



United States of America
Railroad Retirement Board
Office of General Counsel
844 North Rush Street
Chicago, Illinois 60611-1275
Toll Free: 1-877-772-5772
www.rrb.gov

312466

ENTERED
Office of Chief Counsel
September 28, 2026
Part of
Public Record

September 28, 2026

Via Electronic Filing

Ms. Anika S. Cooper
Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
Washington, D.C. 20423

Re: FD 36910

***Denver Transit Operators, LLC – Petition
for Declaratory Order – Denver Transit
Dispatch Department***

U.S. Railroad Retirement Board Reply

Dear Ms. Cooper:

Per the procedural schedule in the captioned matter under the Surface Transportation Board's June 30, 2026 and July 30, 2026 orders, the Reply of the Railroad Retirement Board in this matter is attached.

Sincerely,

A handwritten signature in black ink that reads "Peter J. Orlowicz".

Digitally signed by PETER
ORLOWICZ
Date: 2026.09.28 07:33:55
-05'00'

Peter J. Orlowicz
Senior Counsel
U.S. Railroad Retirement Board
Office of General Counsel
844 North Rush Street
Chicago, IL 60611
(312) 751-4922 (phone)
(708) 943-8795 (cell)
Peter.orlowicz@rrb.gov

cc: FD 36910 Service List Counsel of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36910

DENVER TRANSIT OPERATORS, LLC – PETITION FOR DECLARATORY ORDER –
DENVER TRANSIT DISPATCH DEPARTMENT

REPLY OF U.S. RAILROAD RETIREMENT BOARD

Per the Surface Transportation Board’s decisions of June 30, 2026 and July 30, 2026 regarding the procedural schedule for this matter, the Railroad Retirement Board submits this reply to Denver Transit Operators, LLC (Denver Transit)’s opening statement and to the supporting comments of the American Short Line and Regional Railroad Association (ASLRRA).¹

Introduction

The RRB’s interest in this proceeding is not to increase the regulatory burdens on local commuter rail authorities who happen to provide dispatching services for rail carriers subject to STB jurisdiction. Instead, the RRB merely seeks to administer its own statutory mandate to maintain “a broad retirement program for employees playing many roles within the railroad industry”, including dispatchers. *Herzog Transit Services, Inc. v. U.S. Railroad Retirement Board*, 624 F.3d 467, 474 (7th Cir. 2010). This broad, protective purpose is distinct from the objectives of the Interstate Commerce Act, the ICC Termination Act of 1995 (ICCTA), or the

¹ To avoid any possible confusion or ambiguity between the decisions and actions of the Surface Transportation Board and those of the Railroad Retirement Board, this reply will use the initialisms “STB” and “RRB” for each agency respectively.

Rail Transportation Policy factors codified at 49 U.S.C. § 10101. Congress emphasized this fact in the ICC Termination Act of 1995 itself, embedding in the statutory text the directive that “[t]he enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.” Pub. L. 104-88, § 102 (Dec. 29, 1995); *see* 49 U.S.C. § 10501(c)(3)(B).

As the Interstate Commerce Commission (ICC) recognized as early as 1992, transit agency control of dispatching is a significant factor in determining whether a common carrier retains the ability to provide service over shared infrastructure, and whether the ICC/STB has jurisdiction over the transit agency as a rail carrier as a result. *Southern Pacific Transportation Company – Abandonment Exemption*, 8 I.C.C. 2d 495, 508 (1992); *Orange County Transportation Authority et al. – Acquisition Exemption – The Atchison, Topeka and Santa Fe Railway Company*, 10 I.C.C. 2d 78, 83 (1994). The ICC/STB’s subsequent decision to exempt such agencies from continued regulation under 49 U.S.C. Subtitle IV does not alter that jurisdiction, nor does it alter RRB coverage attached to that jurisdiction.

The *State of Maine* doctrine² has always required the ICC/STB to make an individualized, case-by-case assessment of how much control a state or local commuter transportation agency has over the operations of common carriers in these circumstances, and the STB has acknowledged that “[e]arly on, the ICC applied a relatively strict standard, requiring the carrier to retain an “unconditional” easement that allowed the freight carrier to operate without interference from the acquirer of the physical assets.” *Massachusetts Dept. of Transportation –*

² *State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company*, 8 I.C.C. 2d 835 (1991).

Acquisition Exemption – Certain Assets of CSX Transportation, Inc., FD 35512 (STB served May 3, 2010) at 19. The record in this case demonstrates that Denver Transit exercises the type of control over interstate passenger rail traffic in and out of Denver Union Station that subjects it to STB jurisdiction as a rail carrier.

However, STB has acknowledged that more recent cases applying the *State of Maine* standard have allowed for reasonable restrictions on carrier operations if necessary to permit commuter operations, without the local transportation agency becoming a rail carrier under STB jurisdiction. *MassDOT* at 19. Even if the STB would find Denver Transit not to be a rail carrier under the *State of Maine* standard as it has evolved to date, that changing standard should not shrink the RRB’s jurisdiction over those same local transportation agencies if the ICC would have found the agency covered based on its precedent immediately prior to the ICCTA. Therefore, the STB should make clear in its decision that RRB coverage may attach to a local transportation agency under 49 U.S.C. § 10501(c)(3)(B), even if STB uses its discretion to exclude the local agency from its regulatory authority on modern *State of Maine* grounds. *Id.* at fn 4.

Finally, Denver Transit asks the STB to revisit and overturn its decision in *Rail-Term Corp. – Petition for Declaratory Order*, FD 35582 (STB served Nov. 19, 2013) (*aff’d* by denial of petition for reconsideration in FD 35582 (STB served Dec. 30, 2014)).³ The supporting statement filed by the ASLRRA similarly urges the STB to revisit the scope of *Rail-Term*, arguing that contract dispatching companies should not be treated as rail carriers simply because they provide dispatching services to railroads. *Rail-Term* is limited by its facts to for-profit,

³ The RRB adopts the convention described in footnote 4 of Denver Transit’s opening statement of referring to this case and its history collectively as “*Rail-Term*”.

private entities whose primary function is to provide dispatching services as an extension of, and replacement for, dispatching that the rail carrier would normally perform. The RRB stipulates that Denver Transit does not fall into this category. Accordingly, *Rail-Term* does not control this case, and it is not necessary for the STB to revisit its precedent in *Rail-Term* to resolve this case. Should the STB decide to do so, however, the RRB asks the STB to review *Rail-Term* in the proper context as a necessary outgrowth of the principle of maintaining jurisdiction over companies and functions that have the capability of interfering with rail carriers' obligations to provide common carrier service, and as a means to preserve Congress' intent to keep a robust, protective railroad retirement system even as other elements of the regulatory landscape and industry business practices have continued to evolve.

Background

In addition to the factual background described in Denver Transit's opening statement (Petitioner's opening statement at 3-9), the RRB offers these additional facts and comments.

Prior to Denver Transit's assumption of dispatching duties for Amtrak in April 2016, dispatching for all Amtrak trains in and out of Denver Union Station had been coordinated by employers covered by the Railroad Retirement Act and Railroad Unemployment Insurance Acts. Denver Union Terminal Railway Company was held to be a rail carrier covered under the Acts effective August 17, 1912 through August 13, 2001, the date Denver Union Station was sold to the Regional Transportation District (RTD) that contracts with Denver Transit. Railroad Retirement Board Coverage Decision 2006-20, *Denver Union Terminal Railway Company* (May 25, 2006). Denver Transit conceded before the RRB that the movements of Amtrak passenger

trains into and out of Union Station between 2001 and 2016 were coordinated by Amtrak train personnel and BNSF Railway yard personnel until Denver Transit assumed responsibility for remote dispatching of those trains. Railroad Retirement Board Coverage Decision 2025-34, *Denver Transit Operators, LLC* (decision on reconsideration) (Jun. 23, 2025) at 9.

At the time of the RRB's original decision regarding Denver Transit's dispatching unit, the only interstate passenger rail service using Denver Union Station and being dispatched by Denver Transit were Amtrak trains, including the Chicago-to-California *California Zephyr* service and a seasonal ski train. *Id.* at 8. The *Canyon Spirit* service began in 2021, and its operator sought STB authorization to provide that service as well as an exemption from subtitle IV of title 49 of the U.S. Code. *American Rocky Mountaineer, LLC – Petition for Exemption From 49 U.S.C. Subtitle IV*, FD 34648 (STB served May 28, 2021). STB granted the petition, recognizing that American Rocky Mountaineer's passenger rail service from Denver, Colorado to Moab, Utah was subject to STB jurisdiction, but concluding that exempting American Rocky Mountaineer from the requirements of Subtitle IV was appropriate. *Id.* The RRB also found American Rocky Mountaineer to be a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Railroad Retirement Board Coverage Decision 2022-17, *American Rocky Mountaineer, LLC d/b/a Rocky Mountaineer* (Apr. 11, 2022).

