

**EMPLOYER STATUS DETERMINATION – DECISION ON RECONSIDERATION
BCD 2025-34**

Denver Transit Operators, LLC (DTO)

Dispatching Services

B.A. No. 9756

June 23, 2025

This is the decision on reconsideration by the Railroad Retirement Board of its determination dated July 13, 2020, in Board Coverage Decision (B.C.D.) 2020-23 concerning the status of the dispatching unit of Denver Transit Operations, LLC (DTO) as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA) (collectively, the Acts). 45 U.S.C. § 231 *et seq.*; 45 U.S.C. § 351 *et seq.* For the reasons set forth below, a majority of the Board (Management Member dissenting) affirms and incorporates the Board's initial decision that DTO's dispatching unit is a covered employer under the RRA effective April 22, 2016, the date DTO commenced dispatching for Amtrak trains within the boundaries of Denver Union Station. In accordance with the suspension of reporting obligations issued by the Board pending reconsideration on December 8, 2020, a majority of the Board (Management Member dissenting) finds the dispatching unit is a covered employer under the RUIA effective the date of this decision on reconsideration. The Management Member concurs with the majority's analysis with respect to Parts IV and V of the decision but dissents as to the application of the *State of Maine* doctrine as an exclusion from coverage (Parts II and III), the application of the Board's segregation regulations (Part VI), and the resulting status of DTO as a covered railroad employer, as explained in the attached dissenting opinion.

I. Prior Decisions and Request for Reconsideration

The three-member Board initially held in B.C.D. 14-15 (Apr. 16, 2014) that DTO was not a covered employer under the Acts but reserved a ruling on the limited subset of DTO employees engaged in dispatching services. In B.C.D. 2020-23 (Jul. 13, 2020), the Board determined that DTO's dispatching unit is a covered employer under the RRA effective April 22, 2016, the date DTO commenced dispatching from its Operations Control Center, which included dispatching Amtrak (B.A. No. 8301) trains within the boundaries of Denver Union Station. Pursuant to its authority under section 8(k) of the RUIA, the Board determined not to give retroactive effect to its decision with respect to coverage under the RUIA and found that DTO's dispatching unit was a covered employer under the RUIA effective July 13, 2020, the date of the decision.

On November 11, 2020, counsel for DTO requested reconsideration of B.C.D. 2020-23. In its request for reconsideration, DTO argued the Board has implicit discretion to recognize *de minimis* exceptions to coverage for rail carriers along the same lines as the express exclusion in the Acts for casual service of carrier affiliates performing service in connection with rail transportation, and that the facts of the current case justify the Board's exercise of that discretion to exclude DTO from coverage under the Acts. DTO

emphasized that the only covered rail carrier activity DTO performs is the dispatching of Amtrak trains within the bounds of Denver Union Station, which accounts for less than 0.1% of DTO's overall dispatching activity. DTO further claimed the Board has previously created and applied a de minimis test for rail carrier affiliates that does not cite or rely on the casual service statutory exception or any other express statutory language for its legal basis. Therefore, DTO argued the Board must also have interpretive authority to recognize other de minimis exceptions from coverage under the Acts.

In arguing for application of a de minimis exclusion from coverage for rail carriers, DTO cites the Surface Transportation Board's (STB) decisions under its *State of Maine* doctrine. In the *State of Maine* case, the Interstate Commerce Commission (ICC) as the predecessor to the STB held a state or other public agency could acquire a rail line without becoming a rail carrier subject to ICC/STB jurisdiction if the selling railroad retained a permanent easement to continue freight service and there were no unreasonable restrictions on the seller's ability to provide freight service. *State of Maine, Department of Transportation – Acquisition and Operation Exemption – Maine Central Railroad Company; Maine Central Railroad Company/Springfield Terminal Railroad Company – Trackage Rights – State of Maine Department of Transportation*, 8 I.C.C. 2d 835 (May 20, 1991). DTO argued that by application of the *State of Maine* doctrine, it is not a rail carrier subject to STB jurisdiction and, therefore, should not be considered as such for purposes of section 1(a)(1)(i) of the RRA. DTO distinguished its case from *Rail-Term Corporation*, B.C.D. 2011-14 (reconsideration decision) on this basis and the fact it operates Denver's commuter rail system (including its dispatching department) under contract with the Regional Transportation District (RTD), a political subdivision of the State of Colorado. As a result, DTO urged the Board to exercise discretion to determine that limited dispatching of trains on behalf of a public agency, which is clearly incidental to the primary dispatching of non-covered commuter rail, does not trigger coverage as an employer under the Acts.

DTO also asserted in its request for reconsideration that Denver Union Station is not part of the interstate rail network. In support of the argument, DTO cited the STB decision in *All Aboard Florida—Operations LLC and All Aboard Florida—Stations—Construction and Operation Exemption in Miami, Florida and Orlando, Florida*, STB Finance Docket 35680 (decision served December 21, 2012), finding that All Aboard Florida's intrastate passenger rail service was not part of the interstate rail network, even though the passenger rail service involved the joint use of right-of-way and tracks of a covered freight railroad. DTO also explained that Denver Union Station was purchased by the RTD from Denver Union Terminal Railway Company (B.A. No. 4705) in 2001, at a time when the only trains using the station were a daily Amtrak California Zephyr train and a seasonal Amtrak ski train that operated only on the weekends. Train movements in and out of the station were coordinated by Amtrak train personnel and BNSF Railway (B.A. No. 1621) yard personnel rather than by remote dispatching until 2014 when the RTD entered into an agreement with Amtrak to allow Amtrak use of tracks and facilities within the station for Amtrak passenger service. As part of that agreement, the RTD agreed to provide dispatching for Amtrak trains in and out of the station to coordinate movements of Amtrak trains with

movements of the commuter rail service. DTO argued because neither Union Pacific Railroad (B.A. No. 1713) nor BNSF Railway had any ownership or possessory interest in the tracks within Denver Union Station, Amtrak's use of the station tracks was only by consent of RTD and this minimal use was insufficient to make the station tracks part of the interstate rail network subject to STB jurisdiction under 49 U.S.C. § 10501(a)(2).

Finally, DTO disagreed with the Board's decision that coverage as an employer under the RRA must be retroactive to the date covered operations began, and renewed its argument that the obligations of a covered employer, including payroll taxes, should be imposed prospectively only from the date of B.C.D. 2020-23. DTO characterizes these obligations as "contribution obligation for Railroad Retirement Act withholding taxes," although payroll taxes on covered employers and employees are imposed by the Railroad Retirement Tax Act administered by the Internal Revenue Service, not by the RRA. 26 U.S.C. § 3201 *et seq.* DTO argued the same factors applied by the Board in considering waiver of retroactive contributions under section 8(k) of the RUIA should also apply to retroactive coverage under the RRA. DTO asserted finding retroactive coverage under the RRA would impose undue burdens on DTO, forcing it to reconstruct years of compensation records and tax withholding. DTO also argued it would be unfairly penalized and its covered dispatch employees would receive "an undeserved and unanticipated benefit" through a retroactive coverage decision because DTO provided a 401(k) employee benefit plan with employer matching contributions under a collective bargaining agreement, which it asserts it would have eliminated or substantially curtailed if it knew at the time the dispatch employees would be covered by the RRA.

Separately from its request for reconsideration, on November 11, 2020, DTO submitted a request to the RRB General Counsel for a legal opinion regarding implementation of the coverage decision. DTO requested if the Board decision was affirmed on reconsideration, that it be allowed to implement the Board's decision by segregating only the specific work hours that dispatchers spend performing Amtrak business and reporting only those work hours as covered railroad service. On December 8, 2020, the RRB General Counsel advised DTO that the implementation proposal should be addressed by the Board in the first instance and referred the matter for the Board's adjudication as part of this decision on reconsideration.

II. Discussion – De Minimis Coverage Exception for Rail Carriers

The Board unanimously disagrees with DTO's assertion that the Board has previously recognized a complete exemption from coverage under the Acts for rail carriers when the rail carrier operations are de minimis or casual service. Section 1(a)(1) of the RRA, insofar as relevant here, defines a covered employer as:

- (i) 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;
- (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

45 U.S.C. §§ 231(a)(1)(i), (ii). Section 1(a) of the RUIA contains essentially the same definition, as does section 3231(a) of the Railroad Retirement Tax Act (RRTA). 45 U.S.C. § 351(a); 26 U.S.C. § 3231(a). The statutes expressly exclude from coverage casual service by an affiliate of a rail carrier, but no comparable language permits exclusion of a rail carrier itself. The Board has not recognized such an implied atextual exception for rail carriers in prior decisions, and in the absence of explicit statutory authority, a majority of the Board declines to do so in this case.¹

DTO's arguments to the contrary are not persuasive. Every Board coverage decision cited by DTO in support of recognizing a de minimis exception to coverage for rail carriers is a decision involving rail carrier affiliates, where casual service is an express consideration. DTO emphasizes that these affiliate decisions engage in detailed discussion regarding the amount of service provided by the non-carrier to its affiliated railroad, including quantifying the percentage of business performed by the non-carrier to the affiliated railroad, but seeks to characterize these decisions as interpreting something other than the casual service exception to affiliate coverage. DTO acknowledges the Board's regulations define casual service as service rendered by a carrier affiliate in connection with rail transportation whenever such service is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial. 20 C.F.R. § 202.6. Where DTO misses the mark is that the Board's inquiries into the percentage of business performed by the non-carrier to the affiliated railroad in these cases is precisely aimed at determining whether such service is "insubstantial" for purposes of the casual service exclusion.

The linchpin of DTO's argument is its citation of *VMV Enterprises, Inc.*, B.C.D. 1993-79, as a decision purportedly establishing a de minimis test separate from the statutory casual

¹ As explained in Part III and the attached dissent, the Management Member would accept this exclusion but would confine its application to cases fitting within the STB's *State of Maine* doctrine.

service exception. DTO observes the Board did not explicitly refer to the “casual service” language in this decision. However, B.C.D. 1993-79 does expressly cite the regulation defining “casual service” and states VMV was not an employer “because it provides only a minimal amount of service to its affiliated railroad.” Minimal service as articulated in B.C.D. 1993-79 (and other Board decisions which cite favorably to it) is synonymous with the casual service statutory exception to coverage and the regulatory definition of casual service as including “insubstantial” service. In *Trans-Serve, Inc.*, B.C.D. 2009-5, the Board expressly characterized the decision in B.C.D. 1993-79 as making a finding of “insubstantial service” and connected it directly to the casual service exclusion. Other contemporary evidence of Board decisions issued around the same time as B.C.D. 1993-79 demonstrates the Board’s consistent use of quantified percentage of affiliated carrier business as part of a casual service determination. In the same year as B.C.D. 1993-79 was originally issued, the Board also issued *Short Lines, Inc.*, B.C.D. 1993-08, explaining “since these services [in connection with rail transportation] generate 100% of SLI’s total revenues, those services are not casual service.” In *Rail Link, Inc.*, B.C.D. 1994-13, a majority of the Board concluded that because only one out of the company’s 70 employees performed services in connection with rail transportation for an affiliated carrier and that employee spent approximately 10% of working time on those duties, the services were casual in nature and the company was not an employer under the Acts. Similarly, *Lake County of Oregon Board of Commissioners*, B.C.D. 2002-08, found “the service provided by the Lake County Board of Commissioners is so small and also is such a small percentage of the Board of Commissioners’ total operations, that it constitutes casual service.” More recently, since DTO filed its request for reconsideration the Board referenced this connection explicitly in *P.T. Railroad Services, Ltd.*, B.C.D. 2022-24:

In Board Coverage Decision 1993-79, the Board considered the issue of “casual service” in determining the status of VMV Enterprises (VMV), which was affiliated with the Paducah and Louisville Railway, a covered rail employer. VMV provided “repair, maintenance and reconditioning of railroad locomotives,” as well as leasing and maintaining locomotives. However, VMV performed 55.7 percent of its business with railroads other than its covered affiliate, and only 2.5 percent of its business with its covered rail affiliate Paducah and Louisville Railway. Because such a small percentage of VMV’s business was derived from its affiliate rail carrier, the majority of the Board found that VMV was only performing “casual service” under 20 C.F.R. § 202.6, and therefore VMV was not a covered employer.

