 718 F.2d 779 (5th Cir. 1983); United States v. Queen, 445 F.2d 358 (10th Cir. 1971); Lone Star Steel Co. v. McGee, 380 F.2d 640, 643 (5th Cir. 1967) (steel company that owned a rail carrier held to be a common carrier for purposes of FELA).

Conneaut Dock Co. (P&C Dock), 8 I.C.C. 2d 280, 294 (1992), finding that a stevedoring company (P&C) should be deemed a carrier notwithstanding that it did not “file tariffs with the Commission nor ‘hold out’ transportation service to shippers, but simply contract[ed] with [the carrier] to perform stevedoring-type services at issue,” which the carrier then compensated P&C for on a per-ton basis. 8 I.C.C. 2d at 294. In rejecting the argument that P&C was not holding out its stevedoring services to the public, the Interstate Commerce Commission (ICC) stated that, “[a]s 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, “whether through common ownership or contract, is ‘deemed’ to hold itself out to the public.”

In this case, the Board found that the holding out of Rail-Term’s rail carrier clients should be imputed to Rail-Term because otherwise carriers could evade the many railroad labor, safety, and other laws simply by having an unaffiliated party perform their functions—even functions, such as dispatching, that involve the physical operation and control of freight rail service and, therefore, are integral to the overall unity of a rail operator’s common carrier obligations. In particular, on the issue of labor coverage, the Board noted that, under Rail-Term’s view of the law, carriers could subcontract out every essential rail operation—even those performed by crews operating the trains—and avoid many of the applicable rail laws, simply by declaring that none of the companies providing what collectively amounts to the totality of the rail operations are in fact rail carriers. Instead, the only company that would be a rail carrier would be the shell company that pays the actual providers of service. The Board concluded that Congress did not intend that result.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b), the Board may grant reconsideration because of changed circumstances, new evidence, or material error. Rail-Term claims that the Board committed material error in the Rail Carrier Decision in three respects. First, it contends that the decision misinterpreted or ignored the plain language of the Interstate Commerce Act. In this regard, Rail-Term argues that it cannot be a rail carrier under the clear language of 49 U.S.C. § 10102(5) because it does not own locomotives, rolling stock, or track necessary to perform rail transportation, nor does it hold itself out as providing rail transportation to the public.

Second, Rail-Term asserts that the Rail Carrier Decision ignored, misapplied, or reversed existing precedent without any rational explanation. That precedent, according to Rail-Term, holds that a person is not a rail carrier unless it holds itself out as providing rail transportation to others. Pet. at 9, citing B. Willis, C.P.A., Inc., FD 34013, slip op. at 6 (STB served July 26, 2002). Rail-Term also claims that the Rail Carrier Decision is inconsistent with the agency’s State of Maine precedent<sup>12</sup> and with Board decisions such as H&M International Transportation Inc.—Petition for Declaratory Order (H&M), FD 34277 (STB served Nov. 12, 2003), holding

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<sup>12</sup> The State of Maine precedent refers to the line of cases originating with Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C. 2d 835 (1991), discussed in the Rail Carrier Decision, slip op. at 11-13.

that a third-party contractor could provide transloading services to shippers without becoming a rail carrier.

Third, Rail-Term and the *amici* argue that the Rail Carrier Decision was arbitrary and capricious because the definition has no limiting principle and could make almost every railroad industry vendor a rail carrier subject to the Board's jurisdiction.

Finally, Rail-Term argues that the Board does not have the authority to consider issues of railroad benefits coverage and labor law in deciding whether Rail-Term is a rail carrier under the Interstate Commerce Act. It also claims that the Rail Carrier Decision will have bizarre and unintended results, such as requiring Rail-Term to obtain abandonment or discontinuance authority if it decided to withdraw from the dispatching business.

