

BEFORE THE SURFACE TRANSPORTATION BOARD

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Docket No. FD 35582

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RAIL-TERM CORP. – PETITION FOR DECLARATORY ORDER

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COMMENTS OF  
NATIONAL RAILROAD CONSTRUCTION AND  
MAINTENANCE ASSOCIATION, INC.

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I. Introduction and Summary

The National Railroad Construction and Maintenance Association, Inc. (“NRC”) submits these Comments in accordance with the Board’s Decision served February 12, 2014 allowing public comment on its November 19, 2013 Decision finding Rail-Term Corp. to be a rail carrier (hereinafter “*Rail-Term Decision*”).<sup>1</sup>

Prior to the Board’s *Rail-Term Decision*, for more than the past 100 years, under Board and judicial precedents, a company was considered to be a “rail carrier” under the Interstate Commerce Act (“ICA”), as amended, 49 U.S.C. § 10102(5), and other federal statutes only if it both (1) held itself out to the public to provide rail transportation service and (2) had the physical ability to do so. This case should have been simple. The Board found that Rail-Term Corp. did not hold itself out to provide common carrier rail transportation for hire and did not possess tracks, equipment or any ability to do so. Thus, under the plain language of Section 10102(5) and settled precedent, Rail-Term is clearly not a rail carrier. Yet, a then-majority of the Board found that it could “impute” a holding out by Rail-Term as a common carrier because the function that Rail-Term contracted to perform for railroads, dispatching, was an “integral” or “required” part of those railroads’ common carrier service. The then-Board Majority did not address the language of Section 10102(5) or the second necessary element for rail carrier status, that Rail-Term must also have the physical ability to provide transportation service.

The then-Board Majority found support for its ability to impute a holding out by Rail-Term in misinterpreted pre-WWII Supreme Court decisions. As the NRC will discuss in these Comments, and as noted in the Dissent of Vice Chairman Begeman, the

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<sup>1</sup> The NRC filed an appeal on February 24, 2014 from the February 12, 2014 Decision of the Director of Office of Proceedings to the extent it limited the participation of NRC and others to amicus.

Board Decision is contrary to the definition of rail carrier in Section 10102(5) and the very judicial and agency precedents upon which the then-Board Majority relied. None of those decisions imputed a holding out as a common carrier to a company, like Rail-Term, which does not provide services to shippers and does not have the ability to provide rail transportation service.

There is also no support in the record in this case that Rail-Term's rail carrier customers offer the dispatching function they contract from Rail-Term as part of the services they hold out to shippers. But, even if Rail-Term's dispatching services could be considered as embraced within such services, that alone would still not make Rail-Term a rail carrier under the ICA and Board precedent.

Finally, the Board's proffered policy reasons for finding Rail-Term to be a rail carrier are not logical. According to the Board, more employees will enjoy the benefits under the Railroad Retirement Act and Railroad Unemployment Insurance Act ("RUIA") and Rail-Term will enjoy the benefits of federal preemption from Board jurisdiction. Decision at 13. However, the *Rail-Term Decision* is actually at odds with congressional intent as expressed in the Railroad Retirement Act and RUIA. In those Acts, Congress determined that companies that contract to provide transportation related services to rail carriers are not themselves rail carriers, no matter how essential or integral the service to rail operations, unless the company is also "owned or controlled by, or under common control with, one or more . . ." rail carriers. 45 U.C.S. § 231 (a)(ii). Rail-Term is not an affiliate of any rail carrier. This policy justification is not without irony since this case landed at the Surface Transportation Board precisely because the Railroad Retirement Board was stymied in finding that Rail-Term was a covered employer under the language

of the Railroad Retirement Act. As for the preemption justification, there is no evidence that Rail-Term needs Board preemption. In any event, these proffered policy justifications do not trump the requirements of Section 10102(5) and controlling precedent governing the definition of rail carrier.

