B.C.D. 01-27

MAR 2 2 2001

EMPLOYER STATUS DETERMINATION
Thoroughbred Technology & Telecommunications, Inc.

This is a determination of the Railroad Retirement Board concerning the status of Thoroughbred Technology & Telecommunications, Inc. (T-Cubed) 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.).

Information regarding T-Cubed was provided by Mr. Robert M. Kesler, Jr., General Counsel-Taxes for the Norfolk Southern Corporation. T-Cubed was incorporated on August 10, 1999, as a wholly owned subsidiary of the Norfolk Southern Corporation (BA No. 9408). T-Cubed currently has eight employees. The company was organized to construct fiber optic conduits in the non-operational portion of railroad rights of way owned or leased by Norfolk Southern Railway Company (BA No. 1525) and its railroad affiliates. T-Cubed leases the non-operational portions of the rights of way from the railway companies in exchange for rent payments, constructs fiber optic conduits in the leased portions of the rights of way, and then sells the conduits and subleases the non-operational portion of the rights of way to third party telecommunications companies.

In addition, T-Cubed manages, as an agent of the railway companies, existing fiber optic lease agreements relating to the non-operational portion of the railway rights of way. These management activities principally include receiving and processing the railways' account payments for rent, license fees, and other amounts due the railways under the agreements. T-Cubed is paid a management fee of 10% of the annual revenues under the agreements. In the future, it is anticipated that T-Cubed, as an agent for the railways, will negotiate and manage new fiber optic lease agreements or similar telecommunications agreements with respect to the non-operational portion of the railways' rights of way. In addition to the management fee, T-Cubed will receive a brokerage fee for these agreements. Finally, it is also anticipated that T-Cubed will provide the railways access to certain of its fiber optic cables for use in railroad communications.

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;

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> (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 shows that T-Cubed is not a rail carrier employer under the definition of employer in subparagraph (i) quoted above since it does not operate, and has never operated, as a common rail carrier in interstate commerce. This conclusion, however, leaves open the question as to whether T-Cubed is an employer under the definition in subparagraph (ii), commonly referred to as the "affiliate definition."

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).

The evidence of record shows that T-Cubed is under common control with a rail carrier employer. T-Cubed is a wholly owned subsidiary of Norfolk Southern Corporation. T-Cubed is thus under common control with the railroad affiliates owned by the Norfolk Railroad Corporation.

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 * * * 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 ... .

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According to Mr. Kesler, T-Cubed is engaged in the construction and management of fiber optic conduits on the non-operational portions of the rights of way of the various railroad affiliates of Norfolk Southern Corporation. A majority of the Board, Labor Member dissenting in a separate opinion, finds that T-Cubed's activities currently do not involve railroad operations. Consequently, a majority of the Board finds that T-Cubed is not performing service in connection with railroad transportation for its affiliates within the meaning of section 1(a)(1)(ii) of the RRA and the corresponding provisions in the RUIA. If, in the future, T-Cubed does begin to provide access to its fiber optic cables for use in railroad communications by its affiliates, this determination will have to be reevaluated.

The information summarized above indicates that T-Cubed is under common control with the railroad affiliates of Norfolk Southern Corporation. However, it is not currently performing any service in connection with railroad transportation. Accordingly, it is determined that T-Cubed is not an employer within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act [(45 U.S.C. §231(a)(1)(ii)] and the corresponding provision of the Railroad Unemployment Insurance Act.

Cherryl T. Thomas

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V M Speakman, Jr.

V. M. Speakman, Jr. (Separate dissenting opinion attached)

Jerome F. Kever

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DISSENT IN PART
V. M. SPEAKMAN, JR.
EMPLOYER STATUS DETERMINATION
THOROUGHBRED TECHNOLOGY AND
TELECOMMUNICATIONS, INC.

As stated in the Board's decision, Thoroughbred Technology and Telecommunications, Inc., (T-Cubed) provides management activities relating to the non-operational portion of its railroad affiliates. Section 202.14 of the Board's regulations (20 CFR 202.14) defines service in connection with or incidental to railroad transportation as the performance of functions which would normally be performed by its constituent employees. It is my position that T-Cubed's activities constitute such services. Accordingly, I would find that these management's services provided for the railroad affiliates to be covered services.

I respectfully dissent from the majority on this point.

VM Speakman, Jr.
V. M. Speakman, Jr.

3-16-01
Date