

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

236729

FD 35496

ENTERED
Office of Proceedings
September 25, 2014
Part of
Public Record

PETITION FOR DECLARATORY ORDER

**DENVER & RIO GRANDE RAILWAY
HISTORICAL FOUNDATION, INC.
D/B/A DENVER & RIO GRANDE RAILROAD, LLC**

**JOINT REPLY OF
THE CITY OF MONTE VISTA, CO,
AND THE SAN LUIS & RIO GRANDE RAILROAD
TO PETITION FOR RECONSIDERATION**

Submitted by

John D. Heffner
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Submitted: September 25, 2014

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SURFACE TRANSPORTATION BOARD**

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**I.
INTRODUCTION**

Respondents the City of Monte Vista (“the City”) and the San Luis & Rio Grande Railroad (“SLRG”),¹ respond to the Petition for Reconsideration filed September 8, 2014, by the Denver & Rio Grande Railway Historical Foundation d/b/a Denver & Rio Grande Railroad, LLC (“hereafter DRGRHF”) seeking review of the Surface Transportation Board’s (“the Board”) decision issued August 18, 2014. The Board ruled that DRGRHF’s activities consisting of the storage of railroad cars, equipment, and parts on leased land inside the City’s limits do not

¹ A Class III short line railroad subject to the jurisdiction of the Surface Transportation Board.

constitute transportation within the Board’s jurisdiction and are therefore not subject to preemption from local laws. Respondents assert that the Board reached the correct decision and urge that reconsideration be denied.

II. BACKGROUND

The facts of this dispute are well known and need only be repeated for the sake of clarity. DRGRHF owns a line of railroad that it acquired about 15 years ago from the Union Pacific Railroad in an offer of financial assistance proceeding. That line extends between MP 299.3 at Derrick (near South Fork) and MP 320.9 in the City of Creede, CO. SLRG is a railroad established in 2003 which acquired the balance of this line (over 100 miles of track) between Derrick and Walsenburg, CO,² where it connects with the Union Pacific Railroad and BNSF Railway. Some years ago, DRGRHF leased a parcel of land inside Monte Vista’s city limits from a corporate affiliate and stored railroad equipment and parts on that property in violation of a City ordinance³ that forbade the storage of railcars on property not connected to a rail line. The subject parcel is adjacent but not connected to SLRG’s line and is some 30 miles east of DRGRHF’s own track. The City found that DRGRHF’s owner Donald Shank had violated its ordinance. DRGRHF petitioned the Board to find that its activities “as a rail carrier” on the parcel

² *San Luis & Rio Grande Railroad Company—Acquisition and Operation Exemption—Union Pacific Railroad Company*, FD 34350, STB served July 18, 2003.

³ Monte Vista Municipal Code §12-17-110(3).

preempted the City's ordinance. The Board ruled that DRGRHF's service did not constitute transportation under the ICC Termination Act ("ICCTA") and denied preemption.

On August 27, 2014, DRGRHF petitioned the Board to stay its August 18 decision which the Chairman properly denied in a decision served September 16. DRGRHF filed this reconsideration request on September 8.

III. ARGUMENT

The Board's rules at 49 CFR §1115.3 govern petitions for reconsideration of agency decisions. Those rules provide that a petition will only be granted upon a showing that the prior action will be affected materially because of new evidence or changed circumstances or that the prior action involves material error. Any new evidence must not appear to be cumulative and an explanation must be provided as to why it was not previously adduced. Finally, any petition exceeding 10 pages in length must be accompanied by a summary.

DRGRHF's petition must be rejected on all of these grounds. As a matter of pure form, it must be rejected because it exceeds 10 pages (it is 15 pages long) and does not contain the required preface and summary of argument. Moreover, much of the information is cumulative and could have been introduced when Petitioner initiated this declaratory relief proceeding in 2011.

DRGRHF begins its petition with a regurgitation of points with which it either agrees or disagrees with the Board's August 18 ruling. As best Respondents can fathom, the gist of DRGRHF's rambling presentation is as follows:

- DRGRHF conducts its storage and maintenance activities on the parcel (the property in Monte Vista adjacent to SLRG's line) because it lacks storage space on the Creede Branch.
- The Creede Branch is a "line of railroad" as that term is understood under ICCTA precedent and is therefore automatically entitled to preemption.
- The Board has overlooked language alleged to be in the record as to the alleged use of the parcel.⁴
- The Board improperly assumed that the "less-than-carload" freight that DRGRHF purports to transport is associated with its excursion service and is not freight in its own right.
- The Board ignored evidence that DRGRHF has been soliciting the movement of livestock and that it is storing cars on the parcel for moving that traffic.
- While conceding that it does not have a "formal" interchange agreement with SLRG, DRGRHF claims to have an "informal" interchange agreement under which it moved its locomotive and concession car for lease to SLRG back in 2006-7. DRGRHF urges that the leasing of rail equipment constitutes an "integral part of a railroad's interstate operations," "transportation," and "car service."

