Strasburger
ATTORNEYS AT LAW

March 27, 2012

Writer's Direct Dial No: 202-742-8607
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232129

**BY E-FILING**

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

ENTERED
Office of Proceedings
March 27, 2012
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. ("RTC") in connection with the above-captioned proceeding. On March 8, 2012, the Board released a decision instituting a declaratory order directing the parties to supplement the record by submitting by March 28, copies of their respective filings submitted to the Railroad Retirement Board ("RRB") and the United States Court of Appeals for the D.C. Circuit ("the Court") in the course of those proceedings.

In accordance with that decision, Rail-Term submits the following substantive documents:

1. The RRB's initial inquiry letter dated Aug. 14, 2006, to RTC and RTC's response dated Sep. 7, 2006;
2. The RRB's follow up letter to RTC dated Sept. 21, 2006, and RTC's response dated Nov. 16, 2006;
3. The RRB's letter dated Feb. 28, 2007, to me as counsel for RTC and my response dated April 20, 2007;
4. RTC's letter dated Oct. 23, 2007, to RRB management member Kever;
5. The RRB's initial ruling dated April 6, 2010;
6. RTC's Petition for Reconsideration and Administrative Stay dated June 8, 2010 (actually filed July 9. 2010) including attachments;

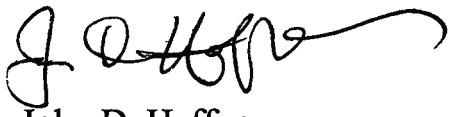
7. The RRB's letter to me dated Aug. 3, 2010, acknowledging the filing of RTC's petition for reconsideration and including an Index to Record;
8. My letter to the RRB dated Aug. 23, 2010, requesting that certain additional documents be included in the record and the RRB's reply dated Sept. 8, 2010, adding the requested documents to the Index to Record;
9. A Nov. 2, 2010, memorandum from RRB General Counsel Steven Bartholow to the Board regarding STB FD 35381 declining to grant RTC's request for a declaratory order;
10. My letter dated Dec. 6, 2010, to the RRB seeking a stay of reporting requirements and the RRB's letter dated Jan. 13, 2011 to me, granting that request;
11. The RRB's decision on reconsideration dated Jan. 28, 2011;
12. My March 21, 2011, letter to the RRB requesting an informal stay of the RRB's final ruling on reconsideration and the Board's letter dated April 20, granting that request;
13. RTC's petition for review to the Court filed March 28, 2011(omitting the agency decision and corporate disclosure statement, the former as redundant and the latter as irrelevant for these proceedings);
14. My letter to the Court dated April 20, 2011, submitting the docketing statement, certificate as to parties, statement of issues, and deferred appendix statement;
15. RTC's reply dated Aug. 15 to ATDA's Motion to file an *amicus* brief;
16. RTC's final opening brief to the Court dated Sept. 16, 2011;
17. RTC's final reply brief to the Court dated Sept. 16, 2011;
18. The Court's order and memorandum dated Nov. 14, 2011, holding the proceeding in abeyance and directing that RTC petition the Surface Transportation Board ("STB") for a declaratory order on whether RTC is a "rail carrier" under 49 U.S.C. §10102(5); and
19. The Report filed by RTC with the Court dated December 14, 2011, advising them of its STB filing.

In the interest keeping this lengthy submission as short as possible, I have not submitted the Joint Appendix filed with the Court; however, items #1 through 11 represent all substantive materials submitted to the Court in the Joint Appendix.

The STB's decision also requests that RTC submit copies of filings by any parties other than RTC and the American Train Dispatchers Association ("ATDA") before the RRB and the Court as well as any transcripts of proceedings before those bodies. RTC responds that it was the only party that appeared before the RRB and there were no oral hearings or other proceedings before that agency for which a transcript was prepared. As to the Court proceedings, RTC and the RRB were the principal parties that prepared briefs and presented argument. Inasmuch as the RRB was a party to those proceedings and is now a party to the STB's proceedings, the STB should direct that agency to file its appellate brief and any other submissions in this proceeding. ATDA sought and was granted leave to file an *amicus* brief but it did not present any argument. RTC has previously submitted the transcript of the Court proceedings before the court as Exhibit C with its Petition for Declaratory Relief filed on Dec. 14, 2011, with the STB.

Please advise if there is anything else that the Board needs.

Respectfully submitted,



John D. Heffner

Enclosures
cc: Rachel Simmons, Esq.
Michael Wolly, Esq.
Mr. Francois Prenovost
Dennis Devaney, Esq.

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

Bureau of Fiscal Operations
Room 506

AUG 1 4 2006

Mr. Pete Neville
Chief Operating Officer
Rail Term
118 Post Street
Rutland, VT 05701

In reply refer to: Rail Term (RT)/ee

Dear Mr. Neville:

The purpose of this letter is to obtain information concerning the services RT performs or has performed for the railroad industry.

The Railroad Retirement and Railroad Unemployment Insurance Acts provide that an "individual is in the service of an employer" if:

> (I)(A) he is subject to the continuing authority of the employer to supervise and direct the rendition of his service, or (B) he is rendering professional and technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and (ii) he renders such service for compensation...

Individuals who meet the foregoing definition may be held to be employees of a covered employer, even though not directly compensated through the employer's payroll.

So that we may determine the status of RT and its employees under the jurisdiction of the Railroad Retirement and Railroad Unemployment Insurance Acts, I am requesting that you furnish the following information:

1. Information regarding the company:
   a. The correct corporate name and address.
   b. The date RT was incorporated or acquired.
   c. The name of the owner(s) of RT.
   d. The date RT began operations.
   e. Provide RT's Employer Identification Number.
   f. Is RT a publicly or privately held corporation?

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2. Information regard RT employees:
   a. The name of the Chief Executive Officer.
   b. The number of current employees and the date from which employees were firs compensated.
   c. What proportion of the employees work in positions related to business connected with rail carriers?
   d. Do RT employees perform work on property owned by a railroad? If yes, please describe fully.

3. Information regarding RT's revenues and services:
   a. Describe the operations in which RT has been engaged in from the date of incorporation to the present to include any business not connected with the railroad industry.
   b. Provide the amount of business which RT does with railroad carriers and include the following:
      1) Name of rail carrier,
      2) Percent of total business time spent doing business with rail carrier,
      3) Percentage of revenue received from rail carrier, and
      4) A detailed description of services provided for the rail carrier.

4. Information regarding RT's ownership:
   a. Does any railroad have a financial interest in RT, either through direct or indirect stock ownership, as a parent company (brother/sister corporation)?
   b. Name any individual who owns both a controlling interest in RT and controlling interest in any other rail carrier, and name the carrier involved.
   c. Are any RT officers/directors also officers/directors of another rail carrier? If yes, please name the officer/directors, the positions held, and the rail carriers involved.

5. Information regarding RT's assets:
   a. Describe the nature of equipment and facilities owned.
   b. Describe the nature of equipment and facilities jointly controlled.

6. Provide information regarding contracts:
   a. Does RT provide service for any carrier pursuant to a written agreement? If yes, provide sample copies of such agreements.
   b. If RT is a lessee or lessor of railroad track or equipment, provide copies of the lease.

7. Information regarding RT's status:
   a. Has the Federal Railroad Administration required RT to pay user fees?
   b. Has the Interstate Commerce Commission or the Surface Transportation Board made any rulings regarding the status of RT? If yes, please provide copies of rulings and notices.
   c. Has the Internal Revenue Service ruled on the applicability of the Railroad Retirement Tax Act to RT? If yes, please provide details.

I am asking that you furnish any additional information that will help us determine what the correct status of RT or its employees should be under the jurisdiction of the Railroad Retirement and Railroad Unemployment Insurance Acts.

Please direct a signed and dated response to me within 30 days from receipt of this letter. You may FAX your response to the Audit and Compliance Division at (312) 751-7171. Should you have any questions concerning this letter, please contact Ms. Ethel R. Escho at (312) 751-4878.

Sincerely,

William E. Wolfe

William E. Wolfe
Audit and Compliance Division

RAIL-TERM

September 7, 2006

Mr. William E. Wolfe
Audit and Compliance Division
**RAILROAD RETIREMENT BOARD**
844 North Rush Street
Chicago, Illinois
60611-2092

**BY FAX: 312-751-7171**

Re: ***Request for Information on Rail-Term Corp.***

Dear Mr. Wolfe:

Following the receipt of your letter of request for information dated August 14th, 2006, I contacted your associate Ms. Ethel R. Escho.

I explained to Ms. Escho that back in early 2004, as we were contemplating entering into a contractual arrangement with two railroads for performing train-dispatching services, I contacted your offices for information on how to join the RRB.

I spoke at the time with two representatives of the RRB, Mr. Joe Ellena, who also referred me to Mr. Michael Litt. I explained who we were and what we did in Canada for dispatching services and that one of our Canadian short-line railroad customers with operations in the USA and another US short-line operator were discussing with us the opportunity of purchasing our services.

It was completely clear at the time from conversations with the FRA that we could not dispatch from our Canadian dispatching center and that we would have to establish an office in the USA.

I was disturbed at the time by the fact that since we did not qualify as a rail carrier, mainly because we did not own railroad property and were not in any manner associated with a railroad as this made our recruiting of train dispatchers that much more complicated, since they would not be able to pursue with the RRB if they joined us.

Considering the cost of establishing a competitive retirement benefit package for our employees, I asked, at great cost, my lawyers to confirm the RRB was right in their assessment that we were not a rail carrier under the

.../2

RAIL-TERM CORP.
118 B, Post Street • Rutland • VT • 05701 • Tel.: (802) 774-2900 • Fax: (802) 774-2901

Railroad Retirement Act of 1974, as amended, as it would be quite difficult to revert to an RRB structure once we went a different route based on your interpretation. My lawyers concluded that your interpretation that Rail-Term was not covered was fully consistent with the statute.

We then went on to spend a significant amount of money with accountant and actuaries to establish a competitive retirement package.

Our employees are under our direct authority and it is clearly understood our customer have no authority over them. We are an independent contractor and our employees are strictly not integrated with our customers' Staff. Our services are rendered with and from our property. Rail-Term Corp. is not the property of nor is it related to any railroad. No Rail-Term Corp. directors and officers are involved with any of the railroads we service, nor with any railroad.

Ms. Escho suggested I write you this letter and that this may very well clarify our situation.

Would you kindly let me know if the present is sufficient for your determination.

If you have any questions, please feel free to contact me at 514-420-1212.

Thank you and best regards.

**Rail-Term Corp.**

François Prénovost
Executive Vice-President

c.c. Dennis Devaney: Strobl, Cunningham & Sharp PC

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

SEP 21 2006

Bureau of Fiscal Operations
Room 506

Mr. Francois Prenovost
Executive Vice-President
RAIL TERM Corporation
201 – 10765 Cote de Liesse
Dorval (Quebec) H9P 2R9

In reply refer to: RAIL TERM Corporation (RTC)/ee

Dear Mr. Prenovost:

Thank you for the information furnished in your letter dated September 7, 2006, concerning RTC. After reviewing the information, our Office of General Counsel stated that even though RTC may have received advice concerning RTC coverage status under the Railroad Retirement and Railroad Unemployment Insurance Acts, the final decision regarding coverage must be mad by the Railroad Retirement Board's Three Member Board.

So that we may submit RTC to the Board Members for a coverage decision, I am requesting tha you respond to each question posed in our letter of August 14, 2006 (copy enclosed), to include and specifically identify what type of services are rendered by RTC, to include the name of any United States companies.

Please direct your response to me within 30 days of receipt of this letter. You may FAX your response to the Audit and Compliance Division at (312) 751-7171. Should you have any questions concerning this letter, please contact Ms. Ethel R. Escho at (312) 751-4878.

Sincerely,

William E. Wolfe
Chief, Audit and Compliance Division

Enclosure

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FAX (202) 296-3939
j.heffner@verizon.net

CONFIDENTIAL VERSION

November 16, 2006

Mr. William E. Wolfe
Chief, Audit and Compliance Division
United States Railroad Retirement Board
844 Rush Street
Chicago, IL 60611-2092

RE: RAIL-TERM Corporation (RTC) ee

Dear Mr. Wolfe:

I am writing on behalf of Rail-Term Corp. ("RT") in response to your letters dated Aug. 14 and Sept. 21, 2006, regarding RT's coverage status as an "employer" under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (collectively referred to as "the Act"). By letter dated October 26, I requested and you agreed to extend the deadline for answering your letters until November 21, 2006.

As a preliminary matter, my client's Executive Vice President Francois Prenovost wrote you on Sept. 7, 2006, responding to your Aug. 14 letter. In that letter Mr. Prenovost advised you that at the time it was establishing its business of providing dispatching services for client railroads, it sought the advice and assistance of the Board. Mr. Prenovost discussed its factual situation with your Joe Ellena (who I understand has since passed away) and Michael Litt. It is my understanding that the Board personnel advised the client that it was not a "covered entity" under the Act and that its employees were similarly not subject to coverage under the Act. The client then advised you by letter that it spent substantial money on legal fees to confirm the advice given by Board employees and to establish a retirement benefit package for its American employees that would be competitive with any retirement program under the Act.

I believe it is important to advise you of these actions taken by the client both to demonstrate its good faith and to show that requiring it to convert its employee retirement coverage to a system subject to the Act at this late date would be difficult, onerous, and extremely expensive.

With that background information, I shall now answer your questions as follows:

1. **Information regarding the company.**
   a. **The correct corporate name and address.**

      Rail-Term Corp.
      118B Post Street
      Rutland, Vermont
      05701

   b. **The date RT was incorporated or acquired.**

      Incorporated on March 3, 2000.

   c. **The name of the owner(s) of RT.**

      RT is 100% owned by Rail-Term Inc., a Canadian corporation. Rail-Term Inc. is in turn owned by Robert Wheeler, Geoffrey Chambers and Francois Prenovost

   d. **The date RT began operations.**

      Mid March 2000

   e. **Provide RT's Employer Identification Number.**

      38-3520599

   f. **Is RT a publicly or privately held corporation?**

      It is privately held.

2. **Information regard (sic) RT employees.**
   a. **The name of the Chief Executive Officer.**

      Robert Wheeler is President.

Francois Prenovost, Executive Vice President

b. **The number of current employees and the date from which employees were first compensated.**

RT currently employs 8 people in the United States with all remaining employees employed in Canada. The six employees stationed in Vermont were first compensated on March 1, 2005. The two employees stationed in New York were first compensated on June 27, 2005 for the 1st and February 13th 2006 for the 2nd. The company had originally employed several individuals in connection with an intermodal consulting assignment in the United States back in 2000, until these employees were terminated in June 2004 when the assignment ended.

c. **What proportion of the employees work in positions related to business connected with rail carriers?**

75% of RT's business time is involved with providing train-dispatching services and 25% is spent on railroad-related computer software development.

d. **Do RT employees perform work on property owned by a railroad? If yes, please describe fully.**

No. They perform work in RT's offices in the United States.

3. **Information regarding RT's revenues and services.**

a. **Describe the operations in which RT has been engaged in from the date of incorporation to the present to include any business not connected with the railroad industry.**

RT originally began operations in mid March 2000 as an intermodal terminal operations consultant for a subsidiary of Canadian Pacific Railway in the United States (Expressway Terminal LLC). RT disbanded that operation in June 2004 and terminated those employees. RT has an affiliate established

and based in Canada (Centre Rail-Control Inc.) which performs train dispatching services for 7 Canadian short line and regional railroads and Canada's passenger carrier, VIA Rail Canada.

b. **Provide the amount of business which RT does with railroad carriers and include the following:**

**(1) Name of rail carrier.**

Vermont Railway and affiliates Green Mountain Railway Company, Clarendon and Pittsford Railroad, Washington County Railroad, and New York & Ogdensburg Railway.

Buffalo & Pittsburg Railroad, Inc. and affiliate Rochester & Southern Railroad, Inc.

**(2) Percent of total business time spent doing business with rail carrier.**

VRS 25%, B&P 50%, and 25% with railroad related computer software development

**(3) Percentage of revenue received from rail carrier, and**

VRS 27.5%, B&P 47.5%, and 25% with railroad related computer software development

**(4) A detailed description of services provided for the rail carrier.**

RT provides train dispatching services in each case.

4. **Information regarding RT's ownership:**

a. **Does any railroad have a financial interest in RT, either through direct or indirect stock ownership, as a parent company (brother sister corporation)?**

No.

b. Name any individual who owns both a controlling interest in RT and controlling interest in any other rail carrier, and name the carrier involved.

N.A. There is none.

c. Are any RT officers/directors also officers/directors of another rail carrier? If yes, please name the officers/directors, the positions held, and the rail carriers involved?

No.

5. Information regarding RT's assets:

a. Describe the name of equipment and facilities owned.

RT owns computer equipment and software as well as office equipment and telephone equipment.

b. Describe the name of equipment and facilities jointly controlled.

None.

6. Provide information regarding contracts:

a. Does RT provide service for any carrier pursuant to a written agreement? If so, provide sample copies of such agreements.

Yes. Redacted copies of its agreement with its two current American railroad clients are attached.

b. If RT is a lessee or lessor of railroad track or equipment, provide copies of the lease.

N.A. RT does not lease railroad track or equipment.

7. Information regarding RT's status:

a. Has the Federal Railroad Administration required RT to pay user fees?

No.

b. **Has the Interstate Commerce Commission or the Surface Transportation Board made any rulings regarding the status of RT? If yes, please provide copies of such rulings and notices.**

No.

c. **Has the Internal Revenue Service ruled on the applicability of the Railroad Retirement Tax Act to RT? If yes, please provide the details.**

No.

I trust that this letter satisfies your inquiry. Please contact me by letter or phone if you have any additional questions.

Sincerely yours,

John D. Heffner

Enclosures

Cc: Mr. Francois Prenovost

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

FEB 28 2007

BOARD MEMBERS:

MICHAEL S. SCHWARTZ, CHAIRMAN
V.M. SPEAKMAN, JR., LABOR MEMBER
JEROME F. KEVER, MANAGEMENT MEMBER

Mr. John D. Heffner
Attorney at Law
1920 N Street N.W.
Suite 800
Washington, D.C. 20036

Re: Rail-Term Corporation

Dear Mr. Heffner:

This letter is in reference to the Board's examination of the status of Rail-Term Corporation (RTC) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. In your letter of November 16, 2006 to William E Wolfe of the Board's office of audit and compliance, you indicated that 75 percent of Rail-Term's business time is involved with providing train dispatching services. The Board needs additional details about the train dispatching services as part of its consideration of the coverage status of Rail-Term under the Acts.

1. From where are the dispatching services provided? It appears from the Dispatching Services Agreement between Rail-Term and Vermont Railway Incorporated (VTR) that the services are provided from the State of Vermont however, it is not clear whether the services are provided from an office of Rail-Term or from facilities owned/controlled by a railroad or from some other location.

2. To whom does each dispatcher report? Is each dispatcher on the payroll of Rail-Term? If not, on whose payroll does each dispatcher serve?

3. How do the dispatchers receive their daily directions for train schedules, operations and restrictions? Who does the dispatcher communicate with concerning changes in the train operations?

4. Who owns the Traffic Control System systems used by Rail-Term dispatchers?

5. If dispatching is not done on carrier property, is it subject to carrier inspection?

6. Are the dispatchers responsible for the maintenance of the necessary records incident to the movement of trains by train orders?

7. In the performance of their duties, do the dispatchers direct the operating personnel of the carrier?

8. Who trains the dispatchers?

9. Are any of the dispatchers employed by Rail-Term former dispatchers of a carrier for which Rail-Term performs dispatching services?

10. With respect to any violation of law or regulation involving movement of trains by train order, to what extent is any action of the dispatcher imputed to the carrier?

A reply at your earliest convenience no more than 60 days from the date of this letter will be appreciated.

Sincerely,

Beatrice Ezerski

FOR THE BOARD
Beatrice Ezerski
Secretary to the Board

JOHN D. HEFFNER, PLLC
1920 N STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20036
(202) 263-4180
FAX (202) 296-3939
j.heffner@verizon.net

April 20, 2007

United States Railroad Retirement Board
844 Rush Street,
Chicago, IL 60611-2092
Attn: Ms. Beatrice Ezerski

**RE: Rail-Term Corporation**

Dear Ms. Ezerski:

I am writing on behalf of Rail-Term Corporation ("Rail-Term") in response to your letter dated February 28, 2007. You state that the Board needs additional details about the train dispatching services that Rail-Term performs for clients in connection with its consideration of Rail-Term's coverage status under the Railroad Retirement Act ("the Act"). More specifically, you asked for Rail-Term's responses to ten questions.

Before responding to your request, I would like to make a couple of observations. Moreover, I would like the opportunity to discuss this matter with a member of your legal department's staff and to present such legal argument at the appropriate time supporting my client's position that it is not subject to coverage under the Act.

The widespread use of consultants and contractors in the railroad industry is a comparatively new phenomenon. While railroads have frequently and historically used nonemployee contractors to provide various types of services, the current trend towards using contractors is so different as to present the Board with a major new coverage policy issue. This development is due in part to the fairly recent growth of short line and regional railroads and due in part to the tremendous need for highly trained personnel providing technical services. In many cases short line and regional railroads cannot afford to have on

their payroll as a full or even part-time employee the many types of specialized expertise required for a technologically sophisticated railroad. Furthermore, short line and regional railroad personnel whose responsibilities include dispatching, signaling, computers, and telephone equipment lack the sophistication and knowledge of third party experts such as those provided by Rail-Term. This matter involves the issue of whether such a third party that works as an independent contractor for multiple rail carrier clients should be subject to the jurisdiction of the Act. Good law, policy, and practical considerations dictate that the answer should be "no."

Finally, as you will recall from my letter to you dated November 16, 2006, my client's Executive Vice President Francois Prenovost had previously advised you that at the time it was establishing its business of providing dispatching services for client railroads, it sought the advice and assistance of the Board. Mr. Prenovost discussed its factual situation with your Joe Ellena (who I understand has since passed away) and Michael Litt. It is my understanding that these Board personnel advised the client that it was not a "covered entity" under the Act and that its employees were similarly not subject to coverage under the Act. The client then advised you by letter that it spent substantial money on legal fees to confirm the advice given by Board employees and to establish a retirement benefit package for its American employees that would be competitive with any retirement program under the Act. For the Board to now overrule the advice previously given by Mssrs. Ellena and Litt would work a tremendous hardship on the client. I hope the Board's decision will take that consideration into account.

That said, I will respond to your inquiry by restating each question and giving Rail-Term's response.

1. **From where are the dispatching services provided?**

From our dispatching office in Rutland, Vermont.

2. **To whom does each dispatcher report? Is each dispatcher on the payroll of Rail-Term? If not, on whose payroll does each dispatcher serve?**

Our dispatchers report to the Director of Operations of Rail-Term, who is employed by Rail-Term and is based at our Rutland office.

During our initial operations in the United States, we temporarily utilized some people initially employed by two of our railroad clients. These workers included two people newly hired by one rail carrier client who had barely completed their training as dispatchers with that client when they joined Rail-Term. One left Rail-Term's employ within one week after joining us, another stayed for six weeks. A third one left in March 2007. A fourth person will have left Rail-Term's employ by April 28, 2007. Finally, two dispatchers who worked for our rail carrier employer client were sub contracted to us so that their Railroad Retirement payments will vest. They left in January 2007. As of April 28, 2007, all of the dispatchers are on the Rail-Term payroll.

3. **How do the dispatchers receive their daily directions for train schedules, operations, and restrictions? Who does the dispatcher communicate with concerning changes in train operations?**

Before answering this question, I must explain that Rail-Term employees do not supervise and cannot discipline the employees of its rail carrier clients and its clients similarly do not supervise and cannot discipline Rail-Term employees. Any communication between Rail-Term and its clients concerning the quality of services provided and any sort of supervision or

discipline moves up and down the chain of command within either Rail-Term or its client railroad. Therefore if a client employee refuses a Rail-Term provided instruction or direction, the employee would communicate his or her concern to that person with the client with whom Rail-Term deals. Similarly, if a Rail-Term employee has difficulty dealing with a client employee, the Rail-Term employee would bring this matter to the attention of the individual at Rail-Term who deals with that client.

Regarding your question, the dispatchers receive their daily directions for train schedules, operations and restrictions from Rail-Term's Director of Operations. Rail-Term's Director of Operations receives the same from our customers' Operations Managers. The information concerning changes in train operations follows the same channel.

4. **Who owns the Traffic Control System used by Rail-Term dispatchers?**

Rail-Term is the owner of the dispatching system.

5. **If dispatching is not done on carrier property, is it subject to carrier inspection?**

Dispatching is not done on carrier property. Our carrier customers are welcome to visit our offices, but there is no right to inspection.

6. **Are the dispatchers responsible for the maintenance of the necessary maintenance records incident to the movement of trains by train orders?**

Rail-Term and its carrier customers do not use the train order method of operations.

Our computerized dispatching software maintains train movement records as per FRA requirement.

7. **In the performance of their duties, do the dispatchers direct the operating personnel of the carrier?**

   The dispatchers give the operating personnel authorities to occupy the track. They do not direct the operating personnel.

8. **Who trains the dispatchers?**

   Rail-Term trains their dispatchers.

9. **Are any of the dispatchers employed by Rail-Term former dispatchers of a carrier for which Rail-Term performs dispatching services?**

   No.

10. **With respect to any violation of law or regulation involving trains by train order, to what extent is any action of the dispatcher imputed to the carrier?**

    Rail-Term is a third party service provider and is solely responsible for its actions. The FRA will sanction Rail-Term if it is deemed responsible for a violation, not the carrier. Rail-Term manages its own disciplinary file, without influence or implication by the carrier.

I hope this information satisfies your inquiry. Please contact me if you require further information.

Sincerely yours,

John D. Heffner

cc: Mr. Francois Prenovost

RAIL-TERM

October 23, 2007

**BY FAX AND MAIL**

Mr. Jerome F. Kever
Management Member
U.S. Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

**RE: Rail-Term Corporation**

Dear Mr. Kever:

I am writing on behalf of Rail-Term Corporation ("Rail-Term") in connection with your inquiry regarding the outsourcing of railroad dispatching services by freight and passenger railroads. It is my understanding that you seek information about the current state of dispatching technology and about whether dispatchers can perform their duties without being under the direct supervision of the employees of common carrier operating railroads. I provide this information on behalf of Rail-Term with the understanding that you will share it with the other two members of the Board.

By way of background, Rail-Term is a small privately held Michigan corporation originally established in March 2000 in connection with an intermodal consulting assignment. Upon the conclusion of that assignment, Rail-Term changed its business focus to one of providing train dispatching services and to developing railroad-related computer software.

Rail-Term is a subsidiary of a Canadian corporation, Rail-Term Inc., that operates 3 inter-modal terminals for Canadian Pacific Railway and provides track and signal maintenance for several rail passenger and transit carriers in Canada. Established in 1996, Rail-Term Inc. has a second subsidiary, a Canadian corporation named Centre Rail-Control Inc., which provides same type of services to Canadian rail clients including VIA Rail Canada, Canada's national rail passenger company, Genesee & Wyoming Canada, OmniTRAX Canada, Capital Railway, Kelowna Pacific Railway, Windsor &

RAIL-TERM INC.
10765, Côte de Liesse • bureau 201 • Dorval (Québec) • H9P 2R9 • Tél.: (514) 420-1200 • Fax: (514) 422-8225

Hantsport Railway, the Montreal, Maine & Atlantic Railway in Canada, and two of Quebec Railway Corporation's subsidiaries. Collectively, Rail-Term Inc., Rail-Term, and Centre Rail-Control Inc. employ approximately 100 people. Neither Rail-Term nor its owners or affiliates own, or are owned by, or are under common control with any common carrier railroad operating in the United States and Canada.

Currently, Rail-Term provides rail-dispatching services on a 24 hours per day, 7 days per week and 365 days per year basis to several American common carrier short line and regional railroads. Two of our railroad clients are subsidiaries of Genesee & Wyoming, Inc., five companies comprise the Vermont Rail System, and six are subsidiaries of OmniTRAX, Inc.

I began my professional career as an accountant and have been employed in roles as an accountant and comptroller with several Canadian based companies. In 1994 I joined a Rail-Term predecessor called Cygnus for whom I was responsible for the overall management of the administrative, accounting and financial structures of the company. In addition, I served on the start up team of Rail-Term and a Canadian short line railroad operator, Genesee Rail-One, where I served as Chief Accounting Officer. I am currently Vice President of Rail-Term Inc. and a 20% owner of that company. Additionally, I serve as Executive Vice-President of Rail-Term where I am responsible for corporate development.

It is my understanding that you seek Rail-Term's views on two issues: 1) what is the current state of technology utilized in the dispatching of train operations and 2) can dispatching operations occur without the dispatchers being under the direct supervision of employees of the operating carrier. I will address each in turn.

<u>The current state of technology utilized in the dispatching of train operations:</u> The vast majority of carriers perform their own dispatching using computer dispatching software. Depending on the size and complexity of the operation and if it is Centralized Traffic Control or Dark Territory Control (i.e. unsignaled track), the design and implementation of this software will take anywhere from a few months to a few years. The challenge is to integrate anti-collision logic and regulation with operational considerations.

This software is developed mostly by specialized firms. Very few carriers develop them "in house," although some do. This software is not available "over the counter" and will cost anywhere between, say $50,000.00 for a smaller carrier to $20,000,000.00 for a large class I railroad. At Rail-Term, we decided to develop our own software because we have so many different customers, using different rules sets and with different operational idiosyncrasies. Our software was nearly complete when we took over the Buffalo & Pittsburg and Rochester & Southern Railroads and Vermont Railway as customers. This is why we used their software for a very short period at the start of our US operation. All the dispatching for our new customers afterward was performed on our software from inception. We require great flexibility to be ready for changes in regulation or operating protocols or simply for bug fixing and enhancements. We would not have had that flexibility with a third party supplier. Although there may be some carriers who develop their own software, that it is not the norm. We invested over $700,000.00 of our own money so far in developing our software and we are still adding new features and incurring associated costs on a regular basis, trying to bring the short line railroad industry into the 21st century.

Can dispatching operations occur without the dispatchers being under direct supervision of employees of the operating carrier? The answer to this question is a simple "yes." When using the services provided by Rail-Term, the carrier customer subcontracts the direct supervision of the dispatchers to Rail-Term. In other words, the carrier assigns the responsibility for dispatching to Rail-Term which provides those services through its own dispatching staff. Rail-Term's dispatchers do not take instructions from the carrier. Instead they take their instructions from Rail-Term management. But let me emphasize that it is the individual customer, the railroad carrier, that controls its operation through the adherence to its timetable and operating rules. Rail-Term provides dispatching services by having its personnel adhere to the rules of the carrier who is its customer.

Our dispatchers are trained and supervised by Rail-Term management and must follow the stringent regulations issued by the Federal Railroad Administration as well as the operating rules set by individual railroads and local dispatching protocols such as NORAC. Our dispatchers

understand the operational requirements of our customers through the training they receive from Rail-Term. Any changes to these operational requirements by our customers must be communicated to Rail-Term management, who, after agreeing with the carrier that the changes are consistent with the applicable regulations and operating rules, will instruct our dispatchers as to how to affect the changes. Our dispatchers work in conjunction with the carrier employees, but they do not take instructions from them unless they are approved by Rail-Term management.

Rail-Term's relationship with the carrier is governed by its contract with that customer carrier. As stated in our contracts, Rail-Term has "overall responsibility of managing the safe and efficient movement of the [customer's] trains in conjunction with its transportation managers."

I hope that this information satisfies your inquiry. Please do not hesitate to contact me if you need anything further.

Sincerely yours,

Francois Frenovost

Cc: John D. Heffner, Esq.

RAIL-TERM

B.C.D. 10-33 APR 06 2010

**EMPLOYER STATUS DETERMINATION**
**Rail-Term Corporation**

This is the determination of the Railroad Retirement Board concerning the status of Rail-Term Corporation as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) (RUIA). Rail-Term has not previously been held to be an employer under the Acts.

Information about Rail-Term was furnished by John D. Heffner, counsel for Rail-Term. Rail-Term was incorporated March 3, 2000 and began operations in mid-March 2000. It is entirely owned by Rail-Term, Inc., a Canadian corporation. Rail-Term, Inc. is owned by Robert Wheeler, Geoffrey Chambers, and Francois Prenovost. Seventy percent of Rail-Term's business is spent in providing train dispatching services and 25 percent is spent on railroad-related computer software development.

Rail-Term originally began operations in March 2000 as an intermodal terminal operations consultant for Expressway Terminal, LLC, a subsidiary of Canadian Pacific Railway in the United States. Rail-Term disbanded that operation in June 2004 and terminated those employees. Rail-Term has an affiliate established and based in Canada (Centre Rail-Control Inc.) which performs train dispatching services for seven Canadian short line and regional railroads and VIA Rail Canada, which is Canada's passenger carrier.

Rail-Term performs services for Vermont Railway (BA 2114) and four of its affiliates: Green Mountain Railway Company, Clarendon and Pittsford Railroad (B.A. 2103), Washington County Railroad, and New York & Ogdensburg Railway (BA 2272); and for Buffalo & Pittsburg Railroad, Inc . (BA 2249), and its affiliate Rochester & Southern Railroad, Inc. (BA 2247). Twenty-five percent of Rail-Term's business time is spent doing train dispatching for Vermont Railway and its affiliates and 50 percent for Buffalo & Pittsburgh and its affiliate.

Evidence in the coverage file indicates that Rail-Term entered into a Dispatching Services Agreement with Vermont Railway on February 18, 2005 and with Buffalo & Pittsburgh on March 1, 2005.

Rail-Term provides its dispatching services from its dispatching office in Rutland, Vermont. The dispatchers report to the Director of Operations of Rail-Term, who is employed by Rail-Term and is based at the Rutland office. During Rail-Term's initial operations in the United States, Rail-Term temporarily utilized some individuals employed by two of its railroad clients. As of April 28, 2007, all of the dispatchers were on the Rail-Term payroll.

The dispatchers receive their daily directions for train schedules, operations, and restrictions from Rail-Term's Director of Operations. Rail-Term's Director of Operations receives his daily directions from Rail-Term's customers' Operations Managers. Information concerning changes in train operations follows the same channel.

Rail-Term owns its dispatching system. Dispatching is not done on carrier property. While Rail-Term's carrier customers may visit Rail-Term's facilities, they have no right to inspect those facilities. Rail-Term and its customers do not use the train order method of operations. Rail-Term's computerized dispatching software maintains train movement records in accordance with Federal Railroad Administration (FRA) requirements.

Although Rail-Term does not direct the operating personnel of its carrier customers, Rail Term's dispatchers give the operating personnel authority to occupy track. Rail-Term trains its dispatchers. In response to a question that asked to what extent is any action of the dispatcher imputed to the carrier, Rail-Term responded that it is a third party service provider and is solely responsible for its actions. The FRA will sanction Rail-Term, and not the carrier, if Rail-Term is deemed responsible for a violation.

No evidence in the coverage file indicates that any railroad has a financial interest in Rail-Term or that any individual owns a controlling interest in Rail-Term and in a carrier. Similarly, the file contains no evidence that an officer or director of Rail-Term is an officer or director of a carrier.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, 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 (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Because 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. However, for the reasons explained below, we find that Rail-Term is a carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

It should be noted at the beginning of this discussion that this case does not present to the Board for the first time the question of whether an entity that provides dispatching for interstate railroad operation is a covered employer under the Acts administered by the Board. In our decision in B.C.D. 02-12, issued February 12, 2002, we held that the dispatching department of the Southern California Regional Rail Authority (SCRRA) was a covered employer. Although the evidence in that case demonstrated that the principle business of SCRRA was not rail service, the Dispatching Department was found to be performing rail-related duties. That department was thus segregated under section 202.3 of the Board's regulations and found to be a covered employer effective October 1, 2002. See also our decision on reconsideration upholding the finding that Herzog Transit Services, Incorporated is a covered employer with respect to train dispatching over the rail line of Trinity Railway Express in Texas (B.C.D. 09-53, October 28, 2009).

Train dispatching includes routing and tracking train progress and coordinating the movement of one train with others. A train dispatcher handles two basic types of traffic: trains and maintenance activities [Thomas White, Elements of Train Dispatching, Vol. 2 "Handling Trains" 14 (2003)]. Train dispatchers issue specific authority for maintenance of way activity, just as they do for trains [Id. p. 14]. Dispatching concerns directing the movement of trains and engines over the railroad through the use of clearances, train orders, manipulation of signals, switches, etc. While Rail-Term and its customers do not use the train order method of operation, Rail-Term's computerized dispatching software achieves the same goal of directing the movement of trains and engines over the track of Rail-Term's customers. Until properly dispatched, the engineer cannot begin movement of the train. Because of the control that dispatchers have over the motion of trains, dispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad's common carrier obligation.

Train dispatching is an essential element of safe train operation over a rail line. Canadian Pacific Limited, et al. – Purchase and Trackage Rights – Delaware & Hudson Railway Company, Surface Transportation Board Finance Docket No. 31700 (Sub. No. 13) December 4, 1998, (employer's transfer of train dispatchers voided due to adverse affect on rail safety). Because the safe operation of trains depends on the work of the train dispatchers, dispatchers are subject to the Hours of Service law enacted by Congress. See 49 U.S.C. § 21101 et seq. Section 21101 defines "dispatching service employee" as follows:

> . . . an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements. [49 U.S.C. § 21101(2)].

Section 21105 limits the on duty hours of a dispatching service employee [49 U.S.C. § 21105].

The Federal Railroad Administration, which is charged with the responsibility to carry out the railroad safety duties imposed by the Hours of Service law, has issued regulations that prescribe reporting and record keeping requirements with respect to the hours of service of certain railroad employees, including dispatchers [49 CFR Part 228]. In addition, FRA regulations[1] emphasize the control factor present in the job of a dispatcher. Section 241.5 of those regulations defines the word "dispatch" in pertinent part to mean:

> (1) To perform a function that would be classified as a duty of a "dispatching service employee," as that term is defined by the hours of service laws at 49 U.S.C.

[1] 49 CFR Part 241, "United States Locational Requirement for Dispatching of United States Rail Operations."

21101(2), if the function were to be performed in the United States. For example, to *dispatch* means, by the use of an electrical or mechanical device --

(i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; . . .

Traditionally, the work of dispatching has been performed by employees of individual railroads.[2] However, as is currently the case with many other businesses, some railroads have made a business decision to have dispatching done by a separate entity that specializes in that field of work. Whether the work of dispatching is done by individuals on the payroll of a railroad or by individuals on the payroll of a separate entity, the work is essentially the same: the dispatcher controls the movement of the trains. Because no railroad can fulfill its common carrier obligation unless its trains move, the work of the dispatcher is an integral part of the operation of a common carrier. Thus, because Rail-Term's dispatchers have the ultimate control over the movement of the trains of its rail carrier customers, the

[2] It is noteworthy that the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers is an AFL-CIO affiliated craft union representing employees in the nation's railroad industry who operate and dispatch trains and supply the electric power for those railroads which use electricity for train propulsion and signaling. It is also an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts (B.A. No. 8905).

Board finds that Rail-Term is itself a rail carrier within the definition of an employer under the Railroad Retirement and Railroad Unemployment Insurance Act. Service for Rail-Term is creditable beginning February 18, 2005, the date it first entered into an agreement to provide dispatching services.

As the dissent suggests, there is an alternate theory that dispatching is such an integral part of operating a railroad that it cannot be contracted out to a third party that is outside of the control of the railroad. Under this analysis Rail Term employees would be found to be employees of the railroads for which Rail Term provides dispatching services.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

It should be noted that the tests set forth under paragraphs (B) and (C), above, go beyond the test contained in paragraph (A) and could hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. Under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company,

206 F. 2d 831 (8th Cir. 1953). However, see also, Wabash Railroad Co. v. Finnegan, 67 F. Supp. 94 (E.D. Mo. 1946), a railroad retirement tax case where the court found that the nature of the services performed for a railroad by its contractors was such that the railroad could not surrender control and supervision in fact, even if it did so in words. 67 F. Supp. at 100. The dispatching services provided by Rail Term are analogous to the services provided by contractors in Wabash Railroad Co. in that the dispatching services are of a continuing nature and are so essential to the statutory duty of the rail carriers to provide rail transportation that the carriers must retain the power to direct and control the individuals who conduct the dispatching service.

The Board has applied this principle in its decision with respect to the coverage status of Rail-West, Inc. (B.C.D. 95-51). We noted in that decision that: "The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer." See Restatement (Second) of Agency, § 214. In Rail-West, we held that the individuals provided by Rail-West as crew to operate the trains of the rail division of the Port of Tillamook Bay were covered as employees of that rail division because the Port had to retain ultimate control of the performance of its service as a common carrier. In the case of Rail Term, because a railroad cannot properly discharge its duties as a common carrier without dispatching services, dispatching services fall under this same rule of agency; i.e., they are so essential to the role of common carrier by railroad that responsibility for their proper performance must be retained by the railroad.

In addition, by the nature of the work that dispatchers perform, they are integrated into the railroad's operations. Without the services of the dispatcher, the railroad's trains cannot run. The job of a dispatcher is as critical to the operation of a railroad as is that of a locomotive engineer. Because dispatching is an inextricable part of the railroad's fulfilling its common carrier obligation, we find that the

dispatchers who work for Rail Term could be considered to be employees of each railroad for which Rail Term provides dispatching services. **Cf.** B.C.D. 86-75, Genesee Valley Transportation Company, Inc.

Under either analysis, dispatchers who work for Rail Term would be considered to be covered employees under the Acts administered by this Board.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting Opinion attached)

## 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 (SCRRA) 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

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July 9, 2010

Beatrice Ezerski
U.S. Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

**RE: B.C.D 10-33, Rail-Term Corp.**

Dear Ms. Ezerski:

On behalf of Rail-Term Corp., I am submitting a Petition for Reconsideration of the Board's decision dated April 6, 2010, finding Rail-Rail Corp. subject to coverage under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Please return the date stamped copy marked "stamp and return."

Sincerely yours,

John D. Heffner

cc: Francois Prenovost
Dennis Devaney, Esq.

www.heffnerlaw.com j.heffner@verizon.net

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**FD 35582**

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

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certifies that I transmitted a copy of the foregoing documents submitted by Rail-Term Corp. in the record of proceedings before the Railroad Retirement Board and the United States Court of Appeals for the District of Columbia Circuit to the following parties by first class United States Mail and electronic mail this 28th day of March 2012:

Rachel L. Simmons, Esq.

Michael S. Wolly, Esq.

John D. Heffner

**BEFORE THE**
**UNITED STATES**
**RAILROAD RETIREMENT BOARD**

**B.C.D. 10-33**

**RAIL-TERM CORP.**
**PETITION FOR RECONSIDERATION**
**AND ADMINISTRATIVE STAY**

Submitted by
John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

Dated: June 8, 2010

**Expedited Handling Requested**

BEFORE THE
UNITED STATES
RAILROAD RETIREMENT BOARD

B.C.D. 10-33

RAIL-TERM CORP.
PETITION FOR RECONSIDERATION
AND ADMINISTRATIVE STAY

## INTRODUCTION

Pursuant to 20 CFR 259.3(a), Rail-Term Corp. ("Rail-Term") files this petition seeking reconsideration of the Railroad Retirement Board's ("the Board's") decision issued on April 6, 2010,[1] in the above-captioned matter. There the Board found Rail-Term a "covered employer" subject to the jurisdiction of the Railroad Retirement Act ("RRA") and the Railroad Unemployment Insurance Act ("RUIA").[2] In essence it found that Rail-Term is a rail carrier subject to the jurisdiction of the Surface Transportation Board ("the STB"). Id. at 7. It additionally found that Rail-Term employees would be found to be the employees of its client railroads on the theory that dispatching is such an integral part of operating a railroad that it cannot be contracted out to a third party outside the control of a railroad. Id. The RRBD Initial Decision is arbitrary and capricious and materially wrong

[1] Hereafter cited as The RRBD Initial Decision.
[2] Collectively "the Acts."

because it is an unexplained departure from long standing precedent involving services provided to the railroad industry by independent contractors. Rail-Term also seeks a stay of its effectiveness pending a decision on this Petition. This appeal is timely inasmuch as the challenged decision was issued a little more than three months ago and the Board's Rules provide a one-year period for filing a petition for reconsideration. 20 CFR 259.3(a).

## STATEMENT OF FACTS

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. Neither Rail-Term nor its corporate affiliates own any lines of railroad, operate trains, hold themselves out to provide transportation for compensation, or own, lease, or operate any railroad locomotives or rolling

stock. Furthermore, as the Board itself has held, Rail-Term is neither owned by nor under common control with a rail carrier. Id. at 3.

More specifically, Rail-Term develops computer-based dispatching software and provides dispatching services for several American short line railroads from an office in Rutland, VT. In effect, Rail-Term's rail carrier clients have "outsourced" to Rail-Term the dispatching functions that they would otherwise provide "in house." Rail-Term employs 8 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, among other clients, the Vermont Railway System and its affiliates, the Buffalo & Pittsburgh Railroad, and short line holding company, Omni-Trax, Inc., and its subsidiary railroads. Rail-Term's dispatcher employees work for it, rather than for its client railroads. None of Rail-Term's current dispatchers were formerly employed by its American client railroads so this proceeding does not involve the removal of railroad employees from Railroad Retirement coverage. 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 has filed this petition for reconsideration of The RRBD Initial Decision because it strongly disagrees with the Board's finding that it

is a "carrier employer" under the Acts and hence subject to the Board's jurisdiction. It also challenges the Board's alternative coverage theory, that its employees are employees of its client railroads. Because the Board has frequently based its coverage rulings decisions involving railroad-like entities on rulings by the STB, Rail-Term filed a Petition for Declaratory Relief with that agency on June 3, 2010, seeking a ruling that it is not a "rail carrier"[3] within the meaning of the I.C.C. Termination Act ("the ICCTA").[4] The STB Petition is still pending.

Rail-Term's purported current "covered employer" status is complicated by the fact that it had been advised several years ago by several senior and now retired or dead Board officials that it would not be regarded as a "covered employer" for the purpose of coverage under the Acts. At no point did these officials advise Rail-Term that they were unauthorized to speak for the Board as an institution and that Rail-Term should seek an official opinion from the Board's General Counsel's office. Rail-Term relied on that advice to its detriment by establishing at considerable cost its own 401(k) employee retirement program. Rail-Term had originally wanted

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[3] The ICCTA speaks in terms of a "rail carrier" whereas the Acts use the term "carrier by railroad." Rail-Term believes these terms are legally "fungible" and therefore uses them interchangeably.

[4] In view of its desire to obtain a prompt ruling on reconsideration from this Board, Rail-Term has asked the STB for expedited handling on its Petition for Declaratory Relief. Rail-Term will supplement this Petition with the STB's decision on its rail carrier status once that decision is issued.

to be covered under the Acts in order to be able to attract experienced former railroad employees for dispatcher positions. The Board's rejection of its coverage request required Rail-Term to change the way it wanted to do business. The required additional training associated with that change in how Rail-Term did business has cost the company over $200,000 in additional expenses, costs that it could have avoided had Rail-Term originally been recognized as a "covered employer."

The Board's decision holding Rail Term a "covered employer" puts it in the untenable position of having to potentially deposit substantial and past due sums into the Railroad Retirement account plus any interest and penalties while at the same time "winding down" its 401(k) retirement program. These considerations underscore the need to get a prompt ruling from the Board on reconsideration so that it can properly meet its retirement obligations under the law regardless of the outcome of this appeal.

## THE ISSUE

The issue here is a novel one: whether a company that supplies services to the railroad industry in the form of train dispatching is a "carrier by railroad" and hence "a covered employer" under the Acts and whether the company's employees can be considered employees of its rail carrier clients for coverage purposes.

## THE BOARD'S APRIL 6, 2010, DECISION

After citing the pertinent facts supplied by Rail-Term, the Board identified two alternative statutory bases for finding that an entity is a "covered employer" subject to its jurisdiction, namely that the entity is

> (1) "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board... or
>
> (2) any 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."

See, 45 U.S.C. 231(a)(1). The Board then went on to say,

> "[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. However, for the reasons explained below, we find that Rail-Term is a carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts." The RRBD Initial Decision at 3.

At page 6 of its decision, the Board elaborated, stating

> "[b]ecause Rail-Term's dispatchers have the ultimate control over the movement of the trains of its rail carrier customers, the Board finds that Rail-Term is itself a rail carrier within the definition of an employer under [the Acts]."

The Board's Decision does not provide any reasoned analysis or explanation as to how it could reach a conclusion finding coverage under section 231(a)(1) that Rail-Term is "a carrier by railroad" subject to the

STB's jurisdiction. It did not and could not cite to any STB decision finding Rail-Term subject to this Board's jurisdiction because none exists. Similarly, the Board did not find that Rail-Term owns any lines of railroad or railroad equipment, operates any trains on a common carrier or noncommon carrier basis, or holds itself out as any sort of "common carrier." Rather, it came to the erroneous conclusion that Rail-Term was "a carrier by railroad" subject to the STB's jurisdiction because of "the control that dispatchers have over the motion of trains." The RRBD Initial Decision at 4. More specifically, the Board used the following "syllogistic" reasoning to arrive at such an amazing and statutorily unsupported conclusion that defies both reality and logic:

- This is not the first time the Board has found that an entity performing dispatching services for interstate railroad operation is a covered employer [5]
- Dispatching is an "inextricable part" of train motion and a railroad's common carrier obligation because of the ultimate control that dispatchers have over the motion of trains

[5] The Board cited two of its cases for that proposition, a readily distinguishable case involving Southern California's commuter rail agency that *wanted* its dispatchers to be covered under the Railroad Retirement system as an inducement to working for the agency, B.C.D. 02-12, Southern California Regional Rail Authority Segregation of Dispatching Department (2002) and a case that preceded the Rail-Term case by only a few months, Employer Status Determination-Decision on Reconsideration, Trinity Railway Express-Train Dispatching, Herzog Transit Services, Inc. (2009), and is now on appeal in the Seventh Circuit by the vendor providing dispatching services, No. 09-3945, Herzog Transit Services, Inc., Dallas Area Rapid Transit, and Fort Worth Transportation Authority v. United States Railroad Retirement Board.

- Alternatively, dispatching is such an "integral part" of and so "essential" to operating a railroad that it cannot be contracted out to a third party outside the control of a railroad
- Ergo, Rail-Term is an "employer" for the purpose of the RUIA

The Board based its decision in large part upon the fact that dispatchers are subject to the Hours of Service Act[6] as well as Federal Railroad Administration regulations promulgated thereunder.[7] But there is nothing in the Acts that would permit such an expansive interpretation.

Alternatively, the Board sought to find Rail-Term a "covered employer" through the control that its rail carrier clients allegedly exercise over Rail-Term's employees. But Rail-Term's employees work for it, not for its client railroads. Stated otherwise, the Board found Rail-Term covered through "the continuing authority of the rail carrier employer to supervise and direct the manner of rendition of [its] service." To this end the Board cited 45 U.S.C. 231(d)(1) defining an "employee" as

> "any individual in the service of one or more employers for compensation" and further stating that "an individual is in the service of an employer whether his service is rendered within or without the United States if (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the

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6 Which defines the term "dispatching service employee" and limits the duty hours of a dispatching service employee.

7 As a practical matter, trains operating at a restricted speed of less than 20 mph, as is frequently the case with short line railroads such as those for whom Rail-Term provides dispatching services, do not require the services of a dispatcher under the General Code of Operating Rules ("GCOR").

property used in the employer's operations, personal services the rendition of which is integrated into the employer's operation; and (ii) he renders such service for compensation..."
The RRBD Initial Decision at 7.

## ARGUMENT

Rail-Term agrees with the Board's conclusion that it is not a company directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in 45 U.S.C. 231(a)(1) and which operates any equipment or facility or performs any service in connection with the transportation of passengers or property by railroad. Rather it is the rest of the Board's conclusions, that (1) Rail-Term is a carrier by railroad (in effect subject to the STB's jurisdiction) by reason of the control that its dispatchers have over the motion of the trains of its client railroads and (2) the control that its rail carrier clients have over Rail-Term employees, with which Rail-Term vehemently disagrees.

### I. RAIL-TERM IS NOT A RAIL CARRIER UNDER THE ICC TERMINATION ACT

To state that Rail-Term is not "a rail carrier" under the ICCTA belies the obvious. As the STB held in H&M International Transportation, Inc.-Petition for Declaratory Order, STB Finance Docket No. 34277, slip op. at 2-3, served November 12, 2003 (H&M) finding that this company was not "a rail carrier" under the ICCTA,

> [t]he Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. 10501(a). The term "transportation" is defined to include a facility related to the movement of property by rail, and services related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9)(A), (B). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5).
>
> Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. H&M's intermodal transloading activity could fit within the broad definition of transportation. [Citations omitted] But this is only half of the statutory requirement for Board jurisdiction under section 10501.
>
> 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*"[emphasis supplied] to the public to provide common carrier service. [citations omitted] 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 other recent principal STB precedent on the issue of what constitutes a "rail carrier" under the ICCTA, American Orient Express Railway company LLC-Petition for Declaratory Order, STB Finance Docket No. 34502, slip op. served December 29, 2005 (American Orient Express)

found that an entity providing a "cruise ship type passenger rail excursion service" was a "rail carrier" under the same analysis.

Rail-Term could not possibly be considered "a rail carrier" within the meaning of the ICCTA under H&M and American Orient Express because it does not (1) own or use any facility related to the movement of passengers or property by rail or provide services related to that movement, (2) provide common carrier transportation for compensation, (3) move any railroad equipment of any type, (4) "hold out" to the public to provide transportation for compensation, or (5) hold any license or exemption from the STB to perform common carrier rail operations. Contrary to the Board's conclusion at the top of page 7 of its ruling, Rail-Term is not a rail carrier within the definition of the Acts.

## II. THE BOARD'S RULING IS MATERIALLY WRONG BECAUSE IT VIOLATES THE PLAIN LANGUAGE OF THE STATUTE

The Board must correct its prior decision for the simple reason that The RRBD Initial Decision violates the plain language of the Acts. The Board's fatal error is interpreting the statute in a way that goes beyond the statute's words and Congressional intent. As a general matter courts have reversed Board decisions when those rulings lack a reasonable basis in law. See, e.g., Itel v. U.S. R.R. Ret. Bd., 710 F.2d 1243, 1249 (7th Cir. 1983).

More specifically, courts have reversed Board rulings when they have ignored clear statutory language and legislative history without any underlying justification. Id.; Kurka v. U.S. R.R. Ret. Bd., 615 F.2d 246, 249-250 (5th Cir. 1980). Such is the case here.

The Board bases its decision solely on the first provision of 45 U.S.C. 231(a), which defines "a covered employer" as "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board." The definitions section of the Board's regulations simply states an "employer means an employer as defined in the act and part 203 of this chapter." 20 CFR 201.1(b). Section 202.1, entitled "Statutory provisions" adds that "employer" means:

> any carrier (as defined in subsection 1(m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: Provided, however, That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system now or hereafter operated by any other motive power. The Interstate

> Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and by-laws of such organizations.
>
> .....
>
> The term "employer" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefore, or in any of such activities.

Nowhere does the statute or the regulations define "a covered employer" as an entity that performs railroad-like services for railroads. While the Board does not specifically state that Rail-Term is a "carrier by railroad," its ruling finding Rail-Term's employees to be "covered employees" of its rail carrier clients appears to be a case of "guilt by association." That association is the fact that Rail-Term performs a function, namely train dispatching, which railroads frequently perform "in house." But there are other outside vendors that perform many functions that railroad

have historically performed using their own employees that have been held by the Board to be independent contractors outside the scope of the Board's coverage. Such services include track and signal maintenance, training and testing of train crews, and freight car repairs, among others.[8] As noted in the Statement of Facts, Rail-Term performs these functions using employees that were not recruited from work forces of its rail carrier clients. Neither the evidence submitted by Rail-Term nor the Board's findings demonstrate any effort to deprive railroad employees of their Railroad Retirement or Railroad Unemployment coverage.

Moreover, the Board's attempt to label Rail-Term as a "covered employer" through the control allegedly exercised over Rail-Term's dispatchers by its rail carrier clients represents a factually inaccurate and unjustified linguistic stretch as discussed below.

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[8] B.C.D. 95-78, Tryban Rail Service, Inc. (track maintenance, much of it for one short line railroad client); B.C.D. 93-07, Gulf Rail Car Company (freight car repairs); B.C.D. 06-21, JA d/b/a The "A" Team (track, right of way, and grade crossing maintenance); B.C.D. 03-60, Rail-Scale, Inc. and Southwest Signal Engineering Company (crossing signals); and B.C.D. 95-40, Transportation Certification Services, Inc., (train and engineer training, engineer certification, and signal and communications consulting). In each case a majority of the Board found no basis for coverage under the Acts.

## III. BOARD RELIANCE ON SELECTIVE FEDERAL RAILROAD ADMINISTRATION REGULATIONS AS A BASIS FOR JURISDICTION IS MISPLACED

The Board based its decision finding Rail-Term a "covered employer" on the notion that train dispatching is an essential element of safe train operation and therefore an inextricable part of a railroad's common carrier obligation. In reaching that conclusion, the Board cited the recently enacted Hours of Service Act, 49 U.S.C. 21101 *et seq.*, and the FRA's regulations thereunder, 49 CFR 241.5 defining the terms "dispatching service employee" and "dispatch." The RRBD Initial Decision at 5-6.

Yet as noted above, the FRA regulates numerous other facets of railroad operations in infinite detail. For example, 49 CFR 213 addresses track and track safety standards. 49 CFR 214 covers railroad workplace safety. 49 CFR sections 215, 216, 221, and 224 address railroad equipment standards and maintenance. 49 CFR regulates locomotive safety standards. Other FRA regulations cover block signal, grade crossing signal, and train control systems. See, 49 CFR 233-6. Numerous vendors independent of their railroad clients perform services for the railroad industry in these areas and are treated legitimately by the Board as independent contractors.[9] And some of these functions like signal and communications systems and rail

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[9] see examples in note 8 on page 15.

cars are just as essential to moving trains as are dispatchers. So the Board erred by basing its jurisdiction on some FRA regulations over railroads and railroad operations while ignoring others.

## IV. THE BOARD ERRED BY BASING ITS DECISION ON PRECEDENT THAT IS EITHER INAPPOSITE OR WRONGLY DECIDED WHILE IGNORING OTHER PRECEDENT FAVORABLE TO RAIL-TERM

It is a basic axiom of administrative law that agency decisions are entitled to deference and will not be disturbed on appeal so long as they are adequately explained and supported by the record. Conversely, an agency changing its course must supply a reasoned analysis. See, New York Cross Harbor Railroad v. Surface Transportation Board, 374 F.3d 1177 (D.C. Cir. 2004) and cases cited therein at page 1181.

The Board began its analysis of Rail-Term's carrier status with the statement "[i]t should be noted at the beginning of this discussion that this case does not present to the Board for the first time the question of whether an entity that provides dispatching for interstate railroad operation is a covered employer under the Acts administered by the Board citing to both SCRRA and Herzog Transit. The RRBD Initial Decision contains no further reference to or discussion of either of these cases. Neither case provides convincing support for the Board's finding that Rail-Term is a "covered employer."

SCRRA involved the coverage status of dispatchers employed by the public agency in southern California that was administering commuter rail service provided by Amtrak under contract. The agency had recently hired dispatchers formerly employed by Amtrak and *had specifically asked* [emphasis supplied] the Board to regard those employees as "covered" as an inducement for them to work for the agency. The Board ruled that SCRRA's Dispatching Department and its dispatchers were "covered employees" but that the Dispatching Department was otherwise segregated for coverage purposes from the rest of the agency that was held not to be subject to the Acts. The Board's reliance on SCRRA is misplaced because Rail-Term does not own track or operate trains and two former Board staff members had discouraged Rail-Term from seeking to have its dispatchers covered under Railroad Retirement.

The 2009 Herzog Transit case represents the Board's most recent pronouncement on this issue. Herzog provides intrastate commuter rail service under contract to two public agencies in the Dallas-Fort Worth Area over tracks shared with freight trains operated by railroads operating in interstate commerce subject to the ICCTA. This case has been briefed and argued and is currently pending on appeal to the United States Court of Appeals for the Seventh Circuit. The Board majority, management member

Kever dissenting, found that Herzog's role of dispatching the trains of interstate common carrier freight railroads as well as the publicly supported intrastate commuter trains rendered it a "rail carrier" and an "employer" subject to the Act but only with respect to its dispatchers.

Clearly, the Board's decision holding Rail-Term a "covered employer" is not based on clear and consistent, long standing Board precedent. Rather it purports to rely on the 2002 SCRRA decision that is factually distinguishable and a current Herzog Transit case of questionable applicability now on appeal. The Board did not even cite to the handful of other, albeit inapposite cases such as B.C.D. 03-38, Rail Temps, Inc. (employees of a temp placement firm providing carriers with train crews held to be the employees of its client railroads for coverage purposes), B.C.D. 02-83, Boothill & Western Railway Company (a rail customer using nonrailroad employees for train and engine work held to be an "employer" under the Acts); B.C.D. 96-13, SEMO Port Railroad, Inc. (employees of railroad contractor operating port authority-owned railroad held to be covered employees of the rail line owner and not the contractor), and B.C.D. 00-47, Railroad Ventures, Inc. (decision on reconsideration, owner of railroad line operated by short line railroad contractor held to be a "covered employer" under the Acts) involving the issue of contracting out to third

parties functions allegedly integral to a railroad's operations and common carrier obligation. Each of these cases is likewise distinguishable. Rail-Temps, Inc. , Boothill, and SEMO all involved the provision of train crews by contractors to work for and under the direct supervision of employees of common carrier railroads. SEMO and Railroad Ventures involved the contracting out of all train operations of an STB-authorized railroad common carrier to a third party operator. The facts are very different in that Rail-Term does not own any track, operate any trains, hold out any STB operating authority, or hold out to perform service as a common carrier. Moreover, it does not furnish any train crews or, for that matter, any personnel operating under the direct control and supervision of its client railroads.

The Board then tried to find Rail-Term's employees covered under the Acts by focusing on the control that Rail-Term's rail carrier clients exercise over Rail-Term's dispatcher employees, citing two cases. The first, Wabash Railroad v. Finnegan, 67 F. Supp. 94 (E.D. Mo. 1946), involved a suit by a railroad to recover payroll taxes paid under protest on "wages" paid an independent contractor. The second, B.C.D. 95-51, Rail-West, Inc., was a 1995 Board decision involving facts similar to those in SEMO, a contractor operating a short line railroad for its public agency owner. In each the Board

found that the nature of the services performed by the contractor to its principal were of a continuing nature and so essential to the statutory duty of rail carriers to provide rail transportation that the responsibility for performance must be retained by the railroad. Both are distinguishable.

In Wabash the court discussed the commonly recognized tests to determine the existence of an employer-employee relationship and found that the contractor could not be found to be an entity independent of its principal. The specific services furnished included the provision of coal and sand to steam locomotives and, in some cases, the movement of locomotives in or around the yard or station. Rail-West involved a public agency that retained a contractor to operate its railroad for the agency's account providing train and engine crews and other unidentified functions. The Board concluded that "certain duties are so essential under the law that responsibility for their performance must be retained by the principal or employer." But Rail-Term is not operating a railroad for its clients or providing individuals to perform train and engine service functions for its clients so the citation to Rail-West does not support the Board's position.

While the Board did cite the landmark case of Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir.1953) ("Kelm") on the issue of whether a contractor providing services

to a party is an independent contractor or the employee of a "covered employer," it did not analyze Rail-Term's evidence under the test articulated there. Had the Board applied Kelm and agency precedent cited in note 8 on page 15, supra, to the facts at hand instead of just enunciating the holding, the Board would have reached a different result. As the Board stated, in determining whether an individual is an independent contractor or an employee the Board will consider the criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law.[10] The crucial "supervision test" under 45 U.S.C. 231(d)(1)(i)(A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work. Furthermore, under a consistent line of Board cases including this decision,[11] the Board has stated that it will not apply tests (B) and (C) identified in Kelm[12] where the contractor is engaged in an independent trade or business.

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[10] Lanigan Storage & Van Company, Inc. v. United States, 389 F.2d 337 (6th Cir. 1968) and Aparacor, Inc. v. United States, 556 F.2d 1004 (Ct. Cl. 1977). Both cases analyzed whether the party performing a service was an "employee" of or an independent contractor to its client and determined the party to be an independent contractor.

[11] See cases cited in note 8 on page 15, supra.

[12] (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations.

On this point the information furnished by Rail-Term to the Board presents ample evidence for the Board to find that Rail-Term is an independent entity and that its employees are not integrated into or subject to control by its carrier clients including as to the outcome and way that work is performed. Rail-Term submitted this information in three separate filings with the Board. Its first submission, a letter dated September 7, 2006, from Rail-Term Executive Vice President Francois Prenovost responded to the Board's inquiry dated August 14, 2006. On November 16, 2006, Rail-Term submitted a more detailed response through the undersigned counsel along with redacted copies of its Dispatching Services Agreements[13] with two of its railroad clients. By letter dated February 28, 2007, the Board sought additional information about Rail-Term's operations. Rail-Term answered with a detailed letter dated April 20, 2007.

In support of its position that it is an independent contractor, Rail-Term's submissions document the fact that (1) it has numerous rail carrier clients in both the United States and Canada, (2) it has two separate lines of business (developing and selling specialized computer-based dispatching programs and providing dispatching services to its rail carrier clients), (3) it

[13] The two agreements are from the Vermont Railway System ("the Vermont Agreement") and the Buffalo & Pittsburgh Railroad and related companies ("the B&P Agreement").

has its own office space rather than using client-provided space, (4) it furnishes its own equipment and software rather than using client-provided equipment, and (5) it provides services for a set period of time under an engagement agreement rather than for an indefinite period as is typically the case with an employee. The agreements furnished the Board disclose that Rail-Term provides services for a fixed term for fee,[14] Rail-Term provides its own insurance and assumes the risk and liability of performance,[15] with certain exceptions no longer relevant, Rail-Term provides its own equipment,[16] the parties have the right to terminate in case of a default,[17] Rail-Term's railroad clients are not responsible or liable for vacation, accident, sickness, or lost time incurred by Rail-Term employees,[18] the agreements contain mutual indemnifications by both Rail-Term and its railroad clients, and require compliance by Rail-Term with applicable laws.[19]

On the all important issue of the relationship between Rail-Term employees and the employees of its carrier clients, the evidence furnished discloses that Rail-Term dispatchers report to Rail-Term's Director of

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14 Vermont Agreement at secs. 1 and 3; B&P Agreement at secs. 1 and 3.
15 Vermont Agreement at secs. 4 and 5; B&P Agreement at secs. 4 and 5.
16 Vermont Agreement at sec. 6; B&P Agreement at sec. 6.
17 Vermont Agreement at secs. 9 and 10; B&P Agreement at secs. 9 and 10.
18 Vermont Agreement at sec. 8(c); B&P Agreement at sec. 8(c).
19 Vermont Agreement at sec. 13; B&P Agreement at sec. 7(b).

Operations. Rail-Term's employees do not supervise and cannot discipline the employees of its rail carrier clients and those carrier employees likewise do not supervise and cannot discipline Rail-Term employees. All directions and communications between Rail-Term employees and those of the client railroads are communicated between Rail-Term's Director of Operations and the clients' Operations Managers. Rail-Term employees are subject to discipline by Rail-Term management and not by its client railroads. Hence there is no evidence that Rail-Term's clients have any control over the outcome of the work or the way that individual Rail-Term employees perform work. As a practical matter, the operating employees of Rail-Term's short line clients have no control over it because Rail-Term dispatchers would be subject to supervision by multiple masters, the employees of its various American railroad clients. Furthermore, the FRA holds Rail-Term and not its rail carrier clients responsible for any violations of agency rules or policies. Accordingly, there is no basis in fact for the Board's finding that Rail-Term's dispatchers are subject to the control of its rail carrier clients.

Regarding the issue of whether an entity performing service for a rail carrier is "integrated" into the employers' operations, The RRBD Initial Decision clearly noted under Kelm that the tests of 45 U.S.C. 231(d)(B) and

(C) do *not* apply where the contractors are engaged in an independent trade or business. Id. at 8. Yet despite this language and evidence that Rail-Term is engaged in an independent trade or business, the Board went ahead and found that Rail-Term's dispatchers were integrated into the operations of its rail carrier clients stating:

> In addition, by the nature of the work that dispatchers perform, they are integrated into the railroad's operations. Id. at 9.

The evidence that Rail-Term provided shows that the company has a significant investment in its equipment and employees, may suffer a loss if the expenses associated with performance under the dispatcher agreements exceed the agreed upon payments, and is engaged in a recognized trade or business. Similarly, Rail-Term's dispatcher employees cannot be said to be "integrated" into the work forces of its multiple American railroad clients. Accordingly, Rail-Term is an independent trade or business and the Board's decision to treat its employees as integrated into the work forces of its rail carrier clients is wrong in light of the statutory language and is contrary to established precedent.

## V. REQUEST FOR STAY AND EXPEDITED CONSIDERATION

A few weeks ago, Rail-Term's counsel received a letter dated April 30, 2010, from the Board advising that Rail-Term is a "covered employer" under the Acts effective February 18, 2005. The letter advises that the

Internal Revenue Service has been advised of this decision. The letter goes on to spell out the employer contribution rates under the RUIA and states that Rail-Term must file a report of service and compensation for the years 2005-2009 as soon as possible. Rail-Term requests that if the Board does not reverse its initial decision, the Board should make the date of coverage the date of the forthcoming final decision.

Further, because Rail-Term has sought timely reconsideration, it requests that the effectiveness of The RRBD Initial Decision be stayed pending reconsideration. Rail-Term believes that a stay of that decision is appropriate insofar as the Board has granted stay requests in other reconsideration proceedings.[20] Rail-Term believes it is likely to succeed on the merits of this case because the Board failed without explanation to apply established precedent and its decision contained material errors of law holding Rail-Term a "covered employer" and a "rail carrier" and its employees the employees of its client railroads. Moreover, Rail-Term believes that it is likely to succeed on the merits after listening to the oral argument before the Seventh Circuit in Herzog Transit which presents the same issue, the coverage status of contractors providing dispatching services to rail carrier clients. Failure to grant a stay would significantly harm Rail-

[20] See, i.e., B.C.D. 04-22, H&M International, Inc.-Employer Status Determination; B.C.D. 96-59, Port of Palm Beach District-Employer Status Determination.

Term by causing it to undo a private retirement benefits system it established after being wrongly advised by individual Board employees that it was not a "covered employer" and by having to incur substantial time and expense complying with requirements under the Acts. Requiring Rail-Term to terminate its private retirement benefits system thereby incurring additional expenses for the company would be adding insult to injury. Conversely, no one will be harmed by a grant of this stay request. Rail-Term is unaware of any party opposing or likely to oppose Rail-Term's reconsideration or stay requests. Finally, granting this request during the pendency of this Petition will not harm the public interest.

In any event, the date of the coverage cannot be retroactive back to February 28, 2005, some five and one half years ago. The Board's regulations at 20 CFR 211.16 mandate that, in the absence of fraud, creditable compensation is limited to the four year period after the date on which the compensation was required to be reported to the Board. Weyerhaeuser Co. v. United States Railroad Retirement Bd., 503 F.3d 596 (7th Cir. 2007). By Rail-Term's computation, that date would at the earliest be approximately May 1, 2006.

In the same vein Rail-Term requests that the Board expedite its consideration of the reconsideration request. Simply stated, Rail-Term

desires to get a speedy resolution of this dispute so that it can put this matter behind it and comply with the law whatever the result. As a small business, Rail-Term cannot afford to leave in limbo for any extended amount of time its status under whichever employee benefits laws govern its American workforce.

## VI. CONCLUSION

For the reasons articulated above, Rail-Term requests that the Board reverse The RRBD Initial Decision and find it to be outside the coverage of the Acts.

Respectfully submitted,

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202)296-3334

Dated: June 8, 2010

**Expedited Handling Requested**

# DISPATCHING SERVICES AGREEMENT

This Dispatching Services Agreement ("Agreement") is executed as of MARCH 1ST, 2005 by and among Rail-Term Corp., a Michigan corporation ("Rail-Term"), and Buffalo & Pittsburgh Railroad, Inc., a Delaware corporation ("B&P") and Rochester & Southern Railroad, Inc., a New York corporation ("R&S" and collectively with B&P, the "Railroad"). Rail-Term and the Railroad 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**, the Railroad desires to utilize the Dispatching Services from Rail-Term in accordance with the terms and conditions of this Agreement; and

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

**NOW THEREFORE**, for the consideration hereby 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 of this Agreement (the "Term") shall commence on March 6th, 2005 (the "Effective Date") and shall conclude on March 5th, 2010. The Railroad shall have the option, exercisable by it in its sole discretion and upon written notice provided to Rail-Term no less than 18 months prior to the end of the Term, to cancel the last year of the Term of this Agreement so that the Term would then expire on February 28, 2009.

2. Dispatching Services. During the Term, Rail-Term agrees to provide the Railroad 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.

3. Compensation. During the Term or any written renewal thereof, the Railroad shall pay Rail-Term compensation for the Dispatching Services as more fully described in Exhibit B of the Agreement, which such Exhibit may be amended from time to time by mutual written consent of the Parties.

4. Insurance. Prior to the commencement of this Agreement, Rail-Term shall obtain, at its sole cost and expense, and during the Term, Rail-Term shall maintain, at its sole cost and expense, the following insurance coverage:

(a) General Liability or Railroad Liability Insurance that, either specifically by its wording or by endorsement, includes the following: (i) The minimum coverage and

single limit of liability coverage of the policy secured by Rail-Term shall be no less than US Twenty-Five Million Dollars ($25,000,000) per occurrence with a maximum deductible limit of no more that US Fifty Thousand Dollars ($50,000); (ii) the policy shall include coverage for bodily injury (including death) and property damage liability, including exemplary and punitive damages, FELA (Federal Employers Liability Act) and any other law or benefit to injured employees, and sudden and accidental pollution liability; (iii) The policy shall include a waiver of subrogation clause, rider or endorsement in favor of Railroad; (iv) The policy shall contain cross liability and severability of interests provisions; (v) The policy shall include contractual liability coverage whereby Rail-Term covenants to indemnify Railroad hereby shall be specifically brought within the coverage of the policy; and (vi) If the insurance is in the form of a General Liability Policy, the policy shall include a waiver or deletion of all exclusions relating to railroad operations.

(b) Workers' Compensation and Employers' Liability Insurance including coverage for: (i) Rail-Term's statutory liability under the workers' compensation laws of the state(s) in which the work is to be performed, the insurance must cover all employees in any event; and (ii) Employers' Liability (Part B) with limits of at least US $500,000 each accident, US $500,000 by disease policy limit, US $500,000 by disease each employee.

(c) Automobile Liability Insurance in the amount of US One Million Dollars ($1,000,000) per occurrence and aggregate.

Each policy required by this Agreement (with the exception of Workers Compensation) shall name Railroad, its parent company, subsidiaries and affiliates, and their respective officers, directors and employees, and contractors and agents as additional insureds. If any policy is written on a claims made basis, Rail-Term shall continue to maintain and provide evidence of insurance as required herein for a period of at least five years after termination of this Agreement. The insurance policies required herein shall contain no exclusion for punitive damages. The insurance required herein shall be written by reputable insurance carriers with an A. M. Best rating of A- and Class XII or better who are permitted to do business in the state(s) in which the Demurrage Services are performed. The insurance policies required herein shall be endorsed to provide Railroad with at least thirty (30) days notice of any termination thereof, or of any changes which would reduce the coverage provided thereon, or which change any limits of the insureds thereon. If any portion of the operations under this Agreement is to be subcontracted by Rail-Term in accordance with the terms of this Agreement, Rail-Term shall require that such subcontractor shall provide and maintain insurance coverages as set forth herein, and shall require that subcontractor shall indemnify, defend and indemnify Railroad to the same extent and under the same terms and conditions as Rail-Term is required to release, defend and indemnify Railroad herein. Such subcontracting of work in no way reduces Rail-Term's obligations or requirements under this Agreement. Rail-Term shall provide Railroad with Certificates of Insurance at the inception of this Agreement and at least once a year thereafter, to be received by Railroad on or before the date upon which the policies expire reflecting at least the minimum coverage as specified herein. Such Certificate shall specifically indicate the terms required under this Section 4. If at any time during this Agreement Rail-Term shall change the insurer or the terms of any

policy or policies herein defined or shall secure a replacement policy, then Rail-Term shall furnish to Railroad an updated Certificate of Insurance reflecting at least the minimum coverage as specified herein. Upon written request from Railroad but no more frequently than once a year, Rail-Term agrees to furnish Railroad with a certified copy of the insurance policy(s) providing the coverage required herein. Rail-Term warrants that this Section 4 has been thoroughly reviewed by Rail-Term's insurance agent(s)/broker(s), who have been instructed by Rail-Term to procure the insurance coverage required by this Agreement. Any failure by Rail-Term to maintain the insurance coverage set forth herein shall constitute a material breach of this Agreement. In the event of any such breach, in addition to pursuing any other remedies in law or in equity, Railroad may, at its election, terminate this Agreement without further notice.

5. **Indemnification.**

(a) Except to the extent caused by the negligence or willful misconduct of the Railroad (or any of its employees, contractors, sub-contractors or agents), Rail-Term shall indemnify, defend and save harmless the Railroad, its parent company, affiliates and subsidiaries, and their respective officers, directors, employees, representatives and agents (collectively the "the Railroad Indemnitees") from and against all liabilities, causes of action, proceedings, claims and demands for any losses, costs, damages or expenses suffered or incurred by the Railroad and/or the Railroad'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 the Railroad caused by, resulting from or attributable to any of the following: (i) the failure of Rail-Term or any of its employees, contractors, sub-contractors or agents to discharge or perform any of the Rail-Term or of any of its employees, contractors, sub-contractors or agents, relating in any way to the performance or non-performance of Rail-Term's obligations under this Agreement; provided, however in no event shall Rail-Term be liable to the Railroad for indirect or consequential damages or loss of revenue and anticipated profits.

(b) Except to the extent caused by the negligence or willful misconduct of Rail-Term (or any of its employees, contractors, sub-contractors or agents), B&P and R&S shall, jointly and severally, indemnify, defend and save harmless Rail-Term, its parent company, its affiliates and subsidiaries, and their respective 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 losses, costs, damages or expenses suffered or incurred by Rail-Term and/or Rail-Term's

liable to Rail-Term for indirect or consequential damages or loss of revenue and anticipated profits.

(c) The party seeking indemnification pursuant to this Section 5 (the "Indemnified Party") shall give the party obligated to indemnify (the "Indemnifying Party") notice of any claim or assertion of liability by a third party with respect to which the Indemnified Party is seeking indemnification (a "Claim"). The Indemnifying Party shall have the right to undertake the defense of such Claim (by counsel or other representatives of its own choosing and reasonably acceptable to the Indemnified Party) at the Indemnifying Party's sole risk and cost. Notwithstanding the fact that the Indemnifying Party undertakes the defense of a Claim, if there is a reasonable probability that the Claim may materially and adversely affect the Indemnified Party, the Indemnified Party (by counsel or through other representatives of its own choosing) shall have the right, at its expense, to participate in the defense, compromise or settlement of the Claim. If the Indemnifying Party undertakes the defense of a Claim, (i) the Indemnifying Party shall keep the Indemnified Party informed of the status of the defense and furnish the Indemnified Party with copies of all documents, instruments and information reasonably requested by the Indemnified Party in connection with the Claim; (ii) the Indemnified Party (by counsel or other representatives of its own choosing and at its own expense) shall have the right to consult with the Indemnifying Party (and its counsel and representatives) concerning the Claim, and the Indemnifying Party and the Indemnified Party (and their respective counsel and representatives) shall cooperate with respect to the Claim; and (iii) the Indemnifying Party shall not, without the written consent of the Indemnified Party, settle or compromise a Claim or consent to the entry of a judgment without obtaining from the claimant or plaintiff an unconditional release of all liability of the Indemnified Party in respect of such Claim in a form satisfactory to the Indemnified Party and under circumstances which do not require the Indemnified Party to pay any money or consent to the taking or withholding of any action affecting it or any of its properties, assets or businesses. If the Indemnifying Party does not elect to undertake the defense of a Claim or fails to defend the Claim within a reasonable time after notice of the Claim, the Indemnified Party shall have the right to undertake the defense, compromise or settlement of the Claim (by counsel or other representatives of the Indemnified Party's own choosing) on behalf of, for the account of and at the risk and cost of the Indemnifying Party. In such event, the Indemnifying Party shall pay (in addition to any other sums required to be paid under the terms of this Agreement) the costs and expenses incurred by the Indemnified Party in connection with the defense, settlement or compromise of the Claim as and when those costs are incurred.

6. <u>Hardware and Software</u>.

(a) During the Term, the Railroad will permit Rail-Term to use its Alstom DCS control system and the Safetran communication system. Until Rail-Term returns the Alstom DCS control system and/or the Safetran communication system, Rail-Term agrees that it shall maintain the Alstom DCS System and the Safetran communication system in good working order, which maintenance shall include obtaining and installing all software upgrades, fixes and updates. While Rail-Term uses the Alstom DCS control system and/or the Safetran communication system, Rail-Term will provide the Railroad with a copy of the Alstom DCS

control system software and the Safetran communication system software everytime there is an upgrade, a fix or an update to same. If the Alstom DCS control system and/or the Safetran communication system are not returned before the end of the Term, Rail-Term will return to the Railroad, at the end of the Term, the Alstom DCS control system, including all upgrades, fixes and updates, and the Safetran communication system, along with all related equipment, software and hardware, both of which shall be in good operating condition.

(b) Except as provided in Section 5(e) above, Rail-Term will be responsible for providing the necessary computer and ancillary machines or equipment and related computer programs to permit Rail-Term to perform the Dispatching Services. Rail-Term will be responsible for all costs associated with necessary changes, modifications, upgrades or replacements to the control system or such other machines, equipment and programs. If the Railroad requires Rail-Term to make a specific change to the control system that is beyond the scope of a necessary change, modification, upgrade or replacement, and if the Railroad agrees, in writing, to pay for the cost of such additional change, modification, upgrade or replacement, then Rail-Term agrees to implement such change. As such and for the purpose, among others, of keeping cost to a minimum, Rail-Term will work to introduce, at Rail-Term's cost, its own new DCS control system in a timely manner. Rail-Term agrees that it shall not introduce or implement such new DCS control system unless and until the Railroad has been given an opportunity to review all aspects of such system that relate in any way to the performance of the Dispatching Services and has approved, in writing, of such introduction and implementation (which approval shall not be unreasonably withheld). In the event that Rail-Term introduces or implements such new DCS control system, Rail-Term agrees that prior to implementation and within ten (10) days after the implementation of the [illegible] of same, it will provide the Railroad with a copy of software related to such system for the Railroad to use to prepare for, and to use during, an emergency. (For purposes of this Section 6(b), an "emergency" means a time period or circumstance when the Dispatching Services cannot become unavailable from Rail-Term as set forth herein, but does not include any time period after the end of the Term).

(c) After the execution of this Agreement but prior to the Effective Date, the parties will develop a mutually agreeable written emergency protocol that will set forth the parties respective obligations and duties in the event of certain emergency situations (the "Emergency Protocol"). After such Emergency Protocol has been agreed to by the parties, it will become a part of this Agreement. As a part of such Emergency Protocol, within the first three (3) months of the Term, Rail-Term agrees that it shall, at its expense, install a duplicate dispatching location at a site chosen by the Rail-Term (the "Duplicate Site"). After the Duplicate Site has been installed, Rail-Term shall, at its expense, maintain such Duplicate Site during the entire Term. Rail-Term agrees that such Duplicate Site shall contain all necessary equipment, hardware and current versions of all necessary software, in good working order, that, should the main

frequently than once every six months, Rail-Term agrees to provide training for an employee of the Railroad, at Railroad's expense, sufficient to permit such employee to perform Dispatching Services from the Duplicate Site. Until the Duplicate Site has been installed, and unless the Emergency Protocol provides otherwise, a duplicate dispatching site shall be located at a site chosen by the Railroad and Rail-Term shall, at its expense, ensure that the Railroad has current versions of all software to permit the performance by Rail-Term of Dispatching Services from such duplicate site. Rail-Term agrees that it shall ensure that the Duplicate Site (including its location and condition) shall at all times comply with all applicable laws, rules and regulations (including, without limitation, those laws, rules and regulations to which the Railroad and its operations are subject) and Rail-Term agrees that it shall be solely responsible for all cost and expense associated with ensuring and maintaining compliance with such laws, rules and regulations.

7. **Accident and Incident Investigation; Compliance with Laws.**

(a) During the Term, Rail-Term agrees that it shall comply with those provisions of law implicated by an accident or other incident relating to the Railroad's operations, and further, Rail-Term agrees to comply with those policies and protocols of the Railroad relating to such accidents and incidents as are set forth as Exhibit C hereto (the "Protocol"), and as the same are amended or modified from time to time by the Railroad. In addition, Rail-Term agrees to cooperate with the Railroad with respect to the conduct of the Railroad's internal investigations of operational matters.

(b) 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.

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 shall not sub-contract the performance of any or all of its obligations hereunder to any third party without the prior written approval of the Railroad, 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, contractors or subcontractors as an employee or agent of the Railroad. Except as provided for in Section 5, the Railroad 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, contractors or subcontractors shall be resolved by Rail-Term, the sy

the applicable employees, contractors or subcontractors), without any liability on the part of the Railroad.

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 (each, a "Rail-Term Event of Default"):

(i) If Rail-Term fails to perform all or any part of the Dispatching Services, or any of its other obligations hereunder, in accordance with the terms and conditions of this Agreement (including all Exhibits and Schedules to this Agreement);

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

(iii) If Rail-Term becomes insolvent, bankrupt, makes a proposal, 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;

(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;

(vi) If an accident or collision (or near accident or collision) determined to have been caused by Rail-Term occurs on any rail line for which Rail-Term is providing Dispatching Services; or

(vii) If Rail-Term, in performing or failing to perform the Dispatching Services, is acting in a manner that an appropriate regulatory body has determined in a final ruling that such performance or failure to perform is in violation of applicable laws, rules or regulations or is likely to result in any condition that is unsafe.

(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 thirty (30) days after its receipt of such notice;

then the Railroad 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, and recognizing that (i) the performance of the Dispatching Services are critical to the Railroad's operations; (ii) if a Rail-Term Event of Default occurs that results in the cessation of, or substantial diminishment of the Dispatching Services, then the Railroad shall have the right to terminate this Agreement (reserving for itself all other available legal remedies) if such Rail-Term Event of Default is not cured by Rail-Term within 24 hours after written notice of such Rail-Term Event of Default is provided to Rail-Term; (ii) if Rail-Term fails to maintain the insurance required by Section 8 hereof, then the Railroad shall have the right to terminate this Agreement (reserving for itself all other available remedies) upon written notice to Rail-Term; and (iii) if the Rail-Term Event of Default is one described in Section 9(a)(vi) or Section 9(a)(vii) above, then the Railroad shall have the right to terminate this Agreement (reserving for itself all other available remedies) upon written notice to Rail-Term.

10. **Default by the Railroad**

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

(i) If either B&P or R&S fails to make payment of any of the compensation to Rail-Term as provided for hereunder when due;

(ii) If either B&P or R&S fails to observe or perform all or any part of its other obligations in accordance with the terms and conditions of this Agreement (including all Exhibits and Schedules to this Agreement);

(iii) If either B&P or R&S ceases to carry on its business;

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

(v) If a receiver, receiver and manager, or trustee is appointed in respect of B&P or R&S; or

(vi) If the holder of a security interest takes possession of all or a substantial part of B&P's or R&S's property;

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

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

(ii) Should the Railroad fail to promptly and immediately undertake all necessary corrective actions to remedy the Railroad Event of Default within an initial 10-day period after its receipt of such written notice from Rail-Term; or

(iii) Should the Railroad not remedy the Railroad Event of Default within thirty (30) days after its receipt of such notice;

then 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 the Railroad for damages arising in consequence of the Railroad 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 in attempting to remove such action or causes and shall promptly notify the other party of its extent and probable duration. Recognizing, however, the critical nature of the Dispatching Services to the Railroad's operations, in the event of the cessation or substantial diminishment of the Dispatching Services as a result of a force majeure event, Rail-Term agrees to diligently abide by and comply with the Emergency Protocol identified in Section 6(c) hereof in order to assure the continuation of the Dispatching Services as soon as possible. If, however, Rail-Term does not diligently abide by and comply with such Emergency Protocol, then the Railroad shall (without waiving any other remedies available to it) be permitted to terminate this Agreement on 24 hours written notice to Rail-Term, unless Rail-Term cures such failure before the end of such 24 hour period.

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.

(c) Notwithstanding 12(a) and (b) above, the Railroad shall be permitted to disclose the terms and conditions of this Agreement, and all information related or pertaining thereto (i) to the extent required by applicable law and regulation (including, without limitation, as required by applicable securities laws, securities regulations, and the rules and regulations of any applicable stock exchange), (ii) to its employees, officers, directors and professional advisors and others who have a duty to keep such information confidential, (iii) to any party, who has a duty to keep such information confidential, to whom the Railroad desires or proposes to assign, or partially assign, its rights under this Agreement, and (iv) to its affiliates, subsidiaries, parent company and their respective employees, officers and directors who have a duty to keep such information confidential. Notwithstanding the foregoing, in no circumstances shall the terms and conditions of this Agreement or any information related or pertaining thereto be disclosed to anyone not engaged by the Railroad to perform services similar to those provided by Rail-Term hereunder.

13. **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 thereof, 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: 10,705 Côte De Liesse, Suite 201
Dorval, Quebec
H9P 2R9
Attention: François Prénovost
Fax: 514-422-8225

Rochester, New York
14624
Attention: David J. Collins, President
Fax: 585-463-3305

14. **Governing Law**. The terms and conditions of this Agreement shall be governed, construed, interpreted and enforced in accordance with the domestic laws of the State of New York, without giving effect to any choice of law or conflict of law provision or rule (whether of the State of New York or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of New York.

15. **Arbitration**. Any disputes arising out of this Agreement which cannot be resolved by the Parties themselves or pursuant to the terms of this Agreement shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association ("AAA"). The arbitration is to be conducted by a single arbitrator in the State of New York in accordance with the expedited commercial arbitration rules, as existing at or the time the arbitration is commenced of the AAA. Modification to the expedited procedures may be made only for exceptional good cause, as determined by the arbitrator. Judgment upon the arbitration award may be entered in a court of competent jurisdiction. The arbitrator will be entitled to apportion the costs of the arbitration proceedings and to award any party actual attorney fees and costs on such basis as the arbitrator may determine. The arbitrator shall have the authority to award injunctive relief.

16. **Severability**. If any provision of this Agreement is held, in whole or in part, to be invalid, the remainder of such provision and this Agreement shall remain in full force and effect, with the offensive term or condition being stricken to the extent necessary to comply with any conflicting law.

17. **Successors and Assigns**. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors, lawful assigns, heirs and personal representatives. Rail-Term may not assign this Agreement without the prior written consent of the Railroad, which consent shall not be unreasonably withheld by the Railroad. Without limiting the generality of the foregoing, it shall be reasonable for the Railroad to withhold its consent to any assignment by Rail-Term to a competitor of the Railroad or to any third party who has not been proven to the Railroad to have the ability to perform the Dispatching Services in accordance with the terms and conditions of this Agreement. The Railroad shall be permitted to assign this Agreement (or to partially assign this Agreement) in connection with the sale of all or any part of the business or operations of either Railroad, so long as prior to such assignment, such assignee agrees to assume the applicable obligations of the Railroad hereunder. An assignment of this Agreement by either party shall not release such party from its obligations hereunder unless the other part expressly agrees to such release in writing. Any purported assignment of this Agreement, in whole or in part, except as permitted above, shall be void and of no effect.

18. **Entire Agreement**. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement. The provisions of this Agreement shall supersede all contemporaneous oral agreements, communications and understandings and

all prior oral and written communications, agreements and understandings between the Parties, with respect to the subject matter of this Agreement. Each Party acknowledges that no representation, inducement or condition not set forth herein has been made or relied upon by either Party.

19. Interpretation. Each Party acknowledges that this Agreement was fully negotiated by the Parties and shall not be construed more strictly against any Party.

20. Headings. The headings used herein have been used for the convenience of the parties and are not to be used in construing this Agreement.

21. Amendments, No Waivers.

(a) This Agreement may be amended only by a written agreement signed by each Party.

(b) Any waiver of, or consent to depart from, the requirements of any provision of this Agreement shall be effective only if it is in writing and signed by the Party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of any Party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right.

22. Other.

(a) During the Term, the Railroad (and its employees and agents), upon 48 hours advance written notice to Rail-Term, shall be permitted to audit Rail-Term's business records relating to its performance of the Dispatching Services and its other obligations under this Agreement.

(b) In addition to any other report otherwise required, Rail-Term, at the written request of the Railroad, agrees to provide to the Railroad, such reports, documents and information related to the Dispatching Services as may be reasonably requested by the Railroad, to assist the Railroad in connection with the pursuit or defense of claims arising out of the lines over which the Dispatching Services are to be provided or to assist the Railroad in the investigation of accidents or incidents.

(c) During the three (3) month period prior to, and at the option of the Railroad for up to three (3) months following, the termination or expiration of this Agreement, Rail-Term agrees that it shall provide "Transition Services" to the Railroad, or to such third party(ies) who will perform Dispatching Services for the Railroad following the termination or expiration of this Agreement, to allow the smooth transfer of (i) its communications systems, and (ii) all the Railroad operating documentation as is reasonably necessary to avoid any cessation of, or substantial diminution of, Dispatching Services for the Railroad's rail lines. If the Railroad elects to have Rail-Term provide Transition Services following the termination or expiration of this Agreement, as

provided above, then for each month following the termination or expiration of this Agreement that Rail-Term provides such Transition Services, the Railroad shall pay to Rail-Term (prorated for any partial month) an amount equal 50% of the monthly fee paid by Railroad under this Agreement for the last month of the Term.

*[Signatures appear on the following page.]*

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the Effective date.

**RAIL-TERM CORP.**

By: Francois Pronovost
Its: Executive Vice President

**BUFFALO & PITTSBURGH RAILROAD, INC.**

By: David J. Collins
Its: President

**ROCHESTER & SOUTHERN RAILROAD, INC.**

By: David J. Collins
Its: President

## EXHIBIT A

### Dispatching Services

Dispatching Services, as used in the Agreement to which this Exhibit A is attached, means all of those activities and services previously performed by the Railroad's internal dispatchers with respect to the trains operating on the Railroad's rail lines. Such Dispatching Services shall include, but not be limited to, issuance by Rail-Term's rail traffic control center of operating instructions (including such operating instructions communicated by Railroad to Rail-Term from time to time) to all qualified employees of any railway authorized to operate over said railway lines and to any authorized persons engaged in track and signal maintenance thereon, having to occupy the railway lines (or any part thereof) in relation to their work.

Dispatching Services shall also include:

- Training in rules and hardware and software operation, at Rail Term's cost and expense, for Rail Term by Railroad personnel or their representatives. After the end of the initial training period, all retraining of Rail Term's dispatchers will be performed by Rail Term, at Rail Term's sole cost and expense, but with the cooperation of the Railroad;
- Transfer of the Alstom system, at Rail Term's expense, to Vermont;
- 24 hours per day, 7 days per week train control service on computer assisted DCS (form D control system);
- A dedicated emergency telephone monitoring manned and operational 24/7/365 with contact numbers provided for Railroad personnel notification;
- The issuance of daily order bulletins and speed restrictions as issued by appropriate Railroad personnel;
- Keeping daily train movement records which shall be made available for review by Railroad personnel and FRA or other regulatory agencies as required;
- All conversations with crews, M of W personnel, supervisors and other parties gaining access to the railroad will be recorded on a state of the art voice logger;
- Initial incident reporting and flash reports to regulatory agencies and the Railroad's operating personnel;
- Cost of the telephone communications from Vermont to the Railroad (voice and fax);
- Updating the RMI system, moving trains in the computer including but not limited to initializing, departing, and arriving trains, recording setoffs and pickups, maintaining current standing order of cars in train as provided by train crews and/or AEI readers, and providing all necessary RMI training to Rail-Term employees, at Rail-Term's expense;
- Required to work in unison with Railroad customer service in coordinating work done by

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- Conducting the procedure of the Emergency Call list including periodic testing and review of procedures for proper handling of various Emergency events;
- Overall responsibility of managing the safe and efficient movement of trains / track care in conjunction with transportation managers;
- Taking ownership and taking all reasonable actions necessary to maximize the advancement of trains and power utilization;
- Responsible for reporting and notifying various agencies, emergency contacts, and railroad personnel as required;
- e-mailing the dispatching transfer report to the party(ies) designated by the Railroad after the end of every shift.
- The following train assignments (subject to change by the Railroad):
  - **R&S:**
    - 17:00 Monday to Friday - BL-1 — Rochester, NY to Le Roy, NY
    - 08:00 Sunday to Friday - BY-1 — Rochester, NY to Batting / Townline
    - 20:00 Sunday to Friday - BY-2 — Rochester, NY to Batting / Townline
    - 11:59 Sunday to Friday - GW-1 — Rochester, NY to Mt. Morris
    - 23:59 Sunday to Friday - RS 1/2 — Rochester, NY to Silver Springs, NY
    - 05:00 Monday to Saturday - BY-3 — Rochester, NY yard job

  - **B&P (N/E)**
    - 09:00 Sunday to Thursday - BF-1 — Buffalo, NY yard job
    - 20:00 Tuesday to Saturday - BF-2 — Buffalo, NY yard job
    - 09:00 Friday / Saturday - BFRE — Buffalo, NY yard job
    - 20:00 Sunday / Monday - BFRE — Buffalo, NY yard job
    - 10:00 Monday to Friday - BR-1 — Bradford, Pa yard job
    - 00:00 Monday to Friday - JB-2 — Johnsonburg, Pa to Hutchins, Pa
    - 08:00 Monday to Friday - JB-1 — Johnsonburg, Pa yard job
    - 08:00 Extra Sunday - JB-1 — Johnsonburg, Pa yard job
    - 17:00 Monday to Friday - SIBF — Salamanca, NY to Buffalo, NY
    - 08:00 Monday to Friday - SIEB — Salamanca, NY to Johnsonburg, Pa
    - 07:00 Tuesday / Thursday - WAER — Warren, Pa to Erie, Pa
    - 16:00 Monday to Friday - WAIQ — Warren, Pa to Johnsonburg, Pa
    - 07:00 Mon. / Wed. / Fri. - YAWA — Warren, Pa to Corry, Pa

  - **B&P (S/E)**
    - 07:00 Monday to Friday - BT-1 — Butler, Pa yard job
    - 07:00 Extra Saturday - BT-1 — Butler, Pa yard job
    - 16:00 Monday to Thursday - BT-2 — Butler, Pa yard job
    - 07:00 Sunday - BT-2 — Butler, Pa yard job
    - 09:00 Monday to Friday - BT-3 — Butler, Pa to Bruin, Pa
    - 23:00 Extra Sunday / Monday - BTNC — Butler, Pa to New Castle, Pa
    - 07:00 Monday to Friday - DB-1 — Dubois, Pa to Brookville, Pa
    - 07:00 Extra Saturday - DB-1 — Dubois, Pa to Brookville, Pa
    - 18:00 Monday to Friday - DB-2 — Dubois, Pa to East Dubois, Pa
    - 00:00 Monday to Friday - PW-1 — Butler, Pa to Bakerstown, Pa

| | |
|---|---|
| • 19:00 Extra Sunday / Monday - RIBT | Riker, Pa to Butler, Pa |
| • 08:00 Sunday to Thursday - RIJB | Riker, Pa to Johnstown, Pa |
| • 19:00 Sunday / Monday - RIRE | Riker, Pa to Johnstown, Pa to Butler, Pa |
| • 00:00 Monday to Friday - PSDB | Dubois, Pa to Driftwood, Pa to Sligo, Pa |
| • 00:00 Monday to Friday - PSFR | Kittanning, Pa to Reesedale, Pa |

Dispatching Services shall exclude:

- The cost of setting-up and connecting Rail Term's radio facilities located at their Vermont location to the Railroad's existing radio communications infrastructure, in a manner reasonably acceptable to, and approved in writing by, the Railroad;
- The cost of setting-up and connecting Rail Term's radio facilities located at their Vermont location to the Railroad's existing controlled switches' cads system, in a manner reasonably acceptable to, and approved in writing by, the Railroad; and
- RMF access and set-up, and its associated cost, which will be the responsibility of the Railroad.

From time to time during the Term, upon reasonable advance written notice to Rail Term, the Railroad shall have the right to: (i) increase the rail lines subject to this Agreement (provided, however, if such increase of rail lines materially increases the obligations of Rail Term hereunder, such increase in rail lines will not be effective unless and until the parties have agreed, in writing, upon any changes to Exhibit B necessitated by such increase); (ii) exclude rail lines from this Agreement); and (iii) otherwise modify and amend this Exhibit A (provided, however, if such modification or amendment materially increases the obligations of Rail Term hereunder, such modification or amendment will not be effective unless and until the parties have agreed, in writing, upon any changes to Exhibit B necessitated by such modification or amendment).

# 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 Gebo, 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

Dispatching services in accordance with this Agreement. Furthermore, while performing the VTR Dispatching, the VTR Employee shall perform other Rail-Term dispatching work (the "Dispatching Work"), as defined from time to time at the sole discretion of Rail-Term, for other Rail-Term customers, at no charge to Rail-Term. While the VTR Employee is performing the Dispatching Work, the employee will be subject to the sole control of Rail-Term. If the VTR Employee leaves VTR, or will not perform the VTR Dispatching Services, or will not perform the Dispatching Work, Rail-Term shall then perform the VTR Dispatching at the rate described in Exhibit B;

(c) At the request of VTR, as of the Effective Date, Chris Senecal (the "Available Employee") will be made available to VTR, at VTR's cost, one (1) day per month, to perform work for VTR (the "VTR Work"). While the Available Employee is performing the VTR work, he will be subject to the control of VTR. If the Available Employee ceases to be employed by Rail-Term, Rail-Term will not be required to make any other Rail-Term employees available to perform the VTR Work. While the VTR Work is performed by the Available Employee, the rate of compensation will be adjusted to reflect this arrangement, as more fully described in Exhibit B. If the Available Employee ceases to be employed by Rail-Term, the rate of compensation will be adjusted to reflect this arrangement, as more fully described in Exhibit B;

(d) It is Rail-Term's intention to perform the Dispatching Services from within the State of Vermont during the Term. Rail-Term shall only perform the Dispatching Services from outside of the State of Vermont before the 6th anniversary of the Effective Date of this Agreement upon the written approval of VTR, which approval will not be unreasonably withheld.

3. <u>Compensation</u>. During the term of this Agreement or any written renewal thereof, VTR shall pay Rail-Term compensation for the Dispatching Services as more fully described in <u>Exhibit B</u> of the Agreement, which such Exhibit may be amended from time to time upon mutual written consent of the Parties.

4. <u>Insurance</u>. Rail-Term shall, as long as it is in the business of providing services similar to the Dispatching Services as defined herein, at its expense, obtain, and maintain, throughout the term of this Agreement, plus three (3) years after the expiration of this Agreement, the insurance described below:

(a) General liability insurance with a limit of liability of $25,000,000.00, the amount written on a claims made basis against liability imposed by law for death or injury to persons and for damage to property. The policy shall specifically, by its wording or by endorsement, include:

(i) Coverage for Rail-Term's employees: It is agreed among the Parties that all agents or subcontractors to whom Rail-Term subcontracts any portion of the services hereunder will be required to carry sufficient insurance, before beginning working on the property of VTR and that Rail-Term is entitled

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 Indemnities") 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 Indemnities 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' 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 Team 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

If to VTR: One Railway Lane
Burlington, Vermont, 05401
Attention: David W. Wulfson
Fax: 802-658-2553

15. **Governing Law**. The terms and conditions of this Agreement shall be governed, construed, interpreted and enforced in accordance with the domestic laws of the State of New York, without giving effect to any choice of law or conflict of law provision or rule (whether of the State of New York or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of New York.

16. **Arbitration**. Any disputes arising out of this Agreement which cannot be resolved by the Parties themselves or pursuant to the terms of this Agreement shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association ("AAA"). The arbitration is to be conducted by a single arbitrator in the State of New York in accordance with the expedited commercial arbitration rules, as existing as of the time the arbitration is commenced of the AAA. Modification to the expedited procedures may be made only for exceptional good cause, as determined by the arbitrator. Judgment upon the arbitration award may be entered in a court of competent jurisdiction. The arbitrator will be entitled to apportion the costs of the arbitration proceedings and to award any party actual attorney fees and costs on such basis as the arbitrator may determine. The arbitrator shall have the authority to award injunctive relief.

17. **Severability**. If any provision of this Agreement is held, in whole or in part, to be invalid, the remainder of such provision and this Agreement shall remain in full force and effect, with the offensive term or condition being stricken to the extent necessary to comply with any conflicting law.

18. **Successors and Assigns**. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors, lawful assigns, heirs and personal representatives. Neither Party may assign this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld. Any purported assignment of this Agreement, in whole or in part, without the prior written consent of the non-assigning Party shall be void and of no effect.

19. **Entire Agreement**. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement. The provisions of this Agreement shall supersede all contemporaneous oral agreements, communications and understandings and all prior oral and written communications, agreements and understandings between the Parties with respect to the subject matter of this Agreement. Each Party acknowledges that no representation, inducement or condition not set forth herein has been made or relied upon by either Party.

20. **Interpretation**. Each Party acknowledges that this Agreement was fully negotiated by the Parties and shall not be construed more strictly against any Party.

21. **Headings**. The headings used herein have been used for the convenience of the parties and are not to be used in construing this Agreement.

22. **Amendments, No Waivers**.

(a) This Agreement may be amended only by a written agreement signed by each party.

(b) Any waiver of, or consent to depart from, the requirements of any provision of this Agreement shall be effective only if it is in writing and signed by the Party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of any Party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right. No single or partial exercise of any such right shall preclude any other or further exercise of such right or the exercise of any other right.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement as of the Effective date.

**RAIL-TERM CORP.**

By:
Its: EXECUTIVE V.P. PRESIDENT & SECRETARY

**VERMONT RAILWAY INCORPORATED**

By:
Its: Pres

## EXHIBIT A

### Dispatching Services

Dispatching Services shall include, but not be limited to issuance by Rail-Term's rail traffic control center of operating instructions to all qualified employees of any railway authorized to operate over said railway lines and to any authorized persons engaged in track and signal maintenance thereon having to occupy the railway lines (or any part thereof) in relation to their work.

Dispatching Services shall also include:

- 24 hours per day, 7 days per week train control service on computer assisted MCS (form M control system) for VTR alone;
- Issuance of bulletin orders and monthly operating bulletin;
- Weather monitoring;
- A dedicated emergency telephone monitoring;
- The issuance of speed restrictions;
- Keeping daily train movement records;
- Keeping and managing yard information at Whitehall and White River Junction;
- All conversations recorded on a state of the art voice logger;
- Initial incident reporting and flash reports to regulatory agencies and VTR operating personnel;
- The following train assignments (subject to change):

VERMONT RAILWAY:

- 05:30 Monday only -- Rutland to Burlington and return (RDBD/BDRD);
- 06:00 Sunday to Saturday -- Florence to Rutland and return (FLSW);
- 07:00 Monday to Saturday – Rutland road switcher (RDSW) - switches industries around Rutland;
- 23:00 Monday to Saturday – Florence road switcher (FLSW) - switches industries around Florence;
- 23:00 Monday to Saturday – Rutland to Middlebury and return (RDMD/MDRD) swaps train with the Burlington to Middlebury (BDMD/MDBD) at the meeting point;
- 02:00 Monday to Saturday Burlington to Middlebury and return (BMMD/MDBD) swaps train with the Rutland to Middlebury (RDMD/MDRD) at the meeting point;
- 08:00 Monday to Saturday Burlington road switcher (BDSW) - switches industries around Burlington;
- Tuesday or Thursday - Rutland to North Bennington and return (BNR extra);

GREEN MOUNTAIN RAILWAY COMPANY:

- 08:00 Monday to Saturday -- Rutland to Bellows Falls and return (GMRC 263-264);
- 06:00 Monday to Saturday - Bellows Falls road switcher (DASW) - switches industries around Bellows Falls;
- 08:00 Monday to Friday Ludlow road switcher (LOSW) -- switches industries around Ludlow;

CLARENDON AND PITTSFORD RAILROAD:

- 10:00 Sunday to Saturday – Rutland to Whitehall and return (CLP 264/263) - interchanges traffic with CP;
- 07:10 Monday to Friday -- Amtrak 294 - Rutland to CPC 77
- 11:10 Saturday only – Amtrak 292 – Rutland to CPC 77
- 17:15 Sunday only - Amtrak 296 – Rutland to CPC 77
- 19:12 Saturday to Thursday -- Amtrak 291 CPC 77 to Rutland
- 22:12 Friday only Amtrak 293 – CPC 77 to Rutland

WASHINGTON COUNTY RAILROAD:

- 07:00 Monday to Friday – White River Junction to Wells River and return (WRJNP) swaps train with the Newport to Wells River (NPWRJ) at the meeting point;
- 07:00 Monday to Friday - Newport to Wells River and return (NPWRJ) swaps train with the White River Junction to Wells River (WRJNP) at the meeting point;
- One movement daily between Montpelier to Barre -- operates under Rule 97

NEW YORK & ODGENSBURG RAILWAY:

- Operates under Rule 98.

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

AUG 03 2010

BOARD MEMBERS:

MICHAEL S. SCHWARTZ, CHAIRMAN
V.M. SPEAKMAN, JR., LABOR MEMBER
JEROME F. KEVER, MANAGEMENT MEMBER

John D. Heffner
Attorney at Law
1750 K Street, N.W.; Suite 200
Washington, D.C. 20006

Re: Rail-Term Corp. Request for Reconsideration
B.C.D. 10-33

Dear Mr. Heffner:

The Board has received your request for reconsideration of the above captioned Board Coverage Decision regarding Rail-Term Corp.'s dispatching services. The Board is reviewing the Petition for Reconsideration that you originally dated June 8, 2010.

Enclosed with this letter is the record on reconsideration concerning Rail-Term Corp.'s request for reconsideration. The Board will grant 30 days for you to review this record and submit any additional correspondence or evidence that you feel should be included in the record. Upon receipt of any additional materials or the expiration of the 30-day period, the Board will then begin reviewing the record and will draft a decision on reconsideration of the status of Rail-Term Corp. under the Railroad Retirement Act and Railroad Unemployment Insurance Act.

Sincerely,

Beatrice Ezerski

FOR THE BOARD
Beatrice Ezerski
Secretary to the Board

Enclosure

SUITE 200
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939

August 23, 2010

Ms. Beatrice Ezerski
United States Railroad Retirement Board
844 North Rush Street,
Chicago, IL 60611-2092

**RE: Rail-Term Corp. Request for Reconsideration**
**B.C.D. 10-33**

Dear Ms. Ezerski:

I am writing with respect to the Board's letter to me dated August 3, 2010, in connection with the above-captioned Petition for Reconsideration filed by Rail-Term Corp. Your letter acknowledges receipt of my client's Petition and includes an index to and copies of documents constituting the "record" on reconsideration. You request that we review these documents and provide any additional documents that should be included in the record on or before September 3, 2010.

We have reviewed your list and believe the following additional items should be included in the record:

1. A copy of a Petition for Declaratory Relief filed on June 3 with the Surface Transportation Board. This case is currently pending and we will provide you with a copy of that Board's decision when issued.
2. A copy of the Dispatching Services Agreement between Rail-Term Corp. and the Vermont Railway Incorporated dated Feb. 18, 2005.

3. A letter from the Railroad Retirement Board dated April 30, 2010, advising that Rail-Term Corp. became a covered entity as of Feb. 18, 2005.
4. A letter from Rail-Term Corp. to Board member Jerry Kever dated Oct. 23, 2007.

Also I note that our Petition for Reconsideration contains a minor error. The document bears the date June 8 on both the cover page and the signature page. The correct date should have been July 9, 2010.

Please acknowledge receipt of this letter and additional information.

Sincerely yours,

John D. Heffner

Enclosures

cc: Mr. Francois Prenovost
Dennis Devaney, Esq.

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

SEP 08 2010

BOARD MEMBERS:

MICHAEL S. SCHWARTZ, CHAIRMAN
V.M. SPEAKMAN, JR., LABOR MEMBER
JEROME F. KEVER, MANAGEMENT MEMBER

John D. Heffner
Attorney at Law
1750 K Street, N.W.; Suite 200
Washington, D.C. 20006

Re: Rail-Term Corp. Request for Reconsideration
B.C.D. 10-33

Dear Mr. Heffner:

The Board has received your supplements to the Record on Reconsideration. Attached you will see that all of your requests to include documents were honored. I note that the Board had already included the Dispatching Services Agreement as an Appendix to the Record.

As stated in previous correspondence, now that the Record on Reconsideration is complete, the Board will review the record and draft a decision on reconsideration of the status of Rail-Term Corp. under the Railroad Retirement Act and Railroad Unemployment Insurance Act.

Sincerely,

Beatrice Ezerski

FOR THE BOARD
Beatrice Ezerski
Secretary to the Board

Enclosure

# Index to Record on Reconsideration
# Rail-Term Corp.

| Exhibit | Title | Date |
|---|---|---|
| 1 | Board Questionnaire Submitted to Rail-Term | August 14, 2006 |
| 2 | Rail-Term Initial Response to Board | September 7, 2006 |
| 3 | Board's 2nd Request for Questionnaire Response | September 21, 2006 |
| 4 | Rail-Term Request for Extension | October 26, 2006 |
| 5 | Rail-Term Reply to Questionnaire | November 16, 2006 |
| 6 | Board Request for Additional Information | February 28, 2007 |
| 7 | Informational Response by Rail-Term | April 20, 2007 |
| 8 | Board Coverage Decision 10-33 | April 6, 2010 |
| 9 | Request for Reconsideration by Rail-Term | July 9, 2010 |
| 10 | Board Letter Explaining BCD 10-33 | April 30, 2010 |
| 11 | Petition for Declaratory Relief Filed with STB | June 3, 2010 |
| 12 | Rail-Term Letter to Management Member Kever | October 23, 2007 |
| Appendix | Dispatching Services Agreement | February 18, 2005 |

Record Index

Rail-Term Corporation v. U.S. Railroad Retirement Board

Case No. 11-1093

1. Title Page

2. Board Decision on Reconsideration, B.C.D. 11-14, Rail-Term Corporation, January 28, 2011; letter dated January 28, 2011, transmitting decision to John D. Heffner, counsel for Rail-Term Corporation.

3. Letter dated January 13, 2011, from Beatrice Ezerski, Secretary to the Board, to John D. Heffner, counsel for Rail-Term Corporation, transmitting decision of the Board to grant Rail-Term's request for a stay of filing of service and compensation reports under the Railroad Retirement Act pending the outcome of the Board's Decision on Reconsideration.

4. Letter dated December 6, 2010, from John D. Heffner, counsel for Rail-Term Corporation requesting a stay of the reporting requirements under the Railroad Retirement Act.

5. Memorandum dated November 2, 2010, from Steven A. Bartholow, General Counsel, to the Board, summarizing Surface Transportation Board (STB) Decision, Docket # FD 35381, regarding Rail-Term Corporation, with copy of STB decision.

6. September 8, 2010, letter from Beatrice Ezerski, Secretary to the Board, to John D. Heffner, counsel for Rail-Term Corporation, with Index to Record on Reconsideration and documents.

   1) Index to Record on Reconsideration, Rail-Term Corporation.

   2) April 30, 2010, Board letter explaining B.C.D. 10-33.

   3) June 3, 2010 Petition for Declaratory Relief Filed with STB by Rail-Term Corporation, with Exhibits.

   4) October 23, 2007, letter to Management Member Kever, from Rail-Term Corporation.

5) August 23, 2010, Rail-Term Corporation request for documents to be included in Record on Reconsideration of B.C.D. 10-33.

6) August 3, 2010, acknowledgement of Rail-Term Corporation's request for reconsideration of B.C.D. 10-33, and grant of thirty days to review record and submit additional evidence, with Index to Record.

7) August 14, 2006, questionnaire submitted to Rail-Term Corporation.

8) Rail-Term Corporation's initial response dated September 7, 2006.

9) 2nd request for questionnaire response, dated September 21, 2006.

10) Rail-Term Corporation Request for Extension, dated October 26, 2006.

11) Rail-Term Corporation November 16, 2006, reply to questionnaire.

12) Request for additional information, dated February 28, 2007.

13) Response from Rail-Term Corporation, dated April 20, 2007.

7. B. C.D. 10-33, Rail-Term Corporation, dated April 6, 2010.

8. Rail-Term Corporation Petition for Reconsideration, dated July 9, 2010.

9. Dispatching Services Agreement.

UNITED STATES GOVERNMENT

*MEMORANDUM*

FORM G-115F(1-92)
RAILROAD RETIREMENT BOARD
**FOR BOARD INFORMATION**

NOV 0 2 2010

**TO** : The Board

**FROM** : Steven A. Bartholow
General Counsel

**SUBJECT** : Summary of STB Decision
Docket # FD 35381 Rail-Term Corp.

This Office was recently notified that the Surface Transportation Board reached a decision regarding Rail-Term Corporation's (Rail-Term) Petition for Declaratory Order. In the petition, Rail-Term sought an order from the STB declaring that Rail-Term was not a "rail carrier" within the meaning of the definition of "rail carrier" at 49 USC Section 10102(5).

In a decision dated October 8, 2010 (service date of October 12, 2010), the STB denied Rail-Term's Petition for Declaratory Order. The STB explained that in past cases, when the Railroad Retirement Board referred a case to the STB for an STB ruling on whether an entity was a rail carrier under the Interstate Commerce Act, the Railroad Retirement Board would stay its proceedings to permit the STB to reach its conclusion. In the present case, the STB found that the Railroad Retirement Board was actively engaged in the Herzog Transit Services appeal in front of the 7th Circuit Court of Appeals and was actively engaged in Reconsideration of Rail-Term's coverage decision. Since the Railroad Retirement Board did not directly seek an STB ruling as it had done in the past, the STB declined to address an issue already addressed by another Federal agency (the RRB determined Rail-Term was a covered employer in BCD 10-33). The STB further directly cited that it deferred to the Railroad Retirement Board because of the pending appeal in the 7th Circuit.

I have attached a copy of the STB's decision which denied Rail-Term's Petition for Declaratory Order for your review.

Attachment

LAW OFFICES
JOHN D. HEFFNER, PLLC
1750 K STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939

December 6, 2010

Ms. Beatrice Ezerski
United States Railroad Retirement Board
844 North Rush Street.
Chicago, IL 60611-2092

**RE: Rail-Term Corp., Employer No. 9116**
**Annual Notice to Employers-Railroad Unemployment Insurance Act**

Dear Ms. Ezerski:

At the suggestion of Marguerite Dadabo, Esquire, in the Board's General Counsel Office, I am writing on behalf of Rail-Term Corp. ("Rail-Term") in connection with a notice dated October 4, 2010, entitled "Annual Notice to Employers – Railroad Unemployment Insurance Act." That notice appears to provide an explanation for the Board's calculation of an employers' contribution rate for Board-administered unemployment insurance.

As you may recall, the Board issued a decision dated April 6, 2010, finding Rail-term to be a "covered employer" for the purpose of Railroad Retirement Act and Railroad Unemployment Insurance Act ("RUIA") coverage despite the fact that Rail-Term owns no railroad lines or equipment, provides no railroad services, and does not hold itself out as a railroad common carrier providing transportation for compensation. Accordingly, we filed a timely petition for reconsideration including a request for a stay of the Board's decision. That petition is still pending.

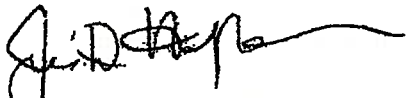
www.heffnerlaw.com

j.heffner@verizon.net

In view of that pending petition as well as any petition for judicial review that would likely follow from any adverse Board ruling on reconsideration, it is very difficult for Rail-Term to comply with your notice request. Potentially, Rail-Term could wind up in the untenable position of being responsible for having to comply with both state and federal unemployment insurance programs as well as the Board's unemployment insurance program. Accordingly, Ms. Dadabo advised me to write the Board to ask that it stay the reporting requirements of this notice until Rail-Term's status under the RUIA is resolved.

Please contact me if you have any questions.

Sincerely yours,



John D. Heffner

cc: Mr. Francois Prenovost
Dennis Devaney, Esq.

7203

Rail Term

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

JAN 13 2011

BOARD MEMBERS:

MICHAEL S. SCHWARTZ, CHAIRMAN
V.M. SPEAKMAN, JR., LABOR MEMBER
JEROME F. KEVER, MANAGEMENT MEMBER

John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006

Re: Request for Administrative Stay

Dear Mr. Heffner:

In your request for reconsideration of the Board's coverage decision concerning the status of Rail-Term Corp. as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, you also asked that the effective date of the initial coverage decision be stayed pending reconsideration. Specifically you stated that "Rail-Term requests that if the Board does not reverse its initial decision, the Board should make the date of coverage the date of the forthcoming decision."

In support of your request, you stated that Rail-Term believes that it is likely to succeed on the merits of the case. You also stated that if the Board's coverage decision were allowed to take effect, Rail-Term would have to "undo a private retirement benefits system it established" for its employees. Finally, you stated that no one, including the public interest, would be harmed by a grant of the requested stay.

Rail-Term's general request for a "stay" must be handled in two distinct parts. The Railroad Retirement Board does have authority under section 8(k) of the RUIA (45 U.S.C. § 358(k)) to decide not to give retroactive effect to a coverage ruling with respect to RUIA contributions. Numerous decisions to apply coverage rulings under the RUIA without retroactive effect have been made by the Board over the years. (see e.g., Board Order 90-149 (Cape Cod and Hyannis Railroad), Board Order 85-53 (Nicolet Badger Northern Railroad), Board Order 85-52 (Railroad Concrete Crosstie), Board Order 78-83 (RSTX, Inc.) Board Order 78-30 (Kansas City Southern Railway with respect to Trans-Mark Services, Inc. and Servitron, Inc.)

Rulings on non-retroactive coverage under the RUIA have been granted by the Board in cases where: (1) the evidence suggests that the employer paid taxes under the Federal/State unemployment compensation system believing in good faith that he was covered by that system; (2) no benefits have been paid to the employer's employees under the RUIA; and (3) where retroactive coverage would impose undue burden on the Board, the employer, and the state system for no apparent gain. Accordingly, the rationale adopted by the Board in prior determinations to limit retroactive effect of coverage under the RUIA continues to provide a useful framework for analysis of the request by Rail-Term. In Rail-Term's case, all three prongs are satisfied. There is no evidence of any unemployment claims by any Rail-Term employee under the RUIA. The Record further supports that Rail-Term paid unemployment taxes under a State unemployment system which previously covered its employees. The Board's conclusion that such state taxes were paid due to a good faith belief that Rail-Term is covered by the state system is supported by the fact that Rail-Term did speak with former Board employees regarding its coverage status. Finally, it is clear to the Board that retroactive application of coverage under the RUIA would pose an undue hardship on both Rail-Term and the Board in trying to determine any reimbursements to or from the Board for Rail-Term's employees under state unemployment systems. Given the considerations discussed herein, the Board has determined to grant the stay for coverage under the RUIA.

Coverage under the RRA requires a different analysis. The Board does not have authority to enforce collection of taxes under the Railroad Retirement Tax Act (RRTA). That authority rests with the Internal Revenue Service (IRS). The Board is also affected by 20 CFR 211.16 in that coverage for service and compensation purposes under the RRA is limited to the four year period, absent any finding of fraud, preceding the date on which compensation was required to be reported to the Board. As previously discussed in this analysis of the request for stay, the Board has determined that the record does not support any finding of fraud against Rail-Term. Further, the Board finds that it is impractical to require Rail-Term to file service and compensation reports while a Reconsideration Decision is pending. In light of the circumstances, the Board will grant a stay of filing of service and compensation reports under the RRA pending the outcome of the Board's Decision on Reconsideration. Any retroactivity of service and compensation will be determined by the Reconsideration Decision.

Sincerely,

Beatrice Ezerski

FOR THE BOARD
Beatrice Ezerski
Secretary to the Board

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

JAN 28 2011

BOARD MEMBERS:

MICHAEL S. SCHWARTZ, CHAIRMAN
V.M. SPEAKMAN, JR., LABOR MEMBER
JEROME F. KEVER, MANAGEMENT MEMBER

Mr. John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006

Re: Rail-Term Corporation

Dear Mr. Heffner:

Enclosed is a copy of the decision of the Board on reconsideration of the status of Rail-Term Corporation as an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Sincerely,

Beatrice Ezerski

FOR THE BOARD
Beatrice Ezerski
Secretary to the Board

Enclosure

B.C.D. 11-14 JAN 28 2011

**EMPLOYER STATUS DETERMINATION – DECISION ON RECONSIDERATION**
**Rail-Term Corporation**

This is the decision on reconsideration of the Railroad Retirement Board (hereinafter the Board) of its determination dated April 6, 2010 (B.C.D. 10-33) pursuant to 20 CFR 259.3(a) concerning the status of Rail-Term Corporation (Rail-Term) as an employer under the Railroad Retirement Act (45 U.S.C. s 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. s 351 et seq.) (RUIA) (the RRA and RUIA are hereinafter collectively referred to as "the Acts").

In its decision dated April 6, 2010, a majority of the Board determined that Rail-Term is a covered employer with respect to its train dispatching employees since that operation consisted of common carriage by rail in interstate commerce due to the integral nature of train dispatching to the overall operation of movement of goods by rail. The Board affirms and adopts its initial decision dated April 6, 2010 with the following additional comments set out below.

On July 9, 2010, Rail-Term filed with the Secretary of the Board a Petition for Reconsideration of Board Coverage Determination ("B.C.D.") 10-33 pursuant to 20 C.F.R. 259.3(a). In its petition, Rail-Term requested the Board to reconsider and reverse its determination in B.C.D. 10-33 and find that Rail-Term is not a covered employer under the Acts because the dispatchers employed by Rail-Term are similar to other independent contractors not found to be covered employees in other cases. Additionally, Rail-Term requested a stay of any applicable requirements to report service and compensation pending the Board's decision in the Petition for Reconsideration of B.C.D. 10-33.

## I. PRIOR BOARD PROCEEDINGS

In rendering this decision, the Board adopts and hereby incorporates the prior Board proceedings as stated in the Board's initial decision rendered April 6, 2010. In addition to those proceedings, the following actions have occurred and are part of the record concerning the present case. After Rail-Term filed its Petition for Reconsideration, Rail-Term filed a Petition for Declaratory Relief with the Surface Transportation Board (STB) on June 3, 2010. The Petition sought a Declaratory Order by the STB that Rail-Term was not a "rail carrier" within the meaning of the I.C.C. Termination Act, 49 USC 10102(5). Subsequently, the STB declined to rule (order issued October 8, 2010) on this issue since it was pending before the Board and determined that the Board's ruling would control Rail-Term's status under the Acts. Additionally, on October 22, 2010, the United States Court of Appeals for the Seventh Circuit issued a decision in Herzog Transit Services, et al. v. U.S. Railroad Retirement Board, which was a case that also determined the status of train dispatchers. Both the Board and Rail-Term cited to the "Herzog" case in prior decisions and arguments. In denying Herzog's Petition for Review and upholding the Board's final Agency Decision, the United States Court of Appeals for the Seventh

Circuit ruled that Herzog was, insofar as it performed the dispatching function for interstate trains, a covered employer under the Acts.

## II. ARGUMENT

Initially, it should be noted that Rail-Term, in its petition for reconsideration, does not raise any new issues which were not previously adjudicated by the Board in its April 6, 2010 initial decision. Rail-Term has expanded upon its previous argument that Rail-Term is not a "rail carrier" under the Acts and that its dispatchers are not under the control of the rail carrier clients whom it serves. In the Petition for Reconsideration, Rail-Term presents its basic argument in four parts. 1) Rail-Term is not a Rail Carrier under the ICC Termination Act. 2) The Board's ruling is materially wrong because it violates the plain language of the statute. 3) The Board's reliance on selective Federal Railroad Administration regulations as a basis for jurisdiction is misplaced. 4) The Board erred by basing its decision on precedent that is either inapposite or wrongly decided while ignoring other precedent favorable to Rail-Term.

Additionally, Rail-Term then requested that the Board stay proceedings until the decision on reconsideration is reached. The Petition also included arguments that relied upon two matters that had not yet been decided: 1) an assumption that the STB would determine that Rail-Term is not a "rail carrier" and 2) an assumption that the Seventh Circuit would overturn the Board's decision that Herzog Transit's dispatchers are covered employees under the Acts. The previously discussed decisions in both of these cases render these arguments on reconsideration moot. The Board will respond to the remaining arguments of Rail-Term in its Petition for Reconsideration.

The majority of the Board rendered its April 6, 2010 decision with respect to the status of Rail-Term as an employer under the Acts by finding that the traditional work of dispatching has been performed by employees of individual railroads; however, although modern business decisions have created situations where dispatching is performed by a separate entity, the work is essentially the same. The dispatcher controls the movement of the trains and no railroad can fulfill its common carrier obligation unless its trains move; therefore, dispatching is an integral part of the operation of a common carrier. The Board found on this basis that Rail-Term is itself a rail carrier within the definition of an employer under the Acts.

Dispatchers control the movement of freight or passengers over rail lines. The Board recognizes that Rail-Term does not, itself, operate the trains, but it does direct engineers in the movement of trains. Without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers. Dispatching is a crucial component of the movement of freight or passengers from point A to point B. In other words, a railroad cannot fulfill its obligation to provide rail service without dispatching services. Similar to the situation where a carrier contracts with another entity to operate its trains, which results in the Board finding the contractor to be an employer, a contractor that provides the essential operating service of dispatching for an employer may be found to be an employer under the RRA and RUIA. In B.C.D. 02-12, the Board held that a commuter authority that provided dispatching services for the Union Pacific, Amtrak, and Burlington Northern Santa Fe was a covered employer with respect to the "carrier

services", i.e. dispatching, that it provided to the Union Pacific, Amtrak, and BNSF. In B.C.D. 03-38, the Board found that a company that provided temporary operating personnel, including engineers, conductors, trainmen, and dispatchers, to a rail carrier employer was itself a rail carrier employer. In reaching its decision in B.C.D 03-38, the Board cited an earlier decision in B.C.D. 03-23 that had concluded that an entity that contracts to provide rail operations on behalf of another is an employer.

Turning to Rail-Term's specific arguments on reconsideration, Rail-Term states that it is not a rail carrier within the meaning of the ICC Termination Act (ICCTA) in its first argument. It finds support for this argument in two STB decisions that Rail Term argues describe what the STB considers to be a "rail carrier" under an act which the STB administers.

However, this argument misses the point. In determining what constitutes a rail carrier under the RRA and RUIA, the threshold inquiry begins with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. This is because the regulatory schemes of the RRA and ICCTA are not symmetrical. Standard Office Buildings Corporation v. United States, 819 F.2d 1371, 1378 (7th Cir. (1987). By virtue of the control that it exercises over the movement of trains, Rail-Term is a rail carrier within the meaning of that term under the RRA and RUIA. To hold otherwise would allow for easy erosion of the RRA and RUIA by parsing out interstate transportation by rail to non-covered entities.

Further, the Board finds that consideration of the all the subsections of the Railroad Retirement Act's definition of "employer" at 45 USC Section 231 (a) (1) makes clear that "congress envisioned a broad retirement program for employees playing many roles within the railroad industry." (see Herzog v., pg. 18 citing USRRB v. Fritz 449 U.S. 166 (1980) which noted that the Act was intended to benefit people who pursued careers in the rail industry.)

As the Seventh Circuit further stated in Herzog:

> Our colleagues in the District of Columbia Circuit have put it, The statute has a "broad purpose" and a "protective character." Cheney R.R. Co., 50 F.3d at 1078. As the judges of the District of Columbia Circuit also have said, the legislative history supports a reading of the text that gives effect to Congress's clear intent that this benefit statute "be construed broadly." Id. at 1077-78. Secondly, as we recognized in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295, 298-99 (7th Cir. 1992), the provisions of this statutory scheme are not to be constrained by the business models common at the time of the passage of the Act. Unless and until Congress deems otherwise, they are equally applicable to today's railroad industry and the organizational relationships of today's business environment, which reflect, among other factors, increased competition and the increased frequency of intrastate commuter lines sharing trackage and other facilities with participants in the Nation's interstate railway system. It is not unusual for an entity, the activities of which generally do not involve interstate transportation, to perform a particular function that is an integral part of interstate transportation by rail and that

therefore is subject to the Acts. The RRA may have been enacted when all functions integral to interstate transportation usually was performed by carriers or their affiliates. Today, the rail transportation industry has adopted other efficiencies. Our duty nevertheless remains the same. We must apply the statute To ensure individuals performing these integral functions to interstate Rail transportation is covered and thereby effectuate Congress's broad protective purpose. (Herzog pgs. 19 and 20).

The Court's reasoning bolsters the Board's logic in finding Rail-Term to be a covered employer. Simply put, modern developments to the railroad industry's business model were not contemplated at the time of enactment of the Acts. The Court explained that it is the duty of the Board to continue to apply the acts to ensure the inclusion of individuals performing integral rail transportation functions to be covered under the Acts. It is therefore appropriate for the Board to find Rail-Term to be covered under the Acts because its employees perform the integral rail function of dispatching services.

Next, Rail-Term argues that the Board's reliance on selective Federal Railroad Administration (FRA) regulations as a basis for jurisdiction is misplaced. Rail-Term's argument alleges that the Board is ignoring some FRA regulations while placing undue weight on others. Specifically, Rail-Term cites that the FRA regulates track safety standards, railroad equipment standards, and locomotive safety standards and that these entities that independently contract for these services have been found to be not covered under the Acts administered by the Board. The Board notes that this argument put forth by Rail-Term misses the fundamental logic behind the Board's finding. The decisions cited by Rail-Term in its footnote 8 on page 15 of its Petition all deal with maintenance, repairs, training and certification, or development of crossing signals. Although these services are integral to transportation by rail, they do not constitute transportation by rail. Through its dispatching function Rail-Term is moving trains in interstate commerce which makes it a rail carrier subject to the RRA and RUIA.

Finally, Rail-Term argues that the Board erred in its previous coverage determination by basing its decision on precedent that is either inapposite or wrongly decided while ignoring other precedent favorable to Rail-Term. Rail-Term argues that the Board should not have relied upon the Herzog case nor the SCRRA case in support of its decision. Further, Rail-Term argues that if the Board would strictly apply the test for independent contractor status as articulated in the case of Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway company, 206 F. 2d 831 (8th cir. 1953), the Board would conclude that the dispatchers employed by Rail-Term are not integrated into the contracting railroad's operations and therefore not subject to the control of the individual railroads for whom Rail-Term performs dispatching services.

This argument by Rail-Term appears to miss the point of the Board's holding in its April 6, 2010 decision. Rail-Term argues in its Petition for Reconsideration that Rail-Term's dispatchers are not integrated into the operations of the client railroads and that its dispatchers are not subject to the control of the client railroads. Rail-Term argues that they are an independent contractor with numerous rail carrier clients. Rail-Term points out that its dispatchers report to a Rail-Term Supervisor and not to the client rail carriers. Further, Rail-Term cited to a long list of administrative functions that Rail-Term itself

provides to the employee dispatchers that further separates the dispatchers from the individual rail carrier clients.

However, these assertions again miss the thrust of the Board's initial decision. Employees of Rail-Term are covered under the RRA and RUIA not by virtue of their relationship to the contracting railroads, but by virtue of their employment relation with Rail-Term, a rail carrier under the RRA and RUIA.

Even if Rail-Term were not considered a carrier under the RRA and RUIA, Kelm would not prevent its employees from being considered employees of the contracting carriers which are also covered under the RRA and RUIA. This alternate theory was suggested by the Management Member in his dissent in the initial decision and was carefully examined in that decision.

The Board finds that the dispatchers perform a service that is an inextricable part of the rail carrier's mission. The Board previously found that without the services of a dispatcher, a rail carrier's trains cannot run. The job of a dispatcher is as critical to the operation of a railroad as is that of a locomotive engineer. Because dispatching is an inextricable part of the rail carrier's fulfilling its common carrier obligation, the Board continues to find for the reasons explained in our initial decision that dispatchers who work for Rail-Term could, in the alternative to Rail-Term being found to be a covered employer under the Acts, be found to be employees of each railroad for which Rail-Term provides dispatching services. The arguments set forth by Rail-Term distinguishing and separating its dispatchers from the day to day administration of the rail carrier clients are noted, but the Board finds that this administrative separation argument does not address the central finding that the Board has determined that dispatching, in and of itself, is an inextricable part of the mission of a rail carrier.

In addition to the four main arguments in its Petition for Reconsideration, Rail-Term argues that in the past, several "senior and now retired or dead Board officials" advised Rail-term that it would not be regarded as a "covered employer." Rail-Term argues that it relied on this advice to its detriment, given the April 6, 2010 coverage decision issued by the Board. The Board reminds Rail-Term that the agency cannot be estopped from following the explicit language of the Act by misinformation provided by one of its employees. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). Even if Rail-Term had received a verbal opinion by a Board employee in the past that the individual Board employee felt that Rail-Term would not be considered a covered employee, Rail-Term cannot prevent the Board from reaching the opposite conclusion.

Rail-Term also sought a stay of the proceedings while the Board's decision on reconsideration was pending. The Board previously granted the stay with regard to coverage under the RUIA. The Board concludes that RUIA coverage will begin with the date of this decision on reconsideration.

Finally, the Board notes that it issued a decision finding Rail-Term to be a covered employer on April 6, 2010. Because upon inquiry Rail-Term commenced dispatching services in the United States in good faith believing that the Board would not find them covered under the RRA and RUIA, the Board modifies its initial decision and finds service

creditable commencing May 1, 2006, the beginning of the four year period preceding the first day of the month after the month in which the initial decision was released, see 20 CFR 211.16.

## III. CONCLUSION

In summary, Rail-Term employs dispatchers to perform contracted dispatching services to a number of rail carrier clients. The Seventh Circuit and the Board have held that train dispatching services are an inextricable part of a rail carrier fulfilling its common carrier obligation. Further, the courts agree that the Board must construe the Acts broadly to satisfy the Congressional intent of the Acts which has been found to be that employees performing integral services within the railroad industry are to be covered under the Acts. Based on the above stated reasons, the Board affirms on reconsideration its initial decision of April 6, 2010, and concludes that Rail-Term is a covered employer with respect to its train dispatching services.

On reconsideration, the Board's initial decision is affirmed.

Original signed by:

Michael S. Schwartz

V.M. Speakman, Jr.

Jerome F. Kever

**JEROME F. KEVER**
**MANAGEMENT MEMBER**
**DISSENT**

**RAIL TERM CORPORATION**

The majority's decision does not contain any additional arguments that persuade me to alter my position articulated in my dissent in the initial determination, by a majority of the Board, finding Rail Term to be a covered employer under our Acts. Further, the majority's finding that Rail Term is an employer makes moot any further analysis or need to comment on attributing Rail Term employees as employees of their rail carrier clients.

First, I must comment on a procedural aspect of this matter. Rail Term filed a petition on June 3, 2010 seeking a Declaratory Order from the Surface Transportation Board (STB) declaring Rail Term not to be a rail carrier within the meaning of 49 U.S.C. 10102(5). On July 9, 2010, Rail Term filed a request for reconsideration before this Board and noted that a petition had been filed before the STB. On October 8, 2010, the STB denied the request citing the fact that the Railroad Retirement Board did not refer this matter, or stay their decision, pending a determination by the STB as it did in H & M International Transportation, Inc. and American Orient Express Railway Co. (Rail-Term Corp. – Petition for Declaratory Order, Docket No. FD 35381 (October 8, 2010).

While this Board did not formally stay – nor did petitioner specifically request a stay, the Board did not immediately act upon the reconsideration request until it learned that the STB denied Petitioner's request. Reflecting on this, I believe we would have been better served had the Board formally stayed its proceedings in accordance with review of the STB. Certainly, it's in the best interest of the public to ensure that there is a level of consistency in interpretations of similar statutory provisions amongst federal agencies. It may be useful in future cases to foster better communication between our two agencies. This would certainly avoid the potential of competing interpretations should the STB review this matter at a future date.

The substantive arguments contained in the majority's decision, mirror those contained in the initial determination but with updated results of the 7th Circuit Herzog decision and, as mentioned above, the decision of the STB. However, as I discussed in my prior dissent, the Herzog decision does not directly bear upon this matter since Herzog, in essence, became a carrier under our Acts as an application of our prior Railroad Ventures determination. This stemmed from DART having owned the tracks upon which interstate freight travels and assuming dispatching functions through its contractor Herzog. Yet, a recent determination by the STB in the Florida Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Docket No. 35110 (December 15, 2010) found that merely dispatching interstate freight traffic does not necessarily subject one to being a carrier under the STB's jurisdiction. It cites a line of cases stemming from its determination in the "State of Maine" case in 1991. This will undoubtedly present some confusion in interpreting the Herzog case and applying it to other similar situations.

While the majority cites a passage from the Herzog decision quoting the words "broad purpose" and a "protective character" of the Railroad Retirement Acts, Herzog at p. 18, the Court in Herzog also reaffirmed, that "Congress intended 'carrier' to have the same meaning in both these closely related statutes and that the RRA statute therefore affords no broader coverage than the OCCTA." (See, Herzog at p. 13). Therefore, it belies common sense and precedent to find Rail Term to be a carrier where it does not own or lease tracks, own or lease rail cars or locomotives, and does not hold itself out to the public as providing interstate transportation services. For these reasons, I again must dissent.

Original signed by:

Jerome F. Kever, Management Member
1/21/11

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March 21, 2011

Steven O. Bartholow, Esq.
General Counsel
United States Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

**RE: B.C.D. 11-14, EMPLOYER STATUS DETERMINATION-Decision on Reconsideration, Rail-Term Corporation**

Dear Mr. Bartholow:

I am writing on behalf of Rail-Term Corp. ("RTC") at the suggestion of Marguerite Dadabo in the Board's Office of General Counsel. Rob Perbohner in the Management Member's office recommended that I contact her to discuss how to seek an informal stay of a Board decision and she in turn advised me to write you. The decision at issue is the Board's final ruling served January 28, 2011, in the above-captioned proceeding, finding RTC "an employer" for coverage purposes under the Railroad Retirement Act ("RRA") and the Railroad Unemployment Insurance Act ("RUIA" or collectively "the Acts").

During my recent call with Ms. Dadabo, I informed her that RTC would likely appeal this decision to a United States Court of Appeals inasmuch as we believe it is arbitrary and capricious and contrary to the plain language of both the Acts and the I.C.C. Termination Act ("ICCTA") for the simple reason that RTC is neither a "carrier by railroad subject to the jurisdiction of the Surface

Transportation Board" nor "a rail carrier" or "a railroad" as those terms are used under the ICCTA. During our call Ms. Dadabo suggested the appropriate way to seek this relief would be for RTC to write your office and informally ask the Board to stay the effectiveness of its decision pending the outcome of that appeal. My purpose in writing this letter is to seek this stay. Inasmuch as the Board is familiar with the facts of this case, I will only review them here to the extent necessary for your understanding.

RTC is a small privately held Michigan corporation which provides railroad dispatching services for short line and regional railroad clients in the United States. It is a subsidiary of a Canadian corporation which owns a similar entity located in Canada that provides such services for Canadian railroads. Significantly, neither RTC nor its corporate affiliates own any lines of railroad, operate trains, hold themselves out to provide transportation for compensation, own, lease, or operate any railroad locomotives or rolling stock. Furthermore, RTC is neither owned by nor under common control with a rail carrier.

RTC's sole activities entail the development of a computer-based dispatching software that it uses to provide dispatching services for its rail carrier clients and providing those services. In the case of its American operations, RTC provides these services to its clients from an office in Rutland, VT, where it employs 8 people. Regarding RTC's business operations, RTC dispatchers work directly for RTC, not for its client railroads, and client railroad operating personnel do not deal directly with RTC dispatchers. As a result, there is no direct control between RTC and the employees of its client railroads.

When RTC was originally developing its dispatching software and related services for the railroad industry around 2005, company management contacted the Board to ascertain whether it was covered under the Acts. Two former Board employees, Joseph Ellena and Michael Litt, advised that it would not qualify as "a covered employer." Relying on that advice, it went to great expense to establish its

own private retirement benefit system under the assumption that its employees were covered under the Social Security system.

As a threshold matter, courts and federal administrative agencies have generally applied a four part test in determining whether or not to grant a stay pending appeal: 1) whether the petitioner is likely to prevail on appeal, 2) the irreparable injury the petitioner would experience absent a stay, 3) the injury any opponents would experience if a stay is granted, and 4) how the public interest is best served. Regarding the first element, RTC believes that it would be likely to prevail upon appeal insofar as the Board's ruling contravenes the "plain meaning" of the statute, defies common sense, ignores or misapplies past precedent, and ignores evidence RTC submitted in its filings with the Board. RTC is not an employer under the Act because it is not a railroad and does not meet the STB's test for what constitutes either a railroad or a "rail carrier." At best, it is providing certain services that railroads perform for themselves and that noncovered railroad contractors perform for their railroad clients. The ruling also contradicts the dissenting opinion of the management member and at least one federal judge (the dissenting judge in the *Herzog Transit* case).

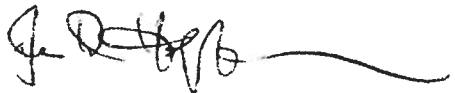
Regarding the second and third elements, failure to grant a stay would cause RTC irreparable harm with no corresponding harm to any other party. RTC seeks a stay because failure to grant same would require it to continue "in limbo," by forcing it to comply with duplicative reporting requirements of both the Board and the Social Security Administration vastly increasing this small company's administrative bookkeeping expenses. Failure to grant a stay would potentially subject RTC to duplicate retirement taxation schemes (RRTA and FICA) with no benefit to either the federal government or RTC. Similarly, a failure to grant this stay would subject RTC to duplicative unemployment compensation reporting requirements and taxation under both the RUIA and state and federal

unemployment compensation schemes applicable to nonrailroad employers. Conversely, no one opposes RTC's request and no employee of any railroad or RTC will be harmed by granting this stay pending appeal.

Finally, the public interest will be served by granting this stay insofar as both RTC and the federal government will both be spared unnecessary and duplicative paperwork in terms of filings and other work needed to comply with parallel schemes involving unemployment and retirement benefits.

RTC appreciates your prompt attention to this matter. Please call me if you have any questions.

Sincerely yours,



John D. Heffner

Cc: Mr. Francois Prenovost
Dennis Devaney, Esq.

Rail Term
cf appeal

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

GENERAL COUNSEL

APR 20 2011

Mr. John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006

RE: B.C.D. 11-14, Decision on Reconsideration
Rail-Term Corporation

Dear Mr. Heffner:

This is in response to your letter of March 21, 2011, in which, on behalf of your client Rail-Term Corporation, you requested a stay of Board Coverage Decision (B.C.D.) 11-14. I can advise you that on April 18, 2011, the Board granted your request.

Sincerely,

Rachel L. Simmons
General Attorney

cc: The Board

Printed on recycled paper

DJW DEVANEY JACOB WILSON, PLLC
Attorneys and Counselors
www.djwlawfirm.com

Dennis M. Devaney
*also admitted in D.C., Maryland, Florida*
Michael M. Jacob
Jeffrey D. Wilson

Caryn J. Weingarden
*Of Counsel*

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
MAR 28 2011
RECEIVED

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED MAR 28 2011
CLERK
STAMP & RETURN

March 28, 2011

HAND DELIVERED

Mr. Mark J. Langer
Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

11-1093

**RE: Rail-Term Corp. v. United States Railroad Retirement Board**

Dear Mr. Langer:

On behalf of Rail-Term Corp., we are enclosing for filing an original and four copies of a Petition to Review a Decision of the United States Railroad Retirement Board along with the required Corporate Disclosure Statement.

We are also enclosing a check payable to the United States Court of Appeal, DC Circuit in the amount of $450.00 to cover the fee associated with docketing this new case. Please date-stamp and return to Mr. Heffner the enclosed duplicate copy of this Petition and Corporate Disclosure Statement.

If you have any questions concerning this filing, please contact Mr. Devaney (248-649-0990) or Mr. Heffner (202-296-3334).

Respectfully submitted,

**DEVANEY JACOB WILSON, PLLC**

Dennis M. Devaney

**JOHN D. HEFFNER, PLLC**

John D. Heffner

Enclosures

cc: Steven A. Bartholow, Esq.

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

MAR 28 2011

RECEIVED

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED MAR 28 2011
CLERK

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| | ) | |
| Petitioner | ) | |
| | ) | |
| v. | ) | No. 11-1093 |
| | ) | |
| United States Railroad Retirement Board, | ) | |
| | ) | |
| Respondent | ) | |
| | ) | |

## PETITION FOR REVIEW

Pursuant to 28 U.S.C. Sections 2321, 2322, 2342, and 2344 and Rule 15 of the Federal Rules of Appellate Procedure, Rail-Term Corp.("Rail-Term") hereby petitions the Court for review of a decision of the United States Railroad Retirement Board ("Board") in B.C.D. 11-14, EMPLOYER STATUS DETERMINATION-DECISION ON RECONSIDERATION Rail-Term Corporation, dated January 28, 2011. A copy of the Decision is appended to this petition.

Pursuant to 28 U.S.C. 2344, Rail-Term submits the following information in support of its petition for review:

1. In its January 28, 2011, Decision, the Board found on reconsideration that Rail-Term was a "covered employer" with respect to its train dispatching

employees under the RRA and RUIA due to the alleged integral nature of train dispatching to the overall operation of movement of goods by rail.

2. Venue is proper under 28 U.S.C. 2343.

3. The Board's Decision that is the subject of the petition for review is contrary to law, arbitrary and capricious, and not supported by substantial evidence.

4. Rail-Term was a party to the proceedings below and is aggrieved.

Rail-Term requests this Court to hold unlawful, vacate, suspend, enjoin, and set aside the Board's Decision and grant it such other relief as may be just and proper.

Respectfully submitted,

DEVANEY JACOB WILSON, PLLC

By: _____

Dennis M. Devaney
3001 W. Big Beaver Road, #624
Troy, Michigan 48084
(248) 649-0990 / F: (248) 649-7155
Attorneys for Rail Term Corp.

JOHN D. HEFFNER, PLLC

By: _____

John D. Heffner
1750 K Street, N.W., #200
Washington, D.C. 20006
(202) 296-3334
Attorney for Rail Term Corp.

Dated: March 28, 2011

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Review by overnight mail and electronic mail upon Steven A. Bartholow, Esq. General Counsel of the United States Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-2092.

Dated at Washington, D.C., this 28th day of March, 2011.

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

LAW OFFICES
JOHN D. HEFFNER, PLLC
1750 K STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939

April 20, 2011

BY ELECTRONIC FILING

Mr. Mark J. Langer
Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

**RE: 11-1093, Rail-Term Corp. v. United States Railroad Retirement Board**

Dear Mr. Langer:

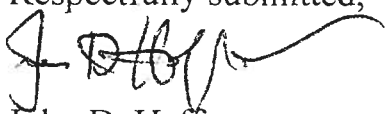
On behalf of Rail-Term Corp., Petitioner, and pursuant to the clerk's order entered March 30, 2011, I am filing the following documents:

Petitioner's docketing statement
Petitioner's certificate as to parties, etc.
Petitioner's statement of issues
Petitioner's deferred appendix statement

Petitioner has no procedural motions at this time and it filed a copy of the agency decision with its Petition for Review.

If you have any questions concerning this filing, please contact me at the number below or, in my absence, James Savage at (202) 296-3335.

Respectfully submitted,



John D. Heffner

Enclosure

cc: Steven A. Bartholow, Esq.
Dennis M. Devaney

# UNITED STATES COURT OF APPEALS
# DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

## AGENCY DOCKETING STATEMENT

*Administrative Agency Review Proceedings (To be completed by appellant/petitioner)*

1. CASE NO. 11-1093 2. DATE DOCKETED: 3/30/2011

3. CASE NAME (read parties only) Rail-Term Corp. v RRRB

4. TYPE OF CASE: ☐ Review ☒ Appeal ☐ Enforcement ☐ Complaint ☐ Tax Court

5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? ○ Yes • No
If YES, cite statute

6. CASE INFORMATION:

a. Identify agency whose order is to be reviewed: United States Railroad Retirement Board

b. Give agency docket or order number(s): B.C.D. 10-33

c. Give date(s) of order(s): January 28, 2011

d. Has a request for rehearing or reconsideration been filed at the agency? • Yes ○ No
If so, when was it filed? July 9, 2010 By whom? John D. Heffner
Has the agency acted? • Yes ○ No If so, when? January 28, 2

e. Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2): Petitioner was a party to the agency proceeding and was aggrieved by the agency's final decision on reconsideration as well as the agency's initial decision

f. Are any other cases involving the same underlying agency order pending in this Court or any other?
Yes • No If YES, identify case name(s), docket number(s), and court(s)

g. Are any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve *substantially the same issues* as the instant case presents?
Yes • No If YES, give case name(s) and number(s) of these cases and identify court/agency:

h. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? ○ Yes • No If YES, provide program name and participation dates

Signature Date 4/20/2011

Name of Counsel for Appellant/Petitioner John D. Heffner

Address 1750 K Street, N.W. Suite 200 Washington, D.C. 20006

E-Mail jheffner@verizon.net Phone ( 202 ) 296-3334 Fax ( 202 ) 296-3939

ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | |
| United States Railroad | ) | No.11-1093 |
| Retirement Board, | ) | |
| Respondent | ) | |
| _____ | ) | |

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. **Parties and Amici**

   The sole party who appeared before the Railroad Retirement Board was:

   Rail-Term Corp.

2. **Rulings Under Review.** The ruling of the Railroad Retirement Board at issue before this Court is B.C.D. 11-14, EMPLOYER STATUS DETERMINATION-DECISION ON RECONSIDERATION Rail-Term Corporation, dated January 28, 2011, a copy of which was attached to the Petition for Review.

This case involves a decision by the three member United States Railroad Retirement Board ("RRRB" or "the Board") holding that Rail-Term Corp. ("Rail-Term") is an "employer" and a "rail carrier" for the purpose of coverage under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (collectively "the Acts"). The Board arrived at this finding despite the fact that Rail-Term does not own or operate any railroad equipment or rail lines and is not licensed to and does not hold out to perform any rail service on any rail line. Rail-Term's sole activity is providing computer software used by rail clients for dispatching trains and by providing to its rail carrier clients people in Rail-Term's employ to provide those services to its clients. The Board rendered its initial decision on April 6, 2010, and affirmed that decision with some modifications on January 28, 2011. The management member dissented from both decisions.

No party opposed Rail-Term in the proceedings before the Board.

3. **Related Cases.** The case on review was not previously before this court or any other court. There is no related case pending in this Court or in any other court of which counsel is aware.

Respectfully submitted,

RAIL-TERM CORP.

By: _____

John D. Heffner
James M.S. Savage
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3333

By: _____

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Rd.,
Suite 624
Troy, MI 48084
(248) 649-0990

Dated: April 20, 2011

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |
| | ) | |

## STATEMENT OF ISSUES TO BE RAISED

1. Whether the Railroad Retirement Board's decision served January 28, 2011, finding Rail-Term Corp. to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is contrary to law.

2. Whether the Railroad Retirement Board's decision served January 28, 2011, finding Rail-Term Corp. to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is arbitrary and capricious.

3. Whether the Railroad Retirement Board's decision served January 28, 2011, finding Rail-Term Corp. to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is supported by substantial evidence.

Respectfully submitted,

RAIL-TERM CORP.

By: _____

John D. Heffner
James M.S. Savage
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3333

By: Dennis M. Devaney by JDH

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Rd.,
Suite 624
Troy, MI 48084
(248) 649-0990

Dated: April 20, 2011

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |
| | ) | |

## STATEMENT AS TO WHETHER A DEFERRED APPENDIX WILL BE UTILIZED

A deferred Appendix will be utilized.

Respectfully submitted,

RAIL-TERM CORP.

By: _____

John D. Heffner
James M.S. Savage
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3333

By: _____

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Rd.,
Suite 624
Troy, MI 48084
(248) 649-0990

Dated: April 20, 2011

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing documents (1) Agency Docketing Statement, (2) Certificate as to Parties, Rulings, and Related Cases, (3) Statement of Issues to be Raised, and (4) Deferred Appendix Statement by overnight mail and electronic mail upon Steven A. Bartholow, General Counsel of the United States Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-2092.

Dated at Washington, D.C., this 20th day of April, 2011.

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |

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**PETITION TO REVIEW ORDER OF**
**THE RAILROAD RETIREMENT BOARD**

# REPLY OF RAIL-TERM CORP. TO MOTION OF AMERICAN TRAIN DISPATCHERS ASSOCIATION

Respectfully submitted,

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Road
Suite 624
Troy, MI 48084
(248) 244-0171

Dated: August 15, 2011

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |

**PETITION TO REVIEW ORDER OF**
**THE RAILROAD RETIREMENT BOARD**

**REPLY OF RAIL-TERM CORP.**
**TO MOTION OF**
**AMERICAN TRAIN DISPATCHERS ASSOCIATION**

Pursuant to Fed. R. App. P. 29(a), the American Train Dispatchers Association (ATDA") filed a motion with this Court August 3, 2011, to submit a brief as *amicus curiae* in support of the United States Railroad Retirement Board ("the Board") affirming its ruling issued on January 28, 2011, that Petitioner Rail-Term Corp. ("Rail-Term") is an "employer" covered by the Railroad Retirement Act, 45 U.S.C. 231 *et seq.,* ("RRA") and the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, ("RUIA"). ADTA's motion indicates that the Board neither objects nor consents to ADTA's *amicus* filing. ADTA correctly indicates that Rail-Term *opposes* that request.

Rail-Term has been a party to proceedings before the Board going back as early Aug. 14, 2006, when it received its first inquiry letter from a member of the Board's staff seeking information about services that Rail-Term performs for the railroad industry. The Board issued its initial decision on April 6, 2010, finding Rail-Term to be covered under both the RRA and RUIA. Issuance of that decision should have alerted ADTA to be on notice to watch for additional pleadings to be submitted to and decisions to be issued by the Board. Yet ADTA took absolutely no action to participate in any future proceedings nor did it contact Rail-Term to the best of the knowledge of the undersigned counsel. On Jan. 28, 2011, the Board issued its final decision finding coverage under both of the Acts and substantially affirming its previous ruling. Again, ADTA took no action. In fact, ADTA took no action after this Court issued its initial scheduling order. It waited until July 29 to advise the undersigned counsel that it wanted to submit an *amicus* brief and requested Rail-Term's consent to that filing.

The Court should deny ADTA's request for two reasons. First, participation in these proceedings should be denied because ADTA failed to participate in the proceedings before the Board and did not submit a timely intervention request in these appellate proceedings. Second, since ADTA is a trade association that only represents dispatchers who work for rail carriers, its membership is not directly affected by these proceedings. Rail-Term does not employ any former rail industry

dispatchers and does not solicit the rail industry to fill empty dispatcher positions. Therefore ADTA and its members have no legal stake in this case.

Accordingly, the Court should deny ADTA's Motion.

Respectfully submitted,

/s/ John D. Heffner

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

/s/ Dennis M. Devaney

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Road
Suite 624
Troy, MI 48084
(248) 244-0171

Dated: August 15, 2011

## CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that on this day August 15, 2011, a copy of the Reply of Rail-Term Corp. to the "Motion of American Train Dispatchers Association For Leave to File Brief as *Amicus Curiae*" was sent electronically and by first class mail, postage prepaid, to:

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

Michael S. Wolly, Esq.
Robert E. Paul, Esq.
1025 Connecticut Ave., N.W.
Suite 712
Washington, D.C. 20036
202-857-5000

/s/ John D. Heffner
John D. Heffner

# 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.

Strasburger
ATTORNEYS AT LAW

STAMP & RETURN

December 14, 2011

JOHN HEFFNER
202.742.8607
Direct Fax: 202.742.8697
john.heffner@strasburger.com

RECEIVED
U.S. COURT OF APPEALS
FOR THE D.C. CIRCUIT
2011 DEC 14 PM 6:22
FILING REPRESENTATIVE

**BY HAND**

STAMP & RETURN

Mr. Mark J. Langer
Clerk of the Court
United States Court of Appeals
For the District of Columbia Circuit
United States Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

RE: 11-1093, Rail-Term Corp. v. United States Railroad Retirement Board

Dear Mr. Langer:

Pursuant to the Court's Order and Memorandum dated November 14, 2011, Rail-Term Corp. is submitting an original and four copies of its report on the status of its filings with the Surface Transportation Board along with a copy of its Petition for Declaratory Relief filed with the Board today.

Please date stamp and return one copy of this filing.

STAMP & RETURN

Sincerely yours

John Heffner

JDH:jg

Enclosures

cc: Dennis M. Devaney, Esq.

Rachel Simmons, Esq.

Appeal No. 11-1093

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

STAMP & RETURN

**RAIL-TERM CORP.,**

**Petitioner**

**v.**

**UNITED STATES RAILROAD RETIREMENT BOARD,**

**Respondent.**

RECEIVED
U.S. COURT OF APPEALS
FOR THE DC CIRCUIT
2011 DEC 14 PM 6:22
FILING DEPOSITORY

**PETITION TO REVIEW ORDER OF**
**THE RAILROAD RETIREMENT BOARD**

**STATUS REPORT**

Respectfully submitted,

STAMP & RETURN

RAIL-TERM CORP.

STAMP & RETURN

John D. Heffner
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Dated: December 14, 2011

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

| | | |
|---|---|---|
| **RAIL-TERM CORP.,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | Appeal No. 11-1093 |
| | ) | |
| **UNITED STATES RAILROAD RETIREMENT BOARD,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**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*)

In accordance with the Order and Memorandum of the Court dated November 14, 2011, counsel for Rail-Term on December 1, 2011 met with staff of the Surface Transportation Board ("STB") to inform them of the Court's Order and to notify the STB that Rail-Term intended to re-submit a Petition for Declaratory Relief to the STB to obtain the Board's position on whether Rail-Term would be considered a " rail carrier" under 49 U.S.C. § 10102(5).

Rail-Term's Petition for Declaratory Relief is being filed with the STB today contemporaneously with this Report to the Court. A copy of

Rail-Term's Petition is attached for the Court's information.

Counsel for Rail-Term will inform the Court as soon as it receives the Surface Transportation Board's statutory interpretation. At that time and in accordance with the Court's Order, Rail-Term will file appropriate motions.

Respectfully submitted,

RAIL-TERM CORP.

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Dated: December 14, 2011

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

| | | |
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| **RAIL-TERM CORP.,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | Appeal No. 11-1093 |
| | ) | |
| **UNITED STATES RAILROAD RETIREMENT BOARD,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2011, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and sent to the Clerk of Court, by hand delivery, the required number of paper copies, and served a copy of the foregoing on the counsel of record listed in the appellate CM/ECF system.

/s/ Dennis M. Devaney

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**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**FD 35582**

# RAIL-TERM CORP.
# PETITION FOR A DECLARATORY ORDER

Submitted by

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Dated: December 14, 2011

**EXPEDITED HANDLING REQUESTED**

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**FD 35582**

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

INTRODUCTION

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(a), Rail-Term Corp. ("Rail-Term") files this Petition for a Declaratory Order seeking a ruling from the Surface Transportation Board ("the STB") that it is not a "rail carrier" within the meaning of the I.C.C. Termination Act ("ICCTA"), 49 U.S.C. 10102(5). Rail-Term submits this Petition as directed by the United States Court of Appeals for the District of Columbia Circuit in its Order and Memorandum dated November 14, 2011.[1] A copy of that decision is attached here as Exhibit A. Rail-Term requests expedited handling by the STB since the matter is held in abeyance by the D. C. Circuit pending the STB determination.

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1 Cited as "November 14 Order and Memorandum."

## BACKGROUND

As the STB will recall from the previous declaratory relief request submitted by the Petitioner on June 3, 2010, 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 does not own any lines of railroad, operate trains, hold itself out to provide transportation for compensation, or own, lease, or operate any railroad locomotives or rolling stock, or hold any sort of license from the STB to operate as a rail carrier or common carrier by railroad in the United States.

More specifically, Rail-Term develops computer-based dispatching software and provides dispatching services for several American short line railroads from an office in Rutland, VT. In effect, Rail-Term's rail carrier clients have "outsourced" to Rail-Term the dispatching functions that they

could otherwise provide "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 provides dispatching services in the United States for the 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.

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")[2] finding it to be a "carrier employer" under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (the "RRA" and the "RUIA" and collectively "the Acts"). 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"

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[2] 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.

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 Surface Transportation Board ("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."

*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 sought review by filing a petition for reconsideration and administrative stay with the RRBD on July 9, 2010. Inasmuch as the RRBD has frequently based its "coverage rulings" finding entities subject to its jurisdiction under the RRA

and RUIA on rulings from the STB, Rail-Term petitioned this agency on June 3, 2010, for a decision confirming that it is not a "rail carrier"[3] as that term is used in the ICCTA.

On October 12, 2010, the STB issued a decision denying Rail-Term's declaratory order 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." More specifically, the STB declined to issue a ruling because there was no referral from the RRBD and because the RRBD did not stay its proceedings to permit Rail-Term to obtain the [Surface Transportation] Board's views. Furthermore, the STB stated Rail-Term had not indicated that it has sought reconsideration of the coverage decision (i.e., the Initial Decision).[4] The Board also deferred ruling on Rail-Term's request in view of the fact that the RRBD's coverage decision in Trinity Railway Express—Train Dispatching—Herzog Transit Services[5] was pending review in the United States Court of Appeals for the Seventh Circuit

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[3] 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. *See* note 10 at page 10.

[4] In fact, Rail-Term did advise the STB that it was going to seek administrative reconsideration of the Initial Decision. At lines 5 through 8 of its previous petition to the STB, Rail-Term stated that "it plans to seek reconsideration of that erroneous ruling by filing both an administrative appeal with the RRBD and, in the event of a second adverse RRBD ruling, by seeking judicial review of that agency's final decision." June 3 Petition at page 4.

[5] B.C.D. 09-53, Oct. 28, 2009.

and could affect the RRBD's future decision on reconsideration of the Rail-Term coverage decision.[6]

The RRBD issued its decision on reconsideration on January 28, 2011.[7] Over a second dissent by management member Kever, it once again found coverage for Rail-Term as an employer as a "carrier by railroad" as well as under an alternate theory that Rail-Term's dispatcher employees are also employees of its carrier clients. The RRBD based its holding that Rail-Term is an employer on the notion that it was providing common carriage by rail in interstate commerce due to the "integral" nature of train dispatching to the overall operation of movement of goods by rail. The RRBD dismissed Rail-Term's argument that it is not a "rail carrier" under the ICCTA stating,

> this argument misses the point. In determining what constitutes a rail carrier under the RRA and RUIA, the threshold inquiry begins with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. This is because the regulatory schemes of the RRA and ICCTA are not symmetrical. Standard Office Buildings Corporation v. United States, 819 F.2d 1371, 1378 (7th Cir. 1987). By virtue of the control that it exercises over the movement of trains, Rail-Term is a rail carrier within the meaning of that term under the RRA and RUIA. To hold otherwise would allow for easy erosion of the RRA and RUIA by parsing out interstate transportation by rail to non-covered entities. Reconsideration Decision at page 3.

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[6] This statement appears to contradict the STB's previous statement that Rail-Term had not indicated that it would seek reconsideration of the RRBD's Initial Decision.

[7] Cited as the "Reconsideration Decision."

On March 28, 2011, Rail-Term appealed the Reconsideration Decision to the United States Court of Appeals for the District of Columbia Circuit. On appeal Rail-Term argued that it could not be a "covered employer" under the RRA and RUIA because it was not a "rail carrier" under the ICCTA or a "carrier by railroad" under the RRA and RUIA. Citing the 7th Circuit's decision in Herzog Transit Services v. the United States Railroad Retirement Board,[8] Rail-Term emphasized that it could not be a "rail carrier" under the plain meaning of the statute, that the language of the ICCTA and the RRA/RUIA is interchangeable, and that Congress intended for the term "carrier" to have the same meaning under these two statutes.

At oral argument the Court asked shouldn't Rail-Term's carrier status be resolved by the STB. Rail-Term replied that "we tried to do that" but the STB "chose not to address that issue." During further questioning, Judge Ginsburg cited the primary jurisdiction of the Surface Transportation Board while acknowledging that the question of Rail-Term's carrier status was not

[8] 624 F.3d 467 (7th Cir. 2010) hereafter cited as "Herzog Transit."

referred to the STB by either the RRBD or the Court but "this time it would be."[9]

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 petition the STB for a determination as to whether it is a "rail carrier" under 49 U.S.C. §10102(5). The Court referred that issue to the STB emphasizing that a resolution of that legal issue is within that agency's primary jurisdiction. As 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.

## ARGUMENT

5 U.S.C. 554(e) and 49 U.S.C. 721, give the STB discretion to issue a declaratory order to terminate a controversy or remove uncertainty. *See*, Norfolk Southern Railroad Company and the Alabama Great Southern Railroad Company-Petition for Declaratory Order, FD 35196, STB served March 1, 2010. The issue here is a novel one: whether a company that supplies services to the railroad industry in the form of train dispatching is a

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[9] A copy of the relevant pages of the oral argument transcript is attached as Exhibit C.

"rail carrier"[10] within the meaning of §10102(5) of the ICCTA. Rail-Term is filing this new Petition for Declaratory Relief in accordance with the Court's instruction. It contends that this filing to clarify its "rail carrier" status is consistent with courses of action taken by other parties before the Surface Transportation Board that had initially been characterized by the RRBD as "rail carriers" under the ICCTA and therefore "covered employers" for RRA and RUIA purposes.[11] *See, e.g.,* H&M International Transportation, Inc.-Petition for Declaratory Order, FD 34277, slip op., STB served November 12, 2003 (cited as "*H&M*"), and American Orient Express Railway Company LLC-Petition for Declaratory Order, FD 34502, slip op., STB served December 29, 2005(cited as "*American Orient Express*"). Rail-Term urges the STB to issue a decision finding that it is not a "rail carrier."

## RAIL-TERM IS NOT A RAIL CARRIER UNDER THE ICC TERMINATION ACT

Rail-Term's review of pertinent STB and RRBD decisions indicates there is little precedent directly on point as to the issue of the rail carrier status of a vendor of subcontracted services to carrier railroads which

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[10] The ICCTA uses the term "rail carrier" while the RRA and RUIA use the term "carrier by railroad." Rail-Term believes they are one and the same and will use these terms interchangeably. *See,* Herzog Transit at 473, where the Court stated "[t]he [RRBD] seemed to assume, and we see no need to disagree, that Congress intended 'carrier' to have the same meaning for both of these closely related statutes and that the RRA therefore affords no broader coverage than the ICCTA."

[11] Rail-Term does not seek any guidance from the STB as to its status under the RRA and RUIA, only under the ICCTA.

historically handled such functions "in house". *Compare* H&M and American Orient Express, *supra.* Both of these STB decisions arose in connection with coverage status proceedings before the RRBD. According to the STB's decision, H&M involved an entity operating warehousing, distribution, truck terminal, and intermodal facilities at various points in the United States. H&M provided services for contracting railroads such as the loading and unloading of trailers and containers and the moving, inspecting, and securing of trailers. At one of these facilities H&M also moved railcars around the site using its own switching locomotives. However, H&M did not operate beyond that facility and was prohibited by its contract with the serving railroad from providing common carrier rail service. In finding that H&M was not a "rail carrier" subject to its jurisdiction, the STB held

> [t]he Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. 10501(a). The term "transportation" is defined to include a facility related to the movement of property by rail, and services related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9) (A), (B). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5).
>
> Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. H&M's intermodal transloading activity could fit within the broad definition of transportation. [citations omitted] But this is only half of the statutory requirement for Board jurisdiction under section 10501.
>
> 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*" [emphasis supplied] to the public to provide common carrier service. [citations omitted] 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.

By comparison, American Orient Express ("AOERC") was a company offering a "rail cruise" vacation experience over the American rail network using its own passenger rolling stock and on board crews in trains operated for it under contract by Amtrak. There the STB ruled that AOERC was a "rail carrier." It found that AOERC did engage in "transportation" by handling passengers in railroad equipment that it owned, that its operation of trains through a contract with Amtrak constituted the provision of railroad transportation, and that it held itself out to the general public to provide transportation for compensation. Slip op. at 3-6.

Outside of the RRBD context, there is substantial STB and Interstate Commerce Commission precedent on the issue of what constitutes "common carriage." *See, e.g.*, SMS Rail Service, Inc., FD 34483, STB served January

24, 2005, slip op. at 5, and B. Willis, C.P.A., Inc., FD 34013, STB served July 26, 2002, slip op at 6. Rail-Term is plainly not "a rail carrier" within the meaning of the ICCTA under that precedent because 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, Rail-Term is not a "carrier by railroad" under the RRBD's precedent insofar as it does not own, lease, or control a rail line or retain the capacity to operate a rail line or operate as a common carrier or hold authority from the STB to do so. *See*, B.C.D. 09-02, Tri-County Commuter Rail Organization, *et al*, Jan. 20, 2009, slip op. at pages 3 and 6; B.C.D. 00-35, Cape Cod Central Railroad, Inc., Sept. 14, 2000; and B.C.D. 03-27, Northern New England Passenger Rail Authority, March 21, 2003, slip op.[12] Accordingly, the Surface Transportation Board should find that Rail-Term is not a "rail carrier" subject to its jurisdiction and should issue a ruling to that effect.

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[12] Copies of the pertinent pages of these decisions are attached as Exhibits D through F.

## CONCLUSION

As directed by the Court, Rail-Term requests that the STB grant its Petition for a Declaratory Order and issue a declaratory ruling finding 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 declaratory proceeding.

Respectfully submitted,

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Dated: December 14, 2011

Strasburger
ATTORNEYS AT LAW

March 27, 2012

Writer's Direct Dial No: 202-742-8607
Writer's Direct Fax No. 202-742-8697

**BY E-FILING**

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

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

Dear Ms. Brown:

I am writing on behalf of Rail-Term Corp. ("RTC") in connection with the above-captioned matter. On March 8, 2012, the Board released a decision instituting a declaratory proceeding directing the parties to supplement the record by submitting by March 28, copies of their respective filings submitted to the Railroad Retirement Board ("RRB") and the United States Court of Appeals for the D.C. Circuit ("the Court") in the course of those proceedings.

Concurrently with this letter I am submitting the substantive documents filed by RTC with the RRB and the Court as well as a letter identifying those documents. My purpose in writing this letter is to bring to the attention of the Surface Transportation Board several decisions issued by the RRB defining a common carrier as "...one that holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier." Moreover, an entity will not be subject to the RRB's jurisdiction unless it is acting as a common carrier. GWI Switching, L.P.

These decisions submitted with this letter include:

- GWI Switching, LP., cited above.
- GWI Switching Services, L.P., Decision on Reconsideration
- B.C.D. 08-20, Total Logistic Control, LLC
- B.C.D. 11-87, Port of Montana Port Authority
- B.C.D. 08-15, Transco Railway Products, Inc., *et al*
- B.C.D. 08-10, Rescar, Inc., *et al*

While these cases differ factually from that of Rail-Term Corp., the point is that Rail-Term-just like these other parties- does not hold itself out to the public to transport people or property for compensation. Accordingly, it is not a rail carrier for the purposes of the I.C.C. Termination Act.

I would be pleased to provide those additional materials, should the STB request them.

Respectfully submitted,

John D. Heffner

Enclosures

cc: Rachel Simmons, Esq.
Michael Wolly, Esq.
Mr. Francois Prenovost
Dennis Devaney, Esq.

Go to Decision on Reconsideration

**EMPLOYER STATUS DETERMINATION**
**GWI SWITCHING, L.P.**

This is the determination of the Railroad Retirement Board concerning the status of GWI Switching, L.P. (GWI), as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

GWI is a switching railway that provides services to only one customer, CMC Railroad I Ltd. Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any express company, sleeping-car company, and carrier by railroad, subject to [the Interstate Commerce Act];
>
> (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 (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The Interstate Commerce Commission has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather transport only for those with whom they see fit to contract individually. The RRB has followed the distinction made by the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also International Detective Service, Inc. v. Interstate Commerce Commission, 595 F.2d 862, 865 (D.C. Cir. 1979).

**GWI SWITCHING, L.P.**

In this case, GWI does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather, it performs switching services over that line only for the one company with which it has contracted. Accordingly, the Board determines that GWI is not a carrier under the Acts.

GWI is controlled by Genesee and Wyoming Industries, Inc., which controls a number of rail carriers. GWI is therefore under common control with employers under the Acts. However, GWI, which is a limited partnership that operates a rail storage yard, does not provide any services for its affiliates. It operates the yard for CMC Railroad I Ltd, an unaffiliated company. Accordingly, in the opinion of a majority of the Board, GWI is not providing service in connection with rail transportation; since it is also not a carrier, as defined in paragraph (i) of section 1(a)(1) of the Railroad Retirement Act, it is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Glen L. Bower

V. M. Speakman, Jr. *(Dissenting Opinion Attached)*

Jerome F. Kever

Attachment

**DISSENT OF V. M. SPEAKMAN, JR.**
**ON THE EMPLOYER STATUS DETERMINATION**
**GWI SWITCHING, L.P.**

I agree that GWI Switching, L.P. (GWI) is under common control with a number of employers under the Acts. In addition, this company may be performing railroad related services in that it furnishes switching services for CMC Railroad I LTD, (CMC). The fact that GWI is not providing railroad services for its affiliate should be irrelevant in a coverage determination case. If CMC is, in fact, a covered employer, then GWI should, in turn, be covered.

I must dissent from the majority opinion in this case and feel that absent a coverage determination on CMC, a valid decision in the current case cannot be made.

V. M. Speakman, Jr.

12/6/84
Date

**EMPLOYER STATUS DETERMINATION**
**GWI Switching Services, L.P.**
**Decision on Reconsideration**

This is the determination on reconsideration of the Railroad Retirement Board concerning the status of GWI Switching Services, L.P. (GWI) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

By letter dated December 28, 1994, GWI was notified of B.C.D. 94-113, wherein a majority of the Board, Mr. Speakman dissenting, found that GWI was not an employer under the RRA and the RUIA. By letter dated December 22, 1995, GWI requested reconsideration of the Board's decision and stated that page 2 of the Board's decision contained a factual error in the following statement:

> In this case, GWI does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather, it performs switching services over that line only for the one company with which it has contracted.

GWI stated that it has held itself, and continues to hold itself, out as a common carrier of rail services to all parties. GWI explained that although it presently serves one customer, its intent and strategy is to broaden its activities to include additional customers. GWI stated that in order to achieve that goal, it reserved for itself in its operating agreements the right to serve additional customers. GWI pointed out that its Southern Pacific Trackage Rights Agreement does not restrict GWI's operations to Southern Pacific's plastic pellet railcars. That same Agreement allows GWI to operate over approximately 5.2 miles of the Southern Pacific Baytown Branch and Southern Pacific Lafayette Main Line. GWI stated that it believes that the introduction of Burlington Northern into the territory, by means of trackage rights over the Southern Pacific Lafayette Main Line, in connection with pending merger transactions, will offer significant opportunities for expanded service by GWI to a variety of customers in the area.

The basis for the Board's decision in B.C.D. 94-113 was the statement cited by GWI in its request for reconsideration. The additional information provided by GWI indicates that GWI does, in fact, meet the criteria for being a common carrier discussed in B.C.D. 94-113. Since GWI does hold itself out as a common carrier to provide rail services, the Board finds that it does fall within the definition of a carrier employer set out in

section 1(a)(1)(i) of the RRA and sections 1(a) and (b) of the RUIA.

The decision in B.C.D. 94-113 is reversed. The Board finds that GWI became a carrier employer under the RRA and the RUIA effective April 6, 1994, the date on which it began operations.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

CCCook:SABartholow:MPDadabo:mpd:ik
GWIS3111.cov
C. 3111-95

TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination -- Decision on Reconsideration
GWI Switching Services, L.P.

Attached is a proposed coverage decision on reconsideration which reverses B.C.D. 94-113 and holds that GWI Switching Services, Inc. ("GWI") became a carrier employer effective April 6, 1994, the date on which it began operations. I am also attaching copies of B.C.D. 94-113 and GWI's request for reconsideration.

Attachments

**B.C.D. 08-20** **MAY 15 2008**

**EMPLOYER STATUS DETERMINATION**
**Total Logistic Control, LLC**

This is the determination of the Railroad Retirement Board concerning the status of Total Logistic Control, LLC (TLC) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, et seq.) (RUIA).

A review of TLC's operations began with an inquiry into Rochelle Railroad Company (RRC), which was an employer covered under the Acts from April 13, 1996, through November 30, 1998 (B.A. No. 2778). In Board Coverage Decision (B.C.D.) 99-36, coverage of RRC was terminated. As explained in that decision, in Surface Transportation Board (STB) Finance Docket AB-549, decided May 21, 1999, the STB granted the application of the City of Rochelle, Illinois (City) requesting the authorization of the discontinuance by RRC of service over 2.06 miles of track that the City owns in an industrial park within the City. According to the STB decision, the City is operating the line through a contractor. That contractor is TLC.[1] In a letter dated June 7, 2006, from Mr. Mike Carr, CEO-President of Pioneer Railcorp., the owner of RRC, RRC discontinued operations in May 1999, when TLC became the sole operator of the track[2].

Total Logistics, Inc. is a Milwaukee-based public company which operates through two wholly-owned businesses, TLC, and Zero Zone[3]. TLC is the tenth largest provider of refrigerated warehousing services in the United States. TLC is a national provider of integrated logistic services which include refrigerated and dry warehousing, supply chain management, dedicated third-party facility and operations management, food distribution, bottling and packaging, and fulfillment services. TLC provides end-to-end supply chain services to a number of major U.S. food and consumer product companies. TLC operates a fleet of over 435 tractors with over 825 refrigerated and dry trailers. It has five maintenance facilities and more than 30 logistic centers.

In response to inquiries from the agency, Peter Westermann, Chief Operating Officer of TLC advised that TLC owns no rail assets other than its own spurs. Although TLC owns track-mobiles, it does not own locomotives. Mr. Westermann stated further that TLC has

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[1] Documentation in the file from Jason T. Anderson, Economic Development Director for the City of Rochelle indicates that the City of Rochelle has no employees engaged in the operations of the railroad and it is TLC who is the rail operator of the railroad.

[2] Mr. Carr noted that TLC actually began operations before May 1999, working with RRC.

[3] Zero Zone is a manufacturer of high quality refrigerated and freezer display cases used in grocery, convenience, dollar and drug store chains for retail merchandising of food, beverage and floral products, as well as refrigeration houses and racks to power and control the refrigeration systems, electrical panels, and stand-by power for both retail and industrial applications.

no employees engaged full time in the exclusive business of railcar moving. Any man-hours spent shuttling, spotting or switching

railcars are a tiny fraction of our total man-hours, and the vast majority of that tiny fraction is to move cars to and around our own warehouse. We do this under a contract with the city in the industrial park.

TLC started warehousing in Rochelle in 1986, and had one agreement with the City from 2002. TLC has a current contract with the City, dated October 1, 2004, to shuttle all cars within the industrial park with TLC's track-mobile. Mr. Westermann explained that because the industrial park is growing, in January 2006 TLC sought bids from short-line rail companies to perform the work TLC was performing. This was done in anticipation of more railcar volume which would necessitate the use of a locomotive rather than a track-mobile. TLC selected the Burlington Junction Railway. The Burlington Junction Railway has been an employer under the Acts since 1985 (B.A. No. 4777)[4]. In a letter dated September 25, 2006, Mr. Westermann stated that the Burlington Junction Railway was on-site in September 2006, performing functions in preparation "for the volume to come in November". According to a letter dated November 17, 2006, from Mr. Robert Wingate, General Manager of the Burlington Junction Railway, there are three employees working out of the Rochelle operation, and service and compensation for all three is reported under the appropriate Acts.

The limited amount of spotting, shuttling or switching railcars which TLC did before entering into the contract with Burlington Junction Railway was done with track-mobiles (not locomotives), and was done pursuant to a contract with the City of Rochelle to shuttle cars within the industrial park to move cars to and around TLC's own warehouse. According to Mr. Westermann, TLC performed the final delivery of approximately 4,000 railcars per year to the facilities in the Rochelle industrial park. About 3,700 of these were to TLC's own facility, with the balance spread across four other buildings in the park. Using a track-mobile, TLC placed at designated individual company locations railcars delivered by Class I railroads. Ninety percent of this volume went to TLC's own warehouse, and ten percent went to the other facilities in the industrial park. The percentage of revenue TLC received from this service was approximately two tenths of one percent (.002). This is based on $800,000.00 in shuttle revenue against $350 million in TLC sales. When measured against total company revenues, the percentage becomes two thousandths of one percent (0.0020%)[5]. The approximate proportion of TLC employees who worked in a capacity related to the shuttle services was two tenths of one percent. No employees worked full time related to shuttle activities.

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[4] Effective March 7, 1997, Burlington Junction Railway changed its name to Burlington Shortline Inc. d/b/a Burlington Junction Railway.

[5] As of January 2005, TLC is a wholly owned subsidiary of SUPERVALU INC. SUPERVALU sales are approximately $40 billion; $800,00.00 is 0.0020% of $40 billion.

Section 1(a) (1) of the Railroad Retirement Act (45 U.S.C. § 231(a) (1)), insofar as relevant here, 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;

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The question before us is whether TLC should be considered a covered rail carrier for the period May 1999 (when Rochelle Railroad Company ceased providing services and TLC took over) through September 2006 (when the Burlington Junction Railway took over operations).

The evidence of record indicates that with the switching services which TLC provided at the Rochelle industrial park TLC would be operating as a switching railway providing services for itself. TLC did not hold itself out to the public as a provider of switching services. The limited provision of TLC's switching services for the other four facilities in the industrial park as described above would not change that description. Decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway.*

The Surface Transportation Board (STB) has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, formerly the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also, International Detective

Service, Inc. v. Interstate Commerce Commission, 595 F. 2d 862, 865 (D.C. Cir. 1979).

Additionally, the term "railroad", under the ICC Termination Act of 1995 includes a switch, spur, track, terminal, or terminal facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. §10102(6)(C)). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and RUIA where they act in the capacity of a common carrier subject to the ICC Termination Act of 1995.

In this case, the information contained in the file indicates that TLC was not a common carrier, but operated as a private carrier which performed intraplant switching primarily for itself. Even with the limited switching services provided to the four other buildings, it would still be considered a private carrier. TLC does not hold itself out as providing services from this facility to any and all who would like to use it – the number of clients is finite, TLC itself, and the entities which used the other four buildings in the park.

Consistent with earlier decisions of the Board, we hold that TLC was not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts for the period May 1999 through September 2006. *See*, B.C.D. 08-10, Rescar, Inc. and Rescar Industries, Inc. decided February 21, 2008.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

**B.C.D. 11-87** **August 30, 2011**
**EMPLOYER STATUS DETERMINATION**
**Port of Montana Port Authority**

This is the determination of the Railroad Retirement Board regarding the status of Port of Montana Port Authority as an employer under the Railroad Retirement Act (45 U.S.C § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C.§ 351 et seq.) (RUIA).

Information regarding the Port of Montana Port Authority was submitted by Ms. Sheryl Ralph, Financial Manager of Port of Montana[1]. According to Ms. Ralph, Port of Montana Port Authority (the Port) was created by resolution on May 7, 1986, pursuant to authority granted by the 1985 Montana Legislative assembly and the city of Butte-Silver Bow, Montana's Council of Commissioners. The Port is a "component unit of the primary governmental unit, Butte-Silver Bow, Butte, Montana". Ms. Ralph explained that the Port:

> is charged with the promotion, stimulation and development of commerce, economic development and prosperity for the State of Montana and its citizens. It does so primarily through the operation of a transload facility. In addition to the transload facility, the Port owns a warehouse at a secondary location which is used exclusively by tenants with long term leases.

The Port has five full-time office employees whose work "includes communications with customers who ship into or out of the Port via truck or rail". The Port also has five full time operations employees whose work "includes direct contact with customer representatives, including employees of the UPRR and BNSF[2] and who also perform switching tasks on a track that is shared between the BNSF, UPRR and the Port". Ms. Ralph stated that at the transload facility, the Port:

> switches rail cars into the appropriate area of the facility, upon receipt from the UPRR or BNSF, and loads or unloads them per customer request. Product that comes in on rail is loaded on truck. That which comes in on truck may leave via rail or truck. The Port provides storage as needed for product in the interim and also leases space to tenants who provide their

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[1] It is noted that "Port of Montana, Inc." was an entity incorporated in the state of Montana on September 1, 1972, and dissolved on December 4, 2006. Review of the evidence of record, including a brochure submitted by Ms. Ralph, as well as the official website for Port of Montana (www.portofmontana.org) indicates that the Port of Montana Port Authority does business as "Port of Montana".

[2] Both the Union Pacific Railroad Company (UPRR) and the Burlington Northern and Santa Fe Railway Company (BNSF) are employers covered by the Acts (B.A. Nos. 1713 and 1621, respectively).

own transloading services. Although the Port receives rail service from both the BNSF and UPRR, it has business contracts only with the UPRR.

The Port's facility includes rail tracks, an unheated warehouse, an auto facility, a bulk minerals building, fertilizer belt, maintenance shop, truck scales, and an office building. There is also an aviation gas pump, bulk liquid tanks and bladders, and a ramp on the premises for use by customers or the Port in handling products. The Port also owns a locomotive, a backup switch engine, piggy packers, forklifts of various sizes, and an unheated warehouse with office space at a secondary location. Service provided to tenants at this secondary location is limited to maintenance and upkeep of the warehouse.

Ms. Ralph also explained that the UPRR leases the auto facility from the Port, which UPRR then uses under contract with General Motors. Port employees switch auto racks into and out of the auto facility[3]. The Port provides snow removal services for the auto facility.

The Port provides other services to the UPRR including the temporary storage of unused rail cars through December 2009, and participation in the One Plus billing program which allows the UPRR to submit a single bill to the customer which includes rail and transload services. The Port also charges the UPRR a switch fee for each car that enters the facility, regardless of the rail carrier who handles it. According to Ms. Ralph, in 2009, approximately 2,000 man hours were expended to provide these services, which accounted for approximately 23% of the Port's total revenues. Ms. Ralph submitted copies of a maintenance agreement, a lease agreement, and a car storage agreement, all between the UPRR and the Port. Ms. Ralph also submitted a copy of a track lease agreement between the Port and Rhodia, Inc., a chemical company.

According to Ms. Ralph, all facilities and equipment are under the control of the Port, unless they are leased to a customer. Ms. Ralph stated that the Port "does not exercise joint control of any asset with another party". The Port has no stockholders or equity holders. A five member Board of Commissions, appointed by the Butte-Silver Bow Chief Executive and confirmed by the Butte-Silver Bow Council of Commissioners, governs the Port. According to Ms. Ralph, none of the Commissioners are affiliated with any railroad. Ms. Ralph stated that the Federal Railroad Administration has not required the Port to pay any user fees; there have been no rulings regarding the status of the Port by the Surface Transportation Board; and the Internal Revenue Service has not ruled on the applicability of the Railroad Retirement Act to the Port.

Review of the brochure submitted by Ms. Ralph, as well as the Port's website, indicates that the Port offers a variety of services to the public, including bonded storage, consulting, customized billing, direct transload for trucks or railcars, container breakdown and transfer, and inventory management and control.

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[3] Other UPRR contractors unload the auto racks, inspect the vehicles, load them onto trucks and provide security for the auto facility.

The Port also offers key contacts and links to different entities "which benefit all customers", such as the United States Department of Commerce, Montana Departments of Agriculture, Commerce, and Transportation.

Additional information regarding the Port was provided in a letter dated February 3, 2011, from Mr. Thomas Lawrence III, counsel to the Port. According to his letter,

> As an independent municipal entity, the Port primarily provides warehouse, distribution and transloading services and building and property leases to its customers. In addition, the Port provides rail switching services on its property to UP and Burlington Northern Santa Fe ("BNSF"). Annually, more than 75% of Port revenues are derived from non-rail customers in the agricultural, mining, construction and forestry industries. For these customers, the Port provides storage, distribution and transload services of their products to or from rail cars. The Port contracts directly with its non-rail customers to provide these services and no rail carrier is a party to the contracts. In fiscal year 2008, services provided to these non-rail customers accounted for 77% of the Port's total revenues of $1.145 million; in 2009 it was 76% of $1.398 million; and in 2010 it was 79% of $1.478 million.
>
> In addition the Port provides rail switching services to UP and BNSF, which services are billed to and paid for by UP. The Port switches rail cars delivered to its facility by these carriers and moves them to the appropriate location within the facility, where pursuant to contracts with the non-rail recipients of these cars, the Port provides its transloading, storage and distribution services. The Port also provides switching services to UP to move auto racks to and from a UP auto distribution center located on property that the Port leases to UP. The Port charges UP and BNSF a fee for each car switched. In fiscal year 2008, the rail switching services provided to UP/BNSF accounted for 10% of the Port's total revenue; in 2009 it was 10% and 2010 it was 9%.

Mr. Lawrence further explained that the Port leases property to UP for its auto distribution center, accounting for about 10% of the Port's total revenues for 2008 through 2010. In 2009 and 2010 the Port also received revenue from UP for storage of rail cars – in 2009 the storage of these cars accounted for 4% of the Port's total revenues, and in 2010 it accounted for 2% of the Port's total revenues. Mr. Lawrence concludes:

> Hence, although revenues from UP accounted for 21% of total Port revenue in 2010; 24% in 2009, and 23% in 2008, the actual revenue attributable to rail switching services for UP was only 10% in 2008; 10% in 2009 and 9% in 2010.

In response to a request for clarification from the agency's General Counsel, in a letter dated April 1, 2011, Mr. Lawrence stated that the Port began providing

switching services in 1990. Documentation supplied by Mr. Lawrence supports his statement that:

> the switching services represent a minor component of the Port's overall annual revenue. Switching services have historically comprised between 5% - 12% of the Port's annual revenues and have never exceeded 14%.

Mr. Lawrence further stated that:

> generally more than 75% of the Port's revenues are derived from non-rail customers, with about 10% of its revenues coming from the switching services provided to Union Pacific Railroad Company ("UP"). The remainder is primarily attributable to a lease of property to UP for an auto distribution center and the Port's storage of surplus railcars for UP.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), which insofar as relevant here, 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 (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The definitional provision establishing the jurisdiction of the Surface Transportation Board over railroad transportation defines "railroad" to include "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation * * *." 49 U.S.C. § 10102(6)(C). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and the RUIA where they act in the capacity of a common carrier subject to the jurisdiction of the Surface Transportation Board. See, e.g., Camp Chase Industrial Railroad, B.C.D. No. 95-41, and GWI Switching Services, L.P., Decision on Reconsideration, B.C.D. No. 96-19. Conversely, where switching operations are conducted by an operator that, without making it a vocation or holding itself out to the public as ready to act for all who desire the service,

undertakes by special agreement in a particular instance only, to transport property or persons from place to place, the Board has held that such operator is a private carrier and not an employer under the RRA and the RUIA. See, e.g., Hardin Southern Railroad Company, B.C.D. 94-29 ("As Hardin conducts rail operations only for one shipper, it operates as a private carrier rather than a common carrier in interstate commerce * * *"); The Great Miami & Western Railway Company, B.C.D. No. 94-105.2 ("GMWR does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question"); Joliet Junction Railroad, Inc., B.C.D. No. 96-48 ("JJR does not fall within the criteria applied by the ICC to determine whether a terminal type company such as JJR, is engaged in interstate commerce"); Port of Palm Beach District, Decision on Reconsideration, B.C.D. 96-59 ("the District is engaged in rail switching only as an ancillary activity to its main governmental purpose, which is the administration of the maritime facilities of the Port of Palm Beach * * * Since the ICC found that the Port of Palm Beach District does not hold itself out to the public as a common carrier by railroad, the Board finds that the District is not now and never has been a rail carrier employer"); Rapid Switching Services, LLC, B.C.D. 01-3 ("RSS-LLC is a switching railway which provides services to only one customer * * *"); Southern California Railroad Company, B.C.D. 01-75 ("There is no evidence that SCRC holds itself out to the public as engaging in the business of transportation of persons or property over the line in question"); R.J. Corman Railroad Switching Company, LLC, B.C.D. 03-49 ("RCSC is not a common carrier, but operates instead as a private carrier which performs intraplant switching for a single customer"); Chicago Heights Switching Company, Decision on Reconsideration, B.C.D. 03-63 ("CHSC provides rail-switching operations only as a private carrier"); and Quincy Railroad Company, Sierra Pacific Industries, Incorporated, B.C.D. 04-11 ("where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer {citing Hardin Southern Railroad Company and Great Miami & Western}").

The evidence of record shows that the Port is performing switching service for the Union Pacific Railroad Company and the Burlington Northern Santa Fe Railway Company, even though it is paid only by the Union Pacific. In his letter of April 1, 2011, Mr. Lawrence argues that "The Port does not advertise switching services to the general public, and it has given no indication that the public may demand switching services from the Port. Such services are only under contract with UP and the Port has no plans to expand its switching service to any other customers". The evidence of record shows that while the Port offers many of its services to the general public, it does not offer switching services to the general public. See, for example, its brochure entitled Port of Montana Gateway to Your Destination, stating, "The Port's Intermodal Hub is ideally positioned to serve all shippers through the Montana corridor.", and its website which states:

> The Port of Montana offers a wide variety of services at its 55-acre facility located in Silver Bow, Montana. We provide warehouse and storage services, certified scales, distribution services, technical support,

> customized billing, railcar and truck transload services, inventory management and control, packaging and shipping, consulting, pricing and logistics.
>
> For over 30 years the Port of Montana has helped customers expand their market areas by providing quality services, equipment and transportation alternatives; thereby strengthening the economic base of Montana. Our client base includes a number of industries such as; railroad, agriculture, automobile, trucking, forest products, silicon, ore concentrates, fertilizer, road treatment, and fuels. The Port of Montana will work to ensure the most competitive cost structure and service for your products helping design business strategies and achieve business goals.

