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October 27, 2026

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ENTERED
Office of Chief Counsel
October 27, 2026
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Public Record

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

Denver Transit Operators, LLC Rebuttal

Dear Ms. Cooper:

Per the procedural schedule in the captioned matter under the Board's June 30, 2026, and July 30, 2026, orders, attached is the **Rebuttal of Denver Transit Operators, LLC.**

Yours,

Bradon J. Smith
Attorney for Denver Transit Operators LLC

CC: FD 36910 Service List Counsel of Record (via emailed file share link)

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

FD 36910

DENVER TRANSIT OPERATORS, LLC

— PETITION FOR DECLARATORY ORDER —

DENVER TRANSIT DISPATCH DEPARTMENT

DENVER TRANSIT OPERATORS, LLC REBUTTAL

Per its own petition for declaratory order and the Board's decisions of June 30, 2026, and July 30, 2026, Denver Transit Operators, LLC ("Denver Transit") replies in rebuttal to the opposition of the United States Railroad Retirement Board ("RRB"), the Brotherhood of Railroad Signalmen ("Brotherhood"), and the American Train Dispatchers Association ("Association").

INTRODUCTION

Dispatching at Denver Union Station is not common carriage such that Denver Transit or its Dispatching Department is a rail carrier under 49 U.S.C. § 10102(5). It is not an activity that meets the Interstate Commerce Act's pre-*Rail-Term*[1] criteria for common carriage. Nor was that decision correct—as underscored

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[1] *Rail-Term Corporation — Petition for Declaratory Order*, FD 35582 (STB served Nov. 19, 2013) ("*Rail-Term I*") (*aff'd* by denial of petition for reconsideration in FD 35582 (STB served Dec. 30, 2014) ("*Rail-Term II*"); (*appeal dismissed sub. nom. in Rail-Term Corp. v. Surface Transp. Bd.*, Case No. 15-1033, ECF Dkt. No. 1561557 (D.C. Cir. Jul. 8, 2015) (determining the court lacked jurisdiction because Rail-Term's petition for review addressed only the Board's reconsideration, and not the merits in the initial decision), *reh'g denied* in ECF Dkt. No. 1572866, *cert. denied* in *Rail-Term Corp. v. Surface Transportation*

by the Brotherhood and Association's rote reliance on *Rail-Term* while overlooking the historic, agency-common law definition of what makes a person a rail carrier.

The RRB has a different theory than *Rail-Term*. The RRB argues now that Denver Transit controls common carrier service at Denver Union Station such that the Dispatching Department should be deemed a rail carrier. RRB Reply at 7, 11, 12. To get there, the RRB insists the Board review Denver Transit as a whole.

But this case is not about whether Denver Transit is a rail carrier. Rather, this declaratory matter is about the Dispatching Department. As the Board's June 30, 2026 decision states: "A controversy exists as to whether Denver Transit's Dispatching Department is a rail carrier subject to the Board's jurisdiction." Likewise, the United States Court of Appeals for the District of Columbia Circuit referred only the Dispatching Department's status under 49 U.S.C. § 10102(5) to the Board. *Denver Transit Operators, LLC v. U.S. R.R. Ret. Bd.,* No. 25-1188, Jan. 23, 2026 Order (attached as Appendix A to Denver Transit's Petition for Declaratory Order).

Were that not enough, it's already been settled that Denver Transit is not a rail carrier.[2] And even if that were the question, neither Denver Transit nor the Dispatching Department has any authority, discretion, or power—that is, control—over the operation of any common carrier service at Denver Union Station.

That leads back to the merits question Denver Transit, the Brotherhood, and the Association have briefed—whether the Dispatching Department's functions make it a rail carrier. Because the sole doctrine supporting that conclusion, *Rail-*

Board, et al. Case No. 15-977 (June 6, 2015). This brief generally refers to this case and history as "*Rail-Term*.

[2] *Denver Transit Operators, LLC,* RRB Coverage Decision 14-15, 3 (attached to Denver Transit Operators' Petition for Declaratory Order ("Petition"), Appendix C).

Term,[3] was inconsistent with the historical, precedential, and logical definitions of what activity makes a person a rail carrier, the Board should determine that the Dispatching Department is not a rail carrier under 49 U.S.C. § 10102(5).

BACKGROUND

THE PARTIES' ARGUMENTS

The Opening Statement shows that dispatching is not common carriage because dispatching has never been known to be a "public profession[4]" that the public "demands."[5] These are necessary for a person's activity to make that person a rail carrier. So, no matter who performs dispatching—whether a rail carrier or its agent—the activity *by itself* does not make a person a rail carrier or fall under the Board's jurisdiction. And even if such activity might otherwise be common carriage, it does not affect the Board's jurisdiction because it is "incidental" to Denver Transit's commuter rail purposes: the service is not Denver Transit's purpose for existing. *Rail-Term Corp. — Petition for Declaratory Order*, FD 35582, at 12 n.24 (STB served Nov. 19, 2013); [6] Am. *Orient Express Ry. Co. v. Surface Transp.* Bd., 484 F.3d 554, 557 (D.C. Cir. 2007) ("Nevertheless, the term 'common carrier'

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[4] *New England Transrail, LLC — Construction, Acquisition, and Operation Exemption — in Wilmington and Woburn, Mass.*, FD 34797 (STB served June 29, 2007) at 10-11 ("*New England Transrail*") (citing *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927).

[5] *Ass'n Pittsburgh & Conneaut Dock Longshoremen v. The Pittsburgh & Conneaut Dock Co. et al.*, 278 ICC.2d 280, 293-294 (1992).

describes not the legal obligations of a company but how the company does business.").

The Brotherhood of Railroad Signalmen and American Train Dispatchers Association base their respective replies on the contention that dispatching *is* Subtitle IV common carrier activity under *Rail-Term*. See Brotherhood Opposition at 3–7 (contending that dispatching should result in jurisdiction under *Rail-Term Corp. — Petition for Declaratory Order*, FD 35582 (STB served Nov. 19, 2013)); Association Reply in Opposition to Denver Transit Operators Opening Statement and ASLRRA's Comments, at 3–10.

