

Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36629

RAIL LINK, INC. - PETITION FOR DECLARATORY ORDER

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MOTION TO STAY AND HOLD IN ABEYANCE

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PLAINTIFF DEMAREE REED**

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RAIL LINK, INC. - PETITION FOR DECLARATORY ORDER

MOTION TO STAY AND HOLD IN ABEYANCE

Plaintiff Demaree Reed respectfully requests that this Board stay and hold in abeyance the current declaratory-order proceedings pending the resolution of a petition for writ of mandamus, which he filed yesterday in the Court of Appeals for the First District of Texas in Houston.¹ There, under Texas standards for mandamus relief, he challenges the trial court’s referral of this matter to the Board for lack of primary jurisdiction—the sole legal basis for referral—on two grounds. *First*, “whether an entity acted as a ‘common carrier’ under FELA section 1 is a question that federal and state courts have repeatedly resolved—for over a hundred years—by applying the statutory text, as well as its abundant caselaw, to straightforward facts.” *Id.* at 2. *Second*, with great respect for this Board, its “expertise is neither necessary nor beneficial in adjudicating the issue of common carriage” under the garden-variety, non-technical facts here, where a switching-services contractor alleges that it cannot be a FELA common carrier despite its intertwined and mutually dependent relationships to its corporate family. *Id.*; *see also generally id.* at 12–33.

Less than 24 hours after receiving the petition, the Court of Appeals requested that Rail Link file a response by November 15. *See* Ex. 2. Considering the likelihood that Mr. Reed’s

¹ *See* Ex. 1, *In re Reed*, No. 01-22-00794-CV, Petition for Writ of Mandamus (Tex. App.—Houston Oct. 25, 2022).

petition will succeed, the interests of this Board and the parties in avoiding duplicative and wasteful proceedings, the lack of prejudice to any party, and good cause here, the Board should stay and hold in abeyance these proceedings until resolution of his mandamus petition.

BACKGROUND AND RELEVANT PROCEDURAL HISTORY

The Board's declaratory-order proceeding arises solely from Mr. Reed's lawsuit, filed in Texas state court as a result of the catastrophic injury he suffered he suffered while working as a switchman, in which a railcar ran over and severed his foot. Ex. 1 at 4–5. Mr. Reed sued his employers—Rail Link, Inc., its parent company Genesee & Wyoming, Inc., and Rail Link's co-subsidary and admitted common carrier Genesee & Wyoming Railroad Services, Inc.—and other entities, alleging negligence and gross negligence under the Federal Employers' Liability Act ("FELA") and Texas common law. Ex. 1 at 6–7. To that end, Mr. Reed alleges that Rail Link is a common carrier within the meaning of FELA section 1 (45 U.S.C. § 51)—in part because Rail Link and the Genesee & Wyoming defendants operated as a single business entity. *See id.*

In Rail Link's motion for summary judgment before in the trial court, Rail Link extensively argued that it is not a common carrier under FELA section 1. *Id.* at 7. Meanwhile, the Genesee & Wyoming defendants moved for summary judgment on grounds that they did not employ Mr. Reed and did not operate as Rail Link's agents, alter egos, or joint venturers, despite their substantial operational overlap. *Id.* at 7–8. The trial court denied both motions.

Over six months later and two months before trial, Rail Link sought reconsideration of the summary judgment and then requested in the alternative—and for the first time—referral of the common-carrier issue to this body. *Id.* at 8–9. The trial court did not vacate its grant of summary judgment order but instead granted Rail Link's request to refer this case to the Board to determine Rail Link's common carrier status. *Id.* at 10–12.

To remedy the trial court's improper referral to the Board under the primary-jurisdiction doctrine, Mr. Reed has sought mandamus relief in the Court of Appeals. Ex. 1.

ARGUMENT

“The Board follows standard federal practice in addressing motions to stay.” *Consol. Rail Corporation Abandonment Exemption in Hudson Cnty., Nj CSX Transp., Inc. Discontinuance of Serv. Exemption in Hudson Cnty., Nj Norfolk S. Ry. Company Discontinuance of Serv. Exemption in Hudson Cnty., Nj*, No. AB 167 (SUB-1189X), 2016 WL 6301646, at *1 (S.T.B. Oct. 26, 2016). Under that standard, the Board will stay proceedings when the moving party shows “(1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay.” *Bulkmatic R.R. Corp.-Acquisition Exemption-Bulkmatic Transp. Co. Chicago Heights Switching Co.-Operation Exemption-Bulkmatic R.R. Corp.*, No. 34145, 2001 WL 1659578, at *1 (S.T.B. Dec. 27, 2001) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

“The Board has broad discretion to determine whether to hold a proceeding in abeyance, and its decision ‘to do so in any particular situation is highly depending on the facts and circumstances of the case.’” *Petition of the Nat’l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. 24905*, No. FD 36048, 2016 WL 5904759, at *2 (S.T.B. Sept. 29, 2016) (quoting *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125 et al., slip op. at 4 (S.T.B. served Nov. 29, 2012)). To that end, the Board grants stay motions where “reasonable” (see *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, No. NOR 42110, 2010 WL 3169306, at *1 (S.T.B. Aug. 10, 2010)) or for “good cause.” *DHX, Inc. v. Matson Navigation Co. & Sea-Land Serv., Inc.*, No. WCC-105, 2003 WL 22357755, at *2 (S.T.B. Oct. 16, 2003), *modified in part*, (S.T.B. Dec. 4,

2003).

Mr. Reed's request that the Board stay the proceedings until the resolution of mandamus proceedings is appropriate for four reasons.

1. Mr. Reed is highly likely to prevail on the merits.

The Board should stay these proceedings because Mr. Reed's mandamus petition is meritorious. Mr. Reed has the right for the issue of Rail Link's common carrier status under FELA section 1 to be adjudicated by the Texas trial court, and not the Board, because the Board lacks primary jurisdiction. *See generally* Ex. 1 at 13–33. *See also, e.g., Boston & Maine Corp. & Springfield Terminal Ry. Co. v. New England Cent. R.R., Inc.*, No. FIN 24612, 2006 WL 47366, at *2 (S.T.B. Jan. 9, 2006) (where dispute was “not within the Board's primary jurisdiction because the dispute is founded primarily on claims of breach of contract and tortious actions,” and concluding that “the court is the appropriate forum to resolve the parties' dispute.”).

An agency has primary jurisdiction only when an issue is beyond the conventional competence of the courts and requires the judgment of the agency's technical experts. *See generally id.* at 14–19. Thus, the doctrine does not apply to “claims that are ‘inherently judicial in nature’” (*Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 518 S.W.3d 422, 430 (Tex. 2017)) like Mr. Reed's negligence claims, the construction of “common carrier” under FELA section 1, and whether Rail Link meets that definition for reasons including its intertwined operations with its corporate family. *See* Ex. 1 at 16–24. Indeed, the issue of common-carrier status under FELA section 1 falls well within the conventional competence of the courts, and is an issue courts have adjudicated for more than a hundred years (since the enactment of the FELA). *See id.* at 20–24 & n.5; *see also, e.g., Nichols v. Pabtex Inc.*, 151 F. Supp. 2d 772 (E.D. Tex. 2001); *Ashworth v. Railserve, Inc.*, No. 09-09-00187-CV, 2010 WL 2172377 (Tex. App.—Beaumont May 27, 2019, no pet.); *Kieronski v. Wyandotte Terminal R. Co.*, 806 F.2d 107 (6th Cir. 1986).

Further still, the doctrine does not apply to “a legal question that ‘is within the conventional competence of courts, [where] the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of the particular case.’” *Forte v. Wal-Mart Store, Inc.*, No. 02:07-CV-155, 2007 WL 2461831, at *4 (S.D. Tex. Aug. 26, 2007) (quoting *Goya Foods, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848, 854 (2d Cir. 1988)). As Mr. Reed’s petition demonstrates, the STB’s expertise in neither necessary or beneficial in light of the ordinary, non-technical facts this case presents. Nor is the STB’s expertise necessary to promote uniform interpretation of any law or regulation. *See* Ex. 1 at 24–33.

Thus, the trial court erred in referring the issue of common carriage to this body. Indeed, even Rail Link has primarily sought *judicial*—not STB—determination of this issue. *See Smith v. Rail Link, Inc.*, 697 F.3d 1304, 1310 (10th Cir. 2012) (citing *Wolf v. Reliance Ins. Co.*, No. 99–CV–40–B, Summary Judgment Memorandum and Order, slip op. at 12–26 (D. Wyo. Jan. 3, 2000)); *Erwin v. Rail Link, Inc.*, No. CIV–93–160–3, Order Granting Rail Link, Inc. Summary Judgment (Cir. Ct. Jefferson County, Ark., June 8, 1994); *Waters v. Rail Link, Inc.*, No. 91–26837, Order Granting Defendant’s Motion for Summary Judgment (D. Ct. Harris County, Tex., May 21, 1992)). Thus, by any measure, Rail Link’s request for referral to the Board—and the Board’s grant of that request—was improper. Accordingly, Mr. Reed’s petition is highly likely to succeed.

2. Mr. Reed will suffer irreparable harm without a stay, and further Board proceedings will waste judicial resources and force the parties into unnecessary litigation.

Absent a stay, the STB’s adjudication of this issue will also likely cause Mr. Reed to suffer irreparable harm, in part because the proceedings here could lead to indefinite delay of Mr. Reed’s trial on the merits, and from which he lacks a remedy by appeal. *See* Ex. 1 at 33–42; *cf. Fife v. Moore*, 808 F. Supp. 2d 1310, 1312 (E.D. Okla. 2011) (proceeding before court lacking jurisdiction would cause irreparable harm).