Argument

I. STB Evolution of Precedent Post-1995 Should Not Alter RRB Jurisdiction Over “Employers”

The Railroad Retirement Act has a “broad purpose” and a “protective character” that Congress has intended to be construed broadly. *Herzog* at 475 (citing *Cheney R.R. Co. v. Railroad Retirement Board*, 50 F.3d 1071, 1077-78 (D.C. Cir. 1995)). The provisions of the statutory scheme administered by the RRB are not to be constrained by the business models common at the time of the original passage of the Railroad Retirement Act of 1937; they are equally applicable to the modern railroad industry and its organizational relationships. *Id.* (citing *Livingston Rebuild Center, Inc. v. Railroad Retirement Board*, 970 F.2d 295, 298-99 (7th Cir. 1992)). When Congress determined it was appropriate to abolish federal preemptive regulation of state and local passenger rail service, including commuter operations, it did not intend to curtail the operation of the Railroad Retirement and Railroad Unemployment Insurance Acts. It expressed this intent in clear text, stating in no uncertain terms that “The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.” Pub. L. 104-88, § 102 (Dec. 29, 1995); 49 U.S.C. § 10501(c)(3)(B). *See also* H.R. Rpt. No. 104-311, at 96 (Nov. 6, 1995):

This section also replaces former Section 10504, regarding the relationship between Federal economic regulation of rail transportation and State or local mass transportation activities, such as commuter rail operations. In keeping with the abolition of all Federal economic regulation of rates, entry, and exit in the rail passenger transportation field, this provision excludes mass transportation operations from the [Transportation Adjudication Panel]’s jurisdiction except for the limited purpose of matters relating to access to railroad facilities and infrastructure. **The Committee does not intend for this section to alter any**

existing law as to the coverage and scope of the Federal statutes governing railroad retirement benefits and railroad unemployment insurance, and the Railway Labor Act.

(emphasis added). While the definition of an “employer” under the Railroad Retirement Act and Railroad Unemployment Insurance Act includes “any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code”, the ICCTA simply inserted this phrase as a direct substitution for “any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act”. Pub. L. 104-88, §§ 323, 324. It therefore must be read in context with the other amendments made by the ICCTA, particularly the clause explicitly disclaiming any diminution of the RRB’s coverage of railroad employers and employees in 49 U.S.C. § 10501(c)(3)(B).

As a result, RRB jurisdiction should not be tied to the STB’s *current* jurisdiction, but *what that jurisdiction looked like in 1995* immediately prior to the ICCTA. For that reason, the STB should apply the standard that existed in 1995 to determine if Denver Transit (or the RTD for which it operates) would have been subject to part I of the Interstate Commerce Act; it is unnecessary for the STB to reach the question of whether Denver Transit is a rail carrier subject to STB jurisdiction as it stands today. Allowing post-1995 interpretations of the STB’s jurisdiction under the ICCTA to affect the RRB’s jurisdiction would be contrary to Congress’ direction in 49 U.S.C. § 10501(c)(3)(B).

Denver Transit’s purpose in bringing this petition for a declaratory order is to resist this conclusion. In its motion to the U.S. Court of Appeals for the D.C. Circuit to hold its petition for review of the RRB’s coverage decision in abeyance to seek this declaratory order from the STB, Denver Transit stated:

...without referral to the STB and ultimate resolution under the auspices of this Court, Denver Transit may end up as a rail carrier solely for purposes of the

Railroad Acts—but not for purposes of the Interstate Commerce Act itself. This is an intolerable non-sequitur and exactly the concern recognized by the Supreme Court when it declared the law’s interest in “[u]niformity and consistency in the regulation of business” and a “rational[] exercise” of judicial review. *W. Pac. R.* 352 U.S. 59, 64 (1956).

Denver Transit Operators, LLC v. Railroad Retirement Board, D.C. Cir. Case No. 25-1188, Petitioner’s Unopposed Motion to Stay and Refer to the Surface Transportation Board (filed Dec. 5, 2025) at *16. What Denver Transit frames as an “intolerable non-sequitur” is in fact Congress’ stated intent. 49 U.S.C. § 10501(c)(2)(A) specifically states that the STB “does not have jurisdiction under this part over public transportation provided by a local government authority,” except as provided in § 10501(c)(3). Section 10501(c)(3)(A) then states:

Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to—

- (i) safety;
- (ii) the representation of employees for collective bargaining; and
- (iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

Section 10501(c)(3)(B) goes on to specify that the STB maintains jurisdiction over local government authorities for purposes of resolving matters involving use of terminal facilities, switch connections and tracks if the STB finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the ICC that were in effect immediately before January 1, 1996. That same “freeze” paragraph directs that the ICCTA “shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.” In two consecutive paragraphs then, Congress directs that the STB lacks jurisdiction over a class of local government authorities, but that those same authorities (and their agents, like Denver

Transit) continue to be subject to the Railroad Retirement and Railroad Unemployment Insurance Acts.

Importantly, this “freeze” provision impacts the STB’s application of its *State of Maine* precedent as well. “Early on, the ICC applied a relatively strict standard, requiring the carrier to retain an “unconditional” easement that allowed the freight carrier to operate without interference from the acquirer of the physical assets.” *Massachusetts Dept. of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc.*, FD 35512 (STB served May 3, 2010) at 19. Only later did the STB decide that reasonable restrictions on carrier operations are acceptable if necessary to permit commuter operations. *Id.* The STB’s evolving *State of Maine* cases should not restrict RRB jurisdiction over dispatchers as covered employees under the Railroad Retirement Act and the STB should make clear in its decision that RRB coverage may attach, even if STB uses its discretion to exclude a local transit agency from its regulatory authority on *State of Maine* grounds. *Id.* at fn 4. Contrary to Denver Transit’s argument, applying post-1995 *State of Maine* cases to remove Denver Transit from the scope of rail carriers subject to RRB jurisdiction would be the violation of the freeze provision, not its inclusion.

It is also noteworthy that if Congress intended STB to make binding determinations of rail carrier status for purposes of RRB employer coverage, it could have done so explicitly. Section 1(a)(2) of the Railroad Retirement Act and section 1(a) of the Railroad Unemployment Insurance Act in fact contain just such a provision for street, interurban, and suburban electric railways that are not operating as part of a general diesel-railroad system of transportation. 45 U.S.C. § 231(a)(2), 45 U.S.C. § 351(a). Such entities are excluded from “employers” under the

Acts, but only if they are not operating as part of the general diesel-railroad system of transportation, regardless of motive power. The relevant provision reads:

The Surface Transportation Board is hereby authorized and directed upon request of the Railroad Retirement Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this paragraph.

Id. Congress did not provide this type of referral and definitive resolution for any other class of employer under the Acts; the STB should decline Denver Transit's invitation to recreate this process through this declaratory order proceeding and make clear that the RRB is entitled to make its own determinations of coverage, even when such a decision might depart from the STB's.

II. ICC Precedent Prior to 1995 Supports a Finding that Denver Transit is a “Rail Carrier” Subject to STB Jurisdiction

With the correct legal framework established, Denver Transit's arguments that it should not be considered a rail carrier subject to STB jurisdiction are unavailing. In both *Southern Pacific Transportation Company – Abandonment Exemption*, 8 I.C.C. 2d 495, 508 (1992) and *Orange County Transportation Authority et al. – Acquisition Exemption – The Atchison, Topeka and Santa Fe Railway Company*, 10 I.C.C. 2d 78, 83 (1994), the ICC found that the local transit agencies involved in those cases would become rail carriers under the ICC's jurisdiction due to their acquisition of rail assets that either transferred common carrier rights or created conditions

under which the common carriers' ability to carry out their service obligations would be restricted. Because the operating agreements between the Denver RTD, Amtrak, and American Rocky Mountaineer place substantial limits on both Amtrak's and American Rocky Mountaineer's ability to provide common carrier service to its passengers through Denver Union Station in favor of local commuter service, the STB should find Denver Transit (as the Regional Transportation District's chosen operator) to be a covered rail carrier.

