B.C.D. 01-16

JAN 3 0 2001

EMPLOYER STATUS DETERMINATION
Royal Gorge Express, LC, and Rock & Rail, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Royal Gorge Express (RGX), Inc. and Rock & Rail (R&R), Inc. as employers 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). Because of the relationship of RGX and R&R, the determinations are being issued together.

Royal Gorge Express, LC.

In Surface Transportation Board (STB) Finance Docket No.33622, decided July 8, 1998, Royal Gorge Express, LC, (RGX), a non-carrier, filed a verified notice of exemption to acquire from Union Pacific Railroad Company (UP) and to operate 11.75 miles of UP's Tennessee Pass railroad line in Freemont County, Colorado, between milepost 171.90 at Parkdale, and milepost 160.15, at Canon City. The STB decision stated that UP will retain permanent, irrevocable overhead trackage rights so as to preserve the integrity of the Tennessee Pass through route.

Information about RGX was provided by Mitch Albert, Manager of RGX. According to Mr. Albert, RGX was created as a partnership on May 12, 1998 and is owned in equal shares by Rock & Rail, Inc., a common carrier freight railroad, and Canon City & Royal Gorge Railroad, a tourist train. Mr. Albert indicates RGX's business is limited to the ownership of the 11.75 miles of track noted above. The track was purchased to assure rail access to the main potential customer along the line, Agile Stone Systems, Inc., which is also owned by Rock &Rail, Inc. RGX does not control any assets with any other company, does not provide any service for any carrier pursuant to a written agreement, and does not plan to have employees or operate a railroad.

Rock & Rail, Inc.

In Surface Transportation Board (STB) Finance Docket No.33608, decided July 8, 1998, Rock & Rail Inc. (R&R) filed a verified notice of exemption to lease from RGX and to operate the rail line noted above, i.e., approximately 11.75 miles of rail line in Freemont County, Colorado, between milepost 171.90 at Parkdale, and milepost 160.15, at Canon City. (As part owner of RGX, R&R is a 50 percent holder of the 11.75 miles of line along the Tennessee Pass Route.) The STB decision stated that the lease of the line is subject to a permanent, irrevocable overhead trackage rights easement retained by the Union Pacific Railroad Company.

Royal Gorge Express, LC, and Rock & Rail, Inc.

Information about Rock & Rail, Inc. (R&R) was provided by William H. Fehr, President of R&R and Mitch Albert, CEO. R&R is owned by Mr. Fehr and Mr. Albert. R&R has never operated over the rail lines noted above. As of May 2, 1999, the UP was operating over the line and Canon City & Royal Gorge was expected to begin their train operations over the 11.75 miles of track within the month[1]. Two employees have performed limited work for R&R, not involving the 11.75 miles of track noted above.

Determinations

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

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

In B.C.D. 00-47, the Board held in its decision on reconsideration of the employer status of Railroad Ventures, Inc. that an entity which 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. The Board then set out a three-part test which it will apply in order to determine whether an entity is a carrier. Specifically, an entity is a carrier under the RRA and the RUIA 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 covered under the Acts administered by the Board. With respect to the first factor, B.C.D. No. 00- 47 states that the Board will make a finding regarding the primary business purpose of the entity based upon full consideration of all

---

[1]The employer status of Canon City & Royal Gorge is considered in a separate coverage determination.

available facts. The record in this case indicates that the 11.75 miles of track was purchased to assure rail access to the main potential customer along the line, Agile Stone Systems, Inc., which is owned by Rock & Rail. There is no information that would indicate that R&R's intent in purchasing the line is primarily designed to preserve rail service rather than profit from railroading activities. The Board finds that the totality of evidence indicates that R&R has as a primary business purpose to profit from railroad activities and is therefore a carrier.

Turning to RGX, a note in B.C.D. No. 00-47 states that 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. Since RGX is so affiliated with R&R, the Board finds that it also is a carrier.

The Board thus finds, in accord with its decision in B.C.D. No. 00-47, that RGX became an employer effective May 12, 1998, the date the partnership was created. The Board finds further that R&R became an employer effective July 3, 1998, the date that the track was purchased from Union Pacific.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever