

**Employer Status Determination  
Union Pacific Distribution Services**

This is the decision of the Railroad Retirement Board regarding the status of Union Pacific Distribution Services (UPDS) 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).

Information concerning UPDS was provided by Mr. Vernon Smith, Manager-Payroll Accounting, Union Pacific Railroad Company. UPDS is a wholly-owned subsidiary of Union Pacific Railroad. UPDS was incorporated September 19, 1995, first compensated employees November 1, 1995, and began operations December 18, 1995. It is a carrier agent that brokers intermodal freight and arranges rail car transload services. It has 53 employees. Under cover of a letter of February 22, 1996, Mr. Smith submitted the following information.

1. Union Pacific Railroad Company is a supplier to UPDS. UPDS also contracts with other suppliers including drayage companies, other railroads, other brokers, freight transloaders, long-haul truck companies. UPDS estimates that 70% of its business is contracted to [Union Pacific Railroad] while 30% is contracted to other suppliers.

2. Nearly every shipment (98%) UPDS brokers has a rail carrier involved as a part of it along with other suppliers (truckers, transloaders). Therefore, the employees all work with shipments that involve rail transports, but the rail segment may only make up 70% of a complete shipment.

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Basically, UPDS offers a rail/truck combination (intermodal) for customers desiring door to door service which the [Union Pacific Railroad] cannot offer alone.

Nearly 60% of all UPDS's business is with customers that ship automotive parts to assembly plants with the majority of the shipments going to Mexico. UPDS offers a "door to door" transportation solution to these customers that the railroad alone cannot. A typical shipment (in a standard 45' or 48' container) would be comprised of an origin truck drayage from the

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automotive part supplier (e.g. bumpers) to the [Union Pacific Railroad] intermodal ramp at Chicago, a rail move on doublestack flatcars from Chicago to the [Union Pacific Railroad] intermodal ramp at Laredo, and a destination truck drayage from the ramp at Laredo to the assembly plant in Mexico.

Another 30% of the business is termed "transload". Again, UPDS offers a "door to door" solution for the shipper. The shipper may load a freight car (e.g. canned goods in a boxcar) but require that product be distributed to three different receivers. [Union Pacific Railroad] will haul the boxcar to a transload center where the product in the boxcar is transloaded into three truck trailers for final delivery to the receivers. UPDS coordinates all of the shipment and buys the transportation for the boxcar from [Union Pacific Railroad]. These programs are very unique and are handled in a variety of ways. There may be an origin consolidation rather than destination distribution, or both. However, there is always a rail/truck combination for these shipments.

The remainder of the business is miscellaneous intermodal freight for customers that want a rail/truck transportation solution beyond what [Union Pacific Railroad] alone can offer.

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 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

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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].

Sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) and (b)) provide a substantially identical definition.

UPDS is owned by the Union Pacific Railroad Company (B.A. No. 1715), which is covered under the Railroad Retirement and Railroad Unemployment Insurance Acts. Thus, if UPDS performs a "service in connection with" railroad transportation, it is a covered employer under the Acts.

Section 202.7 of the Board's regulations explains that service is in connection with railroad transportation if:

\* \* \* such service \* \* \* 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.

UPDS can be described as an intermodal marketing company, although it should be noted that virtually all of its contracts involve rail transportation. UPDS provides services analogous to those of a travel agent with respect to freight shipped in containers that can be stacked on rail cars. It provides a door-to-door delivery service under a single bill of lading usually by a combination of truck-rail-truck transportation.

As a marketer of intermodal services, UPDS clearly enhances the revenues of Union Pacific Railroad and other rail carriers. However, the term "service" implies the subordination of one's own goals for the benefit of another's, and Union Pacific Railroad's purchase of rail services from UPDS should no more be considered a "service" to Union Pacific Railroad than the purchase of rail transportation by any customer of Union Pacific Railroad. Thus, UPDS's relationship to Union Pacific Railroad

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must be more than that of a customer of the carrier before one can say that it is performing a service which is reasonably and directly related, functionally or economically, to Union Pacific Railroad's common carrier obligation. 20 CFR 202.7. The 1938 opinion of the Board's General Counsel, L-38-650, adopted in part by Board Order 39-291, states that when deciding if a company is performing any service in connection with railroad transportation, each situation should be examined on a case by case basis considering such factors as the physical relation of the company to its affiliate carrier; the history or the origin of the company; for whose benefit the company's operations are conducted; and the amount of business the company does with the general public. Thus, initially we shall examine whether UPDS is performing any service in connection with railroad transportation within the framework provided for in L-38-650.

### Physical Location

Physical proximity is relevant to show integration of operations and subordination of enterprise. UPDS and Union Pacific both have corporate offices in Omaha, Nebraska. Mr. Vernon Smith, who supplied the Board with information about UPDS, is the Manager-Payroll Accounting of Union Pacific. The physical proximity of these two companies distinguishes this case from the facts in Board Coverage Decision (B.C.D.) 96-82, In the Matter of CSX Intermodal, Inc. (hereafter CSXI), where CSXI and its affiliate railroad had corporate offices in two different states (Maryland and Florida). More important than physical proximity for these purposes in this case is whether UPDS and Union Pacific Railroad have any officers in common: the President of UPDS, Mr. Michael F. Kelly, is a Vice President Marketing of Union Pacific Railroad. This also differs from the situation in B.C.D. 96-82, where CSXI and its affiliated rail carrier had no officers in common and no officers or senior managers of CSXI reported to anyone at the affiliated railroad carrier.

### History and Origin of UPDS

UPDS is a wholly-owned subsidiary of Union Pacific Railroad which was incorporated and began operations in 1995. It has no history of being independent of Union Pacific Railroad. Again, this situation differs from that of CSXI, in that CSXI or its direct antecedents had had an independent existence. In this case UPDS has had no independent existence.

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### For Whose Benefit Does UPDS Operate

Almost all of the shipments brokered by UPDS have a rail carrier involved, though the rail segment of the shipment may constitute only 70 percent of a complete shipment. Approximately 70 percent of UPDS's business "is contracted to" Union Pacific Railroad. Again this situation differs from that of CSXI, where the largest purchase of rail services were from rail carriers not affiliated with CSXI. UPDS arranges shipping with Union Pacific Railroad, as well as with other carriers, and therefore the economic effect of UPDS's transactions is, in great part, to market the services of the Union Pacific Railroad (as well as of other carriers), even though those transactions may be denominated as purchases from those carriers. See also Mr. Smith's statement, above, that "Basically, UPDS offers a rail/truck combination (intermodal) for customers desiring door to door service which the [Union Pacific Railroad] cannot offer alone," which suggests that the purpose of the contracts with parties other than Union Pacific Railroad are ancillary to the purpose of the contracts with Union Pacific Railroad. (Emphasis added.)

Court opinions regarding similar services support the conclusion that performance of this function constitutes a service in connection with railroad transportation. In Railroad Retirement Board v. Duquesne Warehouse Co., 149 F. 2d 507 (D.C.Cir. 1945), aff'd 326 U.S. 446, 90 L.Ed. 192, 66 S.Ct. 238 (1946), the Court of Appeals held that a warehouse corporation owned by a railroad and engaged in loading and unloading railroad cars and other handling of property transported by railroad, and in other activities which enabled the railroad to perform its rail transportation more successfully, was performing "services in connection with" the transportation of property by railroad and therefore an employer under the Railroad Unemployment Insurance Act. The Court of Appeals quoted approvingly from the opinion of the Board that the carrier affiliate coverage provision includes services which are an integral part of or closely related to the rail transportation system of a carrier. The Board stated that the provision includes within its coverage carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, and also carrier affiliates engaged in activities which enable a railroad to perform its rail

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transportation. Examples of the activities include maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

In Railway Express Agency v. Railroad Retirement Board, 250 F.2d 832 (7th Cir. 1958), the Court of Appeals for the Seventh Circuit held individuals working as "merchant agents" for REA were employees of that company (and not independent contractors); the merchant agents represented REA as agents and conducted express business, essentially a marketing or sales function. That decision was partly based on the Court's finding that the merchant agent's work is an integral part of REA's service. See also Standard Office Bldg. Corp. v. U.S., 819 F. 2d 1371, 1376 (7th Cir. 1987), where the Court, quoting the legislative history of the Railroad Retirement Act stated that the Act covers "substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States. S. Rep. No. 818, 75th Cong. 1st Sess. 4 (1937)."

The Court of Appeals for the Seventh Circuit, in Livingston Rebuild Center, Inc., v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), refused to limit 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, which was held to be an employer under the Acts, rebuilt locomotives and other rolling stock, about 25 percent of its business being with its affiliated carrier.

In Interstate Quality Services v. Railroad Retirement Board, 83 F.3d 1463, at 1465 (D.C. Cir. 1996), the Court approved the decision of the Board holding the company to be an employer under the Acts since it provided a steady source of services to its customers, including its rail carrier affiliate. Similarly, UPDS supplies a steady source of transportation services to its rail carrier affiliate.

## Business with the Public

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Seventy percent of UPDS's business is contracted with Union Pacific, and the remaining 30 percent includes business contracted with the trucking component, as well as with other railroads. The percent of business contracted with carriers other than Union Pacific Railroad is clearly much less than that which is contracted with Union Pacific Railroad. Therefore, UPDS is not providing its product, which is basically increased rail traffic, in its regular course of business to all railroads, but rather is primarily benefiting Union Pacific Railroad. It could be reasonably concluded from the facts in this case that UPDS would not be in business were it not for the connection of the services it performs to the business of its affiliated rail carrier.

The foregoing criteria show UPDS to be a subsidiary wholly-owned and controlled by Union Pacific Railroad, which does approximately 70 percent of its business with its parent, and the remainder of that business clearly constitutes operations ancillary to and necessary for performance of the services provided to Union Pacific Railroad. Based on the foregoing criteria, it is the conclusion of the Board that UPDS is performing a service in connection with rail transportation for Union Pacific Railroad.

However, since a part of that service involves trucking service, it is necessary to briefly examine whether such service constitutes trucking service which is exempted from coverage under section 1(a)(1)(ii) of the Railroad Retirement Act. This issue was examined in B.C.D. 96-82, above, where the majority of the Board relied on factors which are not present in this case to conclude that if CSXI had been found to be performing service in connection with railroad transportation, such service would fall under the exception for trucking service. Specifically, CSXI originated as a social security covered company, was later merged with a trucking company, and maintained the same focus as a trucking company, which is door-to-door delivery of high value goods with emphasis on timeliness of delivery as opposed to rail terminal to rail terminal delivery. The majority of the Board noted that CSXI competed for the same traffic as independent trucking firms. In this case, UPDS does not have any history of independent trucking operations; and, as explained above, its services are performed primarily for its carrier affiliate. The Board concludes that the trucking service exception to coverage under the Acts does not apply in the case of UPDS.

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Accordingly, the Board determines that UPDS is under common control with a rail carrier and is performing a service in connection with rail transportation, which is not exempt from coverage by reason of the trucking service exception. Consequently, UPDS is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective September 19, 1995.

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Glen L. Bower

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V. M. Speakman, Jr.

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