We disagree with these arguments. At the outset, we note that, notwithstanding the relaxation of economic regulation of railroads during the 1970s, 1980s, and 1990s,<sup>13</sup> rail carriers have remained subject to labor protection in connection with licensing actions by the Board under the Interstate Commerce Act; their employees are protected, when injured, by the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51; and for purposes of taxation and benefits, rail carriers and their employees have been governed by the RRA, the RUIA, and the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§ 3201-3241. Given the "broad purpose" and "the protective character" of the RRA and RUIA,<sup>14</sup> which the Supreme Court has described as "a system of retirement and disability benefits for persons who pursued careers in the railroad industry,"<sup>15</sup> Congress "intended these benefit statutes to be construed broadly. . . ."<sup>16</sup> Yet, all of these statutes could be circumvented by Rail-Term's reading of the "rail carrier" provisions of the Interstate Commerce Act. A rail carrier could become nothing more than a shell company that contracts out the entirety of its operations—including the physical operation and control of its trains by engineers, conductors and dispatchers—to independent third-party companies (companies such as Rail-Term itself). And because these third-party providers would not be rail carriers under Rail-Term's interpretation of that term, they would not be subject to the Board's regulatory authority, their employees would not be covered by the labor protection provisions of the Interstate Commerce Act, and these entities and their employees operating and controlling the rail carrier's trains would not be covered by the RRA and RUIA (or the other statutes discussed above).

The Board does not believe that it is required to adopt a narrow definition of "rail carrier" that allows third-party dispatching companies like Rail-Term, which provide essential railroad services that involve train operation and control and historically have been provided by railroad

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<sup>13</sup> See the Railroad Revitalization and Regulatory Reform Act of 1976, the Staggers Rail Act of 1980, and ICCTA.

<sup>14</sup> Cheney R.R. v. RRB, 50 F.3d 1071, 1078 (D.C. Cir. 1995).

<sup>15</sup> RRB v. Fritz, 449 U.S. 166, 168 (1980).

<sup>16</sup> Cheney, 50 F.3d at 1077-78.

employees, to avoid the railroad employee benefit system and the protections afforded railroad employees under the Interstate Commerce Act. Rather, if possible, the term “rail carrier” should be construed in a way that does not undermine or fundamentally alter the availability of these benefits and protections. The Board concludes that such a construction is possible and, indeed, is entirely appropriate.

*Rail Carrier Definition.* A “rail carrier” is “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). Rail-Term does not seriously dispute that it is engaged in railroad “transportation.” Dispatching is a service that is integrally related to the movement of locomotives and cars, and, therefore, meets the statutory definition of “transportation” under 49 U.S.C. § 10102(9)(A), (B).<sup>17</sup> As the RRB explained (without dispute from Rail-Term), dispatching is the direction of the movement of a train from its origin to its destination. Without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers.<sup>18</sup>

Rail-Term argues that the Board materially erred in its interpretation of the statute, claiming that it cannot be a “common carrier” under § 10102(5) because it does not own the locomotives, rolling stock, or rail lines necessary to provide such transportation. Pet. at 7. But the definition of a rail carrier does not turn on ownership of physical assets. Indeed, the provisions of 49 U.S.C. § 10901(a)(4) require a non-carrier that operates a railroad line to obtain a Board license and become a common carrier, even if the track to be operated, the locomotives and rolling stock, and all of the related facilities are owned by someone else. The simple act of conducting such operations over a line owned by another turns a non-carrier into a rail carrier, regardless of what the operator owns or does not own, and places on that operator a common carrier obligation to carry out its responsibilities under 49 U.S.C. § 11101. United Transp. Union-III. Legislative Bd. v. ICC, 52 F.3d 1074, 1078 (D.C. Cir. 1995). The operator needs a Board license because it exercises control over essential components of the rail-carrier owner’s rail service. That is precisely what Rail-Term is doing when it dispatches the trains of its rail carrier clients over their railroad lines.

As Rail-Term acknowledges, dispatching historically has been performed in-house by employees of the rail carrier. In this case, however, Rail-Term’s customers are transferring control of the dispatching function to Rail-Term as a third-party independent contractor. Rail-Term states unequivocally that it dispatches its clients’ trains as “an independent contractor, *not subject to client control*, responsible for its own actions and responsible for its liabilities and

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<sup>17</sup> 49 U.S.C. § 10102(9) defines “transportation” to include “(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[.]”

<sup>18</sup> Rail Carrier Decision, slip op. at 5-6, discussing B.C.D. 10-33 at 4-7.

misdeeds.”<sup>19</sup> In other words, Rail-Term has assumed from its clients a function that is critical to the operation of their railroad lines—the direction of the physical movement of their trains—and performs this function by exercising its own discretion, independent judgment, and control. We find that by taking independent responsibility for the dispatching of the trains of its rail carrier clients, Rail-Term is taking part in the operation of the railroad lines under § 10901(a)(4), and that it therefore is a rail carrier.

