

## **EMPLOYER STATUS DETERMINATIONS**

### **Railcar Repair of the South, Incorporated Arkansas Motive Power Services, Inc. Arkansas Railroad Contractors**

This is a determination of the Railroad Retirement Board of the employer status of Railcar Repair of the South, Incorporated, doing business as Russellville Railcar Repair (RRR), Arkansas Motive Power Services, Inc. (AMPS), and Arkansas Railroad Contractors (ARC) under the Railroad Retirement Act (45 U.S.C. sec 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. sec.351 et seq.). All of these companies are subsidiaries of the Arkansas Short Line Railroads, Inc. (ASLR), which is a holding company incorporated under the laws of Arkansas for the purposes of running short lines and related transportation. ASLR owns and operates the Dardanelle & Russellville Railroad (D&R), a covered employer (BA No. 3813), and the Ouachita Railroad, Inc. (ORI), a covered employer (BA No. 3882). All of the above companies share a common office where all payroll and accounting records are maintained.

### **Railcar Repair of the South d/b/a Russell Rail Car Repair (RRR)**

The following information was obtained by the Division of Audit and Compliance from the records of RRR.

Railcar Repair of the South, Inc., d/b/a Russellville Railcar Repair, was incorporated in the State of Arkansas on March 19, 1991. The purposes for which RRR is organized are: "the repair, refurbishing, construction, and remanufacturing of all types of railroad rolling stock and equipment together with the purchase and sale of all railroad parts and equipment and related activities."

The principal shareholders and officers of RRR are William K. Robbins, Jr. and Timothy K. Robbins. These two individuals are also the principal shareholders and officers of the following corporations: Arkansas Short Line Railroads, Inc. (ASLR), Dardanelle & Russellville Railroad Inc. (D&R) and Ouachita Railroad, Inc. (ORI).

RRR employs approximately 9 individuals. Mr. Jerry Wesley, Vice President Finance/Comptroller-D&R, estimated that RRR performs approximately 90% of its work for railroad customers, including a minimal amount (3%) for its affiliates, and the remaining 10% for non-railroad customers. A review of accounts receivable shows that customer payments for service performed by RRR are being made to its affiliates the D&R and ORI. RRR invoices direct customers to remit payment to the D&R or ORI respectively.

Mr. Wesley stated that Mr. Raymond Vaughn is the supervisor of RRR employees. Mr. Vaughn is shown on payroll records to be an employee of the D&R railroad.

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**Arkansas Motive Power Services (AMPS)**

The following information was obtained from the records of AMPS:

Arkansas Motive Power Services, Inc. (AMPS), is a subsidiary corporation of Arkansas Short Line Railroads, Inc. (ASLR). AMPS was incorporated in the State of Arkansas on May 25, 1991. The purposes for which AMPS is organized are: "to buy, sell, lease, and repair railroad machinery and all related activities." The principal shareholders and officers of AMPS are William K. Robbins, Jr. and Timothy K. Robbins.

AMPS currently employs two mechanics who work on D&R property and repair locomotives. Twenty seven percent of their work is for railroads; the remaining work is for private industry. AMPS performs all the mechanical repairs for its affiliated railroads which amount to 3% of its railroad related business. One of the mechanics who performs work for AMPS is actually an employee of D&R and is carried on the payroll of that company. The evidence shows that the work performed by the other employee is supervised by D&R.

**Arkansas Railroad Contractors, Inc.**

The following information was obtained from the records of ARC:

Arkansas Railroad Contractors, INC. (ARC), is a subsidiary corporation of Arkansas Short Line Railroads, Inc. (ASLR). ARC was incorporated in the State of Arkansas on April 15, 1992. The purposes for which ARC is organized are: "the repair, maintenance, and construction of railroad tracks, beds, right-of-way, bridges, and all structures or assents commonly located upon railroad rights-of-way together with all related activities." The principal shareholders officers of ARC are William K. Robbins, Jr. and Timothy K. Robbins.

Mr. Jerry Wesley, Vice President Finance/Comptroller-D&R, estimated that ARC performed approximately 20%-30% of its rail related service and construction work for railroad customers. He estimated that approximately 70%-80% of ARC's work is performed for non-railroad customers. In 1992, 18% of ARC's revenues were derived from its affiliate, ORI, but this has dropped to less than 1% at the present time. There is no evidence that D&R or ORI employees are involved in the supervision of ARC employees.

**Legal Analysis**

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Section 1(a)(1) of the RRA defines the term "employer" to include:

(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad \* \*

\*. [45 U.S.C. §231(a)(1)(i) and (ii)].

Section 1 of the RUIA contains essentially the same definition.

Section 202.5 of the Board's regulations provides that a company is under common control with a carrier whenever the control of such company is in the same person, persons, or companies as that by which the carrier is controlled. In this case, the same individuals own railroads and RRR, AMPS, and ARC. Thus, RRR, AMPS and ARC are under common control with a carrier under the Acts. In addition, all three companies perform services which are reasonably directly related, both functionally and economically, to the common carrier operations. Thus, these companies in the broadest sense are performing services in connection with railroad transportation. See section 202.7 of the Board's regulations.

However, the facts in these cases are virtually identical to those in Board Coverage Decision 93-79, In re VMV Enterprises Incorporated. VMV did only a small portion of its work, amounting to 2.5% of its revenue, for its affiliated railroad although it performed a substantial amount of its work for the rail industry as a whole. Based on the low level of service for its rail affiliate, the Board (Labor Member dissenting) found that VMV was not performing a service in connection with railroad transportation.

In this case, 3% of RRR's services, 3% of AMPS services, and 1% of ARC's services are performed for their rail affiliates. These percentages are nearly identical to the service level at issue in VMV. Consequently, consistent with its holding in VMV, the Board (Labor Member dissenting) finds that RRR, AMPS, and ARC are not covered employers under the Acts.

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However, this leaves open the question as to whether employees of the non-railroad affiliates should be considered employees of the covered railroads. As indicated above, employees of RRR perform all their work on property of D&R or ORI and are supervised by employees of the rail affiliates. Employees of AMPS perform all their work on D&R property, one mechanic is already carried on the D&R payroll and, as noted earlier, the evidence is that the other employee is supervised by D&R employees. Billings for RRR are done by D&R and remittances for services performed are made to the railroad.

Section 1(d)(1)(A)(i) of the RRA provides that an individual is in the service of an employer when he or she is subject to the continuing authority of an employer to supervise and direct the manner of rendition of his services. (A similar provision is found in the RUIA.) Since employees of RRR are supervised by an employee of D&R, the Board finds that employees of RRR are statutory employees of D&R, and are thus covered under the Acts. Likewise, the employees of AMPS are subject to the direction of D&R and, for purposes of the RRA and the RUIA, are employees of that carrier.

The evidence does not, however, support a finding that employees of ARC are statutory employees of either D&R or ORI. Accordingly, these individuals are not covered under the Acts.

In conclusion, the Board (Labor Member dissenting) finds that RRR, AMPS, and ARC are not employers under the Acts. However, the Board finds that employees of RRR and AMPS should be considered employees of D&R, an employer under the Acts.

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Glen L. Bower

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V. M. Speakman, Jr. (Dissenting in part)

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Jerome F. Kever

**DISSENT OF  
V. M. SPEAKMAN, JR.  
ON EMPLOYER STATUS DETERMINATION  
RAILCAR REPAIR OF THE SOUTH, INC.,  
ARKANSAS MOTIVE POWER SERVICES, INC.  
ARKANSAS RAILROAD CONTRACTORS**

*I agree that the individuals working for Railcar Repair of the South, Inc., doing business as Russellville Railcar Repair (RRR) and Arkansas Motive Power Services (AMPS) are covered railroad employees. However, in the case of RRR, 90% of its work is for railroad customers, and since a substantial amount of its work is for the railroad industry as a whole, it should be a covered employer as well. The fact that only a small percentage of its revenue is derived from its affiliates is not relevant (See my dissent in the VMV Enterprises, Inc., decision).*

*I do not take issue with the determination on Arkansas Railroad Contractors.*

  
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V. M. Speakman, Jr.

OCT 18 1995  
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Date