For its part, the RRB now theorizes that Denver Transit exercises "control" over common carrier service and assets sufficient to render Denver Transit a rail carrier. To support that view, the RRB advances 49 U.S.C. § 10501(c)(3)(B) as jurisdictionally dispositive, adopts the *State of Maine* line of cases it previously had found inapplicable, and concludes that the Dispatching Department is a rail carrier because the broader Denver Transit organization is.[7]

ARGUMENT

The Interstate Commerce Act's jurisdiction is primarily activity based. By its terms, the Act gave the Agency[8] power over "transportation" by "rail carriers" and defined "transportation" as including nearly everything related to "movement." See

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[7] Exactly opposite the position it took previously. *Denver Transit Operators, LLC,* RRB Coverage Decision 14-15, 3 (attached to Denver Transit Operators Petition for Declaratory Order ("Petition") as Appendix C) ("[Denver Transit] is not involved in the transport of freight or passengers in interstate commerce *and is not subject to the authority of the Surface Transportation Board*." (emphasis supplied)).

[8] We refer to the continual, consistent Interstate Commerce Act administration by the ICC and the STB as the acts of the "Agency."

49 U.S.C. §§ 10501(a)(1), 10102(24). Likewise whether a person is a rail carrier is defined by "what [the person] does." *Status of Allegheny & S. Side Ry. Co.*, 277 I.C.C. 119, 120 (1950) *("Allegheny South Side")*; see also Opening Statement at 17.

Secondarily, the Act also regulates assets insofar as they are instruments of common carrier service; the asset is regulated because of the common carrier activity it was used for. *City of Oshkosh, Wis. and Wis. Central Ltd. — Petition for Declaratory Order*, 1994 I.C.C. LEXIS 93, at *3 (1994) (noting asset jurisdiction arises under 49 U.S.C. § 10901 and § 11343). But not every interest in a regulated asset is sufficient to make one a rail carrier. *Status of Tulsa Union Depot Co.*, 262 I.C.C. 78, 81 (1945) (owning terminal company not a rail carrier). Rather, there must be sufficient "control" and by itself dispatch is not control. *Am. Train Dispatchers Ass'n v. Interstate Commerce Comm'n*, 671 F.2d 580, 582 (D.C. Cir. 1982) ("*Am. Train Dispatchers*").

Taking these jurisdictional grounds in order, the RRB (1) agrees that the Dispatching Department does not hold itself out to provide services and (2) abandons its 11-year reliance on *Rail-Term*'s jurisdictional activity reasoning—though the Brotherhood and Association continue to cling fast to it. Part I below shows dispatching-as-jurisdictional-activity is inconsistent with how the Agency has otherwise defined what service makes a person a rail carrier: whether it is for a direct public benefit. Because dispatching was not a jurisdictional activity under these criteria—and *Rail-Term* did not apply them—the Board should find the activity is non-jurisdictional.

That leaves the asset and service "control" theory that the RRB falls back on but that the Brotherhood and Association omit. Brotherhood Reply at 13 (contending *State of Maine* is too complex and requires a better record); Association Opp'n at 10 (dismissing *State of Maine* as irrelevant to the dispatching

jurisdictional ground). Part II first shows the Board should not adopt the RRB's control theory on principles of estoppel and fairness. And even if reached, the theory is deficient as it relies on overreading a single statutory sentence. And even beyond that, were the theory to be applied, it would fail as the facts show Denver Union Station's interstate rail service is not controlled by Denver Transit nor is any interstate service to the terminal subject to the Board's Subtitle IV jurisdiction and protections. Absent either, the Board should find the Dispatching Department has no jurisdictional asset control that would render the Dispatching Department a rail carrier.

Finally, Part III shows that the Board should decline the RRB's belated urgings not to act in the proceeding the Board instituted at the D.C. Circuit's behest.

I. Dispatching Is Not Jurisdictional Activity.

From the principal, "activity" perspective of the Board's jurisdiction, a rail carrier is someone who either (1) holds out its service to the public directly[9] or (2) acts as an agent for a rail carrier by providing a service the public can demand.[10] On the first point, the RRB concedes that Denver Transit itself does not hold out its service to the public.[11] The Brotherhood and Association tacitly do the same, as they make no mention of any public holding out.

That leaves the public service prong, which itself has two elements: first that the person act as an "agent" for a carrier and second that the person provide a

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[9] *Santa Clara Valley Transp. Auth. — Acquisition Exemption — Union Pacific R.*, FD 34094 (STB served Nov. 16, 2001), 13 (citing *Status of Bush Universal, Inc.*, 342 I.C.C. 660, 564 (1973).

[10] *Conneaut Dock*, 278 I.C.C.2d at 280, 293-294 (1992).

[11] RRB Reply at 12.

public service. But an agent does not "*ipso facto*"[12] become a common carrier. Again—the question is what an agent "does"[13] and whether it is a "public calling." *Union Stock Yard & Transit Co. v. United States*, 308 U.S. 213, 221 (1939). So even if the RRB were correct that the RTD's activity made the RTD or the broader Denver Transit organization a rail carrier—more on that below—that does not mean that the Dispatching Department is a carrier if dispatching is not a service the public demands.

A. Principles Underlying Rail-Term Show Dispatching is not Common Carriage.

That is the first point of disagreement. The Brotherhood and Association otherwise engage the Opening Statement on common, activity-based grounds: both cite cases Denver Transit relies on. See Brotherhood Reply at 2–3 and Association Reply at 7–8 (each citing *United States v. Brooklyn E. Dist. Terminal*; *United States v. Union Stock Yard & Transit Co.*; and *Ass'n of P&C Dock Longshoreman v. Pittsburgh & Conneaut Dock).*

But what the Brotherhood and Association do not consider are the principles those cases adopted: that for an activity to qualify it must be a "public calling" (*Union Stock Yard* at 22 citing *Brooklyn E. Dist. Term*) that the public at large has an interest in and can demand. *Conneaut Dock* at 293. See also Opening Statement at 17-19. Put another way, the question is whether there is a public need that the person meets. *Am. Orient Express Ry. Co. v. Surface Transp. Bd.*, 484 F.3d 554, 557 (D.C. Cir. 2007) (describing this definition as the "standard" common-law meaning); *Am. Orient Exp. Rwy. — Petition for Declaratory Order*, FD 34502 (STB served Dec.