In *Southern Pacific*, the Los Angeles County Transportation Commission (LACTC) had purchased the physical assets of several Southern Pacific rail lines in October 1990. Southern Pacific then sought the ICC's permission to abandon those lines in September 1991, relying on *State of Maine* to support its arguments that LACTC had not obtained any right or authority to provide freight service along the transferred lines, and therefore acquired no common carrier obligation with respect to it. *Southern Pacific* at 495-96. After reviewing the purchase agreement and shared use agreements between Southern Pacific and LACTC for the period before abandonment, the ICC concluded LACTC had in fact become a rail carrier through its purchase of the lines. *Id.* at 508. In reaching this conclusion, the ICC stated:

The question of whether LACTC acquired a "line of railroad" subject to 10901, therefore, depends upon whether, by entering into the Purchase and Sale Agreement, the Interim Use Agreement, and the Shared Use Agreements, LACTC is (1) holding out to provide common carrier rail service and (2) has the ability to provide common carrier rail service.... Purchasers acquiring active rail lines acquire the common carrier obligation to assure that service continues to be provided. The underlying rationale is that a carrier's obligation to serve can only be extinguished by Commission authority to sell or abandon. The two elements of common carriage, the willingness and the ability to provide service, may not be separated without our authority.

Id. at 506-07. It further explained that the sale of assets in *State of Maine* left the rail carrier with a permanent and unconditional easement to continue providing common carrier service over the

line that had been transferred to the Maine Department of Transportation, so the Maine Department of Transportation did not become a rail carrier by the transaction.

In LACTC's case, though, the ICC found Southern Pacific did not retain a permanent and unconditional easement over the transferred lines. Instead, the purchase agreement and shared use agreements gave LACTC sole responsibility for the rail line, including "management, operation and maintenance" of the line, and "the movement of trains, cars, and locomotives over and along the tracks shall at all times, be subject to the direction and control of LACTC's superintendent, **train dispatchers**, and other authorized agents." *Id.* at 508 (emphasis added). As a result, the ICC found that Southern Pacific's residual trackage rights "may be relegated to a secondary role behind rail passenger service" and LACTC's rights under the agreements substantially reduced Southern Pacific's ability to carry out its common carrier obligation. The ICC concluded: "[t]he corresponding rights which LACTC has acquired are so extensive that, under the [Interstate Commerce Act], LACTC necessarily incurs an obligation to exercise these rights as a common carrier, unless it acquires abandonment or exemption authority from this agency." The ICC then immediately exempted LACTC from 49 U.S.C. Subtitle IV on its own motion, as it found regulation of LACTC was unnecessary to accomplish the Rail Transportation Policy priorities. *Id.* at 512. This immediate exemption does not alter the jurisdictional analysis, however.

Denver Transit argues that it does not qualify as a common carrier because it is not "holding out" its dispatching service to the public. Denver Transit asserts, and the RRB does not dispute, that the Dispatching Department does not offer its dispatching services directly to the public. Petitioner's opening statement at 12-13. Denver Transit cites to *Ass'n of Pittsburgh & Conneaut Dock Longshoremen v. The Pittsburgh & Conneaut Dock Company et al*, 278 I.C.C.

2d 280, 293-94 (1992) for the principle that “holding out” refers to the right of the public to use the road’s facilities and to demand service of it. This is correct as far as it goes, but Denver Transit fails to recognize that under *Southern Pacific*, the common carriers’ holding out to the public (here, Amtrak and *Canyon Spirit*) must include the actual ability to provide that service; when restrictions or limitations on that ability are transferred to another party, such as LACTC in *Southern Pacific* or Denver Transit in the current case, the entity controlling that right incurs the obligation to exercise those rights as a common carrier itself. *Southern Pacific* at 508. Denver Transit’s argument on this point depends entirely on analogizing from cases that did not involve dispatching, without confronting the cases that directly address dispatching as a component of common carrier ability to provide service.

Similarly, in *Orange County*, five county transportation agencies in the Los Angeles area acquired track and other assets from the Atchison, Topeka and Santa Fe Railway Company. Again, the ICC examined the specific shared use agreements in place between Santa Fe and the county agencies. The ICC found that although the agreements purported to grant Santa Fe a “permanent easement” for service, the agreements contained significant restrictions on Santa Fe’s use of that easement. *Orange County* at 84. Specifically, the ICC highlighted the general priority of commuter passenger traffic over freight trains, which were restricted to special hours. Santa Fe’s access for service had to be “reasonable” and could not “more than minimally interfere with passenger service.” Finally, the county transit agencies controlled dispatching over the lines:

The Transit Agencies' control over dispatching is not absolute. Santa Fe will control dispatching on its busy San Bernardino Subdivision. Also, the shared use agreements contain provisions purportedly guaranteeing that the Transit Agencies' control over dispatching will not interfere with freight service. Despite these provisions, however, it seems that the Transit Agencies will have a superior position because they will be in possession of the dispatching facility and Santa

Fe will have to litigate or arbitrate to correct undue preference of the Transit Agencies.

