EMPLOYER STATUS DETERMINATION
Pacific and Arctic Railway and Navigation Company

MAR 2 4 2000

This is the determination of the Railroad Retirement Board concerning the continued status of the Pacific and Arctic Railway and Navigation Company ("Pacific") (B.A. No. 2903) 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").

## Background

In 1943, Legal Opinion L-43-177 held that the White Pass & Yukon Railway Company Ltd. was not an employer under the Acts administered by the Board. The legal opinion noted that the White Pass & Yukon Railway held the bonds and stocks of four other companies, including Pacific, which collectively were known as the White Pass and Yukon Route. The other three companies which then comprised the White Pass and Yukon Route were the British Yukon Railway Company, the British Columbia Yukon Railway Company, and the British Yukon Navigation Company, Ltd. Both the British Yukon Railway Company and the British Columbia Yukon Railway Company were held in Legal Opinion L-41-520 not to be employers under the RRA and the RUIA. Legal Opinion L-45-813, issued December 26, 1945, held that service to the British Yukon Navigation Company, Ltd., at least outside of the United States, was not creditable under the RRA and the RUIA.

The Pacific and Arctic Railway and Navigation Company was incorporated in the State of West Virginia in 1898. It has been covered as a rail carrier employer under the RRA and the RUIA from its commencement of rail operations in 1898. Its continued status as an employer under those Acts was examined in Legal Opinion L-46-194, after its operations were leased to the United States during World War II. It was determined at that time that Pacific continued to be an employer under the Acts. See also Legal Opinion L-46-222.

According to articles filed with the State of Alaska on December 20, 1979, Pacific was merged into PARN, Inc., an Alaskan corporation which was then renamed the Pacific and Arctic Railway and Navigation Company. A recent coverage investigation concluded that there is no indication that the Board was notified of the changes affecting the corporation over the years since the coverage ruling in 1946. Reports of service and compensation have continued to be made using the BA number assigned to Pacific. The recent coverage investigation obtained information that Pacific is now a third-level subsidiary of Tri-White Corporation, a Canadian corporation.

The name "White Pass and Yukon Route Railroad" ("White Pass") is now a trade name for railway operations conducted by three affiliated railroads from Skagway, Alaska, to Whitehorse, Yukon Territory, a distance of approximately 110 miles. The trackage consists of 20 miles in Alaska, 33 miles in British Columbia, and 57 miles in the Yukon. The trade name is registered with the State of Alaska, and is a registered trademark in the United States and Canada. The three affiliated railroads involved in the White Pass operation are Pacific, The British Columbia Yukon Railway Company, and The British Yukon Railway Company, Limited. The other two railroads are owned directly by Tri-White Corporation.

In 1978, the Klondike Highway between Skagway, Alaska and Whitehorse, Canada opened, thereby allowing ore to be transported by trucks from Yukon mines to Skagway. Freight had previously been carried by the White Pass group. According to its current Chief Financial Officer, the White Pass group on October 16, 1982, suspended rail operations due to economic losses, when a major ore concentrate customer shut down its mine. In 1988, with an influx of cruise ships arriving in Skagway, the railroad re-opened as a tourist operation to the White Pass summit. In 1989, railroad operations were extended to Fraser, British Columbia and Lake Bennett, British Columbia. In 1996, the White Pass group discontinued operations to Lake Bennett for one year.

The excursion service currently provided by the White Pass group involves three different train routes. The first, the White Pass Summit Excursion, is a three-hour ride which briefly crosses the United States border by approximately 150 yards, where the engines then switch from the front of the train to the back to resume the trip back to Skagway. Passengers are not allowed to disembark the train. During the trip an on-board tour guide provides a narrative of the scenery and a history of the train. Gift shop items are available for purchase.

The second route, the Lake Bennett Adventure, is an eight-hour ride to Lake Bennett, British Columbia, where passengers may disembark the train for a walking tour and lunch during a two-hour layover prior to boarding the train for the return trip to Skagway. Proof of citizenship is required for travel across the border.

The third route is the Skagway/Whitehorse train and bus trip, which takes passengers from Skagway to Fraser, British Columbia. There, they transfer to a bus owned either by tour bus and/or cruise ship companies to continue to Whitehorse, Yukon Territory. For the return trip, the White Pass picks up passengers who arrived by bus from Whitehorse, Yukon Territory, and takes

them to Skagway, where they continue the trip either by bus or cruise ship. All transfers take place in Fraser, British Columbia, and proof of citizenship is required. Individuals hiking the 33-mile Chilkoot Trail can also pick up the train at Bennett for crossing the border for a return trip to Skagway.

White Pass has contracts with cruise ship operators to sell vouchers on the ships for scenic railway land tours. The cruise ships receive a 20% commission on the ticket price. White Pass and Yukon Excursions can be purchased from various travel agents around the world. Travel agents receive a 10% to 15% commission on selling vouchers. In 1997, cruise ships accounted for 82 percent of passengers; bus and airline package tours accounted for five percent; and independent travelers made up the other 13 percent. The amount of one way ticket sales for the period 1995 to date was less than one percent.

White Pass operates from May through September each year. In 1997, White Pass, which includes the three railroads identified earlier in this discussion, had 120 employees. Pacific operates over approximately 20 miles of rail line. Although much of the White Pass rail lines operate in Canada, Pacific's portion of those lines is located in Alaska. More specifically, Pacific's mileage begins in Skagway and ends at the United States-Canadian border at milepost 20.4. The British Columbia Yukon Railway Company ("BCYR") owns the right-of-way in Canada between milepost 20.4 and 52.58. BCYR is operating as part of the tourist railroad through scheduled tours to Lake Bennett in Canada at milepost 40.5. The British Yukon Company Limited ("BYR") owns the trackage in Canada between milepost 52.58 and 110, which terminates in Whitehorse, Yukon.

## Applicable Law and Regulations

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 [45 U.S.C. §231(a)(1)(i)].

Section 1 of the RUIA contains essentially the same definition.

Prior to January 1, 1996, section 1(a)(1)(i) of the RRA defined a carrier employer as "any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49." Section 1 of the RUIA contained the same definition. The wording of the carrier definition of an employer was amended by the ICC Termination Act of 1995, Public Law 104-88.

The changes in the definition of carrier employer were, however, conforming amendments made to reflect the fact that P. L. 104-88 gave to the new Surface Transportation Board jurisdiction over railroad transportation previously conferred on the Interstate Commerce Commission. P. L. 104-88 made it clear that it enacted no changes in the coverage of employers or employees under the RRA and the RUIA, expressly providing that:

> The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. [P. L. 104-88, Title I, section 102(a), 109 Stat. 808, codified at 49 U.S.C. §10501(c)(3)(B)].

Thus, P. L. 104-88 made no substantive changes in coverage under the RRA and the RUIA.

Section 201.1(j) of the Board's regulations defines the term "person" as follows:

> The term "person" includes an individual, trust, estate, partnership, association, joint stock company, company, corporation, and institution. 20 CFR 201.1(j).

Section 202.2 of the Board's regulations states that:

> Any company or person principally engaged in carrier business is an employer. (20 CFR 202.2).

Section 259.1(b)(1) of the Board's regulations provides in pertinent part that:

> (b) The General Counsel of the Railroad Retirement Board or his or her designee shall make the initial investigations with respect to:
> (1) The status of any person as an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act and the rules and regulations issued thereunder; 20 CFR 259.1(b)(1).

Section 259.2(a) provides that with respect to a determination "concerning the status of a *person* as an employer . . . that *person* shall be a party to such determination . . ." (Emphasis supplied.).

## Discussion

A coverage ruling issued by the Board applies to a "person" as that term is defined in section 201.1(j) of the Board's regulations. See 20 CFR 259.1(b)(1) and 259.2(a). Thus, a coverage ruling may apply to a business organized as a sole proprietorship, a partnership, an association, a joint stock company, or a corporation. A coverage ruling does not, however, apply to a particular line of railroad: a rail line does not fall within the definition of "person." In a case where a new entity takes over the railroad operations previously carried on by another entity, the Board separately considers whether the new entity falls within the definition of a carrier employer under the RRA and the RUIA. The coverage ruling with respect to the status of the former operator of the rail line does not automatically carry over and apply to the new operator.[1]

In this case, Pacific, a West Virginia corporation, has been an employer under the RRA and the RUIA since 1898. The recent coverage investigation, however, located evidence that Pacific merged into an Alaskan corporation named PARN, Inc., in 1979. Since PARN, Inc. was the surviving corporation of that merger, Pacific ceased to exist as a result of that merger. The Board therefore finds that Pacific ceased to be an employer under the RRA and the RUIA effective December 20, 1979.

The evidence also shows that PARN, Inc. was renamed the Pacific and Arctic Railway and Navigation Company ("Pacific 2") on that same date and used the assigned BA number of the original Pacific ("Pacific 1") to file reports of service and compensation with the Board. Coverage under the RRA and the RUIA is not voluntary or elective. Only this Board has authority to determine whether a particular "person" falls within the definition of an "employer" under those Acts based upon all the relevant facts and circumstances. The evidence in this case indicates that Pacific 2 conducted railroad freight operations from December 20, 1979 until it suspended operations on October 16, 1982. The Board finds that Pacific 2 became a rail carrier employer under the RRA and the RUIA effective December 20, 1979, and remained an employer at least until October 16, 1982. We must next address, however, the question of whether it remained an employer after that date.

