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Before the
SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36629

RAIL LINK, INC. – PETITION FOR DECLARATORY ORDER

**RAIL LINK, INC. REPLY TO
REED MOTION TO STAY AND HOLD IN ABEYANCE**

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Dated: November 11, 2022

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On October 28, 2022, the Board issued a decision placing this proceeding into abeyance and directing Rail Link to reply by November 17 to the Reed Motion to Stay and Hold in Abeyance (“Motion to Stay”) that Reed filed on October 26, 2022, just six days before the due date of Reed’s reply statement.

Despite Reed’s professed concern for judicial resources and unnecessary litigation, he waited until just before the due date of his reply statement to file any sort of pleading in this proceeding. Reed waited to file his Motion to Stay until (i) after Rail Link filed a petition for declaratory order as referred by the District Court of Harris County, Texas (the “State Court”), (ii) after the Board issued a decision instituting a proceeding and establishing a procedural order, and (iii) after Rail Link had already filed its Opening Statement. To the extent the Motion to Stay is a collateral attack on the Board’s decision establishing a proceeding, the Motion to Stay should be dismissed as untimely. Alternatively, the Board should find that Reed has failed to meet his burden to satisfy all of the elements for a stay and deny the Motion to Stay. In either event, the Board should remove the proceeding from abeyance, and Reed should be ordered to file his reply statement within six days in keeping with the procedural schedule established for this proceeding.

I. Procedural History

The Board's procedural schedule has provided Reed ample time and opportunities to object to the Board's decision of September 19, 2022 (the "September 19 Decision") instituting a proceeding and establishing the procedural schedule. He has chosen not to provide any response or filing until his October 26 Motion to Stay. As reflected in the Board's dockets:

- On August 4, 2022, Rail Link filed its Petition for Declaratory Order as ordered by the July 7, 2022 order of the State Court.¹ In its Petition, Rail Link requested an expedited procedural schedule. Rail Link served Reed's counsel as required under 49 C.F.R. §1104.12(a). Reed did not object to the Rail Link Petition or its requested procedural schedule.
- On September 19, 2022, the Board, by the Director of the Office of Proceedings, issued its decision instituting a proceeding and establishing a procedural schedule. In the September 19 Decision, the Board stated, the "matter above has been referred by a court of competent jurisdiction and is within the Board's jurisdiction. Therefore, a proceeding will be instituted to address the issue referred by the Court."² In addition, the Board rejected Rail Link's proposed expedited schedule and ordered that the "parties shall comply with the procedural schedule as set forth in this decision."³ Reed did not object to the Board's decision instituting a proceeding or to the procedural schedule.
- On September 23, 2022, Rail Link filed a Motion for Protective Order and served Reed's counsel. Reed did not file any response. On September 30, 2022, the Board granted Rail Link's motion for a protective order. Again, Reed did not object.

¹ See Referral Order, attached as Exhibit A to Rail Link's Petition for Declaratory Order and Request to Set Procedural Schedule.

² *Rail Link, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 36629, slip op. at 1 (Sept. 19, 2022).

³ *Id.*

- On October 11, 2022, in accordance with the procedural schedule, Rail Link filed its Opening Statement.
- On October 26, instead of replying to any of the Rail Link filings addressing the merits of the common carrier question or appealing the Board’s order instituting a proceeding, Reed filed his Motion to Stay just six days before the due date of his reply statement under the procedural schedule adopted by the Board.

II. Legal Framework

A. Challenges to decisions of employees acting under delegated authority.

In response to Rail Link’s Petition for Declaratory Order, on September 19, the Board, by the Director of the Office of Proceedings, issued a Decision establishing a proceeding and a procedural schedule. In its Decision, the Board stated, the “matter above has been referred by a court of competent jurisdiction and is within the Board’s jurisdiction.”⁴ The Board’s regulations governing challenges to decisions of employees, such as the Director of the Office of Proceedings, establish:

The Board will decide appeals from decisions of employees acting under authority delegated under this section. Appeals must be filed within 10 days after the date of the employee's action, and replies must be filed within 10 days after the due date for appeals. Appeals are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

49 C.F.R. §1011.6(b).

B. Board elements for issuing a stay to prevent unnecessary harm.

Under 49 U.S.C. §1321(b)(4), the Board may issue an appropriate order – such as a stay – to prevent unnecessary harm. In ruling on a petition for a stay, the Board considers: (1) whether

⁴ *Rail Link, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 36629, slip op. at 1 (Sept. 19, 2022).

the party seeking the stay has made a strong showing that it is likely to prevail on the merits; (2) whether the party seeking the stay will suffer irreparable harm in the absence of a stay; (3) whether other interested parties will be substantially harmed by a stay; and (4) the public interest in granting or denying the stay.⁵

The burden of persuasion is on the party seeking a stay. “The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief.”⁶

III. Argument

- A. Reed’s Motion to Stay is a collateral attack on the Board’s order establishing a proceeding and procedural schedule; the time limit for appeal of that order has expired.

The Board should reject the Motion to Stay because it is a collateral attack on the September 19 Decision establishing a proceeding and a procedural schedule. In the September 19 Decision, the Director of the Office of Proceedings stated, the “matter above has been referred by a court of competent jurisdiction and is within the Board’s jurisdiction.” In the Motion to Stay, Reed argues, “Rail Link’s request for referral to the Board – and the Board’s grant of that request – was improper.” This statement is clear, the Motion for Stay is arguing that the Board’s acceptance of the referral and the issuance of the procedural schedule was wrong.

The Board’s regulations for challenging a Board order such as the September 19 Decision are also clear. Appeals must be filed within ten days. And will be granted only in “exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.”⁷

⁵ *Jackson County, MO. – Acquisition and Operation Exemption – Union Pacific Railroad Co.*, STB Finance Docket No. 35982, slip op. at 2 (served Feb. 4, 2016).

⁶ *Central Illinois R.R. Co. – Operation Exemption – Rail Line of the City of Peoria and the Village of Peoria Heights in Peoria and Peoria Heights, Peoria County, IL*, STB Finance Docket No. 34518, slip op. at 2 (served July 1, 2004).

⁷ 49 C.F.R. §1011.6(b).

The Motion to Stay is an attempt to have the Board reconsider the September 19 Decision without arguing or meeting the standards under 49 C.F.R. §1011.6(b). In a similar situation, the Board rejected a movant’s petition to stay what the Board deemed was a petition for reconsideration where the movant did not argue the standards for reconsideration. The Board held that a moving party may not “avoid the obligation of meeting those standards merely by assigning a different label to its request for relief.”⁸

The acceptance of Rail Link’s Petition and instituting a proceeding was neither exceptional, nor was it an error of judgment. The Board, by the Office of Proceedings⁹, routinely accepts petitions for the issuance of a declaratory order premised on a court referral of matters within the Board’s jurisdiction.¹⁰

Further, Reed’s opportunity to appeal the Board order establishing a proceeding and a procedural schedule expired on September 29, 2022 – 10 days after the September 19 Decision. The feigned concern for judicial resources and his “great respect for this Board” as expressed in the Motion to Stay should not obscure the fact that Reed had multiple opportunities to participate in this proceeding and has chosen not to do so. Reed did not reply to Rail Link’s August 4 Petition for Declaratory Order, or the September 19 Decision establishing a proceeding, or the September 23 Motion for Protective Order, or the September 30 Board decision granting the protective order. Only now – six days before his Reply comments were due – he filed this

⁸ *City of Peoria and the Village of Peoria Heights, IL – Adverse Discontinuance – Pioneer Industrial Ry. Co.*, STB Docket No. AB-878 (served Apr. 15, 2008).

⁹ The authority to accept or reject petitions for a declaratory order has been delegated to the Office of Proceedings. 49 C.F.R. §1011.7(a)(2).

¹⁰ 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).

Motion to Stay in which he attacks the Decision of the Board to accept the State Court's referral and open a proceeding. Reed attempts to assign a different label to his request for relief in an attempt to avoid the Board's regulations governing appeals of employee orders. The Board should set aside Reed's attempt to circumvent the Board's regulations, deny the Motion to Stay as an improper appeal, remove this proceeding from abeyance, and order Reed to file its reply statement within six days from service of its decision – reflecting the fact that Reed waited until six days before the reply deadline to file the Motion to Stay.

B. Reed has failed to establish the elements for the issuance of a stay or that a stay is required to prevent irreparable harm

Even if the Board were to forgive Reed's failure to follow Board regulations, Reed has not established that a stay is justified or required. Under 49 U.S.C. §1321(b)(4), the Board may issue an appropriate order – such as a stay – to prevent unnecessary harm. Here, a stay is not warranted because the Board was well within its jurisdiction to accept the referral from the State Court and consider the common carrier status of Rail Link.

1. *Reed has not established that he is likely to prevail on the merits.*

In ruling on a petition for a stay, the Board rejects petitions that fail to make a strong showing that they will likely to prevail on the merits.¹¹ Reed argues that the Board lacks primary jurisdiction, that the State Court improperly made a referral to the Board, and that therefore he is “highly likely to succeed” with his mandamus petition before the Court of Appeals for the First District of Texas.¹² Reed makes this assertion despite unsuccessfully opposing the referral by the State Court and then losing on his petition asking the State Court for reconsideration.

¹¹ *Ill. Central R.R. Co. – Construction and Operation Exemption – In East Baton Rouge Parish, LA*, STB Finance Docket No. 33877, slip op. at 4 (served Feb 20, 2002).

¹² *Motion to Stay* at 5.

Rail Link does not agree that Reed's petition is "highly likely to succeed" and intends to contest Reed's mandamus petition before that court. Until and unless the referral order is withdrawn by the State Court, there is no basis or reason for the Board to delay or suspend this proceeding.

Reed should not be asking the Board to determine under state law whether Reed is likely to succeed on the merits of its mandamus petition at the Court of Appeals. If Reed is so convinced that he will succeed, it would have been more appropriate for him to ask the Court of Appeals to stay the referral. Of course, Reed has not sought a stay in the state courts.

In support of the assertion that the petition for writ of mandamus is "highly likely to succeed," Reed cites case law that breach of contract claims, and tortious actions are not within the Board's primary jurisdiction and therefore the appropriate jurisdiction is a court.¹³ While this may be true, the Motion to Stay fails to explain that the Board declines contract claims and tortious actions because those causes of action fall under state law.¹⁴ Here, the Board is not being asked to consider a state tort law or state contract matter. The question referred to the Board in this matter is whether Rail Link is a common carrier by railroad by holding itself out to the

¹³ *Id.* (citing *Boston & Maine Corp. & Springfield Terminal RY. Co. v. New England Central R.R., Inc.* No. FIN 34612, 2006 WL 47366 at *2 (S.T.B. Jan. 9, 2006)).

¹⁴ See *General Railway Corp, d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA*, STB Finance Docket No. 34867, slip op. at 4 (served June 15, 2007)(stating that a dispute regarding the validity of an agreement "involves state contract and property law. The Board is not the proper forum to resolve such disputes."); *Canadian Pacific Railway Co., et al – Control – Dakota, Minnesota & Eastern Railroad Corp., et al.*, STB Finance Docket No. 35081, slip op. at 7 (served May 7, 2009)("The Board's policy is to refrain from interpreting or enforcing private contracts, leaving such issues to be resolved by the parties to the contract or in Court."); *PCT Transp., Inc. v. Fort Worth & Western R.R. Co.*, STB Docket No. 42094 (Sub-No. 1), slip op. at 6 (served Apr. 25, 2008)(a "common law tort claim is not within the primary jurisdiction of this agency.").

public, a subject within the Board’s jurisdiction.¹⁵ Additionally, Rail Link believes that while the Board may not have exclusive jurisdiction to determine Rail Link’s status as a common carrier except under Title 49, it was well within the State Court’s discretion under Texas law to request for the Board’s view of whether Rail Link is a common carrier based on the Board’s specialized expertise.¹⁶ Because the question of whether an entity conducting railroad operations is holding itself out as a common carrier is within the Board’s purview, Reed is not highly likely to prevail on the merits, and accordingly is not entitled to a stay.

2. *Reed will not suffer irreparable harm in the absence of a stay.*

In order to satisfy the irreparable harm element, “the party seeking a stay must demonstrate that the injury is imminent, certain and great.”¹⁷ The Motion to Stay argues that “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.”¹⁸ The Motion to Stay does not explain how the Board’s consideration of the common carrier question would result in the “indefinite delay” of the trial on the merits. In fact, it is Reed’s own actions, failing to respond to any of

¹⁵ See *The Louisville and Jefferson County Riverport Authority – Petition for Declaratory Order*, STB Finance Docket No. 36463, slip op. at 5-8 (served Oct. 22, 2021); *Northern Plains Railroad Co – Construction and Operation Exemption*, 1992; *Assoc of P&C Dock Longshoremen v. The Pittsburgh and Conneaut Dock Co., et al.*, ICC Finance Docket No. 31363 (Sub-No. 1), 8 I.C.C. 2d 293 – 94 (citing *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir.), cert. denied 389 U.S. 977(1967)).