The Transit Agencies' general control over dispatching is reinforced by control over Santa Fe's scheduling of freight service. The passenger operator must approve Santa Fe's freight schedules, subject to certain conditions. § 4.3 of the shared use agreements. Santa Fe cannot operate during the commuter rush hours in the morning and evening, except: (1) 24-hour operation is permitted over the busy San Bernardino Subdivision; and (2) one through train during each rush hour is permitted over the San Diego Subdivision. If Santa Fe were to transfer its easement or grant trackage rights to a non-carrier or a class III railroad, freight operating hour restrictions would increase. Freight trains could then operate only between 8:00 PM and 5:00 AM. Under the shared use agreements for the San Jacinto, Redlands, and Escondido Subdivisions, where freight density is light, no daytime freight service can be conducted if daytime passenger service is commenced.

Id. at 84-85. The county transit agencies also took responsibility for maintaining the acquired track and could block Santa Fe from constructing new track. Maintenance decisions were required to give passenger trains first priority over Santa Fe trains. *Id.* at 86. As in *Southern Pacific*, the ICC found it had jurisdiction over the county agencies as rail carriers but exempted them from most or all provisions of 49 U.S.C. Subtitle IV. *Id.* at 89-90.

Denver Transit's own opening statement highlights the similarities between *Southern Pacific*, *Orange County*, and the current case. The RTD "maintains almost total control of the activities of the facility." Petitioner's Opening Statement at *15. The opening statement quotes section 3.7 of the operating agreement between Amtrak and the RTD:

In the performance of services referred to in this Agreement, RTD shall have the sole right to direct the movement of Amtrak Trains while on the Rail Lines, although Amtrak shall operate such trains in accordance with RTD's dispatcher's instructions. All personnel rendering services which involve responsibility for RTD's operating facilities or for the handling or movement of any Amtrak Train shall be subject to the direction, supervision and control of RTD, and such services performed by or for Amtrak shall be governed by and subject to all then current operating and safety rules, orders, procedures and standards of RTD with respect thereto.

Id. at *15-16. Section 3.3 of the operating agreement sets out performance standards for RTD. Amtrak trains that arrive or depart Denver Union Station on time will be handled “as soon as practicable by RTD”, but Amtrak trains that are behind schedule will be handled “to the best of RTD’s ability” generally within either 30 or 60 minutes depending on whether RTD is currently moving equipment into Denver Union Station to start daily commuter operations. In other words, Amtrak’s ability to keep to its interstate passenger schedule may be negatively affected by RTD’s daily commuter operations. Petitioner’s Opening Statement, V.S. Salama Ex. B (2014 Amtrak-RTD Agreement) at *10-11. Requests from Amtrak for additional services must be made in advance to RTD and RTD’s response “shall give due regard... to the avoidance of unreasonable interference with the adequacy, safety, and efficiency of RTD’s other railroad operations.” *Id.* at *9.

Denver Transit’s opening statement describes an even greater level of control over American Rocky Mountaineer’s *Canyon Spirit* service, which is indisputably interstate rail carrier service subject to ICC/STB jurisdiction:

Those trains enter RTD property as a bare licensee and are restricted from obtaining any train servicing or supporting improvements. The *Canyon Spirit*’s rights are limited by the RTD’s use, operation, needs, and requirements. The RTD has express rights to limit its service. And *Canyon Spirit* pays a delay charge if it occupies the platforms for too long or if the RTD incurs costs from its occupancy—in addition to an annual license fee.

Petitioner’s Opening Statement at *16. Far from demonstrating that the RTD and Denver Transit are not subject to STB jurisdiction because of a lack of agency relationship, these facts in the operating agreements demonstrate Denver Transit is a rail carrier because of its control over interstate rail traffic in and out of Denver Union Station.

These arrangements between the RTD and its tenant rail carriers are distinguishable from other agreements where the ICC/STB has found dispatching did not trigger rail carrier status for

a public transit agency. Two cases decided under the pre-ICCTA law are notable in this regard. First, in *Los Angeles County Transportation Commission – Petition for Exemption – Acquisition from Union Pacific Railroad Company*, FD 32374 (STB served July 11, 1996), the STB found County Transportation Commission did not unduly impair freight service through an operating agreement with Union Pacific. In that case, the STB explained: “Dispatching control has less importance in its own right than it has as a means of enforcing the service priorities accorded under the operating agreement. If the operating agreement considered as a whole and the circumstances surrounding it are not likely to impair freight service, the passenger operator's control over dispatching will not by itself create such an obstacle, because the latter merely implements the former.” As explained, the operating agreement between Denver RTD and its rail carrier tenants more closely resembles those of *Orange County* and *Southern Pacific*.

