

**EMPLOYER STATUS DETERMINATION – DECISION ON RECONSIDERATION
Indiana Boxcar Corporation**

This is the decision on reconsideration of the Railroad Retirement Board (“the Board”) of Board Coverage Decision (B.C.D.) 08-37, dated August 11, 2008, concerning the status of Indiana Box Car Corporation (IBCX) 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) (collectively, “the Acts”).

In B.C.D. 08-37 the three-member Board determined that the evidence of record established that while IBCX does not conduct rail carrier operations itself, IBCX has been involved in the operation or management of short line railroads since 1997. Accordingly, the Board found that IBCX has been performing services in connection with the transportation of passengers or property by railroad for the period 1997 to 2000, when it had an ownership relationship with Evansville Terminal Railway Company, Inc., and then again from 2003 to the present, when it had ownership relationships with Vermillion Valley Railroad Company, Inc., (2003 to present); Chesapeake and Indiana Railroad Company, Inc. (2004 to present), Tishomingo Railroad Company, Inc. (2006 to present), and Youngstown & Southeastern Railroad Company, Inc. (2006 to present), as well as performing as the contracted manager of Ohi-Rail Corporation (2006 to present), all of which are covered rail carrier employers. The Board held that IBCX became an affiliate employer under the Acts effective January 1, 1997, the beginning of the first year during which it was under common control with a rail carrier employer.

On August 5, 2009, IBCX filed with the Secretary to the Board a Petition for Reconsideration pursuant to 20 C.F.R. § 259.3(a). In its petition, IBCX requests the Board reconsider and reverse its determination in B.C.D. 08-37 and find that IBCX is not an employer under the Acts. Should the Board not reverse this determination, IBCX requests that the dates of coverage be changed to the period from May 28, 1999 to April 1, 2000, and then from April 24, 2003, through July 31, 2008.

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 * * *.

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).

As we found in B.C.D. 08-37, the evidence of record shows that IBCX is clearly not a rail carrier employer under the definition of employer in subparagraph (i) quoted above. This conclusion, however, left open the question as to whether IBCX could be considered an employer under the definition in subparagraph (ii). Under section 1(a)(1)(ii), a company is an employer if it meets **both** of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii). In considering questions of coverage within the meaning of section 1(a)(1)(ii), courts have generally looked to the type of service being provided, the amount of work being performed for the railroad affiliate, and the amount of work being performed for the railroad industry. In B.C.D. 08-37 we found IBCX to be under common control with its railroad subsidiaries, and that it was performing services in connection with the transportation of passengers or property by railroad since January 1, 1997, the beginning of the first year during which it was under common control with a rail carrier employer.

IBCX's first argument raised in its Petition for Reconsideration is that IBCX should not be found to be an employer under the Acts because IBCX is a holding company, and not a corporate sibling of its covered railroad subsidiaries. IBCX states that the Board's finding that IBCX is a covered employer is "contrary to established precedent", and that the Board "fails to recognize IBCX for what it is: a short line railroad holding company", yet notes that "the Board's coverage decision correctly notes that "IBC [IBCX] has had, and continues to have, ownership or management relationships with certain railroads" (Petition for Reconsideration, p. 5, 6).

Information regarding IBCX was provided by R. Powell Felix, President of IBCX. Since 1997 IBCX has been involved in the operation or management of short line railroads. Mr. Felix describes the business dealings which IBCX has had with "scores of railroads over the past two decades" as ranging from "collecting car hire or lease rental for use of IBC owned equipment" to ownership or management of short line railroads. In his letter of May 21, 2007, Mr. Felix states that "IBC presently owns railcars, locomotives, vehicles, equipment, inventory, and short line railroads. Some of these assets are leased to or used by affiliated railroads and some assets are leased to unrelated third parties". In a letter dated November 6, 2007, Mr. Felix described IBCX's management services as including leasing locomotives to Vermillion Valley Railroad Company, Inc., Chesapeake and Indiana Railroad Company, Inc., and Youngstown & Southeastern Railroad Company, Inc.; leasing maintenance equipment to Chesapeake and Indiana Railroad Company, Inc., and Youngstown & Southeastern Railroad Company; and maintaining a central corporate office.

While no railroads have ever had any ownership in IBCX, IBCX has had, and continues to have, ownership or management relationships with the following:

- Evansville Terminal Railway Company, Inc. - indirect and direct ownership from 1997¹ to 2000, when the company was sold and ceased to be an employer under the Acts;
- Vermilion Valley Railroad Company, Inc. (B.A. No. 2396) – 100% owned by IBCX, 2003 to present;
- Chesapeake and Indiana Railroad Company, Inc. (B.A. No. 2397) – direct ownership, 2004 to present;
- Tishomingo Railroad Company, Inc. (B.A. No. 4573) – 50% owned by IBCX, 2006 to present;

- Ohi-Rail Corporation (B.A. No. 3350) – not owned by IBCX, rather IBCX is the contracted manager of the railroad, 2006 to present. While IBCX does not have an ownership interest in Ohi-Rail Corporation, according to his letter of May 21, 2007, Mr. Felix “as an individual, has had direct ownership only in Ohi-Rail Corporation (minority ownership) from 1982 to 2001”. However, in responding to a question regarding IBCX’s ownership interest in Ohi-Rail, in his letter of November 6, 2007, Mr. Felix stated “no ownership by IBC or me personally”. ; and
- Youngstown & Southeastern Railroad Company, Inc. – 100% owned by IBCX, 2006 to present.

Mr. Felix and his wife, Sandra M. Felix, are the sole owners of IBCX, and, as stated above, Mr. Felix is President of IBCX. Mr. Felix also is (or has been) President of each of the railroads named above, in addition to presently being the General Manager of Ohi-Rail Corporation. According to information initially provided by Mr. Felix, he has been an employee of IBCX since 1996, and in 2005, his daughter, Ms. Kesha Felix Lainhart, became an employee of IBCX. According to the Petition for Reconsideration and Mr. Felix’s Affidavit, Mr. Felix took himself off of the IBCX payroll in 2008, and Ms. Lainhart also ceased employment with IBCX in 2008 (Petition for Reconsideration, p. 4, 13; Affidavit, p. 8). Mr. Felix has explained that the he and his daughter had “dual employment with multiple railroads”, and furthermore, when IBCX became an owner of a railroad in 1997, employment for Mr. Felix was segregated between IBCX’s “non-covered activities and railroad employment” (Felix letter of May 21, 2007).

According to the Affidavit submitted by Mr. Felix with the Petition for Reconsideration, IBCX is both a short line railroad holding company and a railroad equipment leasing company which does not own railroad lines or provide transportation for compensation (Petition for Reconsideration, p. 2; Affidavit, p. 1). According to that Affidavit, IBCX’s principle business activity involves owning and leasing rail cars; buying, owning, and

¹ We note that in both the Petition for Reconsideration and Mr. Felix’s Affidavit, statements are made the IBCX did not acquire any interest in the Evansville Terminal Railway Company until May 28, 1999, not 1997 (Petition for Reconsideration, p. 3, 12; Affidavit, p. 2, 3). Our findings in B.C. D. 08-37 were based on information supplied by Mr. Felix in his letter of May 21, 2007 (“IBC has had, or continues to have, ownership or management relationships with the following railroads: Evansville Terminal Railway Company, 1997 to 2000, indirect and direct ownership, company sold”; and “Even as IBC became an owner of a railroad in 1997 * * *”). We find that the information and documentation supplied with the Petition for Reconsideration support the statements that IBCX did not acquire Evansville Terminal Railway Company until May 28, 1999.