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[12] *Terminal Allowance at Minnesota Transfer*, 268 I.C.C. 5, 18 (1946).

[13] *Allegheny South Shore* at 120.

29, 2005) ("one must look to the character of the service of the party in relation to the public."). No party in opposition identified a public need for train dispatching.

Nor had there been any cases before *Rail-Term* addressing whether dispatching activity was a "public calling" emblematic of common carriage (even if not held out). *Compare Lone Star Steel Co. v. McGee*, 380 F.2d 640, 643 (5th Cir. 1967) (referring to "actual rail service" to the public) *with Rail-Term I* at 8 ("Although Supreme Court and related precedent thus has extended common carrier status to companies performing integral transportation services under contract to the carriers who, in turn, hold out those transportation services to the public, it has not specifically extended that principle to dispatching services performed by a non-affiliated third-party for the carrier.").

What that means is what *Rail-Term* did was extend the law; the problem is it did so solely with internal reasoning based on what it deemed "essential" or "integral" services. *Rail-Term I* at 8–9. The flaw with that purely internal standard is exposed in the Brotherhood's circular logic fallacy. *Rail-Term*, the Brotherhood says, should be good law because the Board said it was good law. Brotherhood Reply at 3. It provides ballast for the assertion by repeating the assertion two more times. See, e.g., Brotherhood Reply at 6; *id.* at 7 ("this reasoning was soundly rejected in Rail-Term"); and *id.* (" . . . the Board's comments about Rail-Term apply . . ."). But a logical defense of *Rail-Term* cannot wholly rely on *Rail-Term*.

B. Incidental Dispatching is Not Common Carriage.

Though *Rail-Term* should be overturned, it should not be ignored. The Brotherhood, the Association, and the RRB fail to engage with its redeeming quality—*Rail-Term's* recognition that public agency dispatch of other common carrier services should not be jurisdictional based on preexisting Board precedent predating the ICC Termination Act.

The RRB's rush to abandon the case obscures this residual value.[14] Rather than address public agency dispatching, the RRB now says *Rail-Term* is distinguishable as applicable to private vendors actively seeking the contracting out of freight dispatch. RRB Reply at 19. Yet the RRB doesn't address why that distinction is material for a case that was decided on the basis of whether an activity was "essential transportation services." *Rail-Term I* at 2.

The public agency issue *Rail-Term* addressed is problematic for the RRB. *Rail-Term I* states that imputing common carrier status to commuter rail dispatchers to create jurisdiction would be inconsistent with the RRB's *State of Maine* control theory (discussed under Part II) because that activity would be at most "incidental." *Rail-Term I* at 12 ("As such, while the Board may have discretion *to impute a holding out* to those public entities in these kinds of cases, it is not required to do so where the joint dispatching is simply *incidental* to commuter rail operations, *and where asserting jurisdiction* would undercut the two important public purposes behind the *State of Maine* doctrine."); *id.* at n.24 (citing 1993 case) (emphasis supplied). See also *id.* at 11 (citing 1991 case). Again, "imput[ing]" an

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[14] Recall that in addressing Denver Transit's original case in 2014, the RRB said that it must wait for a final outcome in Rail-Term before it could make a decision on Interstate Commerce Act jurisdiction. Petition for Declaratory Order, Appendix C at 4. ("Consistent with the reasoning . . . in *Rail-Term*, DTO's dispatching services may be rail carrier service . . . As a result, the Board needs further information . . . and reserves its determination."). Two years later in 2016, the RRB was explicit: *Rail-Term* would "most certainly impact any decision of the Board concerning" Denver Transit such that the Board "must hold the decision concerning the train control and dispatching services in abeyance." Id. at Appendix D, 2. Four years after that in 2020, the RRB justified its determination that the Dispatching Department was a rail carrier under the Act because that outcome was "consistent with the STB's decision that *Rail-Term* is a rail carrier subject to STB jurisdiction." Id. at Appendix B, 3. Five years after that, in 2025, the RRB reiterated that *Rail-Term's* enveloping of dispatching into STB jurisdiction supported its original determination. Id. At Appendix B-1, 8.

action to an agent is a jurisdictional finding. Lone Star Steel *Co. v. McGee*, 380 F.2d 640, 643 (5th Cir. 1967). *Rail-Term I* explains that there should be no imputation of the "incidental" activity the Dispatching Department performs to create that jurisdiction.

The Brotherhood not only ignores the incidental exception but creates a strawman, arguing against what it calls a de minimis exception. Brotherhood Opposition at 4. But Denver Transit did not make that argument here. *De minimis* is an RRB doctrine associated with "casual service" for commonly controlled entities, not an STB one.[15] By asserting in its factual narrative that foreign railroad train miles accounted for 0.1% relative to Denver Transit's own train miles, Denver Transit was simply proving that the Dispatching Department's direction of Amtrak, BNSF, the *Canyon Spirit* and Union Pacific within the terminal was "incidental" to Denver Transit and the Dispatching Department's overall purpose.

C. Transportation is Not Common Carriage.

The Association tries a different but old—and rejected—tack relative to the Brotherhood's essential-service argument. It simply equates transportation to rail carriage. See ATDA Opposition at 6. More precisely, it confuses "common carrier transportation" with the definition of "transportation," such that no weight is given to the jurisdictional "rail carrier" element. That equivocation of "transportation" to automatic Board jurisdiction is a well-worn conflation the Board has repeatedly rejected. *See, e.g.*, *HiTech Trans, LLC — Petition for Declaratory* Order, FD 34192 (STB served Aug. 14, 2003), 6. It is one that would make the Board's jurisdiction extend to anything involving railroads, because any transportation activity would make a person a common carrier.

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[15] *Denver Transit Operators, LLC*, RRB Board Coverage Decision 2025-34, 2 (attached to Petition as Exhibit B-1).

