No. 15-977

In the Supreme Court of the United States

RAIL-TERM CORP., PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioner sought review in the court of appeals of a decision of the Surface Transportation Board (STB) that denied reconsideration of an earlier STB decision finding that petitioner was a rail carrier under the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), as amended by the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. 1010 *et seq.*[*] The court of appeals determined that the petition for review was limited to the STB's decision denying reconsideration. Because petitioner had sought reconsideration based solely on alleged material error, the court dismissed the petition for review for lack of jurisdiction under *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). The question presented is:

Whether the court of appeals correctly dismissed the petition for review.

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[*] In the ICCTA, Congress abolished the Interstate Commerce Commission (ICC), assigned the ICC's remaining functions to the STB, and made ICC precedent binding on the STB.

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a-2a; 80a-83a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 8, 2015. A petition for rehearing was denied on September 14, 2015 (Pet. App. 65a-66a). On December 3, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 27, 2016, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Appellate Procedure 15(a)(2)(C) requires that a petition for review must "specify the order or part thereof to be reviewed." Fed. R. App. P. 15(a)(2)(C).

STATEMENT

1. In the ICC Termination Act of 1995, 49 U.S.C. 10101 *et seq.*, Congress conferred on the Surface Transportation Board (STB or Board) jurisdiction over "transportation by rail carrier." 49 U.S.C. 10501(a). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5). A separate system of retirement, disability, and unemployment-insurance benefits administered by the United States Railroad Retirement Board (RRB) applies to rail carriers under STB jurisdiction and to their employees.[1]

2. This case arose out of *Rail-Term Corp.* v. *Railroad Retirement Board,* No. 11-1093 (D.C. Cir. Nov. 14, 2011), a proceeding involving review of an RRB decision finding that petitioner is a rail carrier subject to STB jurisdiction (and, thus, to the Railroad Retirement Laws). See Pet. App. 80a-83a. After oral argument, the court of appeals stayed the case under the doctrine of primary jurisdiction "to allow [petitioner] to petition the [STB] for a declaratory order on the question whether [it] is a 'rail carrier' under 49 U.S.C. § 10102(5)." *Id.* at 80a.

Petitioner filed such a petition with the STB. The STB ruled in a 2-1 decision (Rail Carrier Decision) that petitioner is a "rail carrier" because it performs the essential common-carrier function of directing and controlling the physical movement of the trains of its rail-carrier customers. Pet. App. 34a; see *id.* at 33a-64a. Petitioner sought reconsideration under 49

[1] Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*; Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.* (collectively "Railroad Retirement Laws"). See Pet. App. 34a-36a.

U.S.C. 722(c).[2] On December 30, 2014, the STB denied reconsideration. Pet. App. 3a-30a (Reconsideration Denial).

3. Petitioner filed a petition for judicial review. See 15-1033 Docket entry (Docket entry) (D.C. Cir. Feb. 13, 2015). In a later-filed "supplement" (Docket entry (Feb. 19, 2015)), petitioner stated that it sought judicial "review of a final decision of the [STB] in *Rail-Term Corp.-Petition for Declaratory Order*, FD 35582, served December 30, 2014," in which "two members of the [STB] found on reconsideration that Rail-Term was a 'rail carrier.'" *Id.* at 2 (footnote omitted). Petitioner attached the Reconsideration Denial, and no other agency order, to the petition for review.

Thereafter, as required by the court of appeals' rules, petitioner filed: (1) its Agency Docketing Statement, which identified the December 30, 2014 order as the order to be reviewed (Docket entry (Mar. 18, 2015)); (2) its Preliminary Statement of Issues, which was directed exclusively to whether the December 30, 2014 order was arbitrary, capricious, and not in accordance with law (*ibid.*); and (3) its Certificate as to Parties, Rulings and Related Cases, which stated that "[t]he ruling * * * at issue" was the ruling issued December 30, 2014, the date of the Reconsideration Denial (Pet. App. 73; see *id.* at 72a-74a.).

Respondents moved to dismiss the petition for review on the ground that, under *ICC* v. *Brotherhood of*

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[2] The STB may grant rehearing or reconsideration of a Board action "because of material error, new evidence, or substantially changed circumstances." 49 U.S.C. 722(c). Congress recently recodified that provision without change at 49 U.S.C. 1322(c) in the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228.

Locomotive Engineers, 482 U.S. 270, 280 (1987) (*BLE*), the court of appeals lacked jurisdiction to review an order denying a request for reconsideration based only on alleged material error.[3] See Docket entry (Apr. 6, 2015); see also *Entravision Holdings, LLC* v. *FCC*, 202 F.3d 311, 313 (D.C. Cir. 2000) (a party's failure to specify that a particular order is under review can be excused only if an intent to challenge that order can be fairly inferred from the petition for review and contemporaneous filings). Petitioner did not dispute that *BLE* and *Entravision* controlled, but rather argued that the STB's denial of reconsideration was a new and reviewable final order because the Board had reopened the proceedings and considered new arguments. Docket entry (June 2, 2015) (C.A. Reply to Mot. to Dismiss).

The court of appeals dismissed the petition for review in a one-paragraph, unreported order. Pet. App. 1a-2a. The court held that: (1) the STB had not reopened the proceedings and issued a new and final order; (2) the STB's denial of reconsideration was unreviewable under *BLE* because petitioner had sought administrative reconsideration based on allegations of material error; and (3) under *Entravision*, "an intent to challenge the underlying Rail Carrier Decision [could not] be fairly inferred from the petition for review and contemporaneous filings." *Id.* at 2a.

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[3] Petitioner asserts (Pet. 6) that the motion to dismiss was untimely under D.C. Cir. R. 27(g)(1). That is incorrect. Respondents filed the motion on April 6, 2015, the date specified in the court of appeals' scheduling order for filing dispositive motions. See Docket entry (Feb. 18, 2015).

Thereafter, petitioner filed a petition for panel rehearing, Docket entry (Aug. 24, 2015), which the court of appeals denied without opinion, Pet. App. 65a-66a.

ARGUMENT

It is settled law that an STB order denying a petition for reconsideration is unreviewable where reconsideration was sought only on the basis of material error in the original order. *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 280 (1987). It is also undisputed that petitioner sought reconsideration by the STB solely based on an assertion of material error, and that its petition for review and contemporaneous appellate filings did not identify the STB's earlier Rail Carrier Decision as an order to be reviewed. Under these circumstances, the court of appeals properly determined that the petition for review was limited to the STB's denial of reconsideration and that the petition therefore must be dismissed for lack of jurisdiction. That factbound conclusion does not warrant this Court's review.

1. The Court should not entertain the petition for a writ of certiorari because the question presented was not timely raised or passed on by the court of appeals. Recognizing that it is "a court of review, not of first view," this Court generally declines to reach issues that "were not addressed by the Court of Appeals." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Here, petitioner asks the Court to create an exception to *Entravision Holdings, LLC* v. *FCC*, 202 F.3d 311 (D.C. Cir. 2000), for instances in which a matter has been referred to an agency under the doctrine of primary jurisdiction. See Pet. i. But petitioner did not make that argument to the court of appeals when it opposed the motion to dismiss. Instead, it asked the

court to apply such an exception to *Entravision* for the first time in its petition for panel rehearing.[4] Thus, the argument was waived below and the court of appeals did not consider it. See *Keating* v. *FERC*, 927 F.2d 616, 626 (D.C. Cir. 1991) ("Because [the party] failed to raise this argument until its petition for rehearing, the argument is waived and we decline to reopen the matter now."); see also *Pearson* v. *Shalala*, 172 F.3d 72 (D.C. Cir. 1999) (Silberman, J., concurring in the denial of rehearing en banc). This Court should not consider the argument now as a matter of first impression.

2. Moreover, the court of appeals' dismissal of the petition for review was correct because petitioner specified an unreviewable agency decision as the agency order under review. Petitioner failed to satisfy the requirement of Federal Rule of Appellate Procedure 15(a)(2)(C) to the extent it sought to obtain review of the STB's earlier Rail Carrier Decision.

a. Under *BLE*, 482 U.S. at 278-282, 286-287, a court of appeals lacks jurisdiction to review an order denying a request for reconsideration based on allegations of material error, because an agency's decision whether to reopen on grounds of material error is "'committed to agency discretion by law' within the meaning of the Administrative Procedure Act, and hence unreviewable," *Your Home Visiting Nurse Servs.* v. *Shalala*, 525 U.S. 449, 457 (1999) (quoting *BLE*, 482 U.S. at 282). Petitioner concedes (Pet. 5) that it challenged only the decision that denied its request for reconsideration, which was based on mate-

