EMPLOYER STATUS DETERMINATION
Pacstan, Inc.
Iron Horse Development, LLC

FEB 3 1999

This is the determination of the Railroad Retirement Board concerning the employer status of Pacstan, Inc. (Pacstan) and Iron Horse Development, LLC (IHD), 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).

Mr. Todd Leinbach, controller of Pacstan, Inc., provided information regarding Pacstan and IHD. Additional information was obtained from the coverage files of Pacific Standard Corporation (PSC) (former BA No. 9621), the Columbia Basin Railroad Company (CBRC) (BA No. 2644), and the former Washington Central Railroad Company, Inc. (WCRC) (former BA No. 3651)[1]. Further information was obtained from the audit files of the former WCRC.

Pacstan, Inc.

According to information provided by Mr. Leinbach, Pacstan is a management company which provides or provided management services to IHD, the Spirit of Washington (SPIRIT)(an excursion train), CBRC, ATV,LLC d/b/a/ Prudential Almon Realty (ATV), and the former WCRC. In addition, the company owns and leases a set of passenger cars to the Spirit of Washington. Mr. Leinbach stated that Pacstan incorporated and began operations on January 1, 1992 and has seven employees. The officers are Nicholas B. Temple, President (48% owner), and his sons, Eric Temple, Vice President (26% owner), and Nicholas B. "Brig" Temple, Jr., Secretary (26% owner).

Mr. Leinbach stated that interaction between Pacstan and a covered railroad varies from day to day, month to month, year to year, and by individual. He stated that "probably 25%" of Pacstan's management services are for a covered railroad. Additionally, he estimated that approximately 30% of revenue is attributable to a covered railroad. Management services performed by Pacstan include processing of payroll, accounts payable, monthly financial statements and analysis, tax reporting, review of general direction and support of minor and major issues, and review of current and future business development.

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[1]WCRC was a covered rail carrier employer from October 12, 1986 to December 4, 1996. See B.C.D. 98-3, issued January 28, 1998. CBRC was held to be a rail carrier employer effective December 4, 1996 in B.C.D. 97-33, issued February 26, 1997.

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).

Pacstan is not a carrier by rail within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether Pacstan is an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii).

Eric Temple and Nicholas B. Temple own 52 percent of Pacstan. Together, they also own 100 percent of the stock of the CBRC, a covered class III rail carrier employer under the Acts. Accordingly, the Board finds that Pacstan is under common control with CBRC.

Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

> The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is

> reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Thus, if Pacstan performs a "service in connection with" railroad transportation, it is a covered employer under the Acts.

Pacstan, as a provider of management services, clearly enhances the revenues of CBRC. A 1938 opinion of the Board's General Counsel, L-38-650, adopted in part by Board Order 39-291, states that when deciding if a company is performing any service in connection with railroad transportation, each situation should be examined on a case by case basis considering such factors as the physical relation of the company to its affiliate carrier; the history or the origin of the company; for whose benefit the company's operations are conducted; and the amount of business the company does with the general public. Thus, initially we shall examine whether Pacstan is performing any service in connection with railroad transportation within the framework provided in L-38-650.

Physical Location

Physical proximity is relevant to show integration of operations and subordination of enterprise. Pacstan and CBRC both have corporate offices at the same location at 6 East Arlington in Yakima, Washington 98901. Mr. Todd Leinbach, who supplied the Board with information about Pacstan, is the Controller of Pacstan and CBRC. The physical proximity of these two companies distinguishes this case from the facts in Board Coverage Decision (B.C.D.) 96-82, In the Matter of CSX Intermodal, Inc. (hereafter CSXI), where CSXI and its affiliate railroad had corporate offices in two different states (Maryland and Florida). More important than physical proximity for these purposes in this case is whether Pacstan and CBRC have any officers in common: The President of CBRC, Mr. N. B. "Brig" Temple, Jr., and the Vice-President of CBRC, Mr. Eric Temple, are officers of Pacstan as well. Mr. Eric Temple is the Vice President of Pacstan and Mr. Nicholas B. Temple, Jr. serves as the Secretary of Pacstan. This also differs from the situation in B.C.D. 96-82, where CSXI and its affiliated rail carrier had no officers in common and no officers or senior managers of CSXI reported to anyone at the affiliated railroad carrier.

History and Origin of Pacstan

Pacstan is a management company providing services to IHD, SPIRIT, and CBRC. Pacstan was incorporated and began operations on January 1, 1992. It has no history of being independent of IHD, SPIRIT, or CBRC. Again, this situation differs from that of CSXI in that CSXI or its direct antecedents had an independent existence.

For Whose Benefit Does Pacstan Operate

Information provided by Mr. Leinbach in December 1997 indicates that Pacstan is a management company which provides services only to its affiliates: Iron Horse Development, LLC; Spirit of Washington; Columbia Basin Railroad Co., Inc.; and the former Washington Central Railroad Co., Inc. In addition, Pacstan owns and leases a set of passenger cars to its affiliate, the Spirit of Washington. Mr. Leinbach indicated that approximately 25% of Pacstan's management services are "for a covered railroad" and that approximately 30% of its revenue is "attributed to a covered railroad." Since, according to Mr. Leinbach, Pacstan conducts business only with its affiliates, the Board finds that Pacstan provides 25% of its management services for its carrier affiliate (CBRC) and receives 30% of its revenue from its carrier affiliate (CBRC).

Court opinions regarding similar services support the conclusion that performance of this function constitutes a service in connection with railroad transportation. In Railroad Retirement Board v. Duquesne Warehouse Co., 149 F. 2d 507 (D.C. Cir. 1945), aff'd 326 U.S. 446, 90 L.Ed. 192, 66 S.Ct. 238 (1946), the Court of Appeals held that a warehouse corporation owned by a railroad and engaged in loading and unloading railroad cars and other handling of property transported by railroad, and in other activities which enabled the railroad to perform its rail transportation more successfully, was performing "services in connection with" the transportation of property by railroad and therefore an employer under the Railroad Unemployment Insurance Act. The Court of Appeals quoted approvingly from the opinion of the Board that the carrier affiliate coverage provision includes services which are an integral part of or closely related to the rail transportation system of a carrier. The Board stated that the provision includes within its coverage carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, and also carrier affiliates engaged in activities which enable a railroad to perform its rail transportation. Examples of the activities include maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

In Railway Express Agency v. Railroad Retirement Board, 250 F.2d 832 (7th Cir. 1958), the Court of Appeals for the Seventh Circuit held that individuals working as "merchant agents" for REA were employees of that company (and not independent contractors); the merchant agents represented REA as agents and conducted express business, essentially a marketing or sales function. That decision was partly based on the Court's finding that the merchant agent's work is an integral part of REA's service. See also Standard Office Bldg. Corp. v. U.S., 819 F. 2d 1371, 1376 (7th Cir. 1987), where the Court, quoting the legislative history of the Railroad Retirement Act stated that the Act covers "substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States. S. Rep. No. 818, 75th Cong. 1st Sess. 4 (1937)."

The Court of Appeals for the Seventh Circuit, in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), refused to limit the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts to services which are covered under the Interstate Commerce Act and rebutted contentions to the contrary deriving from the legislative history of the Railway Labor Act and the Railroad Retirement Act. Livingston Rebuild Center, which was held to be an employer under the Acts, rebuilt locomotives and other rolling stock, about 25 percent of its business being with its affiliated carrier.

In Canadian Pacific Finance, Inc., B.C.D. 93-69, financial services such as tax, cash management, and internal audit, were performed by a company for its affiliated railroads. A majority of the Board found these services to be in connection with railroad transportation. These are similar, if not identical, to the services which Pacstan provides to its subsidiaries.

In Interstate Quality Services, Inc. d/b/a/ Interstate Reloads, Inc. v. Railroad Retirement Board, 83 F.3d 1463, at 1465 (D.C. Cir. 1996), the Court approved the decision of the Board holding the company to be an employer under the Acts since it provided a steady source of services to its customers, including its rail carrier affiliate. Similarly, Pacstan supplies a steady source of transportation services to its rail carrier affiliates.

Business with the Public

Approximately half of Pacstan's business is conducted with its affiliates, i.e. CBRC and IHD (which is determined not to be a covered employer later in this decision). There is no business with a covered employer other than CBRC. Therefore, Pacstan is not

providing its product, which is basically general financial management assistance, in its regular course of business to all railroads, but is primarily benefitting IHD and CBRC. It can reasonably be concluded that Pacstan would not be in business were it not for the connection of the services it performs for IHD and CBRC.

The foregoing criteria show that Pacstan is a management company, which does approximately 30 percent of its business with its affiliate rail carrier. Based on the foregoing criteria, it is the conclusion of the Board that Pacstan is under common control with and performing a service in connection with railroad transportation for CBRC.

Therefore, it is determined that Pacstan became an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1992, the date it was incorporated and commenced operations.