⁴ Indicating that Petitioner's rail cars located on the parcel are used to store tools, equipment, and material needed on the Creede Branch, that it is common for railroads to use old cars to store such materials, that the rehabilitation of a rail car for use as a storage shed is an "integral part of the railroad's interstate operations," and that Petitioner's use of the parcel constitutes "transportation" under the law.

- The Board incorrectly stated that DRGRHF has provided no evidence that it conducts or plans to conduct any freight movements as part of the interstate network.

The fact that the activities that DRGRHF conducts on the Monte Vista parcel support its excursion service on the Creede Branch is beside the point. The simple fact is that this service does not constitute “rail transportation” as that term is used in the ICCTA in the first place. While DRGRHF does have a common carrier obligation associated with its ownership of the Creede Branch, that fact does not convey a right of preemption to activities that are not associated with the provision of interstate common carrier rail service. For example, a railroad engaged in such “extracurricular” activities as manufacturing or the operation of a museum would not be entitled to claim preemption as to those functions. *Cf.*, *Town of Milford, MA-Petition for Declaratory Order*, FD 34444, STB slip op. at 2-3 served Aug. 12, 2004 and *Oregon Coast Scenic Railroad v. State of Oregon* (holding that an excursion railroad lacking a connection to the interstate rail system is not entitled to preemption) and cases cited therein, No. 3:14-cv-00414-HZ (US Dist. Ct., Ore., April 18, 2014), copy attached as Exhibit A. So the fact that DRGRHF uses the Monte Vista parcel to support its excursion service on the Creede Branch does not warrant a preemption ruling here. There is no nexus between DRGRHF’s excursion service or its limited “freight” activities and those of SLRG or the national railroad system to warrant any preemption finding.

Furthermore, there is no indication that any of this evidence or argument is in any way “new” or constitutes “changed circumstances.”

DRGRHF identifies in its Petition four examples of what it alleges is “new evidence.” The first which it submits as Exhibit #1 is a March 20, 2013, letter from the Railroad Retirement Board (“RRB”) finding DRGRHF an “employer” under that agency’s laws and a “line haul railroad operating in interstate commerce.” Although the RRB is the agency responsible for determining whether or not an entity is “covered” under its statutes, the Board and not the RRB is *the* agency with the primary jurisdiction for determining whether or not the entity is a common carrier railroad providing transportation for compensation. *See, Rail-Term Corp. v. Railroad Retirement Board*, No. 11-1093, unpublished memorandum and order (DC Cir. November 14, 2011) attached hereto as Exhibit B; *cf., Herzog Transit Services v. U.S.*, 624 F.3d 467, 473 (7th Cir. 2010), *Rehearing, en banc, denied*. Accordingly, the RRB’s letter is not dispositive on DRGRHF’s carrier status and eligibility to claim federal preemption.

Second, DRGRHF submits as Exhibit #2 a tariff prepared in 2013 that it claims constitutes evidence of its common carrier “holding out.” However, DRGRHF fails to explain why it could not have published such a tariff at some earlier date such as when it acquired the Creede Branch in 1999. It blames “a lack

of institutional knowledge” as the excuse for not publishing and submitting this tariff earlier.

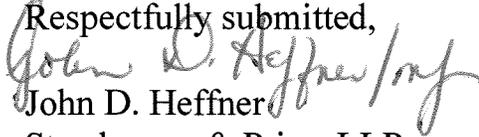
Third, and cited as the “most significant change” constituting new evidence was the 2013 hiring of Eric S. Strohmeyer as DRGRHF’s Director of Freight Services. Petitioner is certainly correct in stating that the Board is well familiar with Mr. Strohmeyer. But no reason is given why DRGRHF could not have hired someone in that capacity at the time it acquired the Creede Branch. There is a wealth of talent in the short line industry available on both a full and part-time basis to handle sales and marketing assignments.

Finally, Petitioner alludes to “specific plans” involving freight movements that would originate on its line or on the Monte Vista parcel and would travel to unnamed East Coast destination(s) for unidentified customers. Petitioner’s allegations are entitled to no weight without more specific information such as types of commodities, numbers of car loads, origins, and destinations, and so forth.

IV. CONCLUSION

The Board’s August 18, 2014, decision was the correct one and should be reaffirmed.

Respectfully submitted,


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Submitted: September 25, 2014

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that I have sent a copy of the foregoing Joint Reply of the San Luis & Rio Grande Railroad and the City of Monte Vista, CO, to the Petition for Reconsideration filed by the Denver & Rio Grande Railway Historical Foundation d/b/a/ Denver & Rio Grande Railroad, LLC, to the following parties by US Mail and electronic mail, this 25th day of September 2014:

Donald Shank
Executive Director
P.O. Box 1280
South Fork, CO 81154

Eugene L. Farish, Esq.
Law Office of Eugene L. Farish, PC
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Monte Vista, CO 81144

/s/ John D. Heffner

John D. Heffner

Dated: September 25, 2014

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON COAST SCENIC RAILROAD
LLC, an Oregon nonprofit corporation,

No. 3:14-cv-00414-HZ

Plaintiff,

OPINION & ORDER

v.

STATE OF OREGON, DEPARTMENT OF
STATE LANDS, and MARY M. ABRAMS,
Director of Dept. of State Lands, in her
official capacity,

Defendants.

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HERNÁNDEZ, District Judge:

Plaintiff Oregon Coast Scenic Railroad (OCSR) filed this declaratory action seeking relief from a cease and desist order issued by Defendants, the State of Oregon's Department of State Lands and its Director, Mary Abrams (collectively "the State"), for violation of the State's removal-fill law. OCSR claims that its railroad track repair work is under the exclusive jurisdiction of the Surface Transportation Board, a federal agency, and thus the State's removal-fill law is preempted. OCSR additionally claims that enforcement of the removal-fill law violates the Commerce Clause.

OCSR moved for a preliminary injunction and a hearing was held on April 9, 2014. Before the court are OCSR's motion for preliminary injunction [8] and the State's motion to consolidate the preliminary injunction hearing with a trial on the merits [18]. Because I find that OCSR has no likelihood of success on the merits on its claims, the motion for preliminary injunction [8] is denied. The parties had the opportunity to fully present their arguments regarding the legal question of federal preemption and no genuine issues of material fact remain. The State's motion to consolidate the preliminary injunction hearing with a trial on the merits [18] is granted. OCSR's requests for declaratory relief and a permanent injunction are denied and all claims are dismissed.

BACKGROUND

Plaintiff OCSR is a nonprofit organization that operates a tourism-related train along the Oregon coast. Wickert Decl. [10] Ex. 1 at 1. In March 2012, OCSR signed a lease with the Port of Tillamook Bay for the right to use the Port's rail line from Enright, Oregon at mile post 810.5 to Industrial Park Yard in Tillamook, Oregon at mile post 859.13. Id. at 2. The lease limits

OCSR to “tourism-related train operations[.]” Id. at 3. OCSR has the right to operate its own tourist trains or “allow other tourist rail operators” to operate trains on the rail line. Id. at 10.

For the first five years of the lease, the funds that OCSR would otherwise pay to the Port to lease the rail line are to be used by OCSR to repair the rail line. Id. at 2. The Port’s “rail connection to a mainline carrier” was severed in 2007 due to storm damage. Id. at 7. No freight traffic runs on the portion of rail line leased by OCSR. Id. at 1, 7. The lease would be modified should the Port’s connection to a mainline carrier be re-established and freight traffic resumes. Id. at 7.

OCSR began repairing the rail line near Salmonberry, Oregon earlier this year. Wickert Decl. [10] ¶ 5. On March 11, 2014, the State sent OCSR a cease and desist order for its repair activities near Salmonberry. Id. Ex. 2 at 1. The State notified OCSR that for the work near the Salmonberry River, “[r]emoval of any amount of material within waters designated Essential Salmonid Habitat” required a permit. Id. The State also disagreed with OCSR’s assertions that the Surface Transportation Board (STB), as authorized by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§ 10101 et seq., had exclusive jurisdiction over OCSR’s repair work, and that the State’s removal-fill law was therefore preempted by ICCTA. Id.

DISCUSSION

OCSR alleges three claims: (1) ICCTA preempts the State’s removal-fill law, (2) enforcement of the State’s removal-fill law violates the Commerce Clause, and (3) enforcement of the State’s removal-fill law imposes a burden on interstate commerce in violation of the Commerce Clause, thereby violating OCSR’s rights under 42 U.S.C. § 1983. Compl. 4-6. OCSR seeks declaratory and injunctive relief. Id. at 7.

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I. Preliminary Injunction

A. Standard

A party seeking a preliminary injunction “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). The movant “must establish that irreparable harm is likely, not just possible.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). The movant must also carry its burden of persuasion by a “clear showing” of the four required elements set forth above. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam); Lopez v. Brewer, 680 F.3d 1068, 1072 (9th Cir. 2012).

The court may apply a sliding scale test, under which “the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.” Alliance for the Wild Rockies, 632 F.3d at 1131. Thus, a party seeking an injunction may show greater irreparable harm as the probability of success on the merits decreases. Id. “To reach this sliding scale analysis, however, a moving party must, at an irreducible minimum, demonstrate some chance of success on the merits.” Global Horizons, Inc. v. United States DOL, 510 F.3d 1054, 1058 (9th Cir. 2007) (quotation omitted). If the movant fails to show that he has some chance on the merits, that ends the matter. Developmental Servs. Network v. Douglas, 666 F.3d 540, 544 (9th Cir. 2011).

B. Analysis

“Once a court determines a complete lack of probability of success, its analysis may end, and no further findings are necessary.” Global Horizons, 510 F.3d at 1058. That is the case here.

The ICCTA granted the STB jurisdiction over “transportation by rail carrier” if the transportation is “part of the interstate rail network[.]” 49 U.S.C. § 10501(a).

- (1) [T]he Board has jurisdiction over *transportation by rail carrier* that is--
 - (A) only by railroad; or
 - (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.
- (2) Jurisdiction under paragraph (1) *applies only to transportation in the United States between a place in--*
 - (A) *a State and a place in the same or another State as part of the interstate rail network;....*”

Id. (emphasis added). Thus, in order for the STB to exercise jurisdiction over “transportation by rail carrier,” as relevant here, the transportation offered by OCSR must be “part of the interstate rail network.” Id.

Although the ICCTA does not define “interstate rail network,” the STB has interpreted the phrase to include facilities or services “that are part of the general system of rail transportation and are *related to the movement of passengers or freight in interstate commerce.*” DesertXpress Enter., LLC, No. FD 34914, 2010 STB LEXIS 183, at *27 (STB May 7, 2010) (emphasis added). If “however, an activity, even though it is on rail property, is not considered ‘transportation by a rail carrier’ under § 10501(a), no federal preemption applies, and states and localities are free to regulate the activity.” Borough of Riverdale, No. FD 35299, 2010 STB LEXIS 340, at *3 (STB Aug. 5, 2010). Therefore, to fall under the STB’s jurisdiction, moving passengers or freight in interstate commerce is requisite for being considered “transportation by a rail carrier.”

In addition to the express language of § 10501(a), the history of the ICCTA shows Congress’ intent to allow jurisdiction only if interstate commerce is implicated. Prior to the ICCTA, the Interstate Commerce Commission (ICC), the predecessor to the STB, did not have

jurisdiction over transportation wholly within a state. DesertXpress, 2010 STB LEXIS 183, at *20. Congress enacted the ICCTA to include jurisdiction over intrastate transportation, but likely added the phrase “as part of the interstate rail network” to § 10501(a) “to avoid constitutional infirmity[.]” Id. at *23. Restricting the jurisdiction to transportation “as part of the interstate rail network” ensured that the intrastate transportation was sufficiently related to interstate commerce. Id.

Earlier decisions by the ICC also emphasize the need for an intrastate operator to have some relation to interstate commerce for jurisdiction to exist. See Napa Valley Wine Train, Inc., No. FD 31156, 1991 ICC LEXIS 195, at *12 (Jul. 18, 1991) (“[W]e may have jurisdiction over intrastate operations by interstate carriers when those operations are sufficiently linked to, and part of, the interstate system to be deemed ‘interstate commerce’ within the meaning of the commerce and supremacy clauses.”); Magner O. S. Railway v. Interstate Commerce Com., 692 F.2d 441, 444-45 (6th Cir. 1982) (no ICC jurisdiction over intrastate scenic railway because of lack of connector to common carrier, even though tracks were owned by interstate freight carriers).

Even after the ICCTA took effect, the STB relied on the ICC decisions in Napa and Magner to determine whether it had jurisdiction over an operator of a wholly intrastate tourist service.