NRC is not filing these Comments simply because it believes the Board committed material legal error. The problem with the *Rail-Term Decision* is that it has created legal uncertainty where there had been none as to when a company can be considered a rail carrier under the ICA and other federal laws that use the ICA's definition. The Board found that Rail-Term was a rail carrier because its rail carrier customers supposedly could not move freight without the contracted dispatching services. But, that can be said of other products, functions and services that rail carriers routinely purchase from independent vendors and contractors. For example, NRC members provide track and signal construction and maintenance services to rail carriers. A rail carrier cannot move trains over defective track. A rail carrier cannot move trains in some circumstances if the signal system is not functioning. A rail carrier cannot move trains if a railroad bridge is out. A rail carrier cannot move trains if its locomotives have not been serviced. A rail carrier cannot provide transportation service unless it has serviceable freight cars. Is the Board really suggesting that all of these services and others are imputedly held out to the public as part of rail carriers' common carrier service because they are integral or necessary to the ability of the rail carrier to conduct rail operations? Or, is the Board saying there is something unique about dispatching services, even though these other services are also essential to rail operations and the Board has in the

past described dispatching as ministerial?<sup>2</sup> To ask these kinds of questions is to show the problems with the *Rail-Term Decision*. Uncertainty has needlessly been created because the Decision is untethered from the plain language of the statute, settled precedent, and the facts on the record.

NRC respectfully submits that the Board should reconsider, grant Rail-Term's Petition for Reconsideration, and find that Rail-Term is not a rail carrier.

II. The Board's Finding Is Contrary to the Plain Meaning of 49 U.S.C. § 10102(5)

A. Statutory Prerequisites to be a Rail Carrier

The statutory definition of "rail carrier" is "a person providing common carrier railroad transportation for compensation . . . ." 49 U.S.C. § 10102(5). The Board, and before it the Interstate Commerce Commission ("ICC"), and courts have repeatedly and consistently held that, under this statutory definition, a person is not a rail carrier unless at least two prerequisites are present: (1) the person must hold itself out to the public to provide rail transportation and (2) have the ability actually to provide rail transportation. For example, in *James Riffin—Petition for Declaratory Order*, STB Finance Docket No. 35245, 2009 STB LEXIS 428, \* 9, the Board stated that "[a]t a minimum, under agency precedent, for an entity to qualify as a rail carrier, it must (1) hold itself out as a common carrier for hire, and (2) have the ability to carry for hire." The Board there cited *Hanson Natural Resources Co.—Non-Common Carrier Status—Petition for a Declaratory Order*,

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<sup>2</sup> *Am. Train Dispatchers Ass'n v. Chicago & N.W.T. Co.*, 1979 ICC LEXIS 20, \*11-12. That case involved the issue whether the transfer of responsibility for dispatching a joint facility from one carrier to another required Board authorization. The Board tries to distinguish that decision on the basis that both entities were rail carriers. Decision at 9 n. 21. That is not, however, why the Board characterized the dispatching function as ministerial. The Board found dispatching ministerial because the identity of the dispatching entity did not affect the control of train movements over the joint facility. As the record shows in this proceeding, that is equally true in the case of Rail-Term. Whether dispatching is performed by the rail carrier or contracted to Rail-Term does not affect the control of train operations, which remains with the rail carrier.

Finance Docket No. 32248, 1994 MCC LEXIS 111, \*40 (emphasis added), where the ICC explained as follows:

A railroad is a common carrier railroad if it purports to hold itself out as a common carrier for hire and if there is an ostensible and actual movement of traffic for the public to hire. The principal test is whether there is a bona fide holding out coupled with the ability to carry for hire.

As NRC next explains, neither statutory requirement is met by Rail-Term.

B. There Is No Holding Out by Rail-Term

The record in this proceeding shows, and the Board found, that Rail-Term does not in fact hold itself out to the public to provide common carrier service. As the Board found, “Rail-Term itself does not possess track, trains, conductors, signalmen, engineers or maintenance of way employees. Nor does Rail-Term directly offer to transport freight by rail for the public.” Decision at 4. In other words, the Board found that Rail-Term possessed neither of the minimum attributes of a “rail carrier” within the meaning of Section 10102(5).

To try to get around the fact that Rail-Term does not hold itself out as providing rail transportation service, the Board, incorrectly relying on misinterpreted Supreme Court precedent, imputed to Rail-Term the holding out by its rail carrier customers on the basis that the “dispatching services provided by Rail-Term are plainly embraced within the broader transportation services its clients hold out to the general public,” *id.* at 9.