leasing locomotives; rerailling derailed rail cars; and railroad-related consulting services for third party clients, including rail-served industries, short line railroads, and state agencies (Petition for Reconsideration, p. 2; Affidavit, p. 1,2). Mr. Felix also states that as IBCX's President, he spends 27% of his time on work unrelated to the short lines which IBCX controls. Mr. Felix explains that 73% of his time is spent administering to the four railroads which IBCX owns and a fifth railroad which it manages. These activities include managing banking and financial relationships; tax issues; strategic planning, including the lease, purchase, or sale of railroad properties or equipment; cash management and budget; and dealing with state and federal government agencies and lawyers. Mr. Felix also spends "a significant amount of time" supervising the managers of IBCX's subsidiaries (Affidavit, p. 8, 9). Mr. Felix is compensated for his services to the railroads which IBCX owns and/or manages by the railroad subsidiaries, with appropriate railroad retirement taxes and contributions paid by the covered employers (Petition for Reconsideration, p.4, 5; Affidavit, p. 7).

There appears to be no dispute that Mr. Felix is the president of IBCX² and of several railroads: Vermilion Valley Railroad Company (BA No. 2396, with service creditable from April 24, 2003 to date), Chesapeake and Indiana Railroad Company, Inc. (BA No. 2397, with service creditable from August 11, 2004 to date), Tishomingo Railroad Company, Inc. (BA No. 4573, with service creditable from May 13, 2000 to date), and Youngstown & Southeastern Railroad Company, Inc. (BA No. 2287, with service creditable from December 1, 2006 to date) In addition, Mr. Felix was the president of Evansville Terminal Railway Company, Inc. from 1997 to 2000 (former BA No. 2369, with service creditable from July 22, 1996 through December 31, 2000).

As stated previously, the evidence clearly shows that IBCX is not a carrier by railroad subject to the jurisdiction of the Surface Transportation Board. However, because Mr. Felix is the owner and President of IBCX and President of the railroads listed in the preceding paragraph, the Board found that IBCX is under common control with those railroads within the meaning of section 1(a)(1)(ii) of the RRA and the corresponding section of the RUIA.

IBCX does not appear to dispute the Board's description of IBCX's holdings or Mr. Felix's managerial position with the various entities involved. Rather, IBCX argues that it is not under common control with one or more railroad common carrier employers, citing a decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act (Petition for Reconsideration p. 7-10). In that case the Court held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of §3231. Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir. 1993).

² As stated previously, Mr. Felix terminated his employment relationship with ICBX as of July 31, 2008. However, he continues to own the company and direct its activities (Petition for Reconsideration, p.3; Affidavit, p. 1-2).

The Board has, in appropriate cases, applied Union Pacific and held that a parent company was not under common control with its subsidiary; however, the corporate structure in Union Pacific is different than in this case. Pursuant to its authority under section 7(b)(5) of the Railroad Retirement Act, the Board has also promulgated regulations³ defining “control”:

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person. (20 CFR 202.4)
202.4.

Section 202.5 of the Board’s regulations provides that a company or person is under common control with a carrier whenever the control of such company or person is in the same person, persons, or company as that by which such carrier is controlled (20 CFR 202.5).

The Board’s regulations promulgated under section 12(l) of the Railroad Unemployment Insurance Act adopt this definition for purposes of determining employers subject to that Act as well. See 20 CFR 301.4. Moreover, regulations of the Internal Revenue Service promulgated under the Railroad Retirement Tax Act contain a similar definition of control at 26 CFR 3231(a)-1:

* * * the term “controlled” includes direct or indirect control, whether legally enforceable and however exercisable or exercised. The control may be by means of stock ownership, or by agreements, licenses, or any other devices which insure that the operation of the company is in the interest of one or more carriers. It is the reality of control, however, which is decisive, not its form nor the mode of its exercise.

