Employer Status Determination

A & K Railroad Materials, Inc.

This is the decision of the railroad Retirement Board (hereafter Board) with respect to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of A&K Railroad Materials, Inc. (hereafter A&K).

According to a letter dated January 27, 1992, from the General Counsel of A&K, A&K has approximately 400-600 employees engaged in the business of supplying railroad track material to railroads throughout the United States. A&K also is engaged in the business of salvaging railroad track material. A&K enters into contracts with various railroads for the purchase, sale and salvage of used rail, track materials and ties. A&K commenced operations as a salvage company in October 1966.

A&K indicates that Mr. Kern W. Schumacher is its majority stockholder. He owns 88.6 percent of the stock in that corporation. Mr. Schumacher is also the majority stockholder in T&P Railway, Inc., owning 90% of the stock in that corporation.[1] T&P Railway, Inc. (B.A. # 3778) is a carrier by railroad covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Another railroad carrier, KCT Railway Corp. (B.A. 3375), is owned by Mr. Troy Schumacher, the son of Mr. Kern W. Schumacher. However, Mr. Troy W. Schumacher is not a stockholder in A&K.[2]

A&K indicates that it provided legal, administrative and valuation advice to KCT and T&P prior to those carriers commencing operations in May 1990 and June 1991, respectively. Since those carriers have commenced operations, the General Counsel of A&K has spent approximately five percent of his time on matters related to KCT and T&P; eighty percent of that five percent has been related to the abandonment of KCT's rail line and related issues. A&K bills the railroads (KCT and T&P) for these services. A&K has also done limited salvage operations for both KCT and T&P.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," in pertinent part, as follows:

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[1] Although the letter from Mr. Michael J. Van Wagenen shows that there are 10,000 shares of T&P Railway, Inc. stock outstanding and that Mr. Schumacher owns 900 shares that letter also states explicitly that Mr. Schumacher owns 90% of the stock. In addition, in a telephone conversation with a member of the Board's legal staff, Mr. Van Wagenen stated that Mr. Schumacher does, in fact, own 90 percent of the stock of T&P Railway, Inc..

[2] KCT has apparently ceased operations.

> The term 'employer' shall include--
>
> (i) any carrier by railroad, subject to part of the Interstate Commerce Act;
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> (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 * * *.

It is clear that A&K is not a carrier by railroad. However, the stockholder who owns a controlling interest in A&K also owns a controlling interest in T&P. Section 202.5 of the regulations of the Railroad Retirement Board (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. Accordingly, A&K is under common control with a railroad carrier by reason of its stockholders' control of T&P.[3]

The question then becomes whether A&K performs a service in connection with railroad transportation. Section 202.7 of the regulations of the Railroad Retirement Board (20 CFR 202.7) defines a service as being in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations.

The question of what constitutes "services in connection with the transportation of passengers or property by railroad" has been litigated on several occasions. In Duquesne Warehouse Company v. Railroad Retirement Board, 326 U.S. 446 (1946), at 454, the Supreme Court held that the Railroad Retirement and Railroad Unemployment Insurance Acts apply whenever "a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs." In Adams v. Railroad Retirement Board, 214 F. 2d 534 (9th Cir. 1954), at 542, the Court held that the provision of "accounting services, the services of a purchasing

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[3]KCT would "own" A&K if the stock in KCT owned by Mr. Kern Schumacher's son, Troy, were considered constructively owned by Kern, in that event, Mr. Kern would be the majority shareholder in both corporations and would own and/or control both corporations. Cf. 26 USC § 318. However, as will be seen below, the Board does not have to reach a decision on this issue to dispose of this case.