These decisions taken as a whole are not evidence of a standalone, implicit de minimis exception unmoored from the statutory exclusions from affiliate coverage. Instead, they are evidence of the Board’s consistent application of the statutory exclusion for casual service and the regulatory definition in 20 C.F.R. § 202.6 by quantifying the percentage of overall service performed by the non-carrier for the carrier affiliate as a relevant (and sometimes determinative) factor, even if the decisions do not in every case expressly use the words

“casual service” or “insubstantial.”

It bears repeating that none of the cases identified by DTO were cases involving coverage of a rail carrier. The definition of “employer” under the Acts does not allow for a casual service exclusion from coverage for rail carriers, and the Board has never recognized one. Instead, the Board accounts for persons or companies that principally engage in non-carrier business, but engage in some carrier business in addition to its principal business, through its segregation regulations at 20 C.F.R. § 202.3. In such cases, the Board examines whether some identifiable and separate enterprise conducted by the person or company should be considered to be the covered employer, in light of factors including the following:

- (1) The primary purpose of the company or person on and since the date it was established;
- (2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;
- (3) The amount of its carrier business and the ratio of such business to its entire business;
- (4) Whether its carrier business is a separate and distinct enterprise.

Only units that are competent to assume legal obligations can be found responsible for the discharge of the duties of the covered employer. 20 C.F.R. § 202.3(b). This standard has been in use and unchanged since 1938. *See* 4 Fed. Reg. 1478 (Apr. 7, 1939) (reissue of regulations to be effective June 1, 1938 except as otherwise stated). The Board engaged in exactly this inquiry in B.C.D. 2020-23 finding DTO’s dispatching unit to be a covered employer, because dispatching is an inextricable and essential element of operating a rail line. *See Southern California Regional Rail Authority*, B.C.D. 2002-12; *Herzog Transit Services, Inc.*, B.C.D. 2009-53 (decision on reconsideration); *Rail-Term Corporation*, B.C.D. 2011-14 (decision on reconsideration). The U.S. Court of Appeals for the Seventh Circuit affirmed both the validity of the segregation approach and the treatment of dispatching as a necessary component of train operations in *Herzog Transit Services, Inc. et al v. United States Railroad Retirement Board*, 624 F.3d 467, 476 (7th Cir. 2010). Accordingly, a majority of the Board declines to disturb more than 80 years of settled Board precedent in favor of DTO’s requested de minimis exclusion from coverage for rail carriers.

III. Discussion – *State of Maine* Doctrine

In furtherance of its argument that the Board may adopt a discretionary de minimis exception to employer coverage of a rail carrier, DTO cites to the STB’s *State of Maine* doctrine and urges the Board to apply the STB’s rule from this line of cases to decline

jurisdiction over state or local commuter rail agencies who perform incidental dispatching over the public entity's rail lines for freight rail or Amtrak trains. Because applying the *State of Maine* rule would contradict long-standing and judicially affirmed Board precedent, including *Southern California Regional Rail Authority*, B.C.D. 2011-14, *Herzog Transit Services, Inc.*, B.C.D. 2009-53 (decision on reconsideration) and *Rail-Term Corporation*, B.C.D. 2011-14 (decision on reconsideration), and the STB's justification for the *State of Maine* rule implicates different policy goals than those of the Acts, a majority of the Board (Management Member dissenting) finds application of the *State of Maine* rule in the context of the Acts is not appropriate.

In the original case that lent its name to the *State of Maine* doctrine, the Maine Department of Transportation (MDOT) sought to acquire a rail line owned by the Maine Central Railroad Company (B.A. No. 1107) and leased and operated by Springfield Terminal Railroad Company (B.A. No. 2112). However, under the terms of the sale, Maine Central Railroad would retain a permanent easement for its continued common carrier freight operations. The ICC held it lacked jurisdiction over the transaction and MDOT would not become a rail carrier subject to its jurisdiction because no common carrier obligation was being transferred, the selling railroad retained a permanent easement to continue freight service, and there were no unreasonable restrictions on the seller's ability to provide freight service. In a footnote, the ICC pointed out the decision also served the ICC's long-held policy to remove obstacles which might inhibit states from acquiring lines so that service can be continued.

More recently, the STB described the *State of Maine* doctrine as serving two important public purposes: it assists states and local communities in preserving freight rail service on lines where profitability is marginal, and it promotes the efficient use of existing freight corridors for commuter rail transportation without unduly interfering with continuing common carrier freight rail operations over the transferred line. *Rail-Term Corporation—Petition for Declaratory Order*, STB Fin. Dkt. 35582 (initial decision served Nov. 15, 2013). However, the Acts have a distinctly different public purpose. As recognized by the U.S. Court of Appeals for the Seventh Circuit, the Acts have a broad purpose and protective character to provide pensions for railroad employees who play many roles within the railroad industry. *Herzog Transit Services, Inc. et al v. United States Railroad Retirement Board*, 624 F.3d 467, 474 (7th Cir. 2010) (citing *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 168 (1980) and *Cheney Railroad Company v. Railroad Retirement Board*, 50 F.3d 1071, 1078 (D.C. Cir. 1995)). Both the Seventh Circuit and D.C. Circuit have observed the legislative history supports clear Congressional intent that these benefit statutes be construed broadly. *Id.* The Seventh Circuit in *Herzog* also noted the provisions of the Acts are not to be constrained by the business models common at the time of the passage of the Acts. *Id.* (citing *Livingston Rebuild Center v. Railroad Retirement Board*, 970 F.2d 295, 298-99 (7th Cir. 1992)). It is therefore far from clear that Congress ever intended the STB's pursuit of its own policy considerations through discretionary interpretation of its jurisdiction in *State of Maine* type cases to bind the Board and shrink coverage of the broader protective purposes of the Acts.

A majority of the Board does not agree that the policy considerations which underlie the STB's *State of Maine* doctrine favor application of the rule to coverage under the Acts, nor that the STB's application of *State of Maine* on a case-by-case basis to effectuate its own policy considerations are persuasive for the Board to do the same here as a matter of interpretation of the definition of an employer in section 1(a)(1)(i) of the RRA and section 1(a) of the RUIA. Moreover, both the Seventh Circuit's decision in *Herzog* and the D.C. Circuit's summary affirmance of the Board's decision in *Rail-Term Corp. v. Railroad Retirement Board*, 666 Fed. Appx. 1 (D.C. Cir. 2016) validated the Board's existing policy that railroad dispatching is an inextricable and essential component of providing common carrier rail service, and therefore warrants coverage under the Acts for employers and employees providing this service. Therefore, a majority of the Board declines DTO's invitation to apply the *State of Maine* rule to coverage under the Acts. As described in the attached dissent, the Management Member would accept the extension of the *State of Maine* doctrine to Board cases and would find DTO not to be a covered employer based on that doctrine in this case.

IV. Discussion – Interstate Rail Network

In the alternative, DTO argues that the trackage of Denver Union Station is not part of the interstate rail network, and therefore neither STB jurisdiction nor coverage under the Acts may be extended to operations within its boundaries. The Board unanimously rejects this argument. DTO cites the history of Denver Union Station and the STB's decision in *All Aboard Florida – Operations LLC and All Aboard Florida – Stations—Construction and Operation Exemption—In Miami, Florida and Orlando, Florida*, STB Finance Docket No. 35680 (decision served Dec. 21, 2012) to defend this contention, but both the history and STB case law, including the STB's decision in *All Aboard Florida*, actually support the Board's prior finding on this issue.

First, DTO emphasizes that at the time RTD purchased Denver Union Station from the Denver Union Terminal Railway Company in 2001, the only trains using the station were a daily Amtrak California Zephyr train and a seasonal Amtrak ski train that operated only on the weekends. As of 1997, the endpoints of the California Zephyr service were Chicago, Illinois and Emeryville, California. To state the obvious, neither of these endpoints are in Colorado where Denver Union Station is located; the California Zephyr service is indisputably interstate passenger rail transportation. Moreover, Denver Union Terminal Railway Company was a covered employer under the Acts prior to the sale of Denver Union Station. B.C.D. 2006-20 explains that Denver Union Terminal Railway Company did not lose the characteristics essential to the existence of its employer status until August 13, 2001, the date the station sale to RTD was finalized. If, as DTO states, the only train operations occurring in Denver Union Station prior to the sale were the two Amtrak trains, and as articulated in B.C.D. 2006-20 the prior owner of the station was a covered employer until the day the station was sold, the unavoidable conclusion is that Denver Union

Terminal Railway Company was an employer under the Acts because of its responsibilities related to Denver Union Station as an Amtrak passenger rail station. DTO concedes that train movements in and out of Denver Union Station were coordinated by Amtrak train personnel and BNSF Railway yard personnel until 2014, when RTD agreed to take over the task through remote dispatching of those trains. The history of operations at Denver Union Station therefore demonstrates that movement of Amtrak trains in and out of Denver Union Station was controlled by covered employers under the Acts since before RTD acquired the station, and through the point at which RTD agreed to assume the obligation. This history reinforces the importance of dispatching as an inextricable and essential element of operating a rail line and supports the Board's finding that an entity dispatching for these trains must be a covered employer under the Acts.

Second, DTO cites the STB's decision in *All Aboard Florida* as support, because construction and operation of a 230-mile rail line between Orlando and Miami, Florida was found not to be subject to the STB's jurisdiction and not part of the interstate rail network, even though portions of *All Aboard Florida*'s right-of-way and trackage would be shared with Florida East Coast Railway LLC (B.A. No. 1510). However, a critical element of the STB's decision in *All Aboard Florida* was that All Aboard Florida "explained it would not connect with Amtrak or any other interstate passenger rail service provider, and that [All Aboard Florida] had no plans to provide through ticketing with Amtrak or any other interstate rail passenger operator for transportation beyond Florida." The STB contrasted this factual scenario with its decision in *American Orient Express Railway Company, LLC*, STB Finance Docket No. 34502 (Dec. 27, 2005), in which the STB found an excursion company that did not itself operate any locomotives or train or engine crews and only employed part-time seasonal employees such as bartenders, maids, waiters, and cooks was nevertheless a rail carrier subject to STB jurisdiction because it contracted with Amtrak to provide motive power and train operation. The facts of this case are materially distinct from *All Aboard Florida*, because the passenger rail service at issue here does not merely connect with Amtrak or provide through ticketing with Amtrak (factors which the STB in *All Aboard Florida* suggested would be significant if not outcome-determinative), it is Amtrak.

The STB has also interpreted the statutory phrase "interstate rail network" in 49 U.S.C. § 10501(a)(2)(A) to include "facilities that are part of the general system of rail transportation and are related to the movement of passengers or freight in interstate commerce" in finding a newly-constructed passenger-only rail line from southern California to Las Vegas, Nevada would become a rail carrier subject to STB jurisdiction. *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, STB Fin. Dkt. 34914 (May 6, 2010). DTO therefore has no grounds to argue that B.C.D. 2020-23 did not attempt to equate the interstate rail network with the general railroad system of transportation: the STB has already explicitly articulated that link in interpreting the relevant statutory terms. Again, the facts of this case are that Denver Union Station is a facility that is regularly used by Amtrak as part of an interstate passenger rail route stretching from Illinois to California. It is untenable to argue that such a facility is not part

of the interstate rail network as the STB has defined the term.

Finally, it is not the case that “Amtrak is permitted to use the station only by reason of the consent of RTD,” as DTO states in its request for reconsideration. 49 U.S.C. § 24308(a) authorizes Amtrak to enter into agreements with other rail carriers or regional transportation authorities such as RTD to use their facilities for reasonable compensation.² If Amtrak and a regional transportation authority cannot agree on reasonable terms for Amtrak’s use of facilities, the STB has express jurisdiction to order that the facilities be made available and services provided to Amtrak, and to impose reasonable terms and compensation for the service being provided. Implying (incorrectly) that RTD has authority to deny Amtrak reasonable access to Denver Union Station is not grounds for finding Denver Union Station is not part of the interstate rail network. Accordingly, the Board unanimously affirms its prior finding that the trackage of Denver Union Station is part of the general railroad system of transportation, and therefore is also part of the interstate rail network.

