

B.C.D. 12-30
Employer Status Determination
Decision on Reconsideration
Atlas Railroad Construction, LLC

August 16, 2012

This is a decision upon reconsideration of the Railroad Retirement Board based on the request of Atlas Railroad Construction LLC (Atlas). The Board issued an initial determination in Board Coverage Decision 11-94, dated November 18, 2011, finding that Atlas is an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts. For the reasons set forth below, the Board determines upon reconsideration that Atlas is not an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts.

The employer at issue in this appeal, Atlas, is engaged in the business of providing railroad engineering, construction and maintenance services, which include track design, project management, track inspection, rail and tie rehabilitation and reconstruction, new construction of various track and rail types, leasing of certain rail-related equipment and shop facilities, and repair and remanufacturing of certain rail-related equipment. In its request for reconsideration, Atlas has characterized its business broadly as: 1. General track construction projects and; 2. Track maintenance and repair. Atlas is wholly owned by RailTex, Inc. (RailTex), a covered employer. RailTex is an indirect subsidiary of RailAmerica Inc. (RA), a holding company that owns approximately 44 railroads.

Under section 1(a)(1)(ii) of the Railroad Retirement Act, a covered employer is:

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 * * *. 45 U.S.C. § 231(a)(1)(ii)

In the decision dated November 18, 2011, the Board found that since Atlas and its parent, RailTex, Inc., are both under the corporate ladder of RA, they were under common control with several rail carriers within the meaning of the Act. See B.C.D. 11-94. The Board then addressed whether Atlas performs a "service in connection with" railroad transportation in accordance with section 231(a)(1)(ii) of the Act and the majority of the Board found that it did. As a result, Atlas was found to be a covered employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act as of July 1, 2010, the date it was acquired by RailAmerica, Inc.

In the request for reconsideration, Attorney Ronald Lane, attorney for Atlas, states that the original determination was based on pre-acquisition experience and requests reconsideration based on actual post-acquisition results. Essentially, he argues that because Atlas' total revenues are increasing and the portion of work they are doing for RA railroads is flat, the percentage of revenues that come from RA railroads has

decreased. He argues that the small amount of maintenance work performed for two RA railroads shows that it is mere casual service. In addition, he argues again that construction activities do not constitute "service in connection with transportation" based on the principles developed by the Board since *Lenoir Car Works*.

With respect to the issue of whether the services which Atlas provides to its rail affiliates constitute "service in connection with" rail transportation, we look to the framework provided in the case of *Lenoir Car Works, et. al*, (Legal Opinion L-38-650), which was used by the Board most recently in the cases of *CSX Intermodal, Inc.* (B.C.D. 96-82), and *Nexterna, Inc., Decision on Reconsideration* (B.D.C.07-8). In addressing, "service in connection with transportation", *Lenoir* stated:

"The determination is to be made upon consideration of all the particular facts and circumstances of each particular case which appear to be relevant. Such determination will include but not be limited to consideration of such factors as the physical relation of subsidiary operations to parent operations; the history and origin of the subsidiary; for whose benefit the subsidiary's operations are conducted; the amount of business carried on by the subsidiary with the general public."

We now look to whether Atlas is performing service in connection with railroad transportation within this framework.

Physical relation of Atlas to RailAmerica

The corporate office of Atlas Railroad Construction, LLC is located in Bridgeville, Pennsylvania, a separate and distinct location from that of RailAmerica, Inc. in Jacksonville, Florida. Furthermore, Atlas and RA have no officers or directors in common. The President, Vice President-Chief Operating Officer, and Vice President-Chief Financial Officer of Atlas are the same individuals who held those positions before the acquisition of Atlas by RA. They have not combined their operations. Rather, when Atlas outgrew its original offices in Eighty Four, Pennsylvania in February 2012, it did not move closer to RA in Florida but remained in Pennsylvania.

History and origin of Atlas

The information submitted shows that Atlas did not originate as an offshoot of RA operations. Prior to acquisition, Atlas was a privately held company engaged in the business of providing railroad engineering, construction and maintenance services. It had been in business as such for 55 years and only began providing RA railroads services in 1995. Atlas employees were covered by FICA as are the employees of Atlas' competitors in the railroad construction and maintenance business. RA's stated principal objective in acquiring Atlas was not to provide service to RA's railroad affiliates but rather to capitalize on the wave of infrastructure spending on rail facilities, including TIGER grants and similar public spending programs. Atlas' business has remained unchanged since acquisition except that under RA ownership, it has taken advantage

of infrastructure spending and has been awarded more railroad construction business which is competitively bid.

Entity Benefiting From Atlas Operations

According to information provided by Mr. Lane, Atlas continues to operate as a separate and distinct legal and business entity since its acquisition. Atlas is only one of a number of contractors that RA uses for construction and maintenance services. Atlas is not the predominant contractor for RA railroads and it accounts for less than 10% of RA's expenditures for construction and maintenance contracts. General track construction projects provided to RA since acquisition have been competitively bid and awarded as arms-length transactions. No project lasted longer than 180 days. Atlas also has maintenance and repair contracts for two of RA's 44 railroads. These contracts were negotiated before acquisition and the work has remained essentially unchanged.

In addition to RA railroads, Atlas provides services nationwide for heavy and light rail facilities, in cities such as Atlanta, Boston, New York, Philadelphia, Baltimore, Washington, D.C., Cleveland, and Dallas. Atlas has done work for the U.S. Army Corp. of Engineers, the Department of Defense, the U.S. Navy, North Carolina Ports, Dundalk Marine Terminal, other agencies and private shippers, Class I railroads and short line railroads.

Business with the public

As we explained in *CSX Intermodal*, this criterion set forth in L-38-650 was initially intended to measure a company's sales of products and services to its carrier affiliate compared to its sales to nonrailroads and to other carriers. When Atlas was acquired by RA in July 2010, approximately 23.8% of Atlas' revenues were derived from services provided to RA. For 2012, that percentage is expected to be 10.5%. Atlas' total revenue has almost doubled since acquisition and that revenue has mainly come from non-RA railroads. As a result, the revenue from the numerous different RA railroads accruing to Atlas is shrinking as a percentage of Atlas' overall revenues. Atlas states that it plans to continue to increase non-RA work and revenues. In addition, as stated above, Atlas provides services to a wide variety of facilities, both private and public, across the country. These services to non-RA railroads make up almost 90% of Atlas' revenues.

Using the framework of *Lenoir Car Works* detailed above, Atlas is not performing a service in connection with railroad transportation. Evidence of record shows that Atlas maintains separate offices and operations from those of RA. Atlas did not start as an offshoot of RA and it continues to provide services as it had prior to acquisition. It provides services to many different customers, both public and private. The work performed by Atlas is also done by competitor companies subject to FICA and the Social Security Act rather than RRA-covered, employers. Atlas approaches RA rail affiliates in the same manner it deals

with any of its customers, by competitive bid. In addition, the percentage of work performed for RA rail affiliates has only decreased since acquisition.

Based upon the above, it is the decision of the Board that Atlas Railroad Construction, LLC is not performing a service in connection with railroad transportation as that phrase has been interpreted by the Board. Accordingly, Atlas Railroad Construction, LLC is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

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