B.C.D. 04-22

APR 21 2004

EMPLOYER STATUS DETERMINATION
H & M International, Inc.
Decision on Reconsideration

This is the decision on reconsideration of the Railroad Retirement Board concerning the status of H & M International, Inc., 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). For the reasons set forth below, the Board finds on reconsideration that H&M International is not a covered employer. The Board also finds service performed by H&M employees may not be credited as service to a railroad which is a client of H&M.

The Board in B.C.D. 02-06, issued January 22, 2002, held H&M to be a covered rail carrier employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act and the corresponding provisions of the Railroad Unemployment Insurance Act, with respect to a rail car switching operation in Marion, Arkansas. Section 1(a)(1) of the RRA (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered rail carrier 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;

Section 1 of the RUIA contains essentially the same definition, as does section 3231(a) of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(a)).

In a petition dated July 23, 2002, H&M, through its attorney, requested that the Board reconsider its initial decision. H&M contended that any rail car movement at Marion is merely in-plant operation not subject to the jurisdiction of the STB under subtitle IV of U.S.C. Title 49. Private rail car switching which is not subject to STB jurisdiction is not rail carrier operation within the meaning of RRA section 1(a)(1) and RUIA section 1. At H&M's request, on November 20, 2002, the Board agreed to stay further consideration to allow H&M to file a request for a declaratory order with the Surface Transportation Board on the issue of whether H&M is a rail carrier subject to STB jurisdiction. The STB issued its decision November 12, 2003, finding H&M not to be a rail carrier subject to STB jurisdiction. See: H&M International Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34277, November 12, 2003. H&M contends that based on the November 12, 2003 STB decision, the Board should now determine that H&M is not a rail carrier employer under the Acts. The initial question presented is therefore the effect of the STB decision upon further consideration by the Board.

The RRA requires that that Act "shall be administered by the Railroad Retirement Board". See RRA section 7(a) (45 U.S.C. §231f(a)); incorporated by reference into the RUIA by section 12(l) of that Act (45 U.S.C. §362(l)). RUIA section 12(l) further provides that in addition to powers and duties expressly provided, the Board "shall have

all powers and duties necessary to administer or incidental to administering this Act." Among duties expressly assigned to the Board by both Acts is the issuance of rules and regulations governing returns of compensation paid to employees of covered railroad employers. See section 9 of the RRA (45. U.S.C §231h) and section 6 of the RUIA (45 U.S.C. §356). The power to determine whether a company must file a return of compensation is at least incidental to administration of sections 6 and 9.

Moreover, both the RRA and the RUIA vest the Board with sole authority to render decisions on claims for benefits under the Acts, and provide that "the decision of the Board upon all issues determined in such decisions shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under the Act, of every party * * * notified of his right to participate in the proceedings." RUIA section 5(c)(5), (45 U.S.C. §355(c)(5)), incorporated into the RRA by section 8 (45 U.S.C. §231g). A decision as to whether a claimant has been employed by a covered employer is fundamental to establishing further rights of the claimant to benefits under the Acts. Finally, section 8(k) of the RUIA confers on the Board, for purposes of collection of contributions due from covered employers under the RUIA, "all authority and functions" vested in the Secretary of the Treasury with respect to collection of taxes under the RRTA. The Secretary of course is authorized in connection with collection of taxes under the RRTA to determine whether an entity is an employer subject to the tax. See regulations of the Internal Revenue Service at 26 CFR 31.3231(a)-1, and generally, 26 U.S.C. §6301.

The Acts make but one specific reference to circumstances where the STB has authority to determine whether a company may be a covered employer under the Acts. Section 1(a)(2) of the RRA provides, regarding determinations of status of electric railways that:

> (2) Notwithstanding the provisions of subdivision (1) of this subsection, the term "employer" shall not include—
> * * *
> (ii) any street, interurban, or suburban electric railway, unless such railway is operating as part of a general diesel railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter operated by any other motive power. The Surface Transportation Board is hereby authorized and directed upon request of the Railroad Retirement Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this paragraph.

See also section 1 of the RUIA. Board regulations acknowledge that where an employer disagrees with a determination by the Board that a company is a covered electric railway, the matter will be submitted to the STB. 20 CFR 202.13(b). Section 3231(a) of the RRTA also contains the same language, except that the Government's authority to request a determination for purposes of the RRTA is vested in the Secretary of the Treasury.

In sum, the RRA and RUIA consistently place authority for determining the status of a company as an employer covered for purposes of establishing benefit entitlement for employees of that company, and for purposes of collection of contributions due under the RUIA from that company with respect to its employees, with the Railroad Retirement Board.[1] Regulations of the Board reserve this authority to the members of the Board itself. 20 CFR 259.1, 259.3. RRA section 1(a)(2) and RUIA section 1 explicitly provide the only exception to this authority. As the rail car switching operation by H&M in Marion, Arkansas does not involve electric locomotive power, the decision by the STB does not foreclose independent consideration of the matter by the Board.

