B.C.D. 04-16

MAR 22 2004

EMPLOYER STATUS DETERMINATION
Mississippi Tennessee Railroad LLC
Mississippi Tennessee Holdings LLC
CGX, Incorporated

This is the determination of the Railroad Retirement Board concerning the status of Mississippi Tennessee Railroad LLC (MsTn RR), Mississippi Tennessee Holdings LLC (MsTn Holdings), and CGX, Incorporated, as employers 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.). The status of these companies has not previously been considered by the Board.

In Surface Transportation Board (STB) Finance Docket No. 34355, decided June 5, 2003, MsTn RR filed a verified notice of exemption to operate an approximately 87.7 mile line of track between Houston, Mississippi and Middleton, Tennessee, formerly owned and operated by Mississippi Tennessee Railnet, Inc., (Ms Tn Railnet) (B.A. No. 5570). The STB decision stated that MsTn RR intended to consummate the transaction on or after May 27, 2003. See: Mississippi Tennessee Holdings, LLC and Mississippi Tennessee Railroad LLC--Acquisition and Operation Exemption—Rail Lines of Mississippi Tennessee Railnet, Inc, Finance Docket No. 34355, 68 Fed. Reg. 35255, June 12, 2003.

Additional information regarding MsTn RR and MsTn Holdings was provided by Mr. Barry S. McClure, Assistant Secretary, Ironhorse Resources, Inc. Ironhorse Resources is a subsidiary of CGX, which Mr. McClure describes as the holding company for a series of asset holding companies, including MsTn Holdings.[1] Mr. McClure states Ironhorse Resources owns MsTn RR. According to Mr. McClure, MsTn Holdings purchased the entire rail line of MsTn Railnet, and leases it to MsTn RR. MsTn RR interchanges with the Burlington Northern Santa Fe Railroad at New Albany, Mississippi; with the Norfolk Southern Railway at Middleton; and with the Kansas City Southern Railway at Corinth, Mississippi. MsTn RR hired 3 employees of the former operator and began operating May 31, 2003. MsTn Holdings has no employees, and evidently exists solely to hold title to the rail line. A companion filing to Mississippi Tennessee Holdings, LLC, supra, further explained that CGX is a privately held corporation, owned by Gregory and Connie Cundiff. See: Gregory B. Cundiff, Connie Cundiff, CGX, Inc., and Ironhorse Resources, Inc.—Continuance in Control Exemption—Mississippi Tennessee Holdings, LLC and Mississippi Tennessee Railroad, LLC, Finance Docket No. 34356, 68 Fed. Reg. 35254, June 12, 2003.

1 Ironhorse Resources itself owns Railroad Switching Service of Missouri, which operates St. Louis Railroad (BA 4397); Southern Switching Company, which operates the Lone Star Railroad (BA 2868); Rio Valley Switching Company, which operates the Rio Valley Railroad (BA 2869); and Border Transload & Transfer, Inc., which operates Las Cruces New Mexico Transload. The status of Ironhorse Resources and Border Transload & Transfer has not been considered.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(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;
>
> (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).

The evidence of record establishes that MsTn RR is a rail carrier operating in interstate commerce. The Board has previously determined that the status of Mississippi & Tennessee Railnet, Inc. as a rail carrier employer under the Acts terminated June 30, 2003, the last date employees were compensated following sale of the rail assets to MsTn RR. See: B.C.D. 03-68, *Mississippi & Tennessee Railnet, Inc.* Accordingly, it is determined that Mississippi Tennessee Railroad LLC 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 May 31, 2003, the date as of which it began operations.

Neither CGX nor MsTn Holdings is a carrier by rail. However, CGX, the parent of MsTn Holdings, is also parent company to Ironhorse Resources, which owns MsTn RR. CGX thus controls both MsTn Holdings and, through ownership of Ironhorse Resources, the MsTn RR. See regulations of the Board at 20 CFR 202.4. A decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of section 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). Though CGX is privately held by two individuals rather than publicly owned as the parent holding company was in Union Pacific Corporation, a majority of the Board believes the Union Pacific case is indistinguishable from the facts presented by CGX. See B.C.D. 97-49 *North American Railnet* (privately held parent company not under common control with subsidiary); and B.C.D. 94-40, *CCP Holdings, Inc.* (incorporating representations by three shareholders of privately held parent company to the former Interstate Commerce Commission in Donald R. Wood, Jr., CCP Holdings, Inc., Chicago, Central & Pacific Railroad Co. and Cedar River Railroad Company—Corporate Family Exemption, Finance Docket No. 32373, 58 Fed. Reg. 59277, November 8, 1993.) Accordingly, a majority of the Board determines that CGX is not

under common control with its rail carrier subsidiaries, and CGX is not a covered employer under the Acts.

However, MsTn Holdings is owned by CGX, which also, through ownership of Ironhorse Resources, owns MsTn RR. Accordingly, as control of both MsTn Holdings and MsTn RR ultimately lies with CGX, the Board finds that MsTn Holdings is under common control with MsTn RR. See regulations of the Board at 20 CFR 202.5 and Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358 (10th Cir., 1942). If MsTn Holdings performs a service in connection with the transportation of property by rail, it is a rail carrier affiliate employer under section 1(a)(1)(ii) of the RRA and 1(a) of the RUIA.

The evidence is that CGX utilized MsTn Holdings to acquire the rail line to be used by MsTn RR in its rail carrier business. Early in the administration of the Railroad Retirement Act of 1937, the Board considered the status of the Rock Island Improvement Company. See Board Order 39-766, adopting the opinion of the General Counsel in Legal Opinion L-39-822. The operation of the Improvement Company was stated in that opinion as follows:

> One of the chief purposes of the Improvement Company was to permit acquisition of property, such as land, railway terminals and equipment, in such manner that the title would be in the Improvement Company but the use thereof be made by the [affiliated] Railway Company. * * *
>
> The Improvement Company has not engaged in any outside commercial business. In fact, it has not engaged in business activity of any sort except that for a few years it operated certain railroad owned coal properties in Oklahoma, the entire output of which was taken and used by the Railway Company for company fuel. Its principal, if not sole, function, has been to take title to and hold various properties for and on behalf of the Railway Company. Practically all of these items of property are used for common carrier purposes by the Railroad Company. (emphasis in original).

There is no evidence that MsTn Holdings engages in any outside commercial business. Rather, the record shows "the principal, if not sole function" is to hold title to the rail line used by MsTn RR. Accordingly, the Board finds MsTn Holdings, by owning the rail line of the affiliated rail carrier MsTn RR, performs a service in connection with the transportation of property by rail. See regulations of the Board at 20 CFR 202.7., and Southern Development Co. v. Railroad Retirement Board, 243F. 2d 351 (8th Cir., 1957). As it is under common control with MsTn RR, and performs a service in connection with railroad transportation, MsTn Holdings is a covered employer under the Acts, effective May 31, 2003, the date the rail carrier began operations.

It should be noted that any officer of CGX who is also an officer of CGX covered subsidiaries may be considered an employee of the subsidiary for any work done for the subsidiary. Similarly, any employee of CGX that is performing day to day work for any carrier or affiliate covered under the Acts may be considered an employee of the carrier or affiliate.

Michael S. Schwartz

V. M. Speakman, Jr.
(*Dissenting in part in separate opinion*)

Jerome F. Kever

DISSENTING OPINION OF
V. M. SPEAKMAN, JR.
EMPLOYER STATUS DETERMINATION
MISSISSIPPI TENNESSEE RAILROAD LLC
MISSISSIPPI TENNESSEE HOLDINGS LLC
CGX, INC.

While I agree any officer of the parent company CGX, Inc. who is also an officer of one its covered subsidiaries, and employees of CGX, Inc. who are involved in the day-to-day operations of the subsidiaries should be considered employees of the carrier, I would also find that CGX, Inc. is under common control with Mississippi Tennessee Railroad LLC, its subsidiary carrier.

The majority found that CGX was not under common control with its subsidiary carrier based upon the decision in *Union Pacific v. United States, 5 F.3d 523 (Fed. Cir. 1993.* In *Union Pacific* the court held that for purposes of administration of the Railroad Retirement Tax Act, a parent company cannot be said to be under common control with its parent company. I will not take the time here to debate the merits of that decision, but only point out that, even if one assumes that *Union Pacific* was correctly decided, there are limits to its application in light of the Board's own regulations. Specifically, where the parent and subsidiary are owned by a small number of shareholders, in the case of CGX, two, in my view *Union Pacific* is not applicable and the parent and subsidiary may be said to be under common control. In such a case the common control exists because the shareholders of the parent also directly control the subsidiary. The parent and subsidiary are essentially one economic enterprise. This is not necessarily true in the case of a publicly held corporation where ownership is generally too diffuse to allow control of the organization to be directly vested in the shareholders. Consequently, I would find that section 202.5 of our regulations controls. That section provides that a carrier and non-carrier are under common control when the power to direct the business of these companies is vested in the same person or persons. Thus, CGX, Inc. is under common control with its subsidiary carrier and to the extent CGX performs services in connection with railroad transportation would be a covered employer.

VM Speakman Jr.
V. M. Speakman, Jr.

3-17-04
Date