B.C.D. 04-10

FEB 26 2004

EMPLOYER STATUS DETERMINATION
D&W Railroad, Inc.

This is the determination of the Railroad Retirement Board concerning the status of the D&W Railroad, Inc. (D&W) 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).

Information regarding D&W was provided by Mr. Thomas F. McFarland, attorney for D&W. Mr. McFarland stated that D&W is the owner of a rail line which is operated by Iowa Northern Railway Company (IANR) (B.A. No. 3643). He further stated that D&W is not an operating rail carrier; has no rail operating employees and no legal obligation to provide rail service over the line operated by IANR as long as IANR is providing that service. However, if IANR were to be relieved of its obligation to service that rail line, Mr. McFarland said that D&W would be obliged to arrange for another carrier to do so and, if not, D&W would be obliged to provide that service itself. Concurrent Surface Transportation Board (STB) decisions, STB Finance Docket Nos. 34401 and 34402, issued on October 1, 2003, respectively exempted D&W in acquiring 51.95 miles of rail line, including incidental trackage rights, all located in Blackhawk, Buchanan and Fayette Counties, Iowa, from the Union Pacific Railroad Company (UP); and exempted IANR in the operation of the aforesaid rail line pursuant to an operating agreement with D&W. IANR began these operations on October 2, 2003, according to Mr. Mark Sabin, General Manager of IANR.

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;

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Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially the same definition as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

In its decision regarding the employer status of 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 that 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.

In STB Finance Docket 34401, cited above, D&W certified to the STB that its projected revenues would not exceed those that would qualify it as a Class III rail carrier. There is no information that would indicate that the intent of D&W in purchasing the line was primarily designed to preserve rail service rather than profit from railroading activities. The Board therefore finds D&W is an enterprise which is intended to profit from railroad activities and is thus a carrier under the Railroad Ventures test.

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In view of the foregoing, the Board finds that D&W Railroad, Inc. became a rail carrier employer under the RRA and RUIA effective October 2, 2003, the date rail operations began on its rail line.

Original signed by:

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