

**EMPLOYER DETERMINATION
Pan Am Southern, LLC**

This is a determination of the Railroad Retirement Board concerning the status of Pan Am Southern LLC (PAS) as an employer under 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).

In a Surface Transportation Board decision¹ decided on April 10, 2009 (STB Finance Docket No. 35147), the STB approved the application and related filings by which Norfolk Southern Railway Company (NS) (B.A. No. 1525), Pan Am Railways, Inc., and two of Pan Am Railways, Inc.'s rail carrier subsidiaries, Boston and Maine Corporation (B.A. No. 1102) (BMC) and Springfield Terminal Railway Company (B.A. No. 2112) (STRC) sought approval: (1) for Norfolk Southern Railway Company and BMC to jointly own and control PAS, a new rail carrier to be formed and (2) for the agreements pursuant to which Springfield Terminal Railway Company would operate PAS's rail lines and establish rates for PAS.

Information regarding PAS was provided by Mr. David A. Fink, President and currently the sole officer of PAS. Mr. Fink stated that PAS is a limited liability company that was formed on April 6, 2009 and began operations on April 10, 2009. Mr. Fink stated that Norfolk Southern Railway Company and Boston and Maine Corporation each own 50% of PAS. According to Mr. Fink, PAS does not have any compensated employees; however, PAS owns the railroad right of way and abutting properties from Ayer, Massachusetts to Rotterdam Junction, New York, as well as trackage rights over connecting carriers. According to Mr. Fink, pursuant to an operating agreement between PAS and Springfield Terminal Railway Company, all carrier services are performed by Springfield Terminal Railway Company. Springfield Terminal Railway Company is an affiliate of the Boston and Maine Corporation. Mr. Fink further stated that 100% of PAS's total business is from doing business with multiple rail carriers. Mr. Fink also stated that 100% of PAS's revenue is from doing business with rail carriers in providing common carrier rail transportation services.

Section 1(a)(1) of the RRA defines the term "employer" to include:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of Title 49;

¹ The STB decision noted that it "also embraces" the related filings in Finance Docket No. 35147, Sub-Nos 1, 2 and 3.

In the decision on reconsideration of the employer status of Railroad Ventures, Inc. (B.C.D. 00-47, November 7, 2000), the Board held that an entity that has STB authority to operate a rail line, but leases or contracts with another to operate the line in question, is covered under the Acts administered by the Board unless the Board determines that the entity is not a carrier. An entity is not a carrier under the Railroad Retirement Act if the Board finds that all three of the following factors exist:

- 1) The entity does not have as a primary business purpose to profit from railroad activities. An entity that owns a railroad line solely to preserve or promote passenger or freight service would not be considered to have as its primary business purpose to profit from railroad activities. The Board will make a finding regarding the primary business purpose of the entity based upon full consideration of all the available facts. Factors that the Board will consider in determining whether a primary business purpose of an entity is to profit from railroad activities include, but are not limited to: (1) the reasons stated in the STB decision for the entity's acquisition of authority to operate the rail line; (2) the existence of a State statute which authorized the formation of the entity and/or authorizes the entity to acquire one or more rail lines for the purpose or purposes set out in the authorizing statute; (3) proof that the entity is considered by the Internal Revenue Service to be a non-profit entity; (4) circumstances surrounding the acquisition of line which would show intent simply to maintain service such as a history of unprofitability of line acquired, potential or actual abandonment of line, or decrease in rail traffic over the line; (5) whether the entity is affiliated with other carriers. An entity that is affiliated through common ownership with other for profit carriers will be presumed to have as a primary business purpose to profit from the ownership of the line.
- 2) The entity does not operate or retain the capacity to operate the rail line. If another entity is the certified operator of the rail line in question and actually conducts the railroad service over the line, the entity that owns the line will not be considered the operator. An entity that leases out the rail line or grants trackage rights and easements will not be considered to be operating the line if it does not retain control over the day to day operations of the line.
- 3) The operator of the rail line is already covered or would be found covered under the Acts administered by the Board. Where the

operator of the line is not covered and could not be found to be covered, the Board will necessarily find the entity owning the rail line to be covered and persons operating the line to be the entity's employees.

Applying these Railroad Ventures factors to this case, we find that PAS is a rail carrier. First, PAS obtained STB authority to acquire and operate certain lines of the Boston and Maine Corporation and acquire incidental trackage rights from Springfield Terminal to operate over the lines of third parties (Pan Am Southern LLC – Acquisition and Operation Exemption – Lines of Boston and Maine Corporation, STB Finance Docket No. 35147 (Sub-No. 1)).

In addition, PAS is owned by two rail carrier employers, Norfolk Southern Railway Company and Boston and Maine Corporation. As noted earlier in this discussion, the STB decision in Finance Docket No. 35147 issued April 10, 2009 stated that Boston and Maine Corporation is a subsidiary of holding company Pan Am Railways, Inc., as is Springfield Terminal Railway Company. Under our decision in B.C.D. 00-47, because PAS is affiliated through common ownership with other for profit carriers, PAS is presumed to have as a primary business purpose to profit from railroad activities.

Because PAS has as a business purpose to profit from railroad activities, we need not address the other two Railroad Ventures factors, since all three must be present to remain outside the coverage of the RRA and the RUIA.

We therefore find that PAS became a rail carrier employer under section 1(a)(1)(i) of the Railroad Retirement Act and the corresponding sections of the Railroad Unemployment Insurance Act effective April 10, 2009, the date it began operations.

Original signed by:

Michael S. Schwartz

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Jerome F. Kever