Dispatching is important for safety. But that is axiomatic of any activity in the industry. And so that importance does not mean that the Board has jurisdiction over any particular safety-sensitive activity as common carriage—particularly given the FRA's particular interest in dispatch. *See, e.g.,* Association Opposition at 3. Rather, it makes the Dispatching Department's functions like any number of other activities—car repair, car supply, drayage to a rail terminal, maintenance of way, and back office terminal services—that the Agency has never found to be common carriage and which the Association acknowledges may be outsourced. *Compare* Denver Transit Opening Statement at 23 (citing *United States ex rel. Chi., N.Y. & Bos. Refg. Co. v. Interstate Commerce Comm'n*, 265 U.S. 292 (1924); *Sampson v. GATX Corp.,* 2012 Dist Lexis 36886, at *15 (W.D. La. 2012); *In re Atlas Railroad Construction, LLC*, RRB Board Coverage Decision 12-30 (RRB served Aug. 16, 2012); *Tulsa Union Depot Co.*, 262 I.C.C. at 78; and *Hi Tech Trans* LLC) *with* Association Opposition at 8 (citing *Rail-Term I*).

All of those are part of transportation under the Interstate Commerce Act. They meet the Brotherhood and the Association's characterizations of being "essential" for rail service; but none of them meet the "public calling" characteristic of common carriage.

D. Undue Contracting Out is Already Protected.

That every common service might be contracted out without retaining Railroad Retirement or Unemployment Insurance Act coverage is overstated. See Brotherhood Reply at 9. Denver Transit's Opening Statement observed and analyzed the requirements of (1) agency and (2) the "imputed"-"public calling" service standard. Opening Statement at 14-18. The Interstate Commerce Act has boundaries for common carriage and no part of Denver Transit's Petition asks the

Board to permit every job to be outsourced. Rather, Denver Transit analyzed and identified the Agency's rail carrier indicia. Dispatching simply does not qualify.

That conclusion works no harm on employees here. No commuter rail employees are losing Railroad Retirement or Unemployment Act benefits as this service did not exist before and would not have been covered under the RRB's formulation and decision on Denver Transit. Opening Statement Appendix C at 3.

* * *

And so *Rail-Term* should be overturned. Such is the implication of the RRB's abandonment after trying to apply it for 11 years and the Brotherhood and Association's steadfast clinging to the "essential" standard without any independent ground to support it. *Rail-Term* lacks any external support in the law of common carriage for its conclusions and should not be applied going forward.

Additionally, overturning *Rail-Term* would satisfy both the RRB, which has consistently—until this proceeding—eschewed applying *State of Maine* to dispatching, and the Brotherhood, which says the doctrine is bad law (Brotherhood Reply at 12) and too complex for application here (Brotherhood Reply at 13).[16] It would also allow the Board to more completely address the concerns the Board raised in *Rail-Term I* footnote 24, namely that the *Herzog* line of decisions conflicted with the Agency's precedent in *City of Dallas, City of Fort Worth and D/FW RAILTRAN—Pet. for Decl. Order (City of Dallas),* FD 32406 (I.C.C. served Dec. 30, 1993). As it is now, there is an I.C.C. decision going one way on dispatching, and an RRB decision going another.

[16] Even so, the RRB's invocation of the doctrine is addressed below.

Overturning *Rail-Term* will represent a return to the Agency's prior law and a consolidation of the Board's prior position that dispatching is not a jurisdictional activity.

II. The Dispatching Department Does Not Control an Asset Used for Common Carriage Service.

The Board supports its supervision of common carriage by attaching its jurisdiction to qualifying assets. But an interest in an asset is neither necessary nor sufficient. Consider first that 49 U.S.C. § 10501(a)(1) attaches jurisdiction first and foremost to "transportation by rail carrier"—the activity-based "movement" jurisdiction described above. Then consider that one can be regulated as a rail carrier without owning any assets. *Am. Orient Express — Petition for Declaratory Order*, FD 34502, at 3 (STB served Dec. 27, 2005). And of course, the converse is true: one can own rail assets and not be a rail carrier. *Florida Department of Transportation — Acquisition Exemption — Certain Assets of CSX Transportation, Inc.*, FD 35110, at 2 n.3 (STB served Dec. 15, 2010) [hereinafter FDOT]. So unless a person's interest in an asset permits or requires that person to control common carriage on that asset, that person is not a rail carrier.

The RRB's legal theory here is that Denver Transit at large is controlling common carriage at Denver Union Station as that control would have been understood before the ICC Termination Act. Subpart B shows there is neither control nor a regulated asset sufficient to support the RRB's asset jurisdiction approach.

But as Subpart A explains, the Board should not even apply the RRB's theories on the merits, because they are out of bounds, unfairly asserted, and collapse under their own internal contradictions.

A. The RRB Unnecessarily Expands the Scope of the Proceeding.

The RRB tries to assert that Denver Transit exercises sufficient "control" of common carriage at Denver Union Station to make the Dispatching Department a common carrier under the *State of Maine* line of cases. Its basis is that RTD's agreement with Denver Transit gives Denver Transit the RTD's substantial supervision authority, and that makes the Dispatching Department vicariously liable. Or at least that's the implication; a whole-word search of the RRB's reply indicates "Dispatching Department" occurs exactly once, on page 12. The RRB spends the rest of its argument litigating the status of Denver Transit and, in doing so, tries to expand the scope of this proceeding from a determination under 49 U.S.C. § 10102 to a decision under 49 U.S.C. § 10501(c)(3)(B). The Board should resist both shifts in focus.

1. <u>The RRB Should Not Be Permitted to Re-Litigate Denver Transit's status.</u>

The first shift in focus the RRB undertakes is to put the rail carrier status of Denver Transit at large in issue. That issue is not only beyond the scope of the referral, but it's also already been decided. The RRB has already found Denver Transit *not* to be a rail carrier. In 2014, in response to Denver Transit's petition for a Board Coverage Decision, the RRB determined that Denver Transit was not a rail carrier and would not be subject to coverage under the Railroad Retirement Act and Railroad Unemployment Insurance Act. It reasoned that

> [Denver Transit] is not involved in the transport of freight or passengers in interstate commerce *and is not subject to the authority of the Surface Transportation Board*. Further DTO is the first operator of this service; it is not assuming a service previously performed by a covered railroad employer. Accordingly, it does not fall within the definition of "employer" under the Railroad Retirement Act . . .
>
> Appendix C at 3 (emphasis supplied).

