

**EMPLOYER STATUS DETERMINATION****Western Fuels Association, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Western Fuels Association, Inc. (WFA) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Information was provided by Darold Koch, Vice President Finance & Administration of WFA.

According to Mr. Koch, WFA was incorporated July 9, 1974, and began operations in 1974. WFA also operates the Escalante-Western Railway in New Mexico<sup>1</sup>. WFA currently has 14 employees, and employees were first compensated in 1974. Mr. Koch also explained that four of the 14 employees operate a train owned by one of WFA's members. Of the remaining ten employees, Mr. Koch stated that six are in positions which would be business connected with rail carriers, as detailed below. None of these employees work on property owned by a railroad.

Mr. Koch describes WFA's operations as "to develop reliable, adequate supplies of coal at the lowest cost possible for use by its members in generating electricity". Current members with equity ownership in the cooperative include Tri-State Generation and Transmission Association, Inc.; Basin Electric Power Cooperative; Sunflower Electric Power Cooperative; Southern Minnesota Municipal Power Agency; Board of Public Utilities of Kansas City, Kansas; and Board of Municipal Utilities of Sikeston, Missouri.

WFA is described on its website ([.westernfuels.org](http://westernfuels.org)) as a:

cooperative enterprise operating on a not-for-profit basis to provide coal and other services for the generation of electricity by consumer owned utilities. Western Fuels' member-owners are rural electric generation and transmission cooperatives, municipal utilities, and other public power entities.

WFA supplies coal to nine member plants. To do this, WFA either owns or leases approximately 1,600 rail cars and manages scheduling, maintenance and repair on behalf of its members. The cars are in service with BNSF Railway and the Union Pacific Railway to haul coal to WFA members.

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<sup>1</sup> In Board Coverage Decision (B.C.D.) 04-21, we found the Escalante-Western Railway not to be an employer under the Acts, finding that "Escalante Western Railway does not operate, and never has operated, as a rail common carrier. Rather, Western Fuels Association, Inc. established EWR for the sole purpose of transporting coal to one of its power plants. Further, there is no evidence that EWR provides any service in connection with the interstate transportation of freight or passengers by rail within the meaning of the RRA and RUIA".

According to its website, WFA will: negotiate transportation contracts/tariffs and manage the same including the development of rail negotiation strategies; manage rail car fleets for members including purchase/lease rail car equipment for members, maintain rail cars, general pooling of all members' railcars for a reduced car requirement and flexibility in utilizing "slots"; schedule coal shipments with railroads for coal transportation between mines and power plants; and provide contact point for all parties.

According to Mr. Koch, no railroad has a financial interest in WFA, no individual has both a controlling interest in WFA and a controlling interest in a rail carrier, and no officers or directors of WFA are also officers or directors of a rail carrier. WFA does not own any equipment or facility with a rail carrier; it is not a lessee or lessor of railroad track or equipment; the Federal Railroad Administration has not required WFA to pay user fees; the Surface Transportation Board has not ruled regarding the status of WFA; and the Internal Revenue Service has not ruled on the applicability of the Railroad Retirement Tax Act to WFA.

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;
  - (ii) any company which is directly or indirectly owned or controlled by or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad \*
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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).

WFA is clearly not a carrier by rail. Further, the evidence of record indicates that it is not under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. Therefore, the Board finds that Western Fuels Association, Inc., is not a covered employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

This conclusion leaves open, however, the question whether WFA's employees should be considered to be employees under the Acts. As stated above, WFA currently has 14 employees - four of the 14 employees operate a train owned by

one of WFA's members, and of the remaining ten employees, six are in positions which would be business connected with rail carriers. None of these employees work on property owned by a railroad. We initially note that section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. As none of WFA's members are employers under the Acts, the individuals providing services to WFA members are not performing services which would be creditable under the Acts. Furthermore, information submitted contemporaneously with the case at hand<sup>2</sup> indicates that the individuals operating a train owned by one of the WFA members are operating the train on the Lee Ranch Coal Spur, i.e., the Escalante-Western Railway. This is the line specifically addressed in B. C. D. 04-21, which found the Escalante-Western Railway not to be an employer under the Acts (See, B.C.D. 04-21, " \* \* \* EWR is owned by WFAI and began operations in 1984. He also stated that EWR employs four employees. \* \* \* Mr. Wolf stated that the EWR provides rail service from the Escalante Generating Station, approximately 4.0 miles on the Palmer Spur and then 37 miles on the Lee Ranch Coal Spur to the Lee Ranch Mine; however, EWR is a private carrier and does not interchange with any rail carriers covered under the RRA"). Accordingly, these individuals also are not performing services which would be creditable under the Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

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<sup>2</sup> Investigation into WFA began with an inquiry from a former employee of the Escalante-Western Railway requesting his service for that entity be found to be creditable under the Acts. His request is being handled, in accordance with Board Order 09-38, by the agency's division of Compensation and Employer Services as a protest of service and compensation.