department, * * * correspondence of the stenographic services * * * bridge and building services, a safety engineer and repairs for its automotive equipment and its general rolling stock" by a carrier's affiliate were services in connection with rail transportation so as to render the affiliate an employer under the Acts. In Southern Development Co. v. Railroad Retirement Board, 243 F. 2d 351 (8th Cir. 1957), at 355, the Court held that a railroad affiliate which owned and operated an office building "almost exclusively for use by a railroad company for ticket selling and general offices could reasonably be considered [to be performing] a service connected with and supportive of rail transportation" and was an employer under the Acts. In Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir. 1983), the Court held that the provision of crossties by a manufacturer to its railroad carrier affiliate was "supportive of transportation and essential to its proper functioning." Railroad Concrete Crosstie, 709 F. 2d at 1410, quoting Southern Development Co. The court in Standard Office Building Corporation v. U.S. 819 F.2d 1371, 1379 (7th Cir. 1987), concluded that the best approach to resolving questions as to whether a service performed by an affiliated entity is a service in connection with rail transportation "is one that will minimize corporate reorganization designed to avoid railroad retirement tax liability and will protect reasonable expectations." In making its determination, the Seventh Circuit looked to the history of the entity (which was formed 35 years before enactment of the Railroad Retirement Tax Act), the situation and expectations of the employees (they were not members of railway labor organizations), and the degree to which the affiliate services the rail carrier affiliate(s). Id., at 1379-1380.

Recently, in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1992), at 298, the court reaffirmed the analysis contained in Duquesne Warehouse, that is, if the service is one which could be performed by the carrier and rolled into the carrier's line haul tariffs it is a service which is covered under the Railroad Retirement and Railroad Unemployment Insurance Acts. Livingston does not directly address the issue of how much rail connected service a company must perform for its affiliate carrier, as opposed to the railroad industry in general, before such a company is considered to be performing services in connection with railroad transportation. The facts in that case were, however, that Livingston did approximately 25 percent of its business with its rail affiliate and approximately 95 percent of its business with the rail industry.

The salvage and supply operation by A&K is as essential to railroad transportation as is the repair of rail cars and locomotives at issue in Livingston. However, unlike Livingston, little of A&K's business is done with its affiliate railroad(s). A&K buys approximately 500 miles of track per year, none of this track is purchased from its affiliate(s). Other than a limited amount of

salvage work (less than 1% of A&K's salvage work in one year) and the minimal administrative assistance, described earlier in this decision, A&K has done little business with T&P and KCT.

In 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 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 analogous to Pullman Standard and the companies considered in Board orders 85-16 and 83-113, A&K does virtually no business with its affiliated railroad. 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 covered employer and we are not prepared to establish any minimum affiliate service level in connection with this case. However, we do hold, consistent with Board Order 85-16 and Board Order 83-113, that some affiliate service that is more than trifling is necessary in order to find a company covered under section 1(a)(1)(ii) of the RRA. Accordingly, we find that with respect to its track salvaging operation A&K is not performing a service in connection with railroad transportation so as to bring it within the definition of an employer under section 1(a)(1)(ii).

With respect to the miscellaneous administrative services performed by A&K for KCT and T&P prior to the commencement of carrier operations, such services are similar to the accounting and office services provided in Adams. As such, they would constitute a service in connection with transportation by rail. However, 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, quoted above, 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. 20 CFR 202.6.

The administrative services were one-time arrangements of short duration rendered prior to the commencement of carrier operations. As such, there is a substantial basis for an inference that such limited service will not be repeated. The ongoing service provided by the General Counsel of A&K, which service accounts for no more than 5 percent of the General Counsel's time, is clearly insubstantial. A majority of the Board (Labor Member dissenting) finds that such service is casual service within the meaning of the Board's regulations.

It is the determination of the Board that A&K is not an employer under the Acts.

Glen L. Bower

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

Jerome F. Kever

DISSENT OF
V.M. SPEAKMAN, JR.
ON COVERAGE DETERMINATION
OF
A&K RAILROAD MATERIALS, INC.

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-railroad 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. However, the Seventh Circuit Court decision in Livingston Rebuild Center, Inc., v. Railroad Retirement Board is completely contrary to the rulings in that Board Order. Furthermore, I did not conclude from the decision in Railroad Concrete Crosstie, Corp., v. Railroad Retirement Board that an entity must perform railroad service for the affiliate to be covered.

Since A&K Railroad Materials, Inc., is under common control with a carrier and does perform service in connection with railroad transportation, I must respectfully dissent from the majority on this coverage decision.

V. M. Speakman, Jr.

11/15/93
Date