B.C.D. 02-13

FEB 13 2002

EMPLOYER STATUS DETERMINATION
Bellingham International Railroad, LLC
Decision on Reconsideration

This is the decision of the Railroad Retirement Board with respect to a request by the Bellingham International Railroad, LLC (BIR) that the Board reconsider its decision (B.C.D. 01-07) dated January 10, 2001, that BIR has been an employer covered by the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA) from December 11, 1998.

In Board Coverage Decision (B.C.D). No. 01-07, issued January 10, 2001, the Board found that the BIR was an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. That decision was based on the Board's finding that BIR was organized with a primary business purpose to profit from its rail activities. The facts set forth in the initial decision are as follows:

> Information regarding BIR was provided by Ms. Cynthia Thomas, attorney for BIR. Ms. Thomas stated that BIR was formed on April 24, 1998. It is a privately held limited liability company owned by the Bellingham Cold Storage Co. BIR reportedly has no employees and owns the track and signaling equipment between milepost 2.98 and 4.98 in Bellingham, Washington. In a decision in Surface Transportation Board (STB) Finance Docket No. 33635 entered on July 27, 1998, the STB indicated that BIR had filed an exemption under 49 CFR 1150.31 to acquire from the Burlington Northern and Santa Fe Railway Company (B.A. No. 1621) (BNSF) the exclusive rail freight easement and all track, track materials, and related structures and to operate 2.0 miles of rail line between the above cited mileposts. Information obtained indicates that on December 11, 1998, BIR began operating, via an Agency Agreement with BNSF, under which BNSF operates the rail line for BIR. BIR received reporting marks from the Association of

> American Railroads (AAR) and is considered to be a class III rail carrier by both the AAR and the STB. [See letter to Attorney Thomas from J. J. Carroll, of the AAR dated January 15, 1999, and footnote 1 to STB Finance Docket No. 33635 (63 F.R. 41619, Aug. 4, 1998)].

A recent Board Coverage Decision in Railroad Ventures, Inc. (B.C.D. 00-47, November 7, 2000) refined the standard that the Board would use to determine when an entity that has its railroad functions performed by another would be found to be an employer under the Acts. In Railroad Ventures, the Board set forth a three-part test that it would use to determine the employer status of such an entity. The three-part test is as follows:

> 1) whether the entity does not have as a primary purpose to profit from railroad activities;
>
> 2) whether the entity does not operate or retain the capacity to operate the rail line;
>
> 3) whether the operator of the rail line is already covered under the RRA and RUIA. B.C.D 00-47, at pages 4-5.

In our initial decision we found that

> [T]he Surface Transportation Board (STB) decision [STB Finance Docket No. 33635 (63 F.R. 41619, Aug.4, 1998)] cited above notes that BIR certified to the STB that its projected revenues would not exceed those that would qualify it as a Class III rail carrier and that its revenues were not projected to exceed $5 million.

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> There is no information that would indicate that Bellingham International Railroad, LLC's intent in purchasing the line is primarily designed to preserve rail service rather than profit from railroading activities. The Board therefore finds that BIR is an enterprise which is intended to profit from railroad activities. The Board therefore finds that BIR became a rail carrier employer under the RRA and RUIA effective December 11, 1998, the date rail operations began on its rail line.

Thus, we concluded that BIR failed the first prong of the three-prong test enunciated in Railroad Ventures.

In its request for reconsideration, BIR provides new evidence to support its contention that BIR was established solely to maintain rail service on a line of rail that would otherwise have been abandoned. Mr. Karl Morell, attorney for BIR, provided additional information. BIR is a wholly owned subsidiary of Bellingham Cold Storage Company (BCS). BCS operates a storage facility at the end of the 2-mile line of rail that is owned by BIR. In November 1996, the Burlington Northern Santa Fe (BNSF) ceased all operations on the line due to the poor condition of the track. BNSF informed BCS that BNSF would have to abandon operations on that rail line since the volume of traffic did not justify the expense of rehabilitating the rail line. In order to preserve rail service for itself and its customers, BCS organized BIR to acquire the track and rehabilitate and maintain the track. On July 24, 1998, BIR acquired the track and hired a contractor to rehabilitate the track. On December 10, 1998, BNSF resumed operations on the line. During the last three years, BIR has hired a contractor to maintain the track. BIR has no employees. It owns no rolling stock. All movement of freight on the rail line is made by BNSF, an employer under the Acts. BIR receives $20

for each loaded freight car the BNSF moves over the track. BNSF retains all other revenues. BIR spent approximately $180,000 to rehabilitate the rail line. In 1998 BNSF originated or terminated 8 cars; in 1999, 139 cars; in 2000, 100 cars, and through September 2001, 86 cars. BIR argues that the revenue of $20 per car does not cover the cost of maintenance and insurance. In 2000, the revenues, $2000, constituted approximately 24% of the total maintenance costs of $8,290, and about 16% of the insurance costs of $12,125. In addition, the revenue cannot repay the capital expense of $180,000 invested by BIR to rehabilitate the rail line.

Based on this additional evidence, we conclude that BIR does not have as a primary business purpose to profit from its rail activities. The revenue generated by the rail line does not even cover the operating expenses of BIR let alone repay the investment needed to rehabilitate the rail line. It is clear that the primary business purpose of BIR was and is to prevent the abandonment of the rail line that runs to the BCS facility. The second prong of the Railroad Ventures test is also met, since BIR has no employees or rolling stock and it lacks the ability to operate the rail line. Finally, BIR meets the third prong of the Railroad Ventures test, since BNSF operates the rail line and is an employer covered by the Acts.

Based on the above the Board finds that BIR is not an employer covered by the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the

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Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). B.C.D. 01-07 is hereby reversed.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever