B.C.D. 02-83

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EMPLOYER STATUS DETERMINATION
Boothill & Western Railway Company

This is the determination of the Railroad Retirement Board concerning the status of Boothill & Western Railway Company (B&W), 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 B&W was provided by attorney Marc E. Kliewer, and by Brenda Kenton, Grain Division Manager of the Right Cooperative Association of Wright, Kansas (Cooperative).[1] According to a response from Mr. Kliewer sent by telefacsimile April 23, 2001, the B&W, which is owned by the Right Cooperative Association, acquired on September 1, 2000, approximately 26 miles of track in Kansas, running from Bucklin to Dodge City. The B&W interchanges with the Union Pacific Railroad at Bucklin and the Burlington Northern Santa Fe Railway at Dodge City. In Surface Transportation Board Finance Docket 33945, December 13, 2001, B&W filed a notice of exemption to acquire the line from the Dodge City Ford & Buklin Railroad Company. See: Boot Hill & Western Railway Co. LC – Acquisition Exemption – Dodge City Ford & Bucklin Railroad Company, December 13, 2000, 65 Fed. Reg. 77959.

Mr. Kliewer advised in April 2001 that although B&W had never had any employees on its payroll, eight train movements had occurred since September 2000, with B&W equipment operated by an employee of the parent Cooperative. Ms. Kenton confirmed by letter dated August 29, 2002 that "The railroad has no full time employees and is presently operating on an as needed basis only using the employees of the Right Cooperative Association."

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

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[1]According to the Right Cooperative Association website (rightcoop.com), the Cooperative ships grain by truck and rail transportation, operates feed mills, processes soy beans into meal and oil, operates 15 trucks to move grain and commodities through the United States, assists farmers in crop production, sells petroleum products, and operates an auto repair and farm supply store.

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> (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;

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. 351(a) and (b), contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3231.

The evidence of record establishes that B&W is a carrier operating in interstate commerce. Accordingly, it is determined that B&W is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231a(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of September 8, 2000, the date as of which it acquired the rail line and commenced operations.

The evidence available is that B&W is not staffed with administrative or operating employees, but that employees of the Cooperative run the locomotive and conduct duties associated with train movement such as switching and signaling as necessary. While B&W nominally has no employees, it nevertheless does conduct train operations. The last question is therefore whether B&W has employees which it must report to the Board within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

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(ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also the way he performs such work. With respect to locomotive engineers, the Board notes that the Federal Railway Safety Act and regulations promulgated thereunder prescribe minimum standards for training, testing, certification and monitoring. See 49 U.S.C. 20135, and regulations of the Federal Railroad Administration (FRA) at 49 CFR Part 240. The FRA regulations further specify that a contractor for a railroad who performs for a railroad any function covered by the regulations must perform that function in accordance with the requirements. 49 CFR 240.3(c). These standards represent the judgment of Congress that the paramount importance of safe railroad operation requires oversight of engineer qualifications on a national basis. Cf. Peters v. Union Pacific Railroad Co., 80 F.3d 257, 261 (8th Cir., 1996) (pursuant to former 45 U.S.C. 434, now codified as 49 U.S.C. 20106, FRA locomotive engineer licensing procedures pre-empt engineer's claim under state law against railroad for withholding certificate).

It is the opinion of the Board that the duties of a locomotive engineer are so integral to the operation of a rail carrier that the railroad must retain control over the manner in which these individuals perform their service. It is further the opinion of the Board that the operation of rail service requires that B&W must direct and control the duties of a brakeman/switchman as well. See Railway Express Agency v. Railroad Retirement Board, 250 F. 2d 832, (7th Cir., 1958), (the nature of the employer's business requires retention of direction and control of non-exclusive commission express agents).

Accordingly, in the opinion of the Board, the control test in paragraph (A) is met with respect to individuals providing train operation services to the B&W, including locomotive engineers, switchmen, and brakemen. Service and

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compensation attributable to service performed for B&W is to be reported by B&W for these individuals.

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