B.C.D. 04-26

EMPLOYER STATUS DETERMINATION

MAY 1 7 2004

The WV Southern Railway Co.
The Railroad Company, Inc.

This is the determination of the Railroad Retirement Board concerning the status of The Railroad Company, Inc. (TRC) and The WV Southern Railway Co. (WVSR) as employers 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).

According to Surface Transportation Board Finance Docket No. 34384, decided August 7, 2003, TRC and its wholly owned subsidiary WVSR jointly filed a verified notice of exemption to acquire and operate a 12-mile rail line owned by CSX Transportation (CSXT) (B.A. No. 1524). The rail line extends from milepost 0.00 at Thurmond, to milepost 12.0 at Mt. Hope, in Fayette County, West Virginia.

Information regarding TRC was provided by Roger S. Lipscomb. According to Mr. Lipscomb, both he and Mr. Jon Dragan own TRC. TRC, a privately held corporation, was incorporated on September 17, 2002 and began operations on August 18, 2003. Mr. Lipscomb stated that TRC does not have a CEO; however, both he and Mr. Dragan serve as operating partners. He stated that TRC was formed to negotiate and purchase from CSXT the 12 miles of rail line discussed above. Mr. Lipscomb advised that although TRC has no employees, TRC formed the WVSR, a wholly-owned subsidiary, to perform freight railroad operations over this line. He stated that WVSR, which began operations on the rail line on August 18, 2003, provides switching services for shippers on the rail line. He further stated that WVSR interchanges freight with CSXT.

Mr. Lipscomb also provided information pertaining to TRC's subsidiary, The WV Southern Railway Company, a privately held corporation. According to Mr. Lipscomb, WVSR was incorporated on July 16, 2003 and began rail operations on August 18, 2003. Mr. Lipscomb and Mr. Dragan also serve as operating partners of WVSR. WVSR employs four (4) full time employees and two (2) part time employees. WVSR's employees were first compensated on September 1, 2003. WVSR employees provide freight operations pursuant to a License and Assumption Agreement between TRC and WVSR.

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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.

In applying section 1 of the RRA and the RUIA, the evidence of record establishes that WVSR is a rail carrier operating in interstate commerce. Accordingly, it is determined that The WV Southern Railway Company became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act and the corresponding provision of the Railroad Unemployment Insurance Act effective August 18, 2003, the date it began rail operations.

With respect to TRC, the Board notes that in its decision regarding Railroad Ventures, Inc. (B.C.D. 00-47), the Board held that an entity that has STB authority to operate a rail line but leases or contracts with another to operate the line in question, is covered under the Acts administered by the Board unless the Board determines that the entity is not a carrier. The Board enunciated a three-part test in B.C.D. No. 00-47 to be applied in making this determination. An entity that leases a line to another company or contracts with another company to operate the line, is a carrier under the Railroad Retirement Act unless the Board finds that all three of the following factors exist: 1) the entity does not have as a primary business purpose to profit from railroad activities; 2) the entity does not operate or retain the capacity to operate the rail line; and 3) the operator of the rail line is already covered or would be found to be covered under the Acts administered by the Board.

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The Verified Notice of Exemption filed by TRC and WVSR in Finance Docket No. 34384 indicates that the projected annual revenue of the subject rail line would not exceed $5 million. There is no information that would indicate that TRC's intent in purchasing the line was primarily designed to preserve rail service rather than profit from railroading activities. Therefore, the Board finds that TRC is an enterprise which is intended to profit from railroad activities and that it is a carrier under the Railroad Ventures test. The Board finds further that TRC became an employer under the RRA and the RUIA effective August 18, 2003, the date railroad operations began on that rail line.

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