

B.C.D. 16-09

May 25, 2016

EMPLOYER STATUS DETERMINATION

ARG Railroad Services, LLC

ARG Transportation Services, LLC

This is a determination of the Railroad Retirement Board concerning the status of ARG Railroad Services, LLC (ARG Rail) 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.). The status of ARG Rail as an employer under the Acts has not been previously considered.

ARG Rail is a subsidiary corporation of ARG Transportation Services, LLC (ARG Trans), a successor company to American Railroad Group Transportation Services, LLC. In Board Coverage Determination (B.C.D.) 15-02, issued February 13, 2015, the Board found that American Railroad Group Transportation Services, LLC was not a covered employer under the Acts. Mr. Scott L. Parkinson, the President of ARG Rail and of ARG Trans, provided information regarding ARG Rail and the merger of ARG Trans with American Railroad Group Transportation Services, LLC. Articles of Merger were filed with the State of Oregon on July 2, 2014 to merge American Railroad Group Transportation Services, LLC into ARG Trans, with ARG Trans to be the surviving entity. The merged ARG Trans remains a privately held corporation wholly owned by Scott and Maura Parkinson. The Board finds that evidence of record indicates there have been no substantial changes to the status of ARG Transportation Services, LLC, f/k/a American Railroad Group Transportation Services, LLC. Records of the Board will be changed to reflect the new name.

Mr. Parkinson indicated that ARG Rail was formed and began operations on October 1, 2014, with two employees to be compensated beginning the same date. ARG Rail is a wholly owned subsidiary of ARG Trans, and ARG Rail acts as a parent holding company for Coos Bay Rail Line (CBR) (BA# 5745) and San Pedro Operating Company d/b/a San Pedro & Southwestern Railroad (SPSR) (BA# 4786). CBR was found to be a covered employer under the Acts in B.C.D. 11-92, issued October 17, 2011, and SPSR was found to be a covered employer under the Acts in B.C.D. 04-3, issued February 2, 2004. ARG Rail's employees provide professional services directly to CBR and SPSR, including accounting and financial services, marketing, and operations management.

Section 1(a)(1) of the Railroad Retirement Act (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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Section 1(a) of the RUIA (45 U.S.C. § 351) contains essentially the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Section 202.5 of the Board's regulations (20 CFR §202.5) defines a company or person 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. Additionally, section 202.7 of the Board's regulations (20 CFR §202.7) states that service or operation of equipment or facilities is in connection with railroad transportation when such service or operation is reasonably directly related, functionally or economically, to the performance of 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.

ARG Rail is not itself a carrier by railroad subject to the jurisdiction of the Surface Transportation Board. Therefore, it is not a covered employer under paragraph (i) of Section 1(a)(1) of the RRA and Section 1(a) of the RUIA. However, ARG Rail's ownership of two Class III rail carriers require the Board to analyze whether ARG Rail is under common control with a rail carrier and performs services in connection with rail transportation as required by paragraph (ii) of Section 1(a)(1) of the RRA and Section 1(a) of the RUIA. The standard that the Board applies to determine "common control" was identified by the U.S. Court of Appeals for the Federal Circuit in *Union Pacific Corporation v. United States*, 5 F.3d 523 (1993).

The Federal Circuit explained:

“The term “under common control” does not usually apply to two companies in a parent-subsidary relationship. These words – “under common control” – convey a meaning of mutual subordination to a controlling principal. A company which controls another is not “under common control” with its subsidiary. Rather two companies most naturally fit within the term “under common control” when occupying parallel positions as subsidiaries controlled by a common parent.” 5 F.3d at 525-26.

See also *Indiana Boxcar Corporation v. Railroad Retirement Board*, 712 F.3d 590, 592 (2013).

Past decisions of the Board have held that where an intermediate holding company of rail carriers is itself owned by a parent company, the intermediate holding company is also under common control by the ultimate parent with sister or subordinate rail carriers. Because ARG Trans directly owns ARG Rail, and through its ownership of ARG Rail owns both CBR and SPSR, ARG Rail is under common control with rail carriers CBR and SPSR within the meaning of Section 1(a)(1)(ii) of the RRA. *See, e.g.*, B.C.D. 12-45, Permian Basin Railways, Inc.; and B.C.D. 09-39, Patriot Rail, LLC.

Under Board precedent, to satisfy paragraph (ii) of Section 1(a)(1) of the RRA, the affiliate must perform service, other than casual service, for the benefit of the rail carrier that is under common control. *See, e.g.*, Board Coverage Determination (B.C.D) 93-79, VMV Enterprises; B.C.D. 93-39, Magnus Metals, and B.C.D. 02-11, Transworks Company. Information provided by Mr. Parkinson indicates that ARG Rail provides accounting and financial support for both CBR and SPSR, as well as management of railroad operations, responsibility for purchasing, and contract negotiations. There is no evidence that ARG Rail provides services for any non-affiliated rail carriers. Consequently, the service performed cannot be casual in nature.

Because ARG Rail is under common control with rail carriers CBR and SPSR and performs services for those affiliated carriers in connection with rail transportation, the Board finds that ARG Rail is a covered employer within the meaning of Section 1(a)(1) of the Railroad Retirement Act and Section 1 of the Railroad Unemployment Insurance Act effective October 1, 2014, the date ARG Rail began operations and began compensating employees.

The Board finds that no changes need to be made to the records of the subsidiary railroads (SPSR and CBR) covered under the Acts based upon the change in ownership from ARG Trans to ARG Rail or based upon the name change of the parent company ARG Trans.

Original signed by:

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