EMPLOYER STATUS DETERMINATION
Decision on Reconsideration
Delaware Otsego Corporation

DEC 24 2003

This is the determination of the Railroad Retirement Board on reconsideration of its decision dated April 24, 2002, regarding the employer status of Delaware Otsego Corporation (DOC) as an 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).

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;
>
> (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).

BACKGROUND – BOARD COVERAGE DECISION 02-32

Board Coverage Decision (BCD) 02-32 held that DOC became an employer under the RRA and the RUIA effective January 31, 1996. That decision concluded that DOC was a carrier based on a contract it

had entered to act as the agent of the Toledo, Peoria and Western Railway Corporation (B.A. 2346), in which company it had a substantial interest, effective as of that date. The Board concluded that DOC was the operator of the Toledo, Peoria and, accordingly, was a carrier-employer under the Acts. DOC sold its interests and discontinued its administrative agreement with Toledo, Peoria on August 31, 1999.

DOC was a publicly held company until October 4, 1997, when Walter G. Rich purchased 80 percent of its common stock and the Norfolk Southern Corporation and CSX Transportation acquired ten percent each. At the time of the stock purchase, DOC wholly owned the New York, Susquehanna and Western Railway (B.A. No. 3251), for which it provided services. Accordingly, the Board concluded that DOC was under common control with an employer under the Acts for which it provided services and was thus an affiliate employer effective October 4, 1997.

REQUEST FOR RECONSIDERATION

In its request for reconsideration, DOC contends that it was not the operator of the Toledo, Peoria, and that it is not under common control with the New York, Susquehanna, and that, consequently, it should not be held to be an employer under the Acts.

-I-

The "Administrative Services Agreement" entered into on January 31, 1996 between the Toledo, Peoria and DOC, provided that DOC agreed to function as the agent of the Toledo, Peoria to supervise and manage the operation and maintenance of the Toledo, Peoria rail properties. The services to be performed by DOC under that Agreement are listed in the Board's decision dated April 24, 2002, and included performance of the following duties: the supervision of all railroad operations on rail

properties; the supervision of the maintenance of rail properties; employment of personnel as might be required for the proper operation and maintenance of rail properties, including payment of salaries, wages, payroll taxes, premiums and charges for insurance, etc., and including the discharge and other disciplining of personnel; the incurring and payment of all charges and operating expenses of rail properties; the billing and collecting of all charges for transportation services, rents, fees, and other amounts due the Toledo, Peoria; and the negotiation and execution of leases and licenses and other agreements.

In its request for reconsideration, DOC states that it did not manage the Toledo, Peoria as stated in the Agreement. A re-examination of the entire record shows that the audit performed in connection with the Board's coverage determination described work performed by DOC for the Toledo, Peoria which included payroll, purchasing, accounting, legal services, accounts payable and receivable management, data processing, real estate management, and administration. This description is not consistent with the terms of the Agreement but is consistent with DOC's contention that it provided administrative services for all of its subsidiaries and did not operate any of them. Accordingly, on re-examination of the evidence in the record, the Board concurs with DOC that it did not operate the Toledo, Peoria and was not an employer under the Acts by reason of the services provided to the Toledo, Peoria.

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The issue remaining is whether, within the meaning of that phrase in the definition of an employer under the RRA and the RUIA, DOC is under common control with the New York, Susquehanna as of October 4, 1997. As mentioned above, DOC was a publicly held company until October 4, 1997, when Walter G. Rich purchased 80 percent of its

common stock and the Norfolk Southern Corporation and CSX Transportation acquired ten percent each.

A representative of DOC advised that DOC employees also perform administrative services for the New York, Susquehanna. Approximately 94 percent of DOC's operating revenue derived from Toledo, Peoria and New York, Susquehanna. Services which DOC employees perform for the New York, Susquehanna include accounting, payroll, legal and other services.

Four of the five officers of DOC are also officers of the New York, Susquehanna[1]; three of the five officers of DOC are directors of the New York, Susquehanna[2]; and one director of DOC is a director of the New York, Susquehanna[3].

As pointed out in the Board's April 24, 2002, decision, a majority of the Board has previously held that a holding company will not be under common control with its subsidiary based on the decision in Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). The Court held, regarding a claim for refund of taxes under the Railroad Retirement Tax Act, that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of § 3231 of the Act. The Court wrote that, "The term 'under common control' does not usually apply to two companies in a parent-subsidiary relationship." Union Pacific, 5 F.3d at 525.

Consistent with the Board's decisions that have followed the Union Pacific decision, DOC would not be under common control with its subsidiary prior to October 4, 1997.

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1 Walter Rich, Joseph Senchyshyn, Nathan Fenno, and Tabetha Rathbone.
2 Walter Rich, Joseph Senchyshyn, and Nathan Fenno,
3 Walter Rich.

