

## **Employer Status Determination Watco, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Watco, Inc. as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Information concerning Watco has been provided by Mr. Charles R. Webb, who is president, sole owner, and a director of Watco. Mr. Webb is also sole owner of the Southeast Kansas Railroad Company, a rail carrier which he established in 1987 and which was held to be an employer under the Acts effective April 13, 1987 (B.A. No. 3869).

Watco was incorporated in November 1982 and began operations in June 1983. It employs approximately 215 persons and performs rail car repair, locomotive repair and maintenance, locomotive leasing, track repair and maintenance, and rail car management services. Watco does the vast majority of its business with non-railroad companies involved with the railroad industry. Ten percent of Watco's business is with railroad companies, such as the Burlington Northern, CSX Transportation, Atchison, Topeka & Santa Fe, Kansas City Southern, Union Pacific, South Kansas & Oklahoma Railroad, and the Southeast Kansas Railroad. Less than five percent of Watco's business is with its affiliated railroad, Southeast Kansas Railroad. Most of Watco's business consists of rail-related service for non-railroad companies such as paper mills, smelting and mining companies, petroleum refineries, chemical companies, agricultural companies, steel manufacturing and processing companies, aircraft manufacturing companies, utility companies, private car owners, and others. The service performed for these companies includes rail car maintenance, track repair and maintenance, switching service, and locomotive lease, repair, and maintenance.

Section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) defines an employer as follows:

(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 \* \* \*.

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

Watco is clearly not a carrier by rail. 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. Watco is under common control with a rail carrier in that it is wholly owned by Mr. Charles R. Webb, who is also the sole owner of the Southeast Kansas Railroad Company, a rail carrier employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts. Thus, the only issue regarding coverage of Watco under the Acts is whether it provides "service in connection with" railroad transportation.

The question of whether railcar repair is a service in connection with railroad transportation has been addressed previously by the Board and by the Courts. In Despatch Shops Inc. v. Railroad Retirement Board, 153 F. 2d 644 (D.C. Cir. 1946), the Court of Appeals for the District of Columbia Circuit ruled that railcar repair falls within the definition of a service in connection with railroad transportation. 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), held a company whose business consisted of repairing locomotives and other rolling stock to be performing service in connection with railroad transportation in a fact situation where approximately 25 percent of its business came from its affiliate and where approximately 95 percent of its business came from the railroad industry.

Funding Systems Railcars, Inc., the subject of an appeal in Board Order 83-113, 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. Like Watco, 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. On appeal, the Board held that Funding Systems was not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

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In Board Order 85-16, the Board 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. Emons Industries itself had already been held not to be an employer under the Acts. The principal business of one of those three 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.

The instant case is not distinguishable from those involving Funding Systems Railcars, Inc. and Emons Industries. Watco is an independent business which antedates by several years its being brought under common control with a rail carrier; only a small percentage (10%) of its business consists of performing service for rail carriers and, unlike the company in Livingston Rebuild Center, a substantially smaller percentage of that business (5%) consists of providing services for its affiliated carrier. Section 202.6 of the regulations of the Board, implementing the casual service exception contained in section 1(a)(1)(ii) of the Railroad Retirement Act, provides that:

The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is 'casual' whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.

Based on the information discussed above, the services in connection with rail transportation provided by Watco to its affiliate amount to no more than five percent of its business and thus constitute an insubstantial portion of the operations of Watco. Accordingly, the services being performed by Watco for its affiliate are casual. Cf. Rev. Rul. 84-91, 1984-1 C.B. 203, which held that the performance of services in connection with

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rail transportation was casual where the services performed for the affiliate constituted less than four percent of the related company's activities. Therefore, the Board concludes that Watco is not an employer under the Acts.

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