In light of the evidence of record, and consistent with previous decisions cited above, we find that the Port is not an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

**B.C.D. 08-15** **MAR 13 2008**

**EMPLOYER STATUS DETERMINATION**
**Transco Railway Products, Inc.**
**Transco Railcar Repair, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of Transco Railway Products, Inc. (TRPI) and Transco Railcar Repair, Inc. (TRR) as employers under the Railroad Retirement Act (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Information regarding TRPI and TRR was provided by Mr. Ronald A. Lane, attorney for TRPI and TRR. According to Mr. Lane, as well as information obtained from TRPI's website, TRPI, a privately owned entity, is an independent provider

> of freight car repair, modification and rebuilding services to the rail transportation industry. The Company was organized in its current form in 1967 as a combination of certain predecessor companies that had been in the railcar repair and component manufacturing business since 1936.

TRPI operates rail car repair shops at seven locations throughout the Great Lakes region, Iowa, Montana and Georgia. TRPI also operates a rail car component fabrication facility in Ohio.

TRR, a subsidiary of TRPI, was created in 2004 to purchase most of the repair shop assets of Trinity Railcar Repair, Inc., (Trinity) including the shops at Miles City, Montana, Sioux City, Iowa and Waycross, Georgia. TRR also hired the Trinity employees at these locations. TRR performs the same services which Trinity performed. These services are performed for car owners, some of which are railroads, but, according to Mr. Lane, most of which are leasing companies or shippers which own their own car fleets. Trinity had been found by the Board to not be a covered employer under the Acts[1].

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[1] *See*, Trinity Railcar Repair, Inc., Board Coverage Decision 03-75. It is further noted that the Interstate Commerce Commission (the predecessor of the Surface Transportation Board), found that PLM Railcar Maintenance Company, the predecessor to Trinity, was not subject to regulation to the extent that it performed car repair and maintenance operations, and this exemption was not lost by virtue of incidental switching service provided to neighboring industries. *See*, Interstate Commerce Commission Decision, Finance Docket No. 30453, decided May 10, 1984.

TRPI is also part-owner of a non-operating carrier, D&W Railroad, LLC (D&W), which owns approximately 29 miles of rail line which is operated by Iowa Northern Railway. D&W conducts no operations and has no employees. The Board has found D&W not to be a covered employer under the Acts[2]. Neither TRPI nor TRR own or control any other rail carrier, and TRR performs no services for D&W. No railroad owns any direct or indirect interest in TRR. The officers and directors of TRR are also officers or directors of TRPI and D&W.

The Miles City facility (which was the initial subject of the Board's inquiries to TRPI) is, as explained above, owned and operated by TRR. According to Mr. Lane, BNSF Railway Inc. (BNSF) delivers and picks up rail cars for repair in the Miles City yard. BNSF also delivers and picks up cars in the yard for three other shippers whose facilities adjoin TRR's yard. One of the three shippers is Peavey Grain (Peavey). Mr. Lane explained that both of TRR's predecessors, PLM Railcar and Trinity, had agreed to pull Peavey's cars in and out of its elevator facility incidental to moving cars for repair in and out of its shops, and TRR has continued that practice. TRR also provides the same service on a "sporadic basis" for an adjacent scrap dealer and a car cleaning operation which operates within TRR's yard and performs cleaning services incidental to repair work performed at the TRR shop.

TRR began operations in May 2004, and employs 102 people, 46 of whom work at the Miles City facility. No TRR employee at Miles City works on property owned by any rail carrier. According to Mr. Lane, at the Miles City facility, TRR generated about $7.9 million in revenue from 28 different customers during fiscal year 2006-07. Of that revenue, about $1.5 million (18%) was from four unrelated Class I carriers. TRR's assets include railcar repair shops and related equipment, including a locomotive engine at Miles City, which is used for moving cars within the TRR yard and to and from adjoining shipper facilities. Railcar repair is performed pursuant to standard purchase orders, as well as a wide variety of contracts with different car owners.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer" to include:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined

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[2] *See*, Board Coverage Decision 05-34.

> in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. 45 U.S.C. §231(a)(1)(i) and (ii).

Section 1 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

The evidence of record establishes that TRPI is not operating as a rail carrier in interstate commerce. In addition, TRPI is not under common control with nor is it owned or controlled by a rail carrier employer. Furthermore, the evidence also establishes that TRR is not operating as a rail carrier in interstate commerce. While TRR is under common control with D&W Railroad, that entity has been found not to be a covered employer under the Acts. Accordingly, TRR is not under common control with nor is it owned or controlled by a rail carrier employer.

Regarding the limited movement of cars which TRR provides Peavey, as well as the sporadic movement of cars for the scrap dealer and car cleaning operation, decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. See, for example, B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway.*

The Surface Transportation Board (STB) has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or

persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, formerly the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also, International Detective Service, Inc. v. Interstate Commerce Commission, 595 F. 2d 862, 865 (D.C. Cir. 1979).

Additionally, the term "railroad", under the Interstate Commerce Act as amended includes a switch, spur, track, terminal, or terminal facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. §10102(6)(C)). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and RUIA where they act in the capacity of a common carrier subject to the Interstate Commerce Act as amended.

In this case, the information contained in the file indicates that TRR is not a common carrier, but performs limited car movement for a single entity, Peavey Grain. Even with the additional sporadic movement of cars for two additional entities, TRR would still be considered a private carrier. It is also noted that Trinity, TRR's predecessor, which operated the Miles City facility, performing the same services as TRR, as well as providing limited car movement for Peavey Grain, was found not to be a covered employer under the Acts.

Consistent with earlier decisions of the Board, we hold that neither Transco Railway Products, Inc. nor Transco Railcar Repair, Inc. is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman

Jerome F. Kever

**B.C.D. 08-10** **FEB 21 2008**

**EMPLOYER STATUS DETERMINATION**
**Rescar, Inc.**
**Rescar Industries, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of Rescar, Inc. (RI) and Rescar Industries, Inc. (RII) as employers under the Railroad Retirement Act (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Information regarding RI and RII was provided by Mr. Dan Madock, attorney for RI and RII. According to Mr. Madock, RI is a privately held company established in the early 1970's, and owned by a single individual, Mr. Joseph Schieszler, Sr. Mr. Schieszler owns no railroads, and is not an officer or director of any railroad. RII is also a privately held company which was established in 1992. RII is owned equally by five qualified subchapter S Trusts. None of the Trust shareholders have ownership interest in any railroad, and none share shareholders, beneficiaries, officers, directors, trustees, or employees with any railroad.

RI and RII (jointly known as "Rescar") employ approximately 1,000 employees who perform rail car repair, maintenance and cleaning for owners and lessors of railcars. Rescar does the vast majority of its business with non-railroad companies involved with the railroad industry, such as paper mills, smelting and mining companies, agriculture companies, petroleum refineries, chemical companies, steel manufacturing and processing companies, private car owners, and others. Rescar has six major facilities located in Elk Mills, Maryland; DuBois, Pennsylvania; Channelview, Texas; Orange, Texas; Longview, Texas; and Gordon, Georgia, and provides its own internal switching at these locations. Rescar also has approximately 64 field service repair and cleaning locations consisting of in-plant operations (located within customer facilities), fast-track locations (located as leased track within a rail yard or similar location), and "mobile" crews that respond to repair or cleaning requests from customers throughout the United States. All of Rescar's switching service primarily concerns in-plant movement of railcars, i.e., either on the client's premises or within a private industrial park, and not movement over the interstate rail network. Other than in-plant switching for ExxonMobil at its Baytown, Texas and Beaumont, Texas facilities[1], Rescar provides no other external (*i.e.*, third party) switching

[1] Only the switching services at the Baytown facility are under consideration in this decision.

services. Rescar currently has no separate division which performs the switching services.

Rescar has recently entered a business venture in which it would provide expanded switching services at ExxonMobil's Baytown, Texas facility[2]. Rescar has three locations at this facility: 350, 420 and 710. Locations 350 and 420 perform only railcar repair and cleaning services and have approximately a total of thirteen employees. Location 710 performs the in-plant switching and has approximately twelve employees. Switching services for this facility were provided by the Union Pacific (UP), a covered railroad employer. The track involved is owned by the UP and leased by ExxonMobil. Under the new agreement, the UP will continue to own the track, and ExxonMobil (by its switching service provider, Rescar) will be given limited, exclusive access across the UP mainline to traverse with trains from the refinery side of the facility bound for the chemical plant and back. The UP will drop trains at ExxonMobil Refinery along the Dock Lead, where Rescar will disassemble and assemble railcars while also providing in-plant movement of railcars for ExxonMobil. Rescar will acquire and operate two locomotives, and the personnel which Rescar assigns to ExxonMobil will be FRA trained and certified according to the position held. Rescar intends to add a new location number for the Baytown facility, and approximately twelve employees to perform the in-plant switching for the chemical side of the facility. The switching services provided ExxonMobil will be a 24/7 operation. Rescar's total revenues at the Baytown facility are currently approximately $3 million, of which $1 million is revenue from switching activities. The addition of the chemical side of the facility will add approximately another $1 million in switching revenue. This revenue represents approximately 1.6% of Rescar's total revenues. The total number of switching employees (22[3] ) represents approximately 2.4% of all Rescar employees.

Because the UP will no longer be serving the Baytown facility, there are two[4] additional third party industries which will require minimal switching services. Both of these entities, Rhodia and Advanced Aromatics, are located within the Baytown facility and will be without rail service if the UP no longer switches within the facility. Rescar argues that the services provided to these two entities will be *de minimis* and merely incidental to Rescar's in-plant switching for ExxonMobil. Rescar anticipates monthly total switching of less than fourteen cars for both third party industries combined. This will be less than 1% of the total monthly

---

[2] Rescar initially provided switching services for the ExxonMobil Refinery Complex on the refinery side of the Baytown Complex, but not the chemical side of the facility.

[3] The initial twelve employees, plus the additional twelve employees who would be hired.

[4] Initially there were three third party industries involved; however the entity NGO is no longer in business.

railcars (1,859) Rescar will switch in-plant for ExxonMobil. Rescar will enter into separate switching agreements with Rhodia and Advanced Aromatics.

Regarding the switching services which Rescar provides at ExxonMobil's Beaumont, Texas facility[5], information provided indicates that Rescar's total revenue at that plant is approximately $2 million, of which $900,000 is from switching activities. Rescar provides switching services only for ExxonMobil, and all services are provided within the plant. No third party customers are served, and Rescar is not contemplating expansion of switching services at the Beaumont facility.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer" to include:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;
>
> (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 (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. 45 U.S.C. §231(a)(1)(i) and (ii).

Section 1 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

The evidence of record indicates that with the switching services Rescar previously provided to ExxonMobil at the Baytown, Texas and Beaumont, Texas facilities, Rescar would be operating as a switching railway which is providing services to only one customer, ExxonMobil. Rescar does not hold itself out to the public as a provider of switching services. The expansion of Rescar's switching services for ExxonMobil at the Baytown facility as described above would not change that description. Decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company

---

[5] All switching services at the Beaumont facility are within the plant and no third party customers are served.

does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway.*

The Surface Transportation Board (STB) has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, formerly the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also, International Detective Service, Inc. v. Interstate Commerce Commission, 595 F. 2d 862, 865 (D.C. Cir. 1979).

Additionally, the term "railroad", under the ICC Termination Act of 1995 includes a switch, spur, track, terminal, or terminal facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. §10102(6)(C)). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and RUIA where they act in the capacity of a common carrier subject to the ICC Termination Act of 1995.

In this case, the information contained in the file indicates that Rescar is not a common carrier, but operates as a private carrier which performs intraplant switching for a single customer, ExxonMobil. Even with Rescar providing switching services to two additional clients, it would still be considered a private carrier. The track it uses is leased by ExxonMobil, and runs through the ExxonMobil facility, making the process akin to intraplant switching. Rescar does not hold itself out as providing services from this facility to any and all who would

like to use it – the number of clients is finite, i.e., the two entities described above, Rhodia and Advanced Aromatics.

Consistent with earlier decisions of the Board, we hold that Rescar is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman

Jerome F. Kever

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JOHN D. HEFFNER, PLLC
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SUITE 200
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939

March 21, 2011

Steven O. Bartholow, Esq.
General Counsel
United States Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

**RE: B.C.D. 11-14, EMPLOYER STATUS DETERMINATION-Decision on Reconsideration, Rail-Term Corporation**

Dear Mr. Bartholow:

I am writing on behalf of Rail-Term Corp. ("RTC") at the suggestion of Marguerite Dadabo in the Board's Office of General Counsel. Rob Perbohner in the Management Member's office recommended that I contact her to discuss how to seek an informal stay of a Board decision and she in turn advised me to write you. The decision at issue is the Board's final ruling served January 28, 2011, in the above-captioned proceeding, finding RTC "an employer" for coverage purposes under the Railroad Retirement Act ("RRA") and the Railroad Unemployment Insurance Act ("RUIA" or collectively "the Acts").

During my recent call with Ms. Dadabo, I informed her that RTC would likely appeal this decision to a United States Court of Appeals inasmuch as we believe it is arbitrary and capricious and contrary to the plain language of both the Acts and the I.C.C. Termination Act ("ICCTA") for the simple reason that RTC is neither a "carrier by railroad subject to the jurisdiction of the Surface

Transportation Board" nor "a rail carrier" or "a railroad" as those terms are used under the ICCTA. During our call Ms. Dadabo suggested the appropriate way to seek this relief would be for RTC to write your office and informally ask the Board to stay the effectiveness of its decision pending the outcome of that appeal. My purpose in writing this letter is to seek this stay. Inasmuch as the Board is familiar with the facts of this case, I will only review them here to the extent necessary for your understanding.

RTC is a small privately held Michigan corporation which provides railroad dispatching services for short line and regional railroad clients in the United States. It is a subsidiary of a Canadian corporation which owns a similar entity located in Canada that provides such services for Canadian railroads. Significantly, neither RTC nor its corporate affiliates own any lines of railroad, operate trains, hold themselves out to provide transportation for compensation, own, lease, or operate any railroad locomotives or rolling stock. Furthermore, RTC is neither owned by nor under common control with a rail carrier.

RTC's sole activities entail the development of a computer-based dispatching software that it uses to provide dispatching services for its rail carrier clients and providing those services. In the case of its American operations, RTC provides these services to its clients from an office in Rutland, VT, where it employs 8 people. Regarding RTC's business operations, RTC dispatchers work directly for RTC, not for its client railroads, and client railroad operating personnel do not deal directly with RTC dispatchers. As a result, there is no direct control between RTC and the employees of its client railroads.

When RTC was originally developing its dispatching software and related services for the railroad industry around 2005, company management contacted the Board to ascertain whether it was covered under the Acts. Two former Board employees, Joseph Ellena and Michael Litt, advised that it would not qualify as "a covered employer." Relying on that advice, it went to great expense to establish its

own private retirement benefit system under the assumption that its employees were covered under the Social Security system.

As a threshold matter, courts and federal administrative agencies have generally applied a four part test in determining whether or not to grant a stay pending appeal: 1) whether the petitioner is likely to prevail on appeal, 2) the irreparable injury the petitioner would experience absent a stay, 3) the injury any opponents would experience if a stay is granted, and 4) how the public interest is best served. Regarding the first element, RTC believes that it would be likely to prevail upon appeal insofar as the Board's ruling contravenes the "plain meaning" of the statute, defies common sense, ignores or misapplies past precedent, and ignores evidence RTC submitted in its filings with the Board. RTC is not an employer under the Act because it is not a railroad and does not meet the STB's test for what constitutes either a railroad or a "rail carrier." At best, it is providing certain services that railroads perform for themselves and that noncovered railroad contractors perform for their railroad clients. The ruling also contradicts the dissenting opinion of the management member and at least one federal judge (the dissenting judge in the *Herzog Transit* case).

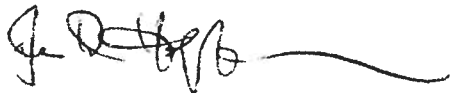
Regarding the second and third elements, failure to grant a stay would cause RTC irreparable harm with no corresponding harm to any other party. RTC seeks a stay because failure to grant same would require it to continue "in limbo," by forcing it to comply with duplicative reporting requirements of both the Board and the Social Security Administration vastly increasing this small company's administrative bookkeeping expenses. Failure to grant a stay would potentially subject RTC to duplicate retirement taxation schemes (RRTA and FICA) with no benefit to either the federal government or RTC. Similarly, a failure to grant this stay would subject RTC to duplicative unemployment compensation reporting requirements and taxation under both the RUIA and state and federal

unemployment compensation schemes applicable to nonrailroad employers. Conversely, no one opposes RTC's request and no employee of any railroad or RTC will be harmed by granting this stay pending appeal.

Finally, the public interest will be served by granting this stay insofar as both RTC and the federal government will both be spared unnecessary and duplicative paperwork in terms of filings and other work needed to comply with parallel schemes involving unemployment and retirement benefits.

RTC appreciates your prompt attention to this matter. Please call me if you have any questions.

Sincerely yours,



John D. Heffner

Cc: Mr. Francois Prenovost
Dennis Devaney, Esq.

Rail Term
cf appeal

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

GENERAL COUNSEL

APR 20 2011

Mr. John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006

RE: B.C.D. 11-14, Decision on Reconsideration
Rail-Term Corporation

Dear Mr. Heffner:

This is in response to your letter of March 21, 2011, in which, on behalf of your client Rail-Term Corporation, you requested a stay of Board Coverage Decision (B.C.D.) 11-14. I can advise you that on April 18, 2011, the Board granted your request.

Sincerely,

Rachel L. Simmons
General Attorney

cc: The Board

Printed on recycled paper

DJW DEVANEY JACOB WILSON, PLLC
Attorneys and Counselors
www.djwlawfirm.com

Dennis M. Devaney
*also admitted in D.C., Maryland, Florida*
Michael M. Jacob
Jeffrey D. Wilson

Caryn J. Weingarden
*Of Counsel*

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
MAR 28 2011
RECEIVED

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED MAR 28 2011
CLERK
STAMP & RETURN

March 28, 2011

HAND DELIVERED

Mr. Mark J. Langer
Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

11-1093

**RE: Rail-Term Corp. v. United States Railroad Retirement Board**

Dear Mr. Langer:

On behalf of Rail-Term Corp., we are enclosing for filing an original and four copies of a Petition to Review a Decision of the United States Railroad Retirement Board along with the required Corporate Disclosure Statement.

We are also enclosing a check payable to the United States Court of Appeal, DC Circuit in the amount of $450.00 to cover the fee associated with docketing this new case. Please date-stamp and return to Mr. Heffner the enclosed duplicate copy of this Petition and Corporate Disclosure Statement.

If you have any questions concerning this filing, please contact Mr. Devaney (248-649-0990) or Mr. Heffner (202-296-3334).

Respectfully submitted,

**DEVANEY JACOB WILSON, PLLC**

Dennis M. Devaney

**JOHN D. HEFFNER, PLLC**

John D. Heffner

Enclosures

cc: Steven A. Bartholow, Esq.

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

MAR 28 2011

RECEIVED

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED MAR 28 2011
CLERK

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| | ) | |
| Petitioner | ) | |
| | ) | |
| v. | ) | No. 11-1093 |
| | ) | |
| United States Railroad Retirement Board, | ) | |
| | ) | |
| Respondent | ) | |
| | ) | |

## PETITION FOR REVIEW

Pursuant to 28 U.S.C. Sections 2321, 2322, 2342, and 2344 and Rule 15 of the Federal Rules of Appellate Procedure, Rail-Term Corp.("Rail-Term") hereby petitions the Court for review of a decision of the United States Railroad Retirement Board ("Board") in B.C.D. 11-14, EMPLOYER STATUS DETERMINATION-DECISION ON RECONSIDERATION Rail-Term Corporation, dated January 28, 2011. A copy of the Decision is appended to this petition.

Pursuant to 28 U.S.C. 2344, Rail-Term submits the following information in support of its petition for review:

1. In its January 28, 2011, Decision, the Board found on reconsideration that Rail-Term was a "covered employer" with respect to its train dispatching

employees under the RRA and RUIA due to the alleged integral nature of train dispatching to the overall operation of movement of goods by rail.

2. Venue is proper under 28 U.S.C. 2343.

3. The Board's Decision that is the subject of the petition for review is contrary to law, arbitrary and capricious, and not supported by substantial evidence.

4. Rail-Term was a party to the proceedings below and is aggrieved.

Rail-Term requests this Court to hold unlawful, vacate, suspend, enjoin, and set aside the Board's Decision and grant it such other relief as may be just and proper.

Respectfully submitted,

DEVANEY JACOB WILSON, PLLC

By: _____

Dennis M. Devaney
3001 W. Big Beaver Road, #624
Troy, Michigan 48084
(248) 649-0990 / F: (248) 649-7155
Attorneys for Rail Term Corp.

JOHN D. HEFFNER, PLLC

By: _____

John D. Heffner
1750 K Street, N.W., #200
Washington, D.C. 20006
(202) 296-3334
Attorney for Rail Term Corp.

Dated: March 28, 2011

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Review by overnight mail and electronic mail upon Steven A. Bartholow, Esq. General Counsel of the United States Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-2092.

Dated at Washington, D.C., this 28th day of March, 2011.

John D. Heffner
John D. Heffner, PLLC
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(202) 296-3334

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FAX: (202) 296-3939

April 20, 2011

BY ELECTRONIC FILING

Mr. Mark J. Langer
Clerk of the Court
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

**RE: 11-1093, Rail-Term Corp. v. United States Railroad Retirement Board**

Dear Mr. Langer:

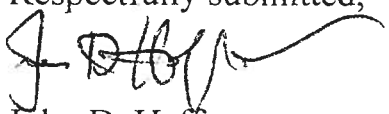
On behalf of Rail-Term Corp., Petitioner, and pursuant to the clerk's order entered March 30, 2011, I am filing the following documents:

Petitioner's docketing statement
Petitioner's certificate as to parties, etc.
Petitioner's statement of issues
Petitioner's deferred appendix statement

Petitioner has no procedural motions at this time and it filed a copy of the agency decision with its Petition for Review.

If you have any questions concerning this filing, please contact me at the number below or, in my absence, James Savage at (202) 296-3335.

Respectfully submitted,



John D. Heffner

Enclosure

cc: Steven A. Bartholow, Esq.
Dennis M. Devaney

# UNITED STATES COURT OF APPEALS
# DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

## AGENCY DOCKETING STATEMENT

*Administrative Agency Review Proceedings (To be completed by appellant/petitioner)*

1. CASE NO. 11-1093 2. DATE DOCKETED: 3/30/2011

3. CASE NAME (read parties only) Rail-Term Corp. v RRRB

4. TYPE OF CASE: ☐ Review ☒ Appeal ☐ Enforcement ☐ Complaint ☐ Tax Court

5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED? ○ Yes • No
If YES, cite statute

6. CASE INFORMATION:

a. Identify agency whose order is to be reviewed: United States Railroad Retirement Board

b. Give agency docket or order number(s): B.C.D. 10-33

c. Give date(s) of order(s): January 28, 2011

d. Has a request for rehearing or reconsideration been filed at the agency? • Yes ○ No
If so, when was it filed? July 9, 2010 By whom? John D. Heffner
Has the agency acted? • Yes ○ No If so, when? January 28, 2

e. Identify the basis of appellant's/petitioner's claim of standing. See D.C. Cir. Rule 15(c)(2): Petitioner was a party to the agency proceeding and was aggrieved by the agency's final decision on reconsideration as well as the agency's initial decision

f. Are any other cases involving the same underlying agency order pending in this Court or any other?
Yes • No If YES, identify case name(s), docket number(s), and court(s)

g. Are any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve *substantially the same issues* as the instant case presents?
Yes • No If YES, give case name(s) and number(s) of these cases and identify court/agency:

h. Have the parties attempted to resolve the issues in this case through arbitration, mediation, or any other alternative for dispute resolution? ○ Yes • No If YES, provide program name and participation dates

Signature Date 4/20/2011

Name of Counsel for Appellant/Petitioner John D. Heffner

Address 1750 K Street, N.W. Suite 200 Washington, D.C. 20006

E-Mail jheffner@verizon.net Phone ( 202 ) 296-3334 Fax ( 202 ) 296-3939

ATTACH A CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 7 calendar days by letter, with copies to all other parties, specifically referring to the challenged statement

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | |
| United States Railroad | ) | No.11-1093 |
| Retirement Board, | ) | |
| Respondent | ) | |
| _____ | ) | |

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. **Parties and Amici**

   The sole party who appeared before the Railroad Retirement Board was:

   Rail-Term Corp.

2. **Rulings Under Review.** The ruling of the Railroad Retirement Board at issue before this Court is B.C.D. 11-14, EMPLOYER STATUS DETERMINATION-DECISION ON RECONSIDERATION Rail-Term Corporation, dated January 28, 2011, a copy of which was attached to the Petition for Review.

This case involves a decision by the three member United States Railroad Retirement Board ("RRRB" or "the Board") holding that Rail-Term Corp. ("Rail-Term") is an "employer" and a "rail carrier" for the purpose of coverage under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (collectively "the Acts"). The Board arrived at this finding despite the fact that Rail-Term does not own or operate any railroad equipment or rail lines and is not licensed to and does not hold out to perform any rail service on any rail line. Rail-Term's sole activity is providing computer software used by rail clients for dispatching trains and by providing to its rail carrier clients people in Rail-Term's employ to provide those services to its clients. The Board rendered its initial decision on April 6, 2010, and affirmed that decision with some modifications on January 28, 2011. The management member dissented from both decisions.

No party opposed Rail-Term in the proceedings before the Board.

3. **Related Cases.** The case on review was not previously before this court or any other court. There is no related case pending in this Court or in any other court of which counsel is aware.

Respectfully submitted,

RAIL-TERM CORP.

By: _____

John D. Heffner
James M.S. Savage
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3333

By: _____

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Rd.,
Suite 624
Troy, MI 48084
(248) 649-0990

Dated: April 20, 2011

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |
| | ) | |

## STATEMENT OF ISSUES TO BE RAISED

1. Whether the Railroad Retirement Board's decision served January 28, 2011, finding Rail-Term Corp. to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is contrary to law.

2. Whether the Railroad Retirement Board's decision served January 28, 2011, finding Rail-Term Corp. to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is arbitrary and capricious.

3. Whether the Railroad Retirement Board's decision served January 28, 2011, finding Rail-Term Corp. to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is supported by substantial evidence.

Respectfully submitted,

RAIL-TERM CORP.

By: _____

John D. Heffner
James M.S. Savage
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Suite 200
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(202) 296-3333

By: Dennis M. Devaney by JDH

Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Rd.,
Suite 624
Troy, MI 48084
(248) 649-0990

Dated: April 20, 2011

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |
| | ) | |

## STATEMENT AS TO WHETHER A DEFERRED APPENDIX WILL BE UTILIZED

A deferred Appendix will be utilized.

Respectfully submitted,

RAIL-TERM CORP.

By: _____

John D. Heffner
James M.S. Savage
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By: _____

Dennis M. Devaney
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(248) 649-0990

Dated: April 20, 2011

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing documents (1) Agency Docketing Statement, (2) Certificate as to Parties, Rulings, and Related Cases, (3) Statement of Issues to be Raised, and (4) Deferred Appendix Statement by overnight mail and electronic mail upon Steven A. Bartholow, General Counsel of the United States Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-2092.

Dated at Washington, D.C., this 20th day of April, 2011.

John D. Heffner
John D. Heffner, PLLC
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Washington, D.C. 20006
(202) 296-3334

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |

---

**PETITION TO REVIEW ORDER OF**
**THE RAILROAD RETIREMENT BOARD**

# REPLY OF RAIL-TERM CORP. TO MOTION OF AMERICAN TRAIN DISPATCHERS ASSOCIATION

Respectfully submitted,

John D. Heffner
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Dennis M. Devaney
Devaney Jacob Wilson, PLLC
3001 West Beaver Road
Suite 624
Troy, MI 48084
(248) 244-0171

Dated: August 15, 2011

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |

**PETITION TO REVIEW ORDER OF**
**THE RAILROAD RETIREMENT BOARD**

**REPLY OF RAIL-TERM CORP.**
**TO MOTION OF**
**AMERICAN TRAIN DISPATCHERS ASSOCIATION**

Pursuant to Fed. R. App. P. 29(a), the American Train Dispatchers Association (ATDA") filed a motion with this Court August 3, 2011, to submit a brief as *amicus curiae* in support of the United States Railroad Retirement Board ("the Board") affirming its ruling issued on January 28, 2011, that Petitioner Rail-Term Corp. ("Rail-Term") is an "employer" covered by the Railroad Retirement Act, 45 U.S.C. 231 *et seq.,* ("RRA") and the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, ("RUIA"). ADTA's motion indicates that the Board neither objects nor consents to ADTA's *amicus* filing. ADTA correctly indicates that Rail-Term *opposes* that request.

Rail-Term has been a party to proceedings before the Board going back as early Aug. 14, 2006, when it received its first inquiry letter from a member of the Board's staff seeking information about services that Rail-Term performs for the railroad industry. The Board issued its initial decision on April 6, 2010, finding Rail-Term to be covered under both the RRA and RUIA. Issuance of that decision should have alerted ADTA to be on notice to watch for additional pleadings to be submitted to and decisions to be issued by the Board. Yet ADTA took absolutely no action to participate in any future proceedings nor did it contact Rail-Term to the best of the knowledge of the undersigned counsel. On Jan. 28, 2011, the Board issued its final decision finding coverage under both of the Acts and substantially affirming its previous ruling. Again, ADTA took no action. In fact, ADTA took no action after this Court issued its initial scheduling order. It waited until July 29 to advise the undersigned counsel that it wanted to submit an *amicus* brief and requested Rail-Term's consent to that filing.

The Court should deny ADTA's request for two reasons. First, participation in these proceedings should be denied because ADTA failed to participate in the proceedings before the Board and did not submit a timely intervention request in these appellate proceedings. Second, since ADTA is a trade association that only represents dispatchers who work for rail carriers, its membership is not directly affected by these proceedings. Rail-Term does not employ any former rail industry

dispatchers and does not solicit the rail industry to fill empty dispatcher positions. Therefore ADTA and its members have no legal stake in this case.

Accordingly, the Court should deny ADTA's Motion.

Respectfully submitted,

/s/ John D. Heffner

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/s/ Dennis M. Devaney

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(248) 244-0171

Dated: August 15, 2011

## CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that on this day August 15, 2011, a copy of the Reply of Rail-Term Corp. to the "Motion of American Train Dispatchers Association For Leave to File Brief as *Amicus Curiae*" was sent electronically and by first class mail, postage prepaid, to:

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

Michael S. Wolly, Esq.
Robert E. Paul, Esq.
1025 Connecticut Ave., N.W.
Suite 712
Washington, D.C. 20036
202-857-5000

/s/ John D. Heffner
John D. Heffner

# 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.

Strasburger
ATTORNEYS AT LAW

STAMP & RETURN

December 14, 2011

JOHN HEFFNER
202.742.8607
Direct Fax: 202.742.8697
john.heffner@strasburger.com

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FOR THE D.C. CIRCUIT
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**BY HAND**

STAMP & RETURN

Mr. Mark J. Langer
Clerk of the Court
United States Court of Appeals
For the District of Columbia Circuit
United States Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

RE: 11-1093, Rail-Term Corp. v. United States Railroad Retirement Board

Dear Mr. Langer:

Pursuant to the Court's Order and Memorandum dated November 14, 2011, Rail-Term Corp. is submitting an original and four copies of its report on the status of its filings with the Surface Transportation Board along with a copy of its Petition for Declaratory Relief filed with the Board today.

Please date stamp and return one copy of this filing.

STAMP & RETURN

Sincerely yours

John Heffner

JDH:jg

Enclosures

cc: Dennis M. Devaney, Esq.

Rachel Simmons, Esq.

Appeal No. 11-1093

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

STAMP & RETURN

**RAIL-TERM CORP.,**

**Petitioner**

**v.**

**UNITED STATES RAILROAD RETIREMENT BOARD,**

**Respondent.**

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**PETITION TO REVIEW ORDER OF**
**THE RAILROAD RETIREMENT BOARD**

**STATUS REPORT**

Respectfully submitted,

STAMP & RETURN

RAIL-TERM CORP.

STAMP & RETURN

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Dated: December 14, 2011

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

| | | |
|---|---|---|
| **RAIL-TERM CORP.,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | Appeal No. 11-1093 |
| | ) | |
| **UNITED STATES RAILROAD RETIREMENT BOARD,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**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*)

In accordance with the Order and Memorandum of the Court dated November 14, 2011, counsel for Rail-Term on December 1, 2011 met with staff of the Surface Transportation Board ("STB") to inform them of the Court's Order and to notify the STB that Rail-Term intended to re-submit a Petition for Declaratory Relief to the STB to obtain the Board's position on whether Rail-Term would be considered a " rail carrier" under 49 U.S.C. § 10102(5).

Rail-Term's Petition for Declaratory Relief is being filed with the STB today contemporaneously with this Report to the Court. A copy of

Rail-Term's Petition is attached for the Court's information.

Counsel for Rail-Term will inform the Court as soon as it receives the Surface Transportation Board's statutory interpretation. At that time and in accordance with the Court's Order, Rail-Term will file appropriate motions.

Respectfully submitted,

RAIL-TERM CORP.

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Dated: December 14, 2011

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

| | | |
|---|---|---|
| **RAIL-TERM CORP.,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | Appeal No. 11-1093 |
| | ) | |
| **UNITED STATES RAILROAD RETIREMENT BOARD,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2011, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and sent to the Clerk of Court, by hand delivery, the required number of paper copies, and served a copy of the foregoing on the counsel of record listed in the appellate CM/ECF system.

/s/ Dennis M. Devaney

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(248) 244-0171

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**FD 35582**

# RAIL-TERM CORP.
# PETITION FOR A DECLARATORY ORDER

Submitted by

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Dennis M. Devaney
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Troy, MI 48084
(248) 244-0171

Dated: December 14, 2011

**EXPEDITED HANDLING REQUESTED**

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

**FD 35582**

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

INTRODUCTION

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(a), Rail-Term Corp. ("Rail-Term") files this Petition for a Declaratory Order seeking a ruling from the Surface Transportation Board ("the STB") that it is not a "rail carrier" within the meaning of the I.C.C. Termination Act ("ICCTA"), 49 U.S.C. 10102(5). Rail-Term submits this Petition as directed by the United States Court of Appeals for the District of Columbia Circuit in its Order and Memorandum dated November 14, 2011.[1] A copy of that decision is attached here as Exhibit A. Rail-Term requests expedited handling by the STB since the matter is held in abeyance by the D. C. Circuit pending the STB determination.

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1 Cited as "November 14 Order and Memorandum."

## BACKGROUND

As the STB will recall from the previous declaratory relief request submitted by the Petitioner on June 3, 2010, 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 does not own any lines of railroad, operate trains, hold itself out to provide transportation for compensation, or own, lease, or operate any railroad locomotives or rolling stock, or hold any sort of license from the STB to operate as a rail carrier or common carrier by railroad in the United States.

More specifically, Rail-Term develops computer-based dispatching software and provides dispatching services for several American short line railroads from an office in Rutland, VT. In effect, Rail-Term's rail carrier clients have "outsourced" to Rail-Term the dispatching functions that they

could otherwise provide "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 provides dispatching services in the United States for the 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.

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")[2] finding it to be a "carrier employer" under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (the "RRA" and the "RUIA" and collectively "the Acts"). 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"

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[2] 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.

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 Surface Transportation Board ("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."

*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 sought review by filing a petition for reconsideration and administrative stay with the RRBD on July 9, 2010. Inasmuch as the RRBD has frequently based its "coverage rulings" finding entities subject to its jurisdiction under the RRA

and RUIA on rulings from the STB, Rail-Term petitioned this agency on June 3, 2010, for a decision confirming that it is not a "rail carrier"[3] as that term is used in the ICCTA.

On October 12, 2010, the STB issued a decision denying Rail-Term's declaratory order 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." More specifically, the STB declined to issue a ruling because there was no referral from the RRBD and because the RRBD did not stay its proceedings to permit Rail-Term to obtain the [Surface Transportation] Board's views. Furthermore, the STB stated Rail-Term had not indicated that it has sought reconsideration of the coverage decision (i.e., the Initial Decision).[4] The Board also deferred ruling on Rail-Term's request in view of the fact that the RRBD's coverage decision in Trinity Railway Express—Train Dispatching—Herzog Transit Services[5] was pending review in the United States Court of Appeals for the Seventh Circuit

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[3] 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. *See* note 10 at page 10.

[4] In fact, Rail-Term did advise the STB that it was going to seek administrative reconsideration of the Initial Decision. At lines 5 through 8 of its previous petition to the STB, Rail-Term stated that "it plans to seek reconsideration of that erroneous ruling by filing both an administrative appeal with the RRBD and, in the event of a second adverse RRBD ruling, by seeking judicial review of that agency's final decision." June 3 Petition at page 4.

[5] B.C.D. 09-53, Oct. 28, 2009.

and could affect the RRBD's future decision on reconsideration of the Rail-Term coverage decision.[6]

The RRBD issued its decision on reconsideration on January 28, 2011.[7] Over a second dissent by management member Kever, it once again found coverage for Rail-Term as an employer as a "carrier by railroad" as well as under an alternate theory that Rail-Term's dispatcher employees are also employees of its carrier clients. The RRBD based its holding that Rail-Term is an employer on the notion that it was providing common carriage by rail in interstate commerce due to the "integral" nature of train dispatching to the overall operation of movement of goods by rail. The RRBD dismissed Rail-Term's argument that it is not a "rail carrier" under the ICCTA stating,

> this argument misses the point. In determining what constitutes a rail carrier under the RRA and RUIA, the threshold inquiry begins with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. This is because the regulatory schemes of the RRA and ICCTA are not symmetrical. Standard Office Buildings Corporation v. United States, 819 F.2d 1371, 1378 (7th Cir. 1987). By virtue of the control that it exercises over the movement of trains, Rail-Term is a rail carrier within the meaning of that term under the RRA and RUIA. To hold otherwise would allow for easy erosion of the RRA and RUIA by parsing out interstate transportation by rail to non-covered entities. Reconsideration Decision at page 3.

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[6] This statement appears to contradict the STB's previous statement that Rail-Term had not indicated that it would seek reconsideration of the RRBD's Initial Decision.

[7] Cited as the "Reconsideration Decision."

On March 28, 2011, Rail-Term appealed the Reconsideration Decision to the United States Court of Appeals for the District of Columbia Circuit. On appeal Rail-Term argued that it could not be a "covered employer" under the RRA and RUIA because it was not a "rail carrier" under the ICCTA or a "carrier by railroad" under the RRA and RUIA. Citing the 7th Circuit's decision in Herzog Transit Services v. the United States Railroad Retirement Board,[8] Rail-Term emphasized that it could not be a "rail carrier" under the plain meaning of the statute, that the language of the ICCTA and the RRA/RUIA is interchangeable, and that Congress intended for the term "carrier" to have the same meaning under these two statutes.

At oral argument the Court asked shouldn't Rail-Term's carrier status be resolved by the STB. Rail-Term replied that "we tried to do that" but the STB "chose not to address that issue." During further questioning, Judge Ginsburg cited the primary jurisdiction of the Surface Transportation Board while acknowledging that the question of Rail-Term's carrier status was not

[8] 624 F.3d 467 (7th Cir. 2010) hereafter cited as "Herzog Transit."

referred to the STB by either the RRBD or the Court but "this time it would be."[9]

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 petition the STB for a determination as to whether it is a "rail carrier" under 49 U.S.C. §10102(5). The Court referred that issue to the STB emphasizing that a resolution of that legal issue is within that agency's primary jurisdiction. As 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.

## ARGUMENT

5 U.S.C. 554(e) and 49 U.S.C. 721, give the STB discretion to issue a declaratory order to terminate a controversy or remove uncertainty. *See*, Norfolk Southern Railroad Company and the Alabama Great Southern Railroad Company-Petition for Declaratory Order, FD 35196, STB served March 1, 2010. The issue here is a novel one: whether a company that supplies services to the railroad industry in the form of train dispatching is a

---

[9] A copy of the relevant pages of the oral argument transcript is attached as Exhibit C.

"rail carrier"[10] within the meaning of §10102(5) of the ICCTA. Rail-Term is filing this new Petition for Declaratory Relief in accordance with the Court's instruction. It contends that this filing to clarify its "rail carrier" status is consistent with courses of action taken by other parties before the Surface Transportation Board that had initially been characterized by the RRBD as "rail carriers" under the ICCTA and therefore "covered employers" for RRA and RUIA purposes.[11] *See, e.g.,* H&M International Transportation, Inc.-Petition for Declaratory Order, FD 34277, slip op., STB served November 12, 2003 (cited as "*H&M*"), and American Orient Express Railway Company LLC-Petition for Declaratory Order, FD 34502, slip op., STB served December 29, 2005(cited as "*American Orient Express*"). Rail-Term urges the STB to issue a decision finding that it is not a "rail carrier."

## RAIL-TERM IS NOT A RAIL CARRIER UNDER THE ICC TERMINATION ACT

Rail-Term's review of pertinent STB and RRBD decisions indicates there is little precedent directly on point as to the issue of the rail carrier status of a vendor of subcontracted services to carrier railroads which

---

[10] The ICCTA uses the term "rail carrier" while the RRA and RUIA use the term "carrier by railroad." Rail-Term believes they are one and the same and will use these terms interchangeably. *See,* Herzog Transit at 473, where the Court stated "[t]he [RRBD] seemed to assume, and we see no need to disagree, that Congress intended 'carrier' to have the same meaning for both of these closely related statutes and that the RRA therefore affords no broader coverage than the ICCTA."

[11] Rail-Term does not seek any guidance from the STB as to its status under the RRA and RUIA, only under the ICCTA.

historically handled such functions "in house". *Compare* H&M and American Orient Express, *supra.* Both of these STB decisions arose in connection with coverage status proceedings before the RRBD. According to the STB's decision, H&M involved an entity operating warehousing, distribution, truck terminal, and intermodal facilities at various points in the United States. H&M provided services for contracting railroads such as the loading and unloading of trailers and containers and the moving, inspecting, and securing of trailers. At one of these facilities H&M also moved railcars around the site using its own switching locomotives. However, H&M did not operate beyond that facility and was prohibited by its contract with the serving railroad from providing common carrier rail service. In finding that H&M was not a "rail carrier" subject to its jurisdiction, the STB held

> [t]he Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. 10501(a). The term "transportation" is defined to include a facility related to the movement of property by rail, and services related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9) (A), (B). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5).
>
> Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. H&M's intermodal transloading activity could fit within the broad definition of transportation. [citations omitted] But this is only half of the statutory requirement for Board jurisdiction under section 10501.
>
> 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*" [emphasis supplied] to the public to provide common carrier service. [citations omitted] 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.

By comparison, American Orient Express ("AOERC") was a company offering a "rail cruise" vacation experience over the American rail network using its own passenger rolling stock and on board crews in trains operated for it under contract by Amtrak. There the STB ruled that AOERC was a "rail carrier." It found that AOERC did engage in "transportation" by handling passengers in railroad equipment that it owned, that its operation of trains through a contract with Amtrak constituted the provision of railroad transportation, and that it held itself out to the general public to provide transportation for compensation. Slip op. at 3-6.

Outside of the RRBD context, there is substantial STB and Interstate Commerce Commission precedent on the issue of what constitutes "common carriage." *See, e.g.*, SMS Rail Service, Inc., FD 34483, STB served January

24, 2005, slip op. at 5, and B. Willis, C.P.A., Inc., FD 34013, STB served July 26, 2002, slip op at 6. Rail-Term is plainly not "a rail carrier" within the meaning of the ICCTA under that precedent because 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, Rail-Term is not a "carrier by railroad" under the RRBD's precedent insofar as it does not own, lease, or control a rail line or retain the capacity to operate a rail line or operate as a common carrier or hold authority from the STB to do so. *See*, B.C.D. 09-02, Tri-County Commuter Rail Organization, *et al*, Jan. 20, 2009, slip op. at pages 3 and 6; B.C.D. 00-35, Cape Cod Central Railroad, Inc., Sept. 14, 2000; and B.C.D. 03-27, Northern New England Passenger Rail Authority, March 21, 2003, slip op.[12] Accordingly, the Surface Transportation Board should find that Rail-Term is not a "rail carrier" subject to its jurisdiction and should issue a ruling to that effect.

---

[12] Copies of the pertinent pages of these decisions are attached as Exhibits D through F.

## CONCLUSION

As directed by the Court, Rail-Term requests that the STB grant its Petition for a Declaratory Order and issue a declaratory ruling finding 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 declaratory proceeding.

Respectfully submitted,

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Dated: December 14, 2011

Strasburger
ATTORNEYS AT LAW

March 27, 2012

Writer's Direct Dial No: 202-742-8607
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**BY E-FILING**

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

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

Dear Ms. Brown:

I am writing on behalf of Rail-Term Corp. ("RTC") in connection with the above-captioned matter. On March 8, 2012, the Board released a decision instituting a declaratory proceeding directing the parties to supplement the record by submitting by March 28, copies of their respective filings submitted to the Railroad Retirement Board ("RRB") and the United States Court of Appeals for the D.C. Circuit ("the Court") in the course of those proceedings.

Concurrently with this letter I am submitting the substantive documents filed by RTC with the RRB and the Court as well as a letter identifying those documents. My purpose in writing this letter is to bring to the attention of the Surface Transportation Board several decisions issued by the RRB defining a common carrier as "...one that holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier." Moreover, an entity will not be subject to the RRB's jurisdiction unless it is acting as a common carrier. GWI Switching, L.P.

These decisions submitted with this letter include:

- GWI Switching, LP., cited above.
- GWI Switching Services, L.P., Decision on Reconsideration
- B.C.D. 08-20, Total Logistic Control, LLC
- B.C.D. 11-87, Port of Montana Port Authority
- B.C.D. 08-15, Transco Railway Products, Inc., *et al*
- B.C.D. 08-10, Rescar, Inc., *et al*

While these cases differ factually from that of Rail-Term Corp., the point is that Rail-Term-just like these other parties- does not hold itself out to the public to transport people or property for compensation. Accordingly, it is not a rail carrier for the purposes of the I.C.C. Termination Act.

I would be pleased to provide those additional materials, should the STB request them.

Respectfully submitted,

John D. Heffner

Enclosures

cc: Rachel Simmons, Esq.
Michael Wolly, Esq.
Mr. Francois Prenovost
Dennis Devaney, Esq.

Go to Decision on Reconsideration

**EMPLOYER STATUS DETERMINATION**
**GWI SWITCHING, L.P.**

This is the determination of the Railroad Retirement Board concerning the status of GWI Switching, L.P. (GWI), as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

GWI is a switching railway that provides services to only one customer, CMC Railroad I Ltd. Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any express company, sleeping-car company, and carrier by railroad, subject to [the Interstate Commerce Act];
>
> (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 (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The Interstate Commerce Commission has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather transport only for those with whom they see fit to contract individually. The RRB has followed the distinction made by the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also International Detective Service, Inc. v. Interstate Commerce Commission, 595 F.2d 862, 865 (D.C. Cir. 1979).

**GWI SWITCHING, L.P.**

In this case, GWI does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather, it performs switching services over that line only for the one company with which it has contracted. Accordingly, the Board determines that GWI is not a carrier under the Acts.

GWI is controlled by Genesee and Wyoming Industries, Inc., which controls a number of rail carriers. GWI is therefore under common control with employers under the Acts. However, GWI, which is a limited partnership that operates a rail storage yard, does not provide any services for its affiliates. It operates the yard for CMC Railroad I Ltd, an unaffiliated company. Accordingly, in the opinion of a majority of the Board, GWI is not providing service in connection with rail transportation; since it is also not a carrier, as defined in paragraph (i) of section 1(a)(1) of the Railroad Retirement Act, it is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Glen L. Bower

V. M. Speakman, Jr. *(Dissenting Opinion Attached)*

Jerome F. Kever

Attachment

**DISSENT OF V. M. SPEAKMAN, JR.**
**ON THE EMPLOYER STATUS DETERMINATION**
**GWI SWITCHING, L.P.**

I agree that GWI Switching, L.P. (GWI) is under common control with a number of employers under the Acts. In addition, this company may be performing railroad related services in that it furnishes switching services for CMC Railroad I LTD, (CMC). The fact that GWI is not providing railroad services for its affiliate should be irrelevant in a coverage determination case. If CMC is, in fact, a covered employer, then GWI should, in turn, be covered.

I must dissent from the majority opinion in this case and feel that absent a coverage determination on CMC, a valid decision in the current case cannot be made.

V. M. Speakman, Jr.

12/6/84
Date

**EMPLOYER STATUS DETERMINATION**
**GWI Switching Services, L.P.**
**Decision on Reconsideration**

This is the determination on reconsideration of the Railroad Retirement Board concerning the status of GWI Switching Services, L.P. (GWI) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

By letter dated December 28, 1994, GWI was notified of B.C.D. 94-113, wherein a majority of the Board, Mr. Speakman dissenting, found that GWI was not an employer under the RRA and the RUIA. By letter dated December 22, 1995, GWI requested reconsideration of the Board's decision and stated that page 2 of the Board's decision contained a factual error in the following statement:

> In this case, GWI does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather, it performs switching services over that line only for the one company with which it has contracted.

GWI stated that it has held itself, and continues to hold itself, out as a common carrier of rail services to all parties. GWI explained that although it presently serves one customer, its intent and strategy is to broaden its activities to include additional customers. GWI stated that in order to achieve that goal, it reserved for itself in its operating agreements the right to serve additional customers. GWI pointed out that its Southern Pacific Trackage Rights Agreement does not restrict GWI's operations to Southern Pacific's plastic pellet railcars. That same Agreement allows GWI to operate over approximately 5.2 miles of the Southern Pacific Baytown Branch and Southern Pacific Lafayette Main Line. GWI stated that it believes that the introduction of Burlington Northern into the territory, by means of trackage rights over the Southern Pacific Lafayette Main Line, in connection with pending merger transactions, will offer significant opportunities for expanded service by GWI to a variety of customers in the area.

The basis for the Board's decision in B.C.D. 94-113 was the statement cited by GWI in its request for reconsideration. The additional information provided by GWI indicates that GWI does, in fact, meet the criteria for being a common carrier discussed in B.C.D. 94-113. Since GWI does hold itself out as a common carrier to provide rail services, the Board finds that it does fall within the definition of a carrier employer set out in

section 1(a)(1)(i) of the RRA and sections 1(a) and (b) of the RUIA.

The decision in B.C.D. 94-113 is reversed. The Board finds that GWI became a carrier employer under the RRA and the RUIA effective April 6, 1994, the date on which it began operations.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

CCCook:SABartholow:MPDadabo:mpd:ik
GWIS3111.cov
C. 3111-95

TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination -- Decision on Reconsideration
GWI Switching Services, L.P.

Attached is a proposed coverage decision on reconsideration which reverses B.C.D. 94-113 and holds that GWI Switching Services, Inc. ("GWI") became a carrier employer effective April 6, 1994, the date on which it began operations. I am also attaching copies of B.C.D. 94-113 and GWI's request for reconsideration.

Attachments

**B.C.D. 08-20** **MAY 15 2008**

**EMPLOYER STATUS DETERMINATION**
**Total Logistic Control, LLC**

This is the determination of the Railroad Retirement Board concerning the status of Total Logistic Control, LLC (TLC) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351, et seq.) (RUIA).

A review of TLC's operations began with an inquiry into Rochelle Railroad Company (RRC), which was an employer covered under the Acts from April 13, 1996, through November 30, 1998 (B.A. No. 2778). In Board Coverage Decision (B.C.D.) 99-36, coverage of RRC was terminated. As explained in that decision, in Surface Transportation Board (STB) Finance Docket AB-549, decided May 21, 1999, the STB granted the application of the City of Rochelle, Illinois (City) requesting the authorization of the discontinuance by RRC of service over 2.06 miles of track that the City owns in an industrial park within the City. According to the STB decision, the City is operating the line through a contractor. That contractor is TLC.[1] In a letter dated June 7, 2006, from Mr. Mike Carr, CEO-President of Pioneer Railcorp., the owner of RRC, RRC discontinued operations in May 1999, when TLC became the sole operator of the track[2].

Total Logistics, Inc. is a Milwaukee-based public company which operates through two wholly-owned businesses, TLC, and Zero Zone[3]. TLC is the tenth largest provider of refrigerated warehousing services in the United States. TLC is a national provider of integrated logistic services which include refrigerated and dry warehousing, supply chain management, dedicated third-party facility and operations management, food distribution, bottling and packaging, and fulfillment services. TLC provides end-to-end supply chain services to a number of major U.S. food and consumer product companies. TLC operates a fleet of over 435 tractors with over 825 refrigerated and dry trailers. It has five maintenance facilities and more than 30 logistic centers.

In response to inquiries from the agency, Peter Westermann, Chief Operating Officer of TLC advised that TLC owns no rail assets other than its own spurs. Although TLC owns track-mobiles, it does not own locomotives. Mr. Westermann stated further that TLC has

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[1] Documentation in the file from Jason T. Anderson, Economic Development Director for the City of Rochelle indicates that the City of Rochelle has no employees engaged in the operations of the railroad and it is TLC who is the rail operator of the railroad.

[2] Mr. Carr noted that TLC actually began operations before May 1999, working with RRC.

[3] Zero Zone is a manufacturer of high quality refrigerated and freezer display cases used in grocery, convenience, dollar and drug store chains for retail merchandising of food, beverage and floral products, as well as refrigeration houses and racks to power and control the refrigeration systems, electrical panels, and stand-by power for both retail and industrial applications.

no employees engaged full time in the exclusive business of railcar moving. Any man-hours spent shuttling, spotting or switching

railcars are a tiny fraction of our total man-hours, and the vast majority of that tiny fraction is to move cars to and around our own warehouse. We do this under a contract with the city in the industrial park.

TLC started warehousing in Rochelle in 1986, and had one agreement with the City from 2002. TLC has a current contract with the City, dated October 1, 2004, to shuttle all cars within the industrial park with TLC's track-mobile. Mr. Westermann explained that because the industrial park is growing, in January 2006 TLC sought bids from short-line rail companies to perform the work TLC was performing. This was done in anticipation of more railcar volume which would necessitate the use of a locomotive rather than a track-mobile. TLC selected the Burlington Junction Railway. The Burlington Junction Railway has been an employer under the Acts since 1985 (B.A. No. 4777)[4]. In a letter dated September 25, 2006, Mr. Westermann stated that the Burlington Junction Railway was on-site in September 2006, performing functions in preparation "for the volume to come in November". According to a letter dated November 17, 2006, from Mr. Robert Wingate, General Manager of the Burlington Junction Railway, there are three employees working out of the Rochelle operation, and service and compensation for all three is reported under the appropriate Acts.

The limited amount of spotting, shuttling or switching railcars which TLC did before entering into the contract with Burlington Junction Railway was done with track-mobiles (not locomotives), and was done pursuant to a contract with the City of Rochelle to shuttle cars within the industrial park to move cars to and around TLC's own warehouse. According to Mr. Westermann, TLC performed the final delivery of approximately 4,000 railcars per year to the facilities in the Rochelle industrial park. About 3,700 of these were to TLC's own facility, with the balance spread across four other buildings in the park. Using a track-mobile, TLC placed at designated individual company locations railcars delivered by Class I railroads. Ninety percent of this volume went to TLC's own warehouse, and ten percent went to the other facilities in the industrial park. The percentage of revenue TLC received from this service was approximately two tenths of one percent (.002). This is based on $800,000.00 in shuttle revenue against $350 million in TLC sales. When measured against total company revenues, the percentage becomes two thousandths of one percent (0.0020%)[5]. The approximate proportion of TLC employees who worked in a capacity related to the shuttle services was two tenths of one percent. No employees worked full time related to shuttle activities.

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[4] Effective March 7, 1997, Burlington Junction Railway changed its name to Burlington Shortline Inc. d/b/a Burlington Junction Railway.

[5] As of January 2005, TLC is a wholly owned subsidiary of SUPERVALU INC. SUPERVALU sales are approximately $40 billion; $800,00.00 is 0.0020% of $40 billion.

Section 1(a) (1) of the Railroad Retirement Act (45 U.S.C. § 231(a) (1)), insofar as relevant here, 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;

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The question before us is whether TLC should be considered a covered rail carrier for the period May 1999 (when Rochelle Railroad Company ceased providing services and TLC took over) through September 2006 (when the Burlington Junction Railway took over operations).

The evidence of record indicates that with the switching services which TLC provided at the Rochelle industrial park TLC would be operating as a switching railway providing services for itself. TLC did not hold itself out to the public as a provider of switching services. The limited provision of TLC's switching services for the other four facilities in the industrial park as described above would not change that description. Decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway.*

The Surface Transportation Board (STB) has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, formerly the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also, International Detective

Service, Inc. v. Interstate Commerce Commission, 595 F. 2d 862, 865 (D.C. Cir. 1979).

Additionally, the term "railroad", under the ICC Termination Act of 1995 includes a switch, spur, track, terminal, or terminal facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. §10102(6)(C)). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and RUIA where they act in the capacity of a common carrier subject to the ICC Termination Act of 1995.

In this case, the information contained in the file indicates that TLC was not a common carrier, but operated as a private carrier which performed intraplant switching primarily for itself. Even with the limited switching services provided to the four other buildings, it would still be considered a private carrier. TLC does not hold itself out as providing services from this facility to any and all who would like to use it – the number of clients is finite, TLC itself, and the entities which used the other four buildings in the park.

Consistent with earlier decisions of the Board, we hold that TLC was not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts for the period May 1999 through September 2006. *See*, B.C.D. 08-10, Rescar, Inc. and Rescar Industries, Inc. decided February 21, 2008.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

**B.C.D. 11-87** **August 30, 2011**
**EMPLOYER STATUS DETERMINATION**
**Port of Montana Port Authority**

This is the determination of the Railroad Retirement Board regarding the status of Port of Montana Port Authority as an employer under the Railroad Retirement Act (45 U.S.C § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C.§ 351 et seq.) (RUIA).

Information regarding the Port of Montana Port Authority was submitted by Ms. Sheryl Ralph, Financial Manager of Port of Montana[1]. According to Ms. Ralph, Port of Montana Port Authority (the Port) was created by resolution on May 7, 1986, pursuant to authority granted by the 1985 Montana Legislative assembly and the city of Butte-Silver Bow, Montana's Council of Commissioners. The Port is a "component unit of the primary governmental unit, Butte-Silver Bow, Butte, Montana". Ms. Ralph explained that the Port:

> is charged with the promotion, stimulation and development of commerce, economic development and prosperity for the State of Montana and its citizens. It does so primarily through the operation of a transload facility. In addition to the transload facility, the Port owns a warehouse at a secondary location which is used exclusively by tenants with long term leases.

The Port has five full-time office employees whose work "includes communications with customers who ship into or out of the Port via truck or rail". The Port also has five full time operations employees whose work "includes direct contact with customer representatives, including employees of the UPRR and BNSF[2] and who also perform switching tasks on a track that is shared between the BNSF, UPRR and the Port". Ms. Ralph stated that at the transload facility, the Port:

> switches rail cars into the appropriate area of the facility, upon receipt from the UPRR or BNSF, and loads or unloads them per customer request. Product that comes in on rail is loaded on truck. That which comes in on truck may leave via rail or truck. The Port provides storage as needed for product in the interim and also leases space to tenants who provide their

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[1] It is noted that "Port of Montana, Inc." was an entity incorporated in the state of Montana on September 1, 1972, and dissolved on December 4, 2006. Review of the evidence of record, including a brochure submitted by Ms. Ralph, as well as the official website for Port of Montana (www.portofmontana.org) indicates that the Port of Montana Port Authority does business as "Port of Montana".

[2] Both the Union Pacific Railroad Company (UPRR) and the Burlington Northern and Santa Fe Railway Company (BNSF) are employers covered by the Acts (B.A. Nos. 1713 and 1621, respectively).

own transloading services. Although the Port receives rail service from both the BNSF and UPRR, it has business contracts only with the UPRR.

The Port's facility includes rail tracks, an unheated warehouse, an auto facility, a bulk minerals building, fertilizer belt, maintenance shop, truck scales, and an office building. There is also an aviation gas pump, bulk liquid tanks and bladders, and a ramp on the premises for use by customers or the Port in handling products. The Port also owns a locomotive, a backup switch engine, piggy packers, forklifts of various sizes, and an unheated warehouse with office space at a secondary location. Service provided to tenants at this secondary location is limited to maintenance and upkeep of the warehouse.

Ms. Ralph also explained that the UPRR leases the auto facility from the Port, which UPRR then uses under contract with General Motors. Port employees switch auto racks into and out of the auto facility[3]. The Port provides snow removal services for the auto facility.

The Port provides other services to the UPRR including the temporary storage of unused rail cars through December 2009, and participation in the One Plus billing program which allows the UPRR to submit a single bill to the customer which includes rail and transload services. The Port also charges the UPRR a switch fee for each car that enters the facility, regardless of the rail carrier who handles it. According to Ms. Ralph, in 2009, approximately 2,000 man hours were expended to provide these services, which accounted for approximately 23% of the Port's total revenues. Ms. Ralph submitted copies of a maintenance agreement, a lease agreement, and a car storage agreement, all between the UPRR and the Port. Ms. Ralph also submitted a copy of a track lease agreement between the Port and Rhodia, Inc., a chemical company.

According to Ms. Ralph, all facilities and equipment are under the control of the Port, unless they are leased to a customer. Ms. Ralph stated that the Port "does not exercise joint control of any asset with another party". The Port has no stockholders or equity holders. A five member Board of Commissions, appointed by the Butte-Silver Bow Chief Executive and confirmed by the Butte-Silver Bow Council of Commissioners, governs the Port. According to Ms. Ralph, none of the Commissioners are affiliated with any railroad. Ms. Ralph stated that the Federal Railroad Administration has not required the Port to pay any user fees; there have been no rulings regarding the status of the Port by the Surface Transportation Board; and the Internal Revenue Service has not ruled on the applicability of the Railroad Retirement Act to the Port.

Review of the brochure submitted by Ms. Ralph, as well as the Port's website, indicates that the Port offers a variety of services to the public, including bonded storage, consulting, customized billing, direct transload for trucks or railcars, container breakdown and transfer, and inventory management and control.

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[3] Other UPRR contractors unload the auto racks, inspect the vehicles, load them onto trucks and provide security for the auto facility.

The Port also offers key contacts and links to different entities "which benefit all customers", such as the United States Department of Commerce, Montana Departments of Agriculture, Commerce, and Transportation.

Additional information regarding the Port was provided in a letter dated February 3, 2011, from Mr. Thomas Lawrence III, counsel to the Port. According to his letter,

> As an independent municipal entity, the Port primarily provides warehouse, distribution and transloading services and building and property leases to its customers. In addition, the Port provides rail switching services on its property to UP and Burlington Northern Santa Fe ("BNSF"). Annually, more than 75% of Port revenues are derived from non-rail customers in the agricultural, mining, construction and forestry industries. For these customers, the Port provides storage, distribution and transload services of their products to or from rail cars. The Port contracts directly with its non-rail customers to provide these services and no rail carrier is a party to the contracts. In fiscal year 2008, services provided to these non-rail customers accounted for 77% of the Port's total revenues of $1.145 million; in 2009 it was 76% of $1.398 million; and in 2010 it was 79% of $1.478 million.
>
> In addition the Port provides rail switching services to UP and BNSF, which services are billed to and paid for by UP. The Port switches rail cars delivered to its facility by these carriers and moves them to the appropriate location within the facility, where pursuant to contracts with the non-rail recipients of these cars, the Port provides its transloading, storage and distribution services. The Port also provides switching services to UP to move auto racks to and from a UP auto distribution center located on property that the Port leases to UP. The Port charges UP and BNSF a fee for each car switched. In fiscal year 2008, the rail switching services provided to UP/BNSF accounted for 10% of the Port's total revenue; in 2009 it was 10% and 2010 it was 9%.

Mr. Lawrence further explained that the Port leases property to UP for its auto distribution center, accounting for about 10% of the Port's total revenues for 2008 through 2010. In 2009 and 2010 the Port also received revenue from UP for storage of rail cars – in 2009 the storage of these cars accounted for 4% of the Port's total revenues, and in 2010 it accounted for 2% of the Port's total revenues. Mr. Lawrence concludes:

> Hence, although revenues from UP accounted for 21% of total Port revenue in 2010; 24% in 2009, and 23% in 2008, the actual revenue attributable to rail switching services for UP was only 10% in 2008; 10% in 2009 and 9% in 2010.

In response to a request for clarification from the agency's General Counsel, in a letter dated April 1, 2011, Mr. Lawrence stated that the Port began providing

switching services in 1990. Documentation supplied by Mr. Lawrence supports his statement that:

> the switching services represent a minor component of the Port's overall annual revenue. Switching services have historically comprised between 5% - 12% of the Port's annual revenues and have never exceeded 14%.