Now the RRB says something entirely different:

> ". . . the STB should find Denver Transit to be a covered rail carrier."
>
> RRB Reply at 15
>
> ". . . these facts in the operating agreement demonstrate Denver Transit is a rail carrier . . ."

Not only is that a reversal, but it is also the wrong focus; this question is about the Dispatching Department. Questions about the broader Denver Transit Operators organization are collateral to the Dispatching Department—and have already been resolved. The law of the case doctrine precludes a party from re-litigating decisions in subsequent proceedings that were not appealed. *See, e.g., Pennsylvania Railroad Company — Merger — New York Central Railroad Company*, 1998 STB 937 at *13 (1998) ("Because the court's order was never appealed and remains in effect today, it is the law of the case, and it may not be collaterally attacked . . ."). Similarly, collateral estoppel holds that an issue finally decided should not be decided again. *Assoc. of Inv. Brokers v. Sec. & Exchange Comm'n*, 676 F.2d 857, 863 at n.17 (D.C. Cir. 1982) (Ruth Bader Ginsburg, Circuit Judge, writing: "[collateral estoppel] concerns a question *necessarily decided in an action that has been terminated by a final judgment*, at which point the strong expectation is that the controversy is at an end." (internal citations omitted) (emphasis supplied)). Each emanates from a basic principle of fair play and certainty as "the same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996).

2. The Section 10501(c)(3)(B) Coverage Theory is Beyond the Referred Question.

The RRB invites the Board to look not only beyond the entity in issue—the Dispatching Department—but also beyond the statute in issue here: 49 U.S.C. § 10102(5). The gist of the RRB's approach is that 49 U.S.C. § 10501(c)(3)(B) should be read "upstream" so as to impose a "freeze" on any *State of Maine* inquiry the Board undertakes under 49 U.S.C. § 10102(5). Contrary to the RRB's construction, when Section (c)(3)(B)'s second sentence says that employee coverage under the RRB's acts is unchanged by the ICC Termination Act, it does not mean that Section (c)(3)(B) affects how the Board should determine jurisdiction. RRB Reply at 10 ("I.C.C. Precedent Prior to 1995 Supports a Finding that Denver Transit is a Rail Carrier Subject to STB Jurisdiction"). That is an overreach that is neither (1) implicated in the referred question nor (2) supported by the text.

Start first with the text. The relevant portion of Section (c)(3)(B) is not the first sentence, which is expressly limited to terminal trackage rights and switch connection remedies ("The Board has jurisdiction under Section 11102 and 11103 . . ."). Those remedies are not in issue here. It is the second sentence: "The enactment of the ICC Termination Act shall neither expand nor contract coverage of employees or employers . . ." by the acts generally governing railroad employee benefits. That sentence, the RRB says, means Denver Transit's rail carrier status must be assessed under pre-ICC Termination Act standards. RRB Reply at 7.

The text makes no mention of STB jurisdiction or rail carriers. It provides only that the "ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers . . ." for those certain public agencies (and contractors) that were not subject to the Board's jurisdiction. This is not a dictate for the STB to apply a retrospective pre-ICC Termination Act test. For that meaning, one would have to add on additional words, to the effect that the "ICC Termination

Act of 1995 **shall preserve the jurisdiction of the Board** so as neither to expand nor contract coverage of employees and employers." Only then would Section (c)(3)(B) work "upstream" to affect the Board's jurisdiction.

But that is not the meaning of the text that actually exists here. Read naturally, it simply preserves two possibilities. First, a person can *not* be a rail carrier (now), but *still* be subject to coverage under Section (c)(3)(B). Second, a person can be a rail carrier (now), but not subject to coverage under Section (c)(3)(B).

3. The Context and History Show That Section (c)(3)(B) Does Not Affect Rail Carrier Status or the Standard for Determining It.

That meaning of the Section is rooted in the ICC Termination Act's withdrawal of Agency jurisdiction from public commuter rail, itself codified at 49 U.S.C. § 10501(c)(2)(A). That express withdrawal might have meant either (1) that public agency commuter employees in *interstate* service in 1995 might not have had Railroad Retirement Benefits in 1996, or (2) that public agency commuter employees in *intrastate* service in 1995—but whose fares were not approved by their governor—might have gained benefits in 1996. *See gen. Commuter Rail Service Continuation Subsidies and Discontinuance Notices*, EP 563 (STB served June 12, 1997) 1-2 at nn. 3&4.

The RRB's "freeze" parlance may well be borrowed from Denver Transit's Opening Statement. There, Denver Transit briefly argued that if the Board continues to interpret 49 U.S.C. § 10102(5) to include all dispatching activity as jurisdictional, it must be mindful that public agencies and their contractors are subject to a limitation on that jurisdiction.

The point is that any post-ICC Termination Act jurisdiction cannot work to expand Railroad Retirement for public agencies that were not and would not have been previously covered—as the RRB has already said Denver Transit would not be.

Petition Appendix C at 3. Denver Transit's observation was that " . . . *Rail-Term* and its 'essential' progeny . . . expands the Agency's jurisdiction beyond what it was in 1996." Opening Statement at 28. That means that 49 U.S.C. § 10501(c)(3)(B) was a limitation on the *effect* of Board jurisdiction, not that it worked in reverse to *affect* that jurisdiction. The second sentence of Section (c)(3) does not work in two directions.

The RRB similarly misreads a statement from Denver Transit's appellate filing at the D.C. Circuit. Commenting on the RRB's then 49 U.S.C. § 10102(5) theory, Denver Transit observed that it would be absurd for the term in question here, "rail carrier," to have a different meaning between two integrated statutes that rely on each other for meaning. RRB Reply at 7-8, citing Denver Transit's Unopposed Motion to Stay. The RRB rips that from its context, and says that Denver Transit is trying to avoid Section (c)(3).[17] Given that Denver Transit cited to Section (c)(3) in its Opening Statement, this is very unlikely. And, in the context of the appellate filing itself, Denver Transit's observations were about how the term "rail carrier" must have a consistent meaning—not necessarily that coverage must. That is evident in the full context:

> There is a sound of silence between *Herzog* and *Rail-Term*; neither addresses a public contractor's dispatch of non-freight traffic . . .
>
> The void noted above raises the real possibility for conflict between the determination of who is a common carrier by the STB—the agency with the primary jurisdiction on the question—and the RRB, particularly where the STB has indicated it wants to revisit the Rail Term precedent. *Alameda Belt* at *1, n.2. The conflict is clearly presented in the instant matter.
>
> And so, without referral to the STB and ultimate resolution under the auspices of this Court, Denver Transit may end up as a rail carrier

[17] RRB Reply at 7 ("Denver Transit's purposes . . . is to resist this conclusion.").