What is more, a stay is also necessary to avoid duplicative litigation efforts and to prevent the Board and the parties from spending needless time and effort in this proceeding. *AT&T Mobility Services LLC v. Payne*, No. 3:17-CV-00649-CRS, 2018 WL 935441, at *3 (W.D. Ky. Feb. 16, 2018) (enjoining state-court proceedings pursuant to valid arbitration agreement where “expense and delay of” needless proceeding would cause irreparable harm).

Indeed, “[c]ourts have held that stays are appropriate where there is the possibility that an earlier-filed action will have preclusive effects in a later-filed action, or where at least some of the issues in the case could be clarified or eliminated.” *ZeniMax Media Inc. v. Samsung Elecs. Co., Ltd.*, No. 3:17-CV-1288-D, 2017 WL 4805524, at *4 (N.D. Tex. Oct. 25, 2017). Absence of a stay here would cause the parties and the Board to expend resources on an issue that already before the First Court of Appeals, and in which the First Court of Appeals could (and likely will) direct the district court to rescind the referral that is the impetus of Rail Link’s petition. Thus, if the Court of Appeals grants Mr. Reed’s mandamus petition, these declaratory-order proceedings will be for naught, and the parties—and this Board—will have needlessly spent many hours and resources litigating a moot issue. A stay is thus especially warranted here.

3. A stay will not prejudice either party.

Nor will a stay prejudice either party. It is a well-established that jurisdiction is “a threshold matter” that is “inflexible and without exception.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1988) (internal citations and quotations omitted). Thus, the propriety of the trial court’s referral of the common-carrier issue to this body is fundamental, and a stay will simply avoid needless litigation here. Accordingly, a stay until resolution of the mandamus proceedings will benefit, not prejudice, both parties.

4. The public interest and other good cause support the granting of a stay.

Finally, a stay will promote principles of federalism and comity. *See, e.g., DeSpain v.*

Johnston, 731 F.2d 1171, 1176 (5th Cir. 1984) (explaining that “the principles of comity and federalism, in conjunction with equitable concerns may require federal abstention.”).

This personal injury lawsuit began in Texas state court. Thus, the trial court (and the Court of Appeals) has subject-matter jurisdiction over the case, including over the propriety of referral to the Board under the primary-jurisdiction doctrine. *See* Ex. 1 at 14–16. Texas trial courts are courts of general jurisdiction that are “*presume[d]* [to] have subject-matter jurisdiction unless a contrary showing is made.” *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002) (emphasis added). By contrast, there is “no presumption that administrative agencies are authorized to resolve disputes.” *Id.* Thus, the Board should temporarily stay these proceedings to allow the Texas courts—where this case originated, and where it will ultimately conclude—to determine in the first instance whether referral was appropriate. There is thus good cause for a stay here.

PRAYER

For these reasons, Mr. Reed respectfully requests that the Board stay and hold in abeyance the current declaratory-order proceedings pending the resolution of his petition for writ of mandamus in the Texas appellate courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record by email on this the 26th day of October, 2022.

/s/ Roland Christensen

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EXHIBIT 1

No. __-22-____-CV

IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS IN HOUSTON

In re Demaree Reed,
Relator.

PETITION FOR WRIT OF MANDAMUS

Original Proceeding from the 215th Judicial District Court
of Harris County, Texas (Cause No. 2019-29955)
Hon. Elaine Palmer, Presiding Judge

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LOCAL RULE 1.3(A) NOTICE

As required by Local Rule 1.3(a), I certify that no related appeal or original proceeding has been previously filed in either the First or Fourteenth Court of Appeals.

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ABBREVIATIONS AND REFERENCES

Abbreviations:

Mr. Reed: Relator Demaree Reed, plaintiff below.

Real Link: Real Party in Interest Rail Link, Inc., defendant below.

Genesee & Wyoming Defendants: Real Parties in Interest Genesee & Wyoming, Inc. and Genesee & Wyoming Railroad Services, Inc., defendants below.

Ineos: Real Parties in Interest Ineos Americas LLC and Ineos USA LLC, defendants below.

Trans-Global: Real Party in Interest Trans-Global Solutions, Inc., defendant below.

PTRA: Port Terminal Railroad Association, a common-carrier railroad.

FELA: Federal Employer Liability Act.

STB: Surface Transportation Board.

References:

The mandamus record is cited as “[volume number]MR:[page number].”

The mandamus appendix is cited as “App:[page number].”

STATEMENT OF THE CASE

<i>Nature of proceeding</i>	This is a personal-injury lawsuit. While working for his employers—Rail Link, Inc., Genesee & Wyoming, Inc., and Genesee & Wyoming Railroad Services, Inc.—Demaree Reed’s foot was run over by a slow-moving railcar, leading to the amputation of the lower half of his leg. 1MR:72. Mr. Reed brought claims of negligence and gross negligence under the Federal Employer Liability Act against Rail Link and the Genesee & Wyoming Defendants, as well as under Texas common law against Ineos Americas LLC, Ineos USA LLC, and Trans-Global Solutions, Inc. 1MR:69–81.
<i>Respondent</i>	Hon. Elaine Palmer 215th Judicial District Court 201 Caroline, 13th Floor Houston, Texas 77002
<i>Respondent’s action</i>	On December 9, 2021, the trial court denied Rail Link’s motion for summary judgment on the issue of common carriage under section 1 of FELA. 4MR:1398. Then, on July 7, 2022, it granted Rail Link’s motion for reconsideration in part, accepting Rail Link’s request to refer the common-carrier issue to the Surface Transportation Board. 4MR:1468. Finally, on August 15, 2022, the trial court denied Mr. Reed’s motion to reconsider its referral order. 4MR:1503. On September 19, 2022, the Surface Transportation Board granted Rail Link’s petition to commence a declaratory proceeding. 4MR:1530.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus in this case under Section 22.221(b)(1) of the Texas Government Code.

ISSUES PRESENTED

- I.** Did the trial court clearly abuse its discretion when it referred the question of common carriage to the Surface Transportation Board under the primary-jurisdiction doctrine, when the issue is within the longstanding conventional competence of courts and does not require the STB's expertise to resolve?
- II.** Does Mr. Reed lack an adequate remedy by appeal when, among other reasons, the trial court's referral order will result in indefinite delay while the matter improperly proceeds before an improper adjudicatory body?

INTRODUCTION

Every day across this State, trial courts must apply law to facts—sometimes basic, sometimes complex—in a wide range of pretrial, trial, and posttrial proceedings. Ruling on motions for summary judgment, for example, is a quintessentially judicial task.

Yet here, the trial court regrettably abdicated its duty. After Real Party in Interest Rail Link, Inc. belatedly requested that the court refer the summary-judgment issue of whether it was a “common carrier” within the meaning of the Federal Employer Liability Act to the Surface Transportation Board—a request Rail Link made only after it first *lost* summary judgment on this issue, and mere weeks before trial—the court punted the issue to that federal agency for resolution.

That ruling is unprecedented: Relator Demaree Reed is unaware of any Texas state court that has *ever* referred the question of an entity’s common-carrier status to the STB. And that ruling has immense consequences. Mr. Reed—who suffered an amputation-causing injury to his leg in 2019 and who was slated to go to trial against all defendants in six weeks—now has his case against Rail Link stayed indefinitely, perhaps for years.

This extraordinary ruling warrants this Court’s immediate intervention. The trial court clearly abused its discretion in referring the common-carriage issue to the STB under the primary-jurisdiction doctrine, the sole legal basis for referral. But for two reasons, that doctrine has no application here, and the trial court fundamentally misapplied the law in concluding otherwise.

First, whether an entity acted as a “common carrier” under FELA section 1 is a question that federal and state courts have repeatedly resolved—for over a hundred years—by applying the statutory text, as well as its abundant caselaw, to straightforward facts. Indeed, courts have long determined the common-carriage question under facts nearly identical to those here.

Second, the STB’s expertise is neither necessary nor beneficial in adjudicating the issue of common carriage. Although courts have found that the STB has primary jurisdiction over disputes that directly implicate STB’s technical expertise—like construing a railroad’s tariff provisions or evaluating its toxic-inhalation requirements—they have rejected requests for referral when the STB’s expertise is not required and the straightforward facts present a straightforwardly applied question of law.

That is the case here: whether Rail Link’s switching services render it a common carrier under the FELA does not present embedded fact issues that

counsel deference to agency proceedings. Rather, the scope of Rail Link's switching services, its relationship to the public common-carrier here, and its relationship to its corporate family—all matters extensively briefed by the parties—simply require the garden-variety application of facts to law, which courts do every day. Because the primary-jurisdiction doctrine does not apply, the trial court clearly abused its discretion by referring the issue to the STB.

Next, for four independent reasons, Mr. Reed lacks an adequate remedy by appeal. *First*, the court's erroneous order sends his case against Rail Link to the wrong adjudicatory body. *Second*, and relatedly, it impermissibly results in an indefinite abatement of the proceedings against Rail Link, during which Mr. Reed cannot challenge the order. Considering the federal appellate process, it will be years before the Surface Transportation Board's decision is final. *Third*, the court's order will force Mr. Reed to unnecessarily try two separate trials on one intertwined set of facts. *And fourth*, the legal issue posed by the primary-jurisdiction doctrine's application to a straightforward set of facts not only is novel; it also will prove elusive on appeal.

The trial court's clearly erroneous referral order readily presents the special circumstances warranting mandamus relief. This Court should grant this petition.

STATEMENT OF FACTS

I. Rail Link's unsafe working conditions caused Mr. Reed to lose much of his leg.

In 2019, Demaree Reed—then 23 years old—worked as a switchman (or brakeman) for Rail Link and the Genesee & Wyoming Defendants. 1MR:2, 130.¹ His daily tasks included assisting with the “switching” of railcars (coupling, uncoupling, loading, and moving them from loading stations to assemble trains), as well as weighing railcars. 1MR:116, 130. These tasks—which he performed at the outdoor Houston facility of Ineos, a manufacturer of polypropylene and polyethylene—required him to periodically ride slow-moving railcars. 1MR:72, 117, 125, 878; 4MR:1402.

Ineos had hired Rail Link to perform switching services within its facility so that its chemical products could be shipped on the tracks of Port Terminal Railroad Association (PTRA), a common-carrier railroad. 3MR:1137, 1141.

While Mr. Reed worked aboard a railcar on January 27, 2019, slippery and muddy conditions at the facility caused his foot to slip from the ladder's bottom rung, which lacked non-skid material. 1MR:416–17, 420–23, 512. As he slipped, his foot fell between the wheels of the moving car. 1MR:418–20.

¹ Genesee & Wyoming, Inc. is the parent company of Genesee & Wyoming Railroad Services, Inc. and Rail Link (among other subsidiaries). 1MR:91, 93.

The car ran over his foot, leading to a devastating injury that ultimately required a doctor to amputate the lower half of his leg:



1MR:418.



1MR:426-27.

Four months later, Mr. Reed brought claims of negligence (and gross negligence) in Harris County District Court against Rail Link and the Genesee & Wyoming Defendants under the Federal Employer Liability Act (FELA), as well as Ineos (the facility owner) and Trans-Global (the track maintenance company) under Texas common law. 1MR:1–8, 69–79. Amongst other claims, he alleged that Rail Link and the Genesee & Wyoming Defendants were negligent (and grossly negligent) because of their inadequate and unsafe policies, failure to properly prepare for the tasks Mr. Reed assisted with when he was injured, and failure to provide a safe work environment. 1MR:72.

Mr. Reed’s petition also included numerous allegations about the overlap between Rail Link and the Genesee & Wyoming Defendants. In particular, he alleged that:

- Rail Link and the Genesee & Wyoming Defendants are employers under FELA (1MR:75–78);
- the Genesee & Wyoming Defendants are alter egos of Rail Link (1MR:78–79);
- Rail Link employees acted as agents of the Genesee & Wyoming Defendants (MR:79); *and*
- the Genesee & Wyoming Defendants and Rail link were engaged in a joint venture in their operations at the Ineos facility. 1MR:79.

In its answer, Genesee & Wyoming Railroad Services, Inc.—one of the Genesee & Wyoming Defendants—admitted that “it is a common carrier by railroad,” a statutory requisite to FELA’s application. 1MR:10; *see* 45 U.S.C. § 51 (FELA applies to “[a]ny employee of a carrier”). Instead, it denied that it employed Mr. Reed. 1MR:10.

II. Following a hearing, the trial court denies Rail Link’s motion for summary judgment.

Rail Link moved for summary judgment on the sole ground that it was “not a ‘common carrier by railroad’ as is required for [] FELA to apply.” 1MR:323–24 & n.2 (citing 45 U.S.C. § 51). Amongst other reasons, Rail Link argued that it “merely performed in-plant switching services at the INEOS chemical plant under a private contract solely with INEOS, did not offer its service to the general public, and did not operate outside of the INEOS chemical plant.” 1MR:328–29. Notably, Rail Link never argued that the matter was appropriate for referral to the Surface Transportation Board under the primary-jurisdiction doctrine.

The Genesee & Wyoming Defendants separately moved for summary judgment on three grounds: (1) Mr. Reed was employed only by Rail Link;

(2) Genesee & Wyoming, Inc. was not a common carrier under FELA;² *and*
(3) Mr. Reed could not establish that Rail Link was a joint venturer with the Genesee & Wyoming Defendants (or their alter ego or agent), despite their substantial overlap. *See* 1MR:94–110.

Mr. Reed opposed both motions. As to Rail Link, Mr. Reed pointed to substantial evidence (including expert testimony) establishing that Rail Link indeed operated as a FELA common carrier at the Ineos facility. 1MR:477–82. And as to the Genesee & Wyoming Defendants, he pointed to substantial evidence establishing his employment by those entities, as well as their operation with Rail Link as a single business entity. 1MR:470–77.

In December 2021, the trial court held a hearing on the motions and denied both. 4MR:1392, 1398. It then set trial for a two-week period in August 2022. 4MR:1398–99.

III. Six months later, Rail Link moves for reconsideration and—for the first time—referral to the Surface Transportation Board.

In June 2022—over six months later, and two months before trial—Rail Link moved for reconsideration of the denial of summary judgment as to its common carrier status under the FELA. 4MR:1401. It argued that its

² Again, the Genesee & Wyoming Defendants had previously conceded that Genesee & Wyoming Railroad Services, Inc. is a common carrier. 1MR:10.

common-carrier status “should be decided as a matter of law prior to trial” (4MR:1401) because “there is no genuine dispute of material fact that Rail Link is not a common carrier by railroad.” 4MR:1406. Its motion reasserted the same points from its summary-judgment motion. 4MR:1406–07.

Then, for the very first time, Rail Link alternatively requested that the court “refer this single issue to the United States Surface Transportation Board [STB], the federal agency with primary jurisdiction over common carrier railroads.” 4MR:1401. Though acknowledging the trial court’s “jurisdiction to make a determination on Rail Link’s status” (4MR:1411)—and despite having argued vigorously both in its summary-judgment motion and reconsideration motion why the court itself could decide Rail Link’s common-carrier status (albeit to reach Rail Link’s requested conclusion)—Rail Link now claimed that the issue implicated the STB’s “experts trained in handling licensing, exemptions, and related issues,” and referral to the STB would “avoid[] conflicting legal determinations with regard to common carrier railroad status[.]” 4MR:1412.

In opposition, Mr. Reed extensively (re)argued the myriad reasons supporting the trial court’s original denial of Rail Link’s summary-judgment

motion on common-carrier grounds. 4MR:1449–53. He then argued why Rail Link’s alternative request for referral was legally unjustified. 4MR:1453.

First, Mr. Reed cited overwhelming authority showing how “the common carrier issue is routinely handled by courts like this one, especially in personal injury cases on summary judgment.” 4MR:1454 (collecting cases). *Second*, he explained how Rail Link’s common-carrier decisions did not “involve personal injury claims like this one where a party’s common carrier status is at issue for FELA liability.” 4MR:1453 (collecting cases). And *third*, Mr. Reed argued that referral would not increase judicial efficiency, given that the extensively intertwined facts between the defendants necessarily required the trial court’s adjudication of the common-carriage issue. 4MR:1454.

IV. Declining to rule on the issue of common carriage, the trial court refers the case to the STB and denies Mr. Reed’s separate motion for reconsideration.

Without a hearing, the trial court summarily granted Rail Link’s alternative request for referral to the STB, directing Rail Link “to file a petition to the [STB] for a determination of Rail Link’s status as either a common carrier or as a private contractor.” 4MR:1468. It did not rule on Rail Link’s

primary basis for reconsideration (*i.e.*, it was not a common carrier as a matter of law). 4MR:1468.

Mr. Reed promptly moved for reconsideration, arguing that the court's referral order was improper. Beyond fact issues on Rail Link's common-carrier status (4MR:1477), he again urged that STB referral was improper where this issue—especially in a “personal injury, fact-intensive case” such as the present one—is “routinely handled by courts like this one[.]” 4MR:1478–79 (collecting cases). Mr. Reed also emphasized how referral would “only serve to delay resolution of the case,” as STB proceedings and subsequent appeals would indefinitely delay trial. 4MR:1481. To that end, he noted Rail Link's yearlong delay in requesting referral to the STB—which itself served as an independent ground for denying referral (3MR:1479–80 (citing *CSX Transp. Co. v. Novolog Bucks Cnty*, 502 F.3d 247, 252 (3d Cir. 2007) and *Glob. Crossing Bandwith, Inc. v. OLS, Inc.*, No. 05-CV-6423L, 2009 WL 763483 (W.D.N.Y. Mar. 19, 2009)))—as a clear delay tactic that Rail Link first proposed two months before its trial date. 4MR:1479–82.

In opposition, Rail Link argued that the referral was within the court's discretion. 3MR:1494–96. Rail Link also asserted that “no trial should occur before the STB decides this dispositive issue” (4MR:1493 (emphasis added))

because Mr. Reed’s claims against the Genesee & Wyoming Defendants “are derivative claims of [Mr. Reed’s] FELA claim, and can only be brought if Rail Link is a party to this lawsuit.” 4MR:1498.

Without a hearing, the court summarily denied Mr. Reed’s motion. 4MR:1503.

V. The trial court sets trial for December for the remaining defendants, and the STB commences a declaratory-order proceeding as to Rail Link.

After denying reconsideration, the trial court set a new two-week trial period beginning December 5, 2022 for the remaining defendants, including the Genesee & Wyoming Defendants. 4MR:1504, 1512.

Meanwhile (and without Mr. Reed’s participation), Rail Link petitioned the STB for a declaratory order. 4MR:1520. The STB granted Rail Link’s petition and commenced a declaratory-order proceeding, giving no indication as to when it might render a decision. 4MR:1530–31. Rail Link filed its seven-page opening statement on October 11, 2022. 4MR:1543.

Consistent with his request here, Mr. Reed will promptly move STB to stay proceedings pending the outcome of this original proceeding.

ARGUMENT

“Mandamus is warranted when [1] a trial court clearly abuses its discretion and [2] the relator has no adequate remedy by appeal.” *In re YRC Inc.*, 646 S.W.3d 805, 808 (Tex. 2022) (orig. proceeding) (per curiam). As explained below, the trial court’s clearly erroneous referral order meets both prongs for mandamus relief. Where an administrative agency has no primary or exclusive jurisdiction and the relator has no adequate remedy by appeal, mandamus relief is warranted. *In re Discovery Operating, Inc.*, 216 S.W.3d 898, 905 (Tex. App.—Eastland 2007, no pet.). As explained below, that is the case here.

I. The trial court clearly abused its discretion in referring the common-carrier issue to the STB because the primary-jurisdiction doctrine does not apply.

“A court clearly abuses its discretion when it makes an error of law.” *In re Abbott*, 645 S.W.3d 276, 282 (Tex. 2022) (orig. proceeding); *see also, e.g., In re Millwork*, 631 S.W.3d 706, 711 (Tex. 2021) (orig. proceeding) (per curiam) (“A trial court abuses its discretion when it misinterprets or misapplies the law.”). As our Supreme Court has held, “a trial court’s decision about whether an agency has primary jurisdiction” is a question of law. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex.

2002). And here, the trial court misapplied the law in referring the issue of Rail Link's common carriage to the STB, which lacks primary jurisdiction over the issue.

A. Primary jurisdiction applies only when an issue is beyond the conventional competence of the courts and requires the judgment of a technically expert body.

“The judicially-created primary jurisdiction doctrine operates to allocate power between courts and agencies when *both* have authority to make initial determinations in a dispute.” *Id.* at 221 (emphasis in original). While Texas trial courts are courts of general jurisdiction “presume[d] [to] have subject-matter jurisdiction unless a contrary showing is made,” there is “no presumption that administrative agencies are authorized to resolve disputes.” *Id.* Rather, they may “exercise only those powers the law, in clear and express statutory language, confers upon them.” *Id.*; *see also In re CenterPoint Energy Houston Elec., LLC*, 629 S.W.3d 149, 154 (Tex. 2021) (orig. proceeding) (agencies “may exercise only powers conferred in clear and express statutory language” and “do not share the jurisdictional presumption of district courts”). Accordingly, courts “will not imply additional authority to agencies, nor may agencies create for themselves any excess powers.” *David*

McDavid Nissan, 84 S.W.3d at 221; accord *In re Discovery Operating, Inc.*, 216 S.W.3d at 904.

Where the Legislature has committed specific, non-exclusive regulatory power to an agency,³ the primary-jurisdiction doctrine provides the sole basis for agency review. The doctrine “assure[s] that an agency to which the Legislature has delegated power over a business or industry will not be bypassed on what is especially committed to it.” *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336, 341 (Tex. App.—Fort Worth 2005, no pet.). It aims to “maintain proper relationships between the courts and administrative agencies by suspending judicial process pending the ‘referral’ of certain issues to an administrative agency for its views.” *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 809 (5th Cir. 2011).⁴

³ Though not at issue here, a legislature also may grant an agency “exclusive jurisdiction to adjudicate a disputed issue,” in which case “the agency has the sole authority to make an initial determination regarding that issue, and a trial court lacks jurisdiction until a party has exhausted administrative remedies.” *In re CenterPoint*, 629 S.W.3d at 154.

⁴ “Despite its name, the doctrine of primary jurisdiction is not related to the subject matter jurisdiction of the district court over the underlying action.” *Elam*, 635 F.3d at 809. Rather, original subject-matter jurisdiction is presumed, and “[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction.” *Id.* (citation and quotation marks omitted); accord *Ellis v. Reliant Energy Retail Services, L.L.C.*, 418 S.W.3d 235, 245 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

But the primary-jurisdiction doctrine does not allow courts to refer an issue to an administrative agency simply because the issue touches upon the agency's scope of regulatory authority. Rather, trial courts may allow an administrative agency "to initially decide an issue" by referral when two separate requirements are met: "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations." *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 518 S.W.3d 422, 429–30 (Tex. 2017) (emphasis added); accord *Elam*, 635 F.3d at 810.

To this end, primary jurisdiction applies when "the agency in consideration usually regulates within an especially technical or complex subject area" and experts "routinely consider" the issue at hand, such as the technical regulation of telecommunications, insurance, environmental protection, and oil-and-gas activities. *Forte v. Wal-Mart Stores, Inc.*, No. 02:07-CV-155, 2007 WL 2461831, at *4 (S.D. Tex. Aug. 26, 2007); accord *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 520 n.15 (5th Cir. 1981). When primary jurisdiction "requires a trial court to defer

to an agency to make an initial determination, the court should abate the lawsuit and suspend final adjudication of the claim until the agency has an opportunity to act on the matter.” *Forest Oil*, 518 S.W.3d at 430 (emphasis added).

But under the many circumstances in which an agency lacks primary jurisdiction, referral is improper. *See, e.g., In re Discovery Operating, Inc.*, 216 S.W.3d at 904–05. For example, the doctrine “does not apply to claims that are ‘inherently judicial in nature,’” such as claims for trespass, negligence per se, fraud, assault, intentional battery, breach of contract, and—particularly relevant here—negligence. *Forest Oil*, 518 S.W.3d at 430. And beyond a lawsuit’s subject matter, the doctrine equally does not apply to “a legal question that ‘is within the conventional competence of the courts, [where] the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of the particular case.’” *Forte*, 2007 WL 2461831, at *4 (quoting *Goya Foods, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848, 854 (2d Cir. 1988)). As the Fifth Circuit has explained, “courts need not refer an issue to an agency when the issue is strictly a legal one, involving neither the agency’s particular expertise nor its fact finding prowess.” *Columbia Gas*, 652 F.2d at 520 n.15.

Still more, the primary-jurisdiction doctrine is likewise inapplicable to “pure questions of law that do not involve embedded fact issues that counsel deference to agency proceedings[,]” which must instead “be decided by the courts.” *Mitz v. Tex. State Bd. of Veterinary Med. Examiners*, 278 S.W.3d 17, 24 (Tex. App.—Austin 2008, pet. dismiss’d). Indeed, the doctrine “is not a doctrine of futility; it does not require resort to an expensive and merely delaying administrative proceeding when there are no substantial issues for the agency to decide.” *Elam*, 635 F.3d at 811.

The doctrine thus does not apply to “the kind of statute and conduct that judges and juries routinely consider.” *Forte*, 2007 WL 2461831, at *4. Examples abound. In *Forte*, primary jurisdiction “d[id] not apply” where the Texas Optometry Board did not promulgate or apply complex or technical regulations, did not routinely consider the legality of the lease agreements at issue, and the statute and conduct at issue were types that court and juries regularly consider. *Id.* Similarly, in *Cash America International, Inc. v. Bennett*, the doctrine did “not require [the] trial court[] to defer to the [Texas Consumer Credit Commissioner]’s resolution in the first instance” where the Texas Supreme Court could “discern no special expertise that would be

required to resolve [the plaintiff's] common-law claims” regarding the value of lost property. 35 S.W.3d 12, 18 (Tex. 2000).

The doctrine was likewise deemed inapplicable in *City of Willow Park*, where a litigant’s pre-suit Rule 202 petition did not “raise a ‘complex problem’ that requires the input of administrative ‘experts’” or require the interpretation of agency rules and regulations. 66 S.W.3d at 341. Nor did it apply to a plaintiff’s negligence claim in *Tema Oil & Gas Company v. ETC Field Services, LLC*, which was “inherently judicial in nature” and did not implicate the Texas Railroad Commission’s technical expertise. No. 07-20-00029-CV, 2021 WL 2944598, at *3 (Tex. App.—Amarillo July 13, 2021, pet. denied).

B. The common-carrier issue is a traditional legal determination well within the competence of courts to resolve.

Just as referral to an administrative agency under the primary-jurisdiction was inappropriate in those cases, so it is here. The STB lacks primary jurisdiction here because the question facing the court—whether an entity acted as a common carrier within the meaning of FELA section 1—is precisely “the kind of statute and conduct that judges and juries routinely consider,” *Forte*, 2007 WL 2461831, at *4. Indeed, as proven by the nonexhaustive list of cases in the footnote below, it is a question that courts

have easily resolved for more than a hundred years without the need for agency intervention.⁵

1. The issue of common carriage is within the longstanding conventional competence of the courts.

As just shown, courts have long construed and applied FELA’s “common carrier” language. Under section 1, “[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed

⁵ FELA was first passed in 1908. *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994). The U.S. Supreme Court apparently adjudicated the question of common carriage for the first time in 1917. *See Washington Ry. & Elec. Co. v. Scala*, 244 U.S. 630, 638, (1917). In Texas and the Fifth Circuit, courts routinely continue to consider the question without referring to the STB. *See, e.g., Ashworth v. Railserve, Inc.*, No. 09-09-00187-CV, 2010 WL 2172377, at *1 (Tex. App.—Beaumont May 27, 2010, no pet.) (defendant “was not operating as a common carrier by railroad” at facility “within the meaning of that term under FELA”); *Zarate v. Brownsville Nav. Dist.*, 768 S.W.2d 393, 396 (Tex. App.—Corpus Christi 1989, no writ) (attestation that navigation district did not engage in transportation of goods by railway was insufficient to show it was not common carrier for purposes of FELA); *Flores v. Coffield Warehouse Co.*, 683 S.W.2d 31, 33 (Tex. App.—Texarkana 1984, no writ) (defendant was not a common carrier under FELA); *Nichols v. Pabtex Inc.*, 151 F. Supp. 2d 772, 775–79 (E.D. Tex. 2001) (fact issues precluded summary judgment on defendant’s “status as a common carrier by rail under the FELA”); *Sampson v. GATX Corp.*, 547 F. App’x 369, 376 (5th Cir. 2013) (per curiam) (affirming summary judgment on common-carrier status); *Huntley v. Bayer MaterialScience, L.L.C.*, 452 F. App’x 453, 460–61 (5th Cir. 2011) (per curiam) (same); *Mahfood v. Cont’l Grain Co.*, 718 F.2d 779, 780 (5th Cir. 1983) (same). The same is true outside Texas and the Fifth Circuit. *See, e.g., Willard v. Fairfield S. Co., Inc.*, 472 F.3d 817, 824–25 (11th Cir. 2006) (affirming summary judgment on common-carrier status); *Luman v. ITS Techs. & Logistics, LLC*, 323 S.W.3d 821, 827 (Mo. Ct. App. 2010) (defendant acted as common carrier and suit was properly brought under FELA); *Donato v. United Grain Corp.*, 573 P.2d 811, 812 (1977) (affirming summary judgment order on plaintiff’s motion to establish common carrier status of defendant); *Gomez v. H&M Int’l Transp., Inc.*, No. 17CV231KSHCLW, 2021 WL 236596, at *8 (D.N.J. Jan. 25, 2021), *reconsideration denied*, No. 17CV231KSHCLW, 2021 WL 4473155 (D.N.J. Sept. 30, 2021) (denying summary judgment on common-carrier status where determination was open-ended and fact-sensitive).

by such carrier” for injuries “resulting in whole or in part from the negligence” of the carrier. 45 U.S.C. § 51. As the Fifth Circuit has held,⁶ the “crucial determination in assessing the status of a carrier is whether the carrier has held itself out to the public or to a definable segment of the public as being willing to transport for hire, indiscriminately.” *Woolsey v. National Transp. Safety Bd.*, 993 F.2d 516, 523 (5th Cir. 1993) (emphasis omitted) (collecting cases).⁷ Whether a given set of facts establish that an entity was a common carrier is a question of law. *Flores v. Coffield Warehouse Co.*, 683 S.W.2d 31,

⁶ State and federal courts have concurrent jurisdiction over FELA claims. See 45 U.S.C. § 56; *Kansas City S. Ry. Co. v. Oney*, 380 S.W.3d 795, 799 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Between those courts, FELA cases “adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal.” *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); see also *Houghton v. Port Terminal R.R. Ass’n*, 999 S.W.2d 39, 43 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

⁷ The common-carriage test is “objective” and relies on “what the carrier actually does rather than upon the label that the carrier attaches to its activity or purpose which motivates it.” *Woolsey*, 993 F.2d at 523 (citation and quotation marks omitted). To determine whether an entity acted as a common carrier, the Fifth Circuit has identified four factors “of prime importance”: (1) actual performance of rail service; (2) the service being performed is part of the total rail service contracted for by a member of the public; (3) the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence is deemed to be holding itself out to the public; and (4) remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad. *Lone Star v. McGee*, 380 F.2d 640, 647 (1967). But see *Smith v. Rail Link, Inc.*, 697 F.3d 1304, 1308 (10th Cir. 2012) (rejecting *Lone Star* factors in favor of broader inquiry of whether the defendant “operate[s] a going railroad that carries for the public”); see also *Kieronski v. Wyandotte Terminal R. Co.*, 806 F.2d 107, 108–09 (6th Cir. 1986) (*Lone Star* factors are a “list of considerations” but not a “four-part test”).

32 (Tex. App.—Texarkana 1984, no writ). But even as to what is ultimately a question of law, genuine issues of fact may preclude summary judgment on the issue. *E.g.*, *Zarate*, 768 S.W.2d at 396; *Gomez*, 2021 WL 236596, at *8; *Pabtex*, 151 F. Supp. 2d at 779.

What is more, courts have long determined the common-carriage question under facts nearly identical to those here—*i.e.*, when a defendant argues that its in-plant switching services could not give rise to common-carrier status. *See, e.g.*, *Pabtex*, 151 F. Supp. 2d at 779; *Ashworth*, 2010 WL 2172377, at *1–4; *Kieronski*, 806 F.2d at 109. Indeed, Rail Link *itself* has litigated the question of whether its *switching services* at a particular location constituted common carriage under section 1. *Smith v. Rail Link, Inc.*, No. 10-CV-156-F, 2011 WL 13192652, at *1, 3–4 (D. Wyo. Feb. 8, 2011), *aff'd*, 697 F.3d 1304 (10th Cir. 2012).

Courts also have adjudicated questions—again, precisely like those here—where “switching companies may be held liable where they are part of a broader corporate family and the operations are intertwined and mutually dependent.” *Id.* at *2–3 (citing *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 523–24 (1911); *Lone Star*, 380 F.2d at 641–42, 647; *Greene v. Long Island R. Co.*, 280 F.3d 224, 235 (2d Cir. 2002)); *see also*

Pabtex, 151 F. Supp. 2d at 778–79. Under these decisions, an employer may be liable as a common carrier where its operations extend beyond “typical ‘in-plant operations’ not subject to the FELA,” perform “at least some rail service,” and are “highly integrated and mutually dependent” with an “admitted common carrier” under common ownership. *Id.* at 778–79; *see also Smith*, 2011 WL 13192652, at *4 (an “internal switching company may be considered a common carrier for FELA purposes based on its corporate family” where operations are intermingled with corporate family).

Rail Link’s original position thus was correct: The common-carrier issue was one that the trial court was well-equipped to adjudicate. To that end, Rail Link extensively briefed the issue of common carriage with a request for a *judicial* grant of summary judgment. 1MR:323–31. Indeed, that constituted Rail Link’s primary position in seeking reconsideration. 4MR:1401–11. But instead, for the first time on reconsideration, Rail Link also alternatively requested STB referral, devoting three paragraphs to its request. 4MR:1411–12.

But Rail Link’s request for STB referral was improper. As just shown, the issue of common carriage is well within the ordinary competence of the

courts. For that reason alone, the trial court’s order was legally erroneous and thus a clear abuse of discretion. *E.g., In re Abbott*, 645 S.W.3d at 282.

2. The STB’s expertise is neither necessary nor beneficial to the issue of common carriage.

Still more, the STB’s expertise is neither necessary, beneficial, nor required to promote uniform interpretation of any law or regulation.

The STB is a federal agency with authority “over matters related to the economic regulatory oversight of freight railroads and the transportation they provide on the interstate rail network.” *S. Plains Switching, Ltd. Co. v. Surface Transp. Bd.*, No. 5:07-CV-047-C ECF, 2007 WL 9754682, at *1 (N.D. Tex. Sept. 25, 2007). The agency thus “regulates railroad rates and services, including the provision of adequate rail service.” *Id.* (citing 49 U.S.C. §§ 10701–47, 10907, 11101–24). *See* Congressional Research Service, *The Surface Transportation Board (STB): Background and Current Issues* 1–2 (Jan. 19, 2022), <https://bit.ly/3TsPG39>. While the Federal Railroad Administration “regulates rail *safety* under the Federal Railroad Safety Act (FRSA),” the STB “regulates rail *transportation* under the ICCTA [Interstate Commerce Commission Termination Act].” *In re Union Pac. R.R. Co.*, 582 S.W.3d 548, 552 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (per curiam) (emphasis added).

The instances in which courts have found that the STB has primary jurisdiction involve disputes that directly implicate STB’s technical expertise. For example, in *New Process Steel, L.P. v. Union Pacific Corporation*, the STB had primary jurisdiction where a railroad’s tariff provision “raise[d] numerous technical issues.” No. CV H-06-1690, 2006 WL 8448695, at *4 (S.D. Tex. Sept. 20, 2006). Two of those issues included the number of switches the railroad was obligated to provide to a consignee and the extent to which the consignee’s receiving capacity was relevant to the railroad’s obligation—both inquiries “essentially one of fact and of discretion in technical matters” that would benefit from the STB’s expertise. *Id.* And in *The Chlorine Institute, Inc. v. Soo Line Railroad*, the STB had primary jurisdiction to address whether a railroad’s requirement that all toxic-inhalation hazards be transported in normalized steel rail cars was a reasonable addition to minimum regulations set by another federal agency. 792 F.3d 903, 911 (8th Cir. 2015).

But courts have rejected primary jurisdiction and requests for STB referral when—as here—the STB has no special expertise relating to the issue and the straightforward facts present a straightforwardly applied question of law. In *Norfolk Southern Railway Company v. Baltimore & Annapolis Railroad*,

the Fourth Circuit held that a district court properly rejected a request for STB referral where there was “no reason to believe the STB ha[d] particular expertise with regard to stranded railcars and the appropriate resultant damages.” 715 F. App’x 244, 249 (4th Cir. 2017). And in *Wilbert Family Ltd. Partnership v. Dallas Area Rapid Transit*, the court rejected an STB referral request on “whether lumber or wood products are exempt under 49 C.F.R. § 1039.11 from the rail service requirements of [49 U.S.C.] § 11101(a)” — “straightforward” facts that presented “a question of law.” No. 3:10-CV-2052-D, 2012 WL 246091, at *5 (N.D. Tex. Jan. 26, 2012).⁸

Indeed, at least one court has rejected *the precise referral request here* — to determine “the common-carrier question[.]” *Union Pac. R.R. Co. v. Reg’l Transp. Auth. & Its Commuter Rail Div.*, No. 19-CV-7957, 2020 WL 6930458, at *2 (N.D. Ill. Aug. 27, 2020), *appeal filed on other grounds*, No. 22-1445

⁸ See also *CSX Transp.*, 502 F.3d at 253 (“the STB’s expertise, while helpful, would not have been crucial to the determination of the issues here, which involve the analysis of precedent and statutory interpretation”); *Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Cent. Ltd.*, 154 F.3d 404, 411 (7th Cir. 1998) (issue of whether railroad lawfully charged another railroad for switching charges and railroad-car rental fees under their interchange agreement did not have to be referred to STB under primary jurisdiction doctrine because it was issue of law rather than matter within special expertise of STB); *Miller v. WD-40 Co.*, 29 F. Supp. 2d 1040, 1045 (D. Minn. 1998) (rejecting request for STB referral where breach of contract action did not present disputed tariff term or implicate “larger issues of transportation policy that demand uniform administration by an expert body”).

(7th Cir. 2022). In *Union Pacific Railroad v. Regional Transportation Authority*, for example, the court rejected a request for referring the issue of common carriage to the STB on four grounds:

First, the defendant had not shown that the case presented “a fact-intensive issue requiring an agency’s understanding of a complex industry.” *Id.* at *3. For example, it had not asked the court to adjudicate the *extent* of a railroad’s common-carrier obligations. Like Rail Link here, it merely asked whether it had common-carrier obligations at all. *Id.* at *1, 3.

Second, the defendant had not shown “that the case involves an issue that is within the agency’s discretion” such as, for example, “requiring interpretation of an ambiguous term in a regulation.” *Id.* at *3 (citing *In re Starnet, Inc.*, 355 F.3d 634, 636–39 (7th Cir. 2004)).

Third, the defendant had failed to identify any statute “under which Congress has delegated the issue in this case to the STB.” *Id.*

And *fourth*, the case presented “an issue of statutory interpretation: whether [the railroad] does or does not have common-carrier obligations” under the governing statute. *Id.* The court explained: “Considering such legal issues is what this Court and its sister courts do every day, which is why it

would not be appropriate to refer such an issue to an agency.” *Id.* (collecting cases).

The same is true here. Whether Rail Link’s switching services render it a common carrier under the FELA does not present “a fact-intensive issue requiring an agency’s understanding of a complex industry.” *Id.* Rather, the scope of Rail Link’s switching services at Ineos, Rail Link’s relationship to the PTRR, and Rail Link’s relationship to the Genesee & Wyoming Defendants—a matter briefed extensively by the parties—simply requires the straightforward application of facts to law, which courts do every day. *See* 1MR:323–31, 470–82; 4MR:1401–11, 1421–52, 1470–81.

Nor has Rail Link shown that the question of common carriage implicates the STB’s technical or administrative expertise, such as “requiring interpretation of an ambiguous term in a regulation.” *Reg’l Transp. Auth.*, 2020 WL 6930458 at *3. It has not pointed to any statutory provision under which Congress has delegated the specific question of common carriage under section 1 to the STB.⁹

⁹ Rail Link’s cited provisions only broadly reference the STB’s procedural and enforcement powers. They nowhere address the issue of common carriage. *See* 4MR:1522 (citing 5 U.S.C. § 554(e), 49 U.S.C. § 1321); *see also David McDavid Nissan*, 84 S.W.3d at 221 (explaining that agencies may “exercise only those powers the law, in *clear and express statutory language*, confers upon them”) (emphasis added).

Referral of the garden-variety facts here thus violates the primary-jurisdiction requirement that “great benefit [be] derived from [the] agency’s uniformly interpreting its laws, rules, and regulations[.]” *Forest Oil*, 518 S.W.3d at 430; *contra* 4MR:1412 (conclusorily arguing to this end). “[A]lthough rail transportation is a highly regulated area of law, resolving this issue in this forum [*i.e.*, the court] is unlikely to threaten uniformity or disrupt a delicate regulatory scheme.” *Wilbert Family*, 2012 WL 246091, at *5; *see also Miller*, 29 F. Supp. 2d at 1045 (rejecting request for STB referral where dispute did not implicate “larger issues of transportation policy that demand uniform administration by an expert body”).

In the end, this case merely presents a classic “issue of statutory interpretation: whether [Rail Link] does or does not have common-carrier obligations[.]” *Reg’l Transp. Auth.*, 2020 WL 6930458 at *3. “Considering such legal issues is what . . . courts do every day.” *Id.* As a result, it “would not be appropriate to refer such an issue to an agency.” *Id.* (collecting cases). And as already discussed, courts routinely decide the precise question here—*i.e.*, the common-carrier status of an in-plant switching services provider under common ownership with an admitted common carrier—as a matter of

law, or they deny summary judgment when precluded by fact issues.¹⁰ To punt the issue to the STB is error. *See, e.g., In re Discovery Operating, Inc.*, 216 S.W.3d at 904; *see also David McDavid Nissan, Inc.*, 84 S.W.3d at 222 (“a trial court’s decision about whether an agency has primary jurisdiction” is a question of law).

Though no more is necessary, the unprecedented nature of the trial court’s referral order implies its error. So far as Mr. Reed can tell, no Texas state court—*none*—has *ever* referred the question of an entity’s common-carrier status to the STB. What is more, by Mr. Reed’s search, only one Texas state court has ever previously referred *any* issue to the STB, and the STB rendered no decision. *See Trinity Indus., Inc.-Petition for Declaratory Order*, No. MC-C-30154, 1989 WL 239075, at *1 (I.C.C. July 25, 1989). Nor is Mr. Reed aware of any Texas appellate case ruling on the propriety of an STB referral in a personal-injury case.

¹⁰ *See, e.g., Lone Star*, 380 F.2d at 648 (company’s railway was a “common carrier” and not an in-plant rail system under FELA because it had “adopted the regular practice of transporting for others”); *Pabtex*, 151 F. Supp. at 779 (fact issues precluded summary judgment on issue of common carriage where operations were “more extensive” than “typical ‘in-plant operations’ not subject to the FELA”; defendant owned at least one locomotive, performed rail services, and shared railcars with common carrier with which it was under common ownership); *Ashworth*, 2010 WL 2172377, at *3–4 (affirming summary judgment for defendant after concluding it “was not operating as a common carrier by railroad” in providing its in-plant switching services).

Even more, the two STB common-carriage dispositions Rail Link identified did not arise from a court referral, or even from a request to determine common-carrier status under FELA section 1. *See* 4MR:1411–12. They arose instead from unilateral party-petitions filed for planning purposes. The *New England Transrail, L.L.C.—Construction, Acquisition, and Operation Exemption* decision came from a private railroad’s proposal to the STB regarding its planned activities for a determination of whether its activities would render it “a rail carrier and thus require Board authorization for the construction, acquisition, and operation of its rail line”—and, if so, whether its activities “would be integrally related to rail transportation and thus come within the scope of the Federal preemption in section 10501(b).” STB Finance Docket No. 34797, 2007 WL 1989841, *6 (S.T.B. June 29, 2007). And in *The Louisville and Jefferson County Riverport Authority—Petition for Declaratory Order*, a public entity sought a declaratory order that its lessee had been improperly operating as a common carrier. STB Docket No. FD 36463, 2021 WL 4940260, at *1 (STB served Oct. 22, 2021).

These dispositions—especially when viewed alongside the legion *judicial* rulings on the issue (*see* Part I.B.1)—lay bare the lack of primary jurisdiction here. The STB’s expertise is in “*economic regulatory oversight of*

freight railroads” (*S. Plains Switching*, 2007 WL 9754682, at *1) (emphasis added)—not the straightforward application of FELA section 1 under federal case law. *See also* 49 U.S.C. § 10701; *In re Union Pac. R.R. Co.*, 582 S.W.3d at 552.

The original proceeding in *In re Discovery Operating* is illustrative. There, the Eastland Court of Appeals found reversible error in the district court’s referral to the Texas Railroad Commission, concluding that the plaintiff had the right to have its claims determined in the district court. 216 S.W.3d at 904. The court explained that although it “d[id] not doubt that the Railroad Commission is staffed with experts trained in handling the problems arising in this case” and that “a benefit would be derived from the Railroad Commission’s uniform interpretation of its rules and regulations,” the Commission did “not have primary jurisdiction in this case.” *Id.* Rather, the issues were “inherently judicial in nature” and the Legislature had not vested jurisdiction over them in an administrative body. *Id.*

So it is here. The only legal basis under which the trial court could refer this issue to the STB is the primary-jurisdiction doctrine, but that doctrine clearly has no application here. Adjudicating the legal issue of common carriage among related corporate entities is what courts, in the exercise of

their conventional competence, have done for a century. And the common-carrier question does not implicate the special expertise or uniform-ruling interests of the STB.

Thus it was not “appropriate to refer such an issue to [the] agency.” *Reg’l Transp. Auth.*, 2020 WL 6930458 at *3. As the court clearly abused its discretion in so doing, mandamus relief is warranted. *See In re Discovery Operating, Inc.*, 216 S.W.3d at 905.

II. Mr. Reed lacks an adequate remedy by appeal.

This Court next must “determine whether an adequate appellate remedy exists by weighing the benefits of mandamus review against the detriments.” *In re Academy, Ltd.*, 625 S.W.3d 19, 32 (Tex. 2021) (orig. proceeding). “This balancing test is necessarily a fact-specific inquiry that resists categorization.” *Id.* (quotation marks omitted). Factors that this Court must consider include the need “to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly

conducted proceedings.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

For at least four reasons, Mr. Reed lacks an adequate remedy by appeal. The trial court’s order: (1) wrongly sends his case against Rail Link to the wrong adjudicatory authority; (2) results in an indefinite abatement of the proceedings, which is impermissible; (3) unnecessarily forces Mr. Reed to try two separate trials on the same set of facts; and (4) raises a novel legal issue that otherwise would prove elusive on appeal.

A. The trial court’s referral order impermissibly allows the case to proceed in the wrong court.

The first reason for mandamus relief is the most straightforward: The trial court’s referral order sends this case to the wrong adjudicatory body.