Mr. Lawrence further stated that:

> generally more than 75% of the Port's revenues are derived from non-rail customers, with about 10% of its revenues coming from the switching services provided to Union Pacific Railroad Company ("UP"). The remainder is primarily attributable to a lease of property to UP for an auto distribution center and the Port's storage of surplus railcars for UP.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), which insofar as relevant here, 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 (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The definitional provision establishing the jurisdiction of the Surface Transportation Board over railroad transportation defines "railroad" to include "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation * * *." 49 U.S.C. § 10102(6)(C). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and the RUIA where they act in the capacity of a common carrier subject to the jurisdiction of the Surface Transportation Board. See, e.g., Camp Chase Industrial Railroad, B.C.D. No. 95-41, and GWI Switching Services, L.P., Decision on Reconsideration, B.C.D. No. 96-19. Conversely, where switching operations are conducted by an operator that, without making it a vocation or holding itself out to the public as ready to act for all who desire the service,

undertakes by special agreement in a particular instance only, to transport property or persons from place to place, the Board has held that such operator is a private carrier and not an employer under the RRA and the RUIA. See, e.g., Hardin Southern Railroad Company, B.C.D. 94-29 ("As Hardin conducts rail operations only for one shipper, it operates as a private carrier rather than a common carrier in interstate commerce * * *"); The Great Miami & Western Railway Company, B.C.D. No. 94-105.2 ("GMWR does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question"); Joliet Junction Railroad, Inc., B.C.D. No. 96-48 ("JJR does not fall within the criteria applied by the ICC to determine whether a terminal type company such as JJR, is engaged in interstate commerce"); Port of Palm Beach District, Decision on Reconsideration, B.C.D. 96-59 ("the District is engaged in rail switching only as an ancillary activity to its main governmental purpose, which is the administration of the maritime facilities of the Port of Palm Beach * * * Since the ICC found that the Port of Palm Beach District does not hold itself out to the public as a common carrier by railroad, the Board finds that the District is not now and never has been a rail carrier employer"); Rapid Switching Services, LLC, B.C.D. 01-3 ("RSS-LLC is a switching railway which provides services to only one customer * * *"); Southern California Railroad Company, B.C.D. 01-75 ("There is no evidence that SCRC holds itself out to the public as engaging in the business of transportation of persons or property over the line in question"); R.J. Corman Railroad Switching Company, LLC, B.C.D. 03-49 ("RCSC is not a common carrier, but operates instead as a private carrier which performs intraplant switching for a single customer"); Chicago Heights Switching Company, Decision on Reconsideration, B.C.D. 03-63 ("CHSC provides rail-switching operations only as a private carrier"); and Quincy Railroad Company, Sierra Pacific Industries, Incorporated, B.C.D. 04-11 ("where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer {citing Hardin Southern Railroad Company and Great Miami & Western}").

The evidence of record shows that the Port is performing switching service for the Union Pacific Railroad Company and the Burlington Northern Santa Fe Railway Company, even though it is paid only by the Union Pacific. In his letter of April 1, 2011, Mr. Lawrence argues that "The Port does not advertise switching services to the general public, and it has given no indication that the public may demand switching services from the Port. Such services are only under contract with UP and the Port has no plans to expand its switching service to any other customers". The evidence of record shows that while the Port offers many of its services to the general public, it does not offer switching services to the general public. See, for example, its brochure entitled Port of Montana Gateway to Your Destination, stating, "The Port's Intermodal Hub is ideally positioned to serve all shippers through the Montana corridor.", and its website which states:

> The Port of Montana offers a wide variety of services at its 55-acre facility located in Silver Bow, Montana. We provide warehouse and storage services, certified scales, distribution services, technical support,

> customized billing, railcar and truck transload services, inventory management and control, packaging and shipping, consulting, pricing and logistics.
>
> For over 30 years the Port of Montana has helped customers expand their market areas by providing quality services, equipment and transportation alternatives; thereby strengthening the economic base of Montana. Our client base includes a number of industries such as; railroad, agriculture, automobile, trucking, forest products, silicon, ore concentrates, fertilizer, road treatment, and fuels. The Port of Montana will work to ensure the most competitive cost structure and service for your products helping design business strategies and achieve business goals.

In light of the evidence of record, and consistent with previous decisions cited above, we find that the Port is not an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever

**B.C.D. 08-15** **MAR 13 2008**

**EMPLOYER STATUS DETERMINATION**
**Transco Railway Products, Inc.**
**Transco Railcar Repair, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of Transco Railway Products, Inc. (TRPI) and Transco Railcar Repair, Inc. (TRR) as employers under the Railroad Retirement Act (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Information regarding TRPI and TRR was provided by Mr. Ronald A. Lane, attorney for TRPI and TRR. According to Mr. Lane, as well as information obtained from TRPI's website, TRPI, a privately owned entity, is an independent provider

> of freight car repair, modification and rebuilding services to the rail transportation industry. The Company was organized in its current form in 1967 as a combination of certain predecessor companies that had been in the railcar repair and component manufacturing business since 1936.

TRPI operates rail car repair shops at seven locations throughout the Great Lakes region, Iowa, Montana and Georgia. TRPI also operates a rail car component fabrication facility in Ohio.

TRR, a subsidiary of TRPI, was created in 2004 to purchase most of the repair shop assets of Trinity Railcar Repair, Inc., (Trinity) including the shops at Miles City, Montana, Sioux City, Iowa and Waycross, Georgia. TRR also hired the Trinity employees at these locations. TRR performs the same services which Trinity performed. These services are performed for car owners, some of which are railroads, but, according to Mr. Lane, most of which are leasing companies or shippers which own their own car fleets. Trinity had been found by the Board to not be a covered employer under the Acts[1].

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[1] *See*, Trinity Railcar Repair, Inc., Board Coverage Decision 03-75. It is further noted that the Interstate Commerce Commission (the predecessor of the Surface Transportation Board), found that PLM Railcar Maintenance Company, the predecessor to Trinity, was not subject to regulation to the extent that it performed car repair and maintenance operations, and this exemption was not lost by virtue of incidental switching service provided to neighboring industries. *See*, Interstate Commerce Commission Decision, Finance Docket No. 30453, decided May 10, 1984.

TRPI is also part-owner of a non-operating carrier, D&W Railroad, LLC (D&W), which owns approximately 29 miles of rail line which is operated by Iowa Northern Railway. D&W conducts no operations and has no employees. The Board has found D&W not to be a covered employer under the Acts[2]. Neither TRPI nor TRR own or control any other rail carrier, and TRR performs no services for D&W. No railroad owns any direct or indirect interest in TRR. The officers and directors of TRR are also officers or directors of TRPI and D&W.

The Miles City facility (which was the initial subject of the Board's inquiries to TRPI) is, as explained above, owned and operated by TRR. According to Mr. Lane, BNSF Railway Inc. (BNSF) delivers and picks up rail cars for repair in the Miles City yard. BNSF also delivers and picks up cars in the yard for three other shippers whose facilities adjoin TRR's yard. One of the three shippers is Peavey Grain (Peavey). Mr. Lane explained that both of TRR's predecessors, PLM Railcar and Trinity, had agreed to pull Peavey's cars in and out of its elevator facility incidental to moving cars for repair in and out of its shops, and TRR has continued that practice. TRR also provides the same service on a "sporadic basis" for an adjacent scrap dealer and a car cleaning operation which operates within TRR's yard and performs cleaning services incidental to repair work performed at the TRR shop.

TRR began operations in May 2004, and employs 102 people, 46 of whom work at the Miles City facility. No TRR employee at Miles City works on property owned by any rail carrier. According to Mr. Lane, at the Miles City facility, TRR generated about $7.9 million in revenue from 28 different customers during fiscal year 2006-07. Of that revenue, about $1.5 million (18%) was from four unrelated Class I carriers. TRR's assets include railcar repair shops and related equipment, including a locomotive engine at Miles City, which is used for moving cars within the TRR yard and to and from adjoining shipper facilities. Railcar repair is performed pursuant to standard purchase orders, as well as a wide variety of contracts with different car owners.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer" to include:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined

---

[2] *See*, Board Coverage Decision 05-34.

> in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. 45 U.S.C. §231(a)(1)(i) and (ii).

Section 1 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

The evidence of record establishes that TRPI is not operating as a rail carrier in interstate commerce. In addition, TRPI is not under common control with nor is it owned or controlled by a rail carrier employer. Furthermore, the evidence also establishes that TRR is not operating as a rail carrier in interstate commerce. While TRR is under common control with D&W Railroad, that entity has been found not to be a covered employer under the Acts. Accordingly, TRR is not under common control with nor is it owned or controlled by a rail carrier employer.

Regarding the limited movement of cars which TRR provides Peavey, as well as the sporadic movement of cars for the scrap dealer and car cleaning operation, decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. See, for example, B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway.*

The Surface Transportation Board (STB) has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or

persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, formerly the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also, International Detective Service, Inc. v. Interstate Commerce Commission, 595 F. 2d 862, 865 (D.C. Cir. 1979).

Additionally, the term "railroad", under the Interstate Commerce Act as amended includes a switch, spur, track, terminal, or terminal facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. §10102(6)(C)). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and RUIA where they act in the capacity of a common carrier subject to the Interstate Commerce Act as amended.

In this case, the information contained in the file indicates that TRR is not a common carrier, but performs limited car movement for a single entity, Peavey Grain. Even with the additional sporadic movement of cars for two additional entities, TRR would still be considered a private carrier. It is also noted that Trinity, TRR's predecessor, which operated the Miles City facility, performing the same services as TRR, as well as providing limited car movement for Peavey Grain, was found not to be a covered employer under the Acts.

Consistent with earlier decisions of the Board, we hold that neither Transco Railway Products, Inc. nor Transco Railcar Repair, Inc. is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman

Jerome F. Kever

**B.C.D. 08-10** **FEB 21 2008**

**EMPLOYER STATUS DETERMINATION**
**Rescar, Inc.**
**Rescar Industries, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of Rescar, Inc. (RI) and Rescar Industries, Inc. (RII) as employers under the Railroad Retirement Act (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Information regarding RI and RII was provided by Mr. Dan Madock, attorney for RI and RII. According to Mr. Madock, RI is a privately held company established in the early 1970's, and owned by a single individual, Mr. Joseph Schieszler, Sr. Mr. Schieszler owns no railroads, and is not an officer or director of any railroad. RII is also a privately held company which was established in 1992. RII is owned equally by five qualified subchapter S Trusts. None of the Trust shareholders have ownership interest in any railroad, and none share shareholders, beneficiaries, officers, directors, trustees, or employees with any railroad.

RI and RII (jointly known as "Rescar") employ approximately 1,000 employees who perform rail car repair, maintenance and cleaning for owners and lessors of railcars. Rescar does the vast majority of its business with non-railroad companies involved with the railroad industry, such as paper mills, smelting and mining companies, agriculture companies, petroleum refineries, chemical companies, steel manufacturing and processing companies, private car owners, and others. Rescar has six major facilities located in Elk Mills, Maryland; DuBois, Pennsylvania; Channelview, Texas; Orange, Texas; Longview, Texas; and Gordon, Georgia, and provides its own internal switching at these locations. Rescar also has approximately 64 field service repair and cleaning locations consisting of in-plant operations (located within customer facilities), fast-track locations (located as leased track within a rail yard or similar location), and "mobile" crews that respond to repair or cleaning requests from customers throughout the United States. All of Rescar's switching service primarily concerns in-plant movement of railcars, i.e., either on the client's premises or within a private industrial park, and not movement over the interstate rail network. Other than in-plant switching for ExxonMobil at its Baytown, Texas and Beaumont, Texas facilities[1], Rescar provides no other external (*i.e.*, third party) switching

[1] Only the switching services at the Baytown facility are under consideration in this decision.

services. Rescar currently has no separate division which performs the switching services.

Rescar has recently entered a business venture in which it would provide expanded switching services at ExxonMobil's Baytown, Texas facility[2]. Rescar has three locations at this facility: 350, 420 and 710. Locations 350 and 420 perform only railcar repair and cleaning services and have approximately a total of thirteen employees. Location 710 performs the in-plant switching and has approximately twelve employees. Switching services for this facility were provided by the Union Pacific (UP), a covered railroad employer. The track involved is owned by the UP and leased by ExxonMobil. Under the new agreement, the UP will continue to own the track, and ExxonMobil (by its switching service provider, Rescar) will be given limited, exclusive access across the UP mainline to traverse with trains from the refinery side of the facility bound for the chemical plant and back. The UP will drop trains at ExxonMobil Refinery along the Dock Lead, where Rescar will disassemble and assemble railcars while also providing in-plant movement of railcars for ExxonMobil. Rescar will acquire and operate two locomotives, and the personnel which Rescar assigns to ExxonMobil will be FRA trained and certified according to the position held. Rescar intends to add a new location number for the Baytown facility, and approximately twelve employees to perform the in-plant switching for the chemical side of the facility. The switching services provided ExxonMobil will be a 24/7 operation. Rescar's total revenues at the Baytown facility are currently approximately $3 million, of which $1 million is revenue from switching activities. The addition of the chemical side of the facility will add approximately another $1 million in switching revenue. This revenue represents approximately 1.6% of Rescar's total revenues. The total number of switching employees (22[3] ) represents approximately 2.4% of all Rescar employees.

Because the UP will no longer be serving the Baytown facility, there are two[4] additional third party industries which will require minimal switching services. Both of these entities, Rhodia and Advanced Aromatics, are located within the Baytown facility and will be without rail service if the UP no longer switches within the facility. Rescar argues that the services provided to these two entities will be *de minimis* and merely incidental to Rescar's in-plant switching for ExxonMobil. Rescar anticipates monthly total switching of less than fourteen cars for both third party industries combined. This will be less than 1% of the total monthly

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[2] Rescar initially provided switching services for the ExxonMobil Refinery Complex on the refinery side of the Baytown Complex, but not the chemical side of the facility.

[3] The initial twelve employees, plus the additional twelve employees who would be hired.

[4] Initially there were three third party industries involved; however the entity NGO is no longer in business.

railcars (1,859) Rescar will switch in-plant for ExxonMobil. Rescar will enter into separate switching agreements with Rhodia and Advanced Aromatics.

Regarding the switching services which Rescar provides at ExxonMobil's Beaumont, Texas facility[5], information provided indicates that Rescar's total revenue at that plant is approximately $2 million, of which $900,000 is from switching activities. Rescar provides switching services only for ExxonMobil, and all services are provided within the plant. No third party customers are served, and Rescar is not contemplating expansion of switching services at the Beaumont facility.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer" to include:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;
>
> (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 (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. 45 U.S.C. §231(a)(1)(i) and (ii).

Section 1 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

The evidence of record indicates that with the switching services Rescar previously provided to ExxonMobil at the Baytown, Texas and Beaumont, Texas facilities, Rescar would be operating as a switching railway which is providing services to only one customer, ExxonMobil. Rescar does not hold itself out to the public as a provider of switching services. The expansion of Rescar's switching services for ExxonMobil at the Baytown facility as described above would not change that description. Decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company

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[5] All switching services at the Beaumont facility are within the plant and no third party customers are served.

does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway.*

The Surface Transportation Board (STB) has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, formerly the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also, International Detective Service, Inc. v. Interstate Commerce Commission, 595 F. 2d 862, 865 (D.C. Cir. 1979).

Additionally, the term "railroad", under the ICC Termination Act of 1995 includes a switch, spur, track, terminal, or terminal facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. §10102(6)(C)). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and RUIA where they act in the capacity of a common carrier subject to the ICC Termination Act of 1995.

In this case, the information contained in the file indicates that Rescar is not a common carrier, but operates as a private carrier which performs intraplant switching for a single customer, ExxonMobil. Even with Rescar providing switching services to two additional clients, it would still be considered a private carrier. The track it uses is leased by ExxonMobil, and runs through the ExxonMobil facility, making the process akin to intraplant switching. Rescar does not hold itself out as providing services from this facility to any and all who would

like to use it – the number of clients is finite, i.e., the two entities described above, Rhodia and Advanced Aromatics.

Consistent with earlier decisions of the Board, we hold that Rescar is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman

Jerome F. Kever

**RECORD NO. 11-1093**

**ORAL ARGUMENT SCHEDULED FOR OCTOBER 24, 2011**

In The

# United States Court of Appeals

For The District of Columbia Circuit

## RAIL-TERM CORP.,

***Petitioner*,**

**v.**

## RAILROAD RETIREMENT BOARD,

***Respondent*.**

**ON APPEAL FROM THE RAILROAD RETIREMENT BOARD**

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## FINAL BRIEF OF PETITIONER

---


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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | |
| United States Railroad | ) | No. 11-1093 |
| Retirement Board, | ) | |
| Respondent | ) | |
| _____ | ) | |

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. **Parties and Amici**

The sole party who appeared before the United States Railroad Retirement Board was:

Rail-Term Corp.

2. **Rulings Under Review.** The ruling of the United States Railroad Retirement Board at issue before this Court is B.C.D. 11-14, *EMPLOYER STATUS DETERMINATION-DECISION ON RECONSIDERATION Rail-Term Corporation*, dated January 28, 2011, a copy of which was attached to the Petition for Review.

This case involves a decision by the three member United States Railroad Retirement Board ("the Board") holding that Rail-Term Corp. ("Rail-Term") is an "employer" and a "rail carrier" for the purpose of coverage under the Railroad Retirement Act and the Railroad

Unemployment Insurance Act (collectively "the Acts"). The Board arrived at this finding despite the fact that Rail-Term does not own or operate any railroad equipment or rail lines and is not licensed to and does not hold out to perform any rail service on any rail line in the United States. Rail-Term's sole activity is providing computer software used by rail clients for dispatching trains and by providing to its rail carrier clients people in Rail-Term's employ to provide those services to its clients. The Board rendered its initial decision on April 6, 2010, and affirmed that decision with some modifications on January 28, 2011. The management member dissented from both decisions.

No party opposed Rail-Term in the proceedings before the Board.

3. **Related Cases.** The case on review was not previously before this court or any other court. There is no related case pending in this Court or in any other court of which counsel is aware.

Respectfully submitted,

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Dated: July 13, 2011

## CORPORATE DISCLOSURE STATEMENT

Pursuant to the requirements of Rule 26.1, Fed. R. App. P., and in order to permit members of this Court to make a determination of whether they have any interest in the Petitioner, the undersigned counsel of record for Petitioner, Rail-Term Corp., certify that there are no parent companies, subsidiaries, or affiliates of Rail-Term Corp., which have any outstanding securities in the hands of the public.

Respectfully submitted,

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## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| Board | United States Railroad Retirement Board |
| FRA | Federal Railroad Administration |
| ICCTA | I.C.C. Termination Act |
| Rail-Term | Rail-Term Corp. |
| RRA | Railroad Retirement Act |
| RUIA | Railroad Unemployment Insurance Act |
| STB | Surface Transportation Board |

**ORAL ARGUMENT SCHEDULED FOR OCTOBER 24, 2011**

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No. 11-1093 |
| United States Railroad | ) | |
| Retirement Board, | ) | |
| Respondent | ) | |
| | ) | |

**BRIEF OF PETITIONER-APPELLANT**
**RAIL-TERM CORP.**

I.

JURISDICTIONAL STATEMENT

The decision under review was issued January 28, 2011, by the United States Railroad Retirement Board ("the Board") pursuant to the Railroad Retirement Act of 1974 § 7(b)(5) ("the RRA"), 45 U.S.C. § 231f(b)(5) (2000). That final agency decision is subject to review in this Court. RRA § 8, 45 U.S.C. § 231g (2000). Rail-Term Corp. (hereinafter "Rail-Term") filed its Petition for Review in this Court on March 28, 2011, within the ninety-day limit provided for in section 5(f) of the Railroad Unemployment Insurance Act ("RUIA"), which the RRA incorporates by reference. *See* Petition for Review, at 2 (citing 45 U.S.C. §§ 355 *et seq.*).

## II.

## STATEMENT OF THE ISSUES

1. Whether the Railroad Retirement Board's decision finding Rail-Term to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is contrary to law.
2. Whether the Railroad Retirement Board's decision finding Rail-Term to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is supported by substantial evidence.
3. Whether the Railroad Retirement Board's decision finding Rail-Term to be an "employer" covered by and a "rail carrier" subject to the Railroad Retirement Act and the Railroad Unemployment Insurance Act is arbitrary and capricious.

## III.

## STATUTES AND REGULATIONS

The following have been set forth in an addendum attached to this brief: 45 U.S.C. § 231, 45 U.S.C. § 351, 45 U.S.C. § 355, 49 U.S.C. § 10102, 49 U.S.C. §§ 21101 *et seq.*, 49 CFR § 213, 49 CFR § 215, 49 CFR § 216, 49 CFR § 221, 49 CFR § 223, 49 CFR § 224, 49 CFR §§ 229-230, and 49 CFR §§ 233-6.

IV.

STATEMENT OF THE CASE

This is an appeal of the Board's decision on reconsideration dated January 28, 2011, holding that Rail-Term is a covered employer under the RRA and the RUIA[1] with respect to its dispatcher employees "since that operation consisted of common carriage by rail in interstate commerce due to the integral nature of train dispatching to the overall operation of movement of goods by rail." [emphasis added]. *See*, *Employer Status Determination-Decision on Reconsideration*, Rail-Term Corporation, B.C.D. 11-14 (served January 28, 2011), J.A. 149 (hereafter "the Reconsideration Decision"). The Reconsideration Decision affirms and adopts the Board's initial decision dated April 6, 2010, with certain additional comments. *Employer Status Determination-Rail-Term Corporation*, B.C.D. 10-33, J.A. 31. (hereafter "the Initial Decision").

V.

STATEMENT OF FACTS

Rail-Term is a privately held Michigan corporation and a subsidiary of Canadian corporation Rail-Term Inc. Rail-Term was originally incorporated on March 3, 2000, to manage an intermodal terminal facility for a subsidiary of the Canadian Pacific Railway operating in the United States. Rail-Term and its

[1] Collectively "the Acts"

corporate affiliates are still engaged in a variety of business activities that support the railroad industry in both the United States and Canada. Starting in March 2005 and through the present, Rail-Term has been and is still engaged in developing dispatching software and providing that software and related dispatching services for short line and regional freight railroads in the United States. Significantly, neither Rail-Term nor its corporate affiliates hold themselves out as common carriers to provide transportation for compensation, or own, lease, or operate any railroad locomotives or rolling stock. J.A. 15-18, 23-26, 27-28, 79-80. Furthermore, as the Board itself has held, Rail-Term is neither owned by nor under common control with a rail carrier. Initial Decision at 3; J.A. 33.

Operating from an office in Rutland, Vermont, Rail-Term currently provides dispatching services for about 11 American short line railroad clients. Rail-Term's rail carrier clients have in effect "outsourced" to Rail-Term the dispatching functions that they would otherwise provide "in house." Rail-Term employs 7 people in its US office and, along with its corporate parent and Canadian sibling, employs about 100 people overall. Rail-Term's dispatcher employees work for it, rather than for its client railroads. J.A. 11, 15-16, 23-25, 28-30, 79-80.

None of Rail-Term's current dispatchers were formerly employed by its American client railroads so the Board proceeding did not involve the removal of railroad employees from Railroad Retirement coverage. Neither Rail-Term nor its

Canadian affiliates own, are owned by, or are under common control with any rail carrier in the United States or Canada. J.A. 17-18, 23-24, 26, 28, 79-80.

This proceeding dates back to August 14, 2006, when Rail-Term received a letter from William E. Wolfe, Chief of the Board's Audit and Compliance Division, seeking information concerning the services it performs for the American railroad industry. J.A. at 7-9. Rail-Term's Executive Vice President Francois Prenovost replied on September 7 explaining that Rail-Term contacted the Board back in 2004 in connection with its proposal to provide train dispatching services and asking how in his words "to join the RRB [the Board]." Mr. Prenovost related that he had spoken with two Board employees, Joe Ellena and Michael Litt,[2] who advised that Rail-Term and its employees would not be covered under the Acts. Prenovost further informed the Board that Rail-Term spent substantial sums on legal research confirming that advice and establishing a competitive retirement benefit package. September 7 letter at 2; J.A. at 10-11, 14, 23, 81-82. Mr. Wolfe followed up with another letter dated September 21, stating that final decisions regarding coverage can only be made by the full three member board and requesting that Rail-Term answer the questionnaire. J.A. at 12.

After Rail-Term responded on November 16, the Board sent another inquiry letter dated February 28, 2007, seeking additional information about the train

[2] Rail-Term understands that Mr. Litt is now retired and Mr. Ellena is deceased.

dispatching services that Rail-Term provides its railroad clients in the United States. J.A. at 20-21. Rail-Term responded on April 20, 2007. As relevant, Rail-Term advised the Board:

- Rail-Term provides dispatching services from its office in Rutland, VT.
- Except for a few situations during the startup of its operations, Rail-Term employs and trains all of its own dispatchers.
- Rail-Term's dispatchers receive their daily directions from Rail-Term's Director, Rail Traffic Control, who in turn receives his or her directions from the customers' Operations Managers. Rail-Term dispatchers do not direct the operating personnel of their client railroads but give the operating personnel authority to occupy track.
- Rail-Term owns its dispatching system and software.
- Rail-Term employees do not perform dispatching services on the client carriers' properties.
- As required by Federal Railroad Administration ("FRA") regulations, Rail-Term's software maintains train movement records.
- Rail-Term (and not its client railroads) is solely responsible to the FRA for its actions.

J.A. at 24-26.

On April 6, 2010, the Board issued the Initial Decision finding that Rail-Term "is a carrier employer under the [Acts]." J.A. at 33, 36-37, 40. In so ruling, the Board reasoned as follows:

1. Because of the control that dispatchers have over the motion of trains, dispatching is an inextricable part of the actual motion of trains and therefore an inextricable part of fulfilling the railroad's common carrier obligation;
2. Train dispatching is an essential element of safe train operation over a rail line and because the safe operation of trains depends upon dispatchers, they are subject to the federal Hours of Service Act administered by the FRA;
3. Because no railroad can fulfill its common carrier obligation under the law unless trains move, the dispatcher's work is an integral part of the operation of a common carrier; and
4. Because Rail-Term's dispatchers have the ultimate control over the movement of its rail carrier clients' trains, the Board finds that Rail-Term is itself a rail carrier under the Acts. J.A. at 34-36.

The Board then addressed an alternate theory for finding Rail-Term subject to its coverage jurisdiction: That dispatching is such an integral part of operating a railroad that it cannot be contracted out to a third party that is outside of the control

of a railroad. Initial Decision at 7; J.A. 37. Under that theory, Rail-Term's employees would be treated as the employees of its client railroads. After citing the traditional statutory definition under the Acts as to when an individual is in the service of an employer and then noting that these tests do not apply to the employees of independent contractors engaged in an independent trade or business providing services for a railroad, the Board asserted that dispatching services were of such a continuing and essential nature that the railroad could not surrender the control and supervision of these services. *Id.* at 9; J.A. 38-40. Thus, the Board concluded that Rail-Term's carrier clients retain the power to direct and control the individuals who conduct the dispatching service and, by the nature of their work, those dispatchers are integrated into the railroad's operations. *Id.*; J.A. at 39-40. Management member Jerome Kever issued a vigorous dissent. While he agreed that dispatching is an "inextricable part" of railroad operations, he found unsupportable the majority's ruling that Rail-Term is a carrier under the Acts, questioning whether the Surface Transportation Board ("STB") would regard Rail-Term as a carrier under its statute, and distinguishing decisions cited by the majority in support of its ruling. *Id.*; J.A. at 41-42.

Specifically, Mr. Kever disagreed that the precedent upon which the majority relied actually supported their conclusion that Rail-Term was a covered rail carrier. He stated that he did not believe the STB would consider Rail-Term to

be a carrier under that agency's statute, the I.C.C. Termination Act ("the ICCTA"). He noted that Rail-Term does not own track or provide train operations over leased track as did the SCRRA and Herzog Transit[3] and did not provide rail cars for transportation or contract with Amtrak to move passengers as in *American Orient Express Railway Company, LLC v. Surface Transportation Board*, 484 F.3d 554 (D.C. Cir. 2007) (hereafter *American Orient*), discussed at footnote 7 at page 17.

Upon receiving that decision, Rail-Term petitioned the STB for a declaratory ruling as to whether it was a "rail carrier" within the meaning of that agency's governing statute. The STB denied Rail-Term's request reasoning that issuing a declaratory order or instituting a proceeding at this time would in its words "interfere with a related proceeding before another federal agency, the Railroad Retirement Board (Retirement Board)" and noting that another case presenting a similar issue was on appeal to the United States Court of Appeals for the Seventh Circuit.[4] *Rail-Term Corp.-Petition for Declaratory Order*, FD 35381, STB served October 12, 2010.

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[3] *See*, B.C.D. 02-12, *Southern California Regional Rail Authority Segregation of Dispatching Department* (2002) (cited as *SCRRA*) discussed at pages 27-28 *infra* and B.C.D. 09-53, *Employer Status Determination Decision on Reconsideration, Trinity Railway Express-Train Dispatching Herzog Transit Services, Incorporated*, slip op., October 28, 2009, *aff'd sub. nom., Herzog Transit Services v. United States Railroad Retirement Board*, 624 F.3d 467 (7th Cir. 2010) (hereafter cited as *Herzog Transit*) discussed at pages 28-30 *infra*.

[4] *Herzog Transit Services v. United States Railroad Retirement Board*, 624 F.3d 467 (7th Cir. 2010).

Rail-Term sought reconsideration of the Initial Decision because it strongly disagreed with the Board's finding that it is a "carrier employer" under the Acts and hence subject to the Board's jurisdiction. It also challenged the Board's alternative coverage theory, that its employees are employees of its client railroads. J.A. 80-81. Upon receiving the Reconsideration Decision, Rail-Term sought and obtained a stay pending appeal of that decision from the Board's General Counsel for RUIA coverage. J.A. 145-147. Inasmuch as the Board's authority to stay its own decisions is limited to the collection of RUIA taxes, Rail-Term will seek relief from the Internal Revenue Service regarding the collection of RRA taxes.

## VI.

## SUMMARY OF ARGUMENT

This proceeding involves a basic issue of statutory construction: whether a company that merely supplies services to the railroad industry in the form of train dispatching is a "carrier by railroad" and hence "a covered employer" under the Acts and alternatively whether the company's employees can be considered employees of its rail carrier clients for coverage purposes. This inquiry necessarily begins with the language of the statute. Where Congress has directly and clearly addressed that issue, that is the end of the matter. Moreover, where the Board's analysis also requires the interpretation of another agency's statute, the ICCTA, this Court reviews that agency's decision *de novo*.

The Board's decision lacks a reasonable basis because it disregards the plain language of the statute and legislative intent. Nowhere does the statute or the regulations regard an entity that performs railroad-like services as "a covered employer." Rail-Term obviously does not qualify under these standards because it is not a "carrier by railroad" or a "rail carrier." It does not furnish rail service to anyone, does not own any rail lines or equipment, does not employ any one capable of operating trains, does not operate any trains under contract to others or for its own account, and has never sought, let alone, obtained any authority from the STB to provide rail service.

The Board's decision also lacks a reasonable basis because it contradicts rulings of its sister agency, the STB, as to whether an entity providing dispatching services can render itself a "rail carrier" on account of those services. The STB has held that the acquiring entity could assume responsibility for maintaining and *dispatching* freight operations under certain circumstances without becoming a "rail carrier" subject to the STB's acquisition jurisdiction.

The Board's decision lacks a reasonable basis by selectively relying on isolated portions of some federal regulations while ignoring other equally important ones. To distinguish between different functions performed by certain types of rail contractors as being "integral" and other types as being more than just

"integral" but "inextricable" demonstrates the magnitude to which the Board's decision is arbitrary and capricious.

By failing to analyze Rail-Term's operations under the applicable test articulated in *Kelm v. Chicago, St. P., M. & O. Ry. Co.*, 206 F.2d 831 (8th Cir. 1953)[5], for determining whether a contractor is or is not subject to coverage under the Acts, the Board's decision ignores the substantial evidence of record and departs from established precedent without explanation. The Board erred in subjecting Rail-Term or its dispatching employees to coverage under the Acts apparently in order to satisfy its broad policy objective of preventing the erosion of the RRA and RUIA by not allowing rail carriers to parse out interstate transportation functions by rail to non-covered entities. An agency concerned with the "erosion" of its jurisdiction and coverage base must pursue that objective through new legislation rather than *ad hoc* decision-making when the statutory language and legislative intent clearly demonstrate that Congress did not intend to cover an entity such as Rail-Term which is neither a covered employer nor a rail carrier.

## VI.

## STANDING

Standing to seek review of an order of the Board is conferred by 45 U.S.C. § 231g and 45 U.S.C. § 355. Rail-Term was a party in an administrative

[5] The Board has adopted the *Kelm* analysis in cases such as *B.C.D. 95-78, Tryban Rail Service, Inc.*, and others cited at page 22 of this brief.

proceeding before the Board and, as such, is adversely affected by the Board's ruling. This proceeding involves an action challenging the validity of the Board's ruling.

## VII.

## ARGUMENT

### A. STANDARD OF REVIEW

In general a Board decision must have a reasonable basis in law, not be based on an error in law, and be supported by substantial evidence. *See, e.g.*, *Interstate Quality Services, Inc. v. Railroad Retirement Board*, 83 F.3d 1463 (D.C. Cir. 1996); *Reed v. Railroad Retirement Board*, 145 F.3d 373 (D.C. Cir. 1998); *Holman v. U.S. R.R. Ret. Bd.*, 253 F.3d 975, 978 (7th Cir. 2001); *S. Dev. Co. v. U.S.R.R. Ret. Bd.*, 243 F.2d 351, 353 (8th Cir. 1957); and *Itel Corporation v. United States Railroad Retirement Board*, 710 F.2d 1243 (7th Cir. 1983) (cited as *Itel*). This Court and others have applied this "reasonable basis in the law" standard to the Board's interpretation of its statutes and regulations. *See*, *Itel*, *supra* (holding that the Board's interpretation of a statute has no reasonable basis in law when it requires the court to ignore clear statutory language and *Kurka v. U.S.R.R. Ret. Bd.*, 615 F.2d 246, 249-50 (5th Cir. 1980) (reversing a Board ruling which misapplied the statutory requirements by ignoring the statutory definition of "employee").

This proceeding involves a basic question of statutory construction: whether a company that merely supplies services to the railroad industry in the form of train dispatching is a "carrier by railroad" and hence "a covered employer" under the Acts and alternatively whether the company's employees can be considered employees of its rail carrier clients for coverage purposes. This inquiry necessarily begins with the language of the statute. *Dean v. United States*, __ U.S.__, 129 S. Ct. 1849, 1853, 2009 LEXIS 3300 (2009). Where, as here, Congress has directly addressed the precise question at issue, that is the end of the matter. It is for the court as well as the agency to give effect to the unambiguously expressed intent of Congress. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-2, 104 S. Ct. 2778, 2781 (1984) cited in *Interstate Quality Services, Inc. v. Railroad Retirement Board*, 83 F.3d at 1465, *supra.*

Furthermore, under the law of this Circuit agency rulings interpreting statutes of other agencies are not entitled to deference under *Chevron*. *Johnson v. United States R.R. Retirement Bd.*, 969 F.2d 1082, 1088-89 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1842 (1993) (holding that the Board's interpretation of the relationship between the RRA and the Social Security Act is not entitled to deference). This Court will review *de novo* STB decisions that turn on the interpretation of statutes that not only include the RRA and RUIA but the ICCTA as well.

As this Court observed in *Cheney R.R. v. Railroad Retirement Bd.*, 50 F.3d 1071, 1073-4 (1995) (hereafter cited as *Cheney*):

> Whether Cheney and Tyson are employers under the RRA and the RUIA present questions of law that turn on the interpretation of not only the RRA and the RUIA, but also the Staggers Rail Act and the ICA. Because the ICA and the Staggers Rail Act are not the Board's governing statutes, but rather are administered by the Commission…[citations omitted] we review *de novo* the Board's decisions that because petitioners are subject to provisions of the ICA, they are employers under the RRA and the RUIA…[citations omitted].

Because the Board's decision involves the meaning of the terms "rail carrier," "carrier by railroad," and "railroad" as defined in the ICCTA, this Court must review the Board's decision *de novo*.

## B. THE BOARD'S DECISION LACKS A REASONABLE BASIS, IS ARBITRARY AND CAPRICIOUS, AND IGNORES THE SUBSTANTIAL EVIDENCE OF RECORD

### 1. <u>The Board's decision lacks a reasonable basis because it disregards the plain language of the statute and legislative intent</u>.

The RRA simply states that the term "employer" shall include

(1) "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board… or

(2) any 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." 45 U.S.C. §§ 351a and b.

The Board has conceded that Rail-Term does not qualify for coverage under the second element of this test. Initial Decision at 3; J.A. 33. But it claims that Rail-Term does qualify under the first element because its activities are so integral to the operation of a railroad that it must be a covered employer. *Id*. at 6-7; J.A. 36-37; Reconsideration Decision at 2; J.A. 150. But that is not what the plain and unambiguous language of the statute says. Nowhere does the statute or the regulations regard an entity that performs railroad-related services as "a covered employer."

While the ICCTA which delineates the STB's jurisdiction does not use the term "carrier by railroad," it does use and define the term "rail carrier." Under the ICCTA a "rail carrier" is a "person providing common carrier railroad transportation for compensation." Although the ICCTA does not define "common carrier," that phrase has generally been understood to mean "an entity that holds itself out to the public as offering transportation services to all who are willing to pay its tariff."[6] *Id.* The STB has defined the term "rail carrier" as "a person

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[6] Other cases define a "common carrier" as "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." *See, e.g.*, *American Orient Express Railway Company LLC-Petition for Declaratory Order*, FD 34502, STB served Dec. 29, 2005, slip op. at 4 (hereafter *AOERC*) and cases cited therein, *aff'd sub. nom.*, *American Orient Express Railway Company, LLC v. Surface Transportation Board*, 484 F.2d 554 (D.C. Cir. 2007) (hereafter *American Orient*); *H&M International Transportation, Inc.-Petition for Declaratory Order*, FD 34277, STB served November 12, 2003, slip op. at 2-3 (hereafter *H&M*) and cases cited therein.

providing common carrier railroad transportation for compensation…offering service to the general public." *DesertXpress Enterprises, LLC-Petition for Declaratory Order*, FD 34914, STB served June 27, 2007. It adds that 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." Among other criteria, the STB has considered whether an entity has held itself out to the public as willing to provide rail service and whether it has ever sought or received a license from the STB to do so. *AOERC* at 4; *H&M* at 3.

To state that Rail-Term is a "rail carrier" not only defies common sense but is directly contrary to the plain language of the statute. *Cf., American Orient*, 484 F.3d 556 (where this Court found that Orient Express' argument that it was not a railroad because it did not own tracks "defies common sense").[7]

Rail-Term does not qualify under these standards because it does not provide any services, transportation or otherwise, to the public at large. It does not furnish rail service to anyone, does not own any rail lines or equipment, does not employ

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[7] That case involved petitions to review decisions of both the STB and the Railroad Retirement Board finding the petitioner a rail carrier subject to the ICCTA and a covered employer under the Acts. The Court upheld rulings of both agencies in a consolidated proceeding. As relevant here, the Court stated "[a] rail carrier may own tracks and transport passengers along its tracks, but that is not the only way to provide 'railroad transportation.' A rail carrier may instead use tracks owned by another entity and 'operated under an agreement'…[t]o be a common carrier, a company need only, in practice, serve the public indiscriminately and not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" *Id.* at 557.

anyone capable of operating trains, and does not operate any trains under contract to others or for its own account. All of its dispatching services are provided to its customers pursuant to an agreement. Furthermore, Rail-Term has never sought, let alone, obtained any authority from the STB to provide rail service. In fact, it sought a ruling from the STB for just the opposite proposition: that it is not a rail carrier under the jurisdiction of the STB and the ICCTA. *Rail-Term Corp.—Petition for Declaratory Order*, *supra*.

The plain meaning of the statutory language dictates that Rail-Term is neither a "rail carrier" nor a "railroad."[8] This Court has consistently held that words will be given their common dictionary meaning. *See*, *e.g.*, *Day v. Veneman*, 315 F.3d 297 (D.C. Cir. 2003) and *Ass'n of Communs. Enters v. FCC*, 253 F.3d 29 (D.C. Cir. 2001). Merriam-Webster's on-line dictionary defines a railroad as "a permanent road having a line of rails fixed to ties and laid on a roadbed and providing a track for cars or equipment drawn by locomotives or propelled by self-contained motors; *also*: such a road and its assets constituting a single property." http://www.merriam-webster.com/dictionary/railroad. Black's Law Dictionary defines a railroad as "a road or way on which iron or steel rails are laid for wheels to run on, for the conveyance of heavy loads in cars or carriage propelled by steam

[8] The ICCTA defines a "railroad" as including the road used by a rail carrier and owned by it or operated under an agreement and a switch, spur, track, terminal, terminal facility, and any freight depot, yard, and ground, used or necessary for transportation." 49 U.S.C. § 10102(6).

or other motive power; a road or way on which iron rails are laid for transportation purposes, as incident to the possession or ownership of which important franchises and rights affecting the public are attached; an enterprise created and operated to carry on a fixed track passengers and freight, or passengers or freight, for rates or tolls, without discrimination as to those who demand transportation." BLACKS LAW DICTIONARY, revised 4th edition, 1968, at page 1424.

How then can an entity that does not own any rail lines, facilities, or railroad property equipment of any kind or provide rail service or operate trains of any sort be considered a "carrier by railroad", "a rail carrier" or a "railroad?"

2. The Board's decision lacks a reasonable basis because it contradicts rulings of its sister agency, the STB, as to whether an entity providing dispatching services can render itself a "rail carrier" on account of those services.

There is a substantial body of law at the STB and its predecessor agency, the Interstate Commerce Commission, on the issue of whether the acquisition of a rail line renders the purchaser a "rail carrier." The recent DC Circuit ruling in *Brotherhood of Railroad Signalmen Et Al v. Surface Transportation Board*, 638 F.3d 807, 2011 U.S. App. LEXIS 6300 (slip op. 2011), upholding an STB decision approving the purchase of an actively operated rail line by the Massachusetts Department of Transportation, contains a lengthy discussion of that agency's rulings involving the acquisition of rail lines by public agency purchasers under its

*State of Maine*[9] doctrine. As relevant here, that case contained a discussion of common carriage. It noted that the acquiring entity could assume responsibility for maintaining and *dispatching* freight operations under certain circumstances without becoming a "rail carrier" subject to the STB's acquisition jurisdiction. *See* discussion at 638 F.3d at 813-815. The STB itself has held that an entity can acquire railroad assets and selected responsibilities as to those assets such as track maintenance and dispatching of freight and passenger service without jeopardizing its noncommon carrier status. *Md. Transit Admin.—Pet'n for Declaratory Order*, FD 34975, STB served Sept. 19, 2008, slip op. at 4-5. Therefore, according to the STB, which is the principal federal agency charged by Congress with regulating the railroad industry on matters other than safety and labor relations, there is nothing inherent in dispatching that makes the dispatching entity a rail carrier.

3. <u>The Board's decision lacks a reasonable basis by selectively relying on some federal regulations while ignoring other equally important ones</u>.

The Board appears to premise its assertion that dispatchers are so integral to railroad operations that they must be covered under the Acts on the fact that dispatchers are subject to the Hours of Service Act, 49 U.S.C. §§ 21101 *et seq.* The Initial Decision stated:

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[9] *Me. Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R.*, 8 I.C.C.2d 835 (1991) (commonly cited as "*State of Maine*").

> "[b]ecause the safe operation of trains depends on the work of train dispatchers, dispatchers are subject to the Hours of Service law enacted by Congress…"
>
> …….
>
> "The Federal Railroad Administration, which is charged with the responsibility to carry out the railroad safety duties imposed by the Hours of Service law, has issued regulations that prescribe reporting and record keeping requirements with respect to the hours of service of certain railroad employees, including dispatchers…In addition, FRA regulations emphasize the control factor present in the job of a dispatcher…"
>
> Initial Decision at 5; J.A. 35.

The Board even went so far as to say that dispatching is such an "inextricable part of train motion" that dispatchers must be covered under the Acts because trains cannot move without dispatching. *Id.* at 4, 9; J.A. 34, 39-40; Reconsideration Decision at 5; J.A. 153. In so ruling, the Board overlooked the fact that the General Code of Operating Rules allows trains to be operated at restricted speeds of less than 10 mph without the services of a dispatcher. Many of Rail-Term's existing and potential clients operate at these restricted speeds. Accordingly, it is not only factually and legally incorrect for the Board to say that trains cannot move at higher speeds without a dispatcher, it is unsupported by any evidence as well as arbitrary and capricious.

When Rail-Term noted that many basic railroad safety-related functions such as signal and track maintenance are provided by independent contractors historically held not to be covered, the Board responded as follows:

> "[a]lthough these services are integral to transportation by rail, they do not constitute transportation by rail." Reconsideration Decision at 4; J.A. 152.

These other functions are the subject of extensive FRA regulation as noted in Rail-Term's Petition for Reconsideration.[10] Numerous vendors independent of their railroad clients perform services for the railroad industry in these areas and have been correctly treated as independent contractors by the Board. *See, e.g.*, B.C.D. 95-78, *Tryban Rail Service, Inc.* (track maintenance, much of it for one short line railroad client); B.C.D. 93-07, *Gulf Rail Car Company* (freight car repairs); B.C.D. 06-21, *JA d/b/a The "A" Team* (track, right of way, and grade crossing maintenance); B.C.D. 03-60, *Rail-Scale, Inc. and Southwest Signal Engineering Company* (crossing signals); and B.C.D. 95-40, *Transportation Certification Services, Inc.* (train and engineer training, engineer certification, and signal and communications consulting). In each case a majority of the Board correctly found no basis for coverage under the Acts.

By ignoring these precedents, the Board violated the basic rule of administrative law that an agency must follow its precedents or provide a reasoned

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[10] The FRA regulates numerous other facets of railroad operations in infinite detail. For example, 49 CFR § 213 addresses track and track safety standards. 49 CFR § 214 covers railroad workplace safety. 49 CFR §§ 215, 216, 221, and 224 address railroad equipment standards and maintenance. 49 CFR §§ 216, 223, 229-230 regulate locomotives. Other FRA regulations cover block signal, grade crossing signal, and train control systems. *See*, 49 CFR §§ 233-6.

explanation for its departure. *National Fed'n of Fed. Emples., Local 951 v. FLRA*, 412 F.3d 119, 120, 124 (D.C. Cir. 2005). As this Court succinctly stated :

> "An agency acts arbitrarily and capriciously if it 'reverses its position in the face of a precedent it has not persuasively distinguished,' citing *Louisiana Pub. Serv. Comm'n v. FERC*, 337 U.S. App. D.C. 312, 184 F.3d 892, 897 (D.C. Cir. 1999) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) ('An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis….' (internal quotation omitted)), and if it fails to 'consider…all the relevant factors" in reaching its decision.' *New York Cross Harbor Railroad v. Surface Transportation Board*, 374 F.3d 1177, 1181 (D.C. Cir. 2004).

Some of these functions like signal and communications systems and rail cars are just as essential to moving trains as are dispatchers. Just as trains cannot move without the assistance of dispatchers, they cannot move without block signals on lines that are so equipped and cannot move without adequate track and roadbed. So the Board erred by basing its jurisdiction on some FRA regulations over railroads and railroad operations while ignoring others. Such arbitrary construction by the Board is not authorized or envisioned by the Congress.

Other railroad facilities, property, and equipment operated or maintained by entities held by the Board to be independent contractors outside its jurisdiction are embraced by the terms "railroad" and "transportation" under the ICCTA.[11] Clearly

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[11] *See* footnote 8 at page 18 for a definition of "railroad." The ICCTA further defines "transportation" as including a locomotive, car, vehicle, vessel, warehouse,

track, signals, and equipment fit within the ICCTA's definitions of "railroad" and "transportation." Maintenance of track, signals, and equipment are just as much core functions of a railroad as is dispatching. A railroad cannot operate without track, signals, and equipment any more than it can operate at higher speeds without dispatchers. In fact, block signals control train movement in much the same way that dispatching does. To distinguish between different functions performed by certain types of rail contractors as being "integral" and other types as being more than just "integral" but "inextricable" documents the arbitrary and capricious nature of the Board's decision-making here.

4. By failing to analyze Rail-Term's operations under *Kelm*, the Board's decision lacks a reasonable basis and ignores the substantial evidence of record.

*Kelm* is the key precedent normally applied by the Board in determining whether a contractor providing services to the railroad industry is really "independent" and therefore outside coverage under the Acts or is a *de facto* employee of a railroad and subject to coverage. In *Kelm* the Eighth Circuit held that a railroad client that employed a contractor to furnish certain services was not liable for Railroad Retirement taxes paid under protest on fees paid where that contractor was truly independent of the railroad. In so holding, the Court relied on

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wharf, pier, dock, yard, property, facility, instrumentality, or equipment of *any kind* [emphasis supplied] related to the movement of passengers or property, or both, by rail, regardless of ownership…" 49 U.S.C. § 10102(9).

a discussion of the legislative history of the 1946 amendment of the Carriers Taxing Act of 1937 rejecting efforts to bring such independent contractors within the coverage of the Acts. 206 F.2d at 833-4.

Had the Board applied *Kelm* and agency precedent cited in note 8 on page 19 of Rail-Term's reconsideration petition to the facts at hand instead of merely paying lip service to the case, the Board would have been obligated to reach a different result. As the Board stated in cases cited on page 22, in determining whether an individual is an independent contractor or an employee the Board will consider the criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law.[12] The crucial "supervision test" under 45 U.S.C. § 231(d)(1)(i)(A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work. Furthermore, under the consistent line of Board cases cited on page 22 as well as this decision, the Board has stated that it will not apply

[12] *Lanigan Storage & Van Company, Inc. v. United States*, 389 F.2d 337 (6th Cir. 1968) and *Aparacor, Inc. v. United States*, 556 F.2d 1004 (Ct. Cl. 1977). Both cases analyzed whether the party performing a service was an "employee" of or an independent contractor to its client and determined the party to be an independent contractor.

tests (B) and (C) identified in *Kelm*[13] where the contractor is engaged in an independent trade or business.

Rail-Term submitted detailed evidence about the services it provides to its client railroads and the reporting relationships between Rail-Term and its employees and between those employees and the client carriers as well as copies of client agreements documenting that information in response to the Board's questionnaires and in its reconsideration petition. J.A. 17-18, 23-26, 28-30, 79-80, 99-101, 106-133. This evidence compels a Board finding that Rail-Term is an independent entity and that its employees are not integrated into or subject to control by its carrier clients including as to the outcome and way that work is performed.

Instead of analyzing that evidence under *Kelm* to determine whether Rail-Term's business structure qualifies it as an independent contractor for coverage purposes, the Board explained its refusal to do so with a curt "this argument …appears to miss the point of the Board's holding in its April 6, 2010 decision." After reciting some of Rail-Term's arguments, the Board's Reconsideration Decision states these employees are covered under the Acts "not by virtue of their relationship to the contracting railroads, but by virtue of their

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[13] (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations.

employment relation with Rail-Term, a rail carrier under the [Acts]." It then went on to say that even if Rail-Term was not considered a carrier under the Acts, *Kelm* would not prevent Rail-Term's employees from being considered employees of its client railroads who are also subject to the Acts. Reconsideration Decision at 5, J.A. 153. In other words without any further explanation or citation to authority, the Board held that it would discard the test it normally uses in determining whether a contractor is or is not subject to coverage under the Acts when it can find some independent basis for holding an entity a rail carrier or its employees the employees of a rail carrier for coverage purposes. In so doing, the Board has ignored substantial evidence submitted by Rail-Term and applied the law in a way that lacks any reasonable basis.

In lieu of analyzing the Rail-Term facts under *Kelm*, the Board attempted to support its rail carrier ruling citing four totally distinguishable cases.[14] *SCRRA* involved the coverage status of dispatchers employed by the public agency in southern California that was administering commuter rail service provided by Amtrak under contract. That agency had recently hired dispatchers formerly employed by Amtrak and *had specifically asked* [emphasis supplied] the Board to address the status of the dispatcher employees who currently work for Amtrak and

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[14] *SCRRA* and *Herzog Transit*, both cited *supra* at footnote 3 at page 9; *Wabash Railroad v. Finnegan*, 67 F. Supp. 94 (E.D. Mo. 1946) (hereafter *Wabash*); and B.C.D. 95-51, *Rail-West, Inc.* (1995) (hereafter *Rail-West*).

would be hired as SCRRA employees in its Dispatching Department. The agency also asked the Board to segregate Dispatching Department employees for coverage purposes. The Board ruled that SCRRA's Dispatching Department and its dispatchers were "covered employees" but that the Dispatching Department was otherwise segregated for coverage purposes from the rest of the agency that was held not to be subject to the Acts.

The Board also cited as additional support the Seventh Circuit's 2010 ruling in *Herzog Transit* which affirmed the agency's decision below. Herzog provides intrastate commuter rail service under contract to two public agencies in the Dallas-Fort Worth Area over tracks shared with freight trains operated by railroads in interstate commerce subject to the ICCTA. The Board majority, management member Kever dissenting, found that Herzog's role of dispatching the trains of interstate common carrier freight railroads as well as the publicly supported intrastate commuter trains it operated under contract rendered it a "rail carrier" and an "employer" subject to the Acts but only with respect to its dispatchers. Slip op. at 3.

On appeal, the Seventh Circuit, Judge Ripple dissenting, held Herzog covered for two reasons. First, it held that it was necessary to apply the statute in a way that ensures that individuals performing functions integral to interstate rail transportation are covered to effectuate the broad purpose and protective character

of the Acts. In other words, the Court reasoned, that if an interstate railroad subject to the Acts could perform this function for itself and could charge any tenant railroad(s) for this service, any party to whom it delegated or contracted out this function would be subject to the Acts as well. Second, the Court concluded that if the public agency that owned the line had assumed the dispatching function from the interstate carriers and then delegated that function to Herzog, then Herzog was performing the function of an interstate common carrier. 624 F.3d at 478.

Judge Ripple dissented asserting that providers of "subsidiary services" that make rail transportation possible are not themselves interstate common carriers. *Id.* at 479. She then went on to say that the owner of the intrastate rail line at issue in *Herzog Transit*, had not been found to be a rail carrier operating in interstate commerce by the Interstate Commerce Commission, and in delegating that entity's dispatching function to Herzog Transit did not make it an interstate common carrier subject to the ICC's jurisdiction. *Id.* at 480-1.

The Board's reliance on these two decisions is misplaced. Unlike those parties, Rail-Term does not own any railroad track or equipment or operate trains as a common carrier or otherwise. Moreover, Rail-Term's dispatchers do not take directions from the operating personnel of its railroad clients. J.A. 11, 24-26, 29-30, 99-101. Rail-Term submits that the policy articulated by the Court majority in *Herzog Transit* is wrong and represents both bad law and outmoded policy (that

personnel who perform functions traditionally provided by railroads themselves should remain subject to the Acts regardless of change in the industry).[15] As discussed below at pages 32-3, *infra*, policy changes in the law to reflect changes in industry are matters for the Congress, not the courts or the Board, to change. Finally, like SCRRA Rail-Term had originally desired that its employees be covered under the Acts, but unlike in *Herzog Transit* it received advice from two former Board staff members advising that its employees would not be subject to the Act and acted on that advice to its detriment. J.A. at 10-11, 14, 23, 81-82.

The Board, citing two cases, then tried to find Rail-Term's employees covered under the Acts by focusing on the control that Rail-Term's rail carrier clients exercise over Rail-Term's dispatcher employees. The first, *Wabash Railroad v. Finnegan*, *supra*, involved a suit by a railroad to recover payroll taxes paid under protest for compensation provided to an independent contractor. The second, B.C.D. 95-51, *Rail-West, Inc.*, was a 1995 Board decision involving a contractor operating a short line railroad for its public agency owner. In each the Court and the Board found that the nature of the services performed by the contractor to its principal was of a continuing nature and so essential to the statutory duty of rail carriers to provide rail transportation that the responsibility for performance must be retained by the railroad. Both are distinguishable.

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[15] See the discussion of the RRA's underlying policy in *Herzog Transit* at 475.

In *Wabash*, a Federal District Court decision preceding *Kelm* by seven years, the Court discussed the commonly recognized tests to determine the existence of an employer-employee relationship and ruled that the contractor could not be found to be an entity independent of its principal. The specific services furnished included the provision of coal and sand to steam locomotives and, in some cases, the movement of locomotives in or around the yard or station. But in stark contrast to Rail-Term, the *Wabash* Court carefully analyzed the facts and found that the railroad controlled and supervised the employees of its contractor as if they were the railroad's own, that the railroad furnished many of the tools, supplies, and materials required for the work, that the work was for an indefinite period of time, that the contractor did not have an independent trade or business, and that there was no evidence that the contractor had clients other than the railroad. *Id.* at 100.

*Rail-West* involved a public agency that retained a contractor to operate its railroad for the agency's account providing train and engine crews and other unidentified functions. The Board concluded that "certain duties are so essential under the law that responsibility for their performance must be retained by the principal or employer." *Id.* at 3-4. Moreover, the Board in *Rail-West* recognized that "where an individual is subject to the direction and control of an employer, the employee relationship is established irrespective of whether the right to supervise and direct is exercised." *Id.* at 4. But once again, Rail-Term is not operating a

railroad for its clients or providing individuals to perform train and engine service functions for its clients and Rail-Term's clients do not direct and control the actions of Rail-Term dispatchers so the citation to *Rail-West* does not support the Board's decision.

5. The Board committed an error of law in subjecting Rail-Term or its dispatching employees to coverage under the Acts.

There is an old saying that there are two reasons for every action taken: the real one and the one that sounds good. Here the real reason is found at pages 3 and 4 of the Reconsideration Decision:

> "Rail-Term is a rail carrier within the meaning of that term under the RRA and RUIA. To hold otherwise would allow for easy erosion of the RRA and RUIA by parsing out interstate transportation by rail to non-covered entities."
>
> …
>
> "…the Board finds that consideration of the all (sic) subsections of the Railroad Retirement Act's definition of 'employer' …makes clear that 'Congress envisioned a broad retirement program for employees playing many roles within the railroad industry…'" J.A. at 151-152.

After citing excerpts of *Herzog Transit*, the Board quoted language from that ruling to the effect that it is the duty of the Board to continue to apply the Acts to ensure the inclusion of individuals performing integral rail transportation functions in coverage under the Acts. It then added, "[i]t is therefore appropriate for the Board to find Rail-Term to be covered under the Acts because its employees perform the integral rail function of dispatching services." *Id.*; J.A. 4.

But the policy articulated in *Herzog Transit* and relied upon by the Board here is inappropriate for application to Rail-Term employees. Unlike other cases cited by the Board, Rail-Term does not hire people from the railroad industry. Its workforce consists solely of individuals who have never been covered by the Acts. Rail-Term does not seek to deprive railroad employees of their Railroad Retirement benefits or remove people from coverage under the Acts. Rail-Term does not present an example of an otherwise covered entity seeking to "erode" the coverage and jurisdiction of the Acts. While the Board's Reconsideration Decision suggests that including employees of independent contractors such as Rail-Term would promote "a broad retirement program for employees playing many roles within the railroad industry," the thrust of the law is to benefit persons who *pursued careers in the railroad industry* [emphasis supplied], not individuals seeking careers with outside contractors. *Cheney*, *supra*, 50 F.3d at 1078.

Should the Board in the future seek to include railroad industry vendors such as Rail-Term within the coverage of the Acts, that decision should be made by Congress. *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 420, 424, 106 S. Ct. 1922, 1930-1 (1986) (indicating it is for the Congress and not the courts to revise the law to reflect major changes in an evolving industry). Absent a clear statement of Congressional intent, missing here, the Board's decision finding Rail-Term a "rail carrier" and a "covered employer" lacks a reasonable basis.

## IX.

## CONCLUSION

The Board erred in holding that Rail-Term is a "carrier by railroad" and "a covered employer" under the Acts and alternatively finding Rail-Term's employees are "employees" of its rail carrier clients for coverage purposes. This ruling violates the plain language of the statute, Congressional intent, and the common meaning of the term "railroad." This court has the power to review *de novo* and overturn the Board's decision because it seeks to interpret the statute of a sister agency, the Surface Transportation Board.

By failing to analyze Rail-Term's operations under the Board's standard normally applied for determining whether a contractor is or is not subject to coverage under the Acts, the Board's decision ignores the substantial evidence of record. Finally, to the extent the policy reason behind the Board's decision is to prevent the "erosion" of its jurisdiction and coverage base, it should pursue that objective through legislation rather than *ad hoc* decision making. Accordingly, this Court should reverse the Board's Reconsideration Decision.

Respectfully submitted,

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Dated: September 16, 2011

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of September, 2011, I caused this Final Brief of Petitioner to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 16th day of September, 2011, I caused the required number of bound copies of the Final Brief of Petitioner to be hand-filed and two bound copies of the same to be served, via UPS Ground Transportation, to Counsel for Respondent and Counsel for Movant-Amicus Curiae at the above-listed address.

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**Employer Status Determination**
Gulf Rail Car Company

This is the decision of the Railroad Retirement Board regarding the status of Gulf Rail Car Company (GRCC) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Heywood C. Massara.

GRCC is a sole proprietorship owned by Mr. Massara which began operations in October 1989. GRCC has one employee in addition to Mr. Massara. Mr. Massara is not affiliated with any railroad. GRCC performs various maintenance, repair, and service functions in connection with privately owned rail freight cars. Mr. Massara advises that GRCC performs no services for any railroad other than repair of privately owned freight cars damaged by a railroad, although 98 percent of GRCC's business is with the rail industry in general. GRCC's operation consists of a mobile repair facility with an office maintained at Mr. Massara's home.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;
>
> (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 (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Section 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

GRCC clearly is not a carrier by rail. Further, there is no evidence that GRCC is under common ownership with any rail carrier or controlled by officers or directors who control a railroad. Therefore, it is the determination of the Board that GRCC is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether Mr. Massara and his employee who perform freight car repair and maintenance for GRCC under its arrangements with freight car owners could be considered to be employees of some other entity than GRCC.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services and rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

Mr. Massara advises that although some work is done on the property of railroads which use the freight cars being repaired, no employee of GRCC is directed or supervised by employees of a railroad. It should be noted that this conclusion is consistent with the characterization by Mr. Massara of GRCC's work as being performed for the freight car owners and not for the railroads using the cars. Accordingly, based upon the evidence of record Mr. Massara and the other GRCC employee are found not to be "subject to the continuing authority" of an employer within the meaning of section 1(d)(i)(A)

The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. Kelm v. Chicago St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Thus, under Kelm, the question remaining to be answered is whether GRCC is an independent contractor. Courts have faced similar

considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g. Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized trade; e.a. Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968, at 341). GRCC clearly has some investment in its repair facility and may suffer a loss if expenses under its contracts exceed the agreed payment. Under these tests, GRCC is an independent contractor; accordingly, its employees are not to be considered employees of rail carriers for whom GRCC may perform services. Kelm, supra.

Accordingly, it is the determination of the Board that service performed by employees of GRCC is not covered under the Acts.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

B.C.D. 95-40

## Employer Status Determination
## Transportation Certification Services, Inc. (TCS)

This is the decision of the Railroad Retirement Board regarding the status of Transportation Certification Services, Inc. (TCS), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

TCS provides training and other services to the rail industry and to other, non-rail, companies. Training services provided include locomotive engineer certification (centralized paperwork management only); engineer, trainman, and yardman training, hazardous materials operating rules training, etc. TCS also offers orientation to railroad operations; a derailment analysis and prevention course; signal and communication consulting; human resources consulting; and representation in connection with labor relations and legal issues. It also has provided consultant services for the aviation industry and the film industry. TCS is a privately held corporation which is not affiliated with a railroad. It has four employees and occasionally uses outside independent contractors.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
>
> (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 (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

TCS clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. Therefore, TCS is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for TCS under its arrangements with rail carriers should be considered to be employees of those railroads

rather than of TCS. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services and rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service recipient not only with respect to the outcome of his work but also the way he performs such work.

The evidence submitted shows that TCS's work consists of the provision of many different consultant services for many different clients and that the service is performed under the direction of TCS; accordingly, the control test in paragraph (A) is not met. Moreover under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Thus, under Kelm, the question remaining to be answered is whether TCS is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; see e.g. Aparacor, Inc. v. United States, 556 F. 2d 1004, 1012 (Ct. Cl., 1977); and whether the contractor engages in a recognized trade; see e.g. Lanigan Storage & Van Co. v. United States, 389 F. 2d 337, 341 (6th Cir., 1968). In the instant case, where the contractor contracts with many companies (there are over 30 railroads listed

on TCS's sample list of clients) to provide a variety a recognized consultant services such as training and legal representation; accordingly, it is the opinion of the Board that TCS is an independent business.

Because TCS is an independent contractor, TCS is not a covered employer within the meaning of paragraphs (B) and (C). Accordingly, it is the determination of the Board that service performed by employees of TCS is not covered under the Acts.

Glen L. Bower

V.M. Speakman, Jr.

Jerome F. Kever

Employer Status Determination
Rail-West, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Rail-West, Inc. (Rail-West) as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA).

Rail-West reports that it was incorporated June 26, 1986 and began operations July 1, 1986. Rail-West owns the Willamette Valley Railroad Company, the Willamina and Grande Ronde Railway Company, and the Willamette Valley Railway. See 58 Fed. Reg. 12599, March 5, 1993.[1] Rail-West also performs track rehabilitation work for nine non-railroad companies, railcar repair for two other non-railroad companies, contract switching for another non-railroad company, and rail contract service for the rail division of the Port of Tillamook Bay (Port), a governmental subdivision of the State of Oregon.[2] Rail-West states that 70-90 percent of its revenue derives from its non-railroad contractual operations and its remaining revenue from its subsidiaries and from the contract with Port.

Section 1(a)(1) of the RRA (45 U.S.C. 231(a)(1)) defines the term "employer", insofar as is relevant here, as follows:

> (i) any express company, sleeping-car company and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
>
> (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 (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Section 1(a) of the RUIA (45 U.S.C. 351(a)) defines "employer" in substantially the same way.

The first question that we must address is whether Rail-West, as the parent of several railroad subsidiaries, is "owned or controlled by or under common control with [those subsidiary railroads]." A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that a parent corporation which owns a rail carrier subsidiary is not under common

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[1]The Willamette Valley Railroad Company, the Willamina and Grand Ronde Railway, and the Willamette Valley Railway have been held to be covered employers under the Acts. See: L-85-75, B.C.D. 93-45, and B.C.D. 93-46.

[2]The rail division of Port has been held to be an employer under the RRA and RUIA. See Legal Opinion L-56-13, dated January 17, 1956.

control with the subsidiary within the meaning of § 3231 of the Internal Revenue Code. Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir., 1993).

