Employer Status Determination
Total Distribution Services, Incorporated

OCT 2 7 1999

This is the decision of the Railroad Retirement Board regarding the status of Total Distribution Services, Inc., (TDS) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

The evidence is that TDS was incorporated on March 1, 1983, as the wholly owned subsidiary of Chessie Motor Express, Inc., a trucking company subsidiary of CSX Corporation, the parent company of CSX Transportation, a covered rail carrier employer under the Acts. On September 2, 1987, Chessie Motor Express merged with the rail carrier, CSX Transportation. In December 1991, TDS became a subsidiary of CSX Technology, a sister corporation of CSX Transportation; in 1995, control of TDS was transferred directly to the parent company, CSX Corporation.

TDS currently operates 36 "automotive centers". A few auto centers, located proximate to auto factories, receive new vehicles directly from the factory and load them onto rail cars or truck trailers for delivery. The majority of the auto centers receive new car shipments by rail, unload the autos from the rail cars, and sort them for loading onto truck trailers for delivery to the ultimate destination. Auto centers may also install window price stickers and floor mats, wash and fuel the vehicle, and replace flat tires or dead batteries. Approximately eighty percent of TDS's business relates to autos originally transported by rail over CSX Transportation. The balance derives from a third function of the auto centers: acting as an initial receiving point for used autos which are returned to the manufacturer at the end of a consumer lease. Approximately seventy-five percent of these used autos are then shipped by rail over CSX Transportation to another location.

TDS also operated over 70 bulk intermodal centers until March 1995, when this operation was transferred to a sister corporation, Bulk Intermodal Distribution Services.[1] These bulk centers transfer commodities to and from barges, ships or trucks and rail cars. Products may also be stored, transferred from rail cars to small containers, mixed, and sampled for quality.

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[1]CSX Corporation has requested that the status of Bulk Intermodal Distribution Services be considered separately. Accordingly, the Board does not address the operation of the bulk intermodal facilities after transfer to BIDS in March 1995.

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TDS itself has 16 employees. Five work at TDS headquarters, and eleven are field managers who are each responsible for managing several TDS facilities. Actual operations at all distribution centers are performed by eight outside contractor companies, which have a combined total of 1,300 employees. TDS owns all personal property, such as ramps and office equipment used at the auto centers, and owns the premises of two centers. Two more centers are leased from Ford Motor Company, and one is leased from General Motors Corporation. The remaining centers are leased from CSX Transportation. All centers, but one, are located along the CSX Transportation right of way.

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:

> (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 * * *.

Section 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).

TDS is clearly not a carrier by rail. However, since December 1991 when control of TDS was transferred from CSX Transportation, TDS has been controlled by CSX Corporation, which also controls CSX Transportation. Accordingly, the Board finds that effective December 1991, TDS has been under common control with a rail carrier employer.[2] Therefore, if TDS provides a service in connection with the transportation of property by rail, it is an employer under the Acts.

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[2]In view of the determination that TDS is not an employer, the Board makes no finding regarding whether TDS was under common control with CSX Transportation prior to that time.

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Section 202.7 of the Board's regulations (20 CFR 202.7) defines a service as being in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations. In this regard, the Board has previously determined that a bulk facility which received coke shipments on behalf of brokers, then crushed, blended, graded or stored the coke until sold by the broker to a client, was not performing a service to its rail carrier affiliate within the meaning of the Acts. Pabtex, Inc., Board Coverage Decision 95-112. In accordance with this earlier opinion, a majority of the Board finds that the bulk commodity services performed by TDS prior to March 1995 are not services in connection with rail transportation under the Acts.

TDS argues that its primary function is to process and prepare autos for further shipment by truck. As noted above, service in connection with rail transportation which is trucking service is excepted from coverage under the Acts. The Board has stated in considering the status of another CSX subsidiary that the trucking service exception "covers certain types of activities which are performed by independent trucking companies with which the railroads desire to compete." In the Matter of CSX Intermodal, B.C.D. 96-82, page 20; and Cf. Missouri Pacific Truck Lines, Inc., v. United States, 3 Cl. Ct. 14 (1983) aff'd. 736 F.2d 706 (Fed. Cir. 1984).

In this case, TDS began existence as a subsidiary of a trucking company within the CSX organization in 1983. Moreover, TDS states that automotive shipments historically were processed at distribution centers by independent trucking companies, which TDS states remain its current competitors. Aside from vehicle preparation services which are clearly not rail related, TDS's business is oriented toward completion of movement of freight by truck. Consistent with CSX Intermodal, a majority of the Board finds that TDS is performing trucking activities and falls within the trucking service exception contained in the Act.

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Based on the above, a majority of the Board finds that TDS is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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V. M. Speakman, Jr. (Dissenting)

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