

**Employer Status Determination
Decision on Reconsideration****Carland, Inc.**

Carland, Inc., was held to be an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts in a decision dated May 11, 1990 (Legal Opinion L-90-68) and communicated to Carland in a letter dated June 8, 1990.

On June 3, 1991, Carland requested reconsideration.¹ Carland was incorporated in 1964. At that time, an employee of the Kansas City Southern Railway became president of Carland and owned 25 percent of the stock. The other 75 percent was owned, through two intervening companies (Veals, Inc, and Southern Enterprises, Inc.), by Kansas City Southern Industries, Inc. (KCS). Carland is currently 100 percent owned, through two intervening companies (Southern Credit, Inc., and Southern Group, Inc.), by KCS (Carland Brief at 3-4). KCS owns the Kansas City Southern Railway which, in turn, owns the Louisiana & Arkansas Railway Company, both of which are carriers covered under the Acts (Carland Brief at 4). KCS has not been held to be an employer under the Acts.

At any one time Carland has had from two to eight employees. It was created to provide for the leasing of small equipment by Kansas City Southern Industries affiliates. In Legal Opinion L-90-68, the Board's Deputy General Counsel found that Carland leased "railroad rolling stock, maintenance of way equipment, and automobiles." In its brief, Carland states that it also leases equipment such as car wash equipment, pool tables, beauty shop equipment, medical equipment, and restaurant equipment to unrelated parties (Carland brief at 6). Carland does not, however, dispute the finding in Legal Opinion L-90-68 that it leases railroad equipment. Moreover, the facts show that leasing of railroad equipment is Carland's major business. Of the equipment leased by Carland, the percentage leased to KCS affiliates for recent years has been 87.1 percent and higher (up to 96 percent for one year, 1984). (Carland Brief at 25.)

According to Carland, it deals with KCS at "arm's length." (Carland Brief at 7.) "Carland obtains its own financing to purchase the equipment that it leases." (Ibid.) Carland retains title to equipment leased by KCS (Id.) Carland also sells used equipment when it comes off lease. (Carland Brief at 6.)

¹Carland submitted a memorandum brief in support of its request. Citations to this brief will be Carland Brief at ___.

The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term 'employer' shall include--

(i) any express company, sleeping car company, and carrier by railroad, subject to [the Interstate Commerce Act];

(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 * * *. [Emphasis supplied.]

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. The absence of actual exercise of that control does not determine whether common control as provided in section 1(a)(1)(ii) exists; the right or power to exercise control is sufficient. See 20 CFR 202.4. Carland is under common control with a rail carrier employer, in that it is a wholly-owned subsidiary of Kansas City Southern Industries, Inc., which is a holding company also owning the Kansas City Southern Railway Company and the Louisiana & Arkansas Railway Company, both rail carrier employers under the Railroad Retirement and Railroad Unemployment Insurance Acts. Thus, the only issue regarding coverage of Carland under the Acts is whether it provides "service in connection with" railroad transportation.

Carland contends that it does not provide services of the type that are subject to the Interstate Commerce Act and that therefore, under applicable case law, Carland does not provide

service in connection with railroad transportation within the statutory definition of "employer" under the Acts. (Carland Brief at 13-14). Carland contends that it finds support for that argument in Istel Corporation v. U.S. Railroad Retirement Board, 710 F.2d 1243 (7th Cir. 1983), and in the legislative history of the Railway Labor Act. Carland cites Istel in support of the proposition that "the activities embraced by the RRA [and RUIA] were intended to be no broader than those embraced by the ICA (Interstate Commerce Act)" (from Istel, quoted in Carland's Brief at 13). Carland contends that since car leasing is not embraced by the Interstate Commerce Act and there was no intent to undermine the Railroad Retirement Act, it should not be a covered employer. (Carland Brief at 14.)

As noted above, section 1(a)(1)(ii) of the Railroad Retirement Act and section 1(a) of the Railroad Unemployment Insurance Act do not provide, either expressly or implicitly, that services must be subject to the Interstate Commerce Act in order to be considered to be "service in connection with" railroad transportation. Nor does the case law which has addressed that definition establish that requirement. While a divided panel of the Court of Appeals for the Seventh Circuit did state in Istel that "the activities embraced by the RRA and RUIA were intended to be no broader than those embraced by the ICA," that Court in Standard Office Building Corporation v. United States, 819 F.2d 1371 (7th Cir. 1987), expressly backed away from that portion of its discussion in Istel which tended to tie together the Interstate Commerce Act with the Railroad Retirement and Railroad Unemployment Insurance Acts. In Standard Office Building, the Court stated:

Our attempt to yoke together the Interstate Commerce Act and the railroad retirement acts overlooked, however, the asymmetry of the regulatory schemes. 819 F.2d at 1378.

