B.C.D. 05-34

JUL 20 2005

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

This is the determination on reopening 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.).

Section 259.6 of the Board's regulations (20 CFR 259.6) provides that any determination by the Board at the initial or reconsideration stages shall be considered a final determination and shall be binding with respect to all parties unless reversed on reconsideration or upon judicial review. Section 259.6 also provides that a final determination may be reopened at the request of a party who was, or could have been, a party to the final determination when the party alleges that the law or the facts upon which the final determination was based have changed sufficiently to warrant a contrary determination.

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 affirmed on reconsideration in a decision dated October 5, 2004 (B.C.D. 04-50). D&W has requested reopening of the decision holding D&W to be an employer under the Acts. That decision was based on D&W's being the owner of a rail line which is operated by Iowa Northern Railway Company (IANR) (B.A. No. 3643).

As mentioned in B.C.D. No. 04-10 and B. C. D. No. 04-50, 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 the 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.

The Board determined that D&W clearly meets the second and third criteria. However, the Board found that D&W did not meet the first Railroad Ventures factor identified above.

In support of its request for reconsideration, D&W submitted a verified statement to the effect 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 indicated 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 support of 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 reconsideration decision found that this map was not current and did not reflect a current intent to abandon the line. The decision also relied on the line sale contract pursuant to which D&W acquired the rail line. That contract did not make any reference to any abandonment proceeding, and 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. Finally, the reconsideration decision relied on the decision in STB Finance Docket No. 34401which stated 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."

In its request for reopening, D&W submitted evidence which the Board concludes supports a finding that D & W does not have as a primary business purpose to profit from railroad operations. Specifically, D & W submitted a verified statement of Raymond E. Allamong, Jr., Senior Manager Rail Line Planning of Union Pacific Railroad (UP). Mr. Allamong stated that he was one of the primary representatives of UP in the sale of its rail line between Dewar and Oelwein, Iowa to D & W and thus has first-hand knowledge of the circumstances surrounding that sale. Mr. Allamong stated that the map provided to the Board in connection with D & W's request for reconsideration was issued in June 1995, and that Chicago and Northwestern Railway Company was not merged into UP until October 1, 1995. Mr. Allamong asserted that the amendment of the system diagram map correctly reflected the intent of the owners of the Dewar-Oelwein rail line to abandon that line.

Mr. Allamong also stated that when UP succeeded to ownership of the Dewar-Oelwein rail line in October 1995, he was approached by Mr. Thomas F. McFarland, attorney for Transco, Inc., seeking sale of that line in lieu of abandonment in order to provide for continuation of rail service to Transco,

Inc.'s affiliate, Transco Railway Products, Inc., at Oelwein, Iowa. Mr. Allamong stated that UP and Transco, Inc. negotiated for an extended period of time over the purchase price and terms of sale of the Dewar-Oelwein rail line and that agreement for the sale was finally reached in 2003. Transco, Inc. formed D & W to acquire the rail line and D & W contracted with Iowa Northern Railway Company to operate the line.

The Board finds that the verified statement of Mr. Allamong provides new and material evidence, not reasonably available at the time of the Board's decision on reconsideration, that indicates that the facts upon which the decision on reconsideration was based have changed sufficiently to warrant a contrary determination. Consequently, under section 259.6 of our regulations, our decision on reconsideration may be reopened. Based upon Mr. Allamong's verified statement, the Board finds that D & W acquired the Dewar-Oelwein rail line solely to preserve rail service on the line to Transco Railway Products at Oelwein.

The Board therefore finds that D&W does not have as a primary business purpose to profit from the railroad activities represented by the line in question. Accordingly, the Board reverses its decision on reconsideration in this matter and holds that D&W is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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