Employer Status Determination
Railroad Signal Consultant Company

This is the decision of the Railroad Retirement Board with respect to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of Railroad Signal Consultant Company Inc. (RSCC). RSCC is a sole proprietorship run by Mr. Gilbert Velasquez, Jr. Mr. Velasquez is the President of the Napa Valley Railroad Company (NVRC) and is in charge of the operation of maintenance of way. NVRC was held on May 5, 1988, to be a rail carrier employer covered under the Acts effective November 15, 1987.

Mr. Velasquez advises that RSCC installs, repairs, maintains, inspects, and tests signal systems and supplies railroad signal materials. It does 90 percent of its work with the railroad industry but none of it with NVRC. It has three part time employees.

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

The term 'employer' shall include-

> (i) any express company, sleeping-car company, and 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
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> * * * "

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

RSCC is not an employer within the meaning of section l(a)(l)(i) of the Railroad Retirement Act. Accordingly, we tum to section l(a)(l)(ii) in order to determine whether RSCC is an employer within the meaning of that section. Under section 1 (a)(l)(ii), a company is a covered employer if it meets both of two criteria: if it provides Zservice in connection withw railroad transportation and if it is owned by or under common control with a rail carrier employer. If it fails to meet either criterion, