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Mai T. Dinh
Director, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

RE: *In re Demaree Reed*, STB Docket No. FD 36629
Letter Regarding Texas Mandamus Briefing

Dear Ms. Dinh:

As the Board is aware, Mr. Reed has filed a petition for a writ of mandamus before the Texas (First) Court of Appeals, which challenges the trial court's order of referral to this Board. The parties yesterday completed briefing before that Court, so the petition is now ripe for resolution. Mr. Reed has enclosed copies of the petition, response, and reply for the Board's reference.

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 23rd day of November, 2022.

/s/ Roland Christensen
Roland Christensen

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.

/s/ Andrew R. Gould

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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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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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- 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.

A P P E A R A N C E S

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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

CAUSE NO. 2019-29955

RECSY

DEMAREE REED,

§

IN THE DISTRICT COURT OF

§

Plaintiff,

§

§

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.

§

§

Defendants.

§

215TH JUDICIAL DISTRICT

**PROPOSED ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION OF
ORDER GRANTING RAIL LINK, INC.'S MOTION FOR REFERRAL TO THE
UNITED STATES SURFACE TRANSPORTATION BOARD**

The Court has considered Demaree Reed's ("Plaintiff") Motion for Reconsideration of Order Granting Rail Link, Inc.'s Motion for Referral to the United States Surface Transportation Board ("Motion"). After considering the Motion and any response by Defendant, it is ORDERED that Plaintiff's Motion for Reconsideration of Order Granting Rail Link, Inc.'s Motion for Referral to the United States Surface Transportation Board is DENIED.

Signed this ____ day of August, 2022.

Signed:

8/15/2022

9:21 AM

Hon. Elaine H. Palmer



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No. 01-22-00794-CV

**In the First Court of Appeals
of Houston, Texas**

IN RE DEMAREE REED

Original Proceeding from the 215th Judicial District Court
Harris County, Texas, the Honorable Elaine Palmer, Presiding
Cause No. 2019-29955

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STATEMENT OF THE CASE

Nature of the Case:

Personal injury lawsuit in which Plaintiff Demaree Reed was injured when he attempted to jump on a moving train, contrary to his training and known safety rules, and his foot slipped under the train wheel. His employer Rail Link Inc. provided in-plant switching services at INEOS USA LLC's yard pursuant to private contract. After the accident, Rail Link began paying Reed workers' compensation benefits for his injuries.

Despite receiving these benefits, Reed has brought claims under the Federal Employer Liability Act against Rail Link, Genesee & Wyoming Railroad Services, Inc. and Genesee & Wyoming Inc., which can only go forward if Rail Link is a common carrier. Rail Link has also filed common law claims under Texas law against INEOS Americas LLC, INEOS USA LLC, and Trans-Global Solutions, Inc.

Relator:

Demaree Reed

Real-Party-in-Interest:

Rail Link, Inc.
Genesee & Wyoming Railroad Services, Inc.
Genesee & Wyoming, Inc.
INEOS Americas LLC
INEOS USA LLC
Trans-Global Solutions, Inc.

Respondent:

The Honorable Elaine Palmer, Judge for the 215th Judicial District Court of Harris County, Texas.

Relevant Trial Court's Action:

Relator's mandamus petition complains of the trial court's July 7, 2022 order that

referred the discrete question of Rail Link's status as a common carrier to the Surface Transportation Board. 4.MR.1468.

Rail Link filed a petition to commence a declaratory proceeding with the Surface Transportation Board, which was granted on September 19, 2022. 4.MR.1530. Reed did not answer the STB Petition.

ISSUE PRESENTED

The primary jurisdiction doctrine requires courts to allow administrative agencies to decide in the first instance those issues especially committed to them by law. The doctrine recognizes the agencies' expertise and promotes uniform treatment of those issues. The United States Surface Transportation Board has both the authority under federal law, as well as the expertise, to interpret and make determinations regarding the application of laws, rules, and regulations of common carrier railroads, including jurisdiction over and regulation of common carriers.

The issue for this Court is whether the 215th District Court (the Honorable Judge Elaine Palmer) abused its discretion to refer the discrete issue of whether Rail Link is a common carrier to the STB and if Reed has no adequate remedy on appeal?

Reed cannot be harmed by having this issue heard by the STB, which has jurisdiction and authority to hear the issue, and Reed is adequately protected on appeal, which Reed acknowledged and admitted multiple times in his petition.

Therefore, Reed's petition for mandamus should be denied.

INTRODUCTION

***Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.*¹**

Plaintiff Demaree Reed was injured when—contrary to his training and safety rules dictating otherwise—he attempted to jump on a moving railcar and his foot slipped under a wheel. On the day of the accident, Rail Link, Inc. (“Rail Link”) was providing in-plant railcar switching services at INEOS USA LLC’s yard pursuant to a private contract between the parties. Reed was employed by Rail Link at the time, and Rail Link has paid Reed workers’ compensation benefits for his injuries ever since.

Despite accepting his workers’ compensation benefits without reservation, Reed sued Rail Link² and other defendants in Harris County District Court for his injuries. Reed claims that Rail Link is exempt from the exclusive workers’ compensation bar because it is a common carrier and therefore liable to Reed for additional damages under the Federal Employer’s Liability Act (“FELA”). Rail Link denies that it is a common carrier for multiple reasons, including that it only performs in-plant services, does not hold itself out for work to the public, does not collect

¹ *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

² Reed also sued Rail Link’s ultimate parent company Genesee & Wyoming, Inc. (“GWI”) and affiliated company Genesee & Wyoming Railroad Services, Inc. (“GRSI”; together, the “G&W Defendants”). GWI is a holding company with no operations. 1.MR.93. GRSI is a service company the performs administrative support services for Rail Link on a contractual basis for a fee. 1.MR.92; 1MR.237. Neither entity is Reed’s employer.

payment from railroads, does not contribute to railroad unemployment insurance, does not meet the Fifth Circuit test for common carrier by railroad,³ and has never registered as a common carrier railroad with, nor has it been regulated by, the United States Surface Transportation Board (“STB”). The STB is a federal agency that approves, has jurisdiction over, and regulates common carrier railroads, and provides those entities with certain mandates and rights that simply do not apply to contract switching companies, like Rail Link.

Reed’s Petition unnecessarily complicates the precise issue on appeal by mixing relevant facts with irrelevant arguments about the G&W Defendants, which are not involved in this appeal. Despite Reed’s long and rambling petition, the issue on appeal is simple and discrete:

Was the order by the 215th District Court (the Honorable Judge Elaine Palmer) referring the discrete question of whether Rail Link is a common carrier to the STB a clear abuse of discretion about which Reed has no adequate remedy on appeal?

The answer as a matter of law is no. The primary jurisdiction doctrine requires trial courts to refer to agencies questions that require special expertise. The STB is the single most qualified organization to determine common carrier status, determination of this issue is well within the STB’s statutory obligations, and this question is typical of the type referred by courts. The trial court’s order was not an

³ *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 643 (5th Cir. 1967).

arbitrary or unreasonable decision and not a deviation or misapplication of Texas law. To be clear, the trial court did *not* request the STB to decide the factual merits or legal validity of Reed's causes of action against Rail Link. Instead, properly relying on the primary jurisdiction doctrine, the trial court simply asked the STB to determine whether Rail Link is a common carrier.

Importantly, what is missing from Reed's petition is any citation to similar Texas cases holding that mandamus is proper because a referral order on common carrier status is a clear abuse of discretion with no adequate remedy on appeal. Contrary to Reed's representations to this Court, there is no impending December 5 trial setting, and the district court has not indefinitely abated the case.

Moreover, this Court's analysis can stop on Reed's admission that he will appeal any adverse ruling from the STB. Pet. n. 11 ("If the Board rules in Rail Link's favor, Mr. Reed intends to exercise his right to challenge that order on appeal."). This admission obviates his right to mandamus relief. Not only does he have a right to appeal the STB decision, he also has a right to appeal any order the trial court makes based on the STB decision. Reed's complaint that his *multiple* avenues of appeal, for which he outlines a step-by-step plan, might be too slow or costly is insufficient for mandamus as a matter of law. Texas law is clear that delay caused by appeal is not sufficient grounds for mandamus, and this Court should deny Reed's petition on this ground alone.

Mandamus is an extraordinary remedy that is not warranted here, and Reed has not met his burden of proof to merit mandamus relief. Reed’s petition should be denied, and the STB should be allowed to proceed in consideration of the common carrier question.

STATEMENT OF FACTS

I. There Is No Pending Trial in the 215th Judicial District of Harris County.

As a preliminary matter, Reed misrepresents the current status of the state court litigation. There is no December 5, 2022 trial setting. As noted on the trial court’s docket, and plainly included in the mandamus record, the December 5 trial setting was passed “UNTIL FURTHER NTC FROM THE PARTIES”:

12/05/2022 09:00 AM	215	Trial Setting	TRIAL ON MERITS (MOTION FOR)	Passed	UNTIL FURTHER NTC FROM THE PARTIES
------------------------	-----	---------------	---------------------------------	--------	--

4.MR.1512. Thus, there is no need for expedited proceedings in this Court, and Reed’s arguments related to the impending trial date are moot.

II. Rail Link Is a Switching Company and Not a Common Carrier.

As mentioned above, Rail Link is an in-plant switching company that moves railcars on private property pursuant to private contracts with companies.

1.MR.333-34. Rail Link does not provide or offer its services to the general public, nor does it solicit business from the general public. 1.MR. 334. Rail Link has never held itself out as a common carrier or as willing to haul or move goods for the general

public, for hire or otherwise. 1.MR.334. Rail Link does not pay taxes into the Railroad Retirement Board (RRB) or contribute to railroad unemployment insurance. 1.MR.335.

At the time of Reed's accident, Rail Link had a switching contract with INEOS Olefins & Polymers USA, a division of INEOS USA LLC (INEOS). 1.MR.334. Rail Link's services were limited to handling INEOS's shipments inside its chemical plant and on track within the INEOS plant. 1.MR.334. Once railcars came into the INEOS chemical plant, Rail Link performed rail-related services in connection with the loading/unloading process within the confines of the INEOS facility. 1.MR.334. Rail Link did not own, lease, or maintain any tracks or railroad track equipment at the INEOS facility. 1.MR.334. Pursuant to the contract, Rail Link received compensation on the basis of hours required to perform its in-plant switching operations, and Rail Link's compensation remained the same regardless of the amount of railcars received or sent out by INEOS. 1.MR.334.

Reed did not dispute these facts in the trial court.

III. Reed's Sole Employer Is Rail Link, and His Sole Remedy Is Workers' Compensation Benefits, Which He Is Receiving and Accepting.

Reed was injured while moving railcars within the INEOS yard. He tried to mount a ladder on a moving railcar, in violation of applicable safety rules, and slipped. 1.MR.88; 141 at 123:6-124:21; 1.MR.154. In this lawsuit, Reed brought state court claims and FELA claims against Rail Link and the other defendants. Rail

Link denies Reed's allegations, denies that Rail Link was the cause of Reed's injuries, and denies liability under FELA. 1.MR.9-10. Rail Link alleges that Reed caused his own injuries by failing to exercise the requisite degree of care. 1.MR.10. Indeed, Reed was trained by Rail Link to not jump onto moving railcars, which Reed admitted in his deposition.

The trial record demonstrates that Rail Link was Reed's sole employer. *See* 1.MR.238; 1.MR.241. Rail Link paid Reed and issued him a W-2. 1.MR.119 at 35:1-3 (discussing his W2: "Q. And it has a box. I think it's box C for employer's name. And what does it say? A. Rail Link."); 120 at 37:6-10 ("Q. On Exhibit 13, which is a 2019 W-2, there's a box for the employer's name, and it says Rail Link, correct?... A. Correct."); 37:22-40:17 (reviewing pay stubs that say Rail Link); 1.MR.155-162 (pay stubs). Every single one of Reed's supervisors and coworkers were employees of Rail Link, and all of Reed's supervisors' supervisors were employees of Rail Link. 1.MR.91.

Additionally, Reed received, and will continue to receive, from Rail Link wage and healthcare benefits related to his injuries under the Texas Workers' Compensation Act. 1.MR.9. Reed accepted and continues to accept those benefits without reservation through the date of this filing. 1.MR.9.

Under the Texas Workers' Compensation Act, workers' compensation benefits are Reed's exclusive remedy against Rail Link. 1.MR.9; Tex. Lab. Code § 408.001.

The trial court agreed with Rail Link when it granted Rail Link's Special Exceptions dismissing Reed's state causes of action against Rail Link and also as against GWI and GRSI because Reed's claims against these two defendants were solely derivative of claims against Rail Link.⁴ 1.MR.67.

Contrary to Reed's contentions, Reed had no co-employers while employed by Rail Link. Reed's Petition commingles relevant facts about Rail Link with irrelevant facts about the G&W Defendants, and none of these facts are at issue in this appeal. For example, Reed has made many allegations that Rail Link and the G&W Defendants are employers under FELA, alter egos of one another, that Rail Link's employees were agents of the G&W Defendants, and the G&W Defendants and Rail Link were engaged in a joint venture. Pet. 6. However, there is no evidence that any other entity is in a joint venture with Rail Link or a co-employer of Reed with Rail Link. The G&W Defendants are separate companies that did not employ Reed. Also, Reed did not report to anyone at the G&W Defendants, and neither entity had involvement in Reed's day-to-day activities. 1.MR.92.

Specifically, GRSI is a separate and distinct affiliated company that performs administrative support services for Rail Link on a contractual basis for a fee. 1.MR.229 at ¶ 9 (Administrative Services Agreement stating that "the parties hereto

⁴ The trial court also ordered Plaintiff to amend his pleading to more particularly state how Rail Link is a common carrier and remove references to gross negligence, punitive damages, and prejudgment interest as prohibited under FELA. 1.MR.67-68.

are ‘independent contractors’ and nothing in this Agreement is intended and nothing shall be construed to create an employer/employee, partnership or joint venture relationship”); 1.MR.237. These services include, but are not limited to, payroll administration support, human-resources support, and occasionally accounting support. 1.MR.174 at 45:6-23; 1.MR.215 at 207:4-209:11. GRSI had no involvement in Reed’s day-to-day activities as an employee of Rail Link. 1.MR.237. Reed was never an employee of GRSI, was not hired or paid by GRSI, and did not report to anyone at GRSI. 1.MR.238. GRSI did not direct or control Reed’s hours, when he should begin or end his work, or the method or manner of accomplishing his work. 1.MR.238.

GWJ is a holding company, conducts no industry operations, has no employees, and is the parent company to various subsidiaries, including GRSI and Rail Link. 1.MR.240 at ¶ 3. It has a separate and distinct board of directors. 1.MR.240 at ¶ 3. GWJ has never operated, constructed, or maintained a railroad, any railroad equipment, or railroad operations of any kind. 1.MR.241 at ¶ 5. GWJ does not control day-to-day operations of GRSI or Rail Link. 1.MR.0240 at ¶ 4. Importantly, GWJ did not hire Reed, provide his training, employ his supervisors, nor provide uniforms or tools. 1.MR.241 at ¶ 9-10. GWJ never employed Mr. Reed. 1.MR.241 at ¶ 10.

On or about June 21, 2021, GWI and GRSI filed a motion for summary judgment that FELA is not applicable to either entity as a matter of law because neither entity employed Reed nor was either entity an alter ego, agent, or joint venture of Rail Link. 1.MR.88. This motion for summary judgment is not part of this appeal, and Reed’s constant references to GWI and GRSI should be ignored.

IV. The Trial Court Properly Referred the Common Carrier Issue to STB.

Reed can only maintain his FELA claim against Rail Link if he demonstrates that Rail Link is a common carrier railroad. 45 U.S.C. § 51. Because Rail Link is not a common carrier, Rail Link filed a motion seeking summary judgment that it was not subject to liability under FELA for multiple reasons,⁵ including that Rail neither meets the *Lone Star Steel* test and was not registered with, nor regulated by, the STB. 1.MR.323-28.

Reed’s response, which he combined with his response to the G&W Defendants’ motions for summary judgment, spent only 6 pages on Rail Link’s motion, with the remainder confusing issues in GWI’s and GRSI’s motions. 1.MR.412. The Court denied all motions for summary judgment. 4.MR.1398 (“Well, at this time, the Court is going to deny the Defendants’ motion for summary judgment....”).

⁵ Rail Link previously brought a Motion for Summary Judgment that Rail Link was not subject to FELA on May 8, 2020, but that motion was superseded and withdrawn with the submission of Rail Link’s June 21, 2021 motion.

On June 10, 2022, Rail Link filed a motion asking the trial court to reconsider whether Rail Link is a common carrier by railroad or, in the alternative, refer the issue to the STB. 4.MR.1401. Plaintiff filed his response on June 27, 2022 (4.MR.1421), and the trial court granted the STB referral on July 7, 2022. 4.MR.1468. Trying to get another bite at the apple, on August 1, 2022, Reed asked the trial court to reconsider the referral, and, shortly thereafter, the trial court denied Reed's motion. 4.MR.1470 (seeking reconsideration); 4.MR.1503 (denying reconsideration).

V. Rail Link Attempted to Expedite the STB Proceedings, but Reed Has Refused to Participate.

Promptly after the trial court referred the issue of Rail Link's common carrier status to the STB, Rail Link filed its Petition for Declaratory Order and Request to Set Procedural Schedule. 4.MR.1520-29 (August 4, 2022). Recognizing that time was of the essence because of the upcoming trial setting, Rail Link requested an expedited briefing schedule in the STB of only 16 total days. 4.MR.1492. As detailed in Rail Link's Petition to the Surface Transportation Board for Declaratory Order, Rail Link approached Reed's counsel to see if mutual agreement could be reached on a proposed procedural schedule, but Reed's counsel indicated they were not willing to engage in these discussions, and Rail Link proposed the expedited briefing schedule to STB without Reed's input. 4.MR.1524. Rail Link further attempted to expedite the process by alerting the STB that the parties were

knowledgeable of the facts and no discovery would be necessary as part of the briefing schedule. 4.MR.1524. Indeed, Reed failed to file any response with the STB after Rail Link filed its Petition for Declaratory Order.

Rail Link also filed a motion seeking an order protecting any confidential information disclosed in the proceeding. 4.MR.1533. Reed decided not to respond to Rail Link's email inquiry about Reed's consent for the motion, and Reed also failed to respond to the motion after filing with the STB. *See* 4.MR.1534.

On September 19, 2022, the STB issued its decision instituting a declaratory order proceeding and establishing a procedural schedule. 4.MR.1530-31. The STB noted that Counsel for Reed did not respond to Rail Link's proposed procedural schedule, so the schedule would be extended to ensure that the parties have sufficient time to prepare their arguments." 4.MR.1530. The STB provided the following procedural schedule:

- Rail Link's opening statement: 20 days from decision served; October 11, 2022
- Reed's reply: 20 days from Rail Link's opening; October 31, 2022
- Rail Link's rebuttal: 10 days from the reply; November 10, 2022

In full compliance with the schedule, Rail Link timely filed its Opening Statement and Evidence on October 11, requesting that the STB provide an order declaring that Rail Link is not a common carrier. 4.MR.1543-93.

Six days before his response was due, Reed did not file a reply on the merits of Rail Link's petition and instead filed a motion to stay the STB proceedings. 1.SMR.1. On October 28, the STB issued an order holding the matter in abeyance and requested a response from Rail Link by November 17, 2022. 1.SMR.98. On November 11, 2022, before the date its response was requested, Rail Link filed its response to Reed's motion to stay, arguing that Reed's motion to stay should be dismissed as untimely and that Reed failed to show that a motion to stay was warranted. App. Tab 1.

As of the date of this response, Reed has filed no reply with the STB on the merits of Rail Link's Petition.

SUMMARY OF ARGUMENT

Reed's Petition for Writ of Mandamus is inappropriate and should be denied for multiple reasons. Mandamus requires a two-prong showing, first that there is a clear abuse of discretion, and second that there is no other adequate remedy at law; Reed's Petition fails to satisfy either prong. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding) ("The other requirement [relator] must meet is to show that it has no adequate remedy by appeal."); *Walker*, 827 S.W.2d at 839 ("Mandamus issues only to correct a clear and abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law.") (citation omitted).

First, this Court should decline to hear Reed's mandamus based on the doctrine of laches. Reed delayed filing this mandamus, while at the same time refusing to participate in the STB proceeding as agency officials began reviewing and considering the issues after Rail Link filed its petition and subsequent briefing. After months of activity by STB officials and Rail Link, Reed has done nothing, but had multiple opportunities to act: when the trial court referred the issue to STB, when Rail Link filed its Petition with the STB, when the STB instituted the action, when Rail Link filed its Motion for Protective Order, and when Rail Link filed its opening statement and evidence. Yet, Reed chose not to file a response, objection, or appeal. Equity "aids the diligent and not those who slumber on their rights"⁶ and Reed has certainly slept on his rights. This Court should deny Reed's Petition on this ground alone.

Second, Reed's Petition should be denied because Reed (as he admits) has an adequate remedy on appeal. Reed not only blueprints the avenues to appeal the STB order, he also admits that he *will* appeal any decision by the STB that favors Rail Link. Pet. n. 11. Indeed, Reed can appeal the STB's decision within the STB; he can appeal any decision of the STB to a federal court of appeals; and he can appeal any order of the trial court based on the STB decision to this Court. Texas law is clear that solely because Reed thinks a normal appellate remedy might be too slow

⁶ *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding).

or costly is insufficient grounds to warrant mandamus. The mandamus can be denied on this basis alone.

Moreover, any claimed delay is solely due to Reed. Reed waited to file this Petition, and he has refused to participate in the STB proceeding. Had he timely filed his STB response, that briefing would already be completed. No matter Reed's complaints, before mandamus will issue, Reed must show that he lacks an adequate remedy at law, which he cannot do. Mandamus must be denied.

Third, the trial court properly exercised its discretion and followed the primary jurisdiction doctrine in referring the discrete question of Rail Link's common carrier status to the STB. Indeed, the STB has jurisdiction to determine this issue, is staffed with experts who routinely consider the question of what constitutes a common carrier, and the question is one that would benefit from the uniformity that a decision by the STB would bring. Reed does not contest that the STB has knowledge, expertise, or has routinely decided issues regarding common carriers, but only argues that courts *also* rule on this issue. But this does not mean that trial courts are unable to refer questions to agencies or that the 215th Judicial District abused its discretion in this referral. There is no clear abuse of discretion or misapplication of the law in the trial court's referral to the STB.

Reed's Petition for Writ of Mandamus should be denied.

ARGUMENT AND AUTHORITIES

I. The Court Should Decline to Exercise Its Discretionary Mandamus Jurisdiction Because Reed Delayed Filing His Petition and Has Refused to Participate in the STB Proceeding.

Reed delayed filing this Petition almost four months and has refused to participate in the STB proceeding. Reed has provided no explanation for why he waited so long to file this action complaining about the trial court's order referring the common carrier issue to the STB. His inactivity occurred while Rail Link and federal agency officials at the STB were engaged in significant regulatory proceedings:

- Rail Link appeared at the STB pursuant to the Court's order. 4.MR.1468.
- Rail Link filed its Petition for Declaratory Order, and the STB instituted an action and set a briefing schedule—Reed did not respond. 4.MR.1520; 4.MR.1530.
- Rail Link filed a motion for protection and the STB granted the motion—Reed did not respond. 4.MR.1532; 4.MR.1547.
- Rail Link filed its opening statement and evidence—Reed did not file his reply. 4.MR.1542; 1.SMR.1.

Rail Link has actively undertaken the proceeding in the STB in good faith and despite Reed's failure to lodge any timely objection or appeal. Reed's delay in bringing this appeal, as well as Reed's refusal to participate in the STB proceeding, has gone unexplained. Pursuant to federal law, Reed could have filed an appeal of any decision by the STB decision within 10 days, but chose not to do so. 49 C.F.R.

§1011.6(b). Rail Link relied on Reed’s inactivity, incurred attorneys’ fees in drafting the above briefing,⁷ and was prejudiced by Reed’s change in position by relying on Reed’s inaction.

Texas Supreme Court precedent is clear and should bar this mandamus. Reed rested on his alleged rights for too long while activity occurred around him:

Mandamus is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles. One such principle is that “[e]quity aids the diligent and not those who slumber on their rights.”

Rivercenter, 858 S.W.2d at 367 (orig. proceeding) (citations omitted). A delay of almost four months has been held sufficient for laches to bar mandamus. *Id.* Here, the referral was ordered on July 7, 2022, and the STB instituted the proceeding on September 19, 2022. 4.MR.1468. Reed failed to timely appeal either proceeding, and the record reveals no justification for his delay.

Reed’s delay alone supports a decision by this Court to decline to exercise its discretionary mandamus jurisdiction, especially when the delay has both prejudiced

⁷ Reed takes issue with Rail Link’s alleged “delay” in filing a motion for reconsideration. However, Rail Link was within its rights to file a motion for reconsideration, and Reed has not cited to a case, rule, or evidence that Rail Was barred from filing or that Reed was harmed by Rail Link’s Motion for Reconsideration. There are no statutory or rule-based deadline for Rail Link’s motion or under which a referral to STB must occur. *See also* Rail Link’s Response to Plaintiff’s Motion for Reconsideration of Order Granting Rail Link, Inc.’s Motion for Referral to the United States Surface Transportation Board, 4.MR.1492-1502.

Rail Link and wasted significant efforts at the STB by both Rail Link and STB officials.

II. Reed's Petition Should Be Denied Because He Has an Adequate Remedy on Appeal.

Reed's Petition must be denied because he has not proven that he lacks an adequate remedy by law. "Mandamus will not issue where there is a clear and adequate remedy at law, such as a normal appeal." *Walker*, 827 S.W.2d at 840 (quoting *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)). Reed is able to appeal both the decision by the STB and any decision the trial court makes in response to the STB's decision. The law is clear; mandamus is not available simply because appeals may cause delay. Moreover, Reed's other arguments are just wrong: (1) there is no current trial setting, so there is no danger of two trials or indefinite abatement in the trial court; and (3) this appeal does not raise any novel legal issues. Reed's arguments are not persuasive and do not merit mandamus. This Court can and should deny Reed's petition on this point alone.

A. Reed Has an Adequate Remedy at Law.

Reed's Petition should be denied because he has an adequate remedy of appeal, as he admits in his petition:

"If the Board rules in Rail Link's favor, Mr. Reed intends to exercise his right to challenge that order on appeal."⁸

⁸ Pet. at n. 11.

Texas courts routinely deny mandamus relief—notwithstanding that a trial court may have abused its discretion—where, as here, relator fails to demonstrate the inadequacy of his legal remedy. *See In re Kansas City S. Indus., Inc.*, 139 S.W.3d 669, 669 (Tex. 2004) (orig. proceeding) (“Because we conclude that relator has an adequate remedy by appeal, we deny mandamus relief without reaching the merits of the dispute.”); *In re Moreno*, 4 S.W.3d 278, 279 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (“Because realtors have an adequate remedy by appeal, we deny relators’ petition for writ of mandamus.”).

Reed offers no compelling argument for the proposition that he lacks an adequate legal remedy short of mandamus. To the contrary, Reed freely admits the adequacy of his multiple venues for appeal, providing a clear blueprint in his petition:

“[The] 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. . . .

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.”). 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.”

Pet. 35-37 (emphasis added). Indeed, in a footnote, Reed blatantly informs the court of his intent to appeal any ruling by the STB, conceding he has a remedy: “If the Board rules in Rail Link’s favor, Mr. Reed intends to exercise his right to challenge that order on appeal.” Pet. n. 11. Accordingly, the Court can and should deny mandamus relief without reaching the question of whether the district court abused its discretion. See *In re United Med. Ctrs., P.A.*, No. 04-18-00257-CV, 2018 WL 2418447, at *1 (Tex. App.—San Antonio May 30, 2018, orig. proceeding) (mem. op.) (denying mandamus because “[i]n its petition, relator does not argue, much less carry its burden to show, that it has no adequate remedy by appeal.”); *In re Santander Consumer USA, Inc.*, 445 S.W.3d 216, 222-23 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (denying mandamus relief because “Santander has not carried its

burden to establish the inadequacy of its remedies on appeal” where relator did not brief benefits and detriments of mandamus review).

Reed can go through the STB’s appeals process, federal courts, and also through the Texas courts since a district court has jurisdiction to review a decision whenever the court has referred a question to the STB for determination. *See 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.”). Reed’s only argument is that it would take too long for the appeals process to end. To be clear, this is not sufficient to warrant mandamus. *In re Kansas City S. Indus.*, 139 S.W.3d at 670 (“That is not the permanent loss of substantial rights; it is really only a complaint that the normal appellate remedy is too slow. As we have repeatedly held, the cost or delay incident to pursuing an appeal does not make the remedy inadequate.”); *see In re Ford Motor Co.*, 988 S.W.2d 714, 726 (Tex. 1998) (orig. proceeding) (“[A]n appellate remedy is not inadequate merely because it might involve more delay or cost than mandamus. . . . The delay in having questions decided through the appellate process does not justify an appellate court’s intervention through the extraordinary writ of mandamus.” (citation omitted)).

The Fourteenth Court of Appeals reaffirmed these principles in *In re Moreno*, in refusing mandamus relief from an order granting a bill of review: “[I]t makes no

difference whether the court rules immediately or at some later time on the merits of the underlying claim. . . . [A] remedy is not inadequate merely because it involves more expense or delay.” 4 S.W.3d at 281 (citing *Walker*, 827 S.W.2d at 842).

Because Reed has not and cannot show that he lacks an adequate remedy at law—because Reed does have several adequate legal remedies—this Court can and should deny the mandamus petition without reaching the arguments Reed raised as to primary jurisdiction.

B. Reed Misstates the Record; There Will Not Be Two Trials.

Despite Reed’s protestations, there is no pressure of a looming trial because the December 5 trial date has been passed until further notice. 4.MR.1512. There is no risk of Reed being “prejudiced by an empty chair,” and such factor does not weigh in favor of mandamus. Reed’s blatant misstatement of the trial court’s docket—and subsequent failure to correct his error with this Court—is not a reason for the Court to vacate the trial court’s referral order.

C. Plaintiff’s Slippery Slope Argument Is Unpersuasive.

Reed argues that the trial court’s proper application of primary jurisdiction is a novel legal issue and, thus, well-suited for mandamus relief. Pet. 41. He urges that once defendants learn of this strategy, they will routinely want to punt to administrative agencies in order to delay trial. Reed uses this argument in an attempt to overcome the two legal mandamus requirements that he cannot meet, but this is

not sufficient—Reed has an adequate remedy on appeal and the trial court did not abuse its discretion. Even if this were a novel issue, which it is not, a novel issue does not obviate these requirements.

Moreover, the legal doctrine of primary jurisdiction is well-established and not novel, as demonstrated by a volume of cases cited by both parties. In fact, Reed’s cited case—*In re CVR Energy, Inc.*, 500 S.W.3d 67, 83 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) (Pet. 41)—does not excuse a relator from meeting the mandamus requirements. While it is correct that the *In re CVR Energy* court granted mandamus on a novel issue related to a motion for leave to designate a responsible third party, the court also found that the trial court abused its discretion and that there was no adequate remedy by appeal. *Id.* at 81-83. The facts of this case, and Reed’s own Petition, show that he cannot satisfy the legal requirements for mandamus because he has multiple clear avenues for an adequate remedy by law. Reed’s arguments to the contrary are either inapposite, blatantly false, or unpersuasive.

This Court can and should deny Reed’s Petition.

III. Mandamus Is Not Proper Because the Trial Court Did Not Abuse Its Discretion Under the Doctrine of Primary Jurisdiction.

Reed’s Petition fails because the trial court did not abuse its discretion in referring the issue of Rail Link’s common carrier status to the STB. To the contrary, the trial court properly exercised its discretion to refer the common carrier issue to the STB, a governmental body that is both permitted and best-equipped to address

it. Mandamus is only proper if a trial court “reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” *Walker*, 827 S.W.2d at 839 (quoting *Johnson*, 700 S.W.2d at 917). In order to disturb the trial court’s referral, Reed must show that the trial court committed a “clear failure” to apply the law correctly. *Id.* at 840. Reed has not, and cannot, meet this burden because the trial court had the discretion under the primary jurisdiction doctrine to refer the issue to the STB.

The true issue is that Reed *is upset* with the trial court using its discretion to refer the common carrier issue to the STB because the decision does not benefit him. Reed’s claims that various trial courts have previously considered the common carrier question, but this is *not* the legal test for primary jurisdiction. Reed is not entitled to mandamus simply because the trial court properly exercised its discretion in a matter that he does not prefer. Reed’s petition should be denied.

A. The Trial Court Did Not Misapply the Law in Exercising Primary Jurisdiction.

Referral to an agency under primary jurisdiction is allowed where *both* the courts and agencies have authority to make determinations on relevant issues. *In re Southwestern Bell Tel. Co., L.P.*, 226 S.W.3d 400, 403 (Tex. 2007) (quoting *Subaru*, 84 S.W.3d at 221). The doctrine applies when an agency, like the STB, has expertise on the issue, and great benefit is derived from the agency interpreting its laws, rules, and regulations. *Id.*

“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.” *In re Luby’s Cafeteria*, 979 S.W.2d 813, 816 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding). Indeed, as Plaintiff notes, “[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction.” *Elam v. Kansas City Southern Railway*, 635 F.3d 796, 809 (5th Cir. 2011). “No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.” *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

In fact, Texas law is clear that trial courts *should* defer to appropriate administrative agencies when (1) the agency is staffed with experts trained in handling complex problems within the agency’s purview, and (2) great benefit is derived from the agency’s uniform interpretation of laws within its purview and the agency’s rules and regulations when courts and juries might reach differing results under similar fact situations.” *In re Southwestern Bell*, 226 S.W.3d at 403.

The 215th Judicial District’s referral order is well-supported. It is routine for Texas courts to refer issues to agencies under the primary jurisdiction doctrine. *See In re Southwestern Bell*, 226 S.W.3d at 403 (referring issue of rates charges to the

Public Utilities Commission); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 208 (Tex. 2002) (holding that trial court must allow administrative agency to initially decide an issue when agency is staffed with experts trained in handling complex problems within agency’s purview and “great benefit is derived from an agency’s uniformly interpreting its laws, rules, and regulations where courts and juries may reach different results under similar fact situations”); *Nelson v. City of Dallas*, 278 S.W.3d 90, 98 (Tex. App.—Dallas 2009, pet. denied) (affirming primary jurisdiction of the city on discipline of police officers); *Am. Capitol Ins. Co. v. Montemayor*, No. 03-02-00658-CV, 2003 Tex. App. LEXIS 2511, at *18-19 (Tex. App.—Austin Mar. 27, 2003, no pet.) (upholding the trial court’s referral of insurance-related issues to the Texas Department of Insurance under the doctrine of primary jurisdiction”); *Beacon Na’tl Ins. Co. v. Montemayor*, 86 S.W.3d 260, 272 (Tex. App.—Austin 2002, no pet.) (finding in declaratory judgment action by homeowners’ insurer that Department of Insurance, subject to judicial review, was better equipped than courts to address complex issues of structural engineering, residential construction, and premium rating); *Harris County Mun. Util. Dist. No. 48 v. Mitchell*, 915 S.W.2d 859, 864 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding Texas Water Commission had primary jurisdiction to determine interest rate). Similarly, the use of the trial court’s discretion should be affirmed by this Court.