> 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 *15–16.

No part of this observation implicates or construes Section (c)(3)(B). [18] Because Section (c)(3) is neutral—coverage applies regardless of whether one is a rail carrier—Denver Transit's observations to the D.C. Circuit on the "rail carrier" question have nothing to do with Section (c)(3).

4. The Section (c)(3) Theory is Self-Defeating.

The RRB builds a defect into its theory. By creating a "pre-ICC Termination Act" paradigm, the RRB suggests that it obtains a more favorable *State of Maine* standard before ICCTA. RRB Reply at 17. But that more favorable understanding the RRB wants—a difference between "jurisdiction" and "authority"—is one the RRB finds in a post-ICC Termination Act case, *Massachusetts Dep't of Transportation — Acquisition Exemption — Certain Assets of CSXT Transportation, Inc.*, FD 35512 (STB served May 3, 2010). The RRB cannot have it both ways—insisting on only pre-ICC Termination Act law, and then justifying it by a post-ICC Termination Act decision that it says "clarified" the *State of Maine* cases in the

[18] Nor as discussed below, is any interpretation necessary to resolve the referred question or for the D.C. Circuit to review the RRB's decision—which makes no mention of Section 10501(c)(3)(B). *Denver Transit Operators, LLC — Dispatching Services*, RRB Board Coverage Decision 2020-23 (attached to Petition as Appendix B); *Denver Transit Operators, LLC — Dispatching Services*, BCD 2025-34 (attached to Petition as Appendix B-1).

RRB's favor. That is exactly the post-hoc rationalization the RRB says is not allowed.

5. Interpreting Section 10501(c)(3)(B) Interferes with the Appellate Record.

As Section (c)(3)(B) has no impact on Section 10102(5) and stands separate and apart from it, the Board should decline to interpret the Section. Were it to rule on the RRB's argument, the Board would be giving credence to an RRB-coverage ground that is beyond the referred question. And that would create new ground for the RRB to defend its decision beyond its current decisional record. *Compare* Petition Appendices B and B-1 (excluding the Dispatching Department from Section (c)(3) scrutiny) *with* June 30, 2026 Decision ("Finally, BRS's participation will *not broaden the issues* because BRS seeks only to address *the single issue* raised by Denver Transit in its petition: whether Denver Transit's dispatching unit is a 'rail carrier' under 49 U.S.C. § 10102(5)."") (emphasis supplied).

B. The Dispatching Department has No Control over a Regulated Asset.

Should the Board make it to the RRB's new "control" theory, there is no power the Dispatching Department exercises that results in jurisdiction-qualifying "control" over (1) a common carrier asset or (2) a service.

1. Dispatch is Not Control.

Am. Train Dispatchers is again instructive. That appeal had two companion cases from the I.C.C., each of which was between two regulated common carriers and involved transferring operational track control pursuant to a preexisting trackage rights agreement. *Id.* at 582. The common carriers to each arrangement wanted to modify it to shift dispatching control. *Id.* at 583. The D.C. Circuit adopted

the I.C.C.'s determination that this shift in responsibility was not "control" subject to the I.C.C.'s authority under the Interstate Commerce Act as then codified at 49 U.S.C. § 11343 (1994).[19] *Id.*

Implicit in the scheme is that for authority to attach under Section 11343, there must be Agency jurisdiction. Section 11343's jurisdictional basis is the Board's power over "rail carriers"—and so the question is whether that particular control would make that previously unregulated person a "rail carrier." *Wis. C.* at **3–4 ("The usual rule is that a person, including a State agency, who acquires the track and land underlying an active rail line thereby assumes a common carrier obligation at least to assure that service continues over the line. *Common Carrier Status of States*, 363 I.C.C. 132 (1980), *aff'd sub nom. Simmons v. I.C.C.*, 697 F.2d 326 (D.C. Cir. 1982). The acquisition of a rail line (and the common carrier obligation that goes with it), therefore, ordinarily requires Commission approval under section 10901 or 11343.").

The need for jurisdiction arises when there has been a control transaction, that is, a "change in relations between the companies whose proposed transaction is before the Commission." *Am. Train Dispatchers* at 582 (internal citation omitted). To answer that, the I.C.C. asked whether the transaction "accomplish[es] a significant increase in the power of one over the other, for example, and increased voice in management or operation, or the ability to accomplish . . . operational changes with greater legal ease?" *Id.*

Neither Denver Transit nor its Dispatching Department has any power over, voice in management or operation, or authority to accomplish operational changes

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[19] A 1982 codification was not available. However, the Government Printing Office annotated 1994 edition shows no public laws effecting the text from 1982 to 1994. See e.g., 49 U.S.C. § 11343 *available at* https://www.govinfo.gov/content/pkg/USCODE-1994-title49/html/USCODE-1994-title49-subtitleIV-chap113-subchapIII-sec11343.htm.

over Amtrak and the *Zephyr* or American Rocky Mountaineer and the *Canyon Spirit*.

Starting first with Amtrak: it has the unqualified "right to operate Amtrak Trains on the rail lines" and to timely request modified or additional services with advance notice to "permit adequate joint planning and joint preparation." V.S. Salama Exhibit B at 8–9, Sections 3.2-3.2(B). Denver Transit and the Dispatching Department have no say over whether these movements[20] will be allowed—they are simply required to dispatch them. See V.S. Salama Exhibit A at 56, Section 3.18 ("Operator shall operate . . . in accordance with the requirements of the Railroad Agreements and without impairing, disrupting, interfering, or otherwise having an adverse impact on the activities or operations of any Heavy Rail Operator"). The RTD retains sole discretion—control—about whether these services will be allowed. *See, e.g., id.* at 26 (defining "Railroad Agreements" as those the RTD enters into).