[4] Petitioner sought only panel rehearing and not rehearing en banc.

rial error, and as such is unreviewable. That admission should be the end of the matter.[5]

b. Petitioner argues (Pet. 8) that the Court should excuse petitioner's failure to identify the Rail Carrier Decision as an order under review in its petition for review or contemporaneous filings as required by Rule 15(a)(2)(C), because the matter is "return[ing]" to the court of appeals "following a primary-jurisdiction referral." Pet. 6. To apply *Entravision* to a petition for review following a primary-jurisdiction referral, petitioner contends, "creates an absurd outcome" because it "cedes judicial authority to review agency resolution of issues referred under the primary-jurisdiction doctrine." Pet. 6-7. That contention is misplaced for several reasons.

First, there is no basis for creating an exception to the specification requirement of Rule 15(a)(2)(C) for agency decisions arising out of referrals from a court of appeals. When a federal court of appeals makes a referral to the STB, the referring court does not retain or acquire jurisdiction over the subsequent agency orders arising out of the referral. Rather, judicial review of those orders proceeds in the ordinary course under the Hobbs Act, 18 U.S.C. 1951, see *Port of Bos-*

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[5] Petitioner has abandoned the argument it advanced below that the STB, in denying reconsideration, actually reopened the proceeding and "issue[d] a new and final order setting forth the rights and obligations of the parties." C.A. Reply to Mot. to Dismiss 2 (quoting *BLE*, 482 U.S. at 278) (alteration in original). Any argument that the decision is reviewable under *BLE* because the agency reopened the decision therefore would not be properly before this Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("[U]nder this Court's Rule 14.1(a), only the questions set forth in the petition, or fairly included therein, will be considered by the Court." (brackets and internal quotation marks omitted)).

ton Marine Terminal Ass'n. v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 69-70 (1970). That means that a party aggrieved by the final STB decision arising from a court of appeals referral must still file a new petition for review in an appropriate court of appeals. See 28 U.S.C. 2342(5), 2344. Compare *ibid.*, with 28 U.S.C. 1336(b) (granting exclusive jurisdiction to district courts to review orders arising out of questions or issues that they referred to the STB). The fact that *Rail-Term* v. *RRB* was a related case under review in the same circuit as petitioner's more recent petition for review in this case is a fortuity and cannot excuse petitioner's failure to comply with jurisdictional requirements for seeking judicial review of the STB's orders.

Second, *Entravision* itself already protects a petitioner from the consequences of inadvertent errors by liberally construing Rule 15(a)(2)(C) to permit the court of appeals to consider a petitioner's other contemporaneous filings, in addition to the petition for review, to determine whether "the petitioner's intent to seek review of a specific order can be fairly inferred." 202 F.3d at 313; see *Martin* v. *FERC*, 199 F.3d 1370, 1373 (D.C. Cir. 2000) (concluding, based on a motion for stay and "filings subsequent to the petition for review," that the party was challenging the underlying order as well as the denial of rehearing); see also *Sinclair Broad. Grp.* v. *FCC,* 284 F.3d 148, 158 (D.C. Cir. 2002) (finding an intent to challenge an earlier merits decision based on a contemporaneously filed statement of the issues). Here, petitioner's specification of the Reconsideration Denial was not inadvertent. Petitioner had numerous opportunities to make clear that it sought review of the underlying Rail

Carrier Decision as well. Its failure to do so in the petition for review or any of its other filings in the court of appeals cannot be remedied through judicial fashioning of a rule that would compel a court to consider prior filings in a different suit that may or may not have been before that particular court.

Third, petitioner is mistaken in contending that *Foman* v. *Davis*, 371 U.S. 178 (1962), commanded the court of appeals to look beyond the petition for review and contemporaneous filings to find what petitioner now asserts was its real intent to seek review of the underlying Rail Carrier Decision. As this Court explained in *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), while it is true that "'mere technicalities' should not stand in the way of consideration of a case on its merits," *Foman* permits courts to find compliance with the requirements of Rules 3 and 15 only where the petitioner's action is the "functional equivalent of what the rule requires." *Id.* at 316-317 (citation omitted). Cf. *Smith* v. *Barry*, 502 U.S. 244 (1992) (informal brief may qualify as a notice of appeal under Rule 3(c)).

