

EMPLOYER STATUS DETERMINATION
Delaware Coast Line Railroad Company
Hide Power & Equipment Co.

This is the determination of the Railroad Retirement Board concerning the status of Delaware Coast Line Railroad Company (DCLR) and Hide Power & Equipment Co. (Hide Power) as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.). The status of Hide Power under the Acts has not been previously considered.

In Legal Opinion L-82-279, DCLR was found to be a lessee carrier which operated over track formerly serviced by the Penn Central and Conrail, and which was at the time owned by the Delaware Transportation Authority. The DCLR, operated on two short segments of track, began operations on October 1, 1982, and had employees first compensated on that date. According to Interstate Commerce Commission¹ Finance Docket No. 30035 dated September 22, 1982:

as of October 1, 1982, this carrier is authorized to provide service over the former Penn Central Transportation Company known as the Milton Running Track which interchanges with Conrail at Ellendale, DE, and the former Consolidated Rail Corporation known as the Lewes Beach Running Track which interchanges at Georgetown, DE.

Mr. Michael D. Herholdt, the then-President of DCLR, was advised of this determination in a letter dated January 6, 1983. DCLR was given B.A. No. 3346.

In a letter dated December 30, 1996, J.E. Herholdt, DCLR's Treasurer, advised the agency that DCLR ceased operations on September 30, 1994, and employees last provided compensated service on December 31, 1994. The operating contract which DCLR had with the State of Delaware was not renewed, but was awarded to the Maryland and Delaware Railroad, an employer under the Acts (B.A. No. 2408), effective October 1, 1994. In Board Coverage Decision (B.C.D.) 97-40, we found that DCLR ceased to be a rail carrier employer under the Acts effective with the close of business on December 31, 1994, the last day as of which it compensated employees.

On December 28, 2010, Mr. Dan Herholdt, current Treasurer of DCLR, contacted the agency regarding DCLR's current status as an employer under the Acts. According to Mr. Herholdt's letter of January 17, 2011, DCLR returned to operating as a contract carrier in January 2000. DCLR has no employees, and owns no equipment. All equipment used by DCLR is owned by Hide Power & Equipment Company (Hide Power). Mr. Michael Herholdt's ownership in DCLR has been transferred to his wife, Ms. Elaine Herholdt.

¹ The Interstate Commerce Commission (ICC) was the predecessor to the Surface Transportation Board (STB).

Mr. Herholdt also contacted the Surface Transportation Board (STB) on December 22, 2010, requesting advice regarding DCLR, as well as Hide Power. Mr. Herholdt was provided with a copy of DCLR's modified rail certificate from 1982, as well as the informal, non-binding opinion that:

I do not think there is a definitive answer as to whether Delaware Coast Lines Railroad (DCLR) needs operating authority from the Board, but I think a strong argument can be made that the operating authority DCLR obtained in 1982 (via Modified Certificate) continued to reside with DCLR during the 5-year period when it was not operating the line. If that is indeed the case, then DCLR does not need to obtain operating authority and should be fine.

* * *

But keep in mind that operating authority generally does not terminate until a party obtains discontinuance authority, or, in the case of Modified Certificates, until it files to have the Modified Certificate terminated. That has not happened here. As a result, I think DCLR could argue that the operating authority it obtained in 1982 continued during the 5-years that Maryland & Delaware operated the line. But I can't this with 100% certainty.

My advice to Mr. Herholdt would be to consult with an attorney that has familiarity with railroad law (including both Board and Railroad Retirement Board processes) to advise him.

Ms. Elaine Herholdt is the Chief Executive Officer of Hide Power, and owns 51% of the stock of Hide Power. Ms. Herholdt is President of Hide Power as well as DCLR, and Mr. Dan Herholdt is the Treasurer of Hide Power as well as DCLR. Hide Power has been in operation since 1982, and owns all locomotives, MOW equipment, vehicles and tools used by DCLR. Hide Power has ten employees, who have been compensated from 2000 to March of 2010. Mr. Herholdt explained that Hide Power provides the train crew for DCLR; maintains a shop for repairs of locomotives and equipment; leases locomotives to DCLR; has a contract with DCLR for MOW; and does rail siding repairs for industrial customers. Hide Power provides services to only one rail carrier, DCLR. For years 2000 through 2007, Hide Power spent about 10% of its business time doing business with DCLR; in 2008 that time was 15%; in 2009 it was 18%; and in 2010 it was 21%. In 2008, Hide Power received 47% of its revenue from DCLR; in 2009 it received 57% of its revenue from DCLR; and 2010 it received 58% of its revenue from DCLR.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), 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 * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The evidence of record establishes that DCLR is once again operating as a lessee rail carrier in interstate commerce. Accordingly, it is determined that DCLR is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of January 2000, when it returned to operating as a contract carrier.

With respect to Hide Power, the evidence of record shows that Hide Power is clearly not a rail carrier employer under the definition of employer in subparagraph (i) quoted above. This conclusion, however, leaves open the question as to whether RR can be considered an employer under the definition in subparagraph (ii). Under section 1(a)(1)(ii), a company is an employer if it meets **both** of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii). In considering questions of coverage within the meaning of section 1(a)(1)(ii), courts have generally looked to the type of service being provided, the amount of work being performed for the railroad affiliate, and the amount of work being performed for the railroad industry.

The evidence of record shows that Hide Power is under common control with a rail carrier employer. Ms. Herholdt has an ownership interest in DCLR as well as Hide Power, and serves as President of both companies. Mr. Dan Herholdt serves as Treasurer of both Hide Power and DCLR. Accordingly, the Board finds that Hide Power is under common control with a rail carrier employer, DCLR.

The question still remains whether Hide Power performs a "service in connection with" railroad transportation. Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is 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, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

As stated previously, Mr. Herholdt advised that Hide Power provides the train crew for DCLR; maintains a shop for repairs of locomotives and equipment; leases locomotives to DCLR; and has a contract with DCLR for MOW. Accordingly, it is determined that Hide Power & Equipment Co. provides a service in connection with the transportation of passengers or property by railroad, and therefore is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, as of January 2000 when it provided the means for DCLR to operate, and employees were first compensated.

Original signed by:

Michael S. Schwartz

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