B.C.D. 10-33 **APR 06 2010**

EMPLOYER STATUS DETERMINATION
Rail-Term Corporation

This is the determination of the Railroad Retirement Board concerning the status of Rail-Term Corporation as an employer 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). Rail-Term has not previously been held to be an employer under the Acts.

Information about Rail-Term was furnished by John D. Heffner, counsel for Rail-Term. Rail-Term was incorporated March 3, 2000 and began operations in mid-March 2000. It is entirely owned by Rail-Term, Inc., a Canadian corporation. Rail-Term, Inc. is owned by Robert Wheeler, Geoffrey Chambers, and Francois Prenovost. Seventy percent of Rail-Term's business is spent in providing train dispatching services and 25 percent is spent on railroad-related computer software development.

Rail-Term originally began operations in March 2000 as an intermodal terminal operations consultant for Expressway Terminal, LLC, a subsidiary of Canadian Pacific Railway in the United States. Rail-Term disbanded that operation in June 2004 and terminated those employees. Rail-Term has an affiliate established and based in Canada (Centre Rail-Control Inc.) which performs train dispatching services for seven Canadian short line and regional railroads and VIA Rail Canada, which is Canada's passenger carrier.

Rail-Term performs services for Vermont Railway (BA 2114) and four of its affiliates: Green Mountain Railway Company, Clarendon and Pittsford Railroad (B.A. 2103), Washington County Railroad, and New York & Ogdensburg Railway (BA 2272); and for Buffalo & Pittsburg Railroad, Inc . (BA 2249), and its affiliate Rochester & Southern Railroad, Inc. (BA 2247). Twenty-five percent of Rail-Term's business time is spent doing train dispatching for Vermont Railway and its affiliates and 50 percent for Buffalo & Pittsburgh and its affiliate.

Evidence in the coverage file indicates that Rail-Term entered into a Dispatching Services Agreement with Vermont Railway on February 18, 2005 and with Buffalo & Pittsburgh on March 1, 2005.

Rail-Term provides its dispatching services from its dispatching office in Rutland, Vermont. The dispatchers report to the Director of Operations of Rail-Term, who is employed by Rail-Term and is based at the Rutland office. During Rail-Term's initial operations in the United States, Rail-Term temporarily utilized some individuals employed by two of its railroad clients. As of April 28, 2007, all of the dispatchers were on the Rail-Term payroll.

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 his daily directions from Rail-Term's customers' Operations Managers. Information concerning changes in train operations follows the same channel.

Rail-Term owns its dispatching system. Dispatching is not done on carrier property. While Rail-Term's carrier customers may visit Rail-Term's facilities, they have no right to inspect those facilities. Rail-Term and its customers do not use the train order method of operations. Rail-Term's computerized dispatching software maintains train movement records in accordance with Federal Railroad Administration (FRA) requirements.

Although Rail-Term does not direct the operating personnel of its carrier customers, Rail Term's dispatchers give the operating personnel authority to occupy track. Rail-Term trains its dispatchers. In response to a question that asked to what extent is any action of the dispatcher imputed to the carrier, Rail-Term responded that it is a third party service provider and is solely responsible for its actions. The FRA will sanction Rail-Term, and not the carrier, if Rail-Term is deemed responsible for a violation.

No evidence in the coverage file indicates that any railroad has a financial interest in Rail-Term or that any individual owns a controlling interest in Rail-Term and in a carrier. Similarly, the file contains no evidence that an officer or director of Rail-Term is an officer or director of a carrier.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Because Rail-Term is neither owned by nor under common control with a rail carrier, a majority of the Board finds that it does not fall within the second definition of an employer under the Acts. However, for the reasons explained below, we find that Rail-Term is a carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

It should be noted at the beginning of this discussion that this case does not present to the Board for the first time the question of whether an entity that provides dispatching for interstate railroad operation is a covered employer under the Acts administered by the Board. In our decision in B.C.D. 02-12, issued February 12, 2002, we held that the dispatching department of the Southern California Regional Rail Authority (SCRRA) was a covered employer. Although the evidence in that case demonstrated that the principle business of SCRRA was not rail service, the Dispatching Department was found to be performing rail-related duties. That department was thus segregated under section 202.3 of the Board's regulations and found to be a covered employer effective October 1, 2002. See also our decision on reconsideration upholding the finding that Herzog Transit Services, Incorporated is a covered employer with respect to train dispatching over the rail line of Trinity Railway Express in Texas (B.C.D. 09-53, October 28, 2009).