B. Referral to the STB Was Proper; the STB Is Staffed with Experts and Makes These Common Carrier Decisions.

Here, the trial court not only could refer the common carrier issue to the STB, but should because (a) the STB is the single most qualified entity to determine Rail Link’s common carrier status *and* (b) this matter is greatly served by relying on the STB’s roster of qualified experts and uniform application of relevant rules and regulations. Notably, Reed concedes that the STB has authority on matters related to the regulatory oversight of railroads and the interstate rail network. Pet. 24. Reed likewise admits that courts have found that the STB has primary jurisdiction before. Pet. 25. However, Reed understates the fact that the STB is *the* entity best equipped to handle these exact sorts of determinations.

As background for the Court, pursuant to the Interstate Commerce Commission Termination Act of 1995 (‘ICCTA’), the STB has broad regulatory jurisdiction over “transportation by rail carrier.” 49 U.S.C. § 10501(a); *see also* 49 U.S.C. § 10901(a) (requiring STB authorization for railroad operations).⁹ Specifically, the ICCTA defines “rail carrier” as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). The common carrier obligation implicates nearly every railroad activity, even down to the precise method and terms of how a commodity should be transported. The STB routinely

⁹ The remedies provided under the section with respect to regulation of rail transportation are exclusive and preempt the remedies under Federal or State law. 49 U.S.C. § 10501(b).

makes common carrier determinations as part of its daily regulatory operations and while exercising jurisdiction over rail carriers. *See e.g., New England Transrail, L.L.C.—Construction, Acquisition, and Operation Exemption*, STB Finance Docket No. 34797, 2007 WL 1989841, *6 (STB served June 29, 2007) (considering the fundamental test of common carriage); *The Louisville and Jefferson County Riverport Authority—Petition for Declaratory Order*, STB Docket No. FD 36463, 2021 WL 4940260, at *7 (STB served Oct. 22, 2021) (finding Port of Louisville was not acting as a common carrier and that therefore the STB did not have jurisdiction over the Port of Louisville).

The STB also regularly makes determinations of common carrier status upon court referral using primary jurisdiction. For example, in *Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903 (8th Cir. 2015), the Eighth Circuit Court of Appeals affirmed that the STB had primary jurisdiction to determine whether a railroad’s requirement to transport hazardous materials was reasonable and thus required by the common carrier obligation under 49 U.S.C. § 11101(a). The Eighth Circuit agreed that determining whether transportation restrictions were reasonable was a “complex, fact-intensive inquiry” that required knowledge of the industry. *Id.* at 911. The court also held that the task was best left to the STB—the agency most experienced in evaluating the particular circumstances of each case. *Id.* at 911 (noting the D.C.

Circuit Court and the Sixth Circuit Court of Appeals had applied the doctrine of primary jurisdiction to defer issues to the STB).

As Reed concedes in his Petition, other courts have referred similar railroad issues to the STB for its determination. *See e.g., Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 215 F.3d 195 (1st Cir. 2000) (holding that shipper's claims against railroad alleging violation of ICC Termination Act should be referred to STB because its expertise was needed, its determination would materially aid district court, and referral would promote uniformity in standards governing refusal to provide service); *Overbrook Farmers Union Co-op Ass'n v. Mo. Pac. R.R. Co.*, 21 F.3d 360, 363 (10th Cir. 1994) (previously referring the question of reasonableness of the rail carrier's refusal to provide service to the ICC); *DeBruce Grain, Inc. v. Union Pac. R.R.*, 149 F.3d 787, 789 (8th Cir. 1998); *New Process Steel, LP v. Union Pacific Corp.*, No. H-06-1690, 2006 WL 8448695 (S.D. Tex. Sept. 20, 2006); *see also Greenville County Economic Development Corporation — Petition for Declaratory Order*, Docket No. FD 34487 (STB served July 27, 2005), 2005 WL 1767438 at *3 (citing *Pejepscot* with approval and holding that "the Board has primary jurisdiction to determine whether a railroad's common carrier obligation has been met"); *see also Finch Paper LLC—Petition for Declaratory Order*, STB Docket No. FD 35981, 2016 WL 547716, at *1 (STB served Feb. 10, 2016)

(Petitions for issuance of a declaratory order premised on a court referral are routinely accepted.”).

Contrary to this great weight of authority, Reed relies on an unpublished and irrelevant Illinois case to suggest that this Court should reject the trial court’s referral—*Union Pacific Railroad Co. v. Regional Transportation Authority*, 2020 WL 6930458 (N.D. Ill. 2020). But the Northern District of Illinois in that case applied a test to determine primary jurisdiction different from the test used by Texas courts. There, the court looked at whether the question “rais[ed] issues of fact not within the conventional experience of judges” or if it “requir[ed] the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.” In Texas, the law is different, as it *requires* courts to “defer to appropriate administrative agencies when (1) the agency is staffed with experts trained in handling complex problems within the agency’s purview, and (2) great benefit is derived from the agency’s uniform interpretation of laws within its purview...” *In re Southwestern Bell*, 226 S.W.3d at 403.

Based on the foregoing, Judge Palmer’s referral to the STB is well-supported by primary jurisdiction cases in Texas and throughout the United States. There was no misapplication of law or clear abuse of discretion by the trial court, and Reed is unable to cite to any case where a Texas appellate court found error in referral to the STB. Based on the foregoing, his Petition should be denied.

C. Great Benefit to the Trial Court Is Derived from Referral to the STB.

Primary jurisdiction is also appropriate here because the STB's determination on Rail Link's common carrier status ensures national uniformity in regulations, avoids conflicting legal determinations, and streamlines issues for the trial court and the jury.

First, this referral promotes national uniformity as Congress has charged the STB with a paramount purpose: overseeing regulation of railroad tariffs, practices, and rates and resolving disputes arising out of those issues. 49 U.S.C. § 10501(b) (The jurisdiction of the Board over (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers...is exclusive.'). Reed's reliance on *Wilbert Family Ltd. Partnership v. Dallas Area Rapid Transit*, No. 3:10-CV-2052-D, 2012 WL 246091, at *5 (N.D. Tex. Jan 26, 2012), for the contention that STB review is not required is misplaced. In that case, the court denied referral to the STB because whether lumber was exempt from rail service requirements did not threaten uniformity or disrupt the regulatory scheme. Here, however, the STB is determining an issue that it makes regularly as required by Congress and that could potentially threaten national uniformity. This is directly related to the regulatory scheme and would have far-reaching impacts on Rail Link's business and commerce in general. As Congress

has recognized, the nation's rail industry demands uniformity, and the STB maintains that uniformity.

Additionally, referral of these types of questions from courts avoids conflicting decisions about issues issued under STB's jurisdiction. Courts have agreed that this is an important purpose of primary jurisdiction and routinely refer issues to the STB when confronted with disputes involving rail commerce¹⁰ and whether transportation subject to STB regulation is contract carriage or common carriage.¹¹

¹⁰ *United States v. W. P.R. Co.*, 352 U.S. 59, 64 (1956) (holding that the Interstate Commerce Commission (ICC, predecessor to the STB) has primary jurisdiction to determine whether operations conducted by an STB-certified carrier are within the scope of its certificate); *Pejepscot*, 215 F.3d at 206; *DeBruce Grain*, 149 F.3d at 789-90; *Union Pac. R.R. v. FMC Corp.*, 2000 U.S. Dist. LEXIS 1019 (E.D. Penn. Feb. 3, 2000) (referring questions of the reasonability of a railroad's practice, whether the railroad was required to give notice, and the date on which the railroad could begin assessing the tariff to the STB); *see also Union Pac. R.R. -- Petition for Declaratory Order*, STB Fin. Docket No. 35219, 2009 WL 1630587, at *3 (S.T.B. June 11, 2009).

¹¹ *See also Atlantic Express v. Standard Transportation Serv.*, 955 F.2d 529, 533-34 (8th Cir. 1992) (referring the contract versus common carrier issue to the ICC pursuant to the doctrine of primary jurisdiction); *E.W. Resort Transportation, LLC v. Sopkin*, 371 F.Supp.2d 1253, 1267 (D. Colo. 2005) (staying proceedings while the STB determined whether rail carrier provided substantial interstate service); *F.P. Corp. v. Keny Way Transp.*, 821 F.Supp. 1032, 1037 (E.D. Penn. 1993) (referring the issue of whether plaintiff was transporting goods for defendants in a contract carriage or common carriage capacity to the ICC pursuant to primary jurisdiction); *Jones Truck Lines v. Williamhouse-Regency*, 1995 WL 453342, *9 (S.D.N.Y. July 31, 1995) (staying proceedings pursuant to the primary jurisdiction doctrine because, among other things, the ICC had primary jurisdiction to decide whether the plaintiff acted as a common carrier); *Riffin v. Surface Transp. Bd.*, 733 F.3d 340 (D.C. Cir. 2013) (STB's interpretation of a common carrier's freight carriage obligations under 49 U.S.C. § 11101(a) was permissible and warranted deference); *V&S Ry., LLC v. Hutchinson Salt Co.*, 2010 U.S. Dist. LEXIS 134705, at * (D. Kan. Dec. 17, 2010) (referring question of whether common carrier had the exclusive right to operate on a railroad track to the STB); *Ill. Cent. R.R. v. S. Tec Dev. Warehouse, Inc.*, 1999 WL 519042, *2-3 (N.D. Ill. July 15, 1999) (question of tariff construction, as well as that of the reasonableness of the tariff, were within the primary jurisdiction of the STB); *Santa Cruz Regional Transportation Commission--Petition for Declaratory Order*, 2011 WL 3667482 (S.T.B.), *3 (STB addressed a request by the City of Santa Cruz that it issue a declaratory judgment that Santa Cruz would not become a common carrier as the result of a proposed transaction).

Lastly, referral of Rail Link's carrier status to the STB will likely streamline issues that the trial court and jury will consider at trial. Without judicial determination of the common carrier issue, the jury will hear considerable testimony and documentary evidence on common carrier status at trial and then answer questions on if Rail Link is a common carrier, if Rail Link met the FELA negligence standard of care, and the G&W defendants are responsible in some manner for Rail Link's alleged negligence. They will also hear considerable evidence about whether premises owner INEOS and service provider Trans-Global were negligent under Texas common law and statutes. Alternatively, if Rail Link is a common carrier, the trial court could grant summary judgment for Rail Link and G&W Defendants, thus eliminating three defendants and a number of causes of actions. Determining common carrier status in Rail Link's favor could prevent the jury from being confronted with potentially confusing and conflicting standards of care (negligence vs. FELA liability) and allow for a more expedient trial on narrow issues. This approach will thus conserve judicial resources and save both parties the time of litigating a straight-forward issue. The trial court certainly has discretion to manage her docket and trial.

The trial court properly exercised primary jurisdiction in this instance.

D. The Issue of Common Carrier Is Proper to Refer.

The STB often considers questions that implicate legal analysis. Thus, solely because a trial court should not refer purely legal questions does not mean referrals cannot touch upon legal issues. To the extent that determining whether Rail Link is a common carrier may require some legal analysis, such analysis does not bar referral. *See e.g., DeBruce Grain*, 149 F.3d at 787-88 (“DeBruce’s claims require not only legal analysis, but also an informed evaluation of the economics or technology of the regulated industry,’ which supports the invocation of primary jurisdiction.”).