American Rocky Mountaineer's *Canyon Spirit* is differently situated vis-à-vis its relationship with the RTD. But Denver Transit and the Dispatching Department owe it the same treatment over dispatching—whatever the Railroad Agreement provides. While the RTD might have control over the *Canyon Spirit*, neither Denver Transit at large nor the Dispatching Department has any discretion—control—over that service's operations.

[20] V.S. Salama Exhibit A at 56, Section 3.17 (requiring dispatching of Heavy Rail Movements); *Id.* at pdf 17 (defining "Heavy Rail Movements" and Heavy Rail Operators" as those the RTD solely authorizes).

2. There is No Jurisdictional Asset or Service for a State of Maine Inquiry.

Even if there were control, there would be no jurisdictional asset or service that the Dispatching Department has power over. There is neither an asset nor a service to which the *State of Maine*[21] "control" theory can attach.

That is because Congress eliminated any Agency common-carrier-based jurisdiction when it passed the Rail Passenger Service Act. From 1971 to 2001, Amtrak assumed all formerly common carrier service that had existed to Denver Union Station. There was no Interstate Commerce Act-jurisdictional activity that attached to the assets—all of it had ceased such that it resulted in Subtitle IV abandonment. Denver Opening Statement at 30, citing the Rail Passenger Service Act of 1970 (Pub. L. No. 91-518, § 401) ("Upon its entering into a valid contract, the railroad shall be relieved of all of its responsibilities as a common carrier of passengers by rail in intercity rail passenger service under part I of the Interstate Commerce Act . . .").

Rather, the only jurisdiction that attached to the terminal assets arose from the agreements between Amtrak and the RTD (as successor to Denver Union Terminal Railway Company) under Rail Passenger Service Act Section 402—which from at least 1994 to the present has been codified at 49 U.S.C. § 24308 within Subtitle V. So the RTD's acquisition of Denver Union Station was not subject to Subtitle IV jurisdiction and incumbent common carrier asset supervision, which the *State of Maine* inquiry is designed to protect. Whatever jurisdiction the Board has

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[21] Recall that Denver Transit's Opening Statement characterized the RTD as a "*de-facto* . . . *State of Maine* entity" whereby the "process was different, but the result was the same . . ." with regard to whether the Board should have determined whether it had authority over the transfer of Denver Union Station. Denver Transit Opening Statement at 30-31. This analysis—"de facto"—was an analogy. Denver Transit was careful to say that *State of Maine* was not *necessarily* applicable.

over the terminal assets related to Amtrak comes from the Rail Passenger Service Act and Subtitle V—not the Interstate Commerce Act and Subtitle IV. And to the extent Amtrak's continued access merits supervision, Subtitle V provides that remedy over the RTD. See, e.g., 49 U.S.C. § 24308(a) (referring to a "regional transportation authority.").

The chronology—cessation of common carrier service, Amtrak assumption, public purchase—means Denver Union Station terminal assets were not subject to Subtitle IV or Interstate Commerce Act jurisdiction in 2001 when the RTD acquired them.

The RRB's *State of Maine* doctrine precedents, *Orange County Transportation Authority et al. — Acquisition Exemption — The Atchison Topeka and Santa Fe Rwy.*, 10 I.C.C. 2d 78, 83 (1994) and *Southern Pacific Transportation Company — Abandonment Exemption— Los Angeles County, CA* 8 I.C.C. 2d 495, 503 (1994) depended on a jurisdictional asset's existence. Each of those transactions involved a "railroad line" that, when acquired, had been used in common carriage so as to be subject to the Board's jurisdiction. *Orange County* at 79; *Los Angeles County* at 496. Under those facts, the I.C.C. had an interest in preserving the common carrier freight service, but could still determine that the acquisition fell "outside" its "jurisdiction" such that the acquirer would not be a rail carrier. *Orange County* at 83; *Los Angeles County* at 503. But as those cases describe, when all Subtitle IV common carrier (e.g., non-Amtrak) service has ceased, these properties and their acquisition are outside the Agency's (non-Amtrak) jurisdiction. *Id.* at 503. So it is with Denver Union Station here where the Rail Passenger Service Act caused all jurisdictional use to cease; that is abandonment under Subtitle IV. *Id.* ("The acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Interstate Commerce Act.").

The RRB's view[22] is that these historical cases—the precedent it cites—imprecisely distinguish between the distinct concepts of the Board's Subtitle IV jurisdiction and its *State of Maine* discretion not to use the authority that jurisdiction creates. *FDOT,* 2 at n.3. RRB Reply at 3 (saying there was a "changing standard").

Not so. *Los Angeles County* draws the distinction between property (jurisdiction) and transaction (authority) in two parallel sentences. After saying "The acquisition by a State of a fully abandoned line is not subject to the jurisdiction of the Interstate Commerce Act," the ICC immediately clarifies "The acquisition by a State of a line approved for abandonment [Ed. Note: e.g., still jurisdictional] . . . is exempted from the Commission's jurisdiction." And the point here is not that the Board had exemption authority over the RTD's control of the service; it is that the asset was non-jurisdictional to begin with.

Even in a counterfactual—overlooking the Rail Passenger Service Act's impact on the terminal assets—passenger terminal companies equivalent to the RTD and its predecessor-in-interest at Denver Union Station are not inevitably recognized as rail carriers. *Tulsa Union Depot Co.*, 262 I.C.C. at 82. Within the recent past, the Board has observed that just because a valuation report exists does not mean that a passenger terminal owner has conducted common carrier service that would attach jurisdiction to an asset. *Commuter Rail Division of the Regional Transportation Authority — Petition for Declaratory Order — Status of Chicago Union Station*, FD 36171 (STB served Aug. 22, 2018), 4 ("[I]n none of those cases was CUSCo.'s rail carrier status a contested issue, nor was it the focus of any of those decisions.").

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[22] Again, a self-defeating view

3. *Canyon Spirit* Should Not Impute Subtitle IV Jurisdiction to the Dispatching Department.

