

EMPLOYER STATUS DETERMINATION**Midtown TDR Ventures, LLC**

This is a determination of the Railroad Retirement Board concerning the status of Midtown TDR Ventures, LLC (Midtown) 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).

In a Surface Transportation Board (STB) decision dated November 30, 2006 (STB Finance Docket No. 34953), Midtown, a noncarrier, filed a notice of exemption to acquire certain assets related to Grand Central Terminal in New York, and a 156-mile line of rail, known as the Harlem-Hudson Line (hereinafter collectively called "Properties"), which accesses the Grand Central Terminal, from American Premier Underwriters, Inc. (APU), APU's wholly owned subsidiary, the Owasco River Railway, Inc., and APU's parent, American Financial Group, Inc.¹ The Harlem-Hudson Line extends from milepost 0.0 at Grand Central Terminal in New York City to milepost 5.2 at Mott Junction, thereafter, diverging in two directions, with one line running north to milepost 75.7 at Poughkeepsie, New York, and a second line proceeding east to milepost 11.8 at Woodlawn Junction then north to milepost 82.0 at Wassaic, New York. Simultaneously, Midtown filed a motion to dismiss the proceeding with the STB, asserting that the transaction should not be subject to STB jurisdiction because the transaction will not result in Midtown becoming a rail common carrier. In a decision dated February 11, 2008, the Surface Transportation Board determined that Midtown would not become a rail carrier as a result of the transaction and granted Midtown's motion to dismiss the STB proceeding. (STB Finance Docket No. 34953).

Information regarding Midtown was provided by Mr. George W. Mayo, Jr., a partner with Hogan & Hartson LLP. Mr. Mayo advised the agency that Midtown was formed as a Delaware limited liability company on July 6, 2006. Mr. Mayo stated that Midtown does not have a chief executive officer; however, Mr. Andrew Penson acts in such capacity for Midtown. Mr. Mayo stated that Midtown is a private sector enterprise owned by AV Midtown TDR Ventures LLC, LBGC LLC and DB Midtown TDR LLC. Mr. Mayo stated that Midtown purchased and acquired control of the Properties on December 12, 2006, the date it also

¹ In Mr. Mayo's response to the agency's request for a description of Midtown's relationship with the Owasco River Railway, Inc., Mr. Mayo stated that the Owasco Railway's interest in the properties was conveyed to Midtown at the time Midtown acquired the properties. According to the Agency's records, Owasco ceased being a covered railroad employer in 1973.

began operations. Mr. Mayo stated that Midtown will not provide transportation service or acquire a common carrier obligation to provide rail service.

Specifically, Mr. Mayo stated that Midtown acquired a fee simple interest in the Properties, subject to an existing long-term lease to Metropolitan Transportation Authority (MTA)². The lease grants MTA exclusive control over the Harlem-Hudson Line. MTA uses the Harlem Hudson line to provide commuter service through its subsidiary, Metro-North Commuter Railroad Company (B.A. No. 3345).

Mr. Mayo also states that pursuant to the trackage rights agreement, freight rail service over the Harlem-Hudson Line will be provided by CSX Transportation, Inc. (CSXT) (B.A. No. 1524) and the Delaware and Hudson Railway Company, Inc. (D&H) (B.A. No. 2252). Mr. Mayo stated that both CSXT and D&H bear the common carrier responsibilities in regard to the line. Mr. Mayo stated that based on the operations on this line, the STB ruled that the common carrier rights and obligations continue to be held by MTA under the MTA lease and by CSXT and D&H under trackage rights agreements. Mr. Mayo stated that the STB also ruled that Midtown is not a rail carrier subject to the STB's jurisdiction as a result of this transaction, and therefore, that transaction does not require STB's authorization.

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

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV 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)]

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act contain the same definition (45 U.S.C. § 351(a) and (b)), as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

²

The MTA lease term expires on February 28, 2274.

Pursuant to the above-quoted provisions of the Railroad Retirement Act, covered railroad employers include carriers and their affiliates which provide railroad-related services. Midtown is not a rail carrier. Although Midtown is a lessor of a rail line, the Board finds that its decision on reconsideration of the status of Railroad Ventures, Inc. (B.C.D. No. 00-47) does not apply because Midtown did not obtain authority to conduct railroad operations.

Furthermore, the evidence does not support a finding that Midtown is under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Accordingly, the Board finds that Midtown TDR Ventures LLC is not a covered employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Original signed by:

Michael A. Schwartz

V.M. Speakman, Jr.
(Concurring Opinion Attached)

Jerome F. Kever

**CONCURRING OPINION OF
V. M. SPEAKMAN, JR.
LABOR MEMBER
MIDTOWN TDR VENTURES, LLC**

In Board Order 89-74, entered on February 22, 1989, a majority of the Board, with the Labor Member dissenting, held in the Appeal of the Board of Trustees of the Galveston Wharves, that a lessor-employer who had sold all of its railroad assets, so that the lessor no longer had the equipment necessary to resume railroad operations, ceased to be a covered rail carrier employer under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA). This decision reversed some fifty years of precedent which held that a lessor-employer does not lose its covered status by contracting with another employer to provide service.

The decision in Galveston Wharves was reconsidered in B.C. D. 00-47 Railroad Ventures Inc. (RVI) (Decision on Reconsideration). On November 6, 1996, RVI purchased a right of way of the Youngstown & Southern Railroad Company and contracted with the Ohio & Pennsylvania Railroad Company to operate the line. Belatedly, RVI sought permission from the STB to acquire and operate the line. RVI later argued that it only sought acquisition authority, not operating authority, but it was clear from the STB determination that RVI was given the authority both to acquire and operate the line in question.

Citing Board decisions after Galveston Wharves, RVI argued that even if it had authority to operate the line in question, it should not be held a covered employer, since it never intended to operate the line and, in any event, had no ability to do so. The Board, after public hearing, set forth a three-prong test to determine when an entity that has STB authority to operate a rail line, but leases or contracts out the operation of the line, would be subject to the RRA and RUIA. Essentially, such an entity is covered unless 1). It does not have as its primary purpose to profit from railroad activities; 2). It does not have the ability to operate the line; 3). And the actual operator of the line is already covered under the Board's statutes. Under this test, RVI was held covered, since it acquired the line in question primarily to profit from railroad activities.

Like RVI, Midtown has acquired a railroad line for the purpose of profiting from railroad activities on that line. Like RVI, it does not intend, nor has the capacity to operate the line. Unlike RVI, the STB has ruled that Midtown is not a carrier subject to its jurisdiction, because it only sought acquisition authority, not operating authority. In its decision the STB divorced the ownership of the line from the common carrier obligations that run with owning the line, which remain with the lessee-carriers.

It seems that to me that the difference between the STB's approach in RVI and in Midtown appears, in large part, to hinge more on how the transactions were presented to STB, rather than the substance of the transactions. I certainly would not be averse to finding that Midtown is a covered rail carrier employer under the test enunciated in RVI. However, since the Board generally defers to a finding by the STB on whether a company is a rail carrier subject to its jurisdiction, and thus covered under the RRA and RUIA, I concur with the result in this case. See B.C.D. 06-15 American Orient Express Railway LLC (Decision on Reconsideration).

Original signed by:

V. M. Speakman, Jr.