Rail-West stands in the same relation to the Willamette Valley Railroad, the Willamette Valley Railway, and the Willamina and Grande Ronde Railway as Union Pacific Corporation did to the Union Pacific Railroad. Accordingly, it is the determination of a majority of the Board that Rail-West is not a carrier affiliate employer under the Railroad Retirement and Railroad Unemployment Insurance Acts with respect to any services its employees perform for its carrier subsidiaries because it is not owned or controlled or under common control with those subsidiaries. As Rail-West meets no other definition of a covered employer under the Acts, in the opinion of a majority of the Board, Rail-West is not a covered employer.

This conclusion leaves open, however, the question whether the persons who perform rail service under Rail-West's arrangement with Port should be considered to be employees of Port rather than of Rail-West. Section 1(b) of the RRA and section 1(d)(1) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services and rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

The Interstate Commerce Commission has determined that Port operates as a common carrier by Rail. Tillamook County Naval Airport Commission, 290 ICC 817 (1955), as summarized in Legal Opinion L-56-13. A rail carrier subject to the Interstate Commerce Act is under a duty to provide locomotives and cars to transport the public's property as part of its operation as a carrier. The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer. See Restatement (Second) of Agency § 214. The Board believes that operation of train service is a function so essential to the statutory duty of a rail carrier to provide rail transportation that the

carrier must retain the power to direct and control the individuals who conduct the service. Cf. Annotation, What Employees are Engaged in Interstate Commerce within the Federal Employers' Liability Act, 10 A.L.R. 1184 (1921), at 1220-1226; and Annotation, Who is an Employee in Interstate Commerce within Federal Employers' Liability Act as Amended in 1939, 10 A.L.R. 2d 1279, 1296 (1950), (both discussing liability of the railroad for injuries to locomotive engineers, firemen, brakemen and conductors). Finally, regulations of the Board provide that where an individual is subject to the direction and control of an employer, the employee relationship is established "irrespective of whether the right to supervise and direct is exercised." See 20 CFR 203.3(b).

The individuals provided to Port by Rail-West act as crew for the trains which Port must run in satisfaction of its rail carrier obligation. Port must retain ultimate control of the performance of its service as a common carrier. Accordingly, it is the determination of the Board that service performed by employees of Rail-West under contract with Port of Tillamook Bay is creditable as service as employees of the Port under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

V. M. Speakman, Jr. (dissenting in part, opinion attached)

Jerome F. Kever

Attachment

# DISSENT OF
# RAIL-WEST, INC.
# EMPLOYER STATUS
# by
# V. M. SPEAKMAN JR.

I am in agreement that the service performed by employees of Rail-West under contract with Port of Tillamook Bay is creditable as service of employees of the Port under the Railroad Retirement (RRA) and Railroad Unemployment Insurance Acts (RUIA). Where I differ from the majority is in the determination that Rail-West is not a carrier affiliate employer under the RRA and RUIA, because it is not under common control with its subsidiaries.

Notwithstanding Union Pacific Corporation vs. United States, I feel that Rail-West is in fact under common control with its subsidiaries.

V. M. Speakman, Jr.

4/25/95
Date

BCD 95-78

**EMPLOYER STATUS DETERMINATION**
**Tryban Rail Service, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Tryban Rail Service, Inc. (TRSI), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

TRSI is an independent company which provides rail maintenance, construction, and rehabilitation. TRSI has previously informed the Board that it has 10 full time employees and that 90 percent of its business derives from railroads. The balance is from repair of private railways. TRSI has a contract with Lake State Railway, a rail carrier employer, to provide all regular rail maintenance for the railroad. Under the terms of the contract TRSI is to provide 9 qualified maintenance of way personnel. Since TRSI has only 10 employees, we can conclude that a substantial portion of TRSI's business is with Lake State Railway.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
>
> (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 (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Section 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231).

TRSI clearly is not a carrier by rail. Further, the available evidence indicates that it is neither controlled by nor under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. Therefore, TRSI is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for TRSI under its arrangements with the Lake State should be considered to be employees of that railroad rather than of TRSI. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

Tryban Rail Service, Inc.

> (i) (A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated in to the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also in the way he performs such work.

Based on the evidence before it, the Board finds that although with respect to the final outcome of the work Lake State exercises a significant degree of control over the services performed for it by TRSI employees, evidence does not establish that employees of TRSI are subject to control, supervision, and direction from State Lake as to the manner of performance of their work. Consequently, the control test of paragraph (A) is not met.

Under paragraphs (B) and (C) an individual is a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. When the Board has applied paragraphs (B) and (C), it has followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). Under Kelm paragraphs (B) and (C) are not used to cover employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts.

The first question to be answered therefore is whether TRSI itself may be considered to be an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401 (c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has an opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl., 1977), at 1012; and whether the contractor engages in a recognized

Tryban Rail Service, Inc.

trade; e.g. Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968), at 341.

The record establishes TRSI is in the business of providing rail maintenance, construction and rehabilitation to customers other than Lake State. Under the contract with Lake State TRSI is obligated "to provide all hand tools, power tools, automobiles, trucks, vehicles, trailers and all other devises in such quantity and with such capacities as necessary" and is "solely responsible for the maintenance, repair, transportation and licensing" of this equipment. The contract with Lake State also provides that the performance of service is

> at the risk of [TRSI] in every respect, and [TRSI] shall be responsible for the Services until completed and accepted by [Lake State], except that title to the results of all Services covered by a request for partial or full payment will pass to [Lake State], or to such other authority as appropriate, upon payment therefor by [Lake State], free and clear of all liens, security interests or encumbrances by [TRSI] or TRSI's subcontractors.

Based on its review of the facts in this case and the contract between TRSI and Lake State, it is the judgment of a majority of the Board that TRSI is an independent contractor.

Turning to the other prong of the Kelm test, no facts which would indicate that TRSI was formed primarily to avoid coverage under the RRA, RUIA, and the Railroad Retirement Tax Act. Accordingly, under Kelm the Board finds the employees of TRSI not to be employees of Lake State under section 1(d)(1)(b) or section 1(d)(1)(c) of the RRA.

Based on the above discussion, the Board finds TRSI not to be a covered employer under the RRA and RUIA and a majority of the Board finds that the employees of TRSI are not statutory employees of Lake State.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting opinion attached)

Jerome F. Kever

***DISSENT OF V. M. SPEAKMAN, JR.***
***ON THE EMPLOYER STATUS DETERMINATION***
***TRYBAN RAIL SERVICES, INC.***

*I disagree with the majority's decision in this case and believe that the persons who perform work for Tryban Rail Services, Inc., (TRSI) under its arrangements with Lake State Railway should be considered employees of that railroad, rather than of TRSI. Since 90% of TRSI's work is for Lake State Railway, it is hard to conclude it is an independent contractor. I consider the employees in question to be rendering, on the property used in Lake State's operations, personal services, the rendition of which are integrated into the railroad's operations.*

*V. M. Speakman, Jr.*

*8/14/95*
*Date*

B.C.D. 02-12

FEB 1 2 2002

**EMPLOYER STATUS DETERMINATION**
**Southern California Regional Rail Authority**
**Segregation of Dispatching Department**

This is the decision of the Railroad Retirement Board with respect to a request by the Southern California Regional Rail Authority (SCRRA) that the Board rule as to whether its employees that will be organized into the Dispatching Department are covered by the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). Specifically, SCCRA has requested the Board to address the status of the dispatch employees who currently work for AMTRAK and who would be hired as employees of SCRRA in its Dispatching Department. The Dispatching Department will be established effective October 1, 2002. The dispatchers will be responsible for dispatching all traffic on SCRRA's lines, which consist of: (1) Metrolink intrastate commuter lines; (2) the "Coaster" intrastate commuter train administered by public transit agencies in San Diego County; (3) AMTRAK interstate and intercity passenger trains; and (4) Burlington Northern Santa Fe and Union Pacific interstate freight trains. SCRRA also requests that the Dispatching Department be segregated for coverage purposes in accord with 20 CFR 202.3.

*Background Information*

In Board Coverage Decision (B.C.D). No. 94-116, issued December 14, 1994, the Board found that the SCRRA was not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. That decision was based on the Board's finding that SCRRA is a governmental entity that is charged with the administration of commuter rail operations in Southern California. SCRRA operates no trains but contracts that function to AMTRAK. Based on previous agency decisions that had held that a public entity that lacks the capability of operating a railroad but rather contracts with an employer under the Acts to operate the rail line is not a covered employer under the Acts, the Board found that SCRRA was not an employer under the Acts.

A recent Board Coverage Decision in Railroad Ventures, Inc. (B.C.D. 00-47, November 7, 2000) refined the standard that the Board would use to determine when an entity that has its railroad functions performed by another would be found to be an employer under the Acts. In Railroad Ventures, the Board set forth a three-part test that it would use to determine the employer status of such an entity. The three-part test is as follows:

1) whether the entity does not have as a primary purpose to profit from railroad activities;
2) whether the entity does not operate or retain the capacity to operate the rail line;
3) whether the operator of the rail line is already covered under the RRA and RUIA. B.C.D 00-47, at pages 4-5.

SCRRA would continue not to be an employer under the three-part test set forth in Railroad Ventures. SCRRA is a public entity charged with the provision of commuter rail service in Southern California. As such, it does not have as a primary purpose to profit from rail activities. Its primary purpose is the provision of rail commuter service, rather than any profit from that service. SCRRA does not retain the capacity to operate a rail line. Finally, SCRRA has contracted with AMTRAK, an employer under the Acts, to operate the trains. In conclusion, even under the test set forth in Railroad Ventures, SCRRA remains not covered by the RRA and the RUIA.

## FUTURE ACTIVITIES

According to the record before us, the Dispatching Department is to be established October 1, 2002. That Dispatching Department will employ former employees of AMTRAK. The former AMTRAK employees previously provided dispatch services for SCRRA on a contract basis. Effective October 1, 2002, SCRRA has decided to

provide its own dispatching services rather than rely on AMTRAK for this service. AMTRAK will continue to provide other railroad services on a contract basis.

Before deciding whether the Dispatching Department will be an employer under the Acts administered by the Board, we must address the issue of whether the Board should at this time issue a ruling or delay until the Dispatching Department actually begins operations. In a recent decision, the Board provided a coverage opinion with regard to future operations. See Keokuk Electric Railway, Inc., B.C.D. 01-83 (December 3, 2001). As in that case, there is no doubt that the Dispatching Department will begin operation October 1, 2002. In order to provide for as smooth a transition as possible, a decision by the Board regarding the coverage status of the Dispatching Department will facilitate rail operations in the United States. Therefore, the Board will issue a decision regarding the Dispatching Department at this time.

## Discussion

As noted in the background information, SCRRA is not an employer under the RRA and the RUIA. As noted above, SCRRA's principal business is not as a rail carrier employer under the RRA and the RUIA, but rather, SCRRA is a public entity charged with the provision of commuter rail service in Southern California. Section 202.3 of the Board's regulations states that:

> (a) With respect to any company or person **principally engaged in business other than carrier business**, but which, in addition to such principal business, engages in some carrier business, the Board will require submission of information pertaining to the history and all

> operations of such company or person with a view to determining whether some identifiable and separable enterprise conducted by the person or company is to be considered to be the employer. The determination will be made in the light of considerations such as the following:
>
> (1) The primary purpose of the company or person on and since the date it was established;
>
> (2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;
>
> (3) The amount of its carrier business and the ratio of such business to its entire business;
>
> (4) Whether its carrier business is a separate and distinct enterprise.
>
> (b) In the event that the employer is found to be an aggregate of persons or legal entities or less than the whole of a legal entity or a person operating in only one of several capacities, then the unit or units competent to assume legal obligations shall be responsible for the discharge of the duties of the employer. (Emphasis supplied.) (20 CFR 202.3).

Information provided regarding SCRRA, demonstrates clearly that SCRRA is not principally engaged in the railroad business and that segregation is applicable to SCRRA. The number of employees employed in the Dispatching Department will be less than 14% of SCRRA's total employees.

The Dispatching Department will be an identifiable and separable enterprise. The Dispatching Department will have a separate payroll. Employees in the Dispatching Department will be supervised solely by

the Dispatching Manager. It is the intent of SCRRA to maintain strict personnel separation between the Dispatching Department and the rest of SCRRA's operations. Employees not assigned to the Dispatching Department will have no involvement with dispatching.

In summary, the Board finds that the evidence of record overwhelmingly demonstrates that the principle business of SCRRA is not rail service. The Dispatching Department, however, will be performing rail related duties. As provided for in section 202.3 of the Board's regulations, the Dispatching Department is properly segregated from the other activities of SCRRA. The Board finds that the Dispatching Department will be a covered employer under the RRA and the RUIA effective October 1, 2002, and its employees' service and compensation should be reported to the Board accordingly.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever

B.C.D. 03-60

June 25, 2003

**EMPLOYER STATUS DETERMINATION**
**Rail Scale, Inc.**
**Southwest Signal Engineering Company**

This is the decision of the Railroad Retirement Board regarding the status of Rail Scale, Inc., and Southwest Signal Engineering Company (SSEC) as employers under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Information regarding SSEC was provided by John H. Wilbur, Wilbur & Allen, counsel for SSEC. SSEC was incorporated and began operations December 6, 1988, and engages in railroad signal engineering services. At least 95 percent of its work is performed for a number of different railroads. SSEC is a privately held corporation which is not affiliated with a railroad. It has 144 employees. SSEC's work is performed on railroad property, and includes provision of technical assistance with projects, construction management services, and construction of crossing signals.

A copy of a contract which was provided, dated December 7, 1999, between SSEC and CSX Transportation (CSXT), obligates SSEC to "(1) test, certify and adjust * * * in-track scales owned by CSXT, (2) test and certify in-tract scales owned by third parties, located throughout CSXT's railroad system, and (3) perform other related scale services to be agreed upon by the parties * * *." Under the contract, SSEC agrees to utilize, and acquire if necessary, the following equipment: six trucks and trailers, three truck mounted knuckle boom cranes, and three test carts, and 216,000 pounds of weights. Under a Supplemental Agreement entered into January 31, 2000, SSEC agrees to lease six of CSXT's Scale Trucks and Scale Tools. Under the terms of a document dated January 1, 2002, labeled "Service Contract Form" entered into between SSEC and CSXT, SSEC agrees to perform signal engineering design and support services. Under the terms of a contract entered into between SSEC and Southern California Regional Rail Authority (the Despatching Department of which is covered under the Acts; B.A. No. 9749), SSEC is to perform signal and communications design services.

Information regarding Rail Scale also was provided by John H. Wilbur. Rail Scale was incorporated June 16, 1999, and began operations February 1, 2000. It engages in the servicing of scales, which work it performs for a number of rail carriers. It performs work for CSXT pursuant to an informal arrangement with SSEC which, as described above, has a formal agreement with CSXT.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, 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 (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

SSEC and Rail Scale clearly are not carriers by rail. Further, the available evidence indicates that they are not under common ownership with any rail carrier nor are they controlled by officers or directors who control a railroad. Therefore, SSEC and Rail Scale are not covered employers under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for SSEC and Rail Scale under its arrangements with rail carriers should be considered to be employees of those railroads rather than of SSEC or Rail Scale. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

The contracts submitted by SSEC show that SSEC itself is obligated to complete the operations described therein. There is no evidence that rail

employees have any authority over SSEC's employees. Since the work performed by Rail Scale is performed under authority derivative of that of SSEC, it must be inferred that rail employees do not have any authority over Rail Scale's employees either. Accordingly, the control test in paragraph (A) is not met. Moreover under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Thus, under Kelm, the question remaining to be answered is whether SSEC and Rail Scales are independent contractors. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968) at 341. SSEC and Rail Scale are engaged in the recognized trade or business of signal and scale maintenance. They are clearly independent operations which contract with many carriers. Accordingly, it is the opinion of the Board that SSEC and Rail Scale are independent businesses.

Because SSEC and Rail Scale are independent contractors, their employees are not covered employees within the meaning of paragraphs (B) and (C). Accordingly, it is the determination of the Board that service performed by employees of SSEC and Rail Scale is not covered under the Acts.

V. M. Speakman,
Jr.

Jerome F. Kever

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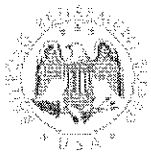

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SERVICE DATE - NOVEMBER 12, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34277

H&M INTERNATIONAL TRANSPORTATION, INC. –
PETITION FOR DECLARATORY ORDER

Decided: November 10, 2003

In a petition filed on March 4, 2003, H&M International Transportation, Inc. (H&M) requests that the Board institute a declaratory order proceeding and determine that H&M is not a rail carrier subject to the Board's jurisdiction. This request arises from a January 22, 2002 decision by the Railroad Retirement Board (RRB)[1] finding that H&M is a rail carrier operating in interstate commerce with regard to 18 employees at its Marion, AR facility.[2] For the reasons discussed below, the request will be denied.

BACKGROUND

H&M is a privately held corporation, with principal offices in Jersey City, NJ. The company operates warehousing, distribution, trucking terminal, and intermodal facilities at Marion and several other locations in the United States.

According to H&M, the company provides similar services at each of its intermodal facilities. H&M primarily loads and unloads trailers and containers on and off railroad flat cars; moves trailers between parking places and ramp tracks for loading or unloading; lifts, stacks, flips and racks trailers and chassis in connection with the ramping process; ties down, secures, and releases equipment loaded onto or unloaded from rail cars; and inspects trailers and cargo for safety and inventory purposes. It provides these services pursuant to agreements with the respective railroads serving each facility.

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[1] The RRB administers the Railroad Retirement Act and the Railroad Unemployment Insurance Act, which, as relevant here, define a covered employer as a railroad subject to the Board's jurisdiction. 45 U.S.C. 231(a)(1)(i); 45 U.S.C. 351(b).

[2] H&M has filed a petition for reconsideration with the RRB. However, the RRB has stayed its reconsideration proceeding to let the Board rule on the matter. The RRB has indicated that, once the Board has done so, the RRB will remove its stay and decide the petition before it based on the Board's determination. H&M Petition at 2.

H&M states that the company's Marion facility, while substantially similar to its other facilities and operated under a similar arrangement, differs from the other facilities in two respects: (1) Marion is the only facility where the company leases the property;[3] and (2) it is the only facility where H&M moves rail cars. The Marion facility consists of six storage and four loading tracks ranging from 6,770 to 8,300 feet in length, several buildings and underlying real property, various ramps, cranes, and other loading equipment owned or leased by H&M, and parking lots for trucks, chassis, containers, and trailers. Most of the facility is surrounded by a chain link fence. The UP mainline runs nearby and two UP lead tracks connect the mainline to the delivery tracks. H&M employees use two leased switch engines to move cars between the delivery tracks and storage and loading tracks inside H&M's facility as needed to facilitate the intermodal work of the company.

According to H&M, its agreements with UP reserve all common carrier rights and obligations to UP and contractually bar H&M from providing common carrier service.[4] H&M says it is also physically unable to offer such service, as it cannot operate beyond the bounds of its facility. Moreover, H&M states that it has never held itself out to provide rail service to the public for compensation, has not actually performed rail service for anyone else for compensation or otherwise, and has not sought regulatory approval for any of its activities. H&M adds that it has never published or participated in any rates for providing rail services to the public, and has no railroad reporting marks or identification assigned by the Association of American Railroads.[5]

## DISCUSSION AND CONCLUSIONS

The Board has broad discretion to issue declaratory orders to terminate a controversy or remove uncertainty. 5 U.S.C. 554(e); 49 U.S.C. 721. The Board need not institute a declaratory order proceeding here, however, because the record makes clear that H&M is not a rail carrier subject to the Board's jurisdiction.

The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. 10501(a). The term "transportation" is defined to include a facility related to the movement of property by rail, and services related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9)(A), (B). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5).

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[3] H&M leases the Marion facility from the Union Pacific Railroad Company (UP) pursuant to a 1-year lease that continues year-to-year until terminated by the parties. H&M Petition at 3.

[4] Ramp Contractor Agreement, Section 1A. See H&M Petition at 3 n.2.

[5] H&M also notes that the Marion facility has been designated under Arkansas law as a "trucking sector business."

Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. H&M's intermodal transloading activity could fit within the broad definition of transportation. See, e.g., Green Mountain Railroad Corporation – Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002) (cement transloading facility); Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001) (automobile unloading facility). But this is only half of the statutory requirement for Board jurisdiction under section 10501.

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.

Nor is there any evidence that UP has control over H&M's business operations. To the contrary, H&M has specifically stated that all car movements within its facility are "at the direction of, under the supervision of, and for the convenience of H&M." H&M Petition at 4. Moreover, the record indicates that UP's obligations and common carrier duty begin and end at the delivery tracks at the H&M facility. Finally, there is no evidence that the movement of cars inside the fence of H&M's Marion facility would be considered an integral part of UP's common carrier service.

For all of these reasons, the record shows that H&M is not a rail carrier subject to the Board's jurisdiction. No reason exists to institute a proceeding to gather additional evidence.

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

It is ordered:

1. H&M's request to institute a proceeding is denied.

2. This decision is effective on November 12, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary

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SERVICE DATE – DECEMBER 29, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34502

AMERICAN ORIENT EXPRESS RAILWAY COMPANY LLC–
PETITION FOR DECLARATORY ORDER

Decided: December 27, 2005

By petition filed on April 30, 2004, American Orient Express Railway Company LLC (AOERC) asked the Surface Transportation Board (Board or STB) to declare that AOERC is not a rail carrier subject to the Board's jurisdiction. A decision instituting a declaratory order proceeding and requesting comments on AOERC's petition was served and published in the Federal Register (69 FR 35130) on June 23, 2004 (June 23 decision).[1] On October 4, 2005, AOERC notified the Board that the Railroad Retirement Board (RRB) plans to issue its final coverage determination regarding AOERC. UTU/GO-386 replied to AOERC's filing. Having reviewed the record, we find that AOERC is a rail carrier subject to our jurisdiction. However, we will exempt AOERC from our licensing requirements, as discussed below.

BACKGROUND

RRB Proceedings. On February 9, 2001, the RRB issued a decision concluding that AOERC is a covered employer for purposes of the Railroad Retirement Act, 45 U.S.C. 231 et seq., and Railroad Unemployment Insurance Act, 45 U.S.C. 351 et seq. (collectively, Railroad Retirement Acts) on the ground that AOERC is a "reincarnation" of a previously covered sleeper car carrier. AOERC sought reconsideration of that decision. The RRB appointed a Hearing Examiner, who, on May 21, 2002, held a hearing on the petition for reconsideration.

[1] On July 9, 2004, American Association of Private Railroad Car Owners, Inc., filed comments in support of AOERC's petition. On July 13, 2004, comments opposing AOERC's petition were filed by John D. Fitzgerald, on behalf of United Transportation Union-General Committee of Adjustment, GO-386 (UTU/GO-386); Rail Labor Division of the Transportation Trades Department, AFL-CIO; and United Transportation Union. On August 10, 2004, AOERC filed a reply to the comments. On August 12, 2004, UTU/GO-386 filed a motion to strike AOERC's reply or for leave to respond by filing a reply to a reply. On August 20, 2004, AOERC filed a pleading in opposition to the motion to strike. In the interest of a more complete record and because no party will be prejudiced, we will deny the motion to strike and accept AOERC's August 10 filing and UTU/GO-386's August 12 response.

On May 16, 2003, the Hearing Examiner recommended that the RRB find that AOERC is a covered employer not because it is a "reincarnation" of a covered sleeper car carrier but because it is a common carrier providing rail transportation subject to STB jurisdiction. The Hearing Examiner looked across different modes of transportation to make his common carrier determination and concluded that "[t]he act of holding out [transportation] as a common carrier creates the obligation owed to the public to follow through with the promised service." Hearing Examiner Recommendation at 40 (May 16, 2003). Based on his view of the facts before him, the Hearing Examiner concluded that AOERC holds itself out to transport a segment of the public for compensation and is, therefore, a common carrier.

The RRB has not acted on the petition for reconsideration or on the Hearing Examiner's recommendation. Instead, it has stayed its decision to allow the STB to rule on the scope of our jurisdiction.[2]

AOERC's Operations. AOERC describes itself as a land excursion company that uses restored vintage railroad coaches, diners and sleepers as the home base for the various 4-, 7-, and 10-day vacation packages that it offers. AOERC operates seasonally and does not offer trips over set routes. All of the vacation packages are offered as one-way excursions, and at the end of an AOERC-arranged trip each customer is responsible for finding his or her own transportation back to the tour origination city or home. Additionally, AOERC may cancel a planned excursion if there are not enough customers or it may add a charter trip on a different route.

AOERC sells the tickets to its customers but contracts with the National Railroad Passenger Corporation (Amtrak) to provide locomotive power and train and engine crews (Amtrak Contract). Amtrak typically operates through trackage rights that it obtains from other railroads. Amtrak pulls AOERC's vintage rail cars pursuant to a schedule for each excursion that meets the availability of both Amtrak and the host railroad (the track owner or operator). AOERC proposes itineraries to Amtrak, usually 2 years in advance, so that Amtrak can determine, based on its own schedule and the availability of the track routes requested, whether they are possible. AOERC cannot offer itineraries that have not been approved by Amtrak. Even if an itinerary has been approved, the Amtrak Contract gives Amtrak the right to cancel or change routes, stops or entire trips.

Under the Amtrak Contract, AOERC is responsible for providing its car consists in good order and on time to meet the schedules of Amtrak and host railroads. Additionally, the consists must be submitted to Amtrak for inspection at the beginning of each touring season and before each trip. Amtrak may refuse to pull cars that do not pass its inspections.

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[2] UTU/GO-386 argues that we should not have begun a declaratory order proceeding given the related pending proceeding before a sister federal agency. But a ruling here will not interfere with the RRB proceeding, which, as noted, is in abeyance pending our ruling. And contrary to UTU/GO-386's argument, there was no requirement for the entire RRB record to have been filed with us; both AOERC and one of the RRB members submitted evidence for our consideration, and we make our findings here on a well-developed record.

Most of AOERC's employees are part-time seasonal employees such as bartenders, maids, waiters and cooks. AOERC argues that it does not employ traditional rail workers because it provides only non-railroad amenities and services. AOERC states that specially tailored meals, luxury accommodations, and various excursions (including walking tours of historic and natural sites, lectures and live music) are the central features of its vacation packages. Children younger than age 8, and others whose physical needs are incompatible with the restrictions of AOERC's rail cars, are not eligible for the vacation packages. AOERC reserves the right to remove a passenger from its excursion for any reason, and has done so on at least two occasions. AOERC argues that its rail-related service is more in the nature of a moveable hotel or restaurant than a railroad; or that it is more like a sleeping car, express, or private car service, none of which are within the Board's jurisdiction.

## DISCUSSION AND CONCLUSIONS

As noted, the RRB has held up its proceeding to give this Board the opportunity to determine whether AOERC is a rail carrier subject to our jurisdiction under 49 U.S.C. 10501. Under section 10501(a), the Board has jurisdiction over "transportation by a rail carrier" on the interstate rail network.

Parsing this definition, we first examine whether AOERC provides "transportation" (it is clear from its evidentiary submissions that its trips are conducted on the interstate rail network, by means of Amtrak's rights to operate over the trackage). AOERC contends that it is not engaged in the business of transporting persons or property from place to place for compensation, because any transportation actually performed is handled by Amtrak and is under Amtrak's control as provided for in the Amtrak Contract. AOERC argues that, in contrast, it is in the business of providing a unique vacation experience whose primary purpose is not to transport customers but rather to provide accommodations on vintage rail cars and to provide attendant amenities such as fine dining, lectures, concerts, and off-rail tours of local points of interest. To that end, AOERC states, it does not employ traditional rail workers because it provides only non-railroad amenities and services; thus, AOERC's employees are part-time seasonal employees such as bartenders, maids, waiters and cooks. AOERC argues that its customers do not purchase AOERC packages in order to get from the origin to destination, but rather to enjoy the amenities provided by AOERC.

Notwithstanding the fact that AOERC's direct employees are not in typical railroad positions, such as engineers, brakemen, and so forth, AOERC does in our view provide transportation. The term "transportation" is broadly defined under 49 U.S.C. 10102(9) to include "a car . . . related to movement of passengers by rail," and "services related to that movement."[3] While Amtrak provides the motive power and train and engine crews to move

[3] Section 10102(9) states that "transportation" includes–

(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.

AOERC's consists, AOERC provides the rail cars and provides services to passengers that are related to the passengers' movement. Thus, AOERC's operations meet the definition of "transportation." To be sure, transportation is not the only service, and perhaps not even the dominant service, that AOERC offers. But it clearly is a part– and not a trivial part– of AOERC's vacation packages. These vacation packages would plainly be less desirable if AOERC offered all of its amenities while its cars remained fixed at one location. Moreover, the statute does not require that transportation encompass movement from an origin to destination as its sole or main purpose, only that movement be involved. 49 U.S.C. 10102(9), 10501(a)(2).

We next examine whether AOERC is a "rail carrier." In 49 U.S.C. 10102(5), the term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." We first consider whether AOERC provides "railroad" transportation. The term "railroad" is defined at 49 U.S.C. 10102(6).[4] While AOERC concedes that its service might meet the statutory definition of "transportation" (Pet. at 20 n.10), AOERC asserts that it is not involved in "railroad" transportation, as the term "railroad" is defined in 49 U.S.C. 10102(6), because it does not own or operate any of the equipment, road, or facilities listed in this statutory provision. But the term "railroad" embraces not only road owned and operated directly, but also road operated under an agreement. 49 U.S.C. 10102(6)(B). AOERC's arrangement with Amtrak is such an agreement. Indeed, AOERC's arrangement with Amtrak appears to provide that Amtrak pays the railroads over whose track it runs a different rate when the track is used for AOERC service than the rate it pays when the track is used for Amtrak service. Because the operations are conducted on AOERC's behalf, AOERC can be considered as providing railroad transportation.

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. See Stimson Lumber v. Kuykendall, 275 U.S. 207, 211 (1927); Pennsylvania R. Co. –Merger– New York Central R. Co., 347 I.C.C. 536, 549 (1974) (Penn. R. Co.); Status of Bush Universal, Inc., 342 I.C.C. 550, 564 (1973).[5] 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." Penn. R. Co. at 549.

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[4] Section 10102(6) provides that "railroad" includes–

(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

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

[5] See also Black's Law Dictionary 205 (7th ed. 1999): "*common carrier*. A carrier that is required by law to transport passengers or freight, without refusal, if the approved fare or charge is paid."

AOERC asserts that its business practices demonstrate that it does not serve or hold itself out to serve the general public. AOERC states that children younger than age 8, and others whose physical needs are incompatible with the restrictions of AOERC's rail cars, are not eligible for its vacation packages. AOERC further argues that it targets its tour packages to a small subset of vacationers that meet its strict eligibility criteria. But these practices do not shield AOERC from characterization as a common carrier. A common carrier need not hold itself out to serve all business at all times; rather, it may establish a business niche, as AOERC has done here.[6] While AOERC only targets a subset of the public, it nevertheless holds itself out to the groups to which it markets its services.

AOERC claims that its service most resembles that of a hotel or restaurant. Because its food and lodging services move from place to place, however, AOERC's operations appear to us to be more like those of a cruise ship operator – which is considered a common carrier[7] – than those of a mere restaurant or hotel.[8] Like AOERC's railroad cars, cruise ships travel from one place to another[9] (or, sometimes, they simply go to sea and return, in the well-known "cruise to nowhere"). Also, just as passengers on AOERC's excursions enjoy fine dining, luxury accommodations, and attendance at lectures and performances on board, so cruise ship passengers engage in activities and use of the ship's facilities such as dining, gambling, dancing, exercising, attending shows, and shopping. And cruise ship passengers may tour the ports of call to which they are transported by the ship, just as AOERC passengers may take walking tours and enjoy attractions at intermediate stops along the excursion route.

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[6] See Steere Tank Lines, Inc. v. ICC, 675 F.2d 103, 105 (5th Cir. 1982).

[7] See American Ass'n of Cruise Passengers v. Cunard Line, 911 F.2d 786, 792 (D.C. Cir. 1990) (unless operating solely between foreign ports, cruise ships are common carriers under Shipping Act of 1984); Petchem, Inc. v. Canaveral Port Auth., 1985 WL 148954 (F.M.C.) (1985) at *12 (same). See also Doe v. Celebrity Cruises, 145 F.Supp.2d 1337, 1344 n.5 (S.D. Fla. 2001) (determining appropriate liability standard for common carrier); Shultz v. Florida Keys Dive Center, Inc., 224 F.3d 1269, 1273 (11th Cir. 2000) (citing cases finding cruise ships to be common carriers); Morton v. De Oliveira, 984 F.2d 289, 292 (9th Cir. 1993) (determining appropriate liability standard for common carrier); Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1334 (11th Cir. 1984) (ship, as common carrier, owes special duty to passengers to provide comfortable accommodations).

[8] AOERC's operations are also similar in some ways to those of tour bus operators, which were historically considered to be common carriers subject to the jurisdiction of the Board's predecessor agency, the Interstate Commerce Commission (ICC). See, e.g., Petition for Declaratory Order–Executive Coach Serv., Docket No. MC-C-10095, 131 M.C.C. 706, 1979 MCC Lexis 18 (1979). Tour bus operators offer amenities to their passengers which, while more minimal in scope than are offered by AOERC, nonetheless distinguish tour buses as a discrete subset of motor common carrier service. The services offered by these companies–as a more luxurious form of bus transportation–are analogous in some ways to those offered by AOERC as a more luxurious form of passenger rail than Amtrak.

[9] The lack of regular schedules or regular routes does not mean that AOERC is not a common carrier. Whether a carrier offers scheduled service is one factor to be examined, but it is not determinative of common carriage. R.C. Serv., Inc. v. Kende Leasing Corp., 1985 U.S. Dist. Lexis 17351 at *5 (N.D. Ill. 1985). The Federal Maritime Commission has found that an entity may be a common carrier without regular calls at ports, regular sailings, or even sailing schedules. Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc., 9 F.M.C. 56, 63 (1965).

AOERC argues that it is not a common carrier because any services that may involve common carriage are provided by Amtrak. But the ICC found that Auto-Train (at the time it was established, before it became part of Amtrak) was a common carrier. See Auto-Train, Rail Passenger & Auto Transport Serv., 342 I.C.C. 533 (1971). Like AOERC, Auto-Train depended at least in part on services and facilities being provided to it by the freight railroads. And, like AOERC, Auto-Train was solely responsible for making reservations and selling tickets, and its customers looked to it as the service provider.

AOERC also argues that its operations are similar to those of sleeping car, express, car service, and private car companies, which are not subject to the Board's jurisdiction. We disagree. To obtain sleeping car services, passengers purchased tickets directly from the railroad for the underlying movement between origin and destination and then separately contracted with a sleeping car company for the accommodations that company provided;[10] here, by contrast, AOERC appears to be the only entity with which the customer makes arrangements. AOERC is also not like an express company, which historically provided an expedited service rendered on passenger trains for transportation of freight requiring quick transportation.[11] Nor is AOERC like a car service company, which leases its equipment to a railroad for that railroad's use.[12] Here, Amtrak moves AOERC's consists but AOERC is the party using the cars.

Finally, AOERC likens itself to a private carrier because it transports only a small number of passengers, it individually contracts with each passenger for his or her transportation, and, on occasion, a company such as Subaru has chartered an AOERC excursion. However, unlike a private carrier, AOERC's primary operations do not consist of carrying its own goods or personnel;[13] rather it offers transportation to the public, even if it is only to a segment of the public as discussed above.

In sum, we find that AOERC meets the definition of a "common carrier" that provides "transportation by a rail carrier" on the interstate rail network. AOERC is thus a "rail carrier" subject to our jurisdiction under 49 U.S.C. 10501(a). Some of the parties that filed comments in this case appeared to be concerned that a Board finding that AOERC is a common carrier could have broad consequences for the private car industry. We recognize this concern, and we note that this holding is limited to the particular facts of this case, and indicates no intention by the Board to alter the status of private car owners that attach cars to an Amtrak train or locomotive.

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[10] See, e.g., Pullman Co. v. Linke, 203 F.1017, 1019 (S.D. Ohio 1913); Calhoun v. Pullman Co., 159 F. 387, 389 (6th Cir. 1908).

[11] Coordination of Motor Transp., 182 I.C.C. 263, 348 (1932).

[12] See, e.g., Edwards v. Pacific Fruit Express Co., 390 U.S. 538, 539 (1968); United States v. ICC, 265 U.S. 292, 293-94 (1924).

[13] See, e.g., S.D. Warren Co.–Acquisition & Operation Exemption–Maine Cent. R.R., STB Finance Docket No.34133, at 2 (STB served Sept. 30, 2002).

This decision is limited to the particular circumstances attending AOERC's operations, as described in this proceeding.

Our finding that AOERC is a rail common carrier subject to our jurisdiction does not mean that we must fully regulate its operations. On our own motion, we will exempt AOERC from the Board's licensing regulation under 49 U.S.C. 10901, for its operations.[14] Requiring AOERC to come to the Board for authority would place an unnecessary burden on it.

It is ordered:

1. The motion to strike AOERC's reply is denied.

2. AOERC's petition for declaratory order is granted.

3. AOERC is exempted, pursuant to 49 U.S.C. 10502, from application of Board regulation under 49 U.S.C. 10901.

4. This proceeding is discontinued.

5. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

[14] See, e.g., Minnesota Zephyr Limited.–Operation Exemption–Between East of Hudson, WI, and Minneapolis and Duluth Junction, MN, Finance Docket No. 31924 (ICC served Apr. 17, 1992); Horsehead Corporation–Petition for Acquisition and Operation Exemption–Chestnut Ridge Railway Company, STB Finance Docket No. 34481 (STB served Mar. 12, 2004); Exem. of Freight Forwarders from Tariff Filing Requir., 2 S.T.B. 48 (1997).

B.C.D. 06-21

**Employee Status Determination** **JUN 05 2006**
**JA d/b/a/ The "A" Team**

This is the decision of the Railroad Retirement Board regarding the status of JA, doing business as The "A" Team, as an employee of a covered railroad employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (RRA and RUIA). The status of this individual as an employee has not previously been considered. For the reasons set forth below, the majority of the Board, Labor Member dissenting, finds JA not to be a covered employee under the Acts.

The record shows that as a result of an inquiry from the Assistant General Chairman of the Brotherhood of Maintenance of Way Employees (BMWE) of the Atchison, Topeka and Santa Fe System Federation, the Chief of Audit and Compliance contacted JA by letter of May 21, 2004 to pose a series of questions regarding his work for the Burlington Northern and Santa Fe Railway Company (BNSF Railway). JA responded that "since 1991" he has moved rails, ties, ballast; removed and installed the pre-cast panels which fit between rails at road grade crossings; and otherwise has done "anything a [model] 950 Cat[erpiller wheeled] loader can do" exclusively for the BNSF Railway. He has worked on BNSF Railway property from Wanoka in northwest Oklahoma to Bovinia, Texas, approximately 70 miles southwest of Amarillo. He works under the supervision of the BNSF Railway road master and a foreman, who inspect and approve his work, stating that "you do it their way or you don't stay." He is paid at an hourly rate upon submission of monthly invoices, as specified by his written agreement.

JA provided a copy of his written agreement with BNSF Railway, dated April 1, 1998. Paragraph 3(a) of the agreement states that JA as contractor agrees to provide and operate "miscellaneous equipment and machinery for loading and unloading railroad ties, removal and installation of switches, [road grade] crossings and site cleanup at various locations in the states of Texas and Oklahoma, on an 'EMERGENCY' or on an 'ON-CALL', 'AS NEEDED' basis." Paragraph 35 provides JA will be compensated at one hourly rate set for both the equipment and the operator together by "Exhibit A" attached to the contract, except that any single non-emergency job over $10,000 requires a separate proposal be submitted for the railroad's acceptance. Paragraph 10 also requires the contractor to rebuild any work found unacceptable by the BNSF Railway without further payments. Unless otherwise agreed, paragraph 36 specifies JA will submit monthly invoices of work done at the end of each calendar month. Paragraph 34 states that JA agrees to accept the compensation pursuant to the agreement as full payment for his work and expenses.

Paragraph 4 of the agreement states that it remains in effect until terminated on 30 days' notice by either party, except that BNSF Railway may terminate on 5 days' notice if JA provides substandard services or otherwise breaches the agreement. Without any fault on JA's part, BNSF Railway may also suspend or terminate any work prior to completion

pursuant to paragraph 26, which then allows JA compensation only for the work performed without further damages. If BNSF Railway terminates work under paragraph 27 due to failure of performance by Mr. Adcock, however, the railroad is allowed damages equal to the cost of completion of that work plus ten percent.

Paragraphs 16, 17, and 18 of the agreement require JA to indemnify the railroad from liability for loss and damage, and to maintain insurance with BNSF Railway as an additional insured. Paragraph 3(c) states that JA is to be considered an independent contractor rather than an employee, while paragraph 20 states that JA must hold BNSF Railway free from any liability for employment taxes, including taxes under the Railroad Retirement Tax Act or contributions under the Railroad Unemployment Insurance Act.

JA also provided copies of the certificates of insurance required by the contract, and a copy of the invoice which he submitted pursuant to paragraph 36 of the agreement on July 6, 2004 for 171 hours of work on 23 days during the preceding month. The invoice shows he worked an average of 7.4 hours per day, ranging from 3 hours on June 18 to 11 ½ hours on June 11.

The Chief of Audit and Compliance also contacted BNSF Railway regarding JA's relationship with the company. By letter of November 4, 2004, the railroad responded that JA has provided services within the railroad's "Panhandle subdivision" between Amarillo, Texas and Woodward, Oklahoma since the merger which created BNSF Railway in 1996, and had performed similar services for predecessor Atchison, Topeka & Santa Fe Railway since 1991. BNSF Railway explained that the number of projects undertaken by the railroad at times exceed the capacity of equipment and employees of the company. Rather than hire additional employees and purchase additional equipment to meet these peak period needs, the company "engages additional capacity when needed to handle such activity spikes; hence, the 'as needed, as required' context of JA's Contract." BNSF Railway states JA's services were required "* * * no more than six or seven months each of the last four years. And even during the months when his services/equipment were utilized, that utilization by no means required his presence five days per week throughout the six or seven month period."

While conceding that JA necessarily works on the premise of the railroad, and that his presence necessarily will occur within the workday of the BNSF Railway crew requiring his services, the railroad states that JA will not necessarily be present at the same time as the railroad crew, and is not governed by work rules requiring the railroad's employees to be present a given number of hours. BNSF Railway states that though its employees inspect JA's work for conformance with the contract, the railroad "relies on JA to provide the identified equipment and on his know-how to operate that equipment" and provides no training in that regard. JA has completed an Internet "Safety Orientation Program" provided by an outside source under agreement with the BNSF Railway, but BNSF Railway requires this course be taken by all contractors working within 25 feet of the right of way track, and notes that the outside source provides the program to other railroads as well. BNSF Railway also points to provisions of its contract with JA noted earlier as evidence

that he is not an employee, including the description in paragraph 3 that he is an independent contractor, and the payment by invoice for work performed under paragraph 36 rather than by hours worked through payroll.

By letter of November 2, 2004, the Director of Strategic Coordination & Research of the Brotherhood of Maintenance of Way Employees forwarded the observations of three BNSF Railway employees (a laborer, a welder, and a construction foreman) who had worked with JA. All three stated they had observed JA operate a front-end loader on a daily basis on BNSF Railway property, moving rails, ties and material. All three stated that each morning JA attends the briefing given to the crew by the BNSF Railway road master regarding the day's work, and that he receives instructions from railroad officials, including the track gang foreman. Two observed that JA starts work at the time the railroad employees do, and takes meal breaks when they do.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, the individual must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(b) and (d)).

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent

upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. The Board has in recent years not applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business, relying on the decision of the United States Court of Appeals for the 8th Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). However, the Court in Kelm distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10th Cir., 1996), at 891(holding with respect to an attorney's agreement to perform professional services for the railroad as an independent contractor that "* * *merely to state that such a relationship exists does not necessarily make it so* * * .")

The majority of the Board notes aspects of JA's agreement with BNSF Railway which would support a decision to disregard the contract's characterization of JA as an independent contractor. JA evidently works only for BNSF Railway, he is paid by the hour, and the contract does not allow him damages beyond payment for the time he worked if the railroad determines to end a job early. Devoting one's time solely to one employer, and receiving payment by the hour only for hours worked rather than payment for a project are common indications that an individual is an employee. Moreover, the evidence of record is also that JA performs his services to the railroad in person, and does not delegate performance to anyone else.

However, the majority of the Board finds other factors weigh in favor of a determination that JA operates "The 'A' Team" as independent business enterprise. He owns, fuels and maintains heavy construction equipment which he agrees to furnish under the contract. This demonstrates a significant investment in the business, beyond what would be expected from an employee. The hourly rate of compensation under the contract specifically includes payment for use of the machinery as well as his own labor, and the evidence regarding the services BNSF Railway requires shows the railroad would not be interested if JA offered his labor alone. Moreover, if he fails to produce a result acceptable to the railroad, he must remedy any deficiencies without compensation for the additional time spent, indicating the railroad is contracting for a result rather than service alone.

Unlike an employee, JA must carry liability insurance which names the railroad as an insured party. On these facts, the majority of the Board finds that the decision in Kelm prevents a determination that JA is an employee of the BNSF Railway for purposes of either paragraph (B) or (C) of section 1(d)(i) of the RRA, or the comparable provision of the RUIA.

Under paragraph (A) of section 1(d)(i), JA is an employee if his performance of service is subject to the control of the railroad not only with respect to the outcome of his work but also with respect to the way he performs such work. Statements by JA and the maintenance of way employees agree that JA works alongside railroad crews working on the tracks, and that he receives instructions from railroad foremen and supervisors at morning briefings. However, BNSF Railway states that the railroad crew is not always present when JA is working, and BNSF Railway expects him to use his own expertise to accomplish the contracted work. The evidence regarding the railroad's control of JA thus conflicts.

In view of the conflicting evidence regarding the question of direction and control of JA's service, the majority of the Board believes it relevant that JA has never over the last fourteen years considered himself an employee of either the BNSF Railway or its predecessor, the Atchison Topeka & Santa Fe, and Mr. Adcock has never claimed to the Board that service as an employee of the railroad should be credited under the RRA and RUIA for any period. As BNSF Railway also asserts he is not an employee, this means both parties to the contract for his services considered the relationship to be purchase of service from an independent contractor. While the intent of the parties is not itself determinative, Gatewood, supra, it is certainly a factor which may be weighed with other evidence. Holt v. Winpisinger, 811 F. 2d 1532, 1538 (D.C. Cir., 1987)(employment relationship established under ERISA).

Accordingly, in view of all the evidence in the record, it is the determination of the majority of the Board that service performed by JA for BNSF Railway or its predecessor AT&SF Railroad, is not covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. Labor Member Speakman dissents from this determination in his separate dissenting opinion.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.
(dissenting opinion attached)

Jerome F. Kever

**DISSENT OF**
**V. M. SPEAKMAN, JR.**
**EMPLOYEE STATUS DETERMINATION ON**
**JA d/b/a THE "A" TEAM**

The Majority's decision in this case eviscerates the deemed employee provisions found in Section 1(d) of the Railroad Retirement Act and Section 1(e) of the Railroad Unemployment Insurance Act by unnecessarily expanding the holding in Kelm.

JA freely admits that since 1991 he has performed maintenance-of-way with his own equipment exclusively for the BNSF Railway and its predecessor, the AT&SF. He states that he works under the supervision of the BNSF Railway road master and a foreman who inspects and approves his work, stating that "you do it their way or you don't stay." He is paid at an hourly rate upon submission of monthly invoices, as specified by his written agreement with BNSF.

Employees of the BNSF, who have worked with JA, have observed JA operate a front-end loader on a daily basis on BNSF Railway property, moving rails, ties and material. All three stated that each morning JA attends the briefing given to the crew by the BNSF Railway road master regarding the day's work, and that he receives instructions from railroad officials, including the track gang foreman. Two observed that JA starts work at the time the railroad employees do, and takes meal breaks when they do.

BNSF Railway freely admits it uses JA so that it does not have to hire additional employees. It concedes that all his work is on carrier property, subject to the general direction of the BNSF foreman. It admits that JA is subject to the same safety rules as its employees, but disputes that he necessarily works the same hours as its employees.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, the individual must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and Section 1(d)(i) of the RUIA both define a covered employee as an individual in

the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met.

The Board has in recent years not applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business, relying on the decision of the United States Court of Appeals for the 8th Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). However, the Court in Kelm distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10th Cir., 1996), at 891(holding with respect to an attorney's agreement to perform professional services for the railroad

as an independent contractor that "* * *merely to state that such a relationship exists does not necessarily make it so* * * .")

JA works only for BNSF Railway, and the contract does not allow him damages beyond payment for the time he worked if the railroad determines to end a job early. Moreover, the evidence of record is also that JA performs his services to the railroad in person, merely doing business in the name of "The 'A' Team." On these facts, the decision in Kelm does not prevent a determination that JA is an employee of the BNSF Railway for purposes of the RRA and the comparable provision of the RUIA if he meets either paragraph (B) or (C) of Section 1(d)(i) of the RRA, even if he would otherwise not meet the test under paragraph (A).

Considering the first element under Section 1(d)(i)(C), BNSF Railway acknowledges that the nature of JA's service necessarily requires that it must be performed on "property used in the employer's operation," the BNSF Railway right-of-way. Moreover, there is no indication that anyone other than JA performs these services.

The final question under paragraph (C) is whether JA's services have been integrated into the operations of the railroad employer. Though the BNSF Railway states that the railroad crew is not always present when JA is working, the railroad does not contradict other evidence that at times JA also is present, and assists the work of railroad's employees. Statements by BNSF Railway, JA and the maintenance-of-way employees therefore all agree that JA works alongside railroad crews working on the tracks.

Statements by JA and the maintenance-of-way employees also agree that he is instructed by railroad foremen and supervisors in the order of tasks and manner of performance of work as part of the railroad crew. Thus, the evidence overwhelmingly indicates that JA's services are integrated into the operations of the BNSF Railway within the meaning of Section 1(d)(i)(C) of the RRA and the comparable provision of the RUIA.

In finding that Kelm applies, my colleagues hang their hat on the fact that JA has investment in equipment and is required to carry liability insurance. These are indeed characteristics of an independent contractor. However, there is nothing in Kelm that provides no independent contractor can come into the ambit of paragraphs (B) and (C). The whole purpose of those provisions is to cover

independent contractors doing business on carrier property and integrated into carrier operations. See Testimony of Murray J. Latimer, Chairman of the Railroad Retirement Board, Hearings on H.R. 1362, 79th Cong.1st Session (1945) page 156.

Kelm holds that only those independent contractors who engage in an independent trade of business escape the application paragraphs (B) and (C). The indicia of an independent trade or business is aptly stated in Legal Opinion 91-8; Loram Maintenance of Way, Incorporated; namely; maintaining a separate place of business, hiring your own employees and a having a multitude of customers.

In short, there is no question that the statutory language in question applies to JA. JA himself make no pretense that he has an independent trade or business. There is no reason to extend Kelm beyond the holding of the case. It is the Board's obligation and that of its General Counsel to apply its statutes as Congress intended them and not to strain to find a way not to apply them so as not to inconvenience a Class I carrier.

The Internal Revenue Service is also in accord with my view. In Revenue Ruling 74-355 (C. B. 1974- page 339) the Internal Revenue Service held that an independent contractor should be considered an employee of the carrier for purposes of the Railroad Retirement Tax Act under section 3231(d)(1) of the Internal Revenue Code, because he was performing services of a continuing nature on the property of the carrier which were similar to services performed by employees of the carrier.

In this case the independent contractor cleaned rail cars for the carrier on an on-call basis. He furnished his own truck, tools and cleaning supplies, worked at his own convenience and was paid a specified amount for each car he cleaned. He performed his services personally and had no employees of his own.

These facts are virtually identical to the facts in the case before us. JA works on a continuous basis on the property of BNSF using his own equipment. He performs services identical to those performed by other BNSF employees. He performs his services personally and has no employees of his own.

Section 3231(d)(1) of the Internal Revenue Code parallels Section 1(d)(1) of the Railroad Retirement Act. This revenue ruling supports a finding that JA should be treated as an employee of the BNSF and that the Kelm case is inapplicable.

Original signed by:

V. M. Speakman, Jr.
Labor Member

37656
EB

SERVICE DATE – JUNE 27, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34914

DESERTXPRESS ENTERPRISES, LLC—PETITION FOR DECLARATORY ORDER

Decided: June 25, 2007

By petition for declaratory order filed on July 24, 2006, DesertXpress Enterprises, LLC (DesertXpress) asks the Board to issue a declaratory order finding that its proposed construction of an interstate high speed passenger rail system is not subject to state and local environmental review and land use and other permitting requirements because of the Federal preemption in 49 U.S.C. 10501(b). The request for a declaratory order will be granted, as discussed herein.

BACKGROUND

DesertXpress' petition for declaratory order concerns its proposed project to construct an approximately 200-mile interstate high speed passenger rail system between Victorville, CA, and Las Vegas, NV. Petitioner states that the project would involve the construction of significant lengths of new track and ancillary facilities, including two passenger stations and a 50-acre train maintenance and storage facility and operations center. DesertXpress states that the proposed route is planned alongside or within the median of Interstate 15 and would provide an alternative to automobile travel on that highway. Petitioner anticipates that the project would utilize European high-speed trains that would operate at speeds up to 125 miles per hour and would travel between the two termini in under 105 minutes.

Petitioner states that it has already met with both the Federal Railroad Administration (FRA) and the Board's Section of Environmental Analysis about the project and supplied sufficient information to allow the process of preparation of an Environmental Impact Statement (EIS) to begin under the National Environmental Policy Act (NEPA) and related laws.[1] (The Board is participating as a cooperating agency in that process. See 40 CFR 1501.6.) DesertXpress states that, in the near future, it will seek from the Board the necessary authority

[1] FRA, which has primary regulatory authority over safety aspects of the proposed line, will be the lead agency in preparing the EIS. The Board is participating in preparing the EIS as a cooperating agency. The EIS, when completed, should give the Board the environmental information it needs to take the requisite hard look at any environmental concerns related to the proposal. See 40 CFR 1501.6(a)(2).

under 49 U.S.C. 10901 to construct the new line and related facilities and to conduct rail operations over the line.

DesertXpress argues that this project presumptively falls within the Board's exclusive jurisdiction over transportation by rail carriers as set forth at 49 U.S.C. 10501 and accordingly qualifies for the preemption from most state or local laws provided in section 10501(b). Petitioner seeks an order from the Board declaring that this project is not subject to state and local land use restrictions, and other permitting requirements in California and Nevada, or to state and local environmental laws, including the California Environmental Quality Act, Cal. Pub. Res. Code 21000 et seq. Petitioner points out, however, that state and local agencies will be encouraged to participate in the ongoing EIS process.

On August 31, 2006, the Board instituted a declaratory order proceeding and sought public comments to determine whether its jurisdiction preempts state and local environmental laws, land use restrictions, and other permitting requirements that might otherwise apply to DesertXpress' project.

On October 16, 2006, the International Brotherhood of Teamsters Rail Conference and its affiliated organizations, the Brotherhood of Locomotive Engineers and Trainmen Division/IBT, and the Brotherhood of Maintenance of Way Employees Division/IBT, filed comments in support of DesertXpress' petition, stating that they believe DesertXpress would be a rail carrier subject to the Board's jurisdiction and that preemption therefore would apply.

Also on October 16, 2006, the New Jersey Department of Environmental Protection (NJDEP) and the New Jersey Meadowlands Commission (NJMC) filed comments in response to the petition. NJDEP and NJMC, which take no position concerning the project described by DesertXpress, maintain that the Board should not issue a declaratory order or otherwise enunciate any general principles concerning the proper scope of Federal preemption under section 10501(b) on this record. They argue that there is neither a particular controversy for which Board guidance is required nor any uncertainty concerning the role to be played by state and local government bodies with respect to this project. NJDEP and NJMC express concern that, if the Board issues broad statements regarding preemption, parties in future or even existing controversies unrelated to this proceeding could mischaracterize those statements in an attempt to mislead governmental bodies or courts concerning the scope of section 10501(b).

On November 6, 2006, DesertXpress filed a reply in response to the comments from NJDEP and NJMC. Petitioner states that there is in fact lingering uncertainty on its part and that of state and local authorities[2] regarding the scope of the Board's exclusive jurisdiction and the

[2] Petitioner attaches a letter signed by seven California state and local officials asking the Board to clarify the jurisdictional issues and confirm the preemptive authority of the Board over the proposed project.

extent of DesertXpress' obligations to those state and local authorities. DesertXpress also argues that the magnitude of the rail construction and the significant financial undertaking of private investors for this unique project justify the issuance of a declaratory order here. Petitioner maintains that Board guidance regarding this project would assist it with its efforts to secure the private investment necessary to move the project forward and would mitigate future project development risks. Finally, petitioner notes that the Board has issued declaratory orders on many occasions to resolve uncertainty and provide guidance to parties.[3]

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). In this case, there is uncertainty regarding the scope of the Board's jurisdiction over this project and the role of state and local government bodies. Moreover, the request for clarification comes not only from petitioner but from a number of state and local officials as well. NJDEP and NJMC's concern that any Board statements regarding preemption might be mischaracterized in unrelated proceedings is unwarranted, as our findings here are relevant only to the specific project DesertXpress is proposing and the individual facts and circumstances at issue here. In sum, it is appropriate for the Board to issue a declaratory order here.

The Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), shields railroad operations that are subject to the Board's jurisdiction from the application of most state and local laws.[4] Section 10501(b) expressly provides that the "jurisdiction of the Board over . . .

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[3] In support, petitioner cites The New York City Economic Development Corporation—Petition for Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004); Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34764 (STB served Feb. 6, 2006); and Georgia Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34665 (STB served Apr. 14, 2005).

[4] The courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action: any form of state or local permitting or preclearance that, by its nature, could be used to deny the railroad the ability to conduct its operations or to proceed with activities that the Board has authorized, and state or local regulation of matters directly regulated by the Board (such as the construction, operation, and abandonment of rail lines). Otherwise the section 10501(b) preemption analysis requires a factual assessment of whether a particular action would have the effect of preventing or unreasonably interfering with railroad transportation. See, e.g., City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998) (City of Auburn) (state and local environmental and land use

(continued...)

transportation by rail carriers" over any track that is part of the interstate rail network "is exclusive." Section 10501(b) also expressly provides that the remedies provided under 49 U.S.C. 10101-11908 are exclusive and preempt the remedies provided under State law.[5] We therefore now examine whether the particular activities contemplated by DesertXpress constitute transportation by a rail carrier under section 10501, and clarify the kinds of laws that are and are not preempted involving this project.

As noted, the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(b). Accordingly, to be subject to the Board's jurisdiction and qualify for Federal preemption under section 10501(b), there must be transportation, and that transportation must be provided by a rail carrier, which is defined as "a person providing common carrier railroad transportation for compensation," 49 U.S.C. 10102(5).[6] Here, DesertXpress intends to carry passengers by rail in interstate transportation. Moreover, it will be providing this transportation as a common carrier, offering service to the general public. Thus, this project clearly involves transportation by a rail carrier. See American Orient Express Railway Company v. STB, No. 06-1077, slip op. at 4, 6 (D.C. Cir. Apr. 20, 2007), aff'g American Orient Express Railway Company, LLC—Petition For Declaratory Order, STB Finance Docket No. 34502 (STB served Dec. 27, 2005) (rail carrier may provide railroad transportation by transporting passengers over its own tracks). Accordingly, the Board has exclusive jurisdiction over the planned new track, facilities, and operations and the Federal preemption under section 10501(b) attaches.

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(...continued)
permitting are preempted); Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 206 F. Supp. 2d 128 (D. Mass. 2002) (state and local permit requirements and environmental review of construction and operation of railroad intermodal facility preempted); N. San Diego County Transit Dev. Bd.—Pet. For Decl. Order, STB Finance Docket No. 34111 (STB served Nov. 9, 2001) (City cannot unilaterally prevent a railroad from reactivating and operating over a line that the Board has not authorized for abandonment).

[5] As the ICCTA legislative history makes clear, the states' police powers are not entirely preempted by section 10501(b). Thus, for example, railroads can be required to comply with some health and safety rules, such as fire and electric codes. Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186, 1189-90 (E.D. Wash. 2000).

[6] See also 49 U.S.C. 10102(9) ("Transportation" defined expansively to embrace "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 . . .,"as well as "services related to that movement").

This means that Federal environmental statutes, such as NEPA,[7] the Clean Air Act, and the Clean Water Act, and the regulation of railroad safety under the Federal Railroad Safety Act, will apply to this proposal. See, e.g., City of Auburn, 154 F.3d at 1031-33; Friends of the Aquifer, et al., STB Finance Docket No. 33966, slip op. at 4-6 (STB served Aug. 15, 2001). However, state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted. See City of Auburn, 154 F.3d at 1031. But state and local agencies and concerned citizens will have ample opportunity to participate in the ongoing EIS process under NEPA and related laws.

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

It is ordered:

1. DesertXpress' petition for declaratory order is granted.

2. This proceeding is discontinued.

3. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon Williams
Secretary

[7] As noted, NEPA review has already begun in this case.

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SERVICE DATE – SEPTEMBER 19, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34975

MARYLAND TRANSIT ADMINISTRATION—PETITION FOR DECLARATORY ORDER

Decided: September 17, 2008

On October 29, 2007, Mr. James Riffin (Riffin) filed a petition for reconsideration of the decision in this proceeding served on October 9, 2007 (October 2007 decision). That decision granted the request of the Maryland Transit Administration (MTA) for a declaratory order confirming that MTA did not require authorization from the Board's predecessor, the Interstate Commerce Commission (ICC), when, in 1990, MTA acquired a 14.22-mile line of railroad between Baltimore and Cockeysville, MD, known as the Cockeysville Industrial Track (CIT). On November 19, 2007, MTA filed a reply opposing the petition for reconsideration. For the reasons discussed below, the petition for reconsideration will be denied.

BACKGROUND

The CIT is a stretch of rail track that carried little freight traffic for many years and has not been utilized for freight service since 2004. MTA, which is part of the Maryland Department of Transportation (MDOT), acquired the CIT from Consolidated Rail Corporation (Conrail) in 1990 in order to construct, operate, and maintain a light rail transit system that now carries over 18,000 passengers per day.

The Agreement of Sale and the deed reserved to Conrail a perpetual, assignable, exclusive freight operating easement over the CIT. An operating agreement between MTA and Conrail (Operating Agreement) set forth the terms by which MTA and Conrail were to share use of the CIT in perpetuity and carry out maintenance, dispatch, and improvements. Subsequently, Norfolk Southern Railway Company (NSR) acquired Conrail's interest.[1]

In its petition for declaratory order, MTA sought confirmation that its 1990 acquisition of the CIT did not require approval under 49 U.S.C. 10901 because Conrail's common carrier rights and obligations were not transferred to, or assumed by, MTA as part of its acquisition of the line's physical assets. Riffin opposed that request, arguing that the Operating Agreement gave

[1] For a more detailed discussion of MTA's acquisition of the CIT, see the October 2007 decision, slip op. at 3-4.

MTA too much control over Conrail's (now NSR's) operations.[2] He also alleged that MTA was interfering with NSR's freight rail service.[3] In the October 2007 decision, we found that MTA's 1990 acquisition of the CIT did not require authorization under section 10901.[4] Riffin now seeks reconsideration of our October 2007 decision.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 722(c) and 49 CFR 1115.3(b), a petition for reconsideration will be granted only upon a showing that the prior action would be affected materially because of changed circumstances or new evidence or that the prior action involves material error. Here, Riffin has not offered any new evidence or changed circumstances. Rather, he argues that we materially erred by failing to properly apply agency precedent and by not providing for discovery aimed at eliciting information from NSR and shippers regarding NSR's past and current ability to provide freight service on the CIT. As discussed below, we are satisfied that our prior finding—that the agreement here preserved NSR's ability to provide rail service—is consistent with precedent. Moreover, there is no reason to believe that allowing Riffin to engage in unspecified discovery would produce any information that would lead to a different result.

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[2] Riffin owns property on York Road in Cockeysville, which he alleges is adjacent to the CIT. However, MTA's engineer, head archivist and historian stated that there has not been any rail connection between Riffin's property and the CIT since the 1940's. Response of the Maryland Transit Administration, Exh. 1, ¶ 7 (verified statement of Robert L. Williams) (filed Apr. 20, 2007). See also James Riffin—Petition for Declaratory Order, STB Finance Docket No. 34997, slip op. at 5 (STB served May 2, 2008) (Riffin Declaratory Order). Riffin has not presented any evidence that his property has been connected to the CIT at any time during the period of his ownership.

[3] CNJ Rail Corporation (CNJ) also filed comments, but did not offer any information or argument not already presented by Riffin. Notwithstanding the name it has chosen, CNJ does not own any rail assets or conduct any rail operations. CNJ's filing did not describe its interest in this proceeding.

[4] Under the May 1990 Agreement of Sale, Conrail retained title to a connecting line referred to as the Cockeysville Industrial Park Track (Exh 1. to Petition for Declaratory Order, Agreement of Sale at 1), which Riffin alleges MTA acquired from Conrail in 1997. See Letter from James R. Paschall filed Mar. 14, 2006, at 1, in STB Docket No. AB-290 (Sub-No. 237X), Norfolk Southern Railway Company—Abandonment Exemption—in Baltimore County, MD (NSR Baltimore County Abandonment). Although Riffin questions why MTA did not include the 1997 acquisition in its request for a declaratory order and asks us to expand this proceeding, we see no reason to do so. Riffin has not shown that later acquisitions of right-of-way by MTA would affect our decision on the question posed by MTA's request for a declaratory order.

Pertinent Precedent

We reject Riffin's claim that, in finding that MTA did not acquire a common carrier obligation by virtue of its acquisition of the CIT, we failed to follow the principles established in Maine, DOT—Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine) and Southern Pac. Transp. Co. —Abandonment Exempt.–LA County, CA, 8 I.C.C.2d 495 (1992), recon. denied, 9 I.C.C.2d 385 (1993) (Southern Pacific). State of Maine is the seminal case establishing that a state agency may work out an arrangement with a freight railroad under which the state agency acquires rail property – either to use in a mass transit system or to hold so that freight rail service can be preserved – without itself becoming a rail freight carrier under the Interstate Commerce Act, 49 U.S.C. 10102(5). In State of Maine, 8 I.C.C.2d at 836-37, the ICC held that the Maine Department of Transportation's acquisition of the physical assets of a rail line owned by a common carrier railroad did not require approval under 49 U.S.C. 10901 where the existing carrier retained a permanent and unconditional easement to conduct common carrier freight operations and the right to maintain, operate and improve the line.[5]

Since State of Maine, other state agencies have sought to work out similar arrangements. As the case law developed, the parameters of State of Maine were occasionally tested. Thus, in Southern Pacific, the ICC found that the acquisition by the Los Angeles County Transportation Commission (LACTC) of the physical assets of several rail lines from the Southern Pacific Transportation Company (SP) required agency approval under section 10901 because, under the terms of the acquisition, LACTC obtained too much control over the freight carrier's ability to provide freight rail service. The operating agreement there gave LACTC the right to acquire SP's remaining interest in the lines and to file an abandonment application to have freight rail service over the lines discontinued, and it prohibited SP from opposing any such acquisition or abandonment request before the agency. Moreover, SP could not use the lines to move overhead traffic, and SP's local trackage rights were subject at all times to the directives and control of LACTC.[6]

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[5] Riffin also cites an earlier decision in City of Austin, TX—Acquisition—Southern Pacific Transportation Company, STB Finance Docket No. 30861 (ICC served Nov. 4, 1986) (Austin), where the City of Austin was found to have assumed a common carrier obligation, even though it did not intend to operate the line itself. However, in State of Maine, the ICC distinguished Austin on the ground that the City there had failed to sever the freight operating rights from the real property interest it acquired. In contrast, here (as in State of Maine), the freight rail carrier retained an exclusive, perpetual easement for freight operations.

[6] It should be noted that the ICC in Southern Pacific did not rescind the acquisition. It recognized that the transaction clearly was in the public interest because Los Angeles needed to construct a mass transit system. Therefore, although it found that LACTC acquired certain common carrier responsibilities because of the control the transaction documents gave LACTC over SP's freight operations, the ICC used its authority under former 49 U.S.C. 10505 (now 49 U.S.C. 10502) to exempt the transaction from regulation to help LACTC fulfill its public

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Riffin argues that the provision in the Operating Agreement here that requires NSR to seek authority to abandon the CIT if NSR ceases using the CIT for rail service for 60 consecutive months is analogous to the abandonment provision of the agreement in Southern Pacific. However, the Southern Pacific decision was based on the totality of the restrictions on the freight operator's ability to provide service; and the abandonment provision there gave the purchaser the unqualified right to require the freight operator to apply for authority to abandon the line at any time. Here, in contrast, the Operating Agreement provides that NSR must seek abandonment authority if there is no rail freight service on the CIT for a 5-year period. In other words, as long as there is any freight service moving over the CIT within a 5-year period, there would be no contractual requirement to seek abandonment authority. And if there has been no freight traffic on the line for such an extended period, then applying for abandonment authority would not seem inconsistent with any freight rail service needs.[7] Thus, Southern Pacific is not analogous to this case.

In any event, Riffin ignores more recent precedent that supports our October 2007 decision. To balance the development of mass transit with the retention of freight rail service, the freight carrier need not necessarily retain full control. Instead, the Board examines in each case whether the agreements between the parties continue to give the freight carrier the ability to conduct its existing and reasonably foreseeable freight operations so that it can satisfy its common carrier obligation.[8]

While the freight carrier must continue to have a permanent easement or its equivalent to provide freight service, the public agency acquiring the right-of-way and track may negotiate terms and conditions with the freight carrier necessary to provide reliable commuter service or protect the agency's investment so long as such terms and conditions do not unreasonably

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purpose as a mass transit operator with minimal regulatory constraints. See Southern Pacific; see also Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, CA, STB Docket No. AB-409 (Sub-No. 5X) (STB served July 17, 2008).

[7] See 49 CFR 1152.50(b) (establishing class exemption from the abandonment requirements of 49 U.S.C. 10903 for rail lines that have been out of service for 2 years).

[8] See State of Maine–Acquisition Exemption—Certain Assets of St. Lawrence & Atlantic Railroad Company, STB Finance Docket No. 35018, slip op. at 2 (STB served Sept. 13, 2007) (St. Lawrence & Atlantic); Washington County, OR—Acquisition Exemption–Certain Assets of the Union Pacific Railroad Company, STB Finance Docket No. 34810 et al., slip op. at 2 (STB served Apr. 11, 2007); Los Angeles County Transportation Commission—Petition for Exemption—Acquisition from Union Pacific Railroad Company, STB Finance Docket No. 32374 et al., slip op. at 2 (STB served July 23, 1996) (LACTC).

interfere with freight rail service.[9] Thus, the easement or the operating agreement may restrict freight operations to specific parts of the day, provided that the window for exclusive freight operations is adequate to satisfy the service needs of freight shippers.[10] Likewise, the public agency may assume responsibility for maintaining the line and dispatching freight operations if the operating procedures are reasonable and do not discriminate against freight service, and if the freight carrier has the right to inspect and to request prompt repair of any track defects.[11] Indeed, the Board has found that construction by a public agency of additional track or track improvements for passenger service on the right-of-way, even if it interrupts freight service, does not unreasonably interfere with the freight carrier's service obligations where the public agency bears the cost of substitute freight service and gives adequate notice to the affected shippers. Utah, slip op. at 4.

Riffin argues that the abandonment provision in the Operating Agreement here is no different than the limited-term easement granted by the Wisconsin Department of Transportation (WisDOT) that the Board found inadequate in Wisconsin Department of Transportation—Petition for Declaratory Order, STB Finance Docket No. 34764 (STB served Dec. 2, 2005) (Wisconsin I). However, the two cases are not analogous. In Wisconsin I, the Board indicated (slip op. at 2) that an easement limiting the freight rail carrier's term to 10 years with renewals at the option of WisDOT was inconsistent with State of Maine. Here, by contrast, the easement granted by MTA to the freight rail carrier is exclusive and perpetual, and the abandonment provision in the Operating Agreement will not be triggered so long as there has been some freight traffic over the line within the previous 5 years. Further, in subsequent decisions in the Wisconsin proceeding, served on February 6, 2006 (Wisconsin II), and March 13, 2006 (Wisconsin III), after noting that WisDOT had expanded the easement term to 50 years and made the renewal options solely at the freight rail carrier's discretion, the Board found that WisDOT would not assume a common carrier obligation through its purchase of the rail line.

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[9] See generally Metro Regional Transit Authority—Acquisition Exemption—CSX Transportation, Inc., STB Finance Docket No. 33838, slip op. at 2-3 (STB served Oct. 10, 2003) (Metro); North Carolina State Ports Authority—Acquisition Exemption—North Carolina Ports Railway Commission, STB Finance Docket No. 34258, slip op. at 3 (STB served Oct. 31, 2002); Sacramento-Placerville Transportation Corridor Joint Powers Authority—Acquisition Exemption—Certain Assets of Southern Pacific Transportation Company, STB Finance Docket No. 33046 (STB served Oct. 28, 1996) (Sacramento-Placerville); LACTC.

[10] Metro at 2; Utah Transit Authority—Acquisition Exemption–Union Pacific Railroad Company, STB Finance Docket No. 35008, slip op. at 2-4 (STB served July 23, 2007) (Utah); St. Lawrence & Atlantic.

[11] Metro, slip op. at 2; Utah, slip op. at 4; Sacramento-Placerville, slip op. at 2; LACTC, slip op. at 2.

Riffin contends that the Operating Agreement here imposes significant constraints on NSR's freight service through MTA's management and dispatch of the CIT and the freight operating window, and he asserts that the Board should have found, as it did in Southern Pacific and Wisconsin I, that the public agency has substantial control over freight operations. However, MTA does not have the same level of control over freight operations that the owners of the lines had in Southern Pacific or Wisconsin I.[12] NSR retains all local and overhead traffic rights, and MTA has acquired no freight operating rights itself, conditional or otherwise. Under the Operating Agreement, MTA is committed to allowing fixed hours of freight operation and to expanding those hours if market demands so warrant. MTA may not alter the freight window unilaterally. Further, as pointed out in the October 2007 decision, slip op. at 6, MTA is obligated to dispatch freight trains in compliance with the Northwestern Operating Rules Advisory Committee and to manage the CIT in a manner that will minimize delays to the freight rail carrier and afford every reasonable accommodation to freight traffic.

Riffin also asserts that we failed to consider which party has ultimate responsibility under the terms of the Operating Agreement for maintenance of the CIT. He is incorrect. In the October 2007 decision, slip op. at 6, we discussed MTA's obligation to maintain the CIT to standards set forth in the Operating Agreement. We pointed to NSR's right to inspect the CIT and to the requirement that, while improvements are being made, the CIT should remain open to permit freight operations to continue at a certain speed. Under the Operating Agreement, MTA also must perform additional maintenance at NSR's request, for which NSR is to reimburse MTA. Thus, MTA's contractual responsibility to maintain the CIT appropriately takes into account the needs of the freight operations.

Riffin contends in addition that, after its 1990 acquisition of the CIT, MTA used its rights under the Operating Agreement to interfere with NSR's ability to satisfy its common carrier obligations. We rejected this argument in our October 2007 decision (slip op. at 1-2, 7-8). Riffin has offered nothing new in his request for reconsideration and has not persuaded us that our decision was in error.

In the 18 years since MTA's acquisition of the CIT, no active shipper on the line has filed a complaint asserting that NSR has not met its service obligations.[13] Nor has NSR filed any

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[12] As noted in Wisconsin I (see slip op. at 2-3), the original transaction documents gave WisDOT the right to provide freight service itself if the freight carrier that held the easement failed to maintain a desirable level of service, as determined by WisDOT, and the freight carrier was required to obtain a permit from WisDOT before operating over lines also used for passenger service. WisDot deleted these provisions in the revised agreements that were before the Board in Wisconsin II and Wisconsin III.

[13] In one of his several "supplemental" filings, Riffin attached letters that he procured from four putative shippers, apparently to show that MTA removed active portions of the CIT or that MTA has interfered with NSR's ability to provide common carrier rail service. They

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complaint (formal or informal) charging that MTA has interfered with its ability to provide service. Further, MTA has satisfactorily answered Riffin's allegations that MTA had compromised NSR's ability to meet its common carrier obligations by dismantling, salvaging or selling portions of the CIT. MTA has explained that it has not salvaged any part of the rail line that NSR was using to provide freight rail service, and Riffin has not shown that any actions taken by MTA have affected active portions of the CIT.[14] MTA and NSR have not made a secret of the fact that, during the period when MTA was double tracking the CIT (see October 2007 decision, slip op. at 2), MTA arranged for alternative service for the remaining shippers on the line with NSR's cooperation and that these shippers have agreed to continue using the alternative arrangements.[15] As noted, we do not consider an interruption of freight service due to the construction of passenger rail lines to be an unreasonable interference with the freight carrier's service obligation where the transit agency makes satisfactory arrangements with the freight shippers and the carrier for alternative service. See Utah Transit, slip op. at 4. Since the purpose of the common carrier obligation is to meet the service needs of shippers, it is not an unreasonable interference with the freight railroad's common carrier obligations for the affected parties to agree to continue the alternative service after completion of the track work. In the absence of objections from NSR or active shippers, we have no reason to believe that freight shippers' needs are not being met.

In sum, our conclusion in the October 2007 decision—that MTA's level of control over management and dispatch of the CIT and the freight operating window does not unduly hinder NSR's ability to carry out its obligations as a common carrier over the CIT—is within the

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contain equivocations such as: "If shipping our raw ingredients to us by rail was less expensive than shipping it via truck, we would consider using rail service." These letters, which are filtered to us through Riffin, are too vague and indefinite to be given any weight. Generally, a reasonable request for service is one that is specific as to volume, commodity and time of shipment. CSX Transportation, Inc.—Abandonment Exemption—In Parke and Vermillion Counties, IN., STB Docket No. AB-55 (Sub-No. 579X) (STB served Sept. 13, 2002), aff'd, Montezuma Grain Co. v. STB, 339 F.3d 535 (7th Cir. 2003). A shipper may not "lie low" and then claim that a request for service has not been honored. See Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation, STB Finance Docket No. 42087, slip op. at 11 (STB served July 27, 2005).

[14] See, e.g., The Atchison, Topeka and Santa Fe Railway—Abandonment Exemption—In Lyon County, KS, Docket No. AB-52 (Sub-No. 71X) (ICC served June 17, 1991).

[15] See Pet. for Exempt. at 8, 14-15, filed Dec. 14, 2005, in NSR Baltimore County Abandonment.

bounds of agency precedent. Riffin has failed to show new evidence, changed circumstances, or material error that would warrant reconsideration of the October 2007 decision.[16]

Request For Discovery

Riffin continues to argue that wide-ranging discovery is needed here to develop a sufficient record. He claims to need discovery to show that the freight operating window and the dispatching on the line were inadequate; that there was inadequate maintenance at certain points in time; and that there could be shippers that want service over the line. Riffin's argument is not persuasive.

The Board generally does not order discovery in declaratory order proceedings where the dispute involves a legal issue[17] and where the record is sufficient to resolve the controversy without discovery.[18] Our October 2007 decision correctly found that the record was sufficient to permit us to issue the requested declaratory order.

At bottom, the October 2007 decision rests on facts that are not in dispute. We based our conclusion that MTA did not require authorization from the ICC to acquire the physical assets of the CIT primarily on the transaction documents submitted by MTA. Riffin has not argued that the transaction documents were ambiguous or that the documents could not be interpreted without discovery.

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[16] In another of his "supplemental" filings, Riffin argues that agency approval of the 1990 acquisition was required under what is now 49 U.S.C. 11323 (formerly 49 U.S.C. 11343) because MTA had common carrier authority elsewhere on the interstate rail system in 1990. This is incorrect. The rail lines acquired by MDOT from Penn Central Corporation in 1982 had already either been abandoned or authorized for abandonment, and, as a result, their acquisition did not give the state agency common carrier status. See 49 CFR 1150.22; Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions, 363 I.C.C. 132 (1980). It was not until 1991—after the 1990 acquisition involved here—that MTA obtained authority to acquire a 5.78-mile line of railroad, in Maryland Mass Transit Administration—Acquisition and Operation Exemption—Baltimore & Annapolis Railroad Company, Finance Docket No. 31929 (ICC served Oct. 25, 1991). Therefore, MTA was not an ICC-regulated rail carrier in 1990, and its acquisition of the CIT was not subject to former 49 U.S.C. 11343.

[17] See CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662, slip op. at 13 (STB served Mar. 14, 2005).

[18] See Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, STB Finance Docket No. 35057, slip op. at 4 n.4 (STB served Feb. 1, 2008).

In addition, we relied on several incontrovertible facts. Neither NSR nor any shipper has intervened and challenged MTA's representations or alleged that NSR's service arrangements have been inadequate, whether due to interference by MTA or any other reason. Neither NSR nor any shipper on the line has indicated to the Board, in this proceeding or in NSR Baltimore County Abandonment, that there are operating window or dispatching problems on the CIT that interfered with NSR's operations or that MTA failed to maintain the CIT and, thus, impeded NSR from fulfilling its common carrier obligation. Moreover, although the Operating Agreement has been in effect for nearly 18 years, no shipper on the CIT has filed a complaint or sought informal assistance alleging that NSR has refused to provide rail service or that MTA has prevented NSR from serving it.[19] These facts are verifiable without discovery. Based on our experience, we can reasonably draw the inference from the lack of shipper participation in this case and the absence of complaints to the Board that MTA has not taken any action that prevented NSR from meeting its common carrier obligations.

Riffin also claims that discovery is needed to address the physical condition of the line. We disagree. Riffin conducted a physical examination of the line, apparently without obtaining MTA's or NSR's consent, and presented his evidence of the line's condition. In our October 2007 decision, we considered Riffin's allegations concerning MTA's alterations of the CIT and were satisfied that MTA has not taken any action that would cause NSR to violate its common carrier obligation. Riffin has not explained why further discovery is necessary.

Finally, we note that Riffin does not purport to represent any shipper here, and that he has not submitted verified statements from any shippers regarding problems with NSR's service or the adequacy of alternative arrangements negotiated between the shippers and MTA or NSR. Under these circumstances, Riffin's bare allegations – presented in his unsworn filings and his own accounts of purported statements by other (sometimes unnamed) individuals – are not sufficient to convince us that discovery was necessary in this case.[20]

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

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[19] Riffin has written a letter and spoken informally to Board personnel about NSR's alleged refusal to deliver unidentified "rail cars" to Riffin in Cockeysville. But consistent with our finding in Riffin Declaratory Order, supra note 2, the record here indicates that Riffin's property is located beyond the northern limit of the CIT and that Riffin's property was severed from the CIT prior to MTA's acquisition of the CIT. See Response of Maryland Transit Administration, Exhibit 1 at ¶ 7, ¶ 13. Thus, Riffin is not a shipper on the CIT.

[20] See Norfolk Southern Railway Company—Abandonment Exemption—Norfolk and Virginia Beach, VA, STB Docket No. AB-290 (Sub-No. 293X), slip op. at 6 (STB served Nov. 6, 2007) (finding unpersuasive Riffin's self-serving characterization of the needs or desires of others).

It is ordered:

1. The petition for reconsideration is denied, as discussed above.

2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

**B.C.D. 09-53** **OCT 28 2009**

**EMPLOYER STATUS DETERMINATION – DECISION ON RECONSIDERATION**
**Trinity Railway Express—Train Dispatching**
**Herzog Transit Services, Incorporated**

This is the decision on reconsideration of the Railroad Retirement Board (hereinafter the Board) of a part of its determination dated January 20, 2009 (B.C.D. 09-2) pursuant to 20 CFR 259.1 concerning the status of South Florida Regional Transportation Authority (SF RTA), Herzog Transit Services, Incorporated (Herzog Transit), and Trinity Railway Express (Trinity) as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA) (the RRA and RUIA are hereinafter collectively referred to as "the Acts").

INITIAL DECISION

In its decision dated January 20, 2009, the three-member Board determined as follows: (1) a majority of the Board, Labor Member Speakman dissenting, determined that SF RTA is not a covered employer under the Acts (Determination #1); (2) a majority of the Board, Management Member Kever dissenting, determined that Herzog Transit is a covered employer only with respect to train dispatching over the rail line of Trinity Railway Express in Texas (Determination #2); and (3) a majority of the Board, Management Member Kever dissenting, determined that Trinity itself is not a covered employer to the extent the train dispatching operations conducted on Trinity's behalf are reported by Herzog Transit (Determination #3).

On April 17, 2009, Herzog Transit, Dallas Area Rapid Transit ("DART"), and Fort Worth Transportation Authority ("The T") (collectively "Petitioners") filed with the Secretary to the Board a Joint Petition for Reconsideration of Board Coverage Determination ("B.C.D.") 09-02 pursuant to 20 C.F.R. § 259.3(a). In its joint petition, Petitioners requested the Board to reconsider and reverse determination #3 in B.C.D. 09-02 and find that Herzog Transit dispatchers providing those services to Trinity are not covered under the Acts without disturbing determination #2 that Trinity itself is not covered. Additionally, Petitioners requested a stay of any applicable requirements to report service and compensation pending the Board's decision in the Joint Petition for Reconsideration of B.C.D. 09-02. For the reasons explained below, on reconsideration the majority of the Board, Management Member Kever dissenting, affirms and adopts its initial decision dated January 20, 2009, with respect to determinations #2 and #3 with the following additional comments. The Board does not disturb or reconsider determination #1.

DISCUSSION

Initially, it should be noted that Petitioners, in their joint petition for reconsideration, do not raise any new issues which were not previously adjudicated by the three-member Board in its January 20, 2009 initial decision. However, in their joint petition for

reconsideration Herzog Transit, DART, and the T specifically make the following arguments: (1) Rather than applying the Railroad Ventures test, the Board should have determined the status of the Herzog Transit dispatchers in accordance with 45 U.S.C. §231(b)(1)(i) and prior Board decisions; (2) The Herzog Transit dispatchers are not subject to the continuing authority or control of a covered rail carrier under 45 U.S.C. §231(b)(1)(i)(A); (3) The Herzog Transit dispatchers are employed by an independent contractor engaged in an independent trade or business and therefore, the "integration" tests under 45 U.S.C. §231(b)(1)(i)(B) and (C) do not apply; and, (4) The Board's decision would have unintended adverse consequences.

Essentially, three of the four arguments made in the Petition for Reconsideration maintain that the Board should have decided this case (i.e., Determinations #2 and #3) by using an analysis of whether or not the service performed constituted employee service for a rail carrier covered by the Acts administered by the Board. The majority of the Board, Management Member Kever dissenting, concludes on reconsideration that the initial decision correctly chose to analyze this case as a determination of employer status – i.e., directly addressing the issue of whether the companies involved are employers as defined in the Railroad Retirement and Railroad Unemployment Insurance Acts.

The Board has both policy-making and quasi-judicial functions. In its policy-making role, the Board establishes and promulgates rules and regulations to resolve matters arising under the Acts it is charged with administering. In its quasi-judicial role, the Board decides controversies of fact and law in accordance with the Acts and the Board's regulations. The Board is authorized by section 7 of the RRA to establish and promulgate rules and regulations. See 45 U.S.C. § 231f(b)(5). Specifically, section 7(b)(5) of the RRA states as follows:

> "The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of this Act. All rules, regulations, or decisions of the Board shall require the approval of at least two members, and they shall be entered upon the records of the Board, which shall be a public record."

Accordingly, the Board is authorized to create and enforce the rules and regulations necessary to implement and enforce the Acts, with the full force of a law. Through proposed rulemaking and the promulgation of regulations the Board issues agency statements of general or practical applicability and future effect designed to implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of the agency. Additionally, under section 7 of the RRA, the Board is responsible for regulating future conduct of either groups of persons or a single person. Based on this premise, a decision regarding a company's status as a covered employer under the Acts must be made based on the law, and not on the equities, as was clearly set forth in the Hearing Examiner's report.

Petitioners argue that that Board was incorrect in applying the Railroad Ventures test, but rather should have determined the status of the Herzog Transit dispatchers in

accordance with 45 U.S.C. § 231(b)(1)(i) and prior Board decisions, specifically citing Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953). The Board's initial decision did not apply the Kelm decision to Trinity's contract with Herzog Transit because the majority determined that the question in this case was not the service performed by the employees, but rather concerned the activity conducted by their employer, Herzog Transit, on behalf of Trinity. The initial Board decision determined the specific issue to be not whether individuals on the payroll of the contractor are statutory employees of a railroad under RRA sections 1(b)(1) and 1(d)(1) and RUIA sections 1(d) and 1(e), but rather was whether the contractor itself is a rail carrier employer under RRA section 1(a)(1) and RUIA section 1(a).

On reconsideration, the majority of the Board, Management Member Kever dissenting, concludes that the initial decision correctly viewed the nature of the activity conducted by Herzog as determinative of the type of analysis the Board used in reaching the initial decision as well as the holding of that decision. Dispatching is essential to operation of a railroad. A dispatcher controls train movement. No train can move until a dispatcher gives it permission to move. In addition to the reasoning set forth in the initial decision, the majority notes on reconsideration that as part of the mission of the Federal Railroad Administration (FRA) to ensure safe train operation, the FRA regulates the number of hours that a dispatching employee may work pursuant to authority set out in the hours of service laws. (See 49 U.S.C. § 21101 et seq.). The definition section of the law defines "dispatching service employee" to mean:

> . . . an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movement. 49 U.S.C. § 21101(2).

Regulations issued by the FRA emphasize the control factor present in the job of a dispatcher. More specifically, section 241.5 of those regulations defines the word dispatch in pertinent part to mean:

> (1) To perform a function that would be classified as a duty of a "dispatching service employee," as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. For example, to dispatch means, by the use of an electrical or mechanical device –
>
> (i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or
>
> (ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both . . . (49 CFR 241.5)

It is by virtue of the control that a dispatcher exerts over train movement that the dispatcher operates the train. Train dispatching includes routing and tracking train

progress, and coordinating the movement of one train with others. Rail safety depends upon many other factors, such as proper track and signal maintenance, and even the purchase of proper equipment. These activities, however necessary though, impact on train operation indirectly and may be required to be performed while trains are not running (e.g., removal and replacement of track). In contrast, dispatching concerns directing the movement of trains and engines over the railroad through the use of clearances, train orders, manipulation of signals, switches, etc. It should be noted that railroad dispatchers shoulder more responsibilities today than ever due to changes in technology, operating practices and the economy. As such, dispatching is as inextricable a part of the actual motion of trains as is the operation of a train's locomotive controls by the engineer. Further, until properly dispatched, the engineer cannot begin movement of the train.

Dispatchers control the movement of freight or passengers over rail lines. Herzog does not, itself, operate the trains, but it does direct engineers in the movement of trains. Without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers. What we are talking about here is a crucial component of the movement of freight or passengers from point A to point B. In other words, a railroad cannot fulfill its obligation to provide rail service without dispatching services.

The majority of the Board also notes on reconsideration that under common law, a common carrier is the insurer of the goods it contracts to deliver. It contracts to safely transport goods as a part of its common carrier obligation to the shipper. Moreover, the Interstate Commerce Act imposes liability on carriers for the goods they transport. Dispatching service is an indispensable component of carrier service and must be delivered as a part of carrier service. Similar to the situation where a carrier contracts with another entity to operate its trains, which results in the Board finding the contractor to be an employer, a contractor that provides the essential operating service of dispatching for an employer may be found to be an employer under the RRA and RUIA. In BCD 02-12, the Board held that a commuter authority that provided dispatching services for the Union Pacific, Amtrak, and Burlington Northern Santa Fe was a covered employer with respect to the "carrier services", i.e. dispatching, that it provided to the Union Pacific, Amtrak, and BNSF. In BCD 03-38, the Board found that a company that provided temporary operating personnel, including engineers, conductors, trainmen, and dispatchers, to a rail carrier employer was itself a rail carrier employer. In reaching its decision in BCD 03-38, the Board cited an earlier decision in BCD 03-23 that had concluded that an entity that contracts to provide rail operations on behalf of another is an employer.

The majority of the Board finds on reconsideration that dispatching services are critical to the performance of a carrier's obligation to provide rail service. Where, as in this case, the train dispatching includes trains that operate interstate, the entity dispatching trains operates as a rail carrier within the meaning of the definition of an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

## CONCLUSION

In summary, the majority of the Board finds on reconsideration that Trinity's rail line is used in interstate freight rail service. If Trinity conducted all aspects of this freight service, it would be a covered employer; if Trinity conducted none of the freight service and merely held ownership of the rail line, Trinity would not be a covered employer. The facts are that rather than contracting all aspects of the freight service together, Trinity split the leased freight activity into two parts: operation of freight locomotives is leased to four rail carriers, while dispatching of those locomotives and their trains is contracted to Herzog Transit. Under Railroad Ventures removing this aspect of rail carrier operation from the covered freight rail carriers cannot remove that portion of the operation from coverage. The majority of the Board, Management Member Kever dissenting, finds on reconsideration that Herzog Transit is a rail carrier employer under the RRA and RUIA as lessee of the train dispatching operation over the Trinity rail line. Because Herzog Transit's principal business is operation of intrastate passenger rail service, however, only the dispatching unit under the contract with Trinity is the enterprise which is considered to be the employer under the regulations of the Board. 20 CFR § 202.3(a).

Petitioners argue that the Board's decision would have unintended adverse consequences for other similarly-situated entities. However, the Board makes decisions concerning a company's status as a covered employer under the Acts based on the particular set of facts before it. In other words, the outcome of each coverage decision is determined by the unique facts relevant to the company being considered. Moreover, the means by which the Board has chosen to rule on this issue, i.e., an adjudication, limits application of the ruling to this particular case. While the interpretation of law in this decision may certainly serve as a precedent for a future case, it does not necessarily decide the outcome when these principles are applied to a future case. Rather, the Board would consider the particular facts before deciding a future case involving the same or a similar issue. Accordingly, this argument set forth by Petitioners is without merit.

Last, contained in this request for reconsideration dated April 15, 2009, and again renewed in a letter dated April 22, 2009 to the Secretary to the Board, counsel for Petitioners requested a stay of any applicable requirements to report service and compensation pending the Board's decision in the Joint Petition for Reconsideration of B.C.D. 09-02. The Board granted the requested stay in a letter dated July 28, 2009. That stay will cease to be effective on the date that this decision is issued.

Based on the above stated reasons, the majority of the Board, Management Member Kever dissenting, affirms and adopts on reconsideration its initial decision of January 20, 2009, and concludes that Herzog Transit is a covered employer only with respect to train dispatching over the rail line of Trinity Railway Express in Texas and that Trinity itself is not a covered employer to the extent the train dispatching operations conducted on Trinity's behalf is reported by Herzog Transit.

The Board notes that Herzog Transit began conducting the train dispatching operation effective January 1, 2001. When evidence is that a company met the definition of a covered railroad employer some years prior to the date of the Board's decision, service is creditable only as permitted by section 9 of the RRA and section 211.16 of the Board's regulations. Section 9 generally states that returns of service and compensation are conclusive four years after the date the return is required to be filed. Regulations of the Board require a return to be filed by the last day of February of the year following the year for which service is reported. 20 CFR 209.8. At the time the Board issued its initial decision on January 20, 2009, the 4 year limitation period under RRA section 9 had not run for service performed in calendar 2004. Accordingly, on reconsideration the majority of the Board orders that Herzog Transit file returns of service with respect to dispatching service employees beginning January 1, 2004.

The petition for reconsideration is denied.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting opinion attached)

JEROME F. KEVER
MANAGEMENT MEMBER

DISSENT

Trinity Railway Express – Dispatching
Herzog Transit Services, Inc.

Docket Item: 09-CO-0019

I dissent from the portion of the majority's decision that affirms the Board's initial determination finding dispatchers working for Herzog Transit Services to be covered under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Original signed by:

10/14/09
Date

Jerome F. Kever, Management Member

**B.C.D. 10-33** **APR 06 2010**

**EMPLOYER STATUS DETERMINATION**
**Rail-Term Corporation**

This is the determination of the Railroad Retirement Board concerning the status of Rail-Term Corporation as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) (RUIA). Rail-Term has not previously been held to be an employer under the Acts.

Information about Rail-Term was furnished by John D. Heffner, counsel for Rail-Term. Rail-Term was incorporated March 3, 2000 and began operations in mid-March 2000. It is entirely owned by Rail-Term, Inc., a Canadian corporation. Rail-Term, Inc. is owned by Robert Wheeler, Geoffrey Chambers, and Francois Prenovost. Seventy percent of Rail-Term's business is spent in providing train dispatching services and 25 percent is spent on railroad-related computer software development.

Rail-Term originally began operations in March 2000 as an intermodal terminal operations consultant for Expressway Terminal, LLC, a subsidiary of Canadian Pacific Railway in the United States. Rail-Term disbanded that operation in June 2004 and terminated those employees. Rail-Term has an affiliate established and based in Canada (Centre Rail-Control Inc.) which performs train dispatching services for seven Canadian short line and regional railroads and VIA Rail Canada, which is Canada's passenger carrier.

Rail-Term performs services for Vermont Railway (BA 2114) and four of its affiliates: Green Mountain Railway Company, Clarendon and Pittsford Railroad (B.A. 2103), Washington County Railroad, and New York & Ogdensburg Railway (BA 2272); and for Buffalo & Pittsburg Railroad, Inc . (BA 2249), and its affiliate Rochester & Southern Railroad, Inc. (BA 2247). Twenty-five percent of Rail-Term's business time is spent doing train dispatching for Vermont Railway and its affiliates and 50 percent for Buffalo & Pittsburgh and its affiliate.

Evidence in the coverage file indicates that Rail-Term entered into a Dispatching Services Agreement with Vermont Railway on February 18, 2005 and with Buffalo & Pittsburgh on March 1, 2005.

Rail-Term provides its dispatching services from its dispatching office in Rutland, Vermont. The dispatchers report to the Director of Operations of Rail-Term, who is employed by Rail-Term and is based at the Rutland office. During Rail-Term's initial operations in the United States, Rail-Term temporarily utilized some individuals employed by two of its railroad clients. As of April 28, 2007, all of the dispatchers were on the Rail-Term payroll.

The dispatchers receive their daily directions for train schedules, operations, and restrictions from Rail-Term's Director of Operations. Rail-Term's Director of Operations receives his daily directions from Rail-Term's customers' Operations Managers. Information concerning changes in train operations follows the same channel.

Rail-Term owns its dispatching system. Dispatching is not done on carrier property. While Rail-Term's carrier customers may visit Rail-Term's facilities, they have no right to inspect those facilities. Rail-Term and its customers do not use the train order method of operations. Rail-Term's computerized dispatching software maintains train movement records in accordance with Federal Railroad Administration (FRA) requirements.

Although Rail-Term does not direct the operating personnel of its carrier customers, Rail Term's dispatchers give the operating personnel authority to occupy track. Rail-Term trains its dispatchers. In response to a question that asked to what extent is any action of the dispatcher imputed to the carrier, Rail-Term responded that it is a third party service provider and is solely responsible for its actions. The FRA will sanction Rail-Term, and not the carrier, if Rail-Term is deemed responsible for a violation.

No evidence in the coverage file indicates that any railroad has a financial interest in Rail-Term or that any individual owns a controlling interest in Rail-Term and in a carrier. Similarly, the file contains no evidence that an officer or director of Rail-Term is an officer or director of a carrier.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, 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 (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Because 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. However, for the reasons explained below, we find that Rail-Term is a carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

It should be noted at the beginning of this discussion that this case does not present to the Board for the first time the question of whether an entity that provides dispatching for interstate railroad operation is a covered employer under the Acts administered by the Board. In our decision in B.C.D. 02-12, issued February 12, 2002, we held that the dispatching department of the Southern California Regional Rail Authority (SCRRA) was a covered employer. Although the evidence in that case demonstrated that the principle business of SCRRA was not rail service, the Dispatching Department was found to be performing rail-related duties. That department was thus segregated under section 202.3 of the Board's regulations and found to be a covered employer effective October 1, 2002. See also our decision on reconsideration upholding the finding that Herzog Transit Services, Incorporated is a covered employer with respect to train dispatching over the rail line of Trinity Railway Express in Texas (B.C.D. 09-53, October 28, 2009).

Train dispatching includes routing and tracking train progress and coordinating the movement of one train with others. A train dispatcher handles two basic types of traffic: trains and maintenance activities [Thomas White, Elements of Train Dispatching, Vol. 2 "Handling Trains" 14 (2003)]. Train dispatchers issue specific authority for maintenance of way activity, just as they do for trains [Id. p. 14]. Dispatching concerns directing the movement of trains and engines over the railroad through the use of clearances, train orders, manipulation of signals, switches, etc. While Rail-Term and its customers do not use the train order method of operation, Rail-Term's computerized dispatching software achieves the same goal of directing the movement of trains and engines over the track of Rail-Term's customers. Until properly dispatched, the engineer cannot begin movement of the train. Because of the control that dispatchers have over the motion of trains, dispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad's common carrier obligation.

Train dispatching is an essential element of safe train operation over a rail line. Canadian Pacific Limited, et al. – Purchase and Trackage Rights – Delaware & Hudson Railway Company, Surface Transportation Board Finance Docket No. 31700 (Sub. No. 13) December 4, 1998, (employer's transfer of train dispatchers voided due to adverse affect on rail safety). Because the safe operation of trains depends on the work of the train dispatchers, dispatchers are subject to the Hours of Service law enacted by Congress. See 49 U.S.C. § 21101 et seq. Section 21101 defines "dispatching service employee" as follows:

> . . . an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements. [49 U.S.C. § 21101(2)].

Section 21105 limits the on duty hours of a dispatching service employee [49 U.S.C. § 21105].

The Federal Railroad Administration, which is charged with the responsibility to carry out the railroad safety duties imposed by the Hours of Service law, has issued regulations that prescribe reporting and record keeping requirements with respect to the hours of service of certain railroad employees, including dispatchers [49 CFR Part 228]. In addition, FRA regulations[1] emphasize the control factor present in the job of a dispatcher. Section 241.5 of those regulations defines the word "dispatch" in pertinent part to mean:

> (1) To perform a function that would be classified as a duty of a "dispatching service employee," as that term is defined by the hours of service laws at 49 U.S.C.

[1] 49 CFR Part 241, "United States Locational Requirement for Dispatching of United States Rail Operations."

21101(2), if the function were to be performed in the United States. For example, to *dispatch* means, by the use of an electrical or mechanical device --

(i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; . . .

Traditionally, the work of dispatching has been performed by employees of individual railroads.[2] However, as is currently the case with many other businesses, some railroads have made a business decision to have dispatching done by a separate entity that specializes in that field of work. Whether the work of dispatching is done by individuals on the payroll of a railroad or by individuals on the payroll of a separate entity, the work is essentially the same: the dispatcher controls the movement of the trains. Because no railroad can fulfill its common carrier obligation unless its trains move, the work of the dispatcher is an integral part of the operation of a common carrier. Thus, because Rail-Term's dispatchers have the ultimate control over the movement of the trains of its rail carrier customers, the

[2] It is noteworthy that the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers is an AFL-CIO affiliated craft union representing employees in the nation's railroad industry who operate and dispatch trains and supply the electric power for those railroads which use electricity for train propulsion and signaling. It is also an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts (B.A. No. 8905).

Board finds that Rail-Term is itself a rail carrier within the definition of an employer under the Railroad Retirement and Railroad Unemployment Insurance Act. Service for Rail-Term is creditable beginning February 18, 2005, the date it first entered into an agreement to provide dispatching services.

As the dissent suggests, there is an alternate theory that dispatching is such an integral part of operating a railroad that it cannot be contracted out to a third party that is outside of the control of the railroad. Under this analysis Rail Term employees would be found to be employees of the railroads for which Rail Term provides dispatching services.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

It should be noted that the tests set forth under paragraphs (B) and (C), above, go beyond the test contained in paragraph (A) and could hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. Under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company,

206 F. 2d 831 (8th Cir. 1953). However, see also, Wabash Railroad Co. v. Finnegan, 67 F. Supp. 94 (E.D. Mo. 1946), a railroad retirement tax case where the court found that the nature of the services performed for a railroad by its contractors was such that the railroad could not surrender control and supervision in fact, even if it did so in words. 67 F. Supp. at 100. The dispatching services provided by Rail Term are analogous to the services provided by contractors in Wabash Railroad Co. in that the dispatching services are of a continuing nature and are so essential to the statutory duty of the rail carriers to provide rail transportation that the carriers must retain the power to direct and control the individuals who conduct the dispatching service.

The Board has applied this principle in its decision with respect to the coverage status of Rail-West, Inc. (B.C.D. 95-51). We noted in that decision that: "The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer." See Restatement (Second) of Agency, § 214. In Rail-West, we held that the individuals provided by Rail-West as crew to operate the trains of the rail division of the Port of Tillamook Bay were covered as employees of that rail division because the Port had to retain ultimate control of the performance of its service as a common carrier. In the case of Rail Term, because a railroad cannot properly discharge its duties as a common carrier without dispatching services, dispatching services fall under this same rule of agency; i.e., they are so essential to the role of common carrier by railroad that responsibility for their proper performance must be retained by the railroad.

In addition, by the nature of the work that dispatchers perform, they are integrated into the railroad's operations. Without the services of the dispatcher, the railroad's trains cannot run. The job of a dispatcher is as critical to the operation of a railroad as is that of a locomotive engineer. Because dispatching is an inextricable part of the railroad's fulfilling its common carrier obligation, we find that the

dispatchers who work for Rail Term could be considered to be employees of each railroad for which Rail Term provides dispatching services. **Cf.** B.C.D. 86-75, Genesee Valley Transportation Company, Inc.

Under either analysis, dispatchers who work for Rail Term would be considered to be covered employees under the Acts administered by this Board.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting Opinion attached)

**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 (SCRRA) 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

40849
DO

SERVICE DATE – OCTOBER 12, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35381

RAIL-TERM CORP.—PETITION FOR DECLARATORY ORDER

Decided: October 8, 2010

The Board is denying the petition of Rail-Term Corp. (RTC) for an order declaring that it is not a "rail carrier" within the definition at 49 U.S.C. § 10102(5), because issuing a declaratory order or instituting a proceeding at this time would interfere with a related proceeding before another federal agency, the Railroad Retirement Board (Retirement Board).

BACKGROUND

RTC and Related Corporations. RTC, a privately held Michigan corporation, and its Canadian corporate sibling, Centre Rail-Control Inc. (Rail-Control), are subsidiaries of a parent company, Rail-Term Inc. (Rail-Term), a Canadian corporation. RTC employs 8 people who develop computer-based dispatching software and provide dispatching services for small rail carriers in the United States.[1] RTC states that it, Rail-Control, and Rail-Term are not owned by, or under common control with, any rail carrier in the United States or Canada.

Retirement Board Ruling. The Retirement Board, a federal agency, determines coverage of employers and employees under the Railroad Retirement Act, 45 U.S.C. § 231 et seq. (Retirement Act), and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 et seq. (Insurance Act). In its recent Board Coverage Decision 10-33, the Retirement Board held that RTC is a "covered employer" under the Retirement and Insurance Acts.

As explained in the Retirement Board's decision, a "covered employer" under the Retirement Act is defined in part at 45 U.S.C. § 231(a)(1)(i) as "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" (the rail provisions of the Interstate Commerce Act, as amended by the ICC Termination Act (the Interstate Commerce Act)).[2] Under the Interstate Commerce Act, "'rail

[1] According to Rail-Term, the small rail carriers are: Vermont Railway System and its affiliates; the Buffalo & Pittsburgh Railroad; and the subsidiary railroads of short line holding company, OmniTRAX, Inc.

[2] The Insurance Act contains a substantially similar definition. The Retirement Board found that RTC does not come within an alternative definition of covered employer, at 45 U.S.C. § 231(a)(1)(ii): "any company which is directly or indirectly owned or controlled by, or under

(continued. . .)

carrier' means a person providing common carrier railroad transportation for compensation . . . [.]"[3]

This Petition. RTC states that it disagrees with, and intends to seek reconsideration of, the initial coverage decision before the Retirement Board. If RTC does not prevail in its reconsideration request, it intends to seek judicial review of the coverage ruling. Notwithstanding its intention to pursue redress before the Retirement Board, RTC nonetheless separately asks this agency to declare that RTC is not a "rail carrier" under the Interstate Commerce Act.

DISCUSSION AND CONCLUSIONS

The Board has broad discretion to issue declaratory orders to terminate a controversy or remove uncertainty. 5 U.S.C. § 554(e); 49 U.S.C. § 721. But 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.

In two other instances involving Retirement Board coverage decisions, this agency has ruled on whether an entity is a rail carrier within the meaning of the Interstate Commerce Act: H& M International Transportation, Inc.—Petition for Declaratory Order, FD 34277 (STB served Nov. 12, 2003) (H&M); and American Orient Express Railway Co.—Petition for Declaratory Order, FD 34502 (STB served Dec. 29, 2005) (Orient Express). However, as explained in both H&M and Orient Express, the Retirement Board in effect referred to this agency the issue of rail carrier status.[4] In both of those cases, the Retirement Board stayed its proceedings on reconsideration of an earlier coverage decision expressly to permit the parties to ask this agency to rule on the question of rail carrier status under the Interstate Commerce Act.

In contrast, here there has been no referral from the Retirement Board, nor has RTC indicated that it has sought reconsideration of the Retirement Board's coverage decision. Thus, it is not surprising that the Retirement Board has not stayed its processes to permit RTC to seek this agency's ruling. The Retirement Board is the federal agency charged with determining coverage under the Retirement and Insurance Acts. The Board will not address an issue already addressed by the federal Retirement Board in this case, unless and until the Retirement Board has been given the opportunity to stay its processes to permit RTC to seek this agency's views or otherwise refer the issue to this agency, or the issue is presented to a reviewing court.

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(. . . continued)
common control with, one or more employers as defined in [subsection i, quoted above], and which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property by railroad * * *."

[3] 49 U.S.C. § 10102(5).

[4] See H&M, slip op. at 1 n.2; Orient Express, slip op. at 2.

Another factor counsels in favor of deferring to the Retirement Board's processes. In its coverage decision on RTC, the Retirement Board relied in part on its earlier ruling in Trinity Railway Express—Train Dispatching—Herzog Transit Services, Retirement Board Coverage Decision 09-53, Oct. 28, 2009 (Trinity Railway), which is pending review in the United States Court of Appeals for the Seventh Circuit.[5] The court's forthcoming decision concerning Trinity Railway could affect the Retirement Board's future decision on reconsideration of the RTC coverage decision.

For these reasons, the Board will not at this time entertain this petition for a declaratory order. 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 a declaratory order is denied.

2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

[5] Herzog Transit Services v. Railroad Retirement Board, No. 09-3945 (7th Cir.). The court heard oral argument in the case on May 26, 2010.

**B.C.D. 11-14** **JAN 28 2011**

**EMPLOYER STATUS DETERMINATION – DECISION ON RECONSIDERATION**
**Rail-Term Corporation**

This is the decision on reconsideration of the Railroad Retirement Board (hereinafter the Board) of its determination dated April 6, 2010 (B.C.D. 10-33) pursuant to 20 CFR 259.3(a) concerning the status of Rail-Term Corporation (Rail-Term) as an employer under the Railroad Retirement Act (45 U.S.C. s 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. s 351 et seq.) (RUIA) (the RRA and RUIA are hereinafter collectively referred to as "the Acts").

In its decision dated April 6, 2010, a majority of the Board determined that Rail-Term is a covered employer with respect to its train dispatching employees since that operation consisted of common carriage by rail in interstate commerce due to the integral nature of train dispatching to the overall operation of movement of goods by rail. The Board affirms and adopts its initial decision dated April 6, 2010 with the following additional comments set out below.

On July 9, 2010, Rail-Term filed with the Secretary of the Board a Petition for Reconsideration of Board Coverage Determination ("B.C.D.") 10-33 pursuant to 20 C.F.R. 259.3(a). In its petition, Rail-Term requested the Board to reconsider and reverse its determination in B.C.D. 10-33 and find that Rail-Term is not a covered employer under the Acts because the dispatchers employed by Rail-Term are similar to other independent contractors not found to be covered employees in other cases. Additionally, Rail-Term requested a stay of any applicable requirements to report service and compensation pending the Board's decision in the Petition for Reconsideration of B.C.D. 10-33.

## I. PRIOR BOARD PROCEEDINGS

In rendering this decision, the Board adopts and hereby incorporates the prior Board proceedings as stated in the Board's initial decision rendered April 6, 2010. In addition to those proceedings, the following actions have occurred and are part of the record concerning the present case. After Rail-Term filed its Petition for Reconsideration, Rail-Term filed a Petition for Declaratory Relief with the Surface Transportation Board (STB) on June 3, 2010. The Petition sought a Declaratory Order by the STB that Rail-Term was not a "rail carrier" within the meaning of the I.C.C. Termination Act, 49 USC 10102(5). Subsequently, the STB declined to rule (order issued October 8, 2010) on this issue since it was pending before the Board and determined that the Board's ruling would control Rail-Term's status under the Acts. Additionally, on October 22, 2010, the United States Court of Appeals for the Seventh Circuit issued a decision in Herzog Transit Services, et al. v. U.S. Railroad Retirement Board, which was a case that also determined the status of train dispatchers. Both the Board and Rail-Term cited to the "Herzog" case in prior decisions and arguments. In denying Herzog's Petition for Review and upholding the Board's final Agency Decision, the United States Court of Appeals for the Seventh

Circuit ruled that Herzog was, insofar as it performed the dispatching function for interstate trains, a covered employer under the Acts.

## II. ARGUMENT

Initially, it should be noted that Rail-Term, in its petition for reconsideration, does not raise any new issues which were not previously adjudicated by the Board in its April 6, 2010 initial decision. Rail-Term has expanded upon its previous argument that Rail-Term is not a "rail carrier" under the Acts and that its dispatchers are not under the control of the rail carrier clients whom it serves. In the Petition for Reconsideration, Rail-Term presents its basic argument in four parts. 1) Rail-Term is not a Rail Carrier under the ICC Termination Act. 2) The Board's ruling is materially wrong because it violates the plain language of the statute. 3) The Board's reliance on selective Federal Railroad Administration regulations as a basis for jurisdiction is misplaced. 4) The Board erred by basing its decision on precedent that is either inapposite or wrongly decided while ignoring other precedent favorable to Rail-Term.

Additionally, Rail-Term then requested that the Board stay proceedings until the decision on reconsideration is reached. The Petition also included arguments that relied upon two matters that had not yet been decided: 1) an assumption that the STB would determine that Rail-Term is not a "rail carrier" and 2) an assumption that the Seventh Circuit would overturn the Board's decision that Herzog Transit's dispatchers are covered employees under the Acts. The previously discussed decisions in both of these cases render these arguments on reconsideration moot. The Board will respond to the remaining arguments of Rail-Term in its Petition for Reconsideration.

The majority of the Board rendered its April 6, 2010 decision with respect to the status of Rail-Term as an employer under the Acts by finding that the traditional work of dispatching has been performed by employees of individual railroads; however, although modern business decisions have created situations where dispatching is performed by a separate entity, the work is essentially the same. The dispatcher controls the movement of the trains and no railroad can fulfill its common carrier obligation unless its trains move; therefore, dispatching is an integral part of the operation of a common carrier. The Board found on this basis that Rail-Term is itself a rail carrier within the definition of an employer under the Acts.

Dispatchers control the movement of freight or passengers over rail lines. The Board recognizes that Rail-Term does not, itself, operate the trains, but it does direct engineers in the movement of trains. Without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers. Dispatching is a crucial component of the movement of freight or passengers from point A to point B. In other words, a railroad cannot fulfill its obligation to provide rail service without dispatching services. Similar to the situation where a carrier contracts with another entity to operate its trains, which results in the Board finding the contractor to be an employer, a contractor that provides the essential operating service of dispatching for an employer may be found to be an employer under the RRA and RUIA. In B.C.D. 02-12, the Board held that a commuter authority that provided dispatching services for the Union Pacific, Amtrak, and Burlington Northern Santa Fe was a covered employer with respect to the "carrier

services", i.e. dispatching, that it provided to the Union Pacific, Amtrak, and BNSF. In B.C.D. 03-38, the Board found that a company that provided temporary operating personnel, including engineers, conductors, trainmen, and dispatchers, to a rail carrier employer was itself a rail carrier employer. In reaching its decision in B.C.D 03-38, the Board cited an earlier decision in B.C.D. 03-23 that had concluded that an entity that contracts to provide rail operations on behalf of another is an employer.

Turning to Rail-Term's specific arguments on reconsideration, Rail-Term states that it is not a rail carrier within the meaning of the ICC Termination Act (ICCTA) in its first argument. It finds support for this argument in two STB decisions that Rail Term argues describe what the STB considers to be a "rail carrier" under an act which the STB administers.

However, this argument misses the point. In determining what constitutes a rail carrier under the RRA and RUIA, the threshold inquiry begins with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. This is because the regulatory schemes of the RRA and ICCTA are not symmetrical. Standard Office Buildings Corporation v. United States, 819 F.2d 1371, 1378 (7th Cir. (1987). By virtue of the control that it exercises over the movement of trains, Rail-Term is a rail carrier within the meaning of that term under the RRA and RUIA. To hold otherwise would allow for easy erosion of the RRA and RUIA by parsing out interstate transportation by rail to non-covered entities.

Further, the Board finds that consideration of the all the subsections of the Railroad Retirement Act's definition of "employer" at 45 USC Section 231 (a) (1) makes clear that "congress envisioned a broad retirement program for employees playing many roles within the railroad industry." (see Herzog v. pg. 18 citing USRRB v. Fritz 449 U.S. 166 (1980) which noted that the Act was intended to benefit people who pursued careers in the rail industry.)

As the Seventh Circuit further stated in Herzog:

> Our colleagues in the District of Columbia Circuit have put it, The statute has a "broad purpose" and a "protective character." Cheney R.R. Co., 50 F.3d at 1078. As the judges of the District of Columbia Circuit also have said, the legislative history supports a reading of the text that gives effect to Congress's clear intent that this benefit statute "be construed broadly." Id. at 1077-78. Secondly, as we recognized in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295, 298-99 (7th Cir. 1992), the provisions of this statutory scheme are not to be constrained by the business models common at the time of the passage of the Act. Unless and until Congress deems otherwise, they are equally applicable to today's railroad industry and the organizational relationships of today's business environment, which reflect, among other factors, increased competition and the increased frequency of intrastate commuter lines sharing trackage and other facilities with participants in the Nation's interstate railway system. It is not unusual for an entity, the activities of which generally do not involve interstate transportation, to perform a particular function that is an integral part of interstate transportation by rail and that

> therefore is subject to the Acts. The RRA may have been enacted when all functions integral to interstate transportation usually was performed by carriers or their affiliates. Today, the rail transportation industry has adopted other efficiencies. Our duty nevertheless remains the same. We must apply the statute To ensure individuals performing these integral functions to interstate Rail transportation is covered and thereby effectuate Congress's broad protective purpose. (Herzog pgs. 19 and 20).

The Court's reasoning bolsters the Board's logic in finding Rail-Term to be a covered employer. Simply put, modern developments to the railroad industry's business model were not contemplated at the time of enactment of the Acts. The Court explained that it is the duty of the Board to continue to apply the acts to ensure the inclusion of individuals performing integral rail transportation functions to be covered under the Acts. It is therefore appropriate for the Board to find Rail-Term to be covered under the Acts because its employees perform the integral rail function of dispatching services.

Next, Rail-Term argues that the Board's reliance on selective Federal Railroad Administration (FRA) regulations as a basis for jurisdiction is misplaced. Rail-Term's argument alleges that the Board is ignoring some FRA regulations while placing undue weight on others. Specifically, Rail-Term cites that the FRA regulates track safety standards, railroad equipment standards, and locomotive safety standards and that these entities that independently contract for these services have been found to be not covered under the Acts administered by the Board. The Board notes that this argument put forth by Rail-Term misses the fundamental logic behind the Board's finding. The decisions cited by Rail-Term in its footnote 8 on page 15 of its Petition all deal with maintenance, repairs, training and certification, or development of crossing signals. Although these services are integral to transportation by rail, they do not constitute transportation by rail. Through its dispatching function Rail-Term is moving trains in interstate commerce which makes it a rail carrier subject to the RRA and RUIA.

Finally, Rail-Term argues that the Board erred in its previous coverage determination by basing its decision on precedent that is either inapposite or wrongly decided while ignoring other precedent favorable to Rail-Term. Rail-Term argues that the Board should not have relied upon the Herzog case nor the SCRRA case in support of its decision. Further, Rail-Term argues that if the Board would strictly apply the test for independent contractor status as articulated in the case of Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway company, 206 F. 2d 831 (8th cir. 1953), the Board would conclude that the dispatchers employed by Rail-Term are not integrated into the contracting railroad's operations and therefore not subject to the control of the individual railroads for whom Rail-Term performs dispatching services.

This argument by Rail-Term appears to miss the point of the Board's holding in its April 6, 2010 decision. Rail-Term argues in its Petition for Reconsideration that Rail-Term's dispatchers are not integrated into the operations of the client railroads and that its dispatchers are not subject to the control of the client railroads. Rail-Term argues that they are an independent contractor with numerous rail carrier clients. Rail-Term points out that its dispatchers report to a Rail-Term Supervisor and not to the client rail carriers. Further, Rail-Term cited to a long list of administrative functions that Rail-Term itself

provides to the employee dispatchers that further separates the dispatchers from the individual rail carrier clients.

However, these assertions again miss the thrust of the Board's initial decision. Employees of Rail-Term are covered under the RRA and RUIA not by virtue of their relationship to the contracting railroads, but by virtue of their employment relation with Rail-Term, a rail carrier under the RRA and RUIA.

Even if Rail-Term were not considered a carrier under the RRA and RUIA, Kelm would not prevent its employees from being considered employees of the contracting carriers which are also covered under the RRA and RUIA. This alternate theory was suggested by the Management Member in his dissent in the initial decision and was carefully examined in that decision.

The Board finds that the dispatchers perform a service that is an inextricable part of the rail carrier's mission. The Board previously found that without the services of a dispatcher, a rail carrier's trains cannot run. The job of a dispatcher is as critical to the operation of a railroad as is that of a locomotive engineer. Because dispatching is an inextricable part of the rail carrier's fulfilling its common carrier obligation, the Board continues to find for the reasons explained in our initial decision that dispatchers who work for Rail-Term could, in the alternative to Rail-Term being found to be a covered employer under the Acts, be found to be employees of each railroad for which Rail-Term provides dispatching services. The arguments set forth by Rail-Term distinguishing and separating its dispatchers from the day to day administration of the rail carrier clients are noted, but the Board finds that this administrative separation argument does not address the central finding that the Board has determined that dispatching, in and of itself, is an inextricable part of the mission of a rail carrier.

In addition to the four main arguments in its Petition for Reconsideration, Rail-Term argues that in the past, several "senior and now retired or dead Board officials" advised Rail-term that it would not be regarded as a "covered employer." Rail-Term argues that it relied on this advice to its detriment, given the April 6, 2010 coverage decision issued by the Board. The Board reminds Rail-Term that the agency cannot be estopped from following the explicit language of the Act by misinformation provided by one of its employees. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). Even if Rail-Term had received a verbal opinion by a Board employee in the past that the individual Board employee felt that Rail-Term would not be considered a covered employee, Rail-Term cannot prevent the Board from reaching the opposite conclusion.

Rail-Term also sought a stay of the proceedings while the Board's decision on reconsideration was pending. The Board previously granted the stay with regard to coverage under the RUIA. The Board concludes that RUIA coverage will begin with the date of this decision on reconsideration.

Finally, the Board notes that it issued a decision finding Rail-Term to be a covered employer on April 6, 2010. Because upon inquiry Rail-Term commenced dispatching services in the United States in good faith believing that the Board would not find them covered under the RRA and RUIA, the Board modifies its initial decision and finds service

creditable commencing May 1, 2006, the beginning of the four year period preceding the first day of the month after the month in which the initial decision was released, see 20 CFR 211.16.

## III. CONCLUSION

In summary, Rail-Term employs dispatchers to perform contracted dispatching services to a number of rail carrier clients. The Seventh Circuit and the Board have held that train dispatching services are an inextricable part of a rail carrier fulfilling its common carrier obligation. Further, the courts agree that the Board must construe the Acts broadly to satisfy the Congressional intent of the Acts which has been found to be that employees performing integral services within the railroad industry are to be covered under the Acts. Based on the above stated reasons, the Board affirms on reconsideration its initial decision of April 6, 2010, and concludes that Rail-Term is a covered employer with respect to its train dispatching services.

On reconsideration, the Board's initial decision is affirmed.

Original signed by:

Michael S. Schwartz

V.M. Speakman, Jr.

Jerome F. Kever

**JEROME F. KEVER**
**MANAGEMENT MEMBER**
**DISSENT**

**RAIL TERM CORPORATION**

The majority's decision does not contain any additional arguments that persuade me to alter my position articulated in my dissent in the initial determination, by a majority of the Board, finding Rail Term to be a covered employer under our Acts. Further, the majority's finding that Rail Term is an employer makes moot any further analysis or need to comment on attributing Rail Term employees as employees of their rail carrier clients.

First, I must comment on a procedural aspect of this matter. Rail Term filed a petition on June 3, 2010 seeking a Declaratory Order from the Surface Transportation Board (STB) declaring Rail Term not to be a rail carrier within the meaning of 49 U.S.C. 10102(5). On July 9, 2010, Rail Term filed a request for reconsideration before this Board and noted that a petition had been filed before the STB. On October 8, 2010, the STB denied the request citing the fact that the Railroad Retirement Board did not refer this matter, or stay their decision, pending a determination by the STB as it did in H & M International Transportation, Inc. and American Orient Express Railway Co. (Rail-Term Corp. – Petition for Declaratory Order, Docket No. FD 35381 (October 8, 2010).

While this Board did not formally stay – nor did petitioner specifically request a stay, the Board did not immediately act upon the reconsideration request until it learned that the STB denied Petitioner's request. Reflecting on this, I believe we would have been better served had the Board formally stayed its proceedings in accordance with review of the STB. Certainly, it's in the best interest of the public to ensure that there is a level of consistency in interpretations of similar statutory provisions amongst federal agencies. It may be useful in future cases to foster better communication between our two agencies. This would certainly avoid the potential of competing interpretations should the STB review this matter at a future date.

The substantive arguments contained in the majority's decision, mirror those contained in the initial determination but with updated results of the 7th Circuit Herzog decision and, as mentioned above, the decision of the STB. However, as I discussed in my prior dissent, the Herzog decision does not directly bear upon this matter since Herzog, in essence, became a carrier under our Acts as an application of our prior Railroad Ventures determination. This stemmed from DART having owned the tracks upon which interstate freight travels and assuming dispatching functions through its contractor Herzog. Yet, a recent determination by the STB in the Florida Department of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Docket No. 35110 (December 15, 2010) found that merely dispatching interstate freight traffic does not necessarily subject one to being a carrier under the STB's jurisdiction. It cites a line of cases stemming from its determination in the "State of Maine" case in 1991. This will undoubtedly present some confusion in interpreting the Herzog case and applying it to other similar situations.

While the majority cites a passage from the Herzog decision quoting the words "broad purpose" and a "protective character" of the Railroad Retirement Acts, Herzog at p. 18, the Court in Herzog also reaffirmed, that "Congress intended 'carrier' to have the same meaning in both these closely related statutes and that the RRA statute therefore affords no broader coverage than the OCCTA." (See, Herzog at p. 13). Therefore, it belies common sense and precedent to find Rail Term to be a carrier where it does not own or lease tracks, own or lease rail cars or locomotives, and does not hold itself out to the public as providing interstate transportation services. For these reasons, I again must dissent.

Original signed by:

Jerome F. Kever, Management Member
1/21/11

TITLE 45 – RAILROADS

CHAPTER 9 – RETIREMENT OF RAILROAD EMPLOYEES

SUBCHAPTER IV – RAILROAD RETIREMENT ACT OF 1974

Sec. 231. Definitions

For the purposes of this subchapter –

(a) (1) The term "employer" shall include –

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49;

(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 (i) of this subdivision, and which operates any equipment or facility of performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad;

(iii) any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any employer as defined in paragraph (i) or (ii) of this subdivision;

(iv) any railroad association, traffic association, tariff bureau, demurrage bureau, weighing and inspection bureau, collection agency and any other association, bureau, agency, or organization which is controlled and maintained wholly or principally by two or more employers as defined in paragraph (i), (ii), or (iii) or this subdivision and which is engaged in the performance of services in connection with or incidental to railroad transportation; and

(v) any railway labor organization, national in scope, which has been or may be organized in accordance with the provisions of the Railway Labor Act, as amended (45 U.S.C. 151 et seq.), and its State and National legislative committees, general committees, insurance departments, and local lodges and divisions, established pursuant to the constitution or bylaws of such of such organization.

(2) Notwithstanding the provisions of subdivision (1) of this section, the term "employer" shall not include –

(i) any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where deliver is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities, and

(ii) any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel – railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter

operated by any other motive power. The Surface Transportation Board is hereby authorized and directed upon request of the Railroad Retirement Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this paragraph.

45 U.S.C. §231(d)(1)(i)(A)

(d) (1) An individual is in the service of an employer whether his service is rendered within or without the United States if--

(i) (A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation, or a method of computing the monthly compensation for such service is provided in section 3(j) [45 USCS § 231b(j)].

(2) Notwithstanding the provisions of subdivision (1) of this subsection--

(i) an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States only when he is rendering service to it in the United States;

(ii) an individual shall be deemed to be in the service of a local lodge or division of a railway-labor-organization employer not conducting the principal part of its business in the United States only if (A) all, or substantially all, the individuals constituting the membership of such local lodge or division are employees of an employer conducting the principal part of its business in the United States; or (B) the headquarters of such local lodge or division is located in the United States; and

(iii) an individual shall be deemed to be in the service of a general committee of a railway-labor-organization employer not conducting the principal part of its business in the United States only if (A) he is representing a local lodge or division described in clause (A) or (B) of paragraph (ii); or (B) all, or substantially all, the individuals represented by such general committee are employees of an employer conducting the principal part of its business in the United States; or (C) he acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer, but in such case if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of

an employer not conducting the principal part of its business in the United States, only such proportion of the remuneration for such service shall be regarded as compensation as the proportion which the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case the Board may prescribe such other formula as it finds to be equitable, and if the application of such mileage formula, or such other formula as the Board may prescribe, would result in the compensation of the individual being less than 10 per centum of his remuneration for such service no part of such remuneration shall be regarded as compensation.

(3) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof. For purposes of this subdivision, the laws applicable on August 29, 1935, in the place where the service is rendered shall be deemed to have been applicable there at all times prior to that date.

TITLE 45. RAILROADS
CHAPTER 9. RETIREMENT OF RAILROAD EMPLOYEES
RAILROAD RETIREMENT ACT OF 1974

45 USCS § 231f

§ 231f. Railroad Retirement Board

(b) Powers and duties.

(5) The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of this Act. All rules, regulations, or decisions of the Board shall require the approval of at least two members, and they shall be entered upon the records of the Board, which shall be a public record.

TITLE 45. RAILROADS
CHAPTER 9. RETIREMENT OF RAILROAD EMPLOYEES
RAILROAD RETIREMENT ACT OF 1974

45 USCS § 231g

§ 231g. Court jurisdiction

Decisions of the Board determining the rights or liabilities of any person under this Act shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act except that the time within which proceedings for the review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.

TITLE 45--RAILROADS

## CHAPTER 11--RAILROAD UNEMPLOYMENT INSURANCE

### Sec. 351. Definitions

For the purposes of this chapter, except when used in amending the provisions of other Acts--

(a) The term ``employer'' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: Provided, however, That the term ``employer'' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is hereby authorized and directed upon request of the Railroad Retirement Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term ``employer'' shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act [45 U.S.C. 151 et seq.], and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term ``employer'' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term ``carrier'' means a railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49.

TITLE 45. RAILROADS
CHAPTER 11. RAILROAD UNEMPLOYMENT INSURANCE

45 USCS § 355

§ 355. Claims for benefits

(f) Review of final decision of Board by Courts of Appeals; costs. Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any base-year employer of the claimant, or any other party aggrieved by a final decision under subsection (c) of this section, may, only, after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States circuit court of appeals [court of appeals] for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Circuit Court of Appeals [Court of Appeals] for the Seventh Circuit or in the Court of Appeals for the District of Columbia [United States Court of Appeals for the District of Columbia]. A copy of such petition, together with initial process shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. A copy of such petition also shall forthwith be served upon any other properly interested party, and such party shall be a party to the review proceeding. Within thirty days after receipt of service, or within such additional time as the court may allow, the Board shall file with the court in which such petition has been

filed the record upon which the findings and decision complained of are based, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

# 49 U.S.C. § 10102 : US Code - Section 10102: Definitions

In this part -

…..

(6) "railroad" includes -
(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
(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;

….
(9) "transportation" includes -
(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; ….

49 USC CHAPTER 211 – HOURS OF SERVICE (as amended by the Rail Safety Improvement Act of 2008 ("RSIA 2008"), Public Law 110 --

Sec. § 21101. Definitions

Sec. § 21102. Nonapplication, exemption, and alternate hours of service regime

Sec. § 21103. Limitations on duty hours of train employees

Sec. § 21104. Limitations on duty hours of signal employees

Sec. § 21105. Limitations on duty hours of dispatching service employees

Sec. § 21106. Limitations on employee sleeping quarters

Sec. § 21107. Maximum duty hours and subjects of collective bargaining

Sec. § 21108. Pilot projects

Sec. § 21109. Regulatory authority

Sec. § 21101. Definitions in this chapter –

(1) – designated terminal means the home or away-from-home terminal for the assignment of a particular crew.

(2) – dispatching service employee means an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.

(3) – employee means a dispatching service employee, a signal employee, or a train employee.

(4) – signal employee means an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems.

(5) – train employee means an individual engaged in or connected with the movement of a

train, including a hostler.

## § 213.1 Scope of part.

(a) This part prescribes minimum safety requirements for railroad track that is part of the general railroad system of transportation. The requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

(b) Subparts A through F apply to track Classes 1 through 5. Subpart G and 213.2, 213.3, and 213.15 apply to track over which trains are operated at speeds in excess of those permitted over Class 5 track.

## § 214.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties to employees involved in certain railroad inspection, maintenance and construction activities.

(b) This part prescribes minimum Federal safety standards for the railroad workplace safety subjects addressed herein. This part does not restrict a railroad or railroad contractor from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

## Subpart A—General

### § 215.1 Scope of part.

This part prescribes minimum Federal safety standards for railroad freight cars.

### § 215.3 Application.

(a) Except as provided in paragraphs (b) and (c) of this section, this part applies to each railroad freight car in service on:

(1) Standard gage track of a railroad; or

(2) Any other standard gage track while the car is being operated by, or is otherwise under the control of, a railroad.

(b) Sections 215.15 and 215.303 of this part do not apply to any car:

(1) Owned by a Canadian or Mexican Railroad; and

(2) Having a Canadian or Mexican reporting mark and car number.

(c) This part does not apply to a railroad freight car that is:

(1) Operated solely on track inside an industrial or other non-railroad installation; or

(2) Used exclusively in dedicated service as defined in §215.5(d) of this part; or

(3) Maintenance-of-way equipment (including self-propelled maintenance-of-way equipment) if that equipment is not used in revenue service and is stenciled in accordance with §215.305 of this part.

(4) Operated in a passenger train and that is inspected, tested, maintained, and operated pursuant to the requirements contained in part 238 of this chapter.

TITLE 49 — TRANSPORTATION [ 49 CFR ]

PART 216 — SPECIAL NOTICE AND EMERGENCY ORDER PROCEDURES: RAILROAD TRACK, LOCOMOTIVE AND EQUIPMENT [ 49 CFR 216 ]

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Subpart A—General

§ 216.1 Application.

(a) This part applies, according to its terms, to each railroad that uses or operates—

(1) A railroad freight car subject to part 215 of this chapter;

(2) A locomotive subject to 49 U.S.C. chapter 207 (49 U.S.C. 20701–03); or

(3) Railroad passenger equipment subject to part 238 of this chapter.

(b) This part applies, according to its terms, to each railroad owning track subject to part 213 of this chapter.

# 49 C.F.R. PART 221—REAR END MARKING DEVICE—PASSENGER, COMMUTER AND FREIGHT TRAINS
**Title 49 - Transportation**

## PART 221—REAR END MARKING DEVICE—PASSENGER, COMMUTER AND FREIGHT TRAINS

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**Authority:** 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

**Source:** 42 FR 2321, Jan. 11, 1977, unless otherwise noted.

### Subpart A—General

#### § 221.1 Scope.

This part prescribes minimum requirements governing highly visible marking devices for the trailing end of the rear car of all passenger, commuter and freight trains. So long as these minimum requirements are met, railroads may adopt additional or more stringent requirements for rear end marking devices.

**49 C.F.R. Subpart A—General**
**Title 49 - Transportation**

Share |

**Title 49: Transportation**
PART 223—SAFETY GLAZING STANDARDS—LOCOMOTIVES, PASSENGER CARS AND CABOOSES

**Subpart A—General**

**§ 223.1 Scope.**

This part provides minimum requirements for glazing materials in order to protect railroad employees and railroad passengers from injury as a result of objects striking the windows of locomotives, caboose and passenger cars.

**49 C.F.R. PART 224—REFLECTORIZATION OF RAIL FREIGHT ROLLING STOCK**
**Title 49 - Transportation|**

# PART 224—REFLECTORIZATION OF RAIL FREIGHT ROLLING STOCK

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## Subpart A—General

(a) The purpose of this part is to reduce highway-rail grade crossing accidents and deaths, injuries, and property damage resulting from those accidents, by enhancing the conspicuity of rail freight rolling stock so as to increase its detectability by motor vehicle operators at night and under conditions of poor visibility.

(b) In order to achieve cost-effective mitigation of collision risk at highway-rail grade crossings, this part establishes the duties of freight rolling stock owners (including those who manage maintenance of freight rolling stock, supply freight rolling stock for transportation, or offer freight rolling stock in transportation) and railroads to progressively apply retroreflective material to freight rolling stock, and to periodically inspect and maintain that material. Freight rolling stock owners, however, are under no duty to install, clean or otherwise maintain, or repair reflective material except as specified in this part.

(c) This part establishes a schedule for the application of retroreflective material to rail freight rolling stock and prescribes standards for the application, inspection, and maintenance of retroreflective material to rail freight rolling stock for the purpose of enhancing its detectability at highway-rail grade crossings. This part does not restrict a freight rolling stock owner or railroad from applying retroreflective material to freight rolling stock for other purposes if not inconsistent with the recognizable pattern required by this part.

**49 C.F.R. PART 229—RAILROAD LOCOMOTIVE SAFETY STANDARDS**
**Title 49 - Transportation**

# PART 229—RAILROAD LOCOMOTIVE SAFETY STANDARDS

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## Subpart A—General

### § 229.1 Scope.

This part prescribes minimum Federal safety standards for all locomotives except those propelled by steam power.

**49 C.F.R. PART 230—STEAM LOCOMOTIVE INSPECTION AND MAINTENANCE STANDARDS**
**Title 49 - Transportation**

# PART 230—STEAM LOCOMOTIVE INSPECTION AND MAINTENANCE STANDARDS

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## Subpart A—General

### § 230.1 Purpose and scope.

This part prescribes minimum Federal safety standards for all steam-propelled locomotives operated on railroads to which this part applies. This part does not

restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

## 49 C.F.R. PART 233—SIGNAL SYSTEMS REPORTING REQUIREMENTS
**Title 49 - Transportation**

## PART 233—SIGNAL SYSTEMS REPORTING REQUIREMENTS

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### § 233.1 Scope.

This part prescribed reporting requirements with respect to methods of train operation, block signal systems, interlockings, traffic control systems, automatic train stop, train control, and cab signal systems, or other similar appliances, methods, and systems.

**49 C.F.R. PART 234—GRADE CROSSING SIGNAL SYSTEM SAFETY**
**Title 49 - Transportation**

# PART 234—GRADE CROSSING SIGNAL SYSTEM SAFETY

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## Subpart A—General

### § 234.1 Scope.

This part imposes minimum maintenance, inspection, and testing standards for highway-rail grade crossing warning systems. This part also prescribes standards for the reporting of failures of such systems and prescribes minimum actions railroads must take when such warning systems malfunction. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

# 49 C.F.R. PART 235—INSTRUCTIONS GOVERNING APPLICATIONS FOR APPROVAL OF A DISCONTINUANCE OR MATERIAL MODIFICATION OF A SIGNAL SYSTEM OR RELIEF FROM THE REQUIREMENTS OF PART 236

**Title 49 - Transportation**

## PART 235—INSTRUCTIONS GOVERNING APPLICATIONS FOR APPROVAL OF A DISCONTINUANCE OR MATERIAL MODIFICATION OF A SIGNAL SYSTEM OR RELIEF FROM THE REQUIREMENTS OF PART 236

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### § 235.1 Scope.

This part prescribes application for approval to discontinue or materially modify block signal systems, interlockings, traffic control systems, automatic train stop, train control, or cab signal systems, or other similar appliances, devices, methods, or systems, and provides for relief from part 236 of this title.

**49 CFR 236.0 - Applicability, minimum requirements, and penalties.**

Code of Federal Regulations - Title 49: Transportation

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TITLE 49 - TRANSPORTATION

SUBTITLE B - OTHER REGULATIONS RELATING TO TRANSPORTATION

CHAPTER II - FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 236 - RULES, STANDARDS, AND INSTRUCTIONS GOVERNING THE INSTALLATION, INSPECTION, MAINTENANCE, AND REPAIR OF SIGNAL AND TRAIN CONTROL SYSTEMS, DEVICES, AND APPLIANCES

236.0 - Applicability, minimum requirements, and penalties.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads.

(b) This part does not apply to (1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or (2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(c) Where a passenger train is operated at a speed of 60 or more miles per hour, or a freight train is operated at a speed of 50 or more miles per hour, a block signal system complying with the provisions of this part shall be installed or a manual block system shall be placed permanently in effect which shall conform to the following conditions: (1) A passenger train shall not be admitted to a block occupied by another train except under flag protection; (2) No train shall be admitted to a block occupied by a passenger train except under flag protection; (3) No train shall be admitted to a block occupied by an opposing train except under flag protection; and (4) A freight train, including a work train, may be authorized to follow a freight train, including a work train, into a block but the following train must proceed prepared to stop within one-half the range of vision but not

exceeding 20 miles per hour.

(d) Where any train is operated at a speed of 80 or more miles per hour, an automatic cab signal, automatic train stop or automatic train control system complying with the provisions of this part shall be installed.

(e) Nothing in this section authorizes the discontinuance of a block signal system, interlocking, traffic control system, automatic train stop, train control, or cab signal system without approval of the Federal Railroad Administration.

(f) Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $550 and not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $27,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See appendix A to this part for a statement of agency civil penalty policy.

(g) A person may also be subject to criminal penalties for knowingly and wilfully making a false entry in a record or report required to be made under this part, filing a false record or report, or violating any of the provisions of 49 U.S.C. 21311.

(h) The requirements of subpart H of this part apply to safety-critical processor-based signal and train control systems, including subsystems and components thereof, developed under the terms and conditions of that subpart.

**RECORD NO. 11-1093**

**ORAL ARGUMENT SCHEDULED FOR OCTOBER 24, 2011**

In The

# United States Court of Appeals

For The District of Columbia Circuit

## RAIL-TERM CORP.,

***Petitioner*,**

**v.**

## RAILROAD RETIREMENT BOARD,

***Respondent*.**

**ON APPEAL FROM THE RAILROAD RETIREMENT BOARD**

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# FINAL REPLY BRIEF OF PETITIONER

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**ORAL ARGUMENT SCHEDULED ON OCTOBER 24, 2011**

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |

**REPLY BRIEF OF PETITIONER-APPELLANT**
**RAIL-TERM CORP.**

I.

STATEMENT OF FACTS

In the Statement of Facts included with its brief, the Railroad Retirement Board ("RRB" or "the Board") quoted from a letter dated September 7, 2006, from Rail-Term Corp.'s[1] Executive Vice President Francois Prenovost stating that he had contacted the Board in 2004 "for information on how to join the RRB." J.A. 10. The Board asserted that "there is no evidence in the record that in the period from Rail-Term's initial contact with the Board in 2004 to Mr. Wolfe's letter of August 14, 2006, that any attorney or other representative from Rail-Term contacted [any office of the Board] for any sort of formal declaration or confirmation of the company's [status as a rail carrier.]" RRB Brief at 5.

[1] Hereafter "Rail-Term"

The RRB mischaracterized Rail-Term's efforts to obtain a status determination under the applicable statutes when Rail-Term contacted the RRB. In that regard, Rail-Term asks the members of this Court to think of how they would have proceeded as business people, not as lawyers or judges, when confronted with a similar issue.

In response to the RRB's version of the facts, Mr. Prenovost has advised his counsel that in 2004 he planned to hire five people and that he inquired of the first Board agent with whom he spoke if Rail-Term could, in his words, "sign up" [i.e. become subject to the Board's jurisdiction under the Acts]. The Board's agent advised that was not likely but in response to Mr. Prenovost's insistence, he recommended that Mr. Prenovost speak to an in-house specialist. Upon further inquiry, the in-house specialist "told me to forget it, as I [Rail-Term] did not meet the basic requirements." That specialist never suggested that Rail-Term make a formal request as it was clear to the RRB agent and specialist that the company would not be able to be covered under the Acts.

At that point Mr. Prenovost concluded that Rail-Term would need to go to "plan B" and set up a 401K plan that would be sufficiently competitive to enable the company to attract qualified employees. Alternatively, Rail-Term would hire people off the street and train them from scratch at great cost.

Before pursuing the non-RRB business model, Mr. Prenovost asked the company's lawyers for a legal opinion as he wanted to insure that counsel for the company's reading of the Act tracked that of the Board's specialist. The company counsel's statutory analysis reached the same conclusion as that given by the Board's specialist. J.A. 10-11.

Rail-Term needed to act quickly inasmuch as time was of the essence with respect to potential customers requesting service. As a reasonable business person, Mr. Prenovost rationally concluded there was no reason to go through the expense and time[2] associated with attempting to establish that the Board's specialist was wrong.

## II.

## SUMMARY OF ARGUMENT

This judicial review proceeding involves a basic issue of statutory interpretation: whether Rail-Term, a non-railroad company which is not a "rail carrier," does not own or operate any trains or railroad equipment, and does not hold itself out to the general public as a common carrier is a "rail carrier" and hence a "covered employer" subject to jurisdiction under the Railroad Retirement

[2] Rail-Term has already expended over $175,000 in legal fees and other expenses dealing with this issue. J.A. 82.

Act ("RRA") and the Railroad Unemployment Insurance Act ("RUIA").[3] The Board's decision at issue is not entitled to deference because it contradicts the plain language of the statute. Furthermore, the Board ignored the substantial evidence submitted by Rail-Term describing the nature of its business and operations including its relationship with its railroad customers in finding coverage under these laws. The Board's decision contains numerous errors of law including incorrect interpretations of the I.C.C. Termination Act ("ICCTA") administered by the Surface Transportation Board ("STB"). Finally, the Board's decision fails to explain why it departed from longstanding agency and court precedent in determining that Rail-Term is subject to its jurisdiction.

## III.

## ARGUMENT

### A.

### THE BOARD'S DECISION IS NOT ENTITLED TO DEFERENCE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE

This proceeding involves a basic issue of statutory interpretation: whether Rail-Term, a non-railroad company which is not a "rail carrier," does not own or operate any trains or railroad equipment, and does not hold itself out to the general public as a common carrier but provides contractual dispatching services for

[3] 45 U.S.C. § 231(a)(1)(i) and 45 U.S.C. §§ 351(a) and (b), respectively. Hereafter cited as "the Acts."

railroad customers, is a "rail carrier" and hence a "covered employer" under section 1(a)(1) of the RRA, 45 U.S.C. § 231(a)(1)(i) and section 1(a) and (b) of the RUIA, 45 U.S.C. §§ 351(a) and (b). The Board would have this Court believe that its decision is entitled to deference under the two part analysis articulated in *Chevron U.S.A. v. National Res. Def. Council*, 467 U.S. 837, 842-3, 104 S. Ct. 2778, 2781-2 (1984) (hereafter cited as *Chevron*). The Board argued that its decision meets the first test because the RRB's interpretation is based on the statutory language and Congressional intent as expressed in the legislative history. Hedging its bets, the Board asserted further that if the Court should find ambiguity in the statutory language it could still accept the Board's ruling as a permissible interpretation under *Chevron* given that the RRB alluded to selective portions of the legislative history of the Acts in reaching its determination.

Rail Term vehemently disputes the Board's assertion that its decision is entitled to deference under *Chevron*. Any statutory analysis necessarily begins with the plain language of the statute. *Dean v. United States*, __ U.S.__, 129 S. Ct. 1849, 1853, 2009 LEXIS 3300 (2009).

The RRA states simply that the term "employer" shall include

(1) "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board… or

(2) any 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." 45 U.S.C. §§ 351a and b.

The Board has conceded that Rail-Term is not "an employer" under the second part of this statutory test. Initial Decision at 3; J.A. at 33. As to the first part of the statutory test, the Board's decision is not entitled to deference because it disregards the plain language of the statute. Nowhere does the statute or the pertinent regulations regard an entity that performs railroad-like services as "a covered employer." Rail-Term obviously does not qualify under these statutory standards because it is not a "carrier by railroad" or a "rail carrier." It does not furnish rail service to anyone, does not own any rail lines or equipment, does not employ any one capable of operating trains, does not operate any trains under contract to others or for its own account, and has never sought, let alone, obtained any authority from the STB to provide rail service.[4]

In its initial brief Rail-Term cited law in this Court holding that words will be given their common dictionary meaning.[5] Rail-Term then cited two common

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[4] In fact it sought a declaratory ruling from the STB that it was not a rail carrier subject to that agency's jurisdiction. *Rail-Term Corp.-Petition for Declaratory Order*, FD 35381, STB served October 12, 2010 (the STB declined to grant that relief because it was reluctant to interfere with a related proceeding before another federal agency, the Railroad Retirement Board (Retirement Board) and noting that another case presenting a similar issue was on appeal to the United States Court of Appeals for the Seventh Circuit.

[5] *See, e.g.*, *Day v. Veneman*, 315 F.3d 297 (D.C. Cir. 2003) and *Ass'n of Communs. Enters. v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

dictionary definitions of the word "railroad" to show that an entity that does not own any rail lines, facilities, or railroad property or equipment of any kind or provide rail service or operate trains of any sort could not be considered a "carrier by railroad," "a rail carrier," or a "railroad." Rail-Term Initial Brief at 18-19. As with many of Rail-Term's arguments, the Board offered no response.

Where, as here, Congress has directly addressed the question at issue that should be the end of the matter. It is for the court as well as the agency to give effect to the unambiguously expressed intent of Congress. *Chevron*, *supra*. Moreover, under the law of this Circuit agency rulings interpreting statutes of other agencies such as the ICCTA are not entitled to deference under *Chevron*. *See*, *Johnson v. United States R.R. Retirement Bd.*, 969 F.2d 1082, 1088-89 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1842 (1992) (holding that the Board's interpretation of the relationship between the RRA and the Social Security Act is not entitled to deference). Accordingly, where the Board's analysis requires the interpretation of another agency's statute such as the ICCTA and terms such as "rail carrier," "carrier by railroad," and "railroad" as defined there, this Court must review the RRB's decisions *de novo*. The RRB's interpretation is not entitled to deference for the simple reason that it ignores the clear statutory language.

Perhaps fearful that its "language of the statute" argument won't stand up on appeal, the Board devoted roughly six pages of its substantive 26 page argument to

a long dissertation as to why its interpretation of the statute is "permissible." Central to this argument was a discussion of the legislative history of the current RRA and previous versions of the law.

While the Board repeatedly claimed that Congress envisioned the Railroad Retirement system as "a broad retirement program for employees playing many roles within the railroad industry," the term "employer" cited in those statutes hinged on the existence of an entity that was either "any carrier" or a "carrier by railroad." RRB brief at 16-18. The fallacy of the Board's argument was that it did not and could not cite to any language stating that a non-railroad entity providing services to the railroad industry was either a "rail carrier" or a "carrier by rail" or for that matter an "employer" for RRA purposes. Moreover, the authority it cited for the proposition that the RRA intended to bring within coverage of the Acts "substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States" consisted of a book on the history of railroad retirement legislation, the testimony of a railroad labor witness at a legislative hearing, and legislative history not relevant to the Board's interpretation of the statutory language. RRB brief at 16-18. The best

the Board could do to support its position was to cite to several cases[6] that are either irrelevant to or easily distinguishable from the facts in the instant proceeding.

B.

THE BOARD'S DECISION DOES NOT REFLECT THE SUBSTANTIAL EVIDENCE SUBMITTED BY RAIL-TERM

In support of its position that it is not a "rail carrier," "carrier by railroad," or a "railroad," Rail-Term submitted detailed evidence about the services it provides to its railroad customers. These documents included Rail-Term's correspondence with the Board and agreements between Rail-Term and two of its railroad customers. This evidence described the company's history, business lines, operations, and key personnel. It explained in detail the reporting relationships between Rail-Term and its employees, between Rail-Term and its carrier customers, and between Rail-Term's dispatching employees and the employees of its carrier customers. J.A. 10-11, 14-18, 23-26, 27-30, 99-101, 106-133. This evidence demonstrated clearly that Rail-Term employees are not subject to the control, supervision, and direction of its customers as to the manner of performance of Rail-Term's work. J.A.11, 24-26, 28-30, 99-101, 106-133. Thus

[6] *Standard Office Building Corporation v. United States*, 819 F.2d 1371 (7th Cir. 1987); *Herzog Transit Services v. United States Railroad Retirement Board*, 624 F.3d 467 (7th Cir. 2010); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); and *Livingston Rebuild Center, Inc. v. Railroad Retirement Board*, 970 F.2d 295 (7th Cir. 1992).

Rail-Term does not meet the requirement of subsection (A) of section 1(d)(1) of the RRA. Furthermore, the evidence demonstrated that Rail-Term is a contractor engaged in an independent trade or business and therefore outside the scope of the Board's coverage under the key precedent normally applied by the Board articulated in *Kelm v. Chicago, St. P., M. & O. Ry. Co.*, 206 F.2d 831 (8th Cir. 1953). J.A.99-101, 106-133. Accordingly, Rail-Term does not satisfy the requirements of subsections (B) and (C) of section 1(d)(1) of the RRA.

Instead of analyzing that evidence to determine whether Rail-Term met the *Kelm* test as an independent contractor, the Board in decisions and again in its brief curtly dismissed Rail-Term's evidence and arguments. It repeatedly rejected Rail-Term's position observing that train dispatching is such an "inextricable part" of the actual motion of trains and therefore an "inextricable part" of fulfilling a railroad's common carrier obligation that it need not apply the *Kelm* analysis. In observing that dispatching covers two basic types of railroad functions namely train operations and maintenance activities, the Board noted as justification for its coverage that train operations are extensively regulated by the Federal Railroad Administration ("FRA") under the Hours of Service Act and the agency's regulations. Yet it failed to explain in its decisions and again in its brief how it could find contractors performing various types of maintenance activities outside its coverage despite the fact that they are also heavily regulated by the FRA while

holding Rail-Term subject to its jurisdiction. These other activities such as track, signal, and equipment maintenance are just as essential to a railroad's ability to perform its common carrier obligations as are dispatching services.

The Board also made light of the fact that the railroad industry's General Code of Operating Rules ("GCOR") permit railroads to operate trains at lower speeds without the services of a dispatcher. Rail-Term's brief had inadvertently and incorrectly represented the top speed at which trains could be operated without a dispatcher as 10 mph. Rail-Term Initial Brief at 21. Subsequent to the preparation of the initial brief, Rail-Term advised undersigned counsel that the top speed for dispatcher-less operation was 20 mph resulting in a much greater number of train operations. The Board's response was to note that "enough of Rail-Term's clients **do** [the Board's emphasis] operate at speeds requiring the services of a dispatcher and that 75% of Rail-Term's revenue is derived from providing dispatcher service. RRB Brief at 24-25. Presumably, the point of the Board's response was once again to show how "integral" dispatching is to the fulfillment of a railroad's common carrier obligations that it cannot be contracted out to a third party outside the jurisdiction of the Board and the Acts. However, the premise behind the Board's conclusion is flawed. The Court should take judicial notice of the fact that a substantial, perhaps overwhelming, number of short line railroad operations are conducted no more frequently than once per day and at speeds of

less than 20 mph so dispatching is not always necessary for a short line railroad to meet its common carrier obligations. All of Rail-Term's existing customers inside the United States are either short line or regional railroads.[7]

Finally, the most egregious example of the flawed "substantial evidence" upon which the Board purported to reach its decision was the Board's response to Rail-Term's assertion that it is not a rail carrier because it does not provide any services, transportation or otherwise, to the public at large. The Board noted:

> "…according to its website…Rail-Term lists at least eleven rail carrier clients in the United States for whom it provides rail dispatching services. Respondent Board maintains that this is substantial evidence that Rail-term is offering its services to the public at large. That fact, when combined with the fact that Rail-Term's dispatchers have the ultimate control over the movement of the trains of its rail carrier customers, led to the Board's decision that Rail-Term was itself a rail carrier within the definition of an employer under the [Acts]." RRB brief at 26-7.

But the test for determining whether an entity is a "rail carrier" and therefore "an employer" for Railroad Retirement coverage purposes is under the ICCTA administered by the STB. It is "a person providing common carrier *railroad transportation* [emphasis supplied] for compensation…offering service to the general public." *DesertXpress Enterprises, LLC-Petition for Declaratory Order*, FD 34914, STB served June 27, 2007. The fact that Rail-Term may be holding

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[7] A regional railroad is larger than a short line typically either having more than $20 million in annual railroad operating revenues (a class II railroad under STB regulations at 49 C.F.R. Part 1201, 1-1, General Instructions, classification of carriers) or serving several states.

itself out to provide dispatching service to "railroads" does not make it a common carrier or a rail carrier. By the Board's reasoning any vendor offering service to railroad clients including professionals such as lawyers, accountants, and consulting engineers could be considered common carriers and therefore subject to the Acts under the Board's rationale! The fact is that times change but the Board has remained a New Deal era institution frozen in time.

C.

THE BOARD'S DECISION CONTAINS
SUBSTANTIAL ERRORS OF LAW

Contrary to its representations, the Board's decisions contain several errors of law. Aside from its characterization of Rail-Term as a "common carrier" because it holds out its dispatching services to the railroad industry, the Board erred in its decisions and again in its brief in its pronouncements on the state of ICCTA law. According to the Board,

> "...the threshold inquiry may begin with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. The regulatory schemes of the Acts and the ICCTA are not symmetrical… [w]hile the Board affords significant weight to ICC and/or STB decisions when making employer determinations, the RRB and STB are two entirely different entities with different purposes." RRB Brief at 27.

Yet the 7th Circuit in the *Herzog Transit* case so heavily relied upon by the Board stated,

> We turn first to the phrase "carrier by railroad." The RRA provides no definition of this term. Notably, however, the [ICCTA] which

> delineates the jurisdiction of the [STB] defines "rail carrier" as a (sic) "a person providing *common carrier* railroad *transportation* for compensation." 49 U.S.C. § 10102 (emphasis supplied). The RRB seemed to assume, and we see no reason to disagree, that Congress intended "carrier" to have the same meaning in both of these closely related statutes and that the RRA statute therefore affords no broader coverage than the ICCTA. 624 F.3d 467 at 473.

So in fact it is the ICCTA and the STB's decisions thereunder that define what is a "rail carrier" or a "carrier by railroad" upon which the term "employer" hinges for the purpose of the Acts.

Rail-Term cited in its brief this Circuit's fairly recent decision in *Brotherhood of Railroad Signalmen Et Al v. Surface Transportation Board*, 638 F.3d 807, 2011 U.S. App. LEXIS 6300 (slip op. 2011), upholding an STB decision approving the purchase of an actively operated rail line by the Massachusetts Department of Transportation. That case not only contained a discussion of common carriage but it noted that the acquiring entity could assume responsibility for maintaining and *dispatching* freight operations under certain circumstances without becoming a "rail carrier" subject to the STB's acquisition jurisdiction. *See* discussion at 638 F.3d at 813-815.[8] Instead of responding to Rail-Term's citation of this case, the Board summarily replied without explanation "it is the position of

[8] The STB itself has held that an entity can acquire railroad assets and selected responsibilities as to those assets such as track maintenance and dispatching of freight and passenger service without jeopardizing its noncommon carrier status. *Md. Transit Admin.—Pet'n for Declaratory Order*, FD 34975, STB served Sept. 19, 2008, slip op. at 4-5.

Respondent that this case is distinguishable and not relevant to the issue before this Court." RRB Brief at 29.

D.

THE BOARD'S DECISION FAILS TO PROVIDE A RATIONAL EXPLANATION FOR ITS DEPARTURE FROM PRECEDENT

In its petition for reconsideration before the Board and again in its initial brief before this Court, Rail-Term cited a series of Board decisions[9] where the agency ruled that parties furnishing services to the railroad industry were independent contractors under the *Kelm* criteria. In each case cited the Board carefully construed the facts under the three part statutory test discussed in *Kelm*. The Board ruled that the entity was not a "covered employer" under the Acts where it found that the contractor was not under the control, supervision, or direction of the service recipient as to the outcome of the work and/or the manner of performance of the work or was found to be engaged in an independent trade or business.

The failure of the Board to analyze the Rail-Term facts under *Kelm* was not just a substantial error of law. It represented an unexplained and incomprehensible departure from long established precedent. As this Circuit has held,

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[9] B.C.D. 95-78, *Tryban Rail Service, Inc.*; B.C.D. 93-07, *Gulf Rail Car Company*; B.C.D. 06-21, *JA d/b/a The "A" Team*; B.C.D. 03-60, *Rail-Scale, Inc. and Southwest Signal Engineering Company*; and B.C.D. 95-40, *Transportation Certification Services, Inc.*

> an agency must follow its precedents or provide a reasoned explanation for its departure. *National Fed'n of Fed. Emples., Local 951 v. FLRA*, 412 F.3d 119, 120, 124 (D.C. Cir. 2005)…. "An agency acts arbitrarily and capriciously if it 'reverses its position in the face of a precedent it has not persuasively distinguished,' citing *Louisiana Pub. Serv. Comm'n v. FERC*, 337 U.S. App. D.C. 312, 184 F.3d 892, 897 (D.C. Cir. 1999) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) ('An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis….' (internal quotation omitted)), and if it fails to 'consider…all the relevant factors" in reaching its decision.' *New York Cross Harbor Railroad v. Surface Transportation Board*, 374 F.3d 1177, 1181 (D.C. Cir. 2004).

Here the Board cited and even discussed *Kelm* in both its decisions and in its brief. But it concluded by stating "the central question to be answered is whether Rail-Term's employees are subject to the control of Rail-Term's carrier clients." However, the evidence submitted conclusively demonstrates that Rail-Term's employees are not subject to control by its carrier clients but only by Rail-Term management. J.A. 23-26, 28-30, 99-101, 106-133. Nevertheless, as the Board itself admits in its brief "under an Eighth Circuit decision [*Kelm*] consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business." RRB Brief at 30. Because of the nature of the services performed for the railroad customers, the Board concluded that those

railroads could not surrender control and supervision over Rail-Term employees even if that was directly contrary to the facts.

Accordingly, and without explanation, the Board has refused to apply long standing precedent including agency rulings and the *Kelm* case as well as the provisions of section 1(d)(1) of the RRA in determining Rail-Term's status under the Acts.

## IV.

## AMERICAN TRAIN DISPATCHERS' BRIEF

On August 3, 2011, the American Train Dispatchers Association ("ATDA"), a labor union representing individuals who dispatch trains for most of the nation's major railroads, filed a brief in support of the Board as *amicus curiae*.[10] Rail-Term filed a reply urging its rejection on the grounds that the ATDA was not a party to proceedings before the Board and it represents dispatchers who work for railroad common carriers. Without waiting for the Court to act on its Motion, ATDA submitted a brief urging the Court to uphold the Board's decision.

As Rail-Term notes in its Initial Brief, there is an old saying that there are frequently two reasons for every action taken: the real one and the one that sounds good. While RRB's brief obliquely suggested an extra statutory policy justification for its decision, ATDA stated it clearly:

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[10] On September 2, 2011, the Court granted ATDA's request to file an *amicus* brief.

> "Attempts by Rail-Term and other contractors to perform these services outside the purview of the [Acts] …threatens the viability of the RRA and RUIA system which covers all other employees in the country who perform transportation services for the nation's railroads and which Congress decided was essential to the nation's economy." ATDA brief at 1.

In short ATDA seeks to intervene in these proceedings because it is concerned that contractors such as Rail-Term could "erode" the employee base from which the Railroad Retirement system draws revenue to fund its benefits.

The gist of ATDA's argument is two-fold. First, train dispatching is such a "safety-sensitive" responsibility that it cannot be contracted out to entities such as Rail-Term. Second, the statute must be applied to ensure that individuals performing these integral functions [i.e., train dispatching] to interstate transportation are covered and thus effectuate what ADTA characterized as Congress's "broad protective purpose."

However, ATDA's arguments fail under closer scrutiny. While train operations and therefore dispatching are indeed "safety-sensitive" so are other activities such as train, signal, and equipment maintenance that are commonly contracted out by even the largest railroads to entities that are not subject to the Acts.[11]

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[11] B.C.D. 95-78, *Tryban Rail Service, Inc.*; B.C.D. 93-07, *Gulf Rail Car Company*; B.C.D. 06-21, *JA d/b/a The "A" Team*; B.C.D. 03-60, *Rail-Scale, Inc. and Southwest Signal Engineering Company*; and B.C.D. 95-40, *Transportation Certification Services, Inc.*, all cited and discussed in the portion of the brief

Regarding ATDA's second argument, ATDA does not represent the interests of Rail-Term's few (five to seven) employees handling dispatching duties for client railroads out of its Rutland, VT, office. By its own admission, ATDA generally represents unionized dispatchers employed by the larger railroads known as "class I carriers." Rail-Term's dispatchers are not unionized and do not work for rail carriers of any size. In fact, Rail-Term does not seek to employ individuals who work for or have worked for rail carriers. So, contrary to ATDA's assertions, Rail-Term's dispatching business does not, in fact, entail taking people out of the Railroad Retirement system or jeopardizing its financial integrity. Any suggestion that a contractor such as Rail Term, which employs only a few dispatchers, could erode the financial integrity of the Railroad Retirement system is ludicrous.

In support of its argument that the Board has followed its case law in holding Rail-Term subject to the Acts, ATDA cited several Board and court decisions.[12] However, ATDA's analysis is legally incorrect. It does not even cite

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responding to the Board. Rail-Term notes that *Transportation Certification Services, Inc.*, involving a firm that trained personnel for such heavily regulated "safety-sensitive functions" as locomotive engineers and trainmen, the Board analyzed respondent Transportation Certification Services, Inc., under the three part *Kelm* test and concluded that respondent did not meet the "control test" inasmuch as it performed services for many different clients.

[12] Notably, B.C.D. 02-12, *Southern California Regional Rail Authority Segregation of Dispatching Department* (2002); B.C.D. 09-53, *Employer Status Determination Decision on Reconsideration, Trinity Railway Express-Train Dispatching Herzog Transit Services, Incorporated*, slip op., October 28, 2009,

or discuss the two pertinent provisions of the RRA which define whether an entity performing service for the railroad industry is subject to the Board's jurisdiction. To be subject to the RRA, an employer shall be

> (1) "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board… or
>
> (2) any 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." 45 U.S.C. §§ 351a and b.

ATDA can not refute Rail-Term's argument that the plain meaning of the statute governs and that Rail-Term is not a railroad or a rail carrier under the statute because it does not hold out to the public to conduct common carrier railroad operations.

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*aff'd sub. nom. Herzog Transit Services v. United States Railroad Retirement Board*, 624 F.3d 467 (7th Cir. 2010); *Wabash Railroad v. Finnegan*, 67 F. Supp. 94 (E.D. Mo. 1946); B.C.D. 95-51, *Rail-West, Inc.* (1995); and BCD 03-38, *Rail-Temps, Inc.* (May 6, 2003). These cases are easily distinguishable insofar as Rail-Term does not perform railroad operations. While *Rail-Temps* involved a firm providing temporary employees to rail carriers such as engineers, trainmen, conductors, and dispatchers, the Board on reconsideration deemed the company to be an employment agency and therefore not an entity subject to its jurisdiction. ATDA even appeared to cite to the Board's administrative rulings in the *Rail-Term* proceedings now under review as precedent for its own arguments. *See*, ATDA brief at 4, 8-10, and 12.

With respect to ATDA's argument that *Kelm*[13] "is not implicated in the Board's alternate finding here," ATDA fails to address Rail-Term's argument that the Acts do not apply to either it or its employees as its workers are not subject to the control of the service recipient.

In summary, ATDA's arguments wholly miss the mark because Rail-Term does not meet the basic statutory test for an "employer" as it is not a rail carrier under the plain meaning of the words in the statute. It does not own or operate any trains or railroad equipment and does not hold itself out to conduct common carrier operations in the remotest sense of the word. Moreover, Rail Term is clearly an independent contractor under *Kelm* as its employees are not subject to control by its railroad customers or their employees.

## V.

## CONCLUSION

The Board erred in holding that Rail-Term is a "carrier by railroad" and "a covered employer" under the Acts and alternatively finding Rail-Term's employees are "employees" of its rail carrier clients for coverage purposes. This ruling violates the plain language of the statute, Congressional intent, and the

[13] Cited at page 10 of this brief. ATDA states "the issue in this case is not whether employees of Rail-Term are covered by the Acts 'by virtue of their relationship to the contracting railroads, but by virtue of their employment relation with Rail-Term, a rail carrier under the RRA and RUIA'" citing to the Board's decision on reconsideration dated January 28, 2011.

common meaning of the term "railroad." This court has the power to review *de novo* and overturn the Board's decision because it seeks to interpret the statute of a sister agency, the Surface Transportation Board. Accordingly, this Court should reverse the Board's Reconsideration Decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of September, 2011, I caused this Final Reply Brief of Petitioner to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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**RECORD NO. 11-1093**

**ORAL ARGUMENT SCHEDULED FOR OCTOBER 24, 2011**

In The

# United States Court of Appeals

For The District of Columbia Circuit

## RAIL-TERM CORP.,

***Petitioner*,**

**v.**

## RAILROAD RETIREMENT BOARD,

***Respondent*.**

**ON APPEAL FROM THE RAILROAD RETIREMENT BOARD**

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# FINAL REPLY BRIEF OF PETITIONER

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**ORAL ARGUMENT SCHEDULED ON OCTOBER 24, 2011**

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

| | | |
|---|---|---|
| Rail-Term Corp., | ) | |
| Petitioner | ) | |
| v. | ) | No.11-1093 |
| United States Railroad | ) | |
| Retirement Board, Respondent | ) | |

**REPLY BRIEF OF PETITIONER-APPELLANT**
**RAIL-TERM CORP.**

I.

STATEMENT OF FACTS

In the Statement of Facts included with its brief, the Railroad Retirement Board ("RRB" or "the Board") quoted from a letter dated September 7, 2006, from Rail-Term Corp.'s[1] Executive Vice President Francois Prenovost stating that he had contacted the Board in 2004 "for information on how to join the RRB." J.A. 10. The Board asserted that "there is no evidence in the record that in the period from Rail-Term's initial contact with the Board in 2004 to Mr. Wolfe's letter of August 14, 2006, that any attorney or other representative from Rail-Term contacted [any office of the Board] for any sort of formal declaration or confirmation of the company's [status as a rail carrier.]" RRB Brief at 5.

[1] Hereafter "Rail-Term"

The RRB mischaracterized Rail-Term's efforts to obtain a status determination under the applicable statutes when Rail-Term contacted the RRB. In that regard, Rail-Term asks the members of this Court to think of how they would have proceeded as business people, not as lawyers or judges, when confronted with a similar issue.

In response to the RRB's version of the facts, Mr. Prenovost has advised his counsel that in 2004 he planned to hire five people and that he inquired of the first Board agent with whom he spoke if Rail-Term could, in his words, "sign up" [i.e. become subject to the Board's jurisdiction under the Acts]. The Board's agent advised that was not likely but in response to Mr. Prenovost's insistence, he recommended that Mr. Prenovost speak to an in-house specialist. Upon further inquiry, the in-house specialist "told me to forget it, as I [Rail-Term] did not meet the basic requirements." That specialist never suggested that Rail-Term make a formal request as it was clear to the RRB agent and specialist that the company would not be able to be covered under the Acts.

At that point Mr. Prenovost concluded that Rail-Term would need to go to "plan B" and set up a 401K plan that would be sufficiently competitive to enable the company to attract qualified employees. Alternatively, Rail-Term would hire people off the street and train them from scratch at great cost.

Before pursuing the non-RRB business model, Mr. Prenovost asked the company's lawyers for a legal opinion as he wanted to insure that counsel for the company's reading of the Act tracked that of the Board's specialist. The company counsel's statutory analysis reached the same conclusion as that given by the Board's specialist. J.A. 10-11.

Rail-Term needed to act quickly inasmuch as time was of the essence with respect to potential customers requesting service. As a reasonable business person, Mr. Prenovost rationally concluded there was no reason to go through the expense and time[2] associated with attempting to establish that the Board's specialist was wrong.

## II.

## SUMMARY OF ARGUMENT

This judicial review proceeding involves a basic issue of statutory interpretation: whether Rail-Term, a non-railroad company which is not a "rail carrier," does not own or operate any trains or railroad equipment, and does not hold itself out to the general public as a common carrier is a "rail carrier" and hence a "covered employer" subject to jurisdiction under the Railroad Retirement

[2] Rail-Term has already expended over $175,000 in legal fees and other expenses dealing with this issue. J.A. 82.

Act ("RRA") and the Railroad Unemployment Insurance Act ("RUIA").[3] The Board's decision at issue is not entitled to deference because it contradicts the plain language of the statute. Furthermore, the Board ignored the substantial evidence submitted by Rail-Term describing the nature of its business and operations including its relationship with its railroad customers in finding coverage under these laws. The Board's decision contains numerous errors of law including incorrect interpretations of the I.C.C. Termination Act ("ICCTA") administered by the Surface Transportation Board ("STB"). Finally, the Board's decision fails to explain why it departed from longstanding agency and court precedent in determining that Rail-Term is subject to its jurisdiction.

## III.

## ARGUMENT

### A.

### THE BOARD'S DECISION IS NOT ENTITLED TO DEFERENCE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE

This proceeding involves a basic issue of statutory interpretation: whether Rail-Term, a non-railroad company which is not a "rail carrier," does not own or operate any trains or railroad equipment, and does not hold itself out to the general public as a common carrier but provides contractual dispatching services for

[3] 45 U.S.C. § 231(a)(1)(i) and 45 U.S.C. §§ 351(a) and (b), respectively. Hereafter cited as "the Acts."

railroad customers, is a "rail carrier" and hence a "covered employer" under section 1(a)(1) of the RRA, 45 U.S.C. § 231(a)(1)(i) and section 1(a) and (b) of the RUIA, 45 U.S.C. §§ 351(a) and (b). The Board would have this Court believe that its decision is entitled to deference under the two part analysis articulated in *Chevron U.S.A. v. National Res. Def. Council*, 467 U.S. 837, 842-3, 104 S. Ct. 2778, 2781-2 (1984) (hereafter cited as *Chevron*). The Board argued that its decision meets the first test because the RRB's interpretation is based on the statutory language and Congressional intent as expressed in the legislative history. Hedging its bets, the Board asserted further that if the Court should find ambiguity in the statutory language it could still accept the Board's ruling as a permissible interpretation under *Chevron* given that the RRB alluded to selective portions of the legislative history of the Acts in reaching its determination.

Rail Term vehemently disputes the Board's assertion that its decision is entitled to deference under *Chevron*. Any statutory analysis necessarily begins with the plain language of the statute. *Dean v. United States*, __ U.S.__, 129 S. Ct. 1849, 1853, 2009 LEXIS 3300 (2009).

The RRA states simply that the term "employer" shall include

(1) "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board… or

(2) any 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." 45 U.S.C. §§ 351a and b.

The Board has conceded that Rail-Term is not "an employer" under the second part of this statutory test. Initial Decision at 3; J.A. at 33. As to the first part of the statutory test, the Board's decision is not entitled to deference because it disregards the plain language of the statute. Nowhere does the statute or the pertinent regulations regard an entity that performs railroad-like services as "a covered employer." Rail-Term obviously does not qualify under these statutory standards because it is not a "carrier by railroad" or a "rail carrier." It does not furnish rail service to anyone, does not own any rail lines or equipment, does not employ any one capable of operating trains, does not operate any trains under contract to others or for its own account, and has never sought, let alone, obtained any authority from the STB to provide rail service.[4]

In its initial brief Rail-Term cited law in this Court holding that words will be given their common dictionary meaning.[5] Rail-Term then cited two common

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[4] In fact it sought a declaratory ruling from the STB that it was not a rail carrier subject to that agency's jurisdiction. *Rail-Term Corp.-Petition for Declaratory Order*, FD 35381, STB served October 12, 2010 (the STB declined to grant that relief because it was reluctant to interfere with a related proceeding before another federal agency, the Railroad Retirement Board (Retirement Board) and noting that another case presenting a similar issue was on appeal to the United States Court of Appeals for the Seventh Circuit.

[5] *See, e.g.*, *Day v. Veneman*, 315 F.3d 297 (D.C. Cir. 2003) and *Ass'n of Communs. Enters. v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

dictionary definitions of the word "railroad" to show that an entity that does not own any rail lines, facilities, or railroad property or equipment of any kind or provide rail service or operate trains of any sort could not be considered a "carrier by railroad," "a rail carrier," or a "railroad." Rail-Term Initial Brief at 18-19. As with many of Rail-Term's arguments, the Board offered no response.

Where, as here, Congress has directly addressed the question at issue that should be the end of the matter. It is for the court as well as the agency to give effect to the unambiguously expressed intent of Congress. *Chevron*, *supra*. Moreover, under the law of this Circuit agency rulings interpreting statutes of other agencies such as the ICCTA are not entitled to deference under *Chevron*. *See*, *Johnson v. United States R.R. Retirement Bd.*, 969 F.2d 1082, 1088-89 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1842 (1992) (holding that the Board's interpretation of the relationship between the RRA and the Social Security Act is not entitled to deference). Accordingly, where the Board's analysis requires the interpretation of another agency's statute such as the ICCTA and terms such as "rail carrier," "carrier by railroad," and "railroad" as defined there, this Court must review the RRB's decisions *de novo*. The RRB's interpretation is not entitled to deference for the simple reason that it ignores the clear statutory language.

Perhaps fearful that its "language of the statute" argument won't stand up on appeal, the Board devoted roughly six pages of its substantive 26 page argument to

a long dissertation as to why its interpretation of the statute is "permissible." Central to this argument was a discussion of the legislative history of the current RRA and previous versions of the law.

While the Board repeatedly claimed that Congress envisioned the Railroad Retirement system as "a broad retirement program for employees playing many roles within the railroad industry," the term "employer" cited in those statutes hinged on the existence of an entity that was either "any carrier" or a "carrier by railroad." RRB brief at 16-18. The fallacy of the Board's argument was that it did not and could not cite to any language stating that a non-railroad entity providing services to the railroad industry was either a "rail carrier" or a "carrier by rail" or for that matter an "employer" for RRA purposes. Moreover, the authority it cited for the proposition that the RRA intended to bring within coverage of the Acts "substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States" consisted of a book on the history of railroad retirement legislation, the testimony of a railroad labor witness at a legislative hearing, and legislative history not relevant to the Board's interpretation of the statutory language. RRB brief at 16-18. The best

the Board could do to support its position was to cite to several cases[6] that are either irrelevant to or easily distinguishable from the facts in the instant proceeding.

B.

THE BOARD'S DECISION DOES NOT REFLECT THE SUBSTANTIAL EVIDENCE SUBMITTED BY RAIL-TERM

In support of its position that it is not a "rail carrier," "carrier by railroad," or a "railroad," Rail-Term submitted detailed evidence about the services it provides to its railroad customers. These documents included Rail-Term's correspondence with the Board and agreements between Rail-Term and two of its railroad customers. This evidence described the company's history, business lines, operations, and key personnel. It explained in detail the reporting relationships between Rail-Term and its employees, between Rail-Term and its carrier customers, and between Rail-Term's dispatching employees and the employees of its carrier customers. J.A. 10-11, 14-18, 23-26, 27-30, 99-101, 106-133. This evidence demonstrated clearly that Rail-Term employees are not subject to the control, supervision, and direction of its customers as to the manner of performance of Rail-Term's work. J.A.11, 24-26, 28-30, 99-101, 106-133. Thus

[6] *Standard Office Building Corporation v. United States*, 819 F.2d 1371 (7th Cir. 1987); *Herzog Transit Services v. United States Railroad Retirement Board*, 624 F.3d 467 (7th Cir. 2010); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); and *Livingston Rebuild Center, Inc. v. Railroad Retirement Board*, 970 F.2d 295 (7th Cir. 1992).

Rail-Term does not meet the requirement of subsection (A) of section 1(d)(1) of the RRA. Furthermore, the evidence demonstrated that Rail-Term is a contractor engaged in an independent trade or business and therefore outside the scope of the Board's coverage under the key precedent normally applied by the Board articulated in *Kelm v. Chicago, St. P., M. & O. Ry. Co.*, 206 F.2d 831 (8th Cir. 1953). J.A.99-101, 106-133. Accordingly, Rail-Term does not satisfy the requirements of subsections (B) and (C) of section 1(d)(1) of the RRA.

Instead of analyzing that evidence to determine whether Rail-Term met the *Kelm* test as an independent contractor, the Board in decisions and again in its brief curtly dismissed Rail-Term's evidence and arguments. It repeatedly rejected Rail-Term's position observing that train dispatching is such an "inextricable part" of the actual motion of trains and therefore an "inextricable part" of fulfilling a railroad's common carrier obligation that it need not apply the *Kelm* analysis. In observing that dispatching covers two basic types of railroad functions namely train operations and maintenance activities, the Board noted as justification for its coverage that train operations are extensively regulated by the Federal Railroad Administration ("FRA") under the Hours of Service Act and the agency's regulations. Yet it failed to explain in its decisions and again in its brief how it could find contractors performing various types of maintenance activities outside its coverage despite the fact that they are also heavily regulated by the FRA while

holding Rail-Term subject to its jurisdiction. These other activities such as track, signal, and equipment maintenance are just as essential to a railroad's ability to perform its common carrier obligations as are dispatching services.

The Board also made light of the fact that the railroad industry's General Code of Operating Rules ("GCOR") permit railroads to operate trains at lower speeds without the services of a dispatcher. Rail-Term's brief had inadvertently and incorrectly represented the top speed at which trains could be operated without a dispatcher as 10 mph. Rail-Term Initial Brief at 21. Subsequent to the preparation of the initial brief, Rail-Term advised undersigned counsel that the top speed for dispatcher-less operation was 20 mph resulting in a much greater number of train operations. The Board's response was to note that "enough of Rail-Term's clients **do** [the Board's emphasis] operate at speeds requiring the services of a dispatcher and that 75% of Rail-Term's revenue is derived from providing dispatcher service. RRB Brief at 24-25. Presumably, the point of the Board's response was once again to show how "integral" dispatching is to the fulfillment of a railroad's common carrier obligations that it cannot be contracted out to a third party outside the jurisdiction of the Board and the Acts. However, the premise behind the Board's conclusion is flawed. The Court should take judicial notice of the fact that a substantial, perhaps overwhelming, number of short line railroad operations are conducted no more frequently than once per day and at speeds of

less than 20 mph so dispatching is not always necessary for a short line railroad to meet its common carrier obligations. All of Rail-Term's existing customers inside the United States are either short line or regional railroads.[7]

Finally, the most egregious example of the flawed "substantial evidence" upon which the Board purported to reach its decision was the Board's response to Rail-Term's assertion that it is not a rail carrier because it does not provide any services, transportation or otherwise, to the public at large. The Board noted:

> "…according to its website…Rail-Term lists at least eleven rail carrier clients in the United States for whom it provides rail dispatching services. Respondent Board maintains that this is substantial evidence that Rail-term is offering its services to the public at large. That fact, when combined with the fact that Rail-Term's dispatchers have the ultimate control over the movement of the trains of its rail carrier customers, led to the Board's decision that Rail-Term was itself a rail carrier within the definition of an employer under the [Acts]." RRB brief at 26-7.

But the test for determining whether an entity is a "rail carrier" and therefore "an employer" for Railroad Retirement coverage purposes is under the ICCTA administered by the STB. It is "a person providing common carrier *railroad transportation* [emphasis supplied] for compensation…offering service to the general public." *DesertXpress Enterprises, LLC-Petition for Declaratory Order*, FD 34914, STB served June 27, 2007. The fact that Rail-Term may be holding

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[7] A regional railroad is larger than a short line typically either having more than $20 million in annual railroad operating revenues (a class II railroad under STB regulations at 49 C.F.R. Part 1201, 1-1, General Instructions, classification of carriers) or serving several states.

itself out to provide dispatching service to "railroads" does not make it a common carrier or a rail carrier. By the Board's reasoning any vendor offering service to railroad clients including professionals such as lawyers, accountants, and consulting engineers could be considered common carriers and therefore subject to the Acts under the Board's rationale! The fact is that times change but the Board has remained a New Deal era institution frozen in time.

C.

THE BOARD'S DECISION CONTAINS
SUBSTANTIAL ERRORS OF LAW

Contrary to its representations, the Board's decisions contain several errors of law. Aside from its characterization of Rail-Term as a "common carrier" because it holds out its dispatching services to the railroad industry, the Board erred in its decisions and again in its brief in its pronouncements on the state of ICCTA law. According to the Board,

> "...the threshold inquiry may begin with what constitutes a rail carrier subject to STB jurisdiction, but it does not end there. The regulatory schemes of the Acts and the ICCTA are not symmetrical… [w]hile the Board affords significant weight to ICC and/or STB decisions when making employer determinations, the RRB and STB are two entirely different entities with different purposes." RRB Brief at 27.

Yet the 7th Circuit in the *Herzog Transit* case so heavily relied upon by the Board stated,

> We turn first to the phrase "carrier by railroad." The RRA provides no definition of this term. Notably, however, the [ICCTA] which

> delineates the jurisdiction of the [STB] defines "rail carrier" as a (sic) "a person providing *common carrier* railroad *transportation* for compensation." 49 U.S.C. § 10102 (emphasis supplied). The RRB seemed to assume, and we see no reason to disagree, that Congress intended "carrier" to have the same meaning in both of these closely related statutes and that the RRA statute therefore affords no broader coverage than the ICCTA. 624 F.3d 467 at 473.

So in fact it is the ICCTA and the STB's decisions thereunder that define what is a "rail carrier" or a "carrier by railroad" upon which the term "employer" hinges for the purpose of the Acts.

Rail-Term cited in its brief this Circuit's fairly recent decision in *Brotherhood of Railroad Signalmen Et Al v. Surface Transportation Board*, 638 F.3d 807, 2011 U.S. App. LEXIS 6300 (slip op. 2011), upholding an STB decision approving the purchase of an actively operated rail line by the Massachusetts Department of Transportation. That case not only contained a discussion of common carriage but it noted that the acquiring entity could assume responsibility for maintaining and *dispatching* freight operations under certain circumstances without becoming a "rail carrier" subject to the STB's acquisition jurisdiction. *See* discussion at 638 F.3d at 813-815.[8] Instead of responding to Rail-Term's citation of this case, the Board summarily replied without explanation "it is the position of

[8] The STB itself has held that an entity can acquire railroad assets and selected responsibilities as to those assets such as track maintenance and dispatching of freight and passenger service without jeopardizing its noncommon carrier status. *Md. Transit Admin.—Pet'n for Declaratory Order*, FD 34975, STB served Sept. 19, 2008, slip op. at 4-5.

Respondent that this case is distinguishable and not relevant to the issue before this Court." RRB Brief at 29.

D.

THE BOARD'S DECISION FAILS TO PROVIDE A RATIONAL EXPLANATION FOR ITS DEPARTURE FROM PRECEDENT

In its petition for reconsideration before the Board and again in its initial brief before this Court, Rail-Term cited a series of Board decisions[9] where the agency ruled that parties furnishing services to the railroad industry were independent contractors under the *Kelm* criteria. In each case cited the Board carefully construed the facts under the three part statutory test discussed in *Kelm*. The Board ruled that the entity was not a "covered employer" under the Acts where it found that the contractor was not under the control, supervision, or direction of the service recipient as to the outcome of the work and/or the manner of performance of the work or was found to be engaged in an independent trade or business.

The failure of the Board to analyze the Rail-Term facts under *Kelm* was not just a substantial error of law. It represented an unexplained and incomprehensible departure from long established precedent. As this Circuit has held,

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[9] B.C.D. 95-78, *Tryban Rail Service, Inc.*; B.C.D. 93-07, *Gulf Rail Car Company*; B.C.D. 06-21, *JA d/b/a The "A" Team*; B.C.D. 03-60, *Rail-Scale, Inc. and Southwest Signal Engineering Company*; and B.C.D. 95-40, *Transportation Certification Services, Inc.*

> an agency must follow its precedents or provide a reasoned explanation for its departure. *National Fed'n of Fed. Emples., Local 951 v. FLRA*, 412 F.3d 119, 120, 124 (D.C. Cir. 2005)…. "An agency acts arbitrarily and capriciously if it 'reverses its position in the face of a precedent it has not persuasively distinguished,' citing *Louisiana Pub. Serv. Comm'n v. FERC*, 337 U.S. App. D.C. 312, 184 F.3d 892, 897 (D.C. Cir. 1999) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) ('An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis….' (internal quotation omitted)), and if it fails to 'consider…all the relevant factors" in reaching its decision.' *New York Cross Harbor Railroad v. Surface Transportation Board*, 374 F.3d 1177, 1181 (D.C. Cir. 2004).

Here the Board cited and even discussed *Kelm* in both its decisions and in its brief. But it concluded by stating "the central question to be answered is whether Rail-Term's employees are subject to the control of Rail-Term's carrier clients." However, the evidence submitted conclusively demonstrates that Rail-Term's employees are not subject to control by its carrier clients but only by Rail-Term management. J.A. 23-26, 28-30, 99-101, 106-133. Nevertheless, as the Board itself admits in its brief "under an Eighth Circuit decision [*Kelm*] consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business." RRB Brief at 30. Because of the nature of the services performed for the railroad customers, the Board concluded that those

railroads could not surrender control and supervision over Rail-Term employees even if that was directly contrary to the facts.

Accordingly, and without explanation, the Board has refused to apply long standing precedent including agency rulings and the *Kelm* case as well as the provisions of section 1(d)(1) of the RRA in determining Rail-Term's status under the Acts.

## IV.

## AMERICAN TRAIN DISPATCHERS' BRIEF

On August 3, 2011, the American Train Dispatchers Association ("ATDA"), a labor union representing individuals who dispatch trains for most of the nation's major railroads, filed a brief in support of the Board as *amicus curiae*.[10] Rail-Term filed a reply urging its rejection on the grounds that the ATDA was not a party to proceedings before the Board and it represents dispatchers who work for railroad common carriers. Without waiting for the Court to act on its Motion, ATDA submitted a brief urging the Court to uphold the Board's decision.

As Rail-Term notes in its Initial Brief, there is an old saying that there are frequently two reasons for every action taken: the real one and the one that sounds good. While RRB's brief obliquely suggested an extra statutory policy justification for its decision, ATDA stated it clearly:

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[10] On September 2, 2011, the Court granted ATDA's request to file an *amicus* brief.

> "Attempts by Rail-Term and other contractors to perform these services outside the purview of the [Acts] …threatens the viability of the RRA and RUIA system which covers all other employees in the country who perform transportation services for the nation's railroads and which Congress decided was essential to the nation's economy." ATDA brief at 1.

In short ATDA seeks to intervene in these proceedings because it is concerned that contractors such as Rail-Term could "erode" the employee base from which the Railroad Retirement system draws revenue to fund its benefits.

The gist of ATDA's argument is two-fold. First, train dispatching is such a "safety-sensitive" responsibility that it cannot be contracted out to entities such as Rail-Term. Second, the statute must be applied to ensure that individuals performing these integral functions [i.e., train dispatching] to interstate transportation are covered and thus effectuate what ADTA characterized as Congress's "broad protective purpose."

However, ATDA's arguments fail under closer scrutiny. While train operations and therefore dispatching are indeed "safety-sensitive" so are other activities such as train, signal, and equipment maintenance that are commonly contracted out by even the largest railroads to entities that are not subject to the Acts.[11]

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[11] B.C.D. 95-78, *Tryban Rail Service, Inc.*; B.C.D. 93-07, *Gulf Rail Car Company*; B.C.D. 06-21, *JA d/b/a The "A" Team*; B.C.D. 03-60, *Rail-Scale, Inc. and Southwest Signal Engineering Company*; and B.C.D. 95-40, *Transportation Certification Services, Inc.*, all cited and discussed in the portion of the brief

Regarding ATDA's second argument, ATDA does not represent the interests of Rail-Term's few (five to seven) employees handling dispatching duties for client railroads out of its Rutland, VT, office. By its own admission, ATDA generally represents unionized dispatchers employed by the larger railroads known as "class I carriers." Rail-Term's dispatchers are not unionized and do not work for rail carriers of any size. In fact, Rail-Term does not seek to employ individuals who work for or have worked for rail carriers. So, contrary to ATDA's assertions, Rail-Term's dispatching business does not, in fact, entail taking people out of the Railroad Retirement system or jeopardizing its financial integrity. Any suggestion that a contractor such as Rail Term, which employs only a few dispatchers, could erode the financial integrity of the Railroad Retirement system is ludicrous.

In support of its argument that the Board has followed its case law in holding Rail-Term subject to the Acts, ATDA cited several Board and court decisions.[12] However, ATDA's analysis is legally incorrect. It does not even cite

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responding to the Board. Rail-Term notes that *Transportation Certification Services, Inc.*, involving a firm that trained personnel for such heavily regulated "safety-sensitive functions" as locomotive engineers and trainmen, the Board analyzed respondent Transportation Certification Services, Inc., under the three part *Kelm* test and concluded that respondent did not meet the "control test" inasmuch as it performed services for many different clients.

[12] Notably, B.C.D. 02-12, *Southern California Regional Rail Authority Segregation of Dispatching Department* (2002); B.C.D. 09-53, *Employer Status Determination Decision on Reconsideration, Trinity Railway Express-Train Dispatching Herzog Transit Services, Incorporated*, slip op., October 28, 2009,

or discuss the two pertinent provisions of the RRA which define whether an entity performing service for the railroad industry is subject to the Board's jurisdiction. To be subject to the RRA, an employer shall be

> (1) "any carrier by railroad subject to the jurisdiction of the Surface Transportation Board… or
>
> (2) any 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." 45 U.S.C. §§ 351a and b.

ATDA can not refute Rail-Term's argument that the plain meaning of the statute governs and that Rail-Term is not a railroad or a rail carrier under the statute because it does not hold out to the public to conduct common carrier railroad operations.

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*aff'd sub. nom. Herzog Transit Services v. United States Railroad Retirement Board*, 624 F.3d 467 (7th Cir. 2010); *Wabash Railroad v. Finnegan*, 67 F. Supp. 94 (E.D. Mo. 1946); B.C.D. 95-51, *Rail-West, Inc.* (1995); and BCD 03-38, *Rail-Temps, Inc.* (May 6, 2003). These cases are easily distinguishable insofar as Rail-Term does not perform railroad operations. While *Rail-Temps* involved a firm providing temporary employees to rail carriers such as engineers, trainmen, conductors, and dispatchers, the Board on reconsideration deemed the company to be an employment agency and therefore not an entity subject to its jurisdiction. ATDA even appeared to cite to the Board's administrative rulings in the *Rail-Term* proceedings now under review as precedent for its own arguments. *See*, ATDA brief at 4, 8-10, and 12.

With respect to ATDA's argument that *Kelm*[13] "is not implicated in the Board's alternate finding here," ATDA fails to address Rail-Term's argument that the Acts do not apply to either it or its employees as its workers are not subject to the control of the service recipient.

In summary, ATDA's arguments wholly miss the mark because Rail-Term does not meet the basic statutory test for an "employer" as it is not a rail carrier under the plain meaning of the words in the statute. It does not own or operate any trains or railroad equipment and does not hold itself out to conduct common carrier operations in the remotest sense of the word. Moreover, Rail Term is clearly an independent contractor under *Kelm* as its employees are not subject to control by its railroad customers or their employees.

## V.

## CONCLUSION

The Board erred in holding that Rail-Term is a "carrier by railroad" and "a covered employer" under the Acts and alternatively finding Rail-Term's employees are "employees" of its rail carrier clients for coverage purposes. This ruling violates the plain language of the statute, Congressional intent, and the

[13] Cited at page 10 of this brief. ATDA states "the issue in this case is not whether employees of Rail-Term are covered by the Acts 'by virtue of their relationship to the contracting railroads, but by virtue of their employment relation with Rail-Term, a rail carrier under the RRA and RUIA'" citing to the Board's decision on reconsideration dated January 28, 2011.

common meaning of the term "railroad." This court has the power to review *de novo* and overturn the Board's decision because it seeks to interpret the statute of a sister agency, the Surface Transportation Board. Accordingly, this Court should reverse the Board's Reconsideration Decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: September 16, 2011

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of September, 2011, I caused this Final Reply Brief of Petitioner to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 16th day of September, 2011, I caused the required number of bound copies of the Final Reply Brief of Petitioner to be hand-filed and two bound copies of the same to be served, via UPS Ground Transportation, to Counsel for Respondent and Counsel for Movant-Amicus Curiae at the above-listed address.

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