Iron Horse Development, LLC

Information provided by Mr. Leinbach stated that IHD was incorporated on December 1, 1994 and began operations on January 1, 1995 and has five employees. IHD can be described as a real estate lease management company, although it should be noted that virtually all of its contracts involve rail transportation. IHD primarily manages real estate for BNSF Acquisition, Inc. (BAI) (BA No. 3669), a wholly owned subsidiary of BNSF Corp., which is the parent company of the Burlington Northern and Santa Fe Railway. IHD also negotiates leases and permits for CBRC, its rail carrier affiliate. The real estate managed for the railroads consists of leases to rail shippers, leases to non-rail shippers, longitudinal wireline permits, private crossing permits, building space leases, etc.
Mr. Leinbach stated the business use of the property is very diverse, ranging from a lease of land for pasturage to leases of land for warehouse or production facilities.
Mr. Leinbach stated that "virtually 100%" of IHD's revenue was from the management of railroad property.

According to Mr. Leinbach, IHD holds a real estate management agreement with BAI. IHD has contracted out to ATV, LLC, d/b/a Prudential Almon Realty (ATV), to provide the actual management of any railroad leases and permits. He stated that ATV employees negotiate, prepare, and process the necessary lease, permit and other forms to be signed by BAI and the lessee. Further, he added that ATV employees also collect fees owed, solve various lease problems, and communicate with BNSF employees regarding various issues.

Nicholas B. Temple, Jr. and Eric Temple each own 40% of IHD and 50% of CBRC, a class III covered employer under the Acts. Accordingly, IHD is under common control with CBRC.

There is no evidence that IHD is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. However, since it is under common control with CBRC, a rail carrier employer under the RRA and the RUIA, we must consider whether IHD is an employer under section 1(a)(1)(ii). The question thus becomes whether IHD provides a service in connection with railroad transportation.

The record suggests that all of the real estate leases by IHD have a rail carrier involved. Virtually 100 percent of IHD's revenue is derived from the management of railroad property. IHD provides real estate management for WCRC (prior to December 1996), CBRC and BAI. Since, according to Mr. Leinbach, "virtually 100%" of IHD's revenue is from the management of railroad property for WCRC (prior to December 1996), BAI and CBRC, it follows that IHD is principally engaged in services for those railroads.

Additional information requested and received from Mr. Leinbach on July 20th and July 28th, 1998, regarding the breakdown of IHD's revenue for the period 1995 through May of 1998, is as follows:

	1995	*1996*	*1997*	*May 1998*
BAI	1,008	28,373	528,919	251,758
WCRC	645,518	582,991	54,155	14,910
CBRC	-	1,305	32,438	13,086
Temples (Nicholas B. & Patricia)	-	-	-	-
TOTALS	$646,526	$612,669	$615,512	$279,754

The information provided regarding IHD's revenue shows that until WCRC merged with BAI in December 1996, more than 95 percent of IHD's revenue was received from WCRC. Following the merger of WCRC into BAI in December 1996, revenue received by IHD decreased to under 9% from WCRC and was approximately 5 percent from CBRC. Figures through May of 1998, indicate the revenue received from CBRC remains somewhat less than 5 percent.

In the additional information provided by Mr. Leinbach, regarding IHD's revenue from BAI and CBRC, it appears that since 1997, between 86% and 90% of IHD's revenue has

come from the leasing of railroad property to BAI. Further, it appears that a bit less than 5 percent of IHD's current revenue is now derived from its rail carrier affiliate, CBRC (approximately 4.7% through May 1998).

In VMV Enterprises (Board Coverage Decision 93-79) a majority of the Board held that a non-carrier which derived only 2.5 percent of its total business from its affiliated carrier, and which performed only 3.2 percent of that affiliate's repair work, was not a covered employer under the Acts. The amount of business conducted by VMV Enterprises with its rail carrier affiliate is similar to the amount of business that IHD has conducted with its rail carrier affiliate after December 4, 1996. Specifically, since WCRC merged into BNSF Acquisition, Inc., IHD has conducted the major part of its business with a rail carrier which is not its affiliate. Approximately only 5% of IHD's business has been conducted with its remaining rail carrier affiliate, CBRC.

In view of the information summarized above, the Board finds that IHD became a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1995, the date on which it commenced operations. Further, a majority of the Board, Labor Member Speakman dissenting, determines that IHD ceased to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts December 4, 1996, the date WCRC merged into BAI.

Cherryl T. Thomas

V. M. Speakman, Jr. (Dissenting in part)

Jerome F. Kever

DISSENT IN PART OF
V. M. SPEAKMAN, JR.
ON COVERAGE DETERMINATION OF
PACSTAN, INC. &
IRON HORSE DEVELOPMENT, LLC

I concur with the decision that Pacstan, Inc., became an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (Acts) effective January 1, 1992, and that Iron Horse Development, LLC (IHD) became an employer under the Acts effective January 1, 1995. I do not agree with the majority's determination that IHD ceased to be an employer December 4, 1996, the date one of its rail carrier affiliates, Washington Central Railroad Company, Inc., (WCRC) merged into BNSF Acquisition Inc., (BAI).

It has been established that IHD is a real estate lease management company with "virtually 100%" of its revenue derived from management of rail property. It is undisputed that IHD is under common control with the Columbia Basin Railroad Company, Inc., (CBRC) a rail carrier under the Acts and that it is principally engaged in services for WCRC (prior to December 1996), BAI, and CBRC, all covered employers under the Acts.

This decision is compared to a previous Board decision, that of VMV Enterprises, Inc., (VMV) where the majority of the Board (Labor Member dissenting) found that a non-carrier which derived only a small percentage of its total business from its carrier affiliate was not covered under the Acts. Since that decision to a large extent formed the basis for the current case, VMV should be analyzed, along with my dissent on that decision.

Section 1(a)(1)(ii) of the Railroad Retirement Act of 1974, in plain language with plain meaning, provides that an entity which is under common control with a rail carrier and which is performing rail service is covered by the Act. That section of law contains no requirement that rail service be performed for the affiliated railroad.

In VMV the majority cited Board Order 85-16 (Labor Member dissenting) which held that Emons Industries and its non-rail subsidiaries were not providing transportation within the meaning of Section 1(a)(1)(ii) of the Railroad Retirement Act and corresponding provision of the Railroad Unemployment Insurance Act, because they did not exist primarily or substantially to serve the rail carrier subsidiaries. The Seventh Circuit Court decision in Itel Corp. v. U.S. Railroad Retirement Board was referenced in the Board Order.

However, a subsequent decision by the same court that ruled on Itel held Livingston Rebuild Center (LRC) to be a covered employer. This decision is totally contrary to Board Order 85-16 and Itel, as LRC clearly did not exist primarily to serve the rail carrier affiliate. Only about 25% of LRC's service (locomotive rebuilding) was for its affiliate, Montana Rail Link (MRL), and only about 25% of MRL's rebuilding business came from LRC.

As the Court pointed out in the LRC decision:

> "Although the Center is thus not a captive in the sense that it is devoted predominantly to serving one railroad's needs, it is nonetheless 'under common control with' MRL, making it a statutory 'employer' if rebuilding rolling stock is a 'service.... in connection with the transportation of passengers or property by railroad.'"

Thus, this decision departs completely from Itel and the previously cited Board Order.

The determining factor in the LRC decision was the amount of service LRC performed for the railroad industry in general, not the amount of service for the rail affiliate.

Also in the VMV determination, the majority of the Board apparently found significance in the Circuit Court decision in Standard Office Building Corporation v. United States.

However, the Standard Office Building case was unlike the one involving VMV, in that the only service "in connection with" that Standard Office Building performed was for the affiliate. So it would stand to reason that one would have to focus on the extent of the railroad's use of Standard Office Building's services in this situation, since this was the sum total of its rail service.

This was clearly not the case with VMV or IHD.

It should be noted that the Court's decision not to cover Standard Office Building was based not on the reasoning that it did not exist primarily to serve the affiliate, but for unrelated reasons.

Again, we must look to this same Court's decision in LRC to get a clearer picture of the Court's interpretation. That decision does not hinge on the percentage of service for the affiliate.

Finally, in RR Concrete Crosstie Corp. v. RR Retirement Board, the Eleventh Circuit Court made a distinction between the then current case and Pullman Standard Car Manufacturing Company. It stated that:

> "The General Counsel found that 'most of their business has been with unaffiliated railroad and non-railroad companies.' That factor is in marked contrast to the case at hand, where not only 'most' but 90%, of the subsidiary's sales are to the parent company."

This decision was in response to RR Concrete's argument that it should be considered in the same vein as Pullman. The Court's explanation correctly contrasted the two cases, but this doesn't lead one to conclude that it agreed or disagreed with the General Counsel's determination in Pullman.

I fail to see how a literal reading of the Acts can lead to any other conclusion except that IHD, as an entity under common control with a rail carrier and performing rail service, is a covered employer.

V M Speakman, Jr.

V. M. Speakman, Jr.

2-2-99

Date