ARTICLE/OP-ED PIECE FOR *RAILWAY AGE*
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The United States Court of Appeals for the District of Columbia Circuit is currently considering two significant cases involving coverage under the Railroad Retirement Act ("RRA"). The first matter has been pending for some time. Docketed as No. 11-1093, *Rail-Term Corp. v. United States Railroad Retirement Board,* it involves the question of whether a contractor that is neither a railroad common carrier nor an entity owned by or under common control with a railroad common carrier, and that provides dispatching services to unaffiliated railroads, is an "employer" subject to coverage under the RRA (and also the companion Railroad Unemployment Insurance Act). The second case which I argued before the Court on February 21, 2013, in No. 12-1150, *Indiana Boxcar Corporation v. Railroad Retirement Board.* It presents the issue of whether a short line railroad holding company that owns no rail lines and provides no common carrier rail service, and is not owned by or under common control with a railroad, is also an "employer" subject to RRA coverage. The outcome of both cases presents significant policy challenges for America's freight and passenger railroads including commuter carriers.

The party in the first case, Rail-Term, is an American subsidiary of a Canadian company. It provides software and railroad dispatching services

for carriers that cannot justify employing their own dispatching staff. Initially, Rail-Term sought to have its US employees covered under Railroad Retirement but two Board employees orally advised the company that it was not eligible for coverage. Thereafter the company established its own retirement program acting on that advice. Subsequently, the Board contacted the company to inquire about its activities. Eventually the Board ruled (management member dissenting) that Rail-Term was indeed covered despite the fact that it did not own any railroad lines, furnished no common carrier railroad service, and was not under the control of or affiliated with any railroad. The basis for the Board's ruling was that the dispatching service Rail-Term was providing for unaffiliated clients was *"so inextricably related"* to providing common carrier service that it was "by osmosis" a common carrier and therefore covered under the Act.

After the majority of the Board substantially reaffirmed its initial decision on reconsideration, Rail-Term sought review in the United States Court of Appeals for the DC Circuit alleging that the Board's ruling failed to follow agency precedent, violated the plain language of the statute, and was contrary to the evidence presented below. At oral argument, the Court held the matter in abeyance directing Rail-Term to seek a ruling from the

Surface Transportation Board as to whether it is a "common carrier." That matter has been pending an STB decision for almost a year.

Indiana Boxcar concerns whether short line owners can continue to take advantage of the ruling in *Union Pacific Corporation v. United States* that insulates noncarrier holding companies from coverage under the RRA. Indiana Boxcar is the typical "mom and pop" short line railroad holding company that owns several small carriers. It also provides consulting services for unaffiliated clients such as political subdivisions that own rail lines, as well as for rail shippers and other short line railroads. Indiana Boxcar has two management employees who receive compensation subject to FICA for work for unaffiliated clients, and receive separate compensation from the subsidiary railroads subject to Railroad Retirement taxes for work for the carrier subsidiaries. This matter began with the usual multi part questionnaire sent to the entity seeking information about its activities and ended with a ruling (management member dissenting) finding the holding company covered as "an employer."

Indiana Boxcar sought reconsideration of the Board's initial order on the grounds that railroad holding companies that are not themselves railroad common carriers are not "covered employers" under the 20 year-old *Union Pacific* precedent. On reconsideration, the Board (management

member again dissenting) responded that *Union Pacific* was only intended to apply to publicly held companies where the holding company and the subsidiaries did not share officers and directors. But the Board made little effort to distinguish numerous agency decisions issued during the past 20 years finding other closely held short line railroad holding companies outside its coverage.

Indiana Boxcar petitioned the DC Circuit for review of the Board's decision on the grounds that the agency's ruling departed from long standing court and agency precedent, specifically *Union Pacific*, without providing a rational explanation for that departure; that its ruling was contrary to the plain language of the statute; and that the ruling did not reflect the substantial evidence as to the correct allocation of employee compensation for uncovered work for the holding company and covered work for the individual railroads. In view of this case's impact on the industry, the American Short Line and Regional Railroad Association participated in the appellate proceedings as an *amicus* in support of Indiana Boxcar filing both a brief and participating in oral argument.

A court ruling either way in each of these two cases would have significant industry implications. In the case of *Rail-Term*, a ruling finding coverage for an independent contractor providing dispatching services

would have grave implications for numerous railroad and transit industry vendors. Are track and signal maintenance, equipment maintenance, computer maintenance, fare collection equipment maintenance, or employee drug and alcohol testing any less "inextricable" than dispatching? The Board had reasoned that railroad dispatching is subject to Federal Railroad Administration regulation and that trains cannot move without dispatching; therefore dispatching is essential to common carriage. But trains can't move without properly functioning track, signals, and equipment, all of which are subject to FRA regulation. Similarly, trains won't function for long without revenue collection and a staff of substance-free employees. Where does this slippery slope end?

Regarding short line holding companies, many have built their "business model" on the expectation that administrative personnel at the headquarters level are not covered under the RRA and have established employee benefit plans accordingly. In view of the fact that the ownership of many corporations shifts from publicly owned to privately held back to public ownership again, as with Warren Buffett's ownership of BNSF Railway and Philip Anschutz's former control of Southern Pacific Transportation Company, continued adherence to *Union Pacific* is required to ensure certainty for the industry.

John D. Heffner practices law with the Washington, D.C., office of Dallas-based Strasburger & Price, LLP, where he represents short line and railroad freight railroads, public agency clients, passenger service providers, and railroad industry vendors. Mr. Heffner prepared the Rail-Term brief along with its regular counsel Dennis Devaney who argued the case. Mr. Heffner both prepared the brief and argued for Indiana Boxcar.