B.C.D. 05-26

EMPLOYER STATUS DETERMINATION
Kettle Falls International Railway, LLC (KFIR)

JUN 14 2005

This is a determination of the Railroad Retirement Board concerning the status of Kettle Falls International Railway, LLC (KFIR) 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 Surface Transportation Board (STB) Finance Docket No. 34616, decided December 20, 2004, KFIR, a Colorado limited liability company, filed a verified notice of exemption to acquire by purchase and lease from the Burlington Northern and Santa Fe Railway Company (BNSF) (B.A. No. 1621) rail lines in the State of Washington. The rail lines purchased are between: (1) milepost 4.7, near West Kettle Falls, Washington, and milepost 34.375 at the United States-Canadian border, and (2) milepost 48.79, at the United States-Canadian border, and milepost 77.14 at San Poil, Washington. The rail lines being leased are between: (1) milepost 0.0 near Kettle Falls, Washington, and milepost 4.7, near West Kettle Falls, Washington; and (2) milepost 61.0 near Chewelah, Washington, and milepost 139.71, at the United States-Canadian border. In addition, KFIR would acquire incidental trackage rights over the rail line between milepost 0.0 near Kettle Falls, Washington, and milepost 4.7, near West Kettle Falls, Washington. While KFIR is leasing that 4.7-mile line, KFIR is acquiring the incidental trackage rights to ensure continued access to BNSF for interchange at Kettle Falls, Washington from the rail line KFIR is purchasing in the event the lease of the line between Kettle Falls, Washington and West Kettle Falls, Washington expires or is terminated.

Information regarding KFIR was furnished by Mr. Mike Ogborn, Manager for KFIR. In a letter dated April 8, 2005, Mr. Ogborn stated that the President of KFIR is Mr. Ed Thum. According to Mr. Ogborn, KFIR is owned by Mr. Patrick Broe, a non-carrier individual who directly controls OmniTRAX, Inc. (OmniTRAX), a non-carrier company[1] that currently controls fifteen Class III railroads operating in eight States. Mr. Ogborn stated that OmniTRAX also controls KFIR. Mr. Ogborn stated that KFIR commenced rail operations on December 11, 2004. According to information provided by Mr. Ogborn, KFIR operates over 160 miles of track in Northeastern Washington State and British Columbia. Mr. Ogborn stated that KFIR handles no passenger traffic and its annual expected volume of traffic is approximately 24,000 carloads a year. Mr. Ogborn stated that KFIR currently employs 21 employees in the United States. KFIR will interchange with BNSF at Chewelah, Washington, Grand Forks Railway Company (GFRC) at Grand Forks,

[1] The Railroad Retirement Board found OmniTRAX not to be an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts in B.C.D. 97-5.

British Columbia, and International Rail Road System (IRRS) at Columbia Gardens, British Columbia. KFIR has entered into a long term lease and a purchase agreement with BNSF to lease and purchase a portion of BNSF's rail lines. Mr. Ogborn stated that KFIR will spend ninety percent of its business time with BNSF, five percent will be spent with GFR, and five percent with IRRS. Additionally, Mr. Ogborn stated that one hundred percent of KFIR's revenues will be received from BNSF. KFIR will "interchange railcars with BNSF at one location, with GFR Company at one location and with IRRS at one location" and "will deliver loaded cars to the receivers located on its lines and pick up empty cars to return to the interchange tracks."

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.

Section 1 of the RUIA contains essentially the same definition. (45 U.S.C. § 351), as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The evidence of record establishes that KFIR is a carrier operating in interstate commerce. Accordingly, it is determined that Kettle Falls International Railway, LLC (KFIR) became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act effective December 11, 2004, the date as of which KFIR began operations.

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