Petitioner's action here was not "the functional equivalent" of what Rule 15(a)(2)(C) requires. *Torres*, 487 U.S. at 316-317. Petitioner clearly indicated in several filings that it was challenging only the Reconsideration Denial, and not the Rail Carrier Decision. Petitioner's earlier filings in a different matter made before the STB proceeding at issue here had even been instituted could not amount to the "functional equivalent" of a petition for review of the orders issued in the STB proceeding. *Ibid.* Moreover, while petitioner argues (Pet. 8) that it is nonsensical to assume that it intended to appeal an unreviewable order, the court of

appeals has recognized that "there no doubt are cases in which a petitioner rationally seeks review only of the order denying reconsideration," and as a result, an agency is not under an obligation to determine whether a party that petitions for review of an order denying reconsideration meant to specify a different order. *Southwestern Bell Tel. Co.* v. *FCC*, 180 F.3d 307, 314 (D.C. Cir. 1999).

3. Petitioner errs in contending (Pet. 9, 12) that what it asserts is the D.C. Circuit's "unduly literal reading" of *Entravision* is inconsistent with *Martin* and other cases in which it is claimed that the court of appeals decided the petitioner's "real" intent was to seek review of an earlier order. The court of appeals' factbound determination in this case that it could not "fairly infer" an intent to seek review of the Rail Carrier Decision is correct. Pet. 7. Petitioner repeatedly and exclusively identified the Reconsideration Denial as the order of which it was seeking review in its petition for review and other contemporaneous filings. For these reasons, nothing in the court of appeals' unpublished and factbound decision warrants review by this Court.[6]

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[6] The court of appeals here applied the *Entravision* standard just as it had in *Martin*. Pet. App. 2a; see *Martin*, 199 F.3d at 1372-1373 (applying the *Southwestern Bell* standard to find an intent to seek review of an earlier agency order based on a motion for a stay filed in the same case and the petitioner's statement of the issues); see also *Entravision*, 202 F.3d at 313 (clarifying *Southwestern Bell*). Cf. *Committee for Open Media* v. *FCC,* 543 F.2d 861, 864-866 & n.20 (D.C. Cir. 1976) (considering the scope of review of a reviewable agency order that necessarily implicated an earlier order not named in the petition). But even if the court of appeals' application of that same standard here were in some tension with a prior decision, this Court does not grant certiorari to

4. Finally, petitioner's contention (Pet. 11-12) that the court of appeals' dismissal for lack of jurisdiction creates a Hobson's choice by forcing litigants to seek judicial review either of an agency's decision on the merits or the decision denying reconsideration, but not both, is insubstantial. A party may seek judicial review of an agency's merits decision and an order denying rehearing in a single petition for review. See, *e.g.*, *City of Oconto Falls* v. *FERC*, 204 F.3d 1154, 1159-1160 & n.4 (D.C. Cir. 2000) (rehearing order can be challenged together with underlying order, but rehearing order cannot be challenged on its own unless rehearing was granted). Indeed, numerous petitions to review multiple agency orders are filed every year in the courts of appeals without any question of their compliance with Rule 15.[7] Petitioner repeatedly identified the Reconsideration Denial as the order under review, and it must live with the consequences of its litigation decision.[8]

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resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[7] See, *e.g.*, the Federal Energy Regulatory Commission's (FERC's) list of new petitions for review and pending cases showing that petitioners regularly seek review of multiple orders in a single proceeding. See *Pending Cases-Listed Alphabetically*, FERC, http://www.ferc.gov/legal/court-cases/pend-case.asp (last visited May 2, 2016); see also *New Petitions*, FERC, http://www.ferc.gov/legal/court-cases/new-petitions.asp (last visited May 2, 2016).

[8] The dismissal of Rail-Term's petition for review does not prevent other providers of outsourced dispatching services to rail carriers from litigating the issue of their status as rail carriers before the Board and, if they timely appeal the proper decision, the courts. See, *e.g.*, *Herzog Transit Servs., Inc.* v. *RRB*, 624 F.3d 467 (7th Cir. 2010) (upholding an RRB finding that another provider of outsourced dispatching services is a rail carrier and therefore is subject to the Railroad Retirement Laws).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2016