B.C.D. 02-65

SEP 06 2002

EMPLOYER DETERMINATION
Bighorn Divide & Wyoming Railroad, Inc.

This is a determination of the Railroad Retirement Board concerning the status of Bighorn Divide & Wyoming Railroad, Inc. (BD&WRR) as an employer 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).

In Surface Transportation Board (STB) Finance Docket No. 34195, decided May 15, 2002, BD&WRR filed a verified notice of exemption to operate an approximately 8 mile line of track between Lost Cabin and Lysite, Wyoming formerly owned and operated by Bad Water Line LLC (B.A. No. 2792), and to acquire from Bad Water Line a trackage rights agreement over an additional 23 miles of track owned by Burlington Northern Santa Fe Railway between Lysite and Shobun, Wyoming. The STB decision stated that BD&WRR and Bad Water Line intended to consummate the transaction on or after May 1, 2002. See: Bighorn Divide & Wyoming Railroad Inc. - Acquisition and Operation Exemption—Rail Lines of Bad Water Line Inc., et. al 67 Fed. Reg. 35843, May 21, 2002.

Information regarding BD&WRR was provided by Mr. Marvin Leonhardt, Chief Financial Officer of BD&WRR. According to Mr. Leonhardt, BD&WRR filed articles of incorporation with the Wyoming Secretary of State on April 17, 2002; and all employees of Bad Water Line Railway LLC became employees of BD&WRR on June 1, 2002. Mr. Leonhardt also stated that Bad Water Line continues to exist solely as title holder to real estate for tax purposes, and that ownership of both entities remains the same.[1] However, Bad Water Line Railway LLC has changed its name to BDW LLC.[2]

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[1] In B.C.D. 00-40, which determined Bad Water Railway LLC to be an employer under the Acts, ownership was stated as: Ron Vosika 29%, Jim King 29%, Linda Vosika 12%, Linda King 12%, Cliff Root 7%, Steve Herkal 6%, and Tom Kasper 5%.

[2] The continuing coverage status of Bad Water Line Railway, LLC is considered in a separate Board determination.

Bighorn Divide & Wyoming Railroad, Inc.

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, as does section 3231 of the Railroad Retirement Tax Act.

The evidence of record establishes that BD&WRR is a rail carrier operating in interstate commerce. Accordingly, it is determined that Bighorn Divide & Wyoming Railroad, Inc., became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act and its corresponding provision of the Railroad Unemployment Insurance Act effective June 1, 2002, the date as of which its first employee was first compensated. [Cf. Rev. Rule. 82-100, 1982-1 C.B. 155, wherein the IRS held that a company became an employer under the Railroad Retirement Tax Act on the date it hired employees to perform functions directly related to its carrier operations.]

Cherryl T. Thomas

Cherryl T. Thomas

V M Speakman, Jr.

V. M. Speakman, Jr.

Jerome F. Kever

Jerome F. Kever