Second, the ICC’s decision in *City of Dallas, City of Fort Worth and D/FW RAILTRAN – Petition for Declaratory Order*, FD 32406 (1993) found that RAILTRAN, as the designee of the cities to carry out certain contract duties such as maintenance, dispatching, and operational control of a jointly shared rail line with Missouri Pacific Railroad Company and Burlington Northern Railroad Company, would not become a rail carrier. The decision observed that Missouri Pacific retained the ability to approve any designee other than Amtrak or a Class I rail carrier, and Missouri Pacific could discharge any functions necessary to the common carrier obligation itself if the local authorities and their designee failed to do so. The use agreements also explicitly recognized the common carrier obligations of both Missouri Pacific and Burlington Northern, and that operating rights related to those obligations could not be

extinguished without ICC approval.⁴ This is the same analysis (but different facts) as applied in *Orange County* and *Southern Pacific*; the use agreements in Denver Transit’s instance do not have the same safeguards that were significant in *RAILTRAN* for preserving common carrier service. Again, *Orange County* and *Southern Pacific* should control here.

To the extent that *Massachusetts Dept. of Transportation – Acquisition Exemption – Certain Assets of CSX Transportation, Inc.*, FD 35512 (STB served May 3, 2010) reflects an evolution of the STB’s *State of Maine* line of cases, it should not be held to limit RRB jurisdiction for the reasons explained in Part I above. *MassDOT* clarifies that even when the ICC or STB uses the term “jurisdiction” in the context of a *State of Maine* transaction, it is in fact only a finding that a transaction as presented to the ICC/STB does not require ICC/STB authorization. In all instances, the STB maintains jurisdiction over the rail property itself, even if it concludes in a particular case that it need not exercise regulatory authority over a proposed transaction. *MassDOT* at fn 4. This is fundamentally a valid exercise of STB discretion as part of its interpretation and administration of its own enabling statute.

However, the exercise of such discretion on the part of the STB in furtherance of its own policy goals should not operate to limit and thereby frustrate the RRB’s own statutory grant of authority in its own enabling statutes toward a concededly different, but no less valid, Congressional purpose. Even in cases such as *Los Angeles County Transportation Commission* and *MassDOT*, where the STB declines to exercise jurisdiction over those public transit agencies, the RRB urges the STB to ratify those decisions in a manner that preserves the RRB’s ability to enforce its own benefit scheme through 49 U.S.C. § 10501(c)(3)(A). As articulated in

⁴ *RAILTRAN* and its implications for RRB coverage specifically is discussed more in Part III of this reply.

Railroad Retirement Board Coverage Decision 2025-34, a majority of the RRB (Management Member dissenting) declined to apply *State of Maine* in its own decisions because the policy considerations underlying those STB cases are fundamentally different than the policy considerations and public purpose of the Railroad Retirement and Railroad Unemployment Insurance Acts. The STB explained the purpose underlying *State of Maine cases* as assisting states and local communities in preserving freight rail service where profitability is marginal and promoting efficient use of existing freight corridors for commuter rail transportation without unduly interfering with continuing common carrier service over the transferred lines. *Rail-Term Corp. – Petition for Declaratory Order*, FD 35582 (STB served Nov. 19, 2013) (*aff'd* by denial of petition for reconsideration in FD 35582 (STB served Dec. 30, 2014)). That purpose is distinctly different from the public purpose of the Railroad Retirement and Railroad Unemployment Insurance Acts, which are to provide retirement, disability, unemployment, and sickness benefits to railroad workers who play many roles within the railroad industry. *See Herzog* at 474. As a result, the STB's exercise of its discretion not to exert its jurisdiction over certain parties should not operate to remove those same parties from the possible scope of RRB coverage, particularly in cases involving local transportation agencies where Congress clearly intended through 49 U.S.C. § 10501(c)(3)(A) that such agencies should continue to be subject to RRB coverage even if the STB lacked jurisdiction.