Section 202.5 of the Board's regulations defines "common control" as follows:

> A company or person is under common control with a carrier, whenever the control (as the term is used in §202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled. (20 CFR §202.5)

Section 202.4 of the Board regulations defines control as follows:

> A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person. (20 CFR §202.4).

DOC was a publicly held company until October 4, 1997. There is no evidence that a majority of ownership was concentrated in any one shareholder or entity prior to that date. However, after October 4, 1997, Walter G. Rich owned 80% of the shares of DOC, which in turn owned the New York, Susquehanna. Furthermore, Walter Rich was also President and director of the subsidiary railroad, New York, Susquehanna. As DOC states in its request:

> DOC, as sole shareholder, elects directors of NYSW, who appoint the officers. As is typical in such situations, DOC and NYSW share certain directors and officers. DOC has seven directors, one of whom is also a director of the subsidiary. DOC has five officers, three of whom are directors of the subsidiary. Four of DOC's five officers are also officers of the subsidiary.

> Notably, a majority of the subsidiary's officers, including the Vice Presidents of Engineering, Transportation, Marketing & Sales, and Mechanical, hold no position at DOC at all. These are the officers who run the railroad, who are compensated by the railroad and who pay railroad taxes on their earnings.

DOC contends that the Board is bound by Union Pacific, which held that the existence of common officers or directors between the parent and subsidiary would not render the parent to be under common control with the subsidiary. See, Union Pacific at P.526. The Court noted that officers and directors serve "the shareholders of the corporate entity or as authorized by the corporate charter". The Court concluded, "the shared individuals within the leadership of these separate corporations do not make the Corporation an employer under Section 3231 (a)."

DOC also contends that the Board is acting inconsistently with certain previous decisions of the Board: OmniTRAX, Inc., North American Railnet, Inc., Beard Land and Investment Company, and The Broe Companies, Inc. Although it is stated in the Board decisions regarding these companies that close corporations were involved, and the Board did rely on Union Pacific in those decisions, there was no evidence cited in the Board decisions regarding the composition of the ownership of those companies, nor of the degree of actual control through a common directorate or common officers. To the extent that those decisions imply that the Board would apply Union Pacific to any case involving a parent with a subsidiary employer without examining the existence of control, the Board rejects that implication.

Nevertheless, the Board recognizes the impact of the Union Pacific decision and the Board's application of the Union Pacific decision in other coverage determinations. Given the history of the Board's consideration of the covered status of this company and the intervening

decision in Union Pacific, the Board has determined to reverse its finding in the initial decision and find DOC not to be covered.

In addition, the Board finds any officer of NYSW that is also an employee or officer of DOC should report their compensation and/or service as reportable under the RRA and RUIA for NYSW. Further, NYSW should report, as its employee for reporting purposes, any employee of DOC who is involved in the day-to-day operations of NYSW rather than the administrative responsibilities of a parent holding company.

Accordingly, the Board modifies it's decision of April 24, 2002, to find that DOC is not a covered employer under the RRA and RUIA. However, certain employees of DOC may ultimately be found to be employees of NYSW as a result of their work for the railroad.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr. (Separate opinion attached)

Jerome F. Kever

SEPARATE OPINION OF
V. M. SPEAKMAN, JR.
EMPLOYER STATUS DETERMINATION
DELAWARE OTSEGO CORPORATION (DOC)

While I concur with the result reached in the determination on DOC's request for reconsideration; namely, that any officer of the parent company DOC who is also an officer of NYSW, and employees of DOC who are involved in the day-to-day operations of NYSW, should be considered employees of that company, I believe that the initial determination of the Board on DOC, as reflected in B.C.D. 02-32, provided a result which is more consistent with our regulations.

In that decision the Board found that as of October 4, 1997, DOC was in common control with its wholly-owned subsidiary, NYSW, and that it was performing services which were not trucking nor casual in nature for that carrier, and thus was an employer under the Acts. The Board based its decision on the fact that on October 4, 1997, Walter G. Rich, became an 80% owner of DOC which in turn wholly-owned NYSW. In finding common control between DOC and NYSW the Board, correctly I believe, found that *Union Pacific v. United States, 5 F.3d 523 (Fed. Cir. 1993)* did not apply to the fact situation presented, and that section 202.5 of our regulations controlled. 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.

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 in 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 the Board's decision in the initial consideration of DOC recognized that, even if one assumes that *Union Pacific* was correctly decided, there are limits to its application. Specifically, where the parent and sub are owned by a small number of shareholders and not engaged in enterprises outside the railroad industry, *Union Pacific* is not applicable and the parent and sub may be said to be under common control. In such a case the common control lies in the owners, which is not true in the case of a publicly held corporation where ownership is generally too diffuse to allow control to be vested in one or a small group of shareholders. Consequently, I believe that the Board was on the mark in its first decision on DOC and that DOC should be considered an employer under the Acts, because it is under common control with its rail carrier sub and performs substantial services for that carrier.

Original signed by:

V. M. Speakman, Jr.
12-22-03