As the Supreme Court has held, “[p]ermitting a case to proceed in the wrong court necessarily costs private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 299 (Tex. 2016) (orig. proceeding) (quotation marks omitted). That is precisely what the trial court’s referral order does here. It improperly transfers this case to an administrative agency that, as just explained, lacks a lawful basis under the primary-jurisdiction doctrine for resolving the common-carrier issue. And as

explained below, that referral order will lead to significant litigation not only before the Surface Transportation Board, but also before a federal circuit court of appeals (and potentially the U.S. Supreme Court). After a potential delay of multiple years, the matter will finally return to the trial court, where an appeal will confirm that the matter was improperly transferred to the Board.

Although that appeal will nullify any action taken by the Board, the time and money wasted litigating the issue before an improper adjudicatory body will never be recovered. That reason alone warrants mandamus relief.

B. The court's order has indefinitely abated Mr. Reed's claims against Rail Link.

The second reason supporting mandamus relief relates to the first: The improper referral order has effectively resulted in an indefinite abatement of Mr. Reed's claims against Rail Link.

"An adequate remedy by appeal does not exist when the plaintiff is effectively denied any other method of challenging the court's action for an indefinite period of time during which the case remains in a suspended state."

In re Lombana, 542 S.W.3d 699, 701–02 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding); accord, e.g., *In re Am. Homes for Rent Properties Eight, LLC*, 498 S.W.3d 153, 155–56 (Tex. App.—Dallas 2016, orig. proceeding); *In*

re Discovery Operating, 216 S.W.3d at 905. As the Fourteenth Court has stated, a trial court’s abatement of a proceeding “completely curtails the prosecution of an entire case and denies another party the right to proceed with full discovery *or to resolution within a reasonable time*[,]” thus making mandamus appropriate. *In re Shulman*, 544 S.W.3d 861, 870–71 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (emphasis added).

Mr. Reed lacks an adequate remedy by appeal because the trial court’s order has indefinitely abated his claims against Rail Link. As both parties understand, the trial court’s referral order effectively stays all proceedings against Rail Link in the trial court until the conclusion of the proceedings before the Surface Transportation Board. 4MR:1481–82, 1493–94.

This is not some temporary abatement, but an indefinite one. As Mr. Reed explained below, “[t]here is no telling how long an STB decision will take.” 4MR:1471. Perhaps it will be before the December trial setting. Or perhaps not.

But even assuming the Board expedites a decision (an assumption that would be based merely on guesswork), its decision is not necessarily final. Presumably if the Board rules that Rail Link is a “common carrier,” Rail Link will exercise its statutory right to appeal the Board’s decision to the relevant

federal circuit court of appeals. *See* 28 U.S.C. § 2321(a) (“a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title”); *id.* § 2342(5) (“court of appeals . . . has exclusive jurisdiction to . . . determine the validity of” “final order of” the Surface Transportation Board”).¹¹ As this Court knows from its own proceedings, the direct-appellate process could easily take a year to reach a decision, if not more.

And still then, that is not necessarily the end of the line. Perhaps the aggrieved party may petition the federal circuit court for panel or en banc rehearing. Fed. R. App. P. 35, 40. Or perhaps it may exercise its statutory right to petition the U.S. Supreme Court for a writ of certiorari. 28 U.S.C. § 1254. Whichever it may be, the result is the same: yet more delay.

Thus in the end, “it is impossible to determine when abatement will end in this case.” *Tex. Mut. Ins. Co. v. Sonic Sys. Intern., Inc.*, 214 S.W.3d 469, 482 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). What is possible to determine—indeed, even certain—is that Mr. Reed’s claims against Rail

¹¹ If the Board rules in Rail Link’s favor, Mr. Reed intends to exercise his right to challenge that order on appeal.

Link in the trial court are “suspended, potentially indefinitely[.]” *In re Lytle*, No. 12-15-00216-CV, 2015 WL 8959428, at *1 (Tex. App.—Tyler Dec. 16, 2015, orig. proceeding). And during this time of indefinite suspension, Mr. Reed will be unable to challenge the trial court’s clearly erroneous referral order. *See In re Benge*, No. 13-18-00283-CV, 2018 WL 3233867, at *3 (Tex. App.—Corpus Christi July 3, 2018, orig. proceeding) (“Benge is effectively denied any method of challenging the court’s action for an indefinite period during which her cause of action remains in stasis.”).

The trial court’s referral order thus effectively results in an indefinite abatement, an error that will deny Mr. Reed his right to have his claims against Rail Link resolved within a reasonable time. *In re Shulman*, 544 S.W.3d at 870–71. This reason alone independently merits mandamus relief. *See also In re RSR Corp.*, 568 S.W.3d 663, 667 (Tex. 2019) (per curiam) (orig. proceeding) (“[A]bsent mandamus relief, another round of costly disqualification would unduly and unjustly delay the trial and final disposition of this ten-year-old dispute, rendering an appellate remedy inadequate.”).

C. The court’s order will improperly result in two trials.

Yet another reason to grant mandamus relief is the inevitability that the trial court’s referral order will impermissibly result in two trials on one set of facts. As the Supreme Court has repeatedly recognized, the possibility of forcing a party to unnecessarily endure two trials is another factor in favor of mandamus relief. *E.g.*, *In re YRC Inc.*, 646 S.W.3d 805, 810 (Tex. 2022) (orig. proceeding) *In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 210 (Tex. 2009) (orig. proceeding). Although the Fourteenth Court has stated that “[t]he additional expense of preparing for and participating in two separate trials does not, standing alone, justify mandamus relief[,]” “the potential waste of resources” remains a proper factor for consideration. *In re Arthur Andersen LLP*, 121 S.W.3d 471, 486 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

The inadequacy of an appeal is especially pronounced when the trial court’s order results in an empty seat at trial. *See, e.g.*, *In re Mobile Mini*, 596 S.W.3d 781, 787–88 (Tex. 2020) (orig. proceeding). A party “has a ‘substantial right to present the complete set of intertwined facts and issues germane to his claims, to one factfinder, in one proceeding, rather than in two separate suits[.]’” *In re Glast, Phillips & Murray, P.C.*, No. 05-20-00557-

CV, 2020 WL 6696371, at *6 (Tex. App.—Dallas Nov. 12, 2020, orig. proceeding) (quoting *Jones v. Ray*, 886 S.W.2d 817, 822 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding)). But “[w]ith one or more defendants missing from each case, the denial of that right may ‘skew the progress and entire conduct of the proceedings—with the resultant potential to affect the outcome of the litigation profoundly, and to compromise then presentation of the parties’ respective claims or defenses in ways unlikely to be apparent in the appellate record.’” *Id.* (quoting *Jones*, 886 S.W.3d at 822).

Just so here. Trial is scheduled for December 2022. 4MR:1504. Assuming the referral order stands, that trial will not include Rail Link. But it will include the remaining defendants: Ineos, Genesee & Wyoming, and Trans-Global. Mr. Reed thus must try his case against those defendants, but with Rail Link’s notable absence. Then, once the Surface Transportation Board proceedings come to a final conclusion (including through the appellate process) years later, Mr. Reed will be forced to try a second case on the same set of facts—but this time, solely against Rail Link.

The caselaw does not compel such a result. To the contrary, as these precedents show, mandamus relief is completely proper to prevent two unnecessary trials from occurring under these circumstances.

D. The elusiveness of this important issue supports granting this petition.

Although no more is necessary, the elusiveness of this important legal issue provides yet another reason why mandamus relief is appropriate. Mandamus relief is proper to “allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments[.]” *Prudential*, 148 S.W.3d at 136. That is particularly the case when the petition “presents a novel legal issue” that is “of first impression” and “likely to recur[.]” *In re CVR Energy, Inc.*, 500 S.W.3d 67, 83 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

The question of law here—the proper application of the primary-jurisdiction doctrine—is one such novel legal issue well-suited for mandamus relief. It is of first impression to Texas appellate courts: As shown in Part I, Mr. Reed knows of no Texas appellate case ruling on the propriety of an STB referral in a personal-injury case based on the primary-jurisdiction doctrine. It is likely to recur: Armed with Rail Link’s strategy, defendants routinely may seek to punt legal issues that Texas trial courts have historically adjudicated to a federal administrative agency merely to delay a trial. And because of the lengthy delay caused by a referral order—again, not simply the agency’s decision itself but also the resulting appellate process—many parties may

choose to simply resolve their disputes rather than waiting for a final agency decision, appealing that decision, and then returning to the local trial court and appealing the initial referral order.

“Here, the error is ‘clear enough, and correction simple enough, that mandamus review is appropriate.’” *CVR Energy*, 500 S.W.3d at 83 (quoting *Prudential*, 148 S.W.3d at 83 (alteration omitted)). This Court should grant Mr. Reed’s petition.

PRAYER

Because the STB lacks primary jurisdiction and Mr. Reed has no adequate remedy by appeal, this Court should grant this petition and direct the trial court to rescind its order referring the issue of Rail Link's common-carrier status to the STB.

Mr. Reed also requests all other relief in law and equity to which he may be entitled.

Dated: October 24, 2022.

Respectfully Submitted,

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Counsel for Demaree Reed

CERTIFICATION

I certify that I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record. Tex. R. App. P. 52.3(j).

I further certify that the attached appendix contains true and correct copies of the original documents pertinent to the issues presented for review. Tex. R. App. P. 52.3(k).

/s/ Andrew R. Gould

Andrew R. Gould

CERTIFICATE OF COMPLIANCE

I certify that this document contains 9,141 words, as determined by Microsoft Word's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Andrew R. Gould

Andrew R. Gould

CERTIFICATE OF SERVICE

I certify that on October 24, 2022, I served a copy of this document on all counsel of record using the Court's electronic-filing system:

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Hon. Elaine Palmer 215th Judicial District Court (via FedEx)	

/s/ Andrew R. Gould
Andrew R. Gould

No. __-22-____-CV

IN THE COURT OF APPEALS FOR THE
FIRST DISTRICT OF TEXAS IN HOUSTON

In re Demaree Reed,
Relator.

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

Original Proceeding from the 215th Judicial District Court
of Harris County, Texas (Cause No. 2019-29955)
Hon. Elaine Palmer, Presiding Judge

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Andrew R. Gould
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Counsel for Demaree Reed

TABLE OF CONTENTS

- Tab 1: Order denying summary judgment (transcript of summary-judgment hearing) dated December 9, 2021 (4MR:1392–1400)
- Tab 2: Order granting referral to Surface Transportation Board dated July 7, 2022 (4MR:1468–69)
- Tab 3: Order denying reconsideration dated August 15, 2022 (4MR:1503)

Tab 1

REPORTER'S RECORD

VOL. OF VOLS.

COURT CAUSE NO. 2019-29955

DAMAREE REED,) IN THE DISTRICT COURT
Plaintiff,)
 vs.) 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,)
Defendants.) 215TH JUDICIAL DISTRICT

MOTION FOR PREFERENTIAL TRIAL SETTING
 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On the 9th day of December 2021, the following
 proceedings came on to be heard in the
 above-entitled and numbered cause before the
 Honorable Elaine Palmer, Judge Presiding, held in
 Houston, Harris County, Texas, via Zoom.

Proceedings reported by computer-aided
 transcription/stenograph machine.

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- AND -

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ATTORNEYS FOR DEFENDANT TRANS-GLOBAL SOLUTIONS, INC.

P R O C E E D I N G

THE COURT: We're on the record, Cause No. 2019-29955, *Damaree Reed vs. Ineos Americas, LLC, Ineos USA, LLC, Trans-Global Solutions, Inc, Genesee & Wyoming Railroad Services, Inc, Rail Link, Inc, and Genesee & Wyoming, Inc.*

Will counsels identify themselves for the record and the parties they represent?

MR. BOATRIGHT: Caj Boatright for the Plaintiff.

MR. FLOYD: Lincoln Floyd for Defendant Trans-Global Solutions, Inc.

MR. ROBBINS: And Wayne Robbins also for Trans-Global Solutions.

MR. ASHLEY: Josh Ashley for Genesee & Wyoming Railroad Services, Inc, Rail Link, Inc. and Wyoming, Inc.

MR. LINDSTROM: Eric Lindstrom for the Genesee and Rail Link Defendants, as well.

THE COURT: Okay. We are here for two motions. We have the Defendants' motion for summary judgment and Plaintiff's motion for preferential setting; is that correct?

MR. BOATRIGHT: Yes, Your Honor.

1 THE COURT: The Court has read the filings
2 of the parties. If there isn't anything new,
3 the Court is ready to make a ruling.

4 MR. ASHLEY: Is the Court speaking of the
5 summary judgment motion or all three?

6 THE COURT: Both.

7 MR. BOATRIGHT: I do not have anything
8 else, Your Honor. If you've read the
9 Plaintiff's, then you've read a lot.

10 MR. ASHLEY: This is Josh Ashley. I would
11 appreciate the opportunity to make just a brief
12 presentation, if Your Honor would hear it.

13 THE COURT: Regarding?

14 MR. ASHLEY: Regarding the two summary
15 judgment motions, Your Honor.

16 THE COURT: Okay.

17 MR. ASHLEY: The main thing, Your Honor, I
18 would highlight is that the structure of the
19 Plaintiff's argument relies on the fact that
20 Rail Link is a common carrier that, as Your
21 Honor knows from reviewing the papers, would
22 open the doors to liability.

23 But the Defendant in that case has to be a
24 common carrier and has to be Plaintiff's
25 employer. I think we've briefed the common

1 carrier issues and explained why Rail Link was
2 not a common carrier; and I would direct the
3 Court, obviously, to our briefing on that.

4 The other issue is whether either the
5 Genesee & Wyoming entities were his employer or
6 was through some form of alter ego liability
7 collapsed into one entity that would be his
8 employer.

9 I would point out, Your Honor -- and I
10 think this was in the briefing; but I want to
11 make sure it got the Court's attention --
12 Genesee & Wyoming is not a common carrier.
13 That's the parent and holding company.

14 I don't think the Plaintiff has argued
15 that it's a common carrier. So regardless, if
16 it's his employer -- and we argue it's not --
17 it wouldn't do any good for Genesee & Wyoming
18 to be his employer because it's undisputed it's
19 just a holding company.

20 The other thing I would add, Your Honor,
21 is this -- were several theories of liability
22 pursued against the Genesee & Wyoming entities
23 in the 30-minute petition and if they were
24 alter ego and agents in the Plaintiff's -- in
25 the Plaintiff's summary judgment response.

1 It looks to me that they are down to just
2 the fact the Genesee & Wyoming entities were
3 his employer or there's a form of alter ego
4 issue going on or they talk about a single
5 business entity.

6 And the one thing I wanted to note, Your
7 Honor, is the Society Enterprise or entity was
8 not stated in the third amended petition.

9 The Plaintiff cited a 2001 federal
10 district court case for that theory of
11 liability.

12 I would direct the Court to one particular
13 case, which is *SSP Partners*. It's a 2008 case
14 at 275 S.W.3d 444. In that case, on 456 of the
15 opinion, the Texas Supreme Court says that the
16 single business enterprise liability theory
17 will not support the imposition of one
18 corporation's obligation on another.

19 That's the "one-thing" theory by the Texas
20 Supreme Court. That opinion came after the
21 district court opinion that Plaintiff is trying
22 to use.

23 Unless the Court -- I would just also
24 remind the Court that there are multiple cases
25 we've cited in our brief, including the Texas

1 Supreme Court in the *Lucas* case.

2 THE COURT: Plaintiffs, you want to make
3 any response?

4 MR. BOATRIGHT: The only response is, I
5 very much appreciate you putting in the front
6 end work on what is a lot of briefs.

7 Obviously, this is a very, very serious
8 incident for the Plaintiff, which resulted in
9 the amputation of his leg.

10 We have taken a ton of depositions. We've
11 hired a ton of experts, and we have created a
12 factual record regarding his employment and
13 regarding common carrier status that we feel
14 certainly give rise to fact issues on control,
15 on who his actual employer is.

16 And certainly if the Court has specific
17 questions about, you know, the dozens upon
18 dozens of exhibits that we've attached, also as
19 evidence, our expert evidence as with regard to
20 common carrier status, I don't have anything
21 else and I don't want to waste your time.

22 THE COURT: Okay. Anything else? All
23 right. Well, at this time, the Court is going
24 to deny the Defendants' motion for summary
25 judgment, and as well as deny Plaintiff's

1 motion for a preferential setting earlier than
2 the August 15th of 2022. I will see you-all,
3 hopefully, in August of 2022 with this matter.

4 If things happen to change, please let the
5 Court know 'cause we have a full docket. With
6 that, you are excused.

1 THE STATE OF TEXAS)

2 COUNTY OF HARRIS)

3 I, Cantrece A. Addison, Certified
4 Shorthand Reporter in and for the State of
5 Texas, do hereby certify that the above and
6 foregoing contains a true and correct
7 transcript of all portions of evidence and
8 other proceedings requested in writing by
9 Counsel for the parties to be included in this
10 Volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which
12 occurred via Zoom and were reported by me.

13 I further certify that this Reporter's
14 Record of the proceedings, truly and correctly
15 reflects the exhibits, if any, admitted by the
16 respective parties.

17 I further certify that the total cost for
18 the preparation of this Reporter's Record is
19 \$_____ and will be paid by _____.

20 WITNESS MY OFFICIAL HAND this the 18th day
21 of October, 2022.

22 /s/Cantrece Addison

23 CANTRECE A. ADDISON, CSR NO. 8236
24 Expiration Date: 11/30/2023
25 201 Caroline, 13th Floor
Houston, Texas 77002

Tab 2

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

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

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.

Signed this ____ day of July, 2022.

Signed:
7/7/2022
9:41 AM

A handwritten signature in black ink, appearing to read 'Elaine H. Palmer', written over a horizontal line.

Hon. Elaine H. Palmer

Tab 3

RECSY

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Automated Certificate of eService

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Status as of 10/25/2022 3:59 PM CST

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Associated Case Party: Rail Link, Inc.

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EXHIBIT 2

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GORDON GOODMAN
SARAH BETH LANDAU
RICHARD HIGHTOWER
JULIE COUNTISS
VERONICA RIVAS-MOLLOY
AMPARO GUERRA
APRIL L. FARRIS
JUSTICES



**Court of Appeals
First District
301 Fannin Street
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CHRISTOPHER A. PRINE
CLERK OF THE COURT

JANET WILLIAMS
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PHONE: 713-274-2700

www.txcourts.gov/1stcoa.aspx

Wednesday, October 26, 2022

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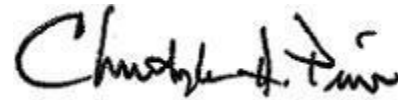
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RE: Court of Appeals Number: 01-22-00794-CV
Trial Court Case Number: 2019-29955

Style: In re Demaree Reed

The Court requests a response from the real party in interest to the petition for writ of mandamus. *See* TEX. R. APP. P. 52.4. The response, if any, should be received in the Clerk's Office no later than **Tuesday, November 15, 2022.**

Sincerely,



Christopher A. Prine, Clerk

cc: Judge 215th District Court (DELIVERED VIA E-MAIL)