Any consideration of the RTD's allowance of *Canyon Spirit* ought not to change this as a matter of policy and administrative jurisprudence. First, the Dispatching Department has little involvement with *Canyon Spirit*; it was the RTD that authorized its use of the tracks and is a party to that Agreement. V.S. Salama, Exhibit C. Relatedly and second, it would be inequitable to conclude that the RTD's permitting the *Canyon Spirit* to operate makes the Dispatching Department a rail carrier. That is because Denver Transit can find no filing showing that *Canyon Spirit's* operating sponsor—American Rocky Mountaineer ("ARM")—*obtained* Board authority the *Board said it needed* to operate common carrier service to Denver Union Station. Its exemption was limited to the Union Pacific assets it formerly used. *Am. Rocky Mountaineer, LLC — Petition for Exemption from 49 U.S.C. Subtitle IV*, FD 36468 (STB served May 27, 2021). The Board could not have been clearer about that exemption's limits:

> "Accordingly, ARM's request for exemption from subtitle IV for the transaction and operations as described in its petition will be granted, with the exception of provisions specifically precluded from exemption by statute. The exemption granted by this decision applies only to passenger rail operations and services of the same nature and scope as those described in ARM's petition, and does not extend to new operations ARM may offer in the future or to any service offered in conjunction *with any carrier other than UP*. For example, this exemption would not extend to activities about which BLET expresses concern, such as constructing or *purchasing a railroad line or entering agreements with entities other than UP*."
>
> *Id.* at 6 (emphasis supplied).

The RRB's insistence that the *Canyon Spirit* makes the Dispatching Department[23] a rail carrier (RRB Reply at 15) invites the Board to allow

[23] More precisely, the RRB argues that Denver Transit at large is a rail carrier. Again, Denver Transit does not concede that is within this proceeding's purpose.

ARM's unscrutinized, unlicensed access to result in Subtitle IV jurisdiction attaching to the Dispatching Department. At best, the RRB's reading overextends what the Board has defined as the scope of the *Canyon Spirit's* operations—there should be no common carriage except as the Board permits. 49 U.S.C. § 10901(a)(3) and (c). At worst, the RRB's position suggests that unauthorized common carrier operations should result in common carrier liability for others.

All to say, the RRB's expanded perspective beyond the proceeding's boundaries unnecessarily implicates questions about ARM, RTD, and Denver Union Station's regulated status. However reviewed, they should be deemed immaterial to this matter given that the Dispatching Department's involvement is incidental.

III. The Board Should Decide the Case.

Though it did not oppose referral or the Petition, the RRB contends the Board should not make a binding determination on the 49 U.S.C. § 10102(5) question for which the Board instituted the proceeding. RRB Reply at 9. It argues that the Board's decision would be *ultra vires.* The conclusion is based on the RRB's assertion that Congress's positive allowances for Board referrals on electric railway questions under the Railroad Retirement (45 U.S.C. § 231(a)(2)) and the Unemployment Insurance (45 U.S.C. § 351(a)) Acts thereby limit the Board's ability to reach any other questions. RRB Reply at 10 ("Congress did not provide this type of referral . . .").

That view has no support in the actual text of either RRB-administered act. The words the RRB cites are a special, affirmative referral that the RRB can undertake. See, e.g., 45 U.S.C. § 231(a)(2)(ii) ("The Surface Transportation Board is hereby authorized . . . upon request of the Railroad Retirement Board, or upon

complaint of any party interested . . ."). But that an electric railway proceeding is affirmatively permitted is not a restriction on other matters including those undertaken under another federal statute (28 U.S.C. § 1336) or a Court's inherent powers.[24] And in the broader context of each RRB-supervised act, the RRB's view undercounts the deliberate choice in defining coverage. Congress extended coverage under the RRB's acts first and foremost to the extent that a person is subject to the Board's jurisdiction under Subtitle IV. 45 U.S.C. § 231(a)(1)(i). Though it does not mean the Board must play a role in every RRB decision, it does mean the Board can when appropriately postured—such as on appellate court referral.

Beyond that, the case history—including the *unopposed* referral posture—shows why the Board should make the determination the D.C. Circuit asks for. RRB Reply at 10. First consider the basic structure at play here: the Railroad Retirement and Unemployment Insurance Act coverage extends only if there is a common carrier involved. 45 U.S.C. § 231(a)(1)(i)-(ii). That is the primary jurisdiction of the Board.

Next consider the procedural history: the RRB forfeited any objection it has to this referral when it did not oppose Denver Transit's motion at the D.C. Circuit. Though the RRB is welcome to argue in any other proceeding that the RRB generally deserves deference and that the Board should not be involved, it cannot credibly take that position after it did not oppose referral here and after the D.C. Circuit referred the question. Again, that issue is collateral to the merits, and the RRB should be estopped from raising it.

Finally, reading the referral allowance as just that—an allowance, not a restriction—is also consistent with the RRB's prior understanding. It has stayed its

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[24] *Rail-Term Corp. v. United States R.R. Ret. Board*, Case No. 11-1093, Oral Argument Tr. 8-9, Oct. 24, 2011.

decisions to permit litigants to petition the STB.[25] In a similar vein, the RRB essentially referred it to the Board when it did not oppose Denver Transit's motion at the D.C. Circuit. The question should not be withdrawn.

CONCLUSION

The Dispatching Department is not a rail carrier under 49 U.S.C. § 10102(5). That is because dispatching is not a jurisdictional activity and the Dispatching Department has no control over any Board-regulated asset or service. Dispatching is not a jurisdictional activity because *Rail-Term* itself shows that dispatching had not met the Board's long recognized "public service" criteria—and the decision's new standard has no basis in precedent or logic. Nor does dispatching qualify as control of a regulated asset: neither Denver Transit nor the Dispatching Department has any power or discretion over Amtrak or the *Canyon Spirit* and neither service is covered by Subtitle IV to make Denver Union Station a common-carrier jurisdictional asset. Without any jurisdictional grounds for determining the Dispatching Department is a rail carrier, the Board should declare the Dispatching Department is not a rail carrier under 49 U.S.C. § 10102(5).

[25] *Am. Orient Exp. Ry. Co. v. Surface Transp. Bd.*, 484 F.3d 554, 556 (D.C. Cir. 2007) ("At the request of the Orient Express, the Retirement Board stayed its proceedings to allow the company to obtain a declaratory order from the Surface Transportation Board.").

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Respectfully submitted,

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