

B.C.D. 11-94

November 18, 2011

**Employer Status Determination
Atlas Railroad Construction, LLC**

This is the decision of the Railroad Retirement Board regarding the status of Atlas Railroad Construction, LLC (Atlas), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Information about Atlas was provided by Scott G. Williams, Vice President & General Counsel of RailAmerica, Inc.

Mr. Williams explained that on July 1, 2010, RailTex, Inc.¹, an indirect subsidiary of RailAmerica, Inc.,² purchased 100% of the outstanding shares of Atlas Railroad Construction, Inc. Subsequent to a series of mergers, Atlas Railroad Construction, Inc., is now known as Atlas Railroad Construction, LLC.

According to Mr. Williams, for the last 55 years Atlas has been:

engaged in the business of providing railroad engineering, construction and maintenance services, which include track design, project management, track inspection, rail and tie rehabilitation and reconstruction, new construction of various track and rail types, leasing of certain rail-related equipment and shop facilities, and repair and remanufacturing of certain rail-related equipment.

Atlas provides these services for “a number of customers, including rail carriers, private industries, and governmental transit agencies”. According to its website ([.atlasrailroad.com](http://atlasrailroad.com)), Atlas works nationwide for heavy and light rail facilities, including Atlanta, Boston, New York, Philadelphia, Baltimore, Washington, D.C., Cleveland, and Dallas. Atlas has done work for the U.S. Army Corp. of Engineers, the Department of Defense, the U.S. Navy, North Carolina Ports, Dundalk Marine Terminal, and other agencies and private shippers.

Atlas provides services to Class I railroads and short line railroads. According to Mr. Williams, Atlas has “historically contracted” with some of the forty short line railroads owned by RailAmerica for episodic construction projects. Two of RailAmerica’s short lines, the Indiana and Ohio Railway (IORY) (B.A. No. 3365) and Chicago Fort Wayne and Eastern Railway (CFER) (B.A. No. 3361) entered into a series of track maintenance contracts in advance of RailAmerica’s acquisition of Atlas. All contracts with a RailAmerica railroad are awarded as a result of competitive bidding.

Mr. Williams explained that since its acquisition by RailAmerica, Atlas:

¹ While RailTex, Inc. was initially found not to be a covered employer under the Acts (Board Coverage Decision (B.C.D.) 95-25), in B.C.D. 02-48 we found Rail Tex, who had been acquired by RailAmerica, Inc., to be an employer under the Acts.

² RailAmerica, Inc. has been found not to be a covered employer under the Acts.

continues to operate as a separate and distinct legal and business entity in the same manner as prior to the acquisition. It has retained its employees and executives, and it has continued its existing business practices and contracts. Atlas assigns its employees and personnel to various projects as it determines, and Atlas needs to retain the flexibility to move its employees and personnel between various project locations, and between track maintenance and capital construction projects, to match available resources with work requirements.

Mr. Williams explained that for 2009, 59.8% of Atlas' revenue was from shortline capital construction; 14.9% was from short line maintenance; and 24.7% was from industry/transit capital construction. For 2010, approximately 10% of Atlas' revenue was from track maintenance for IORY and CFER.

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).

Atlas clearly is not a carrier by rail. However, as of July 1, 2010, the date when it was purchased by RailTex, Atlas fell under common ownership with several rail carriers. In making this determination, the Board considers Union Pacific Corporation v. United States, (5 F. 3d 523 (Fed. Cir. 1993)), a decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act. In that case the Court held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of §3231.

Pacific held that a parent company was not under common control with its subsidiary; however, the corporate structure in Union Pacific is different than in this case. Union Pacific Corporation was the ultimate parent company above its railroad subsidiary

while Atlas and RailTex are both under the corporate ladder of RailAmerica, with RailAmerica controlling RailTex and RailTex in turn controlling Atlas. Therefore, the evidence establishes that even under Union Pacific, Atlas and certain rail subsidiaries are under common control within the meaning of section 202.5 of the Board's regulations.

The question still remains whether Atlas 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.

Mr. Williams argues that capital construction work is routinely contracted to third party railroad construction companies with the "skills and special equipment to perform such work safely and effectively". Citing Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 453 (1946), Mr. Williams argues that "an otherwise permissible activity does not become a transportation service by virtue of being performed by a rail carrier's affiliate". Mr. Williams further argues that the work which Atlas performs for RailAmerica railroads "is work that those railroads had independently decided to contract to third parties and had let out for competitive bids". Citing our decision in *Pacstan, Inc.* (B.C.D. 99-7), Mr. Williams argues that "Under traditional analyses, Atlas has not been providing 'services in connection with' rail transportation". Finally, Mr. Williams argues that:

If historic trends continue, such work will represent about 10% of Atlas' revenues. * * * Such a de minimis amount would be insufficient to constitute "services in connection with" rail transportation. *VMV Enterprises*, B.C.D. 93-79; *Tri-County Commuter Rail*, B.C.D. 09-2.

