

EMPLOYER STATUS DETERMINATION

Port of Palm Beach District Decision on Reconsideration

This is the determination on reconsideration of the Railroad Retirement Board concerning the status of the Port of Palm Beach District (BA No.4567).

Procedural and Historical Background

In Legal Opinion L-89-156, dated December 8, 1989, the Port of Palm Beach District (the "District") was held to be a covered 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) with respect to its rail operations, effective March 1, 1989. Legal Opinion L-89-156 stated that the District is a special taxing district established in 1915 under the Laws of Florida. On March 19, 1946, a Certificate of Public Convenience and Necessity was issued by the Interstate Commerce Commission (ICC), authorizing the District to operate terminal railroad facilities which it had apparently already been operating for several years. Since the District had operated a railroad for more than forty years before the Railroad Retirement Board (RRB) inquired into the question of whether it was covered by the RRA and the RUIA, L-89-156 determined to start coverage under the Acts effective March 1, 1989, the first day of the month after the month in which the issue of employer status was first raised.

In a petition dated June 7, 1990, the District submitted a request that the RRB either defer until a prospective date, or stay the effect of, the ruling in L-89-156 until the ICC ruled on the District's Petition for Exemption from ICC regulation. On November 7, 1991, in Finance Docket No. 31694, the ICC issued a decision exempting the District from the obligations of 49 U.S.C. Subtitle IV (the former Interstate Commerce Act, amended by P.L. 104-88). The ICC decision became effective December 18, 1991.

Discussion

Legal Opinion L-89-156 found that the District was an employer under section 1 of the RRA and section 1 of the RUIA. At the time that Legal Opinion L-89-156 was issued, Section 1(a)(1)(i) of the RRA defined an "employer" under the Act to include:

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any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49 [(45 U.S.C. §231(a)(1)(i)].

Section 1 of the RUIA contained the same definition. Subchapter 1 of chapter 105 of Title 49 was that portion of the Interstate Commerce Act governing ICC jurisdiction over railroad transportation. The ICC Termination Act of 1995 (P.L. 104-88) abolished the ICC and transferred many of its functions to a new entity, the Surface Transportation Board, within the Department of Transportation. P.L. 104-88 did not affect the coverage provisions of the RRA or the RUIA, but it did make a conforming amendment to the definition of "employer" in those Acts. Section 1(a)(1)(i) of the RRA now provides that "employer" includes:

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.

Essentially the same amendment was made in section 1 of the RUIA.

In its decision in Finance Docket No. 31694, the ICC noted that the District is engaged in rail switching only as an ancillary activity to its main governmental purpose, which is the administration of the maritime facilities of the Port of Palm Beach. The ICC concluded that, "Since the Port does not hold itself out to the public as a railroad, no need exists for it to be subject to regulation as a common carrier."

The Board has followed the distinction made by the Interstate Commerce Commission between common and private carriers, which is also judicially supported in The Tap Line Cases, 234 U.S. 1, 58 L.Ed. 1185 (1913). See, also, International Detective Service, Inc. v. Interstate Commerce Commission, 595 F.2d 862, 865 (D.C. Cir. 1979). The definition of "employer" in both the RRA and the RUIA encompasses a common carrier by railroad; *i.e.*, one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular

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instance only, to transport property or persons from place to place. A private carrier thus undertakes not to carry for all persons indiscriminately, but rather to transport only for those with whom the private carrier sees fit to contract individually. [See GWI Switching Services, L.P., B.C.D. No. 96-19, decision on reconsideration, January 26, 1996, and B.C.D. No. 94-113, initial decision, December 6, 1994.]

Since the ICC found that the Port of Palm Beach District does not hold itself out to the public as a common carrier by railroad, the Board finds that the District is not now and never has been a rail carrier employer under the RRA and the RUIA. The decision in Legal Opinion L-89-156 is reversed.

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