V. Discussion – Retroactivity of Coverage Under the RRA

In B.C.D. 2020-23, the Board granted DTO a waiver of retroactive coverage under the RUIA pursuant to section 8(k) of the RUIA and the three-factor test articulated in *RailTex Trac Company, Inc.*, B.C.D. 1995-81A (decision on reconsideration). However, the Board explained that no provision of the RRA allows for waiving retroactive coverage under the RRA, citing *Four Rivers Finance Company, Inc.*, B.C.D. 2016-04 (decision on reconsideration). In its request for reconsideration, DTO disputes the Board’s position that it lacks authority to waive retroactive coverage, instead arguing the Board has discretion to determine the date on which coverage begins even in the absence of a specific statutory provision comparable to section 8(k) of the RUIA. DTO urges the Board to apply a modified version of the three factors identified in B.C.D. 1995-81A: namely, DTO paid taxes pursuant to the Federal Insurance Contributions Act (FICA) in good faith, DTO represents none of its employees have received retirement benefits under the Social Security Act, and retroactive coverage would impose an undue burden on the Board, DTO, and “the state system” (presumably the Social Security Administration and the U.S. Department of Health and Human Services, since tax revenues under FICA are permanently appropriated to trust funds administered by those federal agencies). DTO also explains it has sponsored a 401(k) retirement plan for all its employees as part of its

² It should be noted that “rail carrier” and “regional transportation authority” as used in this section are defined by 49 U.S.C. § 24102 for purposes of Subtitle V, Part C of Title 49 setting Congressional policy for Amtrak, and these definitions do not apply to Subtitle IV, Part A of Title 49 defining the jurisdiction of the STB (and referenced in the definition of an employer under the Acts in Title 45.) In other words, an entity that is a regional transportation authority rather than a rail carrier under 49 U.S.C. § 24102 may still be a rail carrier under STB and RRB jurisdiction through Subtitle IV, Part A of Title 49.

collective bargaining agreement, and it asserts that:

Had DTO known earlier that its dispatching unit would be considered a covered employer, it would have eliminated or curtailed the section 401(k) benefit for dispatchers. As it is, however, DTO has paid hundreds of thousand of dollars in section 401(k) contributions for dispatchers and has little or no realistic chance of recovering such obligations. If DTO is required to make contributions retroactively to 2016 for obligations pursuant to the Railroad Retirement Act, the dispatchers would be receiving an undeserved and unanticipated benefit, and DTO would be penalized by an unfair burden.

Board precedent establishes that coverage under the RRA begins when an employer first compensates employees to perform functions directly related to its carrier operations. *See Riverport Railroad, LLC*, B.C.D. 2002-69 (decision on reconsideration) (employer found to be covered as of the date it first hired employees to perform functions directly related to carrier functions). B.C.D. 2002-69 observes this decision is legally indistinguishable from Internal Revenue Service Revenue Ruling 82-100, which concerned a company's liability for taxes under the Railroad Retirement Tax Act. In Revenue Ruling 82-100, the Internal Revenue Service found the company became an employer subject to taxes under the Railroad Retirement Tax Act on February 1, 1981, the date the company hired employees to perform functions directly related to its carrier operations. The Board also noted in B.C.D. 2002-69 that this ruling was consistent with the long-term past practice of the Board. In DTO's case, the evidence of record is that employees first performed functions directly related to carrier operations when it began dispatching for Amtrak trains in and out of Denver Union Station, so coverage under the RRA began on that date. Whether DTO paid FICA taxes in good faith, whether its employees received benefits under the Social Security Act, or whether DTO would have negotiated a different employee benefits package under its collective bargaining agreement are not relevant to the factual determination of when functions directly related to carrier operations began. Accordingly, the Board unanimously declines to adopt DTO's proposed modified test.

DTO spends much of its argument on this point discussing "contribution obligations under the Railroad Retirement Act" and why "the Board should determine that DTO's contribution obligation for Railroad Retirement Act withholding taxes should begin as of the date of" B.C.D. 2020-23. This is a fundamental misunderstanding of the operation and funding of the railroad retirement system, as articulated by the U.S. Supreme Court:

Two statutes operate in concert to ensure that retired railroad workers receive their allotted pensions and benefits. The first, the [Railroad Retirement Tax Act], funds the program by imposing a payroll tax on both railroads and their employees. The RRTA refers to the railroad's contribution as an "excise" tax, 26 U.S.C. § 3221, and describes the

employee's share as an "income" tax, § 3201. Congress assigned to the Internal Revenue Service (IRS) responsibility for collecting both taxes. §§ 3501, 7801. The second statute, the Railroad Retirement Act (RRA), 50 Stat. 307, as restated and amended, 45 U.S.C. §231 *et seq.*, entitles railroad workers to various benefits and prescribes eligibility requirements. The RRA is administered by the Railroad Retirement Board. See §231f(a).

BNSF Railway v. Loos, 586 U.S. 310, 313-14 (2019). The RRA itself does not impose any withholding requirement for taxes, and administration and enforcement of those taxes are solely within the authority of the IRS. See IRS Railroad Retirement Tax Act Desk Guide, January 2009, § 3, Interaction Between IRS and RRB ("With regard to both determinations of coverage and RRB audit reports, the IRS must decide what action is appropriate relative to assessment and collection of RRTA. This decision should take into account the relative size of the potential adjustment, the year(s) involved, other workload priorities, etc."). In fact, this authority to waive retroactive liability for taxes or contributions under the RRTA is expressly the same authority given to the Board in section 8(k) of the RUIA, but with respect to contributions required by the RUIA only. 45 U.S.C. § 358(k). When Congress expressly recognizes that authority and functions with respect to the RRTA are conferred on other officers and employees of the United States, and Congress explicitly vests those same authorities in the Board, but only with respect to RUIA contributions, the Board cannot infer that any such authority with respect to RRA or RRTA obligations is implicitly available.

VI. Implementation of Segregation

Finally, DTO submitted a request for a legal opinion to the RRB General Counsel that in the event DTO is found to be an employer under the Acts, it should be permitted to implement coverage by segregating only the specific work hours that dispatchers spend performing Amtrak business and reporting only those work hours as covered railroad service. Specifically, DTO explained its dispatching unit employs 17 dispatchers, who are assigned to one of three desks during a given shift. One desk dispatches only commuter trains outside Denver Union Station on the 'A' line, one desk dispatches commuter trains outside the station on the 'B' and 'G' lines, and the third desk dispatches both Amtrak and commuter trains within the station. Any of the 17 dispatchers may be assigned to any of the three desks on a given shift. DTO estimated only about 2 hours per day are spent by dispatchers dispatching Amtrak trains; the remainder of work time spent by dispatchers assigned to the Amtrak desk is spent dispatching commuter trains within the station. DTO proposed to split the payroll of each individual dispatcher and track the start time and end time of each Amtrak arrival and departure from Denver Union Station control, such that each dispatcher will receive one paycheck for their work related to Amtrak dispatching and a separate paycheck for commuter service work. Only the work related to Amtrak dispatching would be creditable as railroad service or have taxes withheld under the

Railroad Retirement Tax Act or the RUIA.