Train dispatching includes routing and tracking train progress and coordinating the movement of one train with others. A train dispatcher handles two basic types of traffic: trains and maintenance activities [Thomas White, Elements of Train Dispatching, Vol. 2 "Handling Trains" 14 (2003)]. Train dispatchers issue specific authority for maintenance of way activity, just as they do for trains [Id. p. 14]. Dispatching concerns directing the movement of trains and engines over the railroad through the use of clearances, train orders, manipulation of signals, switches, etc. While Rail-Term and its customers do not use the train order method of operation, Rail-Term's computerized dispatching software achieves the same goal of directing the movement of trains and engines over the track of Rail-Term's customers. Until properly dispatched, the engineer cannot begin movement of the train. Because of the control that dispatchers have over the motion of trains, dispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad's common carrier obligation.

Train dispatching is an essential element of safe train operation over a rail line. Canadian Pacific Limited, et al. – Purchase and Trackage Rights – Delaware & Hudson Railway Company, Surface Transportation Board Finance Docket No. 31700 (Sub. No. 13) December 4, 1998, (employer's transfer of train dispatchers voided due to adverse affect on rail safety). Because the safe operation of trains depends on the work of the train dispatchers, dispatchers are subject to the Hours of Service law enacted by Congress. See 49 U.S.C. § 21101 et seq. Section 21101 defines "dispatching service employee" as follows:

> . . . 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 movements. [49 U.S.C. § 21101(2)].

Section 21105 limits the on duty hours of a dispatching service employee [49 U.S.C. § 21105].

The Federal Railroad Administration, which is charged with the responsibility to carry out the railroad safety duties imposed by the Hours of Service law, has issued regulations that prescribe reporting and record keeping requirements with respect to the hours of service of certain railroad employees, including dispatchers [49 CFR Part 228]. In addition, FRA regulations[1] emphasize the control factor present in the job of a dispatcher. 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.

[1] 49 CFR Part 241, "United States Locational Requirement for Dispatching of United States Rail Operations."

> 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 --
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> (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
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> (ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; . . .

Traditionally, the work of dispatching has been performed by employees of individual railroads.[2] However, as is currently the case with many other businesses, some railroads have made a business decision to have dispatching done by a separate entity that specializes in that field of work. Whether the work of dispatching is done by individuals on the payroll of a railroad or by individuals on the payroll of a separate entity, the work is essentially the same: the dispatcher controls the movement of the trains. Because no railroad can fulfill its common carrier obligation unless its trains move, the work of the dispatcher is an integral part of the operation of a common carrier. Thus, because Rail-Term's dispatchers have the ultimate control over the movement of the trains of its rail carrier customers, the

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[2] It is noteworthy that the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers is an AFL-CIO affiliated craft union representing employees in the nation's railroad industry who operate and dispatch trains and supply the electric power for those railroads which use electricity for train propulsion and signaling. It is also an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts (B.A. No. 8905).

Board finds that Rail-Term is itself a rail carrier within the definition of an employer under the Railroad Retirement and Railroad Unemployment Insurance Act. Service for Rail-Term is creditable beginning February 18, 2005, the date it first entered into an agreement to provide dispatching services.

As the dissent suggests, there is an alternate theory that dispatching is such an integral part of operating a railroad that it cannot be contracted out to a third party that is outside of the control of the railroad. Under this analysis Rail Term employees would be found to be employees of the railroads for which Rail Term provides dispatching services.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

It should be noted that the tests set forth under paragraphs (B) and (C), above, go beyond the test contained in paragraph (A) and could hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. Under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company,

206 F. 2d 831 (8th Cir. 1953). However, see also, Wabash Railroad Co. v. Finnegan, 67 F. Supp. 94 (E.D. Mo. 1946), a railroad retirement tax case where the court found that the nature of the services performed for a railroad by its contractors was such that the railroad could not surrender control and supervision in fact, even if it did so in words. 67 F. Supp. at 100. The dispatching services provided by Rail Term are analogous to the services provided by contractors in Wabash Railroad Co. in that the dispatching services are of a continuing nature and are so essential to the statutory duty of the rail carriers to provide rail transportation that the carriers must retain the power to direct and control the individuals who conduct the dispatching service.

