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August 4, 2022

VIA E-FILING

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceeding  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20024

Re: STB Docket No. FD 36629  
Rail Link, Inc. – Petition for Declaratory Order  
and Request to Set Procedural Schedule

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket is a Petition for Declaratory Order of Rail Link, Inc. The filing fee has been paid via Pay.Gov.

If there are any questions related to this filing, please contact me.

Respectfully,

CLARK HILL, PLC

*/s/ Eric M. Hocky*

Eric M. Hocky

EMH:e  
Enclosure

cc: All parties shown on the Certificate of Service

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**Before the**  
**SURFACE TRANSPORTATION BOARD**

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STB Docket No. FD 36629

**RAIL LINK, INC. – PETITION FOR DECLARATORY ORDER  
AND REQUEST TO SET PROCEDURAL SCHEDULE**

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*Counsel for Rail Link, Inc*

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STB Docket No. FD 36629

**RAIL LINK, INC. – PETITION FOR DECLARATORY ORDER  
AND REQUEST TO SET PROCEDURAL SCHEDULE**

Pursuant to 5. U.S.C. §554(e) and 49 U.S.C. §1321, and 49 C.F.R. §1117.1, Rail Link, Inc. (“Rail Link”) hereby petitions the Board to exercise its discretionary authority to institute a declaratory order proceeding, and to establish a procedural schedule, to address the issue of Rail Link’s common carrier status referred to the Board by the District Court of Harris County, Texas (the “Court”) in its order of July 7, 2022 (the “Referral Order”), a copy of which is attached hereto as Exhibit A. The Board, by the Office of Proceedings<sup>1</sup>, routinely accepts petitions for the issuance of a declaratory order premised on a court referral of matters within the Board’s jurisdiction. *See Norfolk Southern Railway Company – Petition for Declaratory Order*, STB Docket No. FD 36522 (served August 9, 2021); *Finch Paper, LLC – Petition for Declaratory Order*, STB Docket No. FD 35981 (served February 11, 2016); *West Point Relocation, Inc. and Eli Cohen – Petition for Declaratory Order*, STB Finance Docket No. 35290 (served October 26, 2009). The Board generally accepts the petition under its modified procedures at 49 C.F.R. Part 1112. For the reasons set forth below, the Board should accept the Petition and establish a procedural schedule as proposed by Rail Link.

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<sup>1</sup> The authority to accept or reject petitions for a declaratory order have been delegated to the Office of Proceedings. 49 C.F.R. §1011.7(a)(2).

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### **The State Court Litigation**

On April 29, 2019, Plaintiff Demaree Reed, an employee of Rail Link, filed suit against Rail Link and a number of other entities, seeking to recover damages for injuries suffered by Mr. Reed, an employee of Rail Link, while providing in-plant switching services at the plant of defendant INEOS USA, LLC. *Demaree Reed v. INEOS Americas, LLC, et al*, Cause No. 2019-29955, in the District Court of Harris County, Texas, 215<sup>th</sup> Judicial District (the “State Court Litigation”). Mr. Reed asserted, among other claims, a personal injury claim against Rail Link under the Federal Employers’ Liability Act, 45 U.S.C. §51, *et seq.* (“FELA”).

Rail Link denies all liability under FELA for Mr. Reed’s injuries. Rail Link denies that Mr. Reed can recover against Rail Link under FELA, because a claim under FELA can only be brought against an employer that is a common carrier by rail. Rail Link asserts that is not subject to FELA claims because it is not a common carrier by rail. Instead, Rail Link asserts that compensation for Mr. Reed’s injuries is only available under applicable Texas worker’s compensation law.

### **Referral by the Court**

On June 21, 2021, Rail Link filed its Motion for Summary Judgment seeking dismissal of the FELA claim because Rail Link is not a common carrier by rail. The Court originally denied the motion, but, on reconsideration, the Court ordered that the issue of Rail Link’s common carrier status be referred to the Board. The Court directed Rail Link to petition the Board for a determination of whether Rail Link is either a common carrier or a private contract operator. *See* Referral Order, attached as Exhibit A. It is clearly within the scope of the Board’s authority to determine whether or not an entity is subject to the Board’s jurisdiction as a common carrier by

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rail. See e.g., *The Louisville and Jefferson County Riverport Authority—Petition for Declaratory Order*, STB Docket No. FD 36463 (served Oct. 22, 2021).

As directed by the Court, Rail Link is hereby petitioning the Board to institute a declaratory order proceeding and to set a procedural schedule to resolve the issue.

### **Proposed Procedural Schedule**

The Board's regulations for modified procedures contemplate an opening statement, a reply, and a rebuttal. 49 C.F.R. §1112.2. Replies to rebuttal materials are not permitted. *Id.* Counsel for Rail Link in the State Court Litigation approached counsel for Mr. Reed to see if a mutual agreement could be reached on a proposed procedural schedule. After initially seeming receptive to discussions with respect this proceeding, counsel for Mr. Reed indicated he was no longer willing to engage in any discussions. Accordingly, Rail Link is proposing the following procedural schedule for the submission of statements and evidence for the Board's consideration:

| <b>EVENT</b>                                                                              | <b>DAY</b> |
|-------------------------------------------------------------------------------------------|------------|
| Board order instituting declaratory order proceeding and establishing procedural schedule | 0          |
| Rail Link opening statement and evidence                                                  | +3         |
| Reed reply statement and evidence                                                         | +13        |
| Rail Link rebuttal statement and evidence                                                 | +16        |

At the time the Referral Order was issued, discovery in the State Court Litigation was completed, and trial was scheduled for August 15, 2022. The trial date has since been continued, but Rail Link does not know when it will be rescheduled. Because the parties were so close to trial, the parties are fully knowledgeable of the facts, and no discovery is necessary. Rail Link believes that proposed abbreviated schedule is both expeditious and reasonable given the single question referred to the Board, and the unknown trial date.

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## Conclusion

For the foregoing reasons, Rail Link requests that the Board institute a declaratory order proceeding based on the Referral Order, and adopt the procedural schedule proposed herein.

Respectfully submitted,

*/s/ Eric M. Hocky*

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Holli Pryor-Baze  
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*Counsel for Rail Link, Inc.*

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## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2022, I caused a copy of the foregoing Petition for Declaratory Order to be served on the persons listed below by US first class mail, hand delivery, or by electronic filing where indicated:

|                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                            |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Hon. Elaine H. Palmer<br><br>Harris County District Court<br>215 <sup>th</sup> Civil Court<br>201 Caroline, 13 <sup>th</sup> Floor<br>Houston, Texas 77002                                                                                                                                                                                                                                                                                          | Counsel for Plaintiff Demaree Reed<br><br>Kurt Arnold<br>karnold@arnolditkin.com<br>Caj Boatright<br>cboatright@arnolditkin.com<br>Roland Christensen<br>rchristensen@arnolditkin.com<br>Arnold & Itkin LLP<br>2009 Memorial Drive<br>Houston, Texas 77007 |
| Counsel for Trans-Global Solutions, Inc.<br><br>Wayne L. Robbins, Jr.<br>wlr@robbinstravis.com<br>Lincoln A. Floyd<br>laf@robbinstravis.com<br>Robbins Travis, PLLC<br>2485 E. Southlake Blvd, Suite 160<br>Southlake, TX 76092<br><br>William J. Collins, III<br>wcollins@sheehyware.com<br>Laura S. Favaloro<br>lfavaloro@sheehyware.com<br>Sheehy, Ware & Pappas, P.C.<br>2500 Two Houston Center<br>909 Fannin Street<br>Houston, TX 77010-1003 | Counsel for INEOS Americas LLC and<br>INEOS USA LLC<br><br>Cory Reed<br>creed@thompsoncoe.com<br>Thompson Coe<br>One Riverway, Suite 1400<br>Houston, Texas 77056-1988                                                                                     |

*/s/ Eric M. Hocky*

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**EXHIBIT A**  
**REFERRAL ORDER**

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CAUSE NO. 2019-29955

REHRX

|                            |   |                          |
|----------------------------|---|--------------------------|
| DEMAREE REED,              | § | IN THE DISTRICT COURT OF |
|                            | § |                          |
| <i>Plaintiff,</i>          | § |                          |
|                            | § |                          |
| v.                         | § | HARRIS COUNTY, TEXAS     |
|                            | § |                          |
| INEOS AMERICAS LLC; INEOS  | § |                          |
| USA LLC; TRANS-GLOBAL      | § |                          |
| SOLUTIONS, INC.; GENESEE & | § |                          |
| WYOMING RAILROAD SERVICES, | § |                          |
| INC.; RAIL LINK, INC.; AND | § |                          |
| GENESEE & WYOMING INC.     | § |                          |
|                            | § |                          |
| <i>Defendants.</i>         | § | 215TH JUDICIAL DISTRICT  |

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**PROPOSED ORDER ON RAIL LINK, INC.'S MOTION FOR RECONSIDERATION OF ITS MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, MOTION FOR REFERRAL TO THE UNITED STATES SURFACE TRANSPORTATION BOARD**

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The Court has considered Rail Link, Inc.'s ("Rail Link") Motion for Reconsideration of its Motion for Summary Judgment, or, in the Alternative, Motion for Referral to the United States Surface Transportation Board ("Motion"), and has decided to grant Rail Link's Motion. It is therefore

\_\_\_ ORDERED that Rail Link's Motion for Summary Judgment is GRANTED. It is held as a matter of law that Rail Link is not a common carrier.

OR, in the alternative, it is

  x   ORDERED that the issue of Rail Link's common carrier status is referred to the United States Surface Transportation Board for determination as to Rail Link's status as a common carrier by railroad. Rail Link is directed to file a petition to the Surface Transportation Board for a determination of Rail Link's status as either a common carrier or as a private contract operator.

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Signed this \_\_\_\_ day of July, 2022.

Signed:

7/7/2022

9:41 AM



Hon. Elaine H. Palmer

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