B.C.D. 01-4

JAN 05 2001

EMPLOYER STATUS DETERMINATION
South Plains Switching, Ltd. Co.

This is a determination of the Railroad Retirement Board concerning the status of the South Plains Switching, Ltd. Co. (SPSC) as an employer 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.).

In Surface Transportation Board (STB) Finance Docket 33753, decided July 8, 1999, SPSC filed a verified notice of exemption to acquire approximately 74,384 feet of rail lines from the Burlington Northern and Santa Fe Railway Company (B. A. No. 1621) in Lubbock, Texas. The line acquired from BNSF extends as follows: (1)former Atchison, Topeka and Sante Fe (ATSF) side tracks 0310-0313, 0320, 0330-0332, 0340-0341, 0370, 0372-0373, 0380-0382, 0385, 0387, and 0390; and (2) former Burlington Northern (BN) side tracks 9200-9205, 9208, 9220, 9298, 9310, 9320, 9322, 9330, Orchard Lead, 9304, 9311-9312, 9321, 9323-9326, 9331, 9333, 9401-9406, 9409-9412, 9415, and 9420-9424. In conjunction with the acquisition of these rail lines, SPSC acquired approximately 3 miles of incidental trackage rights over BNSF's mainline between track 9298 and BNSF's Lower Yard at Lubbock, Texas.

Information regarding SPSC was furnished by Ms. Dililah Wisener, Owner of SPSC. Mr. Larry D. Wisener is President of SPSC. According to Ms. Wisener, SPSC began operations on July 5, 1999. Ms. Wisener stated that SPSC has no employees or equipment. She stated that SPSC is owned and operated by the same persons as South Plains Lamesa Railroad (SPLR) (B. A. No. 5817). According to Ms. Wisener, SPSC, "using [SPLR] equipment and labor force, switches industry rail cars after the cars are [sent] to [SPSC] by BNSF. [SPSC] releases loads and/or empty cars back to BNSF." Approximately 5,000 carloads annually are provided to SPSC by BNSF. SPSC interchanges with BNSF.

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.

Section 1 of the RUIA contains essentially the same definition.

In its decision regarding the employer status of Railroad Ventures, Inc. (B.C.D. 00-47), 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

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covered under the Acts administered by the Board unless the Board determines that the entity is not a carrier. The Board enunciated a three-part test in B.C.D. 00-47 to be applied in making this determination. An entity that leases a line to another company or contracts with another company to operate the line is a carrier under the Railroad Retirement Act unless 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; 2) the entity does not operate or retain the capacity to operate the rail line; and 3) the operator of the rail line is already covered or would be found to be covered under the Acts administered by the Board.

Applying this test to the facts of SPSC, the Board determines that SPSC is a covered rail carrier employer. SPSC is owned and operated by the same persons as SPLR, a covered employer under the Acts. An entity that is affiliated through common ownership with other for profit carriers is presumed to have a primary business purpose to profit from the ownership of the line. Accordingly, we do not have to reach the other two considerations, since all three need to be present to remain outside the coverage of the RRA and the RUIA.

Accordingly, it is determined that South Plains Switching, Ltd. Co. became 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 effective July 5, 1999, the date on which it commenced operations.

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