There is nothing in the record that Rail-Term’s customers hold out to their shippers the service for which they contract with Rail-Term. Indeed, there is nothing in the record to suggest that shippers are even aware of Rail-Term or how the movement of trains over the tracks of Rail-Term’s clients is directed. Rather than being held out as part of its customer’s business, Rail-Term’s contracts with its customers establish that it

is an independent contractor and not acting as an agent of its customer. For example, Section 8 of Rail-Term's Dispatching Services Agreement with Vermont Railway states as follows:

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

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

Agreement at 4 [R. 126].<sup>3</sup>

The Board's conclusion that the dispatching services provided by Rail-Term are necessarily embraced in the services held out by its rail carrier customers is based, not in the record, but instead in misinterpreted pre-WWII Supreme Court cases. But, as explained in more detail in Part III of NRC's Comments, those precedents do not support the Board's imputed holding out construct. In those decisions, the Court only found that the services in question were embraced in the services offered by a rail carrier if the record in those cases established that that was in fact the case. Moreover, the services at issue in those cases were completely different than the dispatching function at issue here. In those cases, the services involved the actual transportation of freight for shippers, such as housing cattle in transit, loading and unloading freight from railcars, and switching. And, in each of those cases the Court found that the company deemed to be a rail carrier possessed both of the necessary elements to be a carrier: a holding out and the physical ability to provide rail service to shippers. Thus, those cases do not provide a basis to impute a holding out to Rail-Term.

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<sup>3</sup> References "[R\_]" are to the record developed in the Railroad Retirement Board proceedings, which was filed by Rail-Term with this Board in this docket on March 27, 2012.

Moreover, under the Board’s logic, every component and facet of railroad operations is embraced within the services held out to the public. The Board stated that “dispatching services are embraced within the interstate common carrier services held out to the public by Rail-Term’s clients without which their common carrier services across their system simply could not be executed.” Decision at 10. But that is true for the right-of-way maintenance, tie installation, ballast regulation, rail grinding, insertion of spikes, inspection of bridges, servicing of locomotives, maintenance of signals, etc. Dispatching itself involves several sub-components - there are, for example, the computer software, the physical dispatching components, and communications systems that allow the dispatchers to communicate with train crews and send signal indications to trackside signals. Is a firm that provides IT support for dispatching software a rail carrier? Such software and support are just as “essential” as the dispatcher who sits at a dispatching console. Are communications companies such as Verizon and AT&T rail carriers because their communications service is “essential” and “embraced” in the transportation services provided by their rail carrier customers? As these examples show, it is simply not logical to argue that a function is embraced in the transportation services held out to the shipping public just because it is necessary to rail transportation.

C. Rail-Term Does Not Possess Ability to Provide Rail Transportation

Even assuming for the moment that a holding out could be imputed to Rail-Term, the Board completely ignores the other necessary prerequisite to be a rail carrier — the physical ability to provide rail service. Without that finding, Rail-Term does not satisfy the statutory definition of rail carrier.

By ignoring this element, the Board in effect found that Rail-Term was a rail carrier solely because of the services it provides to its rail carrier customers. Section 10102(5) does not allow the Board such discretion. The statute is clear that more is required to be a rail carrier under the ICA. As discussed, Section 10102(5) has been interpreted to require both a holding out to the public to provide transportation for compensation and the ability to provide rail transportation. When Congress wanted to allow a person to be found to be a rail carrier on the basis of providing services to a rail carrier, it knew how to do so, as it did in the Railroad Retirement Act, Railway Labor Act, and other statutes. *See, e.g.*, 45 U.S.C. §§ 151, First, 231(a)(1). But, in those statutes, to be deemed a rail carrier solely on the basis of providing services to a rail carrier, the person must also be owned or controlled by or under common control with a rail carrier. Congress drew the definition of rail carrier, and therefore the jurisdiction of the Board, more narrowly under the ICA than under these other federal laws.

### III. Supreme Court and Other Court Decisions Do Not Support Board

The then-Board Majority found support for its newfound ability to impute rail carrier status to Rail-Term in Supreme Court and other decisions. The Board characterized those cases as standing for the proposition that “we can impute a holding out to the public where, as here, a company performs outsourced rail functions on behalf of railroads . . . .” Decision at 7. The Board has mischaracterized those cases, which actually demonstrate that Rail-Term is not a rail carrier. None of those cases held that a company, like Rail-Term, which did not own any facilities for providing transportation service and were not actually involved in the movement of freight or passengers could be imputed to be holding themselves out to be a carrier. To the contrary, they only found

that a company was a rail carrier if that company had the physical ability to move freight or passengers and either held itself out to the public or was part of an integrated company structure that included a rail carrier.

