



**Legal Opinion L-2002-15**  
**November 22, 2002**

U.S. Railroad Retirement Board Phone: (312) 751-7139  
844 North Rush Street TTY: (312) 751-4701  
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

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TO: Joseph Ellena  
Chief of Audit and Compliance  
Bureau of Fiscal Operations

FROM: Steven A. Bartholow  
General Counsel

SUBJECT: North Carolina Ports Railway Commission  
Beaufort & Morehead Railway  
Beaufort & Morehead Railroad  
Experience Rating – Assignment of Operating Lease

This is in reply to your inquiry of September 18, 2002, and the June 12, 2002, letter from Mr. William C. Taylor, General Manager, North Carolina Ports Railway Commission (Railway Commission), objecting to the contribution rate assessed under the Railroad Unemployment Insurance Act (RUIA) against the Railway Commission in connection with rail operations conducted by its subsidiary, the Beaufort & Morehead Railway, Inc. (B&M Railway), which you referred for review. Your inquiry requests assistance in determining the identity of the current operator, and requests advice regarding a response to Mr. Taylor's letter.

The subject matter of your inquiry and Mr. Taylor's letter is the operation of a line of rail in North Carolina, originally owned by the Norfolk Southern Railroad and running between Morehead City and Beaufort for approximately 3.17 miles (including a bridge over the Newport River). When Norfolk Southern abandoned service over the line in 1937, it was purchased by a group of local businessmen, who formed the Beaufort and Morehead Railroad (B&M RR). See: Beaufort & Morehead Railroad Company Acquisition, 221 I.C.C. 743, 744, (1937). The owners evidently never envisioned the B&M RR as more than owner of the right of way, as from the outset it owned no equipment and arranged for rail service over the line by other entities, beginning with the Atlantic & North Carolina Railroad. 221 I.C.C. at 744, 745. Ownership of the rail line, and operation of rail service over the line, thus bifurcated at the time the line became independently owned in 1937. The shifting conduct of operations is recorded by a number of notices of the former Interstate Commerce Commission, its successor Surface Transportation Board, and corresponding decisions by the Railroad Retirement Board of the operators' status under the Railroad Retirement and Railroad Unemployment Insurance Acts. These reflect that beginning June 1947, the informal operating agreement between B&M RR and the Atlantic & North Carolina was superceded by a formal lease of the rail line to Mr. A. T. Leary, who became a covered lessee employer (BA 3570). See Legal Opinion L-59-259. Mr. Leary was later succeeded by his son, who operated the line as A. T. Leary Jr., Inc., doing business as the B&M RR.

In February 1990, the Beaufort East Coast RR (East Coast) purchased the lease from A.T. Leary Inc., and continued to operate the leased line as the B&M RR. See Beaufort & Morehead Railway, Inc.--Lease and Operation Exemption—Beaufort & Morehead Railroad Co., ICC Finance Docket No. 31833, February 21, 1991. The East Coast retained the same Board account number (3570) as A.T. Leary, Inc. See coverage notice no. 91-54, July 9, 1991. A year later in February 1991, a new corporation, the Beaufort &



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Morehead Railway (B&M Railway), again purchased the lease and assets from East Coast, and employees of East Coast became employees of B&M Railway. See B.C.D. 95-46, April 3, 1995.

On February 25, 1992, the Interstate Commerce Commission published a notice that the B&M Railway and B&M Railroad had jointly filed a petition for exemption from prior approval to abandon approximately two of the three miles of rail line, salvage the track and any equipment, and dispose of the right of way. See Beaufort & Morehead Railroad Company and Beaufort & Morehead Railway, Inc., -- Abandonment and Discontinuance Exemption in Carteret County, N.C., No. AB-348 (Sub-No. 1X). The ICC subsequently granted the exemption in an order dated April 23, 1992. B&M Railway continued operating over the remaining rail line of approximately one mile.

Sometime in 1990, Railway Commission acquired the stock of the B&M RR.<sup>1</sup> In December 1995, Railway Commission also bought all stock the B&M Railway, thereby gaining control of both Railway and RR. See North Carolina Ports Railway Commission—Acquisition of Control Exemption, Beaufort & Morehead Railway, Inc., ICC Finance Docket 32735, 60 Fed. Reg. 66557, December 22, 1995. In his June 2002 letter, Mr. Taylor advises that in 1998, Railway Commission transferred all assets of the B&M RR to itself, excluding only the Newport River Bridge. The Railway Commission then transferred the B&M RR corporate shell and the bridge to the North Carolina Department of Transportation, which merged the B&M RR with the North Carolina Railroad, and retained ownership of the bridge. See: State of North Carolina—Intracorporate Family Exemption—Merger of Beaufort and Morehead Railroad Company into North Carolina Railroad Company, STB Finance Docket No. 33575, 63 Fed. Reg. 20247, April 23, 1998. The B&M RR therefore ceased to exist effective with the merger in 1998, and only B&M Railway remained. See B.C.D. 98-35, June 17, 1998.

In November 1999, Railway Commission notified the Surface Transportation Board that the B&M Railway would “cease to be a railroad, and [Railway Commission] will become the operator of the line.” See: North Carolina Ports Railway Commission d/b/a/ Beaufort & Morehead Railway—Acquisition and Operation Exemption—Beaufort & Morehead Railway, Inc., STB Finance Docket 33826, 64 Fed. Reg. 67619 (December 2, 1999). The Board thereupon terminated the covered status of the B&M Railway, and re-activated the covered status of the Railway Commission effective January 1, 2000. See B.C.D. No. 00-41, Beaufort & Morehead Railway, and B.C.D. 00-43, North Carolina Ports Railway Commission. Railway Commission was assigned its former Board account number (4560).

In 2002, the Railway Commission again filed a notice with the Surface Transportation Board, stating that effective December 28, 2001, Railway Commission had leased the entire rail line back to its subsidiary B&M Railway, and that B&M Railway “will be operator of the line.” See: Beaufort & Morehead Railway, Inc.—Acquisition and Operation Exemption— North Carolina Ports Railway Commission d/b/a/ Beaufort & Morehead Railway, STB Finance Docket 34151, 67 Fed. Reg. 2729 (January 18, 2002). Accordingly, in B.C.D. 02-29, the Board determined that B&M Railway again became a covered employer under the Acts December 28, 2001.

The evidence is therefore that the B&M Railway which now operates the mile of track is the same entity which acquired the lease of the rail line in 1991 from East Coast as recorded by B.C.D. 95-46, and later relinquished the lease back to its parent entity Railway Commission in 1999 as recorded by B.C.D. 00-41. As the company remained intact, it should retain its original Board account number (5557).

Mr. Taylor states in his letter that the Railway Commission “should not ... pay the high RUIA rate since we have had only one claim since 1986 and currently [are] not operating. The Beaufort & Morehead Railway,

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<sup>1</sup> The Railway Commission itself had been a covered lessor employer under the Acts for the period July 1980 through November 1988, when it was relieved of the residual obligation to conduct service over rail lines (other than the Beaufort and Morehead line) which it controlled. See Legal Opinions L-80-51, L-81-4, and L-89-129.



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Inc., probably should since it had a number of employees terminated in 1997 & 1998.” Mr. Taylor refers to the calculation of an employer’s contribution rate pursuant to section 8(a) of the RUIA (45 U.S.C. 358(a)), which provides in general that the employer’s contribution shall take into consideration the benefits paid under the RUIA to employees of that employer. Only benefits paid after December 31, 1989 are considered. See section 8(a)(15) of the RUIA (45 U.S.C. 358(a)(15)) and regulations of the Board at 20 CFR 345.302(f). Section 8(a)(19) of the RUIA (45 U.S.C. 358(a)(19)) further specifies the conditions under which a merger, consolidation, unification or reorganization of an employer affects the employer’s contribution rate. In addition, section 345.204 of the regulations (20 CFR 345.204) which implements RUIA section 8(a)(19), provides in pertinent part:

**345.204 Sale or transfer of assets.**

- (a) In the event property of an employer is sold or transferred to another employer (or to a person that becomes an employer as a result of the sale or transfer) or is partitioned among two or more employers or persons, the individual employer record of such employer shall be prorated among the employer or employers that receive the property (including any person that becomes an employer by reason of such transaction or partition) \* \* \*.
- (b) There shall be no transfer of the employer record where an employer abandons a line of track in accordance with the provisions of the Interstate Commerce Act and the applicable regulations thereunder, and a new entity, found by the Board to be an “employer” \* \* \* is formed to operate or continue service over such line; the Board will assign to such entity a new-employer contribution rate in accordance with section 8(a)(1)(D) of the RUIA and 345.304 of this part.

The evidence as recounted above is that the operating lease was assigned from A.T. Leary, Inc. to the East Coast in February 1990; and from the East Coast to the B&M Railway in February 1991. While a sublet of property from a lessee to a third party leaves intact the lessee’s duties to the lessor under the original lease, assignment of a lease between lessees extinguishes the interest of the first lessee, leaving only the reversionary interest under the original lease to lessor of the property. See 49 AM JUR 2d Landlord and Tenant, section 1077. The assignments of the lease from A.T. Leary, Inc. to East Coast, and then from East Coast to B&M Railway, by placing each in turn in the relation of lessee operator of the line, are therefore transfers of assets within the meaning of section 8(a)(19) of the RUIA, and section 345.204(a) of the Board’s regulations. Accordingly, in my opinion the individual employer record of East Coast for 1990 transferred with the lease and rail equipment to B&M Railway in 1991.

Although a portion of the line was abandoned in 1992, the remaining section of track remained in operation by B&M Railway at the time the operation passed to Railway Commission. In my opinion, the abandonment rule of section 345.204(b) does not apply, and consequently the employer record of the B&M Railway transferred to the Railway Commission when it assumed operation on January 1, 2001.

Finally, the re-letting of the operation by Railway Commission back to B&M Railway in December 2001 in my opinion is also a transfer of assets within the meaning of section 345.204(a), resulting in the concurrent transfer of the Railway Commission’s employer record with respect to the Beaufort – Morehead rail line as well. As matters stand, in my opinion, Mr. Taylor is therefore correct in his belief that the employer record for the B&M Railway should reflect the RUIA benefits paid to employees of the prior operators of the line, including any paid while Railway Commission conducted operations.

I trust that the foregoing information will assist you in addressing the employer’s inquiry.

cc: Chief Financial Officer  
Director of Policy and Systems



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