With respect to the issue of whether the services which Atlas provides to its rail affiliates constitute "service in connection with" rail transportation, we find Mr. Williams' reliance on our decision in *Pacstan*, (B.C.D. 99-7) to be confusing. In B.C.D. 99-7 we found *Pacstan*, a management company which provided services such as processing of payroll, accounts payable, monthly financial statements and analysis, and tax reporting, to be an employer covered under the Acts because it was under common control with a covered employer

and was performing a service in connection railroad transportation³. In the more recent case of Wilson Railway, Inc. (B.C.D. 08-19), we found that:

As stated above, the evidence of record shows that WRI's services would include design engineering services, track inspection, bridge inspection, image and emergency services, and capital and maintenance programs for property owned by one or more railroads. * * *

In Adams v. R.R.B., 214 F.2d 534 (9th Cir. 1954), the Court of Appeals for the Ninth Circuit held that a non-carrier subsidiary which was in the electric utility business was found to be a covered employer on the grounds that it was also engaged in accounting, purchasing, and stenographic services; caring for and replacing poles in an overhead trolley system; and bridge building and general repair services for its carrier affiliate. Similarly, among the services WRI will provide to its rail carrier affiliate as well as other rail carriers are track inspection, bridge inspection, capital programs, and design engineering services. Accordingly, we find WRI will be performing service in connection with the transportation of passengers or property by railroad.

Similarly, in the case of Mars Steel Corporation, B.C.D. 08-38, we stated that:

Services provided were described by Mr. Mars as "construction/repair of railroad spurs, switches, derails, welding, sandblasting, painting, miscellaneous rolling repairs to rail car tankers, auto racks".

* * * Mars Steel's assets include service trucks, cranes, other equipment (e.g. welders, torches, saws) as well as a 12,000 square foot shop building. It owns no track, is not a lessee or lessor of railroad track or equipment, and no equipment or facilities are jointly owned with a rail carrier. The Federal Railroad Administration has not required Mars Steel to pay user fees; there has been no ruling by the Surface Transportation Board (STB) regarding the status of Mars Steel; and the IRS has not ruled on the applicability of the Railroad Retirement Tax Act to Mars Steel.

* * *

With respect to the question of whether Mars Steel is performing a service in connection with the transportation of passengers or property by railroad, as 100% of Mars Steel's time is spent providing various services to rail carriers (including its affiliate, DRIR), and 81% of Mars Steel's revenue is derived from performing car repairs, track construction and salvage

³ On reconsideration, Pacstan was found to be an affiliate employer under the Acts only with respect to the services which it provided to its rail carrier affiliates (See, B.C.D. 00-5).

services (42% from its affiliate, DRIR), we find it is performing service in connection with the transportation of passengers or property by railroad.

In light of previous decisions by the Board, we find that the track maintenance and capital construction Atlas performs for its affiliate railroads constitute service in connection with rail transportation.

With respect to the argument that since this work represents about 10% of Atlas' revenues and would be de minimis, we note that in the case of *VMV Enterprises* (B.C.D. 93-79), VMV derived only 2.5 percent of its business from its rail affiliates. In the case of *Tri-County Commuter, et al.*, B.C.D. 09-2, we adopted the finding of the Hearings Examiner that a non-carrier under common control with a rail carrier must perform more than a minimal proportion of services in connection with rail transportation to the affiliated rail carrier in order to be held a covered employer. In B.C.D. 09-2 we found Herzog Transit Services, Inc., not to be a covered employer because it provided **no** services to its affiliated rail carrier. These cases are clearly distinguishable from the case at hand, as Atlas derives 10% of its revenue from its rail affiliates. This amount is more than de minimis.

Accordingly, it is the decision of the Board that Atlas Railroad Construction, LLC is an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act as of July 1, 2010, the date it was acquired by RailAmerica, Inc.

Original signed by:

Michael S. Schwartz

Walter A. Barrows

Jerome F. Kever
(Dissenting Opinion)

MANAGEMENT MEMBER DISSENT

Atlas Railroad Construction, LLC

11-CO-0014

While the majority of the Board has found that Atlas Railroad Construction, LLC's activities amount to service in connection with rail transportation, the analysis should not end there in that the Board has a history and precedent of looking at the genesis of the entity and the nature of its services in relation to its affiliates and others. Therefore, with respect to the issue of whether the services which Atlas provides to its rail affiliates constitute "service in connection with" rail transportation, we should look to the framework provided in the case of *Lenoir Car Works, et. al.* (Legal Opinion L-38-650), which was used by the Board most recently in the cases of *CSX Intermodal, Inc.* (B.C.D. 96-82)⁴, and *Nexterna, Inc., Decision on Reconsideration* (B.D.C.07-8). As we stated in *CSX Intermodal*, the *Lenoir* opinion suggests that factors such as the following should be considered in making a determination as to whether a particular service is a service in connection with railroad transportation⁵:

1. the physical relation of the affiliate's operations to the rail operations;
2. the history and origin of the affiliate;
3. for whose benefit are the affiliate's services performed; and
4. the amount of the affiliate's business with the public.