For example, in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911), the Supreme Court found that a terminal company that owned railroad tracks, was under common control of railroads, and was operated as an integrated transportation operation with its affiliated railroads, was a common carrier within the meaning of the ICA. In *U.S. v. Union Stock Yard & Transit Co.*, 226 U.S. 286 (1912), the Court found that a stock yard company, which owned railroad tracks, but leased them to its railroad affiliate, Chicago Junction Railway, and which was under common control with Junction Railway, was a rail carrier under the ICA. The Court also found that the stockyard company held out its services relating to the movement of stock by rail to the public. In *U. S. v. Brooklyn Eastern District Terminal*, 249 U.S. 296 (1919), the Court found that a terminal company that owned tracks and locomotives, switched rail cars to connecting carriers, and held out its terminal facilities to shippers was a rail carrier within the meaning of the Hours of Service Act. In *United States v. California*, 297 U.S. 175 (1936), the Court found that a terminal railroad company, which owned tracks and locomotives, was a common carrier for purposes of the Federal Safety Appliance Act.

In *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5<sup>th</sup> Cir. 1967), the court found that a steel company, which owned tracks and operated an intraplant railroad and also owned the railroad that connected the steel plant to other railroads was itself a rail carrier for purposes of the Federal Employer Liability Act (“FELA”). After reviewing cases including those cited by the Board, the court concluded that “[a]ccording to these cases

various considerations are of prime importance in determining whether a particular entity is a common carrier. First — actual performance of rail service . . .” 380 F.2d at 647 (emphasis added).

To the same effect are the two agency decisions cited by the Board, *Assoc. of P & C Dock Longshoremen v. The Pittsburgh & Conneaut Co.*, Finance Docket No. 31363 (Sub-No. 1), 1992 ICC LEXIS 27 and *American Orient Express Ry. Co. LLC—Petition for Declaratory Order*, STB Finance Docket No. 34502 (served Dec. 29, 2005), *aff’d*, *Am. Orient Express Ry. Co. v. STB*, 484 F.3d 554 (DC Cir. 2007). In *Assoc. of P & C Dock Longshoremen v. The Pittsburgh & Conneaut Co.*, a dock company owned a dock facility and leased track and locomotives from a railroad affiliate. The dock company moved freight cars, which were delivered to and picked up by its railroad affiliate for purposes of loading and unloading at the dock. The railroad affiliate offered the transfer services provided at the dock to its shippers as part of its tariffs. Relying on the factors in *Lone Star*, including the actual performance of rail service and that its rail carrier affiliate publicly held out the loading/unloading services at the docks to shippers, the ICC found that the dock company was a rail carrier. 1992 ICC LEXIS, \*20-21. In *Am. Orient Express*, the Board found that a company which owned passenger cars and offered passenger travel to the public was a rail carrier.

The Board found that the “dispatching services provided by Rail-Term are plainly embraced within the broader transportation services its clients hold out to the general public, and are no different than the services at issue in the cases cited above.” Decision at 9. But, contrary to the Board’s characterization of the services at issue in those cases, they were obviously quite different from the function that Rail-Term

contracted to provide to its rail carrier customers. In all of the decisions cited by the Board where a holding out was imputed to a company, the company in question provided services to shippers, not to a rail carrier. For example, Union Stockyards provided stockyards for shippers' cattle. The Belt Railway and BEDT switched freight cars carrying the shippers' goods. The P&C Dock Company unloaded rail cars carrying the shipper's coal and iron ore. American Orient Express actually transported passengers.

Also, none of these decisions imputed a holding out on the basis that the services in question were necessarily embraced in the rail carrier's common carrier services because they were "necessary" to the railroad's operations. The services were found to have been actually held out to the public based on the record in each case.

In addition, the Board overlooks that in all of these cases, the company was found to be a rail carrier because it also had the physical ability to provide rail transportation service. What these decisions show then is that, for over a 100 years, in order to be a rail carrier under various federal statutes, including the ICA, a company must both physically have the ability to provide rail transportation service and either hold itself out to the public as a carrier or be affiliated with a rail carrier that holds out common carrier rail transportation. As the Second Circuit explained in *Greene v. Long Island Railroad Co.*, 280 F.3d 224 (2d Cir. 2002), after reviewing the cases cited by the then-Board Majority:

In sum, the above cases reveal that companies that have no corporate affiliation or agency relationship with a railroad and merely supply the railroad with equipment such as refrigerator cars, or merely use the railroads to provide services such as courier deliveries for third persons are not "carriers" within the meaning of the FELA.

280 F.3d at 235.

As discussed, the record in this case shows that Rail-Term does not have the physical ability to provide rail transportation service, is an independent contractor and not an agent or affiliate of its rail carrier customers, and does not hold its dispatching services out to the public. Thus, rather than support the Board, these precedents show that Rail-Term does not meet the statutory definition of a rail carrier in Section 10102(5) and long-standing Board and judicial precedent applying that definition.

IV. Rail-Term Decision Is Contrary to Transloading Decisions

As just explained, contrary to the Board's erroneous finding, the dispatching services provided by Rail-Term are not held out by its rail carrier customers to their shippers as part of their transportation services. But, even if they were, as the Board's transloading decisions recognize, that would still not make Rail-Term a rail carrier.

The Board contends that its finding that Rail-Term is a rail carrier is consistent with its transloading decisions, such as *City of Alexandria, Virginia—Petition for Declaratory Order*, STB Finance Docket No. 35157 (served Feb. 17, 2009). However, under the logic of its *Rail-Term Decision*, the Board should have found that the contractor which operated the ethanol unloading facility in that case was a rail carrier.

Norfolk Southern Railway ("NS") constructed and owned a facility for the unloading of ethanol from rail tank cars. NS did not, however, operate the ethanol facility. NS contracted with a non-carrier, independent contractor, RSI Leasing, LLC (RSI), to operate the ethanol transloading facility for NS. The Board found that the transloading services provided by RSI were "operated under the auspices of NS and are part of NS's rail transportation service," Decision at 3, "NS holds itself out as offering transloading service at the Alexandria terminal as part of its common carrier service, and

transloading is bundled with the transportation services that NS provides shippers,” Decision at 4, and “[e]thanol shipped by rail necessitates the transloading operations like those performed at the Facility,” Decision at 5. The Board similarly found that “[a]ll of RSI’s activities here are consistent with RSI’s providing a contract service that is part of NS’s rail transportation business, which includes transloading in this case. Alexandria has failed to show that the service RSI provides to NS here related to transloading differ from any other type of contract services that a rail carrier might utilize to conduct its business.” Decision at 5.

The Board used the same kind of language in describing Rail-Term’s contract dispatching services. The Board described Rail Term’s dispatching service as “integral transportation service,” “an essential component” of its rail carrier’s customers’ transportation, “required,” “inextricable,” and “plainly embraced within the broader transportation services its clients hold out to the general public . . . .” In both cases, rail transportation could not be provided without the function performed by the contractor. In each case, the Board found (albeit erroneously in the case of Rail-Term) the function performed by the contractor to be embraced within the common carrier services held out by the rail carrier to the public. Under the services contract between RSI and Rail-Term with their rail carrier customers, they were independent contractors.<sup>4</sup>

So, where is the distinction between why the Board imputed a holding out to Rail-Term when it did not impute NS’s holding out to RSI? The NRC respectfully submits there is none. *City of Alexandria* demonstrates that, merely because a contractor

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<sup>4</sup> Compare Section 8(a) of Dispatching Services Agreement between Rail-Term and Vermont Railway Inc. with Section 1.C of the Agreement between NSR and RSI provided that “Contractor is and shall remain an independent contractor.” Response of Norfolk Southern Ry. Co. to Pet. for Declaratory Order, Exh. P, STB Finance Docket No. 35157, *City of Alexandria—Pet. for Declaratory Order* (filed July 2, 2008).

performs a function essential to common carrier service and which is held out by the rail carrier as part of its common carrier service, does not mean that the contractor is itself a rail carrier.

