B.C.D. 04-47

Employer Status Determination
Iowa Pacific Holdings, LLC
Permian Basin Railways

SEP 20 2004

This is the decision of the Railroad Retirement Board regarding the status of Iowa Pacific Holdings, LLC, and Permian Basin Railways, as employers under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Iowa Pacific Holdings is a limited liability company based in Chicago, Illinois, which is owned by seven individuals. According to its internet web site, Iowa Pacific "was formed to acquire and operate small- and medium-sized North American Railroads." Iowa Pacific began operations February 1, 2001, and as of September 2002, it had 7 employees.

Iowa Pacific owns 100 percent of Permian Basin Railways, Incorporated. Permian Basin began operations May 25, 2002, when it concluded two transactions with Rail America, Inc. At that time, Permian Basin, through its subsidiary West Texas and Lubbock Railway Company, Inc., entered into a lease of the entire rail line of West Texas and Lubbock Railroad Company, Inc. (emphasis supplied). See: Board Coverage Decision 02-93, and West Texas and Lubbock Railway Co. Inc.—Acquisition and Operation Exemption—West Texas and Lubbock Railroad Company, Inc., STB Finance Docket No. 34205, 67 Fed. Reg. 40980 (June 14, 2002). On or about the same day, Permian Basin also purchased the stock of the Austin Railroad Company, doing business as Austin & Northwestern Railroad Company, Inc. See: Permian Basin Railways, Inc.—Continuance in Control Exemption—West Texas and Lubbock Railway Company, Inc. and Austin & Northwestern Railway Company, Inc., STB Finance Docket No. 34206, 67 Fed. Reg. 40979 (June 14, 2002). The Austin & Northwestern owns a 107 mile line of rail between Monahans, Texas and Lovington, New Mexico which it operates as the Texas New Mexico Railroad. See: Rail America, Inc.—Control Exemption—RailTex, Inc., STB Finance Docket No. 33813, 64 Fed. Reg. 62245 (November 16, 1999). Both the West Texas and Lubbock Railway Company, Inc. (BA No. 2888) and the Austin Railroad Company, d/b/a Austin & Northwestern Railroad Company, Inc., (BA No. 3865) are covered rail carrier employers under the Acts. See: B.C.D. 02-93, *West Texas and Lubbock Railway Company, Inc.*; and Legal Opinion L-86-125, *Austin Railroad Company, Inc., d/b/a Austin and Northwestern Railroad Company.*

In a letter dated September 10, 2003, the Vice President of Iowa Pacific stated that Permian Basin has no employees, and that "The name Permian Basin Railways is used to refer to the W[est] T[exas] L[ubbock] C[ompany] and T[exas] N[ew] M[exico] R[ailroad division of the Austin & Northwestern Railroad Company] collectively to customers of each

railroad." Iowa Pacific itself does provide marketing and accounting services to its subsidiaries, devoting about 10 percent of its time to Texas New Mexico and 5 percent to West Texas Lubbock. Iowa Pacific also reported that 25 percent of its revenue derives from West Texas Lubbock, and 15 percent from Texas New Mexico. However, the major portion of Iowa Pacific's business consists of investments and acquisitions in transportation related companies.

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).

Iowa Pacific does not operate the rail lines it owns as a carrier by rail. Further, a decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of section 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993).

The relevant facts of the Union Pacific case are indistinguishable from those presented by Iowa Pacific. Accordingly, the Board determines that Iowa Pacific Holdings, LLC, is not an employer under the Acts as it is not under common control with its rail carrier subsidiaries.

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Iowa Pacific controls subsidiary Permian Basin as its sole owner. Through control of Permian Basin, Iowa Pacific also controls Permian Basin's two rail carrier subsidiaries. Therefore, Permian Basin, Texas New Mexico, and West Texas Lubbock division of the Austin & Northwestern Railroad Company are under the common control of Iowa Pacific within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts. See regulations of the Board at 20 CFR 202.4. 202.5; and Universal Carloading & Distributing Company v. Railroad Retirement Board, 172 F. 2d 22, (D.C. Cir. 1948). If Permian Basin performed any services for its affiliated rail carriers which were services in connection with the transportation of property by rail, it would meet both conditions for coverage under section 1(a)(1)(ii) above. Based on the information available, however, Permian Basin is a corporate shell with no employees. Any marketing and accounting services performed by the parent superstructure of the railroads for the rail subsidiaries is done by Iowa Pacific. Accordingly, because it does not meet both conditions for coverage under the Acts as a rail carrier affiliate employer, the Board finds that Permian Basin Railways is not a covered employer under the Acts.

Original signed by:

Michael S. Schwartz

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

Jerome F. Kever

Concurring Opinion of
V. M. Speakman, Jr.
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I concur with the result in this case but for a different reason. My colleagues hold that Iowa Pacific Holdings LLC, the parent company of Permian Basin Railways Inc., which in turn owns a number of railroads, is not under common control with these carriers. For support it cites Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed Cir. 1993). I have often indicated my disagreement with the holding in that case, a tax case in which the Railroad Retirement Board was not even a party, and believe that the Board has been remiss in not litigating the issues involved in Union Pacific in another Circuit to test the logic of its holding. Holdings by other Circuits to the effect that "common control" within the meaning of the Railroad Retirement and Unemployment Insurance Acts (Acts) can exist between a parent and subsidiary could cause the Federal Circuit to reconsider its decision in Union Pacific or set the stage for Supreme Court review. Indeed, repeated litigation of the same issue is not new to this agency. See Johnson v. Railroad Retirement Board, 969 F.2d 1082 (D.C. Cir. 1992). In addition, the Board, like the Internal Revenue Service, has independent authority to determine what entities are covered under its statute. Board of Trustees of Galveston Wharves v. United States, 949 F. 2d 404(Fed. Cir. 1991).

The illogic of the holding in Union Pacific is demonstrated by the fact that my colleagues concede that if Permian Basin Railways, Inc. performed substantial services in connection with railroad transportation for its subsidiary carriers, it would be an employer covered under the Acts it and its carriers are under the common control of Iowa Pacific. However, if those same services were performed by Iowa Pacific, the parent company of Permian Basin, Iowa Pacific would not be covered because, in the view of my colleagues, it is not under common control with the carriers it owns through its

ownership of Permian Basin. Thus, whether an entity is covered or not depends solely where it stands in the corporate chain.

However, even if one correctly assumes that Iowa Pacific is under common control with its carriers, I would find that it is not a covered employer. Iowa Pacific is not an operating company but is essentially involved in acquiring transportation-related properties for investment purposes. Mere ownership of a carrier is not performing a service in connection with railroad transportation which would cause a company to be covered under the Acts. What services Iowa Pacific does perform for its carriers appears to be "casual" within the meaning of section 202.6 of our regulations. Of course, any employee of Iowa Pacific who is an officer of or actively manages one of its carriers may be considered an employee of that carrier for purposes of our statutes.

Original signed by:
V. M. Speakman, Jr.