Court decisions under the Railroad Retirement and Unemployment Insurance Acts have found common control to exist where controlling stock ownership of a car and locomotive repair company and a rail carrier lay in the hands of the same individual, Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, (7th Cir., 1992). In this case, IBCX, a subchapter S corporation solely owned by Mr. Felix and his wife, owns (or owned, in the case of Evansville Terminal Railway Company, Inc.) 100% of the stock of three short line rail carriers, and 50% of a fourth. Moreover, Mr. Felix is General Manager of Ohi-Rail Corporation (a covered rail carrier) and is, or has been, President of each of the other short line railroads, as well as IBCX. The Board therefore finds that on these

³ The Board notes that its regulations defining control and common control have remained virtually unchanged for over 60 years (see 4 Fed. Reg. 1477, April 7, 1939) and thus represent the Board’s “longstanding” interpretation of the coverage provisions. Barnhart v. Walton, 535 U.S. 212, (2002) at 219.

facts, control of IBCX is in the same person as that by which Evansville Terminal Railway Company, Inc., Vermillion Valley Railroad Company, Inc., Chesapeake and Indiana Railroad Company, Inc., Tishomingo Railroad Company, Inc., Ohi-Rail Corporation, and Youngstown & Southeastern Railroad Company, Inc. are controlled. The Board finds this constitutes control within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act, section 1(a) of the Railroad Unemployment Insurance Act, and the regulations promulgated thereunder.

With respect to IBCX's argument that the Court's holding in Union Pacific as previously applied by the Board dictates that IBCX is not under common control with its wholly owned subsidiaries, we note that the Board has declined to follow Union Pacific in closely held corporate structures where control of the parent company and subsidiary carrier(s) is clearly concentrated in a few individuals. Review of the Union Pacific case indicates that the Court in Union Pacific noted that the shareholders of the holding company could exercise some control over the policies of that entity, which, in turn, could exercise some control of the policies of the subsidiary rail carrier. However, the Court did not find that the ultimate authority of the shareholders subjected the holding company and subsidiary rail carrier to common control. We find such a conclusion reasonable in the case of a publicly held corporation, where ownership is so diffuse among a large number of stockholders that any control exercised by shareholders is remote, indirect, and, to a certain extent, nonexistent. However, in the case before us, control of all operations is direct and absolute. Mr. Felix and his wife are sole owners of IBCX, which in turn owns a number of small rail carriers covered under the Acts. Ownership of IBCX and the carriers is concentrated in two individuals. Accordingly, the Board finds on these facts that IBCX is under common control with its rail carrier subsidiaries.

Section 202.7 of the Board's regulations defines a service as "in connection with railroad transportation * * * if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person* * * have undertaken as a common carrier by railroad * * * ." See 20 CFR 202.7. The Court of Appeals for the Eighth Circuit found operation of an office building which housed administrative offices of the rail carrier to be "a service connected with and supportive of railroad transportation." Southern Development Co. v. Railroad Retirement Board, 243 F. 2d 351, (8th Cir., 1957) at 355. If such an indirect activity as maintaining space for office employees constitutes a service with the meaning of the Acts, the Board is then convinced that the actual activities of those office employees, such as the "managing banking and financial relationships, tax issues, strategic planning including the lease, purchase, or sale of railroad properties or equipment, cash management and budgeting, and dealing with state and federal government agencies, among others" listed in the Petition for Reconsideration and Mr. Felix's Affidavit (Petition p. 11,12; Affidavit, p. 8,9) must be services in connection with the rail transportation of IBCX's rail carrier subsidiaries as well. See B.C.D. 03-76, *Canadian National Railway Properties, Inc.* (affiliate company which acquired, managed and disposed of real estate and personal property performed a service in connection with the railroad transportation conducted by the associated rail carrier.)

With respect to the question whether IBCX performs any service in connection with railroad transportation, IBCX again looks to Union Pacific, stating that Union Pacific:

Identifies at great length approximately 19 activities conducted at the holding company level which, by implication, are deemed not to be the sort of routine day-to-day activities typically undertaken by a railroad. Such administrative oversight or supervisory activities include, among others, tax issues, equipment financing, auditing, strategic planning, cash management, negotiation of acquisitions or mergers, capital and operating budget, inspection of railroad facilities, press relations, investor relations, and legislative and government relations. (Petition for Reconsideration, p. 11).

According to the Petition for Reconsideration, "Mr. Felix devoted 73% of his total time and compensation to railroad or railroad-related work for IBCX's short line railroad subsidiaries, and 27% of his total time to IBCX work". The Petition further states that "Of that amount, he spent close to 90% of his time on work for third party clients and the rest on the sort of holding company administrative oversight or supervisory activities identified in Union Pacific * * *" (Petition for Reconsideration, p. 11, 12; Affidavit, p. 8,9). In other words, since of the 27% of Mr. Felix's time and compensation is attributable to IBCX, and 90% of that time is spent on Union Pacific-type holding company administrative or supervisory activities for third party clients, the actual amount of time Mr. Felix spends on IBCX services **to its railroad subsidiaries** is 2.7%. It appears that Mr. Felix is arguing that IBCX services provided to its railroad affiliates are casual in nature.

The problem with this argument is that Mr. Felix is equating himself with IBCX. Since Mr. Felix's time is divided as described above, he appears to be arguing that the same division of time and compensation be attributed to IBCX. However, this is not a determination that Mr. Felix is an employer under the Acts, but that IBCX is. As Mr. Felix stated in his letter dated November 6, 2007, IBCX's management services include leasing locomotives to Vermillion Valley Railroad Company, Inc., Chesapeake and Indiana Railroad Company, Inc., and Youngstown & Southeastern Railroad Company, Inc.; leasing maintenance equipment to Chesapeake and Indiana Railroad Company, Inc., and Youngstown & Southeastern Railroad Company; and maintaining a central corporate office. One of IBCX's employees spends 73% of his time on affiliated railroad subsidiary work, and the other spends 50% of his time on the same. We find that IBCX meets both of the criteria contained in section 1(a)(1)(ii) of the RRA; it is under common control with a rail carrier employer and it provides "service in connection with" railroad transportation.

The Petition for Reconsideration also states that IBCX acted upon "advice rendered by Board officials Joseph Elena and Ethel Escho" and further that "IBCX relied to its detriment on advice given by Board employees in structuring its business as a non-employer. As such, under the common law principle of estoppel, it should be bound by the previous advice given IBCX by its former employees" (Petition for Reconsideration, p. 10, 16). At

the outset, we note that the Board cannot be prevented from following its law and regulations. Gressly v. Califano, 609 F. 2d 1265, 1267 (7th Cir. 1979).

However, even if IBCX is suggesting that it received imprecise advice, the agency cannot be estopped from following the explicit language of the Act by misinformation provided by one of its employees. See Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). In that case the Supreme Court rejected the application of estoppel as a basis for payment of disability benefits that were not authorized by the applicable statute even though the recipient had detrimentally relied on the erroneous advice of a government employee. See also, Crown v. U.S. Railroad Retirement Board, 811 F. 2d 1017 (7th Cir. 1987).

Accordingly, on reconsideration, a majority of the Board concludes that Indiana Boxcar Corporation is an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts, and is required to file returns of service and make such contributions as are required of employers under the Acts. In that respect, the last question remaining is the effective date of coverage. In B.C.D. 08-37 we found that IBCX has been performing services in connection with the transportation of passengers or property by railroad for the period 1997 to 2000, when it had an ownership relationship with Evansville Terminal Railway Company, Inc., and then again from 2003 to the present, when it had ownership relationships with Chesapeake and Indiana Railroad Company, Inc. (2003 to present), Tishomingo Railroad Company, Inc. (2006 to present), and Youngstown & Southeastern Railroad Company, Inc. (2006 to present), as well as performing as the contracted manager of Ohi-Rail Corporation (2006 to present), all of which are covered rail carrier employers. The Board held that IBCX became an affiliate employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1997, the beginning of the first year during which it was under common control with a rail carrier employer.