The General Counsel referred this request to the Board for a decision in the first instance. A majority of the Board (Management Member dissenting) finds that the implementation scheme proposed by DTO is not consistent with the Board's regulations allowing for segregation of an identifiable and separate enterprise within an entity to be considered the covered employer. As described in Part II above, when a company or person is principally engaged in non-carrier business, but also engages in some carrier business, the Board will examine the history and operations of the company or person to determine whether some identifiable and separable enterprise conducted by the company or person should be considered to be the employer. 20 C.F.R. § 202.3. These regulations have remained consistent and unchanged since 1938. *See* 4 Fed. Reg. 1477 (Apr. 7, 1939) (reissue of regulations to be effective June 1, 1938 except as otherwise stated). The then-RRB General Counsel explained in Legal Opinion L-1941-83:

It appears, then, that under the Railroad Retirement and Railroad Unemployment Insurance Acts a company meeting the qualifications stated in section 1(a) of each Act will be considered completely covered by the Acts, and all its workmen will be within the terms of the Acts if they meet the requirements of the employee coverage provisions, cited above, unless a strong showing can be made that the company is predominantly engaged in activities not included among those described by the employer coverage provisions, and that **a department of the company** performing substantially all its activities of the types described may readily be separated from its non-covered enterprise. Only in those situations will any part of a legal entity less than the whole be considered a "carrier-employer" or a "carrier-affiliate employer"

(Emphasis added). Similarly, in L-1941-213 the then-RRB General Counsel rejected a request from the Rochester Transit Corporation to segregate only the freight handling portions of the Subway Division as a covered employer, stating:

In general, as indicated in my earlier opinion, the Subway Division is admirably suited for segregation from the general activities of Rochester Transit, since it constitutes a physically distinct line, it has been separately operated as required by the applicable statutes or ordinances, its personnel has been distinct from that engaged in the company's general operations, and its accounts have been separately maintained.

The above-mentioned factors which support a segregation ruling relating to the Subway Division as a unit are not applicable when only its freight operations are examined. The Subway Division's superintendent has charge of all its freight and passenger carriage, assigning crews to do the

work on both runs. The entire Subway Division, with respect to both passenger and freight operations, is subject to his supervision and control, and the movements of all trains or cars, both passenger and freight, on the Subway Division are controlled and correlated by him or under his supervision. The Subway Division inspector ordinarily is engaged only in duties related to the passenger service, but in the absence of the Division's superintendent he has charge of all freight and passenger movements....The individuals employed in the Subway Division's maintenance gang work indiscriminately upon the passenger tracks, the freight tracks, and the junctions or crossings of those tracks....Finally, although absences of the workmen handling the actual movements of the freight equipment apparently have not been frequent, workmen ordinarily engaged in the movement of passenger equipment are assigned to fill their places in the event of such absences.

It must be concluded from a consideration of the foregoing facts that the Subway Division is a unit which may not be further segregated under the Regulations... The properties and activities of the Subway Division are

thus so connected and intermingled that any further segregation may not be accomplished.

On the specific issue of rail dispatching, the Board determined in *Southern California Regional Rail Authority*, B.C.D. 2002-12, that segregation of the Dispatching Department was appropriate. The decision noted the Dispatching Department would have a separate payroll, employees in the Dispatching Department would be supervised solely by the Dispatching Manager, employees not assigned to the Dispatching Department would have no involvement with dispatching, and the Southern California Regional Rail Authority (SCRRA) intended to maintain strict personnel separation between the Dispatching Department and the remainder of SCRRA's non-carrier operations. Significantly, SCRRA's Dispatching Department would be dispatching for all traffic on SCRRA's lines, including Metrolink intrastate commuter rail lines, Coaster intrastate commuter train service in San Diego County, Amtrak interstate and intercity passenger trains, and Union Pacific and BNSF Railway interstate freight trains. Even though only a portion of SCRRA's dispatching activities involved trains operated by covered railroad employers, the Board applied its segregation regulations at the unit level of the Dispatching Department and did not permit further subdivision. *See also Appalachian Railcar Services, Inc.*, B.C.D. 2002-47 ("We must point out that our decision to apply segregation to Appalachian Railcar Services (ARS) is intended to cover all ARS employees who work in any capacity in the operation of [the operating rail carrier] Big Eagle.").

DTO's proposed implementation echoes precisely the type of arrangement rejected by L-1941-213, and a majority of the Board finds it is inconsistent with the Board's treatment of

dispatching work as reflected by B.C.D. 2002-12.³ To be eligible for segregation for purposes of employer coverage under the Acts, an employer must have an identifiable and separable enterprise like a department or division that is legally competent to assume the duties and obligations of an employer. DTO's dispatching unit is such an identifiable and separable unit, as the Board found in B.C.D. 2020-23. Incremental work hours of 17 individual employees whose duties may include a mixture of Amtrak and non-Amtrak dispatching on any given day and requiring issuance of two separate payroll checks to each dispatcher is not such an enterprise, just as the freight operations of the Rochester Transit Corporation's Subway Division were not such an enterprise. The segregable unit that must be treated as a covered employer for purposes of the Acts consists of all employees assigned to DTO's dispatching unit.

Accordingly, it is the determination of a majority of the Board (Management Member dissenting) on reconsideration that DTO is a covered employer under the Acts only with respect to its dispatching unit. Coverage under the Railroad Retirement Act is effective April 22, 2016, the date DTO began dispatch operations and, thereby, acquired the characteristics of a covered employer. Coverage under Railroad Unemployment Insurance Act is effective the date of this decision, in accordance with the suspension of reporting obligations issued by the Board pending reconsideration on December 8, 2020.



Erhard R. Chorlé



John Bragg



Thomas Jayne
(Dissent attached)

³ Although the Management Member dissents from finding DTO to be a covered employer as described in the attached dissent, in the alternative the Management Member would grant DTO's request to limit the segregated covered unit to only those dispatchers actively engaged in dispatching Amtrak trains, as explained in footnote 2 of the attached dissent.