V. Rail-Term Decision Is in Conflict With State of Maine Precedents

In its *State of Maine* precedents, the Board found that the performance of dispatching by a public entity, which acquired a line of railroad from a freight carrier, did not make that public entity a rail carrier subject to the Board's jurisdiction under the ICA. The then-Board Majority sees the obvious inconsistency between its finding that Rail-Term is a rail carrier, solely because it performs the dispatching for freight railroads, but a public entity is not when it performs that same function for freight railroads. The Board struggles to reconcile the inconsistency by drawing distinctions between such public entities and Rail-Term. They are public entities; Rail-Term is not. Dispatching is at the core of Rail-Term's business; dispatching is incidental to the operations of the public entity. Decision at 12. The Board also states that, while it may have the discretion to impute rail carrier status to public entities if they perform the dispatching function, just as it imputed rail carrier status to Rail-Term, it has chosen not to because of the policy goals of encouraging rail commuter passenger service. *Id.*

The Dissent ably points out the problems with the then-Board Majority's attempt to reconcile its finding that Rail-Term is a rail carrier with the Board's *State of Maine* precedents.

As also pointed out in that Dissent and argued in NRC's Comments, the Rail-Term Decision "is not supported by law or logic." Decision at 14. The proper way to

reconcile the *Rail-Term Decision* and the Board's *State of Maine* precedents is to find that Rail-Term is not a rail carrier on the facts of this proceeding.

VI. The Rail-Term Decision Is Not Required by National Transportation Policy

The *Rail-Term Decision* is suffused with concern by the then-Board Majority over contracting-out by rail carriers for various functions or services. *See, e.g.*, Decision at 9. There was a day when railroads did most everything in connection with the provision of rail transportation themselves. They built locomotives and freight cars, installed and maintained all of their own track and bridges, constructed and maintained their own buildings, etc. That day is long past. Railroads, like most other businesses in the United States, contract out for a variety of goods and services so that they may focus on executing their core business mission. There is nothing in the ICA of which NRC is aware that gives the Board jurisdiction over the contracting-out practices of rail carriers.

The Board expresses concern about the extreme hypothetical case where a rail carrier might contract out all functions, leaving a "shell company." Decision at 9. But that is not this case and that extreme hypothetical does not relate to this record. The record shows that Rail-Term's rail carrier customers retain responsibility and control for their operations. The Board stated that "Rail-Term's dispatchers have control over and represent a key step in the movement of the trains of its rail common carrier customers." *Id.* The record shows, however, that this statement is inaccurate or at best misleading. Rail-Term's customers are ultimately responsible for their train operations and the movement of trains over their tracks. For example, in an April 20, 2007 letter from counsel for Rail-Term to the Railroad Retirement Board, Rail-Term explained that

instructions on daily train operations and schedules were given to Rail-Term by its customers.

“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.”

April 20, 2007 Letter from John D. Heffner, PLLC to Beatrice Ezerski, RR Retirement Board at 4 [R. 25].

Rail-Term’s customers control the movement of trains over their tracks, not Rail-Term. Rail-Term provides dispatching services based on the inputs from its customers.

That the *Rail-Term Decision* has nothing to do with transportation policy is also demonstrated by the fact that the then-Board Majority, after straining mightily against the headwinds of the ICA’s definition of rail carrier and long-settled precedent to find Rail-Term to be a rail carrier, turns around and offers to exempt Rail-Term from all regulation by the Board. Decision at 13. In its conclusion, the Board states that “we find that Congress would intend for those services to fall within our jurisdiction and for employees performing those dispatching functions to be subject to the various federal railroad labor-related laws and safety-related laws.” Decision at 13. With this statement, the Board reveals the true rationale for finding Rail-Term to be a rail carrier subject to Board jurisdiction — it is so that Rail-Term will be covered by the Railway Labor Act, Railroad Retirement Act, and other federal laws that use the ICA definition of rail carrier.

As explained, the Board is simply wrong that Congress intended that companies that provide services to rail carriers be deemed rail carriers for that reason alone. When Congress has wanted federal law to cover contractors, which do not themselves provide

rail transportation, it has written the law specifically to achieve that intention, as it did by including such contractors who are also affiliates of a rail carrier in the carrier affiliate definition in the Railroad Retirement Act, 45 U.S.C. § 231(a)(1)(ii). NRC respectfully submits that the Board does not have the authority to rewrite the definition of rail carrier in the ICA to expand the coverage of other federal laws when those laws as written do not apply to Rail-Term.

Conclusion

The *Rail-Term Decision* is replete with material error and ignored the record in this proceeding. For the reasons set forth in NRC's Comments and Rail-Term's Petition for Reconsideration, the Board should grant that petition and find that Rail-Term is not a rail carrier.

Respectfully submitted,



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