

**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 (8<sup>th</sup> 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 Keever 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 Keever 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 Keever 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. Keever, Management Member