This is not to say that the Board should disregard the decisions of other Federal agencies addressing the same legal issues of coverage with respect to a particular company. In declining to determine whether the Board was entitled to deference in its interpretation of the definition of covered employer under the RRA and RUIA, the Seventh Circuit Court of Appeals noted the potential for differing interpretations of the definition of employer, at least between the Board and the Commissioner of Internal Revenue on behalf of the Secretary, could "produce a muddle". Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, 299 (7th Cir. 1992). In the context of parallel determinations of total disability by the Board and the Social Security Administration, the Eighth Circuit Court of Appeals has stated that where two agencies look at the same set of facts under the same rules but arrive at contrary decisions, the result creates a public image of unfairness and conflict in the government. Sones v. United States Railroad Retirement Board, 933 F. 2d. 636, 637 (8th Cir., 1991). For these reasons, the Board recognizes that a decision by the STB regarding the status of a company as a rail carrier, while it cannot relieve the Board of its duties under the Acts it administers, must be weighed in a decision by the Board on the same matter. In decisions involving small class III rail lines, the Board routinely relies on the determination by the STB that a company is a rail carrier subject to subpart IV of Title 49, U.S.C. The Board has on occasion relied on a decision to the contrary as well.

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[1] The former Interstate Commerce Commission specifically refrained from taking a position in a dispute of coverage under the RRA and RUIA. North Carolina Ports Commission—Petition for Declaratory Order or Prospective Abandonment, Finance Docket No. 31248, decided September 21, 1988, at note 9.

See, e.g. B.C.D. 96-59 *Port of Palm Beach District Railroad*, (finding a port authority not a rail carrier on the basis of a decision by the former ICC).

The evidence is that H & M began operations in 1968. At many sites it operates local area trucking terminals, custom examination sites, and warehousing and distribution facilities. H & M also performs operations at five separate railroad terminals. At these intermodal terminal sites, H&M operates side loaders and cranes to load and unload trailers and containers from railroad flat cars. It hostles trailers and containers to and from parking places, and inspects containers and trailers to determine any damages. At one terminal H&M provides customer service and clerical support, which includes systems input, trailer and container inventory, car programming, and office administration. Effective June 1, 1998, under contract with the Union Pacific Railroad, a carrier engaged in interstate commerce, H & M began operating locomotives at the Marion, Arkansas, terminal to move intermodal cars to and from operating tracks and to and from departure tracks and arrival tracks. Only the Marion site involves switching operations. The switching operation in Marion consists of 18 employees out of a total H&M work force of 968.

In its petition for reconsideration, H&M takes issue with the interpretation of its activities at the Marion, Arkansas facility. H&M submits that it provided inaccurate information due to its unfamiliarity with the railroad industry and the practices of the Board. H&M argues that rather than providing switching service that might be subject to the jurisdiction of the Surface Transportation Board (STB), H&M is merely providing in-plant switching for its own use. Secondly, in its petition for reconsideration H&M argues that it does not hold itself out to the public as a carrier by rail, the essential element to being a carrier subject to the jurisdiction of the STB. H&M specifically notes that its lease agreement with the Union Pacific Railroad, from whom it leases the Marion, Arkansas facility, provides that the Union Pacific Railroad is "liable for the performance of all carrier obligations arising in connection with the transportation of the freight in the trailers". H&M also argues that the movement of trailers does not assist any rail carrier in performing its carrier obligation.

The STB states in its November 2003 decision that while H&M's intermodal activity could fall within the definition of rail transportation, H&M nevertheless is not subject to STB jurisdiction as a rail carrier because it does not hold itself out to the public to provide common carrier service. The STB notes that H&M's operations reserve to the Union Pacific Railroad all common carrier rights and obligations and bar H&M from providing common carrier service. The STB agrees that H&M's rail-related activity is in-plant service performed in furtherance of H&M's primary non-rail business purpose.

Although the facts are susceptible to more than one interpretation, the Board cannot say the judgment of the STB regarding evidence of H&M operations is incorrect.[2] In the limited circumstances of the switching done by H&M, and in consideration of the public interest in uniform interpretation of the law, the Board therefore finds on reconsideration that H&M's switching operation at Marion, Arkansas does not constitute operation as a rail carrier, and consequently, H&M is not and has never been a rail carrier employer under the RRA and the RUIA.

This conclusion leaves open, however, the question whether the individuals who perform work for H&M under its arrangements with Union Pacific should be considered to be employees of the railroad rather than of H&M, a matter which the Board did not need to address in B.C.D. 02-06 because H&M itself was determined to be a covered employer.

Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. See 45 U.S.C. §§ 231(b) and 351(d). Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. § 3231(b) and (d)).

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[2] Switching that involves the "making up or break up of trains for road movement" is subject to the jurisdiction of the Surface Transportation Board (petition for reconsideration at 7 & 8). In the Marion, Arkansas facility H&M accepts the trains from the Union Pacific Railroad and according to the "Ramp Operator Agreement" loads and unloads the trailers, provides the switching to make up new trains and delivers them to Union Pacific Railroad for further transportation. In doing so, H&M uses the equipment of the railroad rather than of H&M. It is arguable that the switching is done for the benefit of the Union Pacific Railroad rather than for the benefit of H&M. In Sinkler v. Missouri P. R. Co., 356 US 326, 327, 2 L. Ed 2d 799, 801, 78 S. Ct 758 (1958), the Court described switching as "a vital operational activity of railroading consisting in the breaking up and assembly of trains and the handling of cars in interchange with other carriers". Switching by a common carrier is rail carrier service covered by section 1(a)(1)(i) of the RRA and the corresponding provision of the Railroad Unemployment Insurance Act.

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also the way he performs such work.

In B.C.D. 02-06, the Board noted that H & M began operations in 1968. In addition to the five intermodal operations, H&M engages in non-rail related trucking terminal operations throughout the country, provides custom examination sites, and performs warehousing and distribution facilities. Only one of the H & M intermodal terminal operations involves switching operations. At the rail terminals, H & M operates side loaders and cranes to load and unload trailers and containers from railroad flat cars. The cranes and loaders are provided and maintained by railroads. H&M hostles trailers and containers to and from parking places, and inspects containers and trailers to determine any damages. In this activity H&M evidently uses its own tractors, yard vehicles, and forklifts, and at some locations railroads reimburse H&M for fuel costs. H&M provides customer service and clerical support at one terminal. Clerical support includes providing systems input, trailer and container inventory, car programming, and office administration. Railroads at some locations provide computer equipment. H&M furnishes its own office furniture. Of the total 968 current H & M employees, 397 (41 percent) are in positions related to business connected with rail carriers. Eighteen H&M employees work in the Marion, Arkansas location.

H&M argues that as it is an independent company not affiliated with any rail carrier, its employees should not be considered to be employees of the Union Pacific since the employees are on the H&M payroll, are supervised or directed by H&M and not by Union Pacific employees, and perform service only on the property, through its lease, of H&M. These contentions are consistent with the statement previously provided by the company in January 2001, wherein H&M stated that its managers assign its employees to tractors and lift equipment, determine which rail cars are loaded and unloaded, and train the employees in operation of equipment used in the work performed.

Based on this evidence, H&M, rather than the railroads, direct the rail terminal employees. Accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

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On balance, the Board finds that the evidence supports a conclusion that H&M engages in an independent business. The large, specialized equipment at the intermodal centers is furnished and maintained by the railroads, but H&M has invested in smaller equipment such as vehicles and furniture. Moreover, it may be said that H&M's training of employees in use of the rail-related equipment is an investment as well. Prior coverage decisions have also considered operation of intermodal rail terminals to be an independent business. See L-91-67, *Budco Group Inc., Parsec and Piggyback Services Divisions*, and L-90-159, *Mi-Jack Products Inc., In-Terminal Services Division*. Considering these facts, Kelm would prevent the application of paragraphs (B) and C) of the definition of covered employee to this case. Accordingly, it is the determination of the Board that service performed by employees of H&M is not covered under the Acts as service to the Union Pacific.

The petition for reconsideration is granted.

Original signed by:

Michael S. Schwartz

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

Jerome F. Kever

Concurring Opinion of V. M. Speakman, JR
Employer Status Determination
H & M International, Inc.

In STB Finance Docket No. 34277, November 12, 2003, the Surface Transportation Board found that H & M International was not subject to its jurisdiction because it does not hold itself out to the public to provide common carrier service. On the basis of that decision we find that H & M is not a carrier by rail subject to STB jurisdiction and that H & M does not meet any other conditions for coverage under the statutes administered by this agency.

Our decision on reconsideration also makes it clear that even though we will give deference to a finding that the STB lacks jurisdiction over an entity, the Board could reach a contrary finding on the same evidence. In my view the degree of deference given a decision of the STB should be based upon the extensiveness of the proceedings before that body. Where, as in this case, the STB decision is based only on verified pleadings of the party, far less deference should be given by the Board, than a decision based upon a more extensive inquiry.

Finally, the discussion on whether employees of H &M should be considered employees of the Union Pacific Railroad based upon their limited involvement with moving Union Pacific cars seems to me needless. There is no employee of H & M claiming that he or she should be considered an employee of the Union Pacific, nor do I think they could seriously make such a claim under the facts before us. Board coverage decisions should deal with real issues and not engage in theoretical discussions.

Original signed by:

V. M. Speakman, Jr.
4/9/04