Here, the STB will not only consider the laws surrounding common carrier status, but will also consider the facts of Rail Link’s specific operations at INEOS. In Rail Link’s Opening Statement, Rail Link provided a verified statement of the President of Rail Link and the agreement with INEOS, and provided information about Rail Link’s operations, services, and representations to the public. *See* 4.MR.1544-1593.

Notably, nowhere in Reed’s Petition does he say that a Texas trial court *cannot* send the common carrier question to the STB.¹² Instead, he says that he is “unaware”

¹² To the contrary, Rail Link concedes that “embedded fact issues...counsel deference to agency proceedings”; such issues exist here and require agency analysis. Pet. 2-3.

of a Texas state court doing so. *See* Pet. 1. Reed does not identify or cite to a single Texas case that finds a trial court erred when it referred an issue to the STB.¹³

E. The Trial Court Did Not Create Jurisdiction of the STB.

Reed’s complaint that the trial court created jurisdiction where none existed is patently wrong. The STB has jurisdiction to hear the issue referred to it by the trial court, and when the STB accepted Rail Link’s petition, it noted that it had discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321. 4.MR.1530; *see also Finch Paper LLC—Petition for Declaratory Order*, STB Docket No. FD 35981, 2016 WL 547716, at * 1 (STB served Feb. 10, 2016) (“These matters have been referred by a court of competent jurisdiction and otherwise appear to be within the Board’s primary jurisdiction.”). Again, Reed’s argument that the STB has no primary jurisdiction fail.

F. Reed’s Everything-and-the-Kitchen-Sink Arguments Are Meritless.

Towards the end of his petition, Reed throws in everything he can think of to argue that the trial court’s decision was incorrect. Reed falsely contends that referral was wrong because the courts normally hear these issues, that courts cannot refer statutory construction, and that courts cannot refer “judicial” issues. At the

¹³ The Court can ignore Reed’s citation on page 30 to *Trinity Industries, Inc. – Petition for Declaratory Order*, No. MC-C-30154, 1989 WL 239075, at *1 (I.C.C. July 25, 1989) because no decision by the ICC (the predecessor for the STB) was actually rendered, as the matter in controversy was resolved by a settlement between the parties.

same time that Reed concedes that the STB has expertise over disputes involving technical questions, he ignores that such expertise is required here. Pet. 2. None of Reed's cited cases involve similar factual situations, support his legal arguments, or, most importantly, support the position that this trial court made an arbitrary, unreasonable, and clear abuse of discretion in referring the common carrier issue to the STB. And, notably, none of Reed's cited cases involve examples of courts granting mandamus for referral to the STB of common carrier status. These scattershot arguments contradict each other, are nothing more than disagreements with the trial court's decision, and should be dismissed as entirely meritless.

Specifically:

- *Elam v. Kansas City Southern Railway*, 635 F.3d 796 (5th Cir. 2011), is too dissimilar to be relevant to this Court's analysis on STB's determination of common carrier, which it does regularly and by statute, because *Elam's* referral to STB about a Mississippi statute on anti-blocking had no relation to STB's regulations. Pet. 15. *Here, there is a clearly identified issue for the STB that is within its expertise and regulatory jurisdiction.*
- *Cash America International, Inc. v. Bennett*, 35 S.W.3d 12, 18 (Tex. 2000), involved a situation where the Texas Supreme Court affirmed that the Texas Consumer Credit Commission did not have exclusive or primary jurisdiction over the determination of the value of an item lost by a pawnbroker. The Commission was no more qualified to make the decision than a judge or jury. Pet. 14. *Here, the STB regularly makes determinations on common carrier status, which can be a complex inquiry that would benefit from its expertise, and has regulatory jurisdiction over this matter.*
- *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422 (Tex. 2017), is a red herring because the STB has jurisdiction to consider the issue referred to it by the trial court. Pet. 16, 17. In *Forest Oil*, the Texas Supreme

Court agreed that the Texas Railroad Commission could only be referred issues dependent on interpretation of its regulations. *Here, the question referred to the STB is within its expertise and regulatory authority.*

- *Norfolk Southern Railway Company v. Baltimore & Annapolis Railroad*, 715 F. App'x 244, 249 (4th Cir. 2017), is inapt because it involved a trial court's denial of STB referral of basic contract issues, such as mitigation damages, double recovery, and whether a party had a duty to pay for the railcars, which are issues not heard by the STB. Pet. 25-26. *Here, the issue referred to the STB falls under its regulatory authority and specific expertise.*
- *City of Willow Park v. Squaw Creek Downs, L.P.*, 166 S.W.3d 336, 341 (Tex. App.—Fort Worth 2005, no pet.), is not on point because it involved a Rule 202 petition seeking to depose city officials regarding a lien. Pet. 19. *Here, the referral is proper as part of the adjudication of Reed's claims, and the STB has regulatory jurisdiction over the issue of common carriers.*
- *Tema Oil & Gas Company v. ETC Field Services, LLC*, No. 07-20-00029-cv, 2021 WL 2944598 (Tex. App.—Amarillo July 13, 2021, pet. denied) involved causes of action that were not at all under the jurisdiction of the Texas Railroad Commission, so were properly reversed and put back in the trial court's jurisdiction after appeal. Pet. 19. *Here, Rail Link does not seek referral of all of Reed's claims, only the discrete issue of common carrier status. Moreover, it is clear that the STB has regulatory authority and jurisdiction to weigh in on common carrier status.*
- *Mitz v. Texas State Bd. of Veterinary Med. Examiners*, 278 S.W.3d 17, 24 (Tex. App.—Austin 2008, pet. dismissed), is not on point because this trial court did not refer any constitutional questions to the STB, as the *Mitz* trial court did to the State Board of Veterinary Medical Examiner. Pet. 18. *Here, Rail Link does not seek the determination of constitutionality, but rather a distinct issue within the STB's regulatory jurisdiction.*
- *Forte v. Wal-Mart Stores*, No. 2:07-cv-155, 2007 WL 2461831, at *4 (S.D. Tex. Aug. 27, 2007), involved the Texas Optometry Board opining on the legality of lease agreements. Pet. 16. *Here, the STB has been conferred regulatory authority to provide determinations on common carrier status, and should be allowed to do so here, as referred to by the trial court.*

Reed's cases are entirely inapposite as each is distinguishable from the situation at hand. Furthermore, none of these cases are mandamus cases, and therefore none support Reed's Petition. To the extent that some of these cases are reversals on appeal, such history only supports that Reed has an adequate remedy on appeal. Moreover, no case suggests that the trial court could *not* refer the common carrier issue to the STB as a matter of law, such that the trial court abused its discretion in its referral.

PRAYER

As demonstrated above, Reed has multiple remedies on appeal, and the trial court did not abuse its discretion in referring the discrete issue of Rail Link's status as a common carrier to the STB. Under the primary jurisdiction doctrine, referral was proper. The STB is staffed with experts who routinely consider these questions, and there would be great benefit from the STB's decision. Reed has failed to show that referring this question was a clear abuse of discretion and, therefore, Reed's Petition should be denied.

This Court should deny Reed's Petition and allow the referral to the STB to proceed. Additionally, the Court should grant real party in interest Rail Link all other relief in law and equity to which it may be entitled.

Respectfully submitted,

/s/ Jim Wetwiska

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CERTIFICATION

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

I further certify 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/Jim Wetwiska

CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word 2007 and contains 9,665 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/Jim Wetwiska

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Rail Link, Inc. as real party in interest was served via email to counsel registered to receive electronic service in accordance with the Texas Rules of Appellate Procedure on November 15, 2022:

/s/Jim Wetwiska

No. 01-22-00794-CV

**In the First Court of Appeals
of Houston, Texas**

IN RE DEMAREE REED

Original Proceeding from the 215th Judicial District Court
Harris County, Texas, the Honorable Elaine Palmer, Presiding
Cause No. 2019-29955

APPENDIX TO RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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TAB 1

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

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**

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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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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No. 01-22-00794-CV

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

In re Demaree Reed,
Relator.

REPLY IN SUPPORT OF 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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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.

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

FELA: Federal Employer Liability Act.

Section 1 of the FELA or FELA section 1: 45 U.S.C. § 51.

STB: Surface Transportation Board.

References:

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

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

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

Mr. Reed’s petition is cited as “Pet.[page number].”

Rail Link’s response is cited as “Resp.[page number].”

INTRODUCTION

Rail Link has so little confidence in the merits of the trial court's unprecedented referral order that its response leads with two procedural arguments for denying Mr. Reed's petition. But those arguments either misunderstand or ignore Texas Supreme Court precedent. And just as fundamentally, they cannot obscure the court's clear misapplication of the primary-jurisdiction doctrine.

I. Rail Link's spin that Mr. Reed's October petition is barred by laches because he "delayed filing" for "almost four months"—a period Rail Link measures from the court's July referral order—is doubly incorrect. Only one month passed between the STB's agreement to commence a declaratory-proceeding jurisdiction (and unexpectedly so, given the garden-variety facts) over the issue of Rail Link's common-carrier status. At best for Rail Link, *two* months passed since the court's August denial of Mr. Reed's motion for reconsideration. Rail Link cites no authority—nor could it—holding that laches foreclosed mandamus relief under comparable facts after one or two months. At any rate, Rail Link has suffered no prejudice, for it has not changed any position based on any purported "inaction."

II. Though relegating its defense of the merits of the trial court’s referral order to last place, Rail Link cannot hide the gaping flaws in the trial court’s clearly erroneous application of the primary-jurisdiction doctrine.

Rail Link cannot identify one “complex problem” or “technical question” for which the STB’s expertise is necessary. To the contrary, Rail Link’s own STB filing *disclaims* any facts that implicate the STB’s economic, regulatory, or other technical expertise. Thus as scores of courts (including Texas courts) have done for decades—and at *Rail Link’s request* in at least four prior cases—the trial court should have decided the common-carriage issue here.

Nor can Rail Link show how “great benefit is derived” from referring the run-of-the-mill application of law to facts to the STB. Rail Link conclusorily asserts that judicial determination of its common-carrier status “could potentially threaten national uniformity,” is “directly related to the regulatory scheme,” and would “have far-reaching impacts” on commerce. But Rail Link’s *ipse dixit* on a common FELA section 1 issue is a far cry from the STB-referral cases actually demonstrating the need for national regulatory uniformity—for example, a carrier’s response to a shortage of railcars and a carrier’s refusal to provide service.

Rail Link's citations to Texas cases affirming agency referral confirm the trial court's error. Each case demonstrated both a technical problem within the agency's purview and that "great benefit" would result from the agency's uniform interpretation of a contested rule or regulation. Permitting the referral order under the garden-variety facts here signals that parties may successfully delay cases by seeking their referral to any number of federal or state agencies. The primary-jurisdiction doctrine forbids that improper result.

III. Relying on pre-*Prudential* cases, Rail Link misunderstands mandamus's second prong. Mandamus issues where *ordinary* appellate procedures are inadequate. One example is when a party is forced to unnecessarily endure timely, costly litigation before an improper adjudicatory body that would ultimately be reversed.

That is precisely the case here. The trial court's referral order forces Mr. Reed to undergo potentially years of proceedings before the STB and federal appellate courts on the *merits* of the common-carriage issue—not the propriety of the referral order under the primary-jurisdiction doctrine (a matter of state law)—when the matter was never properly before those bodies in the first place. Under *Prudential*, mandamus is available to prevent the years and costs of unnecessary litigation.

Next, Rail Link wrongly relies on a docket notation—not a court order—to support its claim that there is no December trial setting. Without any such order, Mr. Reed remains exposed to the impermissible risk of two trials on one set of facts. But even if (as Rail Link claims) the trial court’s court coordinator indeed indefinitely stayed any trial “until after the STB proceedings are concluded,” then the harm to Mr. Reed is even greater. That action indefinitely abates *all* of his claims, which myriad courts have held qualifies for mandamus relief.

Finally, Rail Link does not dispute that the lack of any Texas appellate case on the propriety of an STB referral makes this an issue of first impression. Nor does it dispute that the court’s order incentivizes parties to (wrongly) seek agency referral in an effort to delay judicial resolution on the merits, a path that—if left uncorrected—will evade judicial review.

*

The primary-jurisdiction doctrine does not license a trial court’s abdication of its judicial duty, as a court of general jurisdiction, to decide motions that are properly before it for resolution. An ordinary appeal cannot adequately remedy the court’s equally unprecedented and erroneous referral order in this case. This Court should grant the petition.

ARGUMENT IN REPLY

I. Laches does not apply.

Rail Link first argues that Mr. Reed delayed filing his petition by four months, which bars his entitlement to relief under the doctrine of laches. Resp.13, 15–17. Mr. Reed does not dispute that a party who unreasonably delays petitioning for mandamus relief may waive its right to such relief unless the delay is justified. *E.g., In re Am. Airlines, Inc.*, 634 S.W.3d 38, 42–43 (Tex. 2021) (orig. proceeding) (per curiam). But whether on the facts or the law, no such delay occurred here.

Factually, Mr. Reed did not delay filing this petition for four months. After the trial court's July 7, 2022 referral order (4MR:1469), Mr. Reed promptly moved for reconsideration on August 1. 4MR:1477. He did so to allow the court an opportunity to correct the clear error in its unprecedented referral order before seeking extraordinary relief from this Court. The court, however, denied the reconsideration motion on August 15—roughly two months before Mr. Reed filed this petition. 4MR:1503.

Still, there was no need for Mr. Reed to burden this Court unless the STB actually commenced a declaratory proceeding. And given the unremarkable facts here, Mr. Reed anticipated that the STB would deny Rail

Link’s petition. The STB nonetheless commenced a declaratory-order proceeding on September 19. 4MR:1530.

Little more than one month later (October 24), Mr. Reed filed this petition. And he promptly sought a stay of proceedings before the STB, which the STB—perhaps recognizing that it may have hastily granted Rail Link’s petition in error—temporarily granted. SMR:98.

At any rate, Rail Link’s spin that Mr. Reed “delayed filing this Petition almost four months” (Resp. 15)—a period Rail Link measures from the court’s July referral order—is incorrect twice over.

First, Mr. Reed’s petition to this Court should be measured from the STB’s September 19 order commencing its proceeding, because only then did the STB assert (putative) jurisdiction over the common-carriage issue. *See* 4MR:1530. *Second*, even were it otherwise, then any “delay” was at most two months—from the date that the trial court denied Mr. Reed’s reconsideration motion. *See, e.g., In re Five Star Glob., LLC*, No. 05-22-00153-CV, 2022 WL 3354136, at *4 (Tex. App.—Dallas Aug. 15, 2022, no pet.) (timeliness of mandamus relief is “measured between the denial of the reconsideration motion and the filing of the mandamus petition”). And under either theory, Rail Link points to no case holding under comparable facts that laches

forecloses mandamus relief after one or even two months. Resp.15–17. That is because no such case exists.

Rail Link’s additional argument that laches should apply because Mr. Reed did not contest the STB’s jurisdiction before the STB (Resp.15–16) is similarly misplaced. Whether the STB has primary jurisdiction over the issue of Rail Link’s common carriage is a question of Texas state law to be decided by Texas courts of general jurisdiction, not the STB. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220, 221–22 (Tex. 2002); *see also* Pet. 14–16. What is more, “laches cannot confer jurisdiction” on the STB where, as here, none exists. *See In re Simon Prop. Group (Delaware), Inc.*, 985 S.W.2d 212, 216 (Tex. App.—Corpus Christi–Edinburg 1999, orig. proceeding).

Last, Rail Link fails to show that it made any good-faith change of position “by relying on [Mr.] Reed’s inaction” in the STB proceedings. *Contra* Resp. 16. Rail Link has not in any way changed substantive positions or forfeited any right before the trial court, this Court, or the STB. Indeed, as of this filing, the STB proceedings remain held in abeyance. SMR:0098. Thus by no measure has Rail Link detrimentally changed position in reliance on Mr. Reed’s purported “delay,” as required to preclude mandamus relief. *E.g., In re*

Jindal Saw Ltd., 264 S.W.3d 755, 760–61 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding), *mandamus granted on other grounds*, 289 S.W.3d 827 (Tex. 2009) (orig. proceeding).

Indeed, if any party has been “prejudiced,” it is *Mr. Reed*. His petition to this Court and stay motion in the STB would not have been necessary but for Rail Link’s improper request (4MR:1401) and the trial court’s grant of that request (4MR:1468), leading to the STB’s improper proceeding. Rail Link has thus brought needless costs upon not only the STB and Mr. Reed, but also itself.

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

“The first requirement for mandamus to issue” is a clear abuse of discretion. *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding) (per curiam). That occurs when the trial court “clearly fails to correctly analyze or apply the law.” *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). Although Rail Link tellingly relegates this “first requirement” to last position in its brief (see Resp.22–37), its repositioning cannot conceal the trial court’s clearly erroneous application

of the primary-jurisdiction doctrine, the only legal basis for the trial court’s referral order.

To its credit, Rail Link correctly identifies the primary-jurisdiction standard—*i.e.*, that an agency has primary jurisdiction where “(1) the agency is staffed with experts trained in handling complex problems within the agency’s purview, and (2) great benefit is derived from the agency’s uniform interpretation of laws within its purview and the agency’s rules and regulations when courts and juries might reach differing results under similar fact situations.” Resp.24, 29 (quoting *In re Sw. Bell Tel. Co., L.P.*, 226 S.W.3d 400, 403 (Tex. 2007) (orig. proceeding)); accord *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 518 S.W.3d 422, 429–30 (Tex. 2017).

But as explained below, Rail Link wildly misapplies that standard. It never:

- Points to any “complex problem” for which the STB’s technical or interpretive expertise is necessary, much less of “great benefit”;
- Demonstrates that the interpretation of “common carrier” under section 1 of the FELA falls within the STB’s purview rather than that of courts;
- Cites *any* STB rule or regulation at issue—let alone one for which the STB’s “uniform interpretation” would provide “great benefit”; or

- Identifies a single other Texas case referring the issue of common carriage to the STB, even after a century of Texas FELA litigation.¹

See Resp.22–37.

Undeterred, Rail Link insists that the *STB*—not a court of general jurisdiction—is nonetheless the “single most qualified” and “best-equipped” entity to “determine common carrier status[.]” Resp.2, 22, 26. Rail Link, like the trial court, is mistaken.

A. This case presents no complex problem for which the STB’s technical expertise is necessary, let alone of great benefit.

Rail Link does not dispute the issue here: whether Rail Link’s switching services at and near the Ineos plant—and its intertwined relationship with its admitted common-carrier co-subsiary, Genesee & Wyoming Railroad Services, Inc.—render Rail Link a “common carrier” under section 1 of FELA. Pet.2–3, 6–8, 22–23; Resp.7–9. Nor does Rail Link dispute that courts routinely decide this issue under nearly identical facts. See Pet.22–23 (collecting cases). And above all, Rail Link never satisfies the core primary-jurisdiction requirement: the case must present a “complex problem[.]”

¹ See, e.g., *Gutierrez v. El Paso & N.E.R. Co.*, 102 Tex. 378, 382–84 (1909), *aff’d sub nom. El Paso & N.E. Ry. Co. v. Gutierrez*, 215 U.S. 87 (1909) (reciting the FELA’s “common carrier” language and concluding that the FELA, following its passage in 1906, applied to the Territory of New Mexico).

implicating technical issues “within the agency’s purview.” *Forest Oil*, 518 S.W.3d at 429–30.

For proof, look no further than Rail Link’s actual filing with the STB. 4MR:1544. There, Rail Link filed a seven-page statement supported by a three-page affidavit and a copy of Rail Link’s contract with Ineos—nothing more. 4MR:1544, 1554, 1558. In its statement, Rail Link summarized the trial-court litigation in two pages. 4MR:1544–45.² In the remaining five pages (4MR:1545–49), Rail Link argued simply that it could not be a common carrier by rail at the time of Mr. Reed’s injury because it “only operated under contract with Ineos and did not hold itself out to the public.” 4MR:1549. How did Rail Link support that argument? By showing that “[v]arious *courts*, including the Tenth Circuit Court of Appeals, have determined that Rail Link is not a common carrier.” 4MR:1546 (emphasis added).

Still more, Rail Link specifically *disclaimed* any facts that implicate the STB’s economic, regulatory, or other technical expertise. According to Rail Link, it neither received compensation “on the basis of a fixed division or percentage of [Ineos’s] common carrier transportation charges” nor did it

² Yet even then, Rail Link conspicuously omitted several relevant details from Mr. Reed’s allegations. See Pet.6–8; 1MR:10.

“participate with PTRAs” under “any tariff, contract, rate or other charge governing interstate movements of any commodity by rail.” 4MR:1547 (emphasis added). These disclaimers sharply contrast with issues that *do* within the STB’s primary jurisdiction. *See* Pet.25. For example:

- tariff provisions “rais[ing] numerous technical issues” like the number of switches a railroad is obligated to provide to a consignee based on the consignee’s receiving capacity (*New Process Steel, L.P. v. Union Pac. Corp.*, No. CV H-06-1690, 2006 WL 8448695, at *4 (S.D. Tex. Sept. 20, 2006));
- a carrier’s imposition of a requirement beyond Department of Transportation regulations that toxic materials be transported in normalized steel cars (*Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 906–13 (8th Cir. 2015)); and
- the reasonableness of a carrier’s rates (*DHX, Inc. v. Surface Transp. Bd.*, 501 F.3d 1080, 1085 (9th Cir. 2007)).³

Rail Link correctly argues that “the STB has expertise over disputes involving technical questions” (Resp.35), citing the Eighth Circuit’s conclusion that the facts in *Chlorine Institute* presented a “‘complex, fact-intensive inquiry’ that required knowledge of the industry.” Resp.27 (quoting 792 F.3d at 911). And Rail Link provides numerous examples of several STB-

³ *See also* 49 U.S.C. § 10702 (mandating that rail carriers shall establish reasonable rates, rules, and practices); *id.* § 10704 (authorizing the STB to prescribe, on a case-by-case basis, the “maximum rate, classification, rule, or practice” a carrier must follow).

referral cases that undoubtedly implicate the STB’s technical expertise. *See* Resp.28.⁴

But nowhere does Rail Link identify even one such “technical question” or “complex, fact-intensive inquiry” presented by the garden-variety facts of this case. Instead, it meekly offers that “the STB will not only consider the laws surrounding common carrier status, but will also consider the facts of Rail Link’s specific operations at INEOS.” Resp.33. To that end, Rail Link explains, it provided the STB with “information about Rail Link’s operations,

⁴ *See Pejepscot Indus. Park, Inc. v. Maine Cent. R. Co.*, 215 F.3d 195, 206 (1st Cir. 2000) (STB had primary jurisdiction where its “expertise” was “clearly involved” in deciding whether rail carrier’s refusal to provide service to scrap-metal shipping facility “constituted [an] unlawful refusal to ‘provide . . . service on reasonable request’” (quoting 49 U.S.C. § 11101(a)) and where referral would “promote uniformity in the standards governing refusals to provide service”); *Overbrook Farmers Union Co-op. Ass’n v. Missouri Pac. R. Co.*, 21 F.3d 360, 363 (10th Cir. 1994) (district court properly referred identical issue—whether a refusal violated § 11101(a)—to STB pursuant to its primary jurisdiction); *DeBruce Grain, Inc. v. Union Pac. R. Co.*, 149 F.3d 787, 789 (8th Cir. 1998) (STB had primary jurisdiction over the “reasonableness of a railroad’s response to a shortage of cars[,]” which required “specialized expertise[,]” “uniform national treatment[,]” and an “informed evaluation of the economics or technology of the regulated industry”); *New Process Steel, L.P. v. Union Pac. Corp.*, 2006 WL 8448695, at *4 (tariff provisions “raise[d] numerous technical issues”) (discussed *supra*). In its *Finch Paper* filing, the STB asserted jurisdiction—following court referral—over whether a carrier’s “assessment of demurrage charges against Finch Paper [we]re unreasonable practices in violation [of] 49 U.S.C. §§ 10702 and 10746.” *Finch Paper LLC—Petition for Declaratory Order*, STB Docket No. FD 35981, 2016 WL 547716, at *1 (STB served Feb. 10, 2016). The STB’s *Greenville County* declaratory order did not arise from a court referral (*contra* Resp. Br. 28) but considered whether the STB’s *exclusive*-jurisdiction provisions—which “preempt the remedies provided under Federal or State law” (49 U.S.C. § 10501(b))—precluded a state court from hearing the same matter, and thus did not concern primary jurisdiction at all. *Greenville County Economic Development Corporation—Petition for Declaratory Order*, Docket No. FD 34487, 2005 WL 1767438 at *3 (STB served July 27, 2005)).

services, and representations to the public.” Resp.33. Rail Link’s helpful summary shows that even it cannot complicate what is simple.

