B.C.D. 02-48

Employer Status Determination JUL 02 2002

RailTex, Inc.
StatesRail, Inc.

This is the decision of the Railroad Retirement Board regarding the status of RailTex, Inc., and StatesRail, Inc., as employers under the Railroad Retirement and Railroad Unemployment Insurance Acts.

In a decision by the Board dated December 19, 1997, the Board held that StatesRail was not an employer under the Acts because it was not under common control with its rail affiliates, for which it was a holding company (B.C.D. No. 98-1). In a decision dated February 17, 1995, RailTex was also held not to be an employer under the Acts (B.C.D. 95-25) for the same reason.

RailAmerica, Inc. acquired StatesRail and RailTex on January 4, 2002, and February 4, 2000, respectively. RailAmerica is not a covered employer under the Acts but is the parent company of a number of rail carriers[1].

RailAmerica advises that neither StatesRail nor RailTex has employees and that StatesRail provides no services. RailTex leases rail equipment that it subleases to its rail affiliates. RailAmerica contends that this subleasing does not constitute a service: "This is not service; it is an accounting pass through that avoids having either multiple equipment leases for each involved railroad or multiple party equipment leases."

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;

[1] As of May 2000: Cascade & Columbia River Railroad (B.A. No. 3671); Dakota Rail, Inc. (B.A. No. 3640); Delaware Valley Railway Company (B.A. No. 3384); Huron & Eastern Railroad Company (B.A. No. 3267); Minnesota Northern Railroad, Inc. (B.A. No.4648); Otter Tail Valley Railroad, Inc. (B.A. No. 3654); Plainview Terminal Company (B.A. No. 4863); Rail Operating Support Group, Inc. (B.A. No. 9533); Saginaw Valley Railway Company (B.A. No. 3282); South Central Tennessee Railroad Company, Inc. (B.A. 5561); St. Croix Valley Railroad Company (B.A. No. 2646); Ventura County Railroad Company (B.A. No. 2786); and West Texas & Lubbock Railroad Company, Inc. (B.A. No. 2871).

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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).

Since they are now owned by RailAmerica, which is also the parent company of a number of rail carrier employers, the Board finds that both StatesRail and RailTex are under common control with rail carriers. RailAmerica advises that StatesRail provides no services. Accordingly, the Board finds that StatesRail is not an employer under the Acts.

RailTex, however, leases rail equipment, both locomotives and rolling stock that are subleased to and used by railroads within the corporate group. A majority of the Board finds that the obtaining of rail equipment for rail carriers constitutes service in connection with rail transportation. Even if the only purpose of RailTex's leases is one of convenience through consolidation of leases, a majority of the Board finds that fulfillment of that purpose would constitute service in connection with rail transportation. The Management Member dissents from the finding that RailTex provides service in connection with rail transportation because leasing is not a service in connection with rail transportation under the decision in Itel Corporation v. U. S. Railroad Retirement Board, 710 F.2d 1243 (7th Cir. 1983).

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Accordingly, it is the determination of a majority of the Board that RailTex became an employer covered under the Acts effective as of the date of its acquisition by RailAmerica, February 4, 2000.

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V. M. Speakman, Jr.

Jerome F. Kever ***(Dissenting in part)***