The Interstate Commerce Act does not define the term “operate” for purposes of § 10901(a)(4) or for other purposes in 49 U.S.C. Subtitle IV. But inherently, the term embraces control over the movement of trains that carry freight. Given the longstanding Congressional focus in many statutes—including the Interstate Commerce Act—on the relationship between rail carriers and rail employees, we interpret § 10901(a)(4) to mean that a person who is primarily in the business of dispatching the railroad lines of rail carriers subject to the Board’s jurisdiction can be found to be “operating” a railroad line.

Rail-Term contrasts its own operations to those of the prototypical rail carrier that reserves to itself the full responsibility to move the locomotives and cars. But the agency has long held that an entity does not need to physically move the trains to be a rail carrier under § 10102(5). See, e.g., the P&C Dock and American Orient<sup>20</sup> decisions discussed in the Rail Carrier Decision, slip op. at 8. Additionally, the Board in several cases<sup>21</sup> has held that state and municipal agencies that acquired railroad assets, even though they were contractually precluded from offering traditional common carrier freight rail service, were rail carriers under the Interstate Commerce Act because their arrangements gave them rights to affect freight service that are “so extensive that, under the [Interstate Commerce] Act, they would “necessarily incur[] an obligation to exercise those rights as a common carrier. . .”. Southern Pacific, 8 I.C.C. 2d at 508. In those cases, the Board and the ICC found (as we do here) that it was not necessary to subject the public agencies “to the full panoply of carrier obligations under the Interstate Commerce Act.” Orange County, slip op. at 4. But they were held to be carriers, even though they had far less direct involvement with the movement of trains than Rail-Term. As in those cases, here the Board is prepared to use its exemption authority under 49 U.S.C. § 10502 to minimize regulatory burdens on Rail-Term that are not necessary to protect the public interest. But that does not mean that Rail-Term is not a carrier.<sup>22</sup>

<sup>19</sup> Pet. at 12 (emphasis added).

<sup>20</sup> Am. Orient Express Ry.—Pet. for Declaratory Order, FD 34502, slip op. at 4 (STB served Dec. 29, 2005), aff’d, Am. Orient Express Ry. v. STB, 484 F.3d 554 (D.C. Cir. 2007).

<sup>21</sup> E.g., S. Pac. Transp. Co.—Abandonment Exemption—L.A. Cnty., Cal. (Southern Pacific), 8 I.C.C. 2d 495 (1992), recon. denied, 9 I.C.C. 2d 385 (1993); Orange Cnty. Transp. Auth.—Acquis. Exemption—Atchison, Topeka & Santa Fe Ry. (Orange County), FD 32173 (STB served Mar. 12, 1997).

<sup>22</sup> Rail-Term argues that P&C Dock and the other cases cited in the Rail Carrier Decision are distinguishable because they involved both affiliate relationships and contractual relationships, whereas here, Rail-Term only has a contractual – not an affiliate – relationship with its clients. But there is no reason why an imputed holding out should be limited to

(continued . . .)

*Consistency with Precedent.* Rail-Term argues that the Rail Carrier Decision was based on material error in that it is inconsistent with our decisions in cases such as H&M, Town of Babylon,<sup>23</sup> City of Alexandria<sup>24</sup> (involving whether entities that provide terminal services, such as loading and unloading are rail carriers or are entitled to federal preemption); B. Willis; and the agency's State of Maine precedent. We disagree.

In the Rail Carrier Decision, slip op. at 10, we explained why H&M, Town of Babylon, and City of Alexandria, which turned on whether a transloading company was an agent, or under the control of, a rail carrier—were distinguishable from this case. In all three of those cases, the transloading activity was occurring either at the beginning or end of the rail shipment, and it could have been performed by either the rail carrier (see RRB v. Duquesne Warehouse Co., 326 U.S. 446, 453 (1946)), or by the shipper. Accordingly, in those cases, the Board had to determine at what point the common carrier service being offered by the carrier began and ended. This, in turn, depended on the nature of the relationship between the third-party that was providing the transloading services and the rail carrier.<sup>25</sup>

Here, in contrast, Rail-Term is providing a service—the dispatching of trains—that clearly occurs during, and as part of, the common carrier portion of the rail shipment and that cannot be performed by the shipper. It is an integral part of rail transportation that a rail carrier must have—either by employing its own dispatchers or contracting for dispatching services—to

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affiliates, particularly under the facts here, where Rail-Term is responsible for an essential component of the operations of its rail carrier clients and is not under their direction and control in providing its services.

<sup>23</sup> Town of Babylon & Pinelawn Cemetery—Pet. for Declaratory Order, FD 35057 (STB served Feb. 1, 2008), recon. denied (STB served Sept. 26, 2008); declaratory order granted (STB served Oct. 16, 2009), aff'd, N.Y. & Atl. Ry. v. STB, 635 F.3d 66 (2d Cir. 2011) (transload services provided directly to the general public, and not on behalf of the rail carrier, found outside our jurisdiction and thus subject to local zoning ordinances).

<sup>24</sup> City of Alexandria—Pet. for Declaratory Order, FD 35157 (STB served Feb. 17, 2009), aff'd sub nom. Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150 (4th Cir. 2010) (transload services on behalf of the rail carrier found to be subject to our jurisdiction and thus federally preempted).

<sup>25</sup> In H&M and Town of Babylon, the Board found that the transloading was not being offered by the rail carrier as part of its common carrier service based, in part, on the fact that it was being performed by an independent third-party. In other words, the common carrier service offered by the carrier began after the goods were loaded and ended before the goods were unloaded. In City of Alexandria, in contrast, the Board found that the unloading was being offered by the carrier as part of its common carrier service based, in part, on the fact that the party performing the action of unloading the ethanol was doing so under the auspices of the carrier.

meet its common carrier obligations to move freight from origin to destination. As the Board explained in the Rail Carrier Decision, slip op. at 9, “Rail-Term’s dispatchers have control over and represent a key step in the movement of the trains of its rail common carrier customers. . . . [D]ispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad’s common carrier obligation. These dispatching services provided by Rail-Term are plainly embraced within the broader transportation services its clients hold out to the general public . . . .” Thus, even though Rail-Term is acting independently of its clients like the third-party contractors in H&M and Town of Babylon, because Rail-Term is providing a service in which it controls important aspects of the operations of its clients, it is acting as a common carrier itself.

B. Willis also does not compel a different outcome here. In that case, the Board found that track built and maintained by a shipper (in that case a coal-burning electric utility) to serve only that shipper and moving that shipper’s own goods—either by utilizing its own equipment or by contracting for service—was private track and that the shipper was not a common carrier that needed a license to construct, own, and operate the track. By contrast, Rail-Term is an integral part of the operation of common carrier railroads that hold out to the public to move goods for multiple shippers.

Rail-Term and the *amici* continue to argue that the Rail Carrier Decision conflicts with our State of Maine precedent, in which the agency has held, in the context of mixed-use passenger-freight rail corridors, that the dispatching of freight trains by the state and local agencies that own and operate these corridors did not make these governmental bodies rail carriers under § 10102(5). Here, context is determinative. Since the 1970s, Congress has “plac[ed] the states at the forefront of the federal effort to preserve rail service” by involving them in the process to determine the economic viability of lighter density lines, providing financial aid to states for the acquisition and rebuilding of rail lines, and offering states operating subsidies to continue rail service.<sup>26</sup>

In support of this longstanding policy, the ICC and the Board have repeatedly taken steps to remove obstacles that might inhibit states from acquiring lines so that service can be continued. In Common Carrier Status of States, 363 I.C.C. 132, 135-38 (1980), *aff’d*, Simmons, the ICC permitted states to acquire rail lines that had been abandoned or approved for abandonment without becoming rail carriers subject to ICC jurisdiction under the Interstate Commerce Act, provided that the acquiring state entities contracted with a designated operator that would obtain a modified certificate under 49 U.S.C. § 10901. Had the ICC not done that, the states acquiring these lines would have become common carriers – notwithstanding that they were not holding themselves out as providing rail service. See Simmons, 697 F.2d at 331.

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<sup>26</sup> Simmons v. ICC, 697 F.2d 326, 328-29 ((D.C. Cir. 1982) (discussing programs under the “3-R Act,” “the 4-R Act,” and the “Staggers Act” to encourage state involvement in preserving rail lines and freight rail service).

In its 1991 decision in State of Maine, the ICC held that states could preserve rail service on active rail lines that were not involved in abandonment proceedings without becoming rail carriers by structuring their acquisitions so that the legal right and obligation to provide common carrier freight rail service would remain with the selling carrier and the terms of the sale would protect the carrier from undue interference with the provision of common carrier freight rail service. 8 I.C.C. 2d at 136-37; Rail Carrier Decision, slip op. at 11. Later, the ICC and the Board held that State of Maine could be used by states to acquire rail assets for joint mass transit/freight rail operations, and that under certain circumstances the public entity could dispatch the freight rail carrier's trains incidental to its own public mass transit operations without becoming a rail carrier under the Interstate Commerce Act.<sup>27</sup>

As we pointed out in the Rail Carrier Decision, at 11-13, when the noncarrier purchaser of assets in State of Maine transactions assumes the rights and obligations to provide dispatching services, the situation typically involves a public entity that takes over a line for commuter service. When those sorts of entities dispatch, they are principally dispatching their own commuter trains, and are only involved incidentally with the limited number of freight trains that continue to use the line.<sup>28</sup> Rail-Term's principal job, in contrast, is dispatching freight trains. When the Massachusetts Department of Transportation's operator dispatches an occasional CSXT freight train, see Mass DOT, it does not assume the overall responsibility for moving CSXT's freight trains from origin to destination. Rail-Term's clients, in contrast, would have no dispatching at all, and indeed could not operate at all, without Rail-Term's services. Congress meant for employees of organizations such as Rail-Term to be rail carrier employees. See Herzog Transit Servs., Inc. v. RRB, 624 F.3d 467, 475 (7th Cir. 2010).<sup>29</sup>

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<sup>27</sup> See generally, Md. Transit Admin.—Pet. for Declaratory Order, FD 34975, slip op. at 3-6 (STB served Sept. 19, 2008) (discussing evolution of State of Maine); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc. (Mass DOT), FD 35312, slip op. at 8-11 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807, 812-13 (D.C. Cir. 2011); Fla. Dep't of Transp.—Pet. for Declaratory Order—Rail Line of CSX Transp., Inc. between Riviera Beach & Miami, Fla., FD 35783, slip op. at 6-8 (STB served Oct. 1, 2014) (allowing public entity to control dispatching and maintenance given the significant capacity enhancements it made to the track and the high volume of commuter service as compared to freight service).

<sup>28</sup> We recognize that State of Maine-type cases occasionally involve private parties rather than state and local entities. But the Board has never permitted a private party in a State of Maine-type case to take over dispatching without becoming a rail carrier.

<sup>29</sup> Although the Herzog court should, in our view, have given credit to the Board's State of Maine line of cases, we share its view (id.) that "Congress envisioned a broad retirement program for employees playing many roles within the railroad industry," and that to effectuate the "broad purpose" and "protective character" of this statutory scheme, the provisions "are not to be constrained by the business models common at the time of the passage of the Act." As the Seventh Circuit pointed out, an entity that is performing "a particular function that is an integral part of interstate transportation by rail" can be subject to the Interstate Commerce Act as a rail

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*Limiting Principles.* Rail-Term argues (Pet. at 6), as do the *amici*, that the Rail Carrier Decision is arbitrary because it has no limiting principle, contending that the concept of integral railroad functions could make almost every railroad industry vendor a rail carrier subject to the Board's jurisdiction. But Rail-Term and the *amici* have misinterpreted the narrow scope of the Rail Carrier Decision. The RRB's Rail-Term decisions before the D.C. Circuit and our Rail Carrier Decision are premised on the fact that dispatchers control an essential component of rail service. Also central to our decision is the undisputed fact that the dispatching function historically has been performed in-house by rail carrier employees. That was the backdrop against which the labor protective provisions of the Interstate Commerce Act, the RRA, and the RUIA were passed. The implications of our decision here do not extend to rail-related services performed by third-party contractors that do not involve the physical direction and control of the trains of rail carriers.

Consistent with this distinction, the RRB has held in numerous decisions that independent contractors providing a variety of important services to rail carriers that do not involve the physical operation and control of train movements are not rail carriers subject to the Board's jurisdiction and are not covered employers under the RRA and RUIA.<sup>30</sup> The Board does not view the RRB's decisions finding that Rail-Term is a rail carrier under the Interstate

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carrier "to ensure that individuals performing these integral functions are covered and thereby effectuate Congress's broad protective purpose."

<sup>30</sup> Atlas Railroad Constr. LLC., BCD 11-94 (Nov. 18, 2011), *recon granted*, BCD 12-30 (Aug. 16, 2012) (firm providing railroad engineering, construction and maintenance services, including track design, project management, track inspection, rail and tie rehabilitation and reconstruction, new construction of various track and rail types, and repair and remanufacturing of certain rail-related equipment found not to be a rail carrier); Barnes R.R. Serv., Inc., BCD 94-70 (privately held company that performs maintenance and construction of railroad tracks for Class III rail carriers is not a covered employer); CDL Elec. Co., Inc. BCD 06-57 (Dec. 14, 2006) (electrical contractor providing signal installation and maintenance for multiple railroad lines held not to be a rail carrier under the Interstate Commerce Act or a covered employer under the RRA and RUIA); Columbia Nat'l Group, Inc., Columbia Iron & Metal Co., & CR Constr. Co., BCD 04-4 (Feb. 05, 2004) (affiliated companies that perform track maintenance and rail car repair for Class I and shortline railroads found not to be covered employers because they are not carriers by rail and are not under common ownership or control with any rail carriers); DOT Rail Serv., Inc., BCD 03-74 (Sept. 19, 2003) (privately held provider of track maintenance, repair and track rehabilitation work for private industries and rail carriers held not to be a covered employer because it was not a carrier by rail); Midwest Maint. Serv., BCD 03-54 (company providing inspection and maintenance service for locomotives, rail cars, forklifts and locomotive is not a rail carrier and is not under common control with another rail carrier, and, therefore is not a covered employer); R.R. Signal Consultation Co., BCD 94-08 (company that installs, repairs, maintains, inspects and tests signal systems and supplies railroad signal materials held not to be a covered employer because it was not a rail a carrier and was not providing any services to its rail carrier affiliates).

Commerce Act and a covered employer under the RRA and RUIA to call those holdings into question. Likewise, the Rail Carrier Decision should not be read as calling into question the RRB's many decisions finding that independent contractors providing rail services that do not involve the physical operation and control of train movements are not rail carriers.

Thus, we disagree with the assertion that the Rail Carrier Decision lacks a limiting principle. In fact, *without* the Rail Carrier Decision there would be no limiting principle on the services that a carrier could contract out to independent third-party contractors. As described above, absent the boundaries provided by the Rail Carrier Decision, carriers could subcontract out every essential rail operation, leaving only a shell company as the railroad.

*STB Authority to Rule on Labor Matters.* Finally, Rail-Term argues that the Board exceeded its authority by considering issues of railroad benefits coverage and labor law in deciding whether Rail-Term is a rail carrier under the Interstate Commerce Act. We disagree. To be sure, the Board has not been delegated authority to implement the railroad pension, disability, and unemployment laws administered by the RRB. But the Rail Transportation Policy enacted by Congress requires the Board, in regulating the railroad industry, "to encourage fair wages and safe and suitable working conditions in the railroad industry." 49 U.S.C. § 10101(11). Among the Interstate Commerce Act's "primary purposes are to ensure fair shipping rates, safety, fair wages and working conditions and efficiency in transportation, and to discourage monopolistic practices and labor strikes." Cedarapids, Inc. v. Chi., Cent. & Pac. R.R., 265 F. Supp. 2d 1005, 1010 (N.D. Iowa 2003). When interpreting our statute, we cannot ignore the real-world implications of our holdings.