Rail Link’s own filings thus demonstrate that the facts of this case do not require—and nor by any stretch would “great[ly] benefit” from—the STB’s expertise. *Forest Oil*, 518 S.W.3d at 429–30. Instead, the application of FELA “common carrier” case law to Rail Link’s in-plant services at the Ineos facility is quintessentially a task for the courts, which have decided this precise issue for more than 50 years. *See, e.g., Lone Star Steel Co. v. McGee*, 380 F.2d 640, 644, 646–49 (5th Cir. 1967) (addressing defendant’s argument that its in-plant switching services could not render it a “common carrier” under FELA section 1); *Ashworth v. Railserve, Inc.*, No. 09-09-00187-CV, 2010 WL 2172377, at *1–4 (Tex. App.—Beaumont May 27, 2010, no pet.) (same); *see also* Pet.25–28 & n.8 (collecting cases rejecting STB referral).

Were more necessary, Rail Link’s litigation history refutes its claim that the STB’s “expertise is required here.” Resp.35. If Rail Link actually believed that the STB’s expertise was necessary or beneficial here, why did it not move from the very outset to refer this case to the STB? Rail Link instead sought the trial court’s summary judgment on the issue. 1MR:323. It rightly

acknowledged precisely what Mr. Reed is saying here: This is a matter for the court to decide.

It was only after Rail Link *lost* its motion for summary judgment (4MR:1398) that Rail Link sought referral. Yet even then, Rail Link did so only *in the alternative* to the trial court deciding the issue. 4MR:1401.

Rail Link's own litigating position reveals the truth. Rail Link has never truly believed that "this matter is greatly served by relying on the STB's roster of qualified experts." Resp.26. Instead, it arrived at that "belief" only as an effort—and a contingent one at that—to derail a trial then two months away.

What is more, one might expect Rail Link to have previously sought STB referral in another case on the issue of common carriage. Yet it cites no cases in which it has done so. *See* Resp. 22–37. Nor has Mr. Reed's search of STB filings identified any. To the contrary, in at least four earlier cases, Rail Link has sought and obtained determination of its common-carrier status before courts.⁵

⁵ 4MR:1546 (citing *Smith v. Rail Link, Inc.*, 697 F.3d 1304, 1310 (10th Cir. 2012); *Wolf v. Reliance Ins. Co.*, No. 99–CV–40–B, Summ. J. Mem. 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. Summ. J. (Cir. Ct. Jefferson County, Ark., June 8, 1994); *Waters v. Rail Link, Inc.*, No. 91–26837, Order Granting Def.'s Mot. for Summ. J. (D. Ct. Harris County, Tex., May 21, 1992)).

Rail Link’s longstanding position—and its original position in this case—is thus correct: “the courts normally hear these issues[.]” Resp.34. Indeed, scores of courts have decided the issue of common carriage under section 1 of the FELA. *See, e.g.,* Pet.20 n.5 (collecting cases). In the demonstrated absence of a “complex problem” for STB’s technical determination, the trial court was required to do so here—just as it did when it initially denied summary judgment. *See In re Sw. Bell*, 226 S.W.3d at 403.

B. No great uniformity benefit may be derived from the STB’s assessment of the ordinary facts here.

Rail Link’s uniformity arguments (Resp.30–32) are equally unpersuasive. In the face of the second primary-jurisdiction requirement—that “*great benefit* is derived from an agency’s uniformly interpreting its laws, rules, and regulations” (*Forest Oil*, 518 S.W.3d at 430 (emphasis added))—Rail Link offers a conclusory response: “the STB is determining an issue that it makes regularly as required by Congress and that could potentially threaten national uniformity.” Resp.30.

Even assuming Rail Link’s newfound concerns for uniformity are genuine, Rail Link fails to demonstrate the great benefit. While it is undisputed that *no* Texas state court has ever referred the issue of an entity’s common-carrier status to the STB (*see* Pet.30; Resp.33–34), the courts that

have properly referred cases to the STB demonstrated the requisite “great benefit” of uniform interpretation. For example, in *DeBruce Grain*, the Eighth Circuit concluded that the “reasonableness of a railroad’s response to a shortage of cars” required “uniform national treatment” and “would involve issues related to national rail policy, and a judicial ruling could affect rail transportation throughout the country.” 149 F.3d at 789. And in *Pejepscot Industrial Park*, the First Circuit concluded that the decision of whether a rail carrier’s refusal to provide service to scrap-metal shipping facility “constituted [an] unlawful refusal to ‘provide . . . service on reasonable request’” was properly referred to the STB to “promote uniformity in the standards governing refusals to provide service.” 215 F.3d at 205–06 (quoting 49 U.S.C. § 11101(a)).

Rail Link makes no such showing. Although Rail Link rightly recognizes that the STB’s “paramount purpose” concerns the “regulation of railroad tariffs, practices, and rates” (Resp.30), none of those items are at issue here.⁶

⁶ By contrast, all of Rail Link’s other STB-referral cases (see Resp.31 nn. 10–11) actually presented one or more technical questions implicating the STB’s expertise. See *U.S. v. W. Pac. R.R. Co.*, 352 U.S. 59, 64–70 (1956) (“tariff construction and the reasonableness of the tariff as applied” under Interstate Commerce Act); *Union Pac. R.R. Co. v. FMC Corp.*, No. CIV.A. 99-CV-200, 2000 WL 134010, at *2–3 (E.D. Pa. Feb. 3, 2000) (reasonableness of tariff; “interpretation of the regulatory terms ‘rates’ and ‘change of service terms’ as used in” 49 U.S.C. § 11101 and 49 C.F.R. § 1300); *Union Pac. R.R. Co.*—

Nor is it sufficient for Rail Link to rely on its *ipse dixit* that judicial interpretation of its common-carrier status somehow “could potentially threaten national uniformity,” “is directly related to the regulatory scheme,” or “would have far-reaching impacts on . . . business and commerce in general.” Resp. 30. To that end, Rail Link never demonstrates how the STB has special interpretive authority over FELA section 1. Statutory interpretation, after all, is a quintessentially judicial task. *See, e.g., Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 98 n.8 (1983) (“deciding what a statute means” is a “quintessential judicial function”). Indeed, “[t]he term ‘common carrier’ is borrowed from the

Petition for Declaratory Order, No. FIN 35219, 2009 WL 1630587, at *2 (S.T.B. June 11, 2009) (reasonableness of request for service under 49 U.S.C. § 11101); *Atlantis Exp., Inc. v. Standard Transp. Services, Inc.*, 955 F.2d 529, 535–38 (8th Cir. 1992) (reasonableness of carrier’s filed rates); *E. W. Resort Transp., LLC v. Sopkin*, 371 F. Supp. 2d 1253, 1257, 1265–67 (D. Colo. 2005) (whether entity provided “substantial interstate service”); *F.P. Corp. v. Ken Way Transp., Inc.*, 821 F. Supp. 1032, 1035–39 (E.D. Pa. 1993) (reasonableness of rates under Interstate Commerce Act and whether entity was “motor contract carrier” under Motor Carrier Act based in part on “interpretation of . . . regulations promulgated by” STB predecessor); *Jones Truck Lines, Inc. v. Williamhouse-Regency, Inc.*, No. 93 CIV.4772 (JFK), 1995 WL 453342, at *4–5 (S.D.N.Y. Aug. 1, 1995) (tariff application, rate reasonableness, and contract carriage under the Negotiated Rates Act of 1993); *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 342 (D.C. Cir. 2013) (freight carriage of hazardous materials under 49 U.S.C. § 11101(a)); *V & S Ry., LLC v. Hutchinson Salt Co., Inc.*, No. 08-1402 WEB, 2010 WL 5301031, at *3–6 (D. Kan. Dec. 20, 2010) (whether V & S—an undisputed common carrier subject to STB regulation—had exclusive right to operate track on acquired line); *Illinois Cent. R.R. v. S. Tec Dev. Warehouse*, No. 97 C 5720, 1999 WL 519042, at *1–3 (N.D. Ill. July 15, 1999) (rate reasonableness); *Santa Cruz Reg’l Transp. Comm’n—Petition for Declaratory Order*, No. FD 35491, 2011 WL 3667482, at *1–2 (S.T.B. Aug. 22, 2011) (whether “regulatory approval [wa]s required” for acquisition 31-mile railroad line).

common law and frequently incorporated into federal statutes,” as it was into FELA section 1. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 763 (4th Cir. 2018). And as already shown, courts have interpreted that precise term for over a century. *See* Pet. 20 & n.5 (collecting cases).⁷

Rail Link’s next theory that STB referral would “streamline issues that the trial court and jury will consider at trial” and “eliminat[e] three defendants” should the STB find Rail Link not to be a common carrier (Resp. 32) fails for two independent reasons. For one, “streamlin[ing]” of trial-court issues has never been a consideration in the primary-jurisdiction criteria. Those criteria primarily ask only whether agency determination offers “great benefit” from uniform interpretation. *Sw. Bell*, 226 S.W.3d at 403; *Forest Oil*, 518 S.W.3d at 429–30.

For another, Rail Link’s argument is factually incorrect. Even assuming Rail Link is (incorrectly) not deemed a common carrier, the trial court found triable fact issues as to whether Rail Link and the Genesee & Wyoming Defendants—one of which is an admitted common carrier—acted as a single business entity and were together Mr. Reed’s “employer” under FELA section

⁷ Indeed, none of Rail Link’s STB cases (Resp.31 & nn.10–11) construed FELA section 1 or were referred by Texas courts under Texas primary-jurisdiction principles. *See supra* n.6.

1. 1MR:10; 4MR:1392, 1398. So even under Rail Link’s wishful hypothetical, no “streamlining” would occur.

Finally, Rail Link’s argument that STB determination would also “prevent the jury from being confronted with potentially confusing and conflicting standards of care (negligence vs. FELA liability)” is just as meritless. Every day across this State, Texas trial courts and juries consider varying standards of care, duties, and evidentiary thresholds. Rail Link offers no explanation why a jury somehow could not receive the proper instructions as to each defendant. For good reason: There is none.

C. Rail Link’s citations to Texas primary-jurisdiction cases demonstrate the doctrine’s inapplicability.

Struggling to muster support for the trial court’s unprecedented referral order, Rail Link primarily turns to two Texas Supreme Court cases. Resp.24–25. Yet those cases in fact demonstrate even more clearly the doctrine’s lack of applicability. Unlike those cases, each presented both a technical problem within the agency’s purview *and* great benefit from the agency’s uniform interpretation of a contested rule or regulation.

