B.C.D. 04-56

EMPLOYER STATUS DETERMINATION
Heritage Railroad Corporation

NOV 2 3 2004

This is the determination of the Railroad Retirement Board concerning the status of Heritage Railroad Corporation (HRC) 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). HRC has not heretofore been ruled to be an employer under the RRA and RUIA.

Mr. Jeff Deardorff, President, HRC, advised that HRC is a private non-profit corporation that was chartered to preserve and rehabilitate a rail system serving the former Department of Energy (DOE) K-25 Gaseous Diffusion site in Oak Ridge, Tennessee. HRC has no employees. HRC and its parent corporation, the Community Reuse Organization of East Tennessee (CROET) leased the railroad from DOE and has run the line initially by operating contract from August 25, 2000 with Southern Freight Logistics LLC (SF Logistics) d/b/a Southern Freight Railroad (SF Railroad) (an employer under the RRA and RUIA and designated as B.A. No. 5591) and from September 17, 2003, by operating contract with Walden Ridge Railroad Corporation (WRRC), currently a non-carrier. As set forth in B.C.D. 04-37, decided on July 28, 2004, we determined that a portion of SF Logistics, which is known as SF Railroad, and which operated the railroad operations for HRC, is an employer under the RRA and RUIA. The rail operation is over 14.5 miles of track consisting of seven miles from the interchange with the Norfolk Southern Railway (B. A. No. 1525) at Blair, Tennessee to the East Tennessee Technology Park and 24 industrial spurs within the park which total an additional seven and one half miles of track. In view of the fact that WRRC has taken over the very same operations conducted by SF Railroad, a carrier, it would appear that WRRC, a non-carrier, will be determined to be an employer under the RRA and RUIA. The status of WRRC as an employer under the Acts will be considered in a separate Board decision.

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;

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 (26U.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 Surface Transportation Board 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 the Board determines that the entity is not a carrier. The Board enunciated a three-part test in B.C.D. 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.

Applying this to the facts of HRC, the Board determines that HRC is not a covered employer under the Acts. The evidence of record shows that HRC is a non-profit corporation. HRC was chartered to preserve and rehabilitate a rail system on a reindustrialization site owned by the DOE. Based on these facts, we find that HRC does not have as a primary business purpose to profit from railroad activities. With respect to the second part of the Railroad Ventures test, the evidence shows that HRC does not operate the rail line and does not have the capacity to operate the rail line inasmuch as HRC owns no railroad assets nor does it have any employees. Turning to the third part of the

criteria, the record shows that WRRC, a non-carrier employer which it appears would be found to be covered under the Acts administered by the Board, conducts the same railroad operations over the same line previously conducted by a carrier employer. The Board therefore finds that HRC is not a carrier under the test set out in our Railroad Ventures decision.

Accordingly, the Board finds that Heritage Railroad Corporation is not a rail carrier employer under the Railroad Retirement Act or the Railroad Unemployment Insurance Act.

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