In any event, the suggestion that the Rail Carrier Decision has no bearing on matters within the Board's authority under the Interstate Commerce Act is without merit. As noted, rail carriers remain subject to labor protection in connection with licensing actions by the Board under the Interstate Commerce Act. Our observation that Rail-Term's approach, if carried to its logical extreme, would gut the provisions of the statutes administered by the RRB applies equally to the labor provisions of the Interstate Commerce Act. If a rail carrier were able to contract out all of its functions to non-carriers without consequence, then the statutory protective conditions that apply to merger proceedings (*see* 49 U.S.C. § 11326) and abandonment proceedings (*see* 49 U.S.C. § 10903(b)(2)) would be meaningless.<sup>31</sup> The outcome of this proceeding could dramatically affect our own implementation of the Interstate Commerce Act.

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<sup>31</sup> Our ruling here also ensures that firms such as Rail-Term will not be subjected to unreasonable regulation by state and local entities, *see* 49 U.S.C. § 10501(b); that the Board has regulatory authority to issue orders directly to independent contractors that dispatch common carrier railroad lines in emergency situations under 49 U.S.C. § 11123 that require immediate action to serve the public; that the Board would have the authority under 49 U.S.C. § 11144 to require third-party dispatchers to produce their books and records so that the Board could determine whether independent dispatchers are operating reasonably and without discrimination in dispatching lines used by multiple rail carriers; and that the Board can regulate the abandonment or discontinuance of third-party dispatching service to rail carriers under 49 U.S.C.

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The *amici* generally argue that treating third-party dispatching companies as rail carriers will drive many independent contractors out of the railroad market. We doubt the substance of such claims. First, as noted above, the Rail Carrier Decision preserves the status quo under which dispatchers and other operating personnel are covered by the RRA, the RUIA, the Interstate Commerce Act, and other railroad labor laws, while other, non-operating personnel could remain outside of those laws. In addition, there is no reason to believe that Rail-Term and other similar firms cannot operate successfully while being regulated as rail carriers as long as they provide a service based on special expertise, technical sophistication, and the economies of shared operations. Rail-Term's success to date suggests it possesses some or all of these qualities, and if so, its continued success can be expected notwithstanding that its employees enjoy the same benefits as do the in-house dispatchers with which Rail-Term competes. If, on the other hand, the primary business justification for a corporation is to avoid employee benefits that Congress intended should apply, then there is no reason it should not be deemed to be a carrier.

For all of these reasons, the petition for reconsideration is denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for reconsideration is denied for the reasons set forth above.
2. The appeals by ASLRRRA and NRC seeking intervenor rather than *amicus* status are denied.
3. This decision is effective on its service date.
4. Rail-Term is directed to file a copy of this decision with the D.C. Circuit in Rail-Term Corp. v. R.R. Ret. Bd., No. 11-1093, within 30 days of the effective date of this decision, and is directed to inform the Board that it has done so by letter filed in this docket and served on the parties to this case.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.  
Commissioner Begeman dissented with a separate expression.

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COMMISSIONER BEGEMAN, dissenting:

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§ 10903 to ensure that the cessation of dispatching service does not cause a disruption in rail service and harm to the public.

For the many reasons I cited in my dissent to the November 2013 declaratory order in this proceeding, I strongly disagree with the majority's finding that Rail-Term is a "rail carrier."

Rail-Term does not meet any of the definitions or associated requirements of a rail carrier.<sup>1</sup> Rail-Term does not hold itself out to the general public as a provider of interstate rail transportation for persons or property. Rail-Term does not have track, locomotives, rail cars or crews, or have access to or operate a railroad line. Rail-Term is not equipped to provide service upon reasonable request. Rail-Term's clients—the rail carriers—provide interstate rail transportation services, and only they are carriers subject to the Board's jurisdiction.

The majority materially erred in the prior decision, and does so again here. I dissent.

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<sup>1</sup> The Board has jurisdiction under Part A of Subtitle IV of Title 49 over transportation by "rail carrier" when such transportation is "part of the interstate rail network." 49 U.S.C. §§ 10501(a)(1)(A), (a)(2)(A). A "rail carrier" is a "person providing *common carrier* railroad transportation for compensation . . ." 49 U.S.C. § 10102(5) (emphasis added). The Board has stated that a common carrier is one that "holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation." Am. Orient Express Ry. v. STB, 484 F.3d 554, 557 (D.C. Cir. 2007); Wis. Cent. Ltd. v. STB, 112 F.3d 881, 884 (7th Cir. 1997). A rail carrier has a common carrier obligation to provide service upon reasonable request. 49 U.S.C. § 11101.