¹⁶ *TCI Cablevision of Dallas, Inc. v. Owens*, 8 S.W.3d 837, 849 (Tex. App. 2000) (“Primary jurisdiction is a judicially created doctrine of abstention whereby a court that has jurisdiction over a matter nonetheless defers to an administrative agency for an initial decision on questions of fact or law within the peculiar competence of the agency.”).

¹⁷ *R.J. Corman R.R. Property, LLC – Abandonment Exemption – in Scott, Campbell, and Anderson Counties, Tenn.* STB Finance Docket No. AB 1296X, slip op. at 3 (served Dec. 1, 2020).

¹⁸ *Motion to Stay* at 5.

Rail Link's filings, failure to file a timely objection to the Board's September 19 Decision, and now filing a Motion to Stay, that will be the cause of any delay. If delay represented actual harm, Reed would not have ignored the Board's proceeding up until October 26, when he filed his first pleading in this matter, eighty-three days after Rail Link filed its Petition for Declaratory to implement the Board's referral order.

In addition, Reed is wrong to state that he lacks a "remedy by appeal" from a Board decision in this proceeding. The State Court referral of this issue to the Board does not mean that the court has ceded its jurisdiction because the referring court maintains its jurisdiction over the matter.¹⁹ As such, all of Reed's state law appeal remedies remain available to him if he were to disagree with the Board's decision in this matter. Therefore, the harm that Reed complains of here is not only not certain, it does not exist.

3. *The Motion to Stay will result in prejudice to Rail Link.*

The Motion to Stay is wrong to state that a stay would not prejudice either party. Reed's silence – silence after Rail Link's initial Petition for Declaratory Order, silence after the Board issued an order initiating a proceeding, and now his failure to submit his Reply Statement in accordance with the schedule and instead file this Motion to Stay harms Rail Link. Whereas, Reed chose to ignore the Board's procedural schedule, Rail Link expended resources to comply with the State Court's referral order, and to submit its filings as to why it is not a common carrier in a timely manner. Reed had ample time to inform the Board of his intent to appeal the referral to the Board and he chose not to do so. Now, he seeks to flout the Board's regulations and impose a delay on this proceeding, and consequently the State Court proceeding that has

¹⁹ *Reiter v. Cooper*, 507 U.S. 258, 268, (1993); *Rebel Motor Freight, Inc. v. S. Beverage Co.*, 673 F. Supp. 785, 790 (M.D. La. 1987) ("A district court has jurisdiction to review an I.C.C. decision whenever the court has referred a question to the I.C.C. for determination.").

requested the Board's opinion. The Board should reject the Motion to Stay and order Reed to file his reply statement.

4. *The public interest does not support a stay because Reed's Motion to Stay is a late-filed attempt to appeal the September 19 Decision establishing a proceeding.*

The Motion to Stay argues that the public interest will be served because "a stay will promote principles of federalism and comity." In this case, the State Court is seeking the Board's expertise on the question of whether Rail Link is a common carrier. A stay, based on a late filed motion by one party, to delay the Board's consideration of the State Court's request is hardly an example of comity between the courts and a federal agency.

Further, the public interest is not supported when a litigant ignores a Board proceeding and then six days prior to a due date, submits a late-filed appeal of a Board decision relabeled as a Motion to Stay. Reed waited eighty-three days after Rail Link filed its Petition for Declaratory order and 37 days after the Board issued its order instituting a procedural schedule. The Motion to Stay makes no mention as to why it took Reed so long to inform Rail Link and the Board of his intention to seek a stay. The public interest is not served when a party ignores a Board proceeding and then submits a last-minute motion to stay just before a filing deadline.

IV. Conclusion

For the foregoing reasons, Rail Link respectfully requests that the Board deny the Motion to Stay, remove this proceeding from abeyance, and order Reed to file his reply statement with a filing deadline that considers that the Motion to Stay was filed only six days before the reply statement was originally due.

Respectfully submitted,



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Dated: November 11, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of November, 2022, I caused a copy of the foregoing to be served on the persons listed below by email as indicated.

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