**Dissenting Opinion of Management Member Thomas Jayne
Employer Status Determination – Reconsideration Decision
Denver Transit Operators, LLC (DTO) – Dispatching Services
Board Appeal Docket No. 20-CO-0038**

A majority of the Board affirms its initial decision that the dispatching unit for Denver Transit Operators, LLC (DTO) is a covered employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA) (Acts). Because I do not believe that the law or facts support this conclusion, I respectfully dissent.

As noted in the majority opinion, the relevant definition of an employer for purposes of the Railroad Retirement and Railroad Unemployment Insurance Acts is “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.” 45 U.S.C. § 231(a)(1)(i); 45 U.S.C. § 351(b). While the Acts include other categories of employer, the Board has not relied on those other categories to find dispatchers covered under the Acts.

In *State of Maine, Dept. of Transportation* (Finance Docket No. 8 I.C.C. 2d 835 (May 20, 1991)), the Interstate Commerce Commission (ICC) (predecessor to the Surface Transportation Board (STB)) held that a state or local government’s acquisition of an ownership interest in track, right-of-way, and related physical assets would not result in the state agency becoming a rail carrier subject to ICC/STB jurisdiction under 49 U.S.C. § 10102(5), provided that two factors are met. First, the selling freight rail carrier would retain a permanent, exclusive freight rail operating easement, together with the common carrier obligation on the line; and second, the terms of the sale would protect the carrier from undue interference with the provision of common carrier freight rail service. If these two factors are met, the ICC held that it lacks jurisdiction over the transaction and the state or local entity is not a rail carrier subject to ICC jurisdiction. From 1991 through 2009, the ICC, and subsequently the STB, applied this doctrine in over 60 cases.

In 2009, the STB extended the doctrine to apply to situations where a state or local government entity acquires a rail line for commuter service with an easement reserved to freight carriers and assumes joint dispatching services over the commuter line, including the freight traffic, as long as operating procedures are reasonable and do not discriminate against freight service. *See Massachusetts Department of Transportation* (Finance Docket No. 35312, 2009 STB LEXIS 643 (May 3, 2009)). In that case, the Massachusetts Department of Transportation (Mass DOT) purchased property interests from CSX Transportation in 70-plus miles of track and real estate, including rights-of-way, to expand a commuter rail system. CSX retained a permanent easement for freight traffic over the tracks, but Mass DOT assumed all dispatching and maintenance responsibilities. STB found that Mass DOT would not become a rail carrier through its incidental dispatching of CSX trains and the purchase transaction did not have to be approved by STB as an acquisition of a railroad line. A group of railroad unions sought judicial review of the STB decision in the U.S. Court of Appeals for the D.C. Circuit, and the court upheld the STB’s decision, finding that the STB’s application of the *State of Maine* doctrine to exclude Mass DOT from the definition of a rail carrier was a reasonable interpretation of the relevant statute. *See Brotherhood of Railroad Signalmen et al. v. Surface Transportation Board*, 638 F.3d 807 (D.C. Cir. 2011).

State of Maine and *Mass DOT* compel the same result here. However, instead of applying the STB’s analysis to whether a factually indistinct entity is a “carrier by railroad subject to the jurisdiction

of the STB,” the majority relies on the Seventh Circuit’s decision in *Herzog Transit Services v. United States RRB*, 624 F.3d 467 (7th Cir. 2010), and the Board’s decision in *Rail-Term Corporation*, B.C.D. 2011-14 (Reconsideration Decision, January 28, 2011, with Management Member dissenting), to find DTO’s dispatching unit to be a covered employer under the RRA and RUIA. In doing so, the majority again ignores the STB’s own authority on what constitutes a railroad subject to the jurisdiction of the STB.

In *Rail-Term*, a majority of the Board (Management Member dissenting) relied heavily on the Seventh Circuit’s decision in *Herzog* and found that Rail-Term was a rail carrier by virtue of its dispatching activities. Rail-Term sought judicial review of the Board’s decision in the D.C. Circuit. At oral argument, the court suggested, and Rail-Term acknowledged, that the petition was brought in the D.C. Circuit specifically because of the *Herzog* precedent in the Seventh Circuit. After oral argument, the court issued an order holding the case in abeyance pending further order of the court, to allow Rail-Term to petition the STB for a declaratory order on the question of whether Rail-Term was a “rail carrier.”

The STB issued its initial decision on Rail-Term’s status as a rail carrier on November 15, 2013. See *Rail-Term Corporation* (Finance Docket 35582, 2013 STB LEXIS 363, Nov. 15, 2013). A majority of the STB (with the Vice Chairman dissenting) agreed with the RRB that Rail-Term was a rail carrier for purposes of STB and RRB jurisdiction. STB emphasized that Rail-Term performed “an essential rail function on behalf of several short line railroads” and the dispatching services that it provided under contract with carriers were “an essential part of the total rail common carrier services offered by its clients to the public.” *Id.* at *4. STB explained that “[l]ong-standing Supreme Court precedent tells us that we can impute a holding out to the public where, as here, a company performs outsourced rail functions on behalf of railroads, and that we must look at what the entity does, not how its charter might read, in determining whether an entity is a rail carrier.” *Id.* at *18. The STB concluded that, while Rail-Term was not itself physically moving goods or passengers, its contract dispatching services were required for the provision of interstate common carrier rail transportation by its clients.

However, the STB went on to discuss its *State of Maine* doctrine, finding that Rail-Term’s status as a carrier could be harmonized with the *State of Maine* cases primarily because Rail-Term was a private company whose primary purpose was to provide dispatching services exclusively to interstate freight operations. In contrast, the STB emphasized that the *State of Maine* doctrine applied to cases of public entities whose primary purpose was to operate local commuter rail systems and whose dispatching activities were incidental to that purpose and designed to enable the public entity to more efficiently manage its non-common-carrier commuter rail business. “As a public entity, it does not dispatch freight trains for the sake of a freight carrier and does not operate solely as an arm of the freight rail’s operations.” *Id.* at *31.

