

EMPLOYER STATUS DETERMINATION**Gordon Fay Associates, Inc.**

This is the determination of the Railroad Retirement Board concerning the continued status of Gordon Fay Associates, Inc. (GF Associates) (BA number 9353) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

On January 26, 1996, the Chief of the Audit and Compliance Division of the Board's Bureau of Fiscal Operations issued a report on an audit of GF Associates, prepared in connection with audits of the Bay Colony Railroad and the Seminole Gulf Railway. Both Bay Colony (BA 3112) and Seminole Gulf (BA 5508) are covered rail carrier employers under the Acts. Based on information compiled in that audit report, the Board determined GF Associates to be covered under the Acts as a rail carrier affiliate employer effective November 13, 1987. See Board Coverage Decision 96-84. As recounted in that decision, GF Associates is a consultant firm which provides transportation management services. GF Associates is wholly owned by its corporate president, Mr. Gordon H. Fay. Mr. Fay also owns a substantial interest, personally or through GF Associates, in Bay Colony and a 66 percent interest in Seminole Gulf. Mr. Fay is also Chairman of Bay Colony, and principal partner in Seminole Gulf. GF Associates provided Bay Colony and Seminole Gulf with accounting, marketing and sales, and management of real estate and services provided under contract by other outside firms. Payment for these services to Bay Colony and Seminole Gulf comprised from 66 to 70 percent of GF Associates revenues.

In 2001, GF Associates advised the Board that it estimated the amount of time devoted to railroad clients would be reduced to 30 percent. However, the Board found that this constituted a substantial percentage of time, and concluded that GF Associates remained a covered employer under the Acts. See B.C.D. 01-45.

On September 19, 2003, GF Associates, through its attorney James E. Howard, responded to inquiries from Board staff regarding delinquent unemployment insurance contributions due for 2002 by making the late payment, and by stating that the company "has not had any employees subsequent to December 31, 2002, and does not anticipate having any employees in the future." Mr. Howard responded to further inquiries from the Board by letter dated February 4, 2004.

Mr. Howard reported that the accounting, marketing and sales, and management of real estate and services previously performed by GF Associates for Bay Colony and Seminole Gulf, "are now provided directly by employees of Seminole Gulf Railway, L.P. or Bay Colony Railroad Corporation." Mr. Howard described the "only type of service now performed by Gordon Fay Associates, Inc. is the sale of personal computers and parts * * * performed primarily for one customer that is not affiliated with Gordon Fay Associates." Mr. Howard's letter acknowledged that GF Associates had not been dissolved as a corporation, and there had been no general disposition of corporate assets, which he described as cash, two automobiles, and office furniture. The records of the Board do show that GF Associates reported service and compensation paid for seven employees for 2002, and none for 2003.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code;
- (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 * * *.

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

Section 9 of the RRA (45 U.S.C. § 231h) and section 6 of the RUIA (45 U.S.C. § 356) require employers covered by the Acts to file returns of compensation paid to employees. See also, regulations of the Board at 20 CFR Part 209. Section 8(i) of the RUIA (45 U.S.C. § 358(i)) also requires employers to pay contributions to the Board with respect to compensation paid to their employees.

Regulations of the Board at 20 CFR 202.11 provide that the status of an employer as covered by the Acts terminates "whenever such company or person loses any of the characteristics essential to the existence of an employer status." The evidence is that GF Associates no longer provided services in connection with rail transportation to Seminole Gulf Railway, L.P. or Bay Colony Railroad after 2002.

Accordingly, the Board holds that Gordon Fay Associates, Inc. ceased to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective with the close of business on December 31, 2002.

Original signed by:

Michael S. Schwartz

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