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[1]See, for example, Board Coverage Decision ("B.C.D.") No. 99-18, St. Louis Car Company d/b/a Cumbres & Toltec Scenic Railroad and B.C.D. No. 98-44, Golden Isles Terminal Railroad, Inc.

Section 202.12 of our regulations offers some guidance in responding to this question. Subparagraph (a) of that regulation provides that:

> In determining whether a cessation of an essential characteristic, such as control or service in connection with railroad transportation, has occurred, consideration will be given only to those events or actions which evidence a final or complete cessation. Mere temporary periods of inactivity or failure to exercise functions or to operate equipment or facilities will not necessarily result in a loss of employer status. [20 CFR 202.12(a)].

When Pacific 2 resumed operations in 1988, it did so only as part of an excursion railroad conducted with two affiliated Canadian companies. The Board has held that railroad passenger excursion service which does not operate as part of an interstate rail network does not fall within the definition of an employer under the RRA and the RUIA. See, e.g., B.C.D. No. 99-18, St. Louis Car Company, d/b/a Cumbres & Toltec Scenic Railroad, and the decisions cited therein. The legal basis for this line of Board decisions is that a tourist railroad which conducts only passenger excursion service and does not connect with interstate transportation does not constitute an operation in interstate commerce and therefore is not subject to the jurisdiction of the Surface Transportation Board (formerly the Interstate Commerce Commission).

In this case, the evidence indicates that Pacific 2 owns track and operates railroad excursion service within the State of Alaska. Since, however, two of the three routes operated by Pacific 2 together with its two Canadian affiliates as part of the White Pass and Yukon Route Railroad extend into Canada, the facts about this particular excursion service do not fit precisely into the guidelines discussed in prior Board coverage decisions. Section 10501(a)(2)(F) of Title 49 gives to the Surface Transportation Board jurisdiction "only to transportation in the United States between a place in . . . the United States and a place in a foreign country." Thus, in this case we must address the question of whether the fact that the White Pass and Yukon Route Railroad crosses the border into Canada should affect the status of Pacific 2 as an employer under the RRA and the RUIA. For the reasons explained below, we find that the fact that the excursion service in this case crosses the Alaskan border and continues into Canada does not warrant a departure from prior Board coverage decisions.

In order to fall within the definition of a rail carrier employer under the RRA and the RUIA, a railroad must be subject to the jurisdiction of the Surface Transportation Board under part A of subpart IV of Title 49. Prior to enactment of the ICC Termination Act of 1995 (Public Law 104-88), the former Interstate Commerce Commission had jurisdiction over interstate railroad transportation. The ICC Termination Act expressly provided that the Act made no changes in the coverage of employees and employers by the RRA and the RUIA. See 49 U.S.C. §10501(c)(3)(B). In other words, if an entity would have been ruled to be a covered employer prior to enactment of the ICC Termination Act, nothing in that Act would change the status of that entity with respect to its coverage under the RRA and the RUIA. Decisions of the Interstate Commerce Commission (ICC) that we have reviewed consistently ruled that the ICC did not have jurisdiction over excursion railroad service. See ICC Finance Docket No. 31024, The Durango & Silverton Narrow Gauge Railroad Company - Petition for Declaratory Order or Exemption, 1988 ICC LEXIS 345, Nov. 21, 1988; ICC Finance Docket No. 31371, Allegany Central Railroad - Application for a Modified Certificate of Public Convenience and Necessity, 1989 ICC LEXIS 48, Feb. 23, 1989; ICC Finance Docket No. 31156, Napa Valley Wine Train, Inc., Petition for Declaratory Order; 7 I.C.C. 2d 954, 1991 ICC LEXIS 195, July 18, 1991; Magner-O'Hara Scenic Railway v. ICC, 692 F.2d 441 (6th Cir. 1982). Factors cited in these decisions include the following considerations. (1) The service was conducted solely within one state. (2) The service did not physically interchange equipment for the through movement of passengers. (3) The service did not through ticket passengers. (4) The entity marketed its rail service as a local tourist excursion rather than as a conveyance for the through movement of passengers.

Although we have not located any ICC or STB decision which dealt with an excursion service that operated in both the United States and Canada, we do not believe that either would find that it had jurisdiction over the excursion service in which Pacific 2 participates. The rail transportation policy set out in section 10101 of Title 49 clearly indicates that the STB (and formerly the ICC) has as a primary purpose to ensure fair competition in the conduct of interstate commerce by the railroad industry. Pacific 2 is not engaged in interstate railroad transportation. It is engaged in tourism. The recent coverage investigation revealed that in 1997, cruise ships accounted for 82% of White Pass's passengers, bus or airline package tours accounted for 5%, and independent travelers made up the other 13%. The amount of one-way ticket sales for the period from 1995 to date was less than one percent (0.62%).

The equipment owned and maintained by Pacific and its Canadian affiliates is geared toward tourists. The White Pass owns and operates 20 narrow gauge

diesel locomotives, a restored steam engine manufactured in 1947, and a restored steam snow plow manufactured in 1899. White Pass owns 51 parlor cars, many of which are restored vintage cars. The White Pass maintains rail lines to the ship docks and provides dockside service for the convenience of the cruise ship passengers. The White Pass has "people movers," which are modified golf carts, on the dock to transport passengers from the cruise ships to the front of the dock.

White Pass's train depot in Skagway includes a gift shop. Of the 120 employees who worked for White Pass in 1997, 14 were gift shop personnel. White Pass does not operate year-round, but only during the tourist season from May through September. The nature of the business conducted by White Pass is illustrated by the fact that it was listed in the 26th Annual Steam Passenger Service Directory, published in 1991 by Locomotive & Railway Preservation, Ltd. for the Empire State Railway Museum. The title page of that volume identifies the book as:

> An illustrated directory listing tourist-railroad, trolley, and railway-museum operations in the United States and Canada with regularly scheduled or intermittent passenger service. Also included are model and toy-train exhibits and live-steam railroads.

White Pass also has a web page (www.whitepassrailroad.com) which depicts it as a tourist railroad. The web page includes links to scenic photographs, a brochure, and "The Train Shoppe," from which souvenir items may be purchased directly or ordered through a toll free telephone number.

A new undertaking of the White Pass is the negotiation of a joint venture with a company called "Lumberjack Sports International" ("LSI"). The business name for the joint venture is The Great Alaskan Lumberjack Show ("TGALS"). The show which TGALS plans to present beginning in April 2000 will be a demonstration of what it is like to be a lumberjack. Although LSI is conducting this type of show in several locations throughout the United States, White Pass will only be involved in the Ketchikan operation. Mr. Curt Dodd, Chief Financial Officer of White Pass, explained in a letter dated November 8, 1999, that:

> White Pass wishes to become more active in this particular aspect of the tourism market, which is widely known as "shore excursions". People want something to do when they arrive at ports within

> Alaska, and when they disembark the ship they go looking for it. We have proven that we can provide a first class "shore excursion" in Skagway with our railway tour and so we are now attempting to apply our expertise elsewhere within Southeast Alaska.

The evidence concerning the railroad operated by White Pass demonstrates that Pacific 2 does not operate a railroad in interstate commerce. Black's Law Dictionary defines the term "commerce" as "The exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations" (Black's Law Dictionary, Seventh Ed. 1999, p. 263). "Interstate Commerce" is defined as:

> Trade and other business activities between those located in different states; esp., traffic in goods and travel of people between states. For purposes of this phrase, most statutory definitions include a territory of the United States as a state. Some statutory definitions of *interstate commerce* include commerce between a foreign country and a state. (Id., p. 263).

White Pass does not conduct railroad service which constitutes a part of interstate commerce. It does not move goods, and it does not transport people for the purpose of getting them from one place to another. White Pass provides train rides specifically designed for entertainment. The Board finds that the evidence overwhelmingly demonstrates that White Pass, of which Pacific 2 is a part, does not operate as a rail carrier in interstate commerce which would be subject to the jurisdiction of the Surface Transportation Board. Rather, White Pass operates a seasonal excursion railroad solely for amusement purposes. The Board therefore finds that Pacific 2 is currently not an employer under the RRA and the RUIA.

The final question which we must address is when Pacific 2 ceased to be an employer under the RRA and the RUIA. As indicated earlier in this discussion, Pacific 2 conducted railroad freight operations from December 1979 until it suspended operations on October 16, 1982. Section 202.12(a) of the Board's regulations provides that mere temporary periods of inactivity will not necessarily result in loss of employer status. In 1988, White Pass began to conduct its excursion railroad service, thereby demonstrating that it had replaced its freight operations with railroad excursion service. We find that Pacific 2 ceased to be a rail carrier employer on April 30, 1988, which is the last day of the last month prior to the beginning of the tourist season in May of that year.

## Conclusions

For the reasons discussed above, the Board makes the following findings:

1. The West Virginia corporation, Pacific and Arctic Railway and Navigation Company (BA No. 2903), was a rail carrier employer under the RRA and the RUIA from 1898 until it merged into the Alaskan corporation, PARN, on December 20, 1979.

2. PARN, which changed its name to Pacific and Arctic Railway and Navigation Company on December 20, 1979, became a rail carrier employer on December 20, 1979 and ceased to be a rail carrier employer with the close of business on April 30, 1988, the last day of the last month before the beginning of its first season as an operator of the railroad excursion service known as the White Pass and Yukon Route Railroad.

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