B.C.D. 01-45

EMPLOYER STATUS DETERMINATION JUN 01 2001
Gordon Fay Associates, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Gordon Fay Associates, Inc. (GFAI), 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.). This determination also addresses the request on behalf of GFAI for waiver of contributions under the Railroad Unemployment Insurance Act.

On October 2, 1996, the Railroad Retirement Board held GFAI to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective November 13, 1987 (B.C.D. 96-84). That decision was based on GFAI's being under common control with its rail affiliates, Bay Colony Railroad and Seminole Gulf Railway, and providing services to those two rail carriers. GFAI has requested that the Board reopen the determination holding GFAI to be an employer and terminate the coverage of GFAI based on changes of circumstances in the operations of GFAI.

According to information submitted by counsel for GFAI, GFAI is still under common control with Bay Colony Railroad and Seminole Gulf Railway, and is providing services to them. What is alleged to have changed is that GFAI is now performing a greater percentage of its operations in connection with non-rail affiliates and non-affiliated companies. In B.C.D 96-84, it was found that GFAI performed accounting, marketing and sales, executive management, passenger service reservations and ticket sales, real estate management, and management of outside party contracting services, and that these services constituted service in connection with railroad transportation. For 1992-1993 approximately 66 percent to 70 percent of GFAI's revenues were received from Bay Colony Railroad and Seminole Gulf Railway.

In the submission to the Board, it is estimated that GFAI will be providing approximately 30 percent of its billed time to clients for rail-related services. This percentage is still a substantial percentage and sufficient for GFAI to remain a covered employer under the Acts. Section 202.11 of the Board's regulations provides that "The employer status of any company or person shall terminate whenever such company or person loses any of the characteristics essential to the existence of an employer status." Accordingly, since the basis on which GFAI was held to be an employer does not appear to have changed, the Board finds that termination of GFAI's status as an employer is not appropriate.

In regard to contributions under the Railroad Unemployment Insurance Act, it should be noted that GFAI has been assessed contributions for the period from January 1, 1997, through December 31, 2000. In other words, GFAI has been assessed contributions only for periods after the date of the Board's original coverage decision, October 2, 1996.

The Board has the authority under section 8(k) of the Railroad Unemployment Insurance Act to decide not to give retroactive effect to a coverage ruling with respect to contributions under that Act. Rulings on non-retroactive coverage under the Railroad Unemployment Insurance Act have been granted by the Board in cases where (1) the evidence suggests that the employer paid taxes

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under the Federal/State unemployment compensation system believing in good faith that the employer was covered by that system; (2) no benefits have been paid to the employer's employees under the Railroad Unemployment Insurance Act; and (3) retroactive coverage would impose an undue burden on the Board, the employer, and the state system for no apparent gain.

The assessment in this case is not retroactive in that it is not for periods before the date of the Board's initial coverage determination and, accordingly, is not subject to waiver as a retroactive assessment. Further, since in this case the assessment of contributions under the Railroad Unemployment Insurance Act was for periods after the Board's decision of October 2, 1996, holding GFAI to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, GFAI could not have a good faith belief that it was not covered under the Railroad Unemployment Insurance Act after that date. Accordingly, the Board finds that the requirements for waiver of retroactive contributions under the Railroad Unemployment Insurance Act are not met in this case. GFAI's request for waiver of GFAI's obligation to pay contributions for the period January 1, 1997, through December 31, 2000, is denied.

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