B.C.D. 02-69

OCT 1 8 2002

Employer Status Determination - Reconsideration
Riverport Railroad, L.L.C.

This is the determination of the Railroad Retirement Board on reconsideration of its decision dated June 1, 2001 (B.C.D. No. 01-44) holding Riverport Railroad, L.L.C. (B.A. No. 4650), to be 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.) effective March 1, 1999. Mr. John D. Heffner, counsel for Riverport, has requested reconsideration of the Board's decision.

As stated in the Board's decision, Riverport operates as a switching railroad and connects with the Burlington Northern and Santa Fe Railway. Riverport stores out of service railcars for car owners. When the cars are recalled, Riverport delivers the cars to the interchange with the Burlington Northern and Santa Fe. Riverport also leases warehouses on the former army base to subtenants. The Board found that Riverport is a carrier operating in interstate commerce and held that it became an employer under the Acts effective March 1, 1999, the date as of which it first hired employees. This date was provided to the Board by Riverport's General Counsel in a letter dated February 14, 2001.

Mr. Heffner contends that the effective date for coverage of Riverport under the Acts should be some later date. He proposes May 1, 2000, when the freight tariff became effective or October 10, 2000, when Riverport moved its first carload of "revenue freight." Mr. Heffner also points out that Riverport first took possession of leased property March 30, 1999, and states that "It was not until September 10, 1999, that Riverport became a railroad common carrier subject to the federal Surface Transportation Board's (STB) jurisdiction when a notice of exemption for operating authority filed with that agency on September 3, 1999, took effect." (Finance Docket No. 33799.)

Mr. Heffner encloses a statement dated April 8, 2002 by Thomas Kamper, General Manager of Riverport, to the effect that the date employees were first hired by Riverport was June 1, 1999, and that the statement by Philip A. Jackman, General Counsel of Riverport, relied on by the Board, that employees were hired on March 1, 1999, was in error. Mr. Heffner submitted payroll records in support of this contention. Although, according to Mr. Kamper, operations began May 1, 1999[1], those operations "were limited to the solicitation of freight car storage business by then unsalaried management personnel compensated on a commission basis. As of June 1, 'operations' expanded to include the repair and rehabilitation of out of service railroad track and equipment." It is apparent that the repair and rehabilitation of rail track and equipment are required for the operation of freight transportation.

In a submission dated June 12, 2002, Mr. Heffner examines the background of Riverport. He states that the railroad terminal facilities that Riverport took over were originally owned and operated by the United States Army, and were leased by the Army to the Jo-Davies/Carroll County Local Redevelopment Authority (LRA); that when the LRA leased these facilities from the Army in December 1998 and entered into an operating sublease with Riverport in March 1999, Riverport was required as a condition of the lease transaction to create jobs and therefore hire some employees who had previously worked for the Army. Mr. Heffner points out that these employees had not been covered under railroad retirement

[1] This date is also referred to in the letter of February 14, 2001, from Mr. Jackman, wherein Mr. Jackman specifies March 1, 1999, as the date on which employees were first hired. However, a letter of March 13, 2000, from Mr. Jackman states that employees were first hired and compensated and operations began June 1, 1999.

when they worked for the Army and the LRA itself had never sought Surface Transportation Board (STB) authority to acquire the rail facilities. When Riverport took possession of the railroad it did not have any customers, and there was considerable deferred maintenance. Riverport then entered into car storage contracts and solicited tenants looking for warehouse property.

Mr. Heffner states that the initial duties of Riverport's original employees consisted of putting the railroad trackage in a condition suitable for the inbound and outbound movement of rail cars to be stored on its property as well as cleaning up the property. The original employees moonlighted for Riverport while working full time for the Army.

Riverport sought STB authority in September 1999 in order to attract "distribution customers to its warehouse facilities." However, Riverport was not ready to hold itself out as a common carrier until it could attract loaded rail car switching business and stated in its STB notice of exemption that it would commence operations "no sooner than September 10, 1999." Mr. Heffner concludes that Riverport's operations did not evolve from those of a warehouse operator and rail car storage facility to a common carrier short line railroad until 2000. It began soliciting potential shippers to locate on its tracks and began discussing marketing, pricing, and operating arrangements with the Burlington Northern Santa Fe Railway, at which time it published a tariff and in August 2000 signed its first lease with a warehouse customer with the potential to be a rail customer. Riverport has two customers which use its facilities to ship or receive freight in interstate commerce. Riverport handled its first loaded carload of revenue traffic October 10, 2000.

In his submission dated April 8, 2002, Mr. Heffner concedes that Riverport became subject to the jurisdiction of the STB September 10, 1999, and states that, "prior to October 10, 2000, Riverport's activities were limited to rehabilitating and preparing the leased facilities for future railroad service and storing freight cars for railroad leasing companies."

Internal Revenue Service Revenue Ruling 82-100, 1982-1 C.B. 155, concerns a case which is legally indistinguishable. That ruling concerned a company which hired employees on February 1, 1981, to perform functions directly related to its commencement of railroad carrier operations. The Interstate Commerce Commission approved the operation of the railroad effective March 1, 1981. The Ruling held that the company became an employer subject to taxes under the Railroad Retirement Tax Act on February 1, 1981, the date it hired employees to perform functions directly related to its carrier operations. This ruling is consistent with the long-term past practice of the Board.

The previous Board decisions cited by Mr. Heffner do not appear relevant to this case. The decision regarding GWI Switching Services, L.P. (B.C.D. No. 94-113) held that company not to be covered under the Acts because it was a private carrier that did not hold itself out to provide services to the public[2]. The work engaged in by Riverport prior to its beginning carrier operations was not that of a private carrier; that work was preparatory to its beginning carrier operations.

The Board's decision referred to by Mr. Heffner concerning Santa Cruz, Big Trees & Pacific Railway Company (B.C.D. No. 94-9) concerns a company which had previously been held to be a covered employer. On reconsideration, the Board held that the

[2] This decision was reversed on reconsideration when the company substantiated that it did hold itself out to the public and therefore was not a private carrier (B.C.D. No. 96-19).

company's tourist railroad operations should not be covered under the Acts, and that only the company's much smaller freight operations should be covered. Again, that decision appears to have no bearing on the instant case.

On reconsideration, the Board's decision dated June 1, 2001, holding Riverport to be an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act as of March 1, 1999, is amended to hold that Riverport became an employer June 1, 1999, the date as of which it first hired employees.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting in part)

MANAGEMENT MEMBER KEVER'S DISSENT

RIVERPORT RAILROAD, L.L.C.

I disagree with the majority's determination of June 1, 1999 as the effective date of coverage. The effective date of coverage should be September 10, 1999; the date Riverport's STB exemption for operating authority took effect. Prior to that date, Riverport's employees were performing non-common carrier functions.

Jerome F. Kever, Management Member