In *In re Southwestern Bell*, the Supreme Court held that the Texas Public Utility Commission (PUC) had primary jurisdiction over the meaning and effect of interconnection agreements between Southwestern Bell Telephone

Company and its local telephone-service competitors. 226 S.W.3d at 401–04. As the Court explained: (1) the Federal Telecommunications Act granted the PUC “plenary authority” over the agreements; (2) the PUC had “expertise in enforcing and interpreting the requirements of the FTA”; and (3) the PUC’s “uniform interpretation of the agreements” was necessary to prevent disparate treatment among competitors and thus preserve “competition in the local-calling market.” *Id.* at 403–04.

Similarly, in *Butnaru v. Ford Motor Company*, the Supreme Court concluded that legislative intent supported the Texas Motor Vehicle Board’s primary jurisdiction over the plaintiffs’ tortious-interference and declaratory-judgment claims. The Legislature “specifically authorized the Board to resolve disputes between a manufacturer and dealer when the dealer alleges that the manufacturer violated” the Motor Vehicle Commission Code by “unreasonably withholding consent to transfer a dealership.” 84 S.W.3d 198, 208 (Tex. 2002). The specific legislative grant to the Board, the Board’s expertise, and “the State’s interest in a uniform interpretation of the Code” vested primary jurisdiction over the issue in the Board. *Id.* at 208–09.

Together with Mr. Reed’s previously cited cases (Pet.17–19), Rail Link’s own cases disprove the primary-jurisdiction doctrine’s application here.

Unlike the PUC in *Southwestern Bell*, the STB has not been granted “plenary authority” to construe FELA section 1. 226 S.W.3d at 403. Nor has Congress “specifically authorized” the STB to do so, unlike the specific legislative grant to the Texas Motor Vehicle Board in *Butnaru*, 84 S.W.3d at 208. And as shown, Rail Link makes no attempt to demonstrate a “great benefit” from STB determination of the common-carrier status of its Ineos operations (see Resp. 30–32)—again unlike *Southwestern Bell*, where the PUC’s uniform interpretation of the interconnection agreements was essential to preserve competition in the local-calling market. 226 S.W.3d at 404.

So it makes sense that Mr. Reed (to borrow Rail Link’s words) is “unable to cite to any case where a Texas appellate court found error in referral to the STB.” Resp.29. The referral order here is unprecedented precisely because it was so improper that no other Texas trial court has ever considered applying the primary-jurisdiction doctrine under these garden-variety facts.⁸

Indeed, if the primary-jurisdiction doctrine applies to the unremarkable facts here, then where would it not apply? Under the trial court’s

⁸ According to Rail Link, “nowhere in Reed’s Petition does he say that a Texas trial court *cannot* send the common carrier question to the STB” (Resp.33) (emphasis in original). That is the entire point of Mr. Reed’s petition: “Referral of the garden-variety facts here [] violates the primary-jurisdiction requirement[s]” (Pet.29), which are the “only legal basis under which the trial court could refer this issue to the STB[.]” Pet.32.

impermissibly loose application of the doctrine, any arguably “technical” issue related to a specific injury, contract, workplace, or type of defendant may be punted to any number of federal or state agencies that issue rulings under the relevant Administrative Procedures Act (or other authorizing statute), just as the STB is poised to do here. 4MR:1530 (citing 5 U.S.C. § 554(e)).⁹

Fortunately, the primary jurisdiction doctrine does not permit that absurd result. *See, e.g., In re Discovery Operating, Inc.*, 216 S.W.3d 898, 905 (Tex. App.—Eastland 2007, orig. proceeding); *cf. Sw. Bell*, 226 S.W.3d at 403–04. Neither should this Court.

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

The second requirement for mandamus—where a relator “lacks an adequate remedy by appeal”—is fulfilled where mandamus relief outweighs its detriments following a “balancing test [that] is necessarily a fact-specific inquiry[.]” *In re Academy, Ltd.*, 625 S.W.3d 19, 32 (Tex. 2021) (orig.

⁹ Aside from the STB, federal agencies issuing such orders include the Federal Energy Regulatory Commission, the Federal Communications Commission, the Federal Maritime Commission, the National Labor Relations Board, the Food and Drug Administration, the Federal Power Commission, and the Securities and Exchange Commission. Emily S. Bremer, *The Agency Declaratory Judgment*, 78 Ohio St. L.J. 1169, 1179, 1203 (2017). Scores of Texas state agencies with expertise in everything from motor vehicles and environmental quality to real estate and nursing (*see* Texas State Library, *State Agency Information*, bit.ly/3EnqWTy) may likewise issue rulings under the Texas Administrative Procedure Act (Tex. Gov’t Code §§ 2001.001–2001.903) or other authorizing statutes. *See, e.g., Dyer v. Tex. Comm’n on Env’tl. Quality*, 646 S.W.3d 498, 501 (Tex. 2022).

proceeding). Rail Link’s response fundamentally misstates—and then misapplies—this second requirement.

A. Rail Link misunderstands the “no adequate remedy by appeal” mandamus element.

By Rail Link’s assessment, the existence of *any* appellate process—no matter how wasteful, circuitous, “slow,” “costly,” or “long” (Resp. 3, 13–14, 20)—forecloses mandamus relief. By Rail Link’s telling, “Reed can go through the STB’s appeals process, federal courts, and also through the Texas courts” and shouldn’t complain “that it would take too long for the appeals process to end.” Resp. 20.

Rail Link misunderstands the second prong of mandamus in two ways—a misunderstanding reflected in its near-exclusive reliance on cases pre-dating *In re Prudential Insurance Co. of America*, 148 S.W.3d 124 (Tex. 2004) (orig. proceeding). *See* Resp. Br. 18, 20. As the Texas Supreme Court recently reaffirmed, *Prudential* abrogated the “inflexible understanding of an adequate remedy by appeal” that Rail Link parrots in its response. *In re J.B. Hunt Transp.*, 492 S.W.3d 287, 299 (Tex. 2016) (orig. proceeding).

First, the second prong does not turn on whether a party has *any* right to appeal. To state the following is to state the obvious: Where Texas courts have granted mandamus, the relators all had *some* right to appeal. *See, e.g.,*

Prudential, 148 S.W.3d at 138. Rather, mandamus issues where ordinary appellate procedures are *inadequate*. That is why the standard often is phrased as the relator “lack[ing] an adequate remedy by *ordinary* appeal.” *In re Shulman*, 544 S.W.3d 861, 865 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding) (emphasis added).

Second, mandamus issues where necessary to “spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” *Prudential*, 148 S.W.3d at 136; *see also Academy*, 625 S.W.3d at 32.

As explained below, both principles apply here.

B. The trial court’s referral order impermissibly allows the case to wastefully proceed before the wrong adjudicatory body.

Mandamus relief is appropriate—and, indeed, the *only* remedy—where, as here, “the very act of proceeding” would “defeat the substantive right involved.” *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding); *accord Academy*, 625 S.W.3d at 32. For example, “appeal is not an adequate remedy when it will mean[] forcing parties to trial in a case they agreed to arbitrate[,]” or to trial “on an issue they agreed to submit to appraisers[,]” or “to a jury trial when the agreed to a bench trial[,]” or “to trial in a forum other than the one they contractually selected.” *McAllen Med.*

Ctr., 275 S.W.3d at 465 (citations omitted). Absent mandamus relief, the relator in each of those cases would be forced to unnecessarily endure timely, costly litigation before an improper adjudicatory body that would ultimately be reversed. *See also, e.g., J.B. Hunt*, 492 S.W.3d at 299; *Prudential*, 148 S.W.3d at 136.

The same is true here. Mr. Reed has brought this mandamus proceeding to rescind the trial court's improper referral order. Absent mandamus relief, Mr. Reed will be forced to undergo potentially years of proceedings before the STB, a federal circuit court of appeals, and the U.S. Supreme Court on the *merits* of the common-carriage issue—not the propriety of the underlying referral order under the primary-jurisdiction doctrine, which is a matter of Texas state law (*see supra* 8–10)—when the matter was never properly before those bodies in the first place. *See* Pet.36–37. Then, only once the case returns to the trial court and the trial court has entered final judgment will Mr. Reed be able to challenge the court's referral order on ordinary appeal to this Court. But the years and money lost in improper litigation can never be returned. *See J.B. Hunt*, 492 S.W.3d at 299 (“Permitting 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” (quotation marks omitted)). *Prudential* and its progeny thus confirm the inadequacy of an ordinary appeal.

C. Either the trial court will improperly convene two trials, or it has indefinitely abated Mr. Reed’s claims.

Responding to Mr. Reed’s argument that the trial court’s referral order effectively creates the prospect of two trials, Rail Link accuses Mr. Reed of a “blatant misstatement of the trial court’s docket” and “fail[ing] to correct his error with this Court.” Resp.21. According to Rail Link, a docket notation purporting to pass trial “UNTIL FURTHER N[O]T[I]C[E] FROM THE PARTIES” (4MR:1512) conclusively establishes that “[t]here is no December 5, 2022 trial setting.” Resp.4. But a docket notation is not an *order*. To that end, Rail Link never points to any order—or statement from the trial *judge*—rescinding the trial court’s order setting trial for December 2022. *See* Resp.4, 17–22. Mr. Reed thus remains exposed to the impermissible risk of two trials on one set of facts. *See* Pet.39–40.

Apparently during a docket call, the trial court’s court *coordinator* declared that “trial would not be set until after the STB proceedings are concluded.” 2SMR:99. To be sure, if the trial judge had made such a pronouncement in open court captured by a record, that pronouncement

would have the effect of an order. The court coordinator's statement hardly rises to that level.

But for sake of argument, assume that the court coordinator indeed has indefinitely stayed any trial until the conclusion of the STB proceedings. Momentarily assuming the coordinator was permissibly delegated such judicial power, *the harm to Mr. Reed is even greater*. Contrary to Rail Link's mistaken belief (Resp.17), that action amounts to an indefinite abatement of *all* of Mr. Reed's claims in the trial court until the conclusion of proceedings before the STB and federal appellate courts. Myriad courts have held that such indefinite abatement qualifies for mandamus relief. *See* Pet.35–38 (collecting cases).

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

Given the absence of *any* Texas appellate case ruling on the propriety of an STB referral in a personal-injury case based on the primary-jurisdiction doctrine, Rail Link does not contest that this petition presents an issue of first impression in Texas. *See* Resp.21–22; Pet.41–42. Nor does Rail Link contest that the issue is likely to recur. It even nods to Mr. Reed's argument that (in Rail Link's words) "once defendants learn of [Rail Link's] strategy, they will routinely want to punt to administrative agencies in order to delay trial."

Resp. 21. All Rail Link musters is that “the legal doctrine of primary jurisdiction is well-established and not novel, as demonstrated by a volume of cases cited by both parties.” Resp.22.

Putting aside the fact that none of these cases involve a referral under the garden-variety facts here, Rail Link entirely ignores Mr. Reed’s observation that the misapplication of the primary-jurisdiction doctrine will chill the merits adjudication of parties’ disputes. Because of the lengthy delay caused by a referral order—again, not simply by the agency’s decision itself but also the resulting appellate process—many parties may choose to simply resolve their disputes rather than waiting years for a final agency decision, appealing that decision, and then returning to the local trial court and appealing the initial referral order. *See* Resp.21–22.

“Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss” and “allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments[.]” *Academy*, 625 S.W.3d at 32 (quoting *Prudential*, 148 S.W.3d at 136). Just so here.

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 to which he may be entitled.

Dated: November 22, 2022.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 6,715 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 November 22, 2022, I served a copy of this document on all counsel of record using the Court's electronic-filing system:

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