III. *Rail-Term* Does Not Control This Case, But Is Consistent with the Divergent Purposes of the ICCTA and the Railroad Retirement Act

Finally, Denver Transit and ASLRRA urge the STB to revisit and overturn its past precedent in *Rail-Term*. Because Denver Transit should be found to be a rail carrier as described in Part II above, the STB should decline the invitation to revisit the *Rail-Term* precedent because *Rail-Term* does not control this case and it is unnecessary for the STB to even apply *Rail-Term* here. The RRB agrees with Denver Transit that jurisdiction under the rule in *Rail-Term* does not cover Denver Transit. *Rail-Term* on its facts is limited to independent, for-profit, private entities who own no actual rail infrastructure and whose primary function is to provide dispatching services as an extension of, and replacement for, dispatching that the rail carrier would normally perform. Denver Transit is a contractor for a public agency, which owns Denver Union Station and the tracks that lead in and out of the station, whose primary function is operating a commuter mass transit system by rail. That places them squarely in the footprints of the transit agencies in *Orange County* and *Southern Pacific*, not those of *Rail-Term*. Additionally, if the STB reverses *Rail-Term*, that fact by itself would not overturn or vacate the federal court decisions in *Herzog* or *Rail-Term* itself, both of which would continue to apply as binding judicial authority on the RRB.

Even so, if the STB determines this is an appropriate case to revisit *Rail-Term*, the RRB urges the STB to do so with a view toward the divergent purposes of the Railroad Retirement Act and Railroad Unemployment Insurance Act as compared to the ICCTA. In particular, the RRB notes footnote 24 of the STB's initial *Rail-Term* decision expressed disagreement with the decision of the RRB in Railroad Retirement Board Coverage Decision 2009-53, *Herzog Transit*

Services, Inc. (decision on reconsideration), *affirmed by Herzog v. RRB*, 624 F.3d 467, 474 (7th Cir. 2010). *Herzog* involved the same dispatching arrangement on behalf of a public entity as the ICC had previously considered in *RAILTRAN* but declined to exercise jurisdiction over. Under the reasoning set forth in Part II above, the RRB suggests that the result in *Herzog* can be harmonized with *RAILTRAN*, *Rail-Term*, and the STB's other *State of Maine* cases by recognizing that local transit agencies like Denver RTD (and Denver Transit as its agent) can be exempted from STB regulation through *State of Maine* without such discretion on the STB's part being binding or limiting on RRB jurisdiction over the same entities. Footnote 24 of *Herzog* emphasizes that the STB "believes that the statute and governing Supreme Court precedent provide the [STB] with the discretion not to adopt such an expansive interpretation of its jurisdiction where there are compelling public goals that would be compromised." It cannot be the case that Congress intended the pursuit of the STB's compelling public goals to simultaneously undercut the separate public goals of the railroad retirement system. 49 U.S.C. § 10501(c)(3)(A) provides the throughline to resolve this jurisdictional tension.

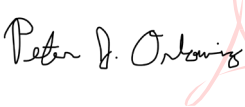
Conclusion

Contrary to the bulk of Denver Transit's argument, neither Denver Transit nor the RTD need be found to be an agent for a different rail carrier to be a rail carrier themselves. Rather, under ICC/STB precedent, owning track used in interstate rail transportation and exercising such control over that track through its dispatching and operating agreements that infringe common carriers' ability to fulfill their own common carrier obligations is enough to make Denver Transit a rail carrier. Denver Transit's own brief admits that these controlling factors are present.

Because Denver Transit is a contractor to a public transit agency, the STB's *State of Maine* cases control, not *Rail-Term*, so the STB should decline Denver Transit's invitation to overturn *Rail-Term*. Nevertheless, if the STB does determine this is an appropriate case to revisit *Rail-Term*, the reasoning and outcomes in both *Rail-Term* and the *State of Maine* line of cases can be harmonized and reconciled with the distinct public purpose of the Railroad Retirement and Railroad Unemployment Insurance Acts in mind, such that the RRB is not deprived of its ability to administer its own statutes because of discretionary choices the STB makes to administer the ICCTA.

Dated: September 28, 2026

Respectfully submitted,

 Digitally signed by PETER
ORLOWICZ
Date: 2026.09.28 07:35:28 -05'00'

Peter J. Orlowicz
Senior Counsel
U.S. Railroad Retirement Board
Office of General Counsel
844 North Rush Street
Chicago, IL 60611
(312) 751-4922 (phone)
(708) 943-8795 (cell)
Peter.orlowicz@rrb.gov