[T]he ICC has determined that it had jurisdiction over a railroad lying wholly within one state *if the railroad participates in the movement of passengers from one state to another under common arrangements with connecting carriers, i.e., by means of through ticketing, or when the railroad participates in the movement of freight in interstate or foreign commerce.*

Fun Trains, Inc., No. FD 33472, 1998 STB LEXIS 75, at *5-6 (STB Mar. 5, 1998) (emphasis added). Based on this reasoning, the STB concluded that it had no jurisdiction because “[t]here

is no indication here that Fun Trains' operations will be sufficiently linked to or will be part of interstate commerce." Id. at *6. Without a connection to interstate commerce, Fun Trains' operations were not "transportation by rail carrier" under the ICCTA.

Here, OCSR has not shown that its operations are part of the interstate rail network. There is no evidence that OCSR participates in the interstate transportation of passengers under arrangements with connecting carriers or participates in the interstate movement of freight. There is also no evidence that the portion of the rail line leased by OCSR is connected to the interstate rail network. In fact, the lease between the Port and OCSR states that the Port's connection to a mainline carrier has been severed. I find that OCSR's operations do not fall under the STB's jurisdiction.

OCSR attempts to shift the focus of the inquiry to whether its repairs on tracks under the STB's jurisdiction is enough to bring its actions under the STB's jurisdiction. OCSR argues that it is an agent of the Port, and that if it were the Port performing the repairs, the State's removal-fill law would be preempted. I am not persuaded by this argument. First, there is no evidence that OCSR is an agent of the Port. The lease between the Port and OCSR does not mention the creation of an agency relationship. Wickert Decl. [10] Ex. 1. An agency relationship cannot be implied simply because OCSR is performing the repairs on behalf of the Port. The lease is a comprehensive legal document. If the parties intended to create an agency relationship, they would have done so expressly. Second, OCSR has not provided any legal authority to suggest that the focus of the inquiry should be whether the tracks themselves are under the STB's jurisdiction. The ICC decision in Magner suggests otherwise. In determining the ICC's jurisdiction, it was not relevant that the scenic railway would operate on tracks owned by three interstate freight carriers. Magner, 692 F.2d at 442-43. See also City of Creede, No. FD 34376,

2005 STB LEXIS 486, at *13-14 (STB May 3, 2005) (“[S]ection 10501(b) preemption does not apply to operations that are not part of the national rail network.”).

I conclude that OCSR is not a railroad carrier that operates as part of the interstate rail network, such that it would be subject to STB’s jurisdiction under § 10501(a). With no likelihood of success on the merits, I need not address the remaining three factors. The motion for preliminary injunction is denied.

II. Consolidation of Hearing and Trial on Merits

Plaintiff’s motion for a preliminary injunction is predicated on its first claim, that the ICCTA preempts the State’s removal-fill law. However, all of OCSR’s claims rely on the Commerce Clause. The ICCTA is based on Congress’ authority under the Commerce Clause to regulate railroads. City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). And OCSR’s second and third claims allege violations of the Commerce Clause. Considering my prior finding that OCSR’s operations do not relate to interstate commerce, OCSR is unlikely to prevail on the merits for its second and third claims.

Rule 65 gives me the discretion to treat a hearing for preliminary injunction as a final adjudication on the merits, so long as the procedure does not result in prejudice to either party. Fed. R. Civ. P. 65(a)(2); Glacier Park Foundation v. Watt, 663 F.2d 882, 886 (9th Cir. 1981). Because there is no genuine issue of material fact which remains at issue in this matter, I exercise my discretion and grant the State’s motion to consolidate the hearing and the trial, so as to fully resolve this matter by ruling on the purely legal issues before me. For the reasons discussed above, I deny OCSR’s request for declaratory relief and a permanent injunction.

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CONCLUSION

Based on the foregoing, Plaintiff's motion for preliminary injunction [8] is denied and Defendants' motion to consolidate the hearing with a trial on the merits [18] is granted.

Plaintiff's request for declaratory and injunctive relief is denied, and this case is dismissed.

IT IS SO ORDERED.

Dated this 18 day of April, 2014.

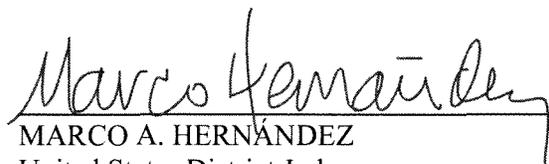

MARCO A. HERNÁNDEZ
United States District Judge

EXHIBIT B

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.