The Board has applied this principle in its decision with respect to the coverage status of Rail-West, Inc. (B.C.D. 95-51). We noted in that decision that: "The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer." See Restatement (Second) of Agency, § 214. In Rail-West, we held that the individuals provided by Rail-West as crew to operate the trains of the rail division of the Port of Tillamook Bay were covered as employees of that rail division because the Port had to retain ultimate control of the performance of its service as a common carrier. In the case of Rail Term, because a railroad cannot properly discharge its duties as a common carrier without dispatching services, dispatching services fall under this same rule of agency; i.e., they are so essential to the role of common carrier by railroad that responsibility for their proper performance must be retained by the railroad.

In addition, by the nature of the work that dispatchers perform, they are integrated into the railroad's operations. Without the services of the dispatcher, the railroad's trains cannot run. The job of a dispatcher is as critical to the operation of a railroad as is that of a locomotive engineer. Because dispatching is an inextricable part of the railroad's fulfilling its common carrier obligation, we find that the

dispatchers who work for Rail Term could be considered to be employees of each railroad for which Rail Term provides dispatching services. **Cf.** B.C.D. 86-75, Genesee Valley Transportation Company, Inc.

Under either analysis, dispatchers who work for Rail Term would be considered to be covered employees under the Acts administered by this Board.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting Opinion attached)

MANAGEMENT MEMBER KEVER'S DISSENT
RAIL-TERM COPORATION

A majority of the Board found Rail-Term to be a covered employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). While I may agree with the majority that dispatching is an "inextricable part" of railroad operations, I can not agree with the majority that Rail-Term is itself a carrier under our Acts.

The Railroad Retirement Act (45 U.S.C . § 231 (a) (1)) (substantially the same as the RUIA) defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49; United States Code;
(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph....

The majority finds Rail-Term to be a covered employer under subsection (i) above. Further, the majority cites Southern California Regional Rail Authority (SCRRA) B.C.D. 02-12 and Herzog Transit Services, Inc. B.C.D. 09-53 (Decision on Reconsideration - Management Member Kever Dissenting) as precedent supporting their conclusion. Because I do not believe that Rail-Term would be considered a carrier by the Surface Transportation Board (STB) under Part A of title 49 and also do not find the above cited decisions applicable to this case, I must dissent.

The Board's decision outlines the nature of dispatching and its relationship to other railroad operations. It also presents examples of how dispatching is regulated by federal agencies including the Federal Railroad Administration. However, the decision does not provide a basis upon which Rail-Term could actually be found to be an entity regulated under the jurisdiction of the STB. In American Orient Express Railway Company, v. Surface Transportation Board, 484 F3d 554 (D.C. Circuit 2007) the Court did not disturb the STB's finding that an entity that did not own tracks or utilize its own employees for movement of passenger trains could still be considered a railroad carrier where it provided its own rail cars and contracted with AMTRAK to move its passengers. Rail-Term may participate in directing car movements by dispatching, but it has not provided rail cars nor participated in interchange agreements or other arrangements to move freight.

The majority decision also cites two prior Board decisions in SCRRA and Herzog Transit Services as support for its determination. These decisions present facts very different than the instant case since both applied factors from the Board's decision in Railroad Ventures, Inc. B.C.D. 00-47. In the initial Board decision on Herzog Transit Services, B.C.D. 09-02, the Board summarized the SCRRA decision and concluded that since SCRRA had assumed the responsibility for part of the railroad operations (dispatching for both intrastate and interstate carriers) that it became covered consistent with the Railroad Ventures' analysis. The Board's initial determination of Herzog goes on to analyze Herzog Transit under the Railroad Ventures factors and concludes that Herzog, as operator for DART, became covered upon their assuming the dispatching function which includes interstate passenger and freight trains. Unlike SCRRA and Herzog, Rail-Term does not own track nor provide train operations over leased track as in Herzog's case. Providing dispatching services by SCRRA and DART/Herzog changed their covered status because they owned track upon which interstate rail traffic moved along with their intrastate commuter operations. This is a very different factual situation than exists in Rail-Term.

While the majority certainly had the authority to find dispatching to be an integral part of railroading that could not be contracted out similar to engineers and conductors (see Rail- West, Inc. B.C.D. 95-51), the majority also chose to find Rail-Term itself to be a carrier which I do not believe is supportable under the Acts; therefore I dissent.

Note - Reference to the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers in footnote (2) of the majority opinion is not relevant since rail unions are subject to coverage under different statutory provisions than rail carrier employers under the RRA and the RUIA.

Original signed by:

Jerome F. Kever
March 26, 2010