In its Petition for Reconsideration, IBCX requests that, should the Board not reverse its initial decision, the period of coverage should be changed to May 28, 1999, through April 1, 2000, and from April 24, 2003, through July 31, 2008. IBCX argues that:

IBCX did not acquire *any* {emphasis supplied} interest in EVT until May 28, 1999. Moreover, inasmuch as the Board found in its decision that EVT had ceased to be an employer as of December 31, 2000, IBCX also could not be an "employer" as of the date of the Board's July 15, 2002, decision. * * * IBCX did not acquire control of EVT until it bought out the majority shareholder, AB Rail Investment on May 28, 1999. Accordingly, IBCX only controlled EVT from that date (May 28, 1999) until the date it sold EVT to the Indiana Southwestern Railway Company, April 1, 2000. (Petition for Reconsideration, p. 12, 13).

IBCX goes on to argue that its status as a railroad holding company began again on April 24, 2003, after it acquired the Vermillion Valley Railroad Company, and then ceased on July 31, 2008, "when Mr. Felix made the decision to take himself off the IBCX payroll".

IBCX argues that “the moment that IBCX ceased to have any compensated employees, it ceased to be an employer subject to the Act”, citing our decision in American Orient Express Railway Company, LLC, et al (B.C.D. 07-32), an Internal Revenue Service (IRS) revenue ruling, and section 202.11 of the Board’s regulations.

As stated previously, we find the documentation submitted on reconsideration sufficient to find that IBCX did not acquire an interest in EVT until May 28, 1999. Therefore we amend our decision in B.C.D. 08-37 to find that IBCX became an employer under the Acts effective May 28, 1999. Regarding IBCX’s argument that coverage should end July 31, 2008, when Mr. Felix ceased his employment with IBCX (even though, by his own statement he “continues to own the company and direct its activities”, Affidavit, p. 2), we note that section 202.11 of the Board’s regulations provides that:

The employer status of any company or person shall terminate whenever such company or person loses any of the characteristics essential to the existence of an employer status.

Review of decisions of the Board terminating an entity’s status as a covered employer indicates that the character of an entity as a railroad no longer exists when, as in the case of American Orient Express Railway Company, (B.C.D. 07-32) all of its railroad assets have been sold (“The information summarized above indicates that, due to the sale of their assets and transfer of their operating agreement rights to GrandLuxe, AOERC, AOEE and AOERS no longer possess the characteristics of an operating rail company”) and/or the corporation has been dissolved. See also, Middletown and New Jersey Railway Company, Inc. (B.C.D. 11-45), “Based on the information set forth above, although MN&J has not yet dissolved as a business organization, it is clear that its character as a railroad no longer exists inasmuch as all of its railroad assets have been sold”. The mere fact an entity does not have employees at a particular point in time is not sufficient evidence on its own to terminate coverage – employees can be hired at any time.

A majority of the Board, therefore, finds on reconsideration that IBCX is an employer under the Acts and the correct dates of coverage are May 28, 1999, through April 1, 2000, and from April 24, 2003, through the present.

Original signed by:

Michael S. Schwartz

Walter A. Barrows

Jerome F. Kever
(Dissenting opinion attached)

**JEROME F. KEVER
MANAGEMENT MEMBER'S WRITTEN DISSENT**

Indiana Boxcar Corporation Reconsideration Decision

Docket Number: 11-CO-0037

I dissent from the majority's holding that *Union Pacific Corporation vs. United States*, 5 F.3d 523 (Fed. Cir. 1993) decision is limited to only public corporations. In prior decisions, I have stressed that while a holding company may not be found to be a covered employer due to the interpretation of "under common control" by the Court in the Union Pacific case, employees of the holding company may be attributed to employees of subsidiary railroads if they are under direct supervision of the railroad. This employee determination would be unique to the factual circumstances presented on a case-by-case basis. For this reason, I must dissent.

Original signed by:

Jerome F. Kever, Management Member

Date: December 14, 2011