More recently, the Court of Appeals for the Seventh Circuit in Livingston Rebuild Center, Inc., v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), declined to follow Istel in regard to limiting the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts to services which are covered under the Interstate Commerce Act, and rebutted contentions to the contrary deriving from the legislative history of the Railway Labor Act and the Railroad Retirement Act. Livingston Rebuild Center rebuilt locomotives and other rolling stock, about 25 percent of its business being with its

affiliated carrier. The Court found that rebuilding locomotives constituted a service in connection with rail transportation, stating in regard to the legislative history of the Railroad Retirement Act that:

* * * Nothing in what Congress enacted links the Railroad Retirement Act to the Interstate Commerce Act; neither the phrase 'service . . . in connection with the transportation of passengers or property by railroad' nor any close approximation appears in the jurisdictional provisions of the Interstate Commerce Act. Senator Wagner thought that the text of the Railroad Retirement Act encompassed more than the Interstate Commerce Act did, 81 Cong. Rec. 6223 (1937), and the committee report implies that the Railroad Retirement Act is broader. S. Rep. No. 697, 75th Cong., 1st Sess. 7 (1937). [970 F. 2d at 298.]

Based on the more recent decisions of the Seventh Circuit Court of Appeals, the Board concludes that insofar as Itel could be read as standing for the proposition that car leasing does not constitute service in connection with railroad transportation, as argued by Carland (Carland Brief at 13-14), it is no longer good law.

Carland leases rail cars and other rail equipment to its rail affiliates. For the last several years, more than 87 percent of its business has been with those affiliates. (Carland Brief at 25). (Compare Itel, where "about 12 percent of the Rail Division's railcars are leased to these subsidiary railroads and less than 5 percent of Rail Division employees are involved in transactions with subsidiary railroads.") The type of service provided by Carland is vital to railroad transportation: a railroad cannot function without railcars and other rail equipment. See Despatch Shops, Inc. v. Railroad Retirement Board, 153 F. 2d 644 (D.C. Cir. 1946); and Livingston Rebuild Center, 970 F. 2d at 297, 298.

Carland also argues in its Brief that the Board's determination that Carland is an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act is inconsistent with the Board's prior decisions and thus has no reasonable basis in law. (Carland Brief at 29.) Each of the prior decisions of the Board cited by Carland to support its contention in this regard is factually distinguishable from this case.

The first decision cited in this connection by Carland is Board Order 83-113 (1983), regarding the appeal of Funding Systems Railcars, Inc. from the determination of the Board's General Counsel that it was an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. Funding Systems Railcars, Inc., was in the business of arranging the purchase and financing of freight cars and managing them through lease or management arrangements with freight car owners or manufacturers. It had apparently operated for some time before coming under common control with a rail carrier employer. For the year 1979 and the nine-month period ended September 30, 1980, revenues from its two rail carrier subsidiaries constituted only about 4 percent of Funding Systems' revenues. Given the similarity of the business conducted by Funding Systems and the Rail Division of ITEL Corporation, as well as the very small percentage of revenue from rail carriers involved in both cases, the Board reasonably decided to apply the decision in ITEL in reversing the determination that Funding Systems was an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.


Carland next cites Board Order 85-16 (1985), which reversed the General Counsel's determination that certain subsidiaries of Emons Industries were employers under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. At issue in the appeal of Emons Industries was the employer status of three subsidiaries of Emons Industries, which itself had already been held not to be an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The principal business of one of those subsidiaries was leasing railcars to the general railroad industry, and the principal business of the other two subsidiaries was the repair of railcars for the leasing company subsidiary. Neither of Emons Industries' two subsidiary railroad companies owned freight cars, and therefore they did not directly use the repair companies to repair cars that they owned. One of the railroad subsidiaries used the services of one of the repair companies to repair cars belonging to other railroads that it hauled in interchange. This work amounted to only 4.4 percent of the car repair work at one of that railroad's business locations; again, an extremely small percentage.

The Board's decision in the present case is not inconsistent with the Board's decisions in regard to Funding Systems and Emons. The types of activities conducted both by the non-carrier subsidiaries of Emons Industries and by Funding Systems differ from the type of work performed by Carland. Although two of Emons' subsidiaries engaged in the repair of railcars,

they did so for Emons' leasing company subsidiary, and not directly for an affiliated rail carrier. The leasing car activities conducted by Funding Systems and by one of Emons' subsidiaries were, given the insignificant amount of business conducted with the rail carrier affiliates, determined by the Board to be controlled by the decision in Istel. In addition, the existence of Funding Systems, like that of the Rail Division in Istel, predated its coming under common control with its rail carrier affiliates.

Finally, in addition to being factually distinguishable from the situations at issue in the Funding Systems Railcar and Emons cases, that portion of the Court's decision in Istel, upon which the Board's rulings in those cases was founded is, as noted above, no longer good law in view of the Seventh Circuit's later decisions in Standard Office Building v. United States (1987) and Livingston Rebuild Center Inc. v. Railroad Retirement Board (1992). Accordingly, the Board is not bound to follow the decisions in Funding Systems Railcar and Emons.

Accordingly, on reconsideration the Board affirms the legal opinion of May 11, 1990, holding Carland to be an employer under the Acts since January 14, 1964.



 Glen L. Bower



 V. M. Speakman, Jr.



 Jerome F. Kever (Dissenting)