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BEFORE THE SURFACE TRANSPORTATION BOARD Public Record

STB Docket No. 35582

RAIL-TERM CORP. – PETITION FOR DECLARATORY ORDER

PETITION TO INTERVENE AND
REQUEST FOR AN OPPORTUNITY FOR PUBLIC COMMENTS OF THE
NATIONAL RAILROAD CONSTRUCTION AND MAINTENANCE ASSOCIATION, INC.

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The Surface Transportation Board (“Board”) found in its decision issued in this proceeding on November 19, 2013 that Rail-Term Corp. (“Rail-Term”) should be “deemed a rail carrier” subject to the jurisdiction of the Board. *Rail-Term Corp.—Pet. for Declaratory Order at 8* (served Nov. 19, 2013) (hereinafter “Decision”). Rail-Term has since filed a petition for reconsideration with the Board on December 16, 2013.

The National Railroad Construction and Maintenance Association, Inc. (“NRC”) is a trade association whose members are contractors, vendors and suppliers to the railroad and transit industry. The NRC was organized specifically to represent the interests of railroad contractors, suppliers and the entire railroad and rail transit construction industry. The NRC has more than 350 member companies. NRC’s members are generally not considered to be rail carriers within the meaning of 49 U.S.C. § 10102(5). The Board’s Decision raises new uncertainty as to when companies that provide services or products to rail carriers may be “imputed” to be rail carriers for purposes of regulation by the Board under the Interstate Commerce Act (“ICA”) and the application of other federal law which applies to entities subject to the jurisdiction of the Board under the ICA. Therefore, NRC petitions for leave to intervene in this proceeding in support of Rail-Term’s petition and joins with the Association of American Railroads and the American Short Line and Regional Railroad Association in requesting the

Board to open this proceeding for public comments on the issues raised by the Board's Decision and the dissent by Vice Chairman Begeman.

Under Board precedent, it is well settled that an entity that does not hold itself out to the public to provide common carrier transportation service by railroad is not itself a rail carrier subject to Board jurisdiction, even though it provides a service or products to a rail carrier in connection with its common carrier service. The Board's Decision creates new uncertainty where none existed as to whether a company that provides such services or products is itself a rail carrier. The Board's decision also appears to be contrary to the language of the ICA and in conflict with prior precedent of the Board and its predecessor, the Interstate Commerce Commission.

While the Board states that its Decision "presents a case of first impression," because it involves dispatching (Decision, page 3), as others have pointed out, the Board's reasoning is in direct conflict with its *State of Maine* and other precedent. In those decisions, the Board has held that the performance of dispatching and signal and track maintenance does not make an entity a rail carrier if, like Rail -Term, it does not possess the common carrier obligation. *See, e.g., Mass. Dept. of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, Finance Docket No. 35312 (served May 3, 2009), *aff'd sub nom. Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807 (D.C. Cir. 2011).

The transloading precedents cited by the Board also do not support its finding that Rail -Term is a rail carrier. In none of such cases did the Board find that a third party contractor operating the transload facility under contract to a rail carrier was itself a rail carrier even though the Board found that the transload operation was part of the transportation service provided by the actual rail carrier. *See, e.g., The City of Alexandria, VA—Pet. for Declaratory Order*, Finance Docket No. 35157, slip op. at 4 (served Feb. 17, 2009), *aff'd sub nom. Norfolk S. Ry. Co. v. City*

of Alexandria, 608 F.3d 150 (4th Cir. 2010) (“There is no evidence that [RSI Leasing, LLC] RSI holds itself out as providing transloading service at the Facility or that RSI has any contractual relationships relating to the Facility with any of the ethanol shippers.”).

And, while the Board finds that Rail- Term is a rail carrier subject to its jurisdiction under the ICA, it then suggests that Rail- Term can apply for exemption from all Board regulation (Decision, page 13). The implication is that the only reason for asserting Board jurisdiction over Rail -Term is to make it subject to other federal laws that apply to rail carriers. The Board’s rationale that it was necessary to impute Rail-Term to be a rail carrier subject to Board jurisdiction in order to assure that its employees are covered by the Railroad Retirement Act and Railroad Unemployment Insurance Act is also contrary to the structure of those statutes. In defining the scope of their coverage, Congress deliberately provided that a company did not become a covered employer merely because it provided a service or product to a rail carrier used in its transportation service. That company also had to be owned or controlled by or under common control with a rail carrier. *See, e.g., 45 U.S.C. § 231(a)(1)(ii).*

The NRC and its members have an interest in ensuring that the Board not extend its jurisdiction to entities that are not true common carriers and by doing so extend the application of other federal laws applicable to rail carriers to entities that are not actual rail carriers as that term has been commonly understood and applied.

Respectfully Submitted,



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