B.C.D. 04-50

OCT 0 5 2004

EMPLOYER STATUS DETERMINATION
DECISION ON RECONSIDERATION
D&W Railroad, Inc.

This is the determination on reconsideration of the Railroad Retirement Board concerning the status of D&W Railroad, Inc., (D&W) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

In a decision dated February 26, 2004, the Board held that D&W became a rail carrier employer effective October 2, 2003 (B.C.D. No. 04-10). That decision was based on D&W being the owner of a rail line which is operated by Iowa Northern Railway Company (IANR) (B.A. No. 3643). D&W is not an operating rail carrier and reportedly has no rail operating employees. Concurrent Surface Transportation Board (STB) decisions, STB Finance Docket Nos. 34401 and 34402, issued on October 1, 2003, respectively authorized D&W to acquire 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 authorized IANR to operate the aforesaid rail line pursuant to an operating agreement with D&W.

As mentioned in B.C.D. No. 04-10, the Board, in its decision regarding the employer status of Railroad Ventures, Inc. (B.C.D. 00-47), 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.

D&W clearly meets the second and third criteria. We must therefore determine whether D&W meets the first Railroad Ventures factor identified above. In support of its request for reconsideration, D&W has submitted a verified statement to support its position that it is not a carrier under the

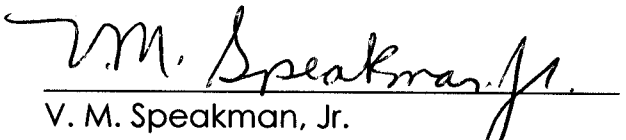
Railroad Ventures test. The statement indicates that Union Pacific formerly operated the rail line in question and that the principal customer of the line was Transco Railway Products, Inc. The statement indicates that Transco Railway Products is a subsidiary of Transco, Inc., which formed D&W to acquire the rail line in lieu of abandonment, in order to preserve rail services for Transco Railway Products.

In response to a request for support for the contention that Union Pacific intended to abandon the line in question, counsel for D&W submitted a reproduction of an undated map of the line which states that it is anticipated that the line will be the subject of an abandonment application within three years. The document states that the "CHICAGO AND NORTH WESTERN RAILWAY COMPANY (AB-1) publishes this amendment to its System Diagram Map * * *."

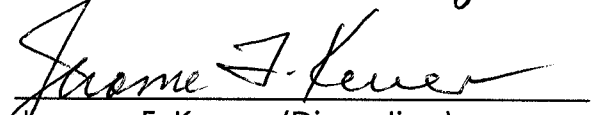
The name of the Chicago and North Western Railway Company was changed to the Chicago and North Western Transportation Company effective June 1, 1972. The Chicago and North Western Transportation Company was merged into the Union Pacific effective October 1, 1995. It appears therefore that the announcement of the possible abandonment of the rail line at issue may be over 30 years old. A majority of the Board finds this documentation to be insufficient evidence of a current proceeding to abandon the rail line. Moreover, the line sale contract pursuant to which D&W acquired the rail line not only made no reference to any abandonment proceeding, but specifically reserved for the seller, Union Pacific, the right to repurchase the line during the first 60 days following the date of the agreement in the event of certain adverse actions by the labor organizations representing any of seller's contract employees (Line Sale Contract dated September 26, 2003, Section 2.c.). Finally, the decision in STB Finance Docket No. 34401 clearly indicated that D&W anticipated revenues from the rail line, stating that "D&W certifies that its projected revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier." A majority of the Board therefore finds that the evidence in this case shows that D&W does have as a primary purpose to profit from railroad activities.

The Board's initial decision in this case is affirmed. The petition for reconsideration is denied.

Michael S. Schwartz



V. M. Speakman, Jr.



Jerome F. Kever (Dissenting)