The following analysis should guide the Board in determining whether Atlas is performing any service in connection with railroad transportation within the framework provided in L-38-650 and B.C.D. 96-82.

⁴ Due to a corporate reorganization, the status of the companies considered in B.C.D. 96-82 was reviewed again in B.C.D. 10-48.

⁵ The rationale of *Lenoir Car Works* formed the basis for the subsequent June 27, 1939, decision of the Board in *Despatch Shops, Inc.*, Board Order 39-429, ultimately affirmed in the twin Court of Appeals decisions *Despatch Shops, Inc. v. Railroad Retirement Board*, 153 F. 2d 644 (D.C. Cir. 1946) and *Despatch Shops, Inc. v. Railroad Retirement Board*, 154 F. 2d 417 (2d Cir., 1946). Forty years later, the Board argued the same reasoning to support a determination that Railroad Concrete Crosstie Corporation performed a service in connection with railroad transportation by manufacturing and selling to its affiliated rail carrier 90 percent of its products. The Eleventh Circuit referred to the *Despatch Shops* cases, noting that manufacture and provision of crossties was as essential to a functioning railroad as repair and construction of rolling stock. *Railroad Concrete Crosstie, v. Railroad Retirement Board*, 709 F.2d 1404 (11th Cir. 1983) at 1410.

Physical Location of Atlas

The corporate office of Atlas Railroad Construction, LLC is located at 1253 State Route 519, P. O. Box 8, Eighty-Four, Pennsylvania, 15330, a separate and distinct location from that of RailAmerica, Inc. in Jacksonville, Florida. Furthermore, Atlas and RailAmerica have no officers or directors in common. The President, Vice President-Chief Operating Officer, and Vice President-Chief Financial Officer of Atlas are the same individuals who held those positions before the acquisition of Atlas by RailAmerica.

History and Origin of Atlas

Atlas did not originate as an offshoot of RailAmerica's operations. As stated above, for the last 55 years Atlas has been a privately held, FICA employer engaged in the business of providing railroad engineering, construction and maintenance services, including track design, project management, track inspection, rail and tie rehabilitation and reconstruction, new construction of various track and rail types, leasing of certain rail-related equipment and shop facilities, and repair and remanufacturing of certain rail-related equipment. These services are provided for a variety of customers, including rail carriers, private industries, and government transit agencies.

For Whose Benefit does Atlas Operate

As quoted above, according to information provided by Mr. Williams, Vice President & General Counsel of RailAmerica, Atlas continues to operate as a separate and distinct legal and business entity since its acquisition by RailAmerica. Atlas works nationwide for heavy and light rail facilities including Atlanta, Boston, New York, Philadelphia, Baltimore, Washington, D.C., Cleveland, and Dallas. Atlas has done work for the U.S. Army Corp. of Engineers, the Department of Defense, the U.S. Navy, North Carolina Ports, Dundalk Marine Terminal, other agencies and private shippers, Class I railroads and Short Line railroads.

Prior to its acquisition by RailAmerica, 59.8 percent of Atlas's revenue was from Short Line capital construction; 14.9 percent was from Short Line maintenance; and 24.7 percent was from industry/transit capital construction. After its acquisition by RailAmerica, approximately 10 percent of Atlas's revenue was from track maintenance for IORY and CFER, its rail affiliates. According to Mr. Williams, Atlas will continue to competitively bid for capital construction work and transit capital projects for RailAmerica as well as a variety of third party railroads.

Business With the Public

As we explained in B.C.D. 96-82, this criterion set forth in L-38-650 was initially intended to measure a company's sales of products and services to its carrier affiliate compared to its sales to non-railroads and to other carriers. Due to the nature of the services provided by Atlas, and the fact that Atlas must compete for capital

construction work and transit capital projects, this test does not strictly apply. As Atlas has recently been acquired by RailAmerica, we have limited information as to amount of services Atlas provide to IORY and CFER, its rail affiliates, and the percentage of Atlas' revenue attributable to those companies. As stated *supra*, for 2010, the year in which RailAmerica acquired Atlas, approximately 10 percent of Atlas's revenue was from track maintenance for IORY and CFER.

Evidence of record indicates that Atlas provides a wide variety of services, to many different customers, both public and private. Atlas approaches its rail affiliates in the same manner it deals with any of its customers, by competitive bid.

Based upon the above, I believe Atlas Railroad Construction, LLC is not performing a service in connection with railroad transportation as that phrase has been interpreted by the Board. Accordingly, Atlas Railroad Construction, LLC should not be considered an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Original signed by

Jerome F. Kever, Dissenting