B.C.D. 05-27

JUN 1 4 2005

EMPLOYER STATUS DETERMINATION
Ogeechee Railway Company

This is the determination of the Railroad Retirement Board concerning the continuing status of Ogeechee Railway Company (ORC) (B.A. No. 5525) 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). ORC has been an employer under the RRA and RUIA with service creditable from May 5, 1989.

Information regarding ORC was provided by David Boddiford, President, ORC, and was also taken from a verified notice of exemption before the Surface Transportation Board (STB) filed by Georgia Midland Railroad, Inc. (GMR) (B.A. No. 5593) and captioned Georgia Midland Railroad , Inc. – Acquisition and Operation Exemption- Rail Lines of Ogeechee Railway Company in Georgia. See STB Finance Docket No. 34466, filed February 9, 2004. GMR is a wholly owned subsidiary of Atlantic Western Transportation, Inc. (AWT), a non-carrier.

On February 20, 2004, ORC subleased its right to conduct railroad operations on certain lines in Georgia to GMR and Heart of Georgia Railroad, Inc. (HOG) (B.A. No. 5575). ORC also leased all of its assets to GMR. ORC ceased its operations on February 21, 2004 and ORC employees were last compensated on March 12, 2004. The sublease to GMR and HOG is for two years with an option to require assignment of the subleases and the conveyance of ORC's assets for $900,000.00. That option can be exercised at anytime by the sublessee's guarantor, AWT. The terms of the sublease provide for a monthly payment to ORC in the amount of $6,500.00 .

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 (26 U.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 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 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 ORC, the Board determines that ORC continues to be an employer covered under the Acts. The evidence of record shows that the sublease provides for a monthly payment of $6,500.00 to ORC. The Board finds that the primary business purpose of ORC is to profit from railroad activities. Secondly, while ORC does not now operate the rail lines in question, the evidence indicates that ORC has the capacity to do so after the expiration of the subleases, since it retains ownership of its locomotives, maintenance –of-way equipment, vehicles, property, radios and office equipment and leases these items to GMR pursuant to the sublease. (See paragraph 5 of the sublease agreement.) The third part of the Railroad Ventures test is satisfied, inasmuch as the subleased railroad operations are conducted by rail carrier employers. However, it is clear that ORC has not satisfied the first two parts of the test.

Therefore, the Board finds that Ogeechee Railroad Company remains a covered employer under the test set out in our Railroad Ventures decision.

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