

EMPLOYER STATUS DETERMINATION**Frontier Rail Corporation**

This is the determination of the Railroad Retirement Board concerning the status 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) of Frontier Rail Corporation (Frontier).

Frontier is a small business 100% owned and managed by Paul Didelius. Mr. Didelius also has a controlling interest in YCR Corp. and LRY LLC, both of which are under the jurisdiction of the Surface Transportation Board and are pending rulings with the Railroad Retirement Board for BA numbers and payroll tax accounts. Frontier was incorporated on June 20, 2005 in Washington State and began operations on August 15, 2006. No other Frontier officers or directors are officers or directors of another rail carrier.

Frontier currently has six employees and employees of Frontier were first compensated in October of 2006. Frontier's business is connected with railroads in that Frontier conducts movement of railcars for non-railroad customers on non-railroad tracks and property. Further, Frontier inspects and repairs railcars and loads freight commodities to or from railcars for non-railroad customers on non-railroad tracks and property. Frontier does less than 5% of its business with Union Pacific Railroad. Frontier does have a written agreement with Union Pacific to provide car inspection services and Frontier leases a locomotive from a third party locomotive lessor. Frontier also owns office equipment, tools, 4 motor vehicles and a belt conveyor. Frontier does not jointly control any equipment or facilities.

Section 1 of the RRA defines an employer to include:

(a)(1) The term "employer" shall include-

" (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, 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 (45 U.S.C. §351) contains essentially the same definition, as does section 3231(a) of the Railroad Retirement Tax Act [26 U.S.C. §3231(a)].

Section 202.4 of the Board's regulations provides as follows:

"A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person." 20 CFR 202.4

Section 202.5 of the Board's regulations provides that:

"A company or person is under common control with a carrier, whenever the control (as the term is used in §202.4) 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.

Section 202.7 of the Board's regulations provides that:

"The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is 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, if such service or operation is reasonably directly related, functionally or economically, to the performance or obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. 20 CFR 202.7.

In the present case, the information provided by Frontier is clear that less than 5% of the business operations are conducted directly with Union Pacific and all switching services, movement of customer rail cars, and inspection of railcars that is performed for customers other than Union Pacific occur exclusively on private, non-railroad property. These factors support a conclusion that under Section 1(a)(1)(i) of the Railroad Retirement Act, Frontier is not engaged in rail activity that would cause Frontier to fall under Surface Transportation Board jurisdiction. Frontier does not meet the requirements to be an employer under Section 1(a)(1)(i) of the Railroad Retirement Act and the corresponding section under the Railroad Unemployment Insurance Act. Whether Frontier is a covered employer therefore turns upon whether Frontier provides a service in connection with rail transportation.

The United States Court of Appeals for the District of Columbia has held that a rail carrier affiliate which repaired and rebuilt rail cars performed a service in connection with rail transportation. Dispatch Shops Inc. v. Railroad Retirement Board, 153 F. 2d 644, 646 (D.C. Cir. 1946). However, in Board Order 85-16 (Appeal of Emons Industries) the Board ruled that a car repair company affiliated with a railroad that performed only 4.4% of its service for the rail affiliate was not performing covered service in connection with rail transportation. See also, Board Order 83-113 (Funding Systems Railcars, Inc.). More recently, the Board determined that a rail carrier affiliate which performed car and locomotive repairs performed a service in connection with rail transportation where 95% of the company's business derived from the rail industry, including 25% from its affiliated railroad. In Re Appeal of Livingston Rebuild Center, Inc. Board Order 91-122. The decision of the Board was affirmed by the Court of Appeals for the Seventh Circuit in Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, (7th Cir. 1991).

The documents reveal that Frontier is 100% owned by Mr. Didelius, who owns a controlling interest in YCR Corp. and LRY LLC, both of which are rail carriers under the jurisdiction of the Surface Transportation Board. In this case, Mr. Didelius is the sole owner of Frontier and the controlling partner or member of two other rail carriers. In contrast, the information provided by Mr. Didelius is clear that Frontier does not directly perform any service for or generate any revenue from work with the rail carriers that Mr. Didelius owns. The actions of Frontier deal with car inspection, switching services, railcar movement, and trans-loading of railcars in addition to 5% of services directly tied to Union Pacific, a rail carrier. None of these services are provided to the affiliates of Frontier. As explained earlier, all but 5% of Frontier's business is conducted on private, non-railroad tracks for private, non-railroad customers. Frontier does not perform any services for the other rail carriers that Mr. Didelius owns and Frontier only performs 5% or less of its business with Union Pacific. Frontier performs considerably less than 95% of its business with rail carriers since it only performs 5% of its service to rail carriers. Further, Frontier does not perform any service to its affiliates, as opposed to 25% of business with affiliates which occurred in the Rebuild case cited. Further, in Board Coverage Decision 93-79 (VMV Enterprises) the Board held that VMV was not a covered employer where VMV performed 58.2% of its service with the rail industry and 2.5% of its business with its affiliates. Frontier performs no service to its affiliates and only 5% of service to the rail industry at large.

Based on our review of relevant court decisions and prior decisions of the Board, we find that Frontier Rail Corporation is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts because it provides no service to affiliated railroads and only minimal service to the rail industry at large.

Original signed by:

Michael S. Schwartz

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

Jerome F. Kever

CONCURRING OPINION OF V.M.SPEAKMAN, JR.
LABOR MEMBER

FRONTIER RAIL COPORATION

I concur with the result in this case, but for different reasons. Less than 5% of Frontier's business is car inspection for a class I carrier. Its remaining business consists of switching services for non-railroad customers on private property. Car inspection is clearly a "service in connection with railroad transportation," but in Frontier's case these services are so insubstantial as to fall within "casual service exception" of section 1(a) (1) (ii) of the Railroad Retirement Act. See also 20 CFR 202.6

The Majority's reliance on VMV Enterprises is unnecessary and misplaced. VMV Enterprises performed locomotive repair services for a variety of covered carriers, but only 2.5% of its business was with its affiliate carrier. A Majority of the Board, over my dissent, held that because VMV performed so little work for its affiliate, it was not performing a service in connection with railroad transportation. I dissented in VMV because, in my view, the Majority's focus on the amount of services performed for the affiliate had no textual support in the applicable provisions of the RRA and RUIA. My view, I believe, is supported by the court's holding in Livingston Rebuild, wherein the court focused on the fact that 95% of Livingston's car repair business was with railroads, 25% of which was with its affiliated carrier. The court noted that there was no evidence that Livingston existed predominantly to serve its affiliate carrier's needs or was a "captive" of this carrier. Thus, the relationship between Livingston and its affiliate carrier appeared to be irrelevant to the court's finding that Livingston was performing a service in connection with railroad transportation.

Original signed by:

V. M. Speakman, Jr.