

## **EMPLOYER STATUS DETERMINATION**

### **P.S. Technology, Inc.**

This is a determination of the Railroad Retirement Board concerning the status of P.S. Technology, Inc. (PST) 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).

PST is a wholly-owned subsidiary of Rio Grande Holding. Rio Grande Holding has a controlling interest in The Denver & Rio Grande Western Railroad, an employer under the Acts.

Information regarding PST was provided by W. D. Falconer, President & CEO of PST, in a letter dated May 1, 1995. That letter stated that PST was incorporated March 10, 1988, and began its operations on that date. PST employs 28 employees. According to the letter, PST is an independently operated subsidiary of Rio Grande Holding which installs and maintains computer software for the railroad and transportation industry. In the period 1991-1994 2.6% of PST's revenues were derived from affiliated railroads, 46.2% of its revenues were derived from other U.S. railroads, 38.9% of its revenues were derived from Canadian railroads, and the remainder from either other foreign railroads or non-railroad sources.

Section 1 of the RRA defines the term employer to include the following:

- (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 services (except trucking service, casual service, and the casual operations of equipment or facilities) in connection with the transportation of passengers or property by railroad.... [45 U.S.C. §231(a)(1)(i) and (ii)]

The RUIA contains the same definition.

Section 202.5 of the Board's regulations, defines when a company or person is under common control:

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].

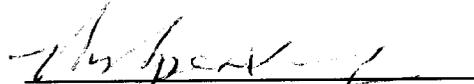
According to the information provided by W.D. Falconer, both PST and The Rio Grande and Western Railroad are owned by Rio Grande Holding. Based on the common ownership of PST and the Rio Grande and Western Railroad by Rio Grande Holding, the Board finds that PST is under common control with a rail carrier. The Board must now determine whether PST performs a service in connection with rail transportation. The facts of this case are quite similar

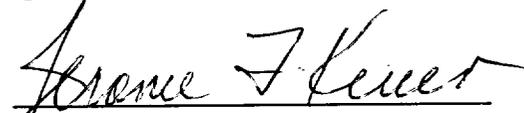
P.S. Technology, Inc.

to the facts addressed in Board Coverage Decision 93-79, In Re VMV Enterprises Incorporated. VMV performed only 2.5% of its services for its rail affiliate and derived only 2.5% of its revenues from that business. VMV did perform a substantial amount of its work, 55.7%, for the rail industry as a whole. Because of the small amount of work performed by VMV for its affiliated railroad, a majority of the Board found that VMV was not performing a service in connection with railroad transportation.

The evidence of record shows that 2.6% of PST's business comes from its railroad affiliate. This level of service is almost exactly the level of affiliate service found insufficient for coverage in Board Coverage Decision 93-79. Consistent with our earlier opinion in B.C.D. 93-79, a majority of the Board finds that P.S. Technology, Inc. is not an employer under the RRA and the RUIA.

  
Glen L. Bower

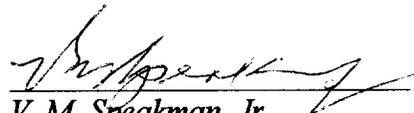
  
V. M. Speakman, Jr. (*Dissenting  
opinion attached*)

  
Jerome F. Kever

**DISSENT OF V. M. SPEAKMAN, JR.  
ON THE COVERAGE DETERMINATION OF  
P.S. TECHNOLOGY, INC.**

*I am in agreement that P.S. Technology, Inc. (PST) is under common control with a rail carrier, but strongly disagree with the majority's determination that it does not perform service in connection with rail transportation. The basis for the majority's decision is Board coverage decision 93-79, VMV Enterprises, Inc. For the same reasons stated in my dissent in VMV, I dissent in this case.*

*Section 1(a)(1)(ii) of the Railroad Retirement Act of 1974 in plain language with plain meaning provides that an entity which is under common control with a railroad and is performing rail services, is covered under the Acts. That section of law contains no requirement that the rail service be performed for the affiliate.*

  
V. M. Speakman, Jr.

7/31/93  
Date