



ASSOCIATION OF  
AMERICAN RAILROADS

**Law Department**

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Office of Proceedings  
March 10, 2014  
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Public Record

March 10, 2014

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

Re: STB Docket No. FD 35582, *Rail-Term Corp.* – *Petition for Declaratory Order*

Dear Ms. Brown:

Pursuant to the decision served in the above captioned proceeding on February 12, 2014, please find attached the comments of the Association of American Railroads.

Respectfully submitted,

Louis P. Warchot  
*Counsel for the Association of  
American Railroads*

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket No. 35582

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RAIL-TERM CORP. –  
PETITION FOR DECLARATORY ORDER

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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BEFORE THE  
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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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Pursuant to the decision served in this proceeding by the Director of the Office of Proceedings of the Surface Transportation Board (“Board”) on February 12, 2014, the Association of American Railroads (“AAR”) submits these comments in support of the petition for reconsideration filed by Rail-Term Corp. (“Rail-Term”) in this proceeding.<sup>1</sup> At issue is the Board’s finding in a November 19, 2013 decision (“November Decision”), with Vice-Chairman Begeman dissenting, that Rail-Term was “a rail carrier performing rail transportation services that are subject to the jurisdiction of the Board.” November Decision at 13. Because the Board’s decision created substantial uncertainty and could have wide-ranging implications to the railroad industry and its vendors, the AAR, the American Short Line and Regional Railroad Association and National Railroad Construction and Maintenance Association, Inc. petitioned the Board to intervene and asked the Board to take public comments on this matter. The AAR

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<sup>1</sup> The February 12 decision stated that interested parties could file *amicus curiae* comments in this proceeding. To the extent that decision could be construed as intending to limit those parties’ appellate rights, the AAR submits that the Director does not have delegated authority to affect parties’ substantive rights. *See* 49 C.F.R. § 1011.6(c)(3) (delegating “routine procedural matters”).

and its freight railroad members have a strong interest in ensuring that the Board asserts its jurisdiction consistent with the Interstate Commerce Act, as amended, and not disrupt the administration of other laws that regulate the railroad industry.

The November Decision marks the first time that a majority of the Board concluded that a company providing dispatching services to rail carriers, but not performing any other transportation activities and not holding itself out to the public to do so, was itself a rail carrier as defined by 49 U.S.C. § 10102(5). For the reasons discussed below, the Board’s decision that Rail Term is a rail carrier subject to the Board’s jurisdiction was material error and the Board should grant Rail-Term’s petition for reconsideration.

#### DISCUSSION

As discussed below, Rail-Term is not a rail carrier as defined by 49 U.S.C. § 10102(5). Rail-term does not operate any lines of railroad. Rail-Term does not own or operate any motive power. Rail-term does not move any freight, does not move any passengers, nor does Rail-Term have the ability to do so. Moreover, Congress could not have intended that companies be subject to the Board’s regulatory authority where that authority cannot be practically applied in any meaningful way. Lastly, such a conclusion is contrary to the plain language of 49 U.S.C. § 10102(5) and 10501 and Board and judicial precedent.

#### **I. The Majority’s Conclusion That Congress Intended For Companies That Provide Dispatching Services To Be Subject to Regulation By the Board Was Material Error**

The Majority’s decision concluded that “the overall scheme of regulation under ICCTA indicates that Congress intended for the regulation of these kinds of contracted dispatching services to rest with” the Board’s jurisdiction. November Decision at 2. But the Majority also recognized that almost none of that regulatory scheme could, in fact, be practically applied to Rail-Term. November Decision at 13. In that regard, it is difficult to see how, for example, the

Board would determine if Rail-Term's rates and practices are reasonable, how Rail-Term would enjoy federal preemption, how the Board would evaluate an acquisition, merger or consolidation transaction involving Rail-Term, and how would Rail-Term fulfill a reasonable request for service.

Rather than reaching the logical conclusion that Congress did not intend to subject companies like Rail-Term to a regulatory regime that cannot be practically applied to them, the majority instead suggests that Rail-Term should pay a \$13,400 filing fee, and seek an exemption from the entire panoply of Board regulation. *See* 49 C.F.R. § 1002.2(f). Accordingly, the holding of the November Decision was material error.<sup>2</sup>

## **II. The Majority's Decision Was Material Error Because It Departed From Precedent Without Rational Explanation.**

The Board, and its predecessor agency, the Interstate Commerce Commission ("ICC"), and the courts have held that an entity should be found to be a rail carrier subject to the jurisdiction only if it has held itself out to the public to provide common carrier service. *See, e.g., B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34013 (STB served Oct. 3, 2001). A core component to holding out to the public is the ability to actually move passengers or freight. *See Hanson Natural Resources Co. – Non-Common Carrier Status – Petition for Declaratory Order*, FD 32248 (ICC Dec. 5, 1994) ("The principle test is whether there is a bona fide holding out coupled with the ability for hire.").

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<sup>2</sup> The fact that the Board has in the past granted blanket exemptions from 49 U.S.C. Subtitle IV to entities that moved freight does not sustain the November Decision's holding. Those decisions involved cases where the agency determined that regulation was not necessary to carry out the rail transportation policy and either the transaction or service was of limited scope or that regulation was not needed to protect shippers from the abuse of market power, not cases where Subtitle IV could not be practically applied. *See, e.g., BG&CM Railroad, Inc. – Exemption from 49 U.S.C. Subtitle IV*, FD 34399 (STB served Oct. 17, 2003).

Similarly, the court *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 647 (5<sup>th</sup> Cir. 1967) laid out a four part test for determining whether an entity should be regarded as a common carrier by railroad: 1) the actual performance of rail service; 2) the service is being performed as part of the total rail service contracted for by a member of the public; 3) the entity that is performing the service is doing so as part of a system of interstate rail transportation by virtue of either common ownership with the railroad or under a contract with the railroad; and 4) remuneration is being received for the services performed.

Rail-Term fails the first prong of the *Lone Star* test and does not fall within the Board's decisions. Rail-Term simply cannot provide rail service. In addition, while the ability to actually provide such service is a necessary condition to be a rail carrier, it is not the only condition. "At 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." *James Riffin—Petition for Declaratory Order*, FD 35245 (STB served Sept. 15, 2009). Rail-Term cannot carry for hire.

The Board acknowledges that Rail-Term "does not directly hold itself out to the public as providing interstate rail transportation services" November Decision at 2, but then goes on to suggest that Supreme Court precedent allows the Board to impute Rail-Term's railroad clients' holding out to Rail-Term. But in every case cited by the Board, the entity determined to be a rail carrier physically moved passengers or freight in some way and either held itself out to shippers or was a corporate affiliate of a railroad. *See, e.g., Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911) (finding 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); *U. S. v. Brooklyn Eastern District Terminal*, 249 U.S. 296 (1919), (finding a terminal company that owned tracks and locomotives, switched rail cars to carriers, and held out its terminal facilities to shippers was a rail carrier within the meaning of the Hours of Service Act). Only when an entity actually moves people or good in rail equipment is the

Board confronted with the more complicated questions that those and other cases cited by the Board present.

The Board attempts to expand the definition of rail carrier to a service that is “essential” for moving freight, November Decision at 8, but many essential services are provided to railroads by non-rail carriers. Such a test leads to incongruous results. Providing fuel is essential for moving freight; trains cannot move without fuel. Manufacturing cars are essential for moving freight; shippers cannot move their freight without placing them in some sort of car. Producing steel is essential for moving freight; a railroad cannot operate without tracks. However, companies that produce fuel, rail cars, and steel are clearly not rail carriers.

Moreover, the majority’s analysis departs from precedent in the consideration of dispatching services in the *State of Maine* line of cases. In those cases, the agency has concluded that the performance of dispatching services and other functions would not make an entity a rail carrier. See, e.g., *N.J. Transit Corp.–Acquis. Exempt. – Norfolk S. Ry.*, FD 35638, slip op. at 5 (STB served Mar. 27, 2013) (assumption of maintenance and dispatching control does not cause an entity to become a rail carrier); *Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transport.*, FD 35312, slip op. at 6 (STB served May 3, 2010) (an entity may “assume responsibility for maintaining the line and dispatching freight operations” without becoming a rail carrier); *Fla. Dep’t of Transp. –Acquis. Exemption—Certain Assets of CSX Transp., Inc.*, FD 35110, slip op. at 4 (STB served June 22, 2011) (entity acquiring dispatching responsibility did not become a rail carrier where there was a “legitimate business justification” for transfer of dispatching responsibility); *Md. Transit Admin.—Pet. for Dec. Order*, FD 34975 (STB served Sep. 19, 2008); *Metro Reg’l Transit Auth.—Acquis. Exemption—CSX Transp., Inc.*, FD 33838, slip op. at 3 (STB served Oct. 10, 2003) (entity acquiring responsibility for dispatching did not become a rail carrier where it “has not conducted freight operations on these segments and will

not hold itself out as willing or able to do so.”); *Los Angeles City Transp. Comm’n—Pet. for Exemption—Acquis. from Union Pac. R.R.*, FD 32374, slip op. at 3 (STB served July 23, 1996).

#### CONCLUSION

For the reasons discussed above, the November Decision contained material error and Rail-Term’s petition for reconsideration should be granted.

Respectfully Submitted,



Of Counsel:

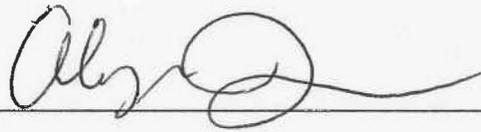
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## CERTIFICATE OF SERVICE

I, Alyssa M. Johnson, hereby certify that on March 10, 2014 I have caused to be served by first-class mail, a copy of the Comments of the Association of American Railroads.

A handwritten signature in cursive script, appearing to read 'Alyssa M. Johnson', is written over a horizontal line.

Alyssa M. Johnson