In its decision, the STB explicitly noted that it disagreed with both the RRB majority and Seventh Circuit in *Herzog*:

We therefore respectfully disagree with the aspect of the decision of the RRB and the Seventh Circuit in the *Herzog* case holding that the dispatching company there, whose dispatching effort was on behalf of the *State of Maine* public entity, was a carrier subject to our jurisdiction. In that case, a state entity was responsible for dispatching a line used for both freight and commuter services, as a follow-on to a *State of Maine*

transaction In keeping with the important goals of our *State of Maine* doctrine, the Board had declined to assert jurisdiction over the municipal authorities and their operator, RAILTRAN, simply because the authorities would be performing incidental freight dispatching services while also dispatching their commuter operations. *City of Dallas, et al.*, 1993 ICC LEXIS 299, at *10-12 (1993). We recognized, without concern for any consequent jurisdictional significance, that either the authorities or RAILTRAN itself might subcontract out the dispatching functions, stating that, were that to occur: “We find that the Commission need not approve the assumption by RAILTRAN of the authority to dispatch, operate, maintain and repair the Corridor or the selection of a Designee to perform these functions.” *Id.* at *10. The RRB and the Seventh Circuit found that, when the state entity did subcontract those dispatching functions to another company, i.e., a “Designee,” that company became a carrier subject to our jurisdiction because of the essential nature of dispatching. We do not agree. The subcontractor's activities were derivative of the dispatching activity taken on by the non-carrier public entity. Hence, the Board believes that the statute and governing Supreme Court precedent provide the Board with the discretion not to adopt such an expansive interpretation of its jurisdiction where there are compelling public goals that would be compromised.

Rail-Term Corporation (2013 STB LEXIS 363 at fn. 24).

Rail-Term requested reconsideration of the November 19, 2013 STB decision. *See Rail-Term Corporation* (Finance Docket 35582, 2014 STB LEXIS 339, Dec. 30, 2014). In the opinion denying reconsideration, the STB noted that it had never permitted a private party in a *State of Maine*-type case to take over dispatching without becoming a rail carrier. *Id.* at *29. The STB again emphasized that Rail-Term’s primary job is dispatching trains and distinguished entities that do not have overall responsibility for moving freight trains:

Rail-Term's principal job, in contrast, is dispatching freight trains. When the Massachusetts Department of Transportation’s operator dispatches an occasional CSXT freight train, see [*Massachusetts Department of Transportation*, Finance Docket No. 35312, 2009 STB LEXIS 643, May 3, 2010], it does not assume the overall responsibility for moving CSXT's freight trains from origin to destination. Rail-Term's clients, in contrast, would have no dispatching at all, and indeed could not operate at all, without Rail-Term's services. Congress meant for employees of organizations such as Rail-Term to be rail carrier employees. *See Herzog Transit Servs., Inc. v. RRB*, 624 F.3d 467, 475 (7th Cir. 2010).

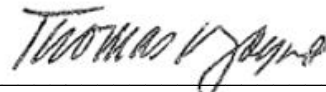
*Id.*¹

Rail-Term Corporation was a closely-held, private, for-profit company established exclusively to perform dispatching functions under contract from freight rail carriers and develop railroad-related

¹ Following unsuccessful petitions for review with the STB, D.C. Circuit, and U.S. Supreme Court, Rail-Term agreed not to seek any further review of the RRB decision in exchange for the RRB agreeing to waive Rail-Term’s retroactive liability for RUIA contributions. *See Railroad Retirement Board Order 17-21* (December 28, 2016).

computer software. Conversely, the only covered rail carrier activity DTO performs is the dispatching of Amtrak trains within the bounds of Denver Union Station, which accounts for *less than 0.1%* of DTO's overall dispatching activity and is incidental to its primary purpose. The STB's decision that Rail-Term was subject to STB jurisdiction relied heavily on Rail-Term's status as a private, for-profit entity whose entire business model was to provide dispatching services for freight railroads, not an incidental function. DTO's activities have much more in common with the STB's *State of Maine* dispatching cases than with the *Rail-Term* progeny, including striking similarities between DTO's incidental dispatching of Amtrak trains into and out of a shared terminal and Mass DOT's incidental dispatching of CSX trains over its commuter lines. Although DTO itself is not a public entity, its dispatching services are provided through contract to the public entity. The STB's footnote 24 in the first *Rail-Term* decision explained that "the subcontractor's activities [in *Herzog*] were derivative of the dispatching activity taken on by the non-carrier public entity." DTO maintains the same type of derivative subcontractor position as *Herzog* did. The public entity in Denver does not provide interstate rail service as a primary or sole purpose, nor does it operate solely as an arm of Amtrak's operations.

For these reasons, the *State of Maine* doctrine compels a conclusion different than that reached by the majority. The Board did not have the benefit of the STB's analysis in the *Rail-Term* cases—and specifically its repudiation of the RRB's and Seventh Circuit's analysis in *Herzog*—in previous dispatching cases. Because the RRA and RUIA premise employer coverage on being subject to the STB's jurisdiction, the STB's explicit language regarding jurisdiction over similar entities that perform incidental dispatching of interstate carriers compels me to reject the majority's reliance on *Herzog* and instead apply the *State of Maine* doctrine to decline jurisdiction over DTO's activities. For these reasons, I would find DTO's dispatch unit not to be covered under the Acts and would prospectively apply the STB's *State of Maine* doctrine as the STB has done.²



Thomas Jayne

² Alternatively, and at a minimum, I would support the request by DTO to redefine the segregated covered unit to include only those dispatchers actively engaged in dispatching Amtrak trains, not those assigned to commuter rail operations. DTO explained in its submissions to the Board that it currently has three dispatch desks, only one of which dispatches Amtrak trains for a few hours a day. In connection with its request for reconsideration, DTO requested a legal opinion from the agency's general counsel as to whether DTO could implement the coverage decision by subdividing the dispatch department, tracking how many hours an individual dispatcher was engaged in dispatching for Amtrak business, and reporting only the Amtrak hours as covered railroad retirement work. The Board previously considered a similar scenario. See B.C.D. 94-09, *Santa Cruz, Big Trees & Pacific Railway* (reconsideration decision). In *Santa Cruz*, the Board on reconsideration determined that freight service by the company was irregular and sporadic and that the company's main business was non-covered recreational trains. As a result, the Board applied segregation and found only the company's freight rail activities to be covered. Applying this model of segregation to DTO's operations would be a more palatable resolution of this matter, given the fact that dispatching Amtrak trains within the bounds of Denver Union Station constitutes less than 0.1% of DTO's overall dispatching activity.