**EMPLOYER STATUS DETERMINATION**
**VMV ENTERPRISES**

A majority of the Board (Labor Member dissenting) hereby determines VMV Enterprises, Incorporated, (VMV) not to be an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts.

VMV is a wholly owned subsidiary of Kentucky Railworks, Incorporated (Railworks). Railworks was incorporated as a Kentucky corporation on February 25, 1986, to purchase from the Illinois Central Gulf Railroad 309 miles of rail line running from Louisville to Paducah, Kentucky. On March 17, 1986, Railworks incorporated the Paducah and Louisville Railway as a wholly-owned subsidiary to operate the line as a class II rail carrier. The Paducah and Louisville has been determined to be a covered rail carrier employer from August 27, 1986, the date operations commenced over the line. See Legal Opinion L-86-116.

With the rail line, the Illinois Central also sold to Railworks a large locomotive repair shop at Paducah. Built in 1927 by the Illinois Central to manufacture and repair steam locomotives, the shop was later converted to handle diesel locomotives. Employment at the repair facility declined over the years from a peak of 1,097 in 1978 to 30 at the time of the sale to Railworks in 1986. Railworks formed VMV, also a Kentucky corporation, on February 25, 1986[1], to operate a repair business at the Paducah plant.

In a decision dated November 14, 1988, the Interstate Commerce Commission approved acquisition and operation of the Paducah and Louisville Railway by Rail Holdings, Inc., a Delaware corporation. Paducah and Louisville Railway Partnership; Acquisition and Operation Exemption, Rail Holdings, Inc., Finance Docket No. 31346 (Sub-1), 53 Fed. Reg. 47772. At that time, Rail Holdings[2] also acquired control of VMV by obtaining control of its parent, Railworks.

Since its formation, VMV has operated the Paducah facility in the business of repair, maintenance and reconditioning of railroad locomotives. VMV also leases locomotives and maintains leased fleets for other companies. VMV advertises its services to the rail industry. See, e.g., The Pocket List of Railroad Officials, Vol. 98, No. 1, pp. 45, 146. It provided a list of some 300 customers, including large class I rail carriers (e.g., CSX Transportation and Chicago & Northwestern Transportation Co.,) small class III rail

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[1] The same day on which Railworks itself was incorporated.

[2] Rail Holdings, Inc. has been determined not to be an employer under the Acts. See Opinion No. B.C.D. 92-67, November 23, 1992.

carriers (e.g., Wisconsin Central, Ltd.), and various non-carrier entities (e.g., U.S. Department of Agriculture). According to the information provided by VMV, over half of VMV's business (55.7%) is associated with railroads other than the Paducah and Louisville, and an additional 2.5 percent of its revenue is earned from repairs conducted for the Paducah and Louisville. The remaining 41.8 percent of its business is with customers which are not rail carriers. VMV reports that the man-hours expended by VMV on repairs for the Paducah and Louisville would equal 3.2 percent if compared to the total hours worked by employees of Paducah and Louisville in the repair shop which the railroad operates independently to conduct its own repairs.

Section 1 of the RRA defines the term "employer" to 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. (45 U.S.C. § 231(a)(1)(i) and (ii)).

Section 1(a) of the RUIA (45 U.S.C. § 351(a)) contains essentially the same definition.

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

> * * * if 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. (20 CFR 202.7).

Section 202.6 of the regulations defines casual service as:

> * * * 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.

Finally, 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 Tenth Circuit has held that where a company and a railroad are jointly owned by a parent company, the non-carrier company is under common control with the railroad. Utah Copper Co. v. Railroad Retirement Board, 129 F.2d 358, 363 (10th Cir., 1942). See also, Livingston Rebuild Center, 970 F. 2d at 296.

There is no question that VMV is itself not a carrier by rail under section 1(a)(1)(i) of the RRA. However, it is under common control with one or more rail carrier employers within the meaning of the Acts because VMV is a subsidiary corporation of Rail Holdings, Inc., a company which also owns a covered rail carrier employer, the Paducah & Louisville. Whether VMV is a covered employer therefore turns upon whether VMV 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. Despatch Shops, Inc., v. Railroad Retirement Board, 153 F.2d 644, 646 (D.C. Cir., 1946). However, in Board Order 85-16 the Board ruled that a car repair company affiliated with a railroad that performed only 4.4 percent of its service for the rail affiliate was not performing covered service in connection with rail transportation. See also, Board Order 83-113. 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 approximately 25 percent 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).

As noted earlier, the facts in this case are that VMV performs 58.2 percent of its business with the railroad industry, but only 2.5 percent of its business is derived from its affiliate, the Paducah and Louisville. This is considerably less than the 95 and 25 percent levels of service at issue in the Livingston Rebuild case. The 2.5 percent is also less than the level of affiliate service found insufficient for coverage in Board Order 85-16.

In another case that should be considered, Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir., 1983), the Court reviewed the application of the "service in

connection with" language and section 202.7 of the Board's regulations to a company that was engaged in manufacturing crossties.

In affirming the Board's ruling that Concrete Crosstie was a covered employer, the Court distinguished Concrete Crosstie, which did 90 percent of its business with Florida East Coast, from the situation addressed in a 1940 decision by the Board's General Counsel (L-40-403) wherein Pullman Standard Car Manufacturing Company was found not covered on the basis that, although Pullman Standard did some business with affiliated carriers, most of Pullman Standard's business was with non-affiliated rail carriers and non-railroad companies.

Unlike Railroad Concrete Crosstie and Livingston Rebuild, however, and like Pullman Standard and the companies considered in Board orders 85-16 and 83-113, VMV does very little of its business with its affiliated railroad. Although the Court in Railroad Concrete Crosstie declined to provide guidance as to the amount of business that must be conducted with an affiliated railroad in order for a company to be a covered employer, it is clear that the Court in that case would require that an affiliate provide more than minimal service to its rail affiliate in order to come within the definition of "employer" in section 1(a)(1)(ii) of the Railroad Retirement Act. As noted above, VMV derives only 2.5 percent of its business from its affiliated railroad. Moreover, it is significant that VMV performs very little of its rail affiliate's car repair work. The repair work done by VMV is equal to only 3.2 percent of the repair work done by Paducah and Louisville in its own car shops. Based on our review of relevant court decisions and prior decisions of the Board, we find that VMV is not an employer under Railroad Retirement and Railroad Unemployment Insurance Acts because it provides only a minimal amount of service to its affiliated railroad.

Based on the foregoing, it is determined that VMV is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

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

Jerome F. Kever

**DISSENT OF**
**V. M. SPEAKMAN, JR. ON**
**COVERAGE DETERMINATION OF VMV**
**ENTERPRISES, INCORPORATED (VMV)**

The coverage decision in this case presents certain points that are out of context or misleading.

Section 1(a)(1)(ii) of the Railroad Retirement Act of 1974, in plain language with plain meaning, provides that an entity which is under common control with a railroad and which is performing rail service is covered by the Act. That section of law contains no requirement that rail service be performed for the affiliated railroad.

It is true that Board Order 85-16 (Labor Member dissenting) held that Emons Industries and its non-rail subsidiaries were not providing transportation within the meaning of Section 1(a)(1)(ii) of the Railroad Retirement Act and corresponding provision of the Railroad Unemployment Insurance Act, because they did not exist primarily or substantially to serve the rail carrier subsidiaries. The Seventh Circuit Court decision in Itel Corp. v. U.S. Railroad Retirement Board was cited in the Board Order.

However, a subsequent decision by that same court that ruled on Itel held Livingston Rebuild Center (LRC) to be a covered employer. This decision is totally contrary to Board Order 85-16 and Itel, as LRC clearly does not exist primarily to serve the rail carrier affiliate. Only about 25% of LRC's services (locomotive rebuilding) is for its affiliate, Montana Rail Link (MRL), and only about 25% of MRL's rebuilding business comes from LRC.

As the Court pointed out in the LRC decision:

> "Although the Center is thus not a captive in the sense that it is devoted predominantly to serving one railroad's needs, it is nonetheless 'under common control with' MRL, making it a statutory 'employer' if rebuilding rolling stock is a 'service.... in connection with the transportation of passengers or property by railroad.'"

Thus, this decision departs completely from Itel and the previously cited Board Order.

The determining factor in the LRC decision was the amount of service LRC received from the railroad industry in general, not the amount of service from the rail affiliate.

Next, the majority of the Board apparently finds significance in the Circuit Court decision in Standard Office Building Corporation v. United States.

However, the Standard Office Building case is unlike the one involving VMV, in that the only service "in connection with" that Standard Office Building performed was for the affiliate. So it would stand to reason that we may have to focus on the extent of the railroad's use of Standard Office Building's services in this situation, since this was the sum total of its rail service.

This is clearly not the case with VMV.

It should be noted that the Court's decision not to cover Standard Office Building was based not on the reasoning that it did not exist primarily to serve the affiliate, but for unrelated reasons.

Again, we must look to this same Court's decision in LRC to get a clearer picture of the Court's interpretation. That decision does not hinge on the percentage of service for the affiliate.

Finally, in RR Concrete Crosstie Corp. v. RR Retirement Board, the Eleventh Circuit Court made a distinction between the then current case and Pullman Standard Car Manufacturing Company. It stated that:

> "The General Counsel found that 'most of their business has been with unaffiliated railroad and non-railroad companies.' That factor is in marked contrast to the case at hand, where not only 'most' but 90%, of the subsidiary's sales are to the parent company."

This decision was in response to RR Concrete's argument, that it should be considered in the same vein as Pullman. The Court's explanation correctly contrasted the two cases, but this doesn't lead one to conclude that it agreed or disagreed with the General Counsel's determination in Pullman.

For the reasons stated, I must respectfully dissent from the majority on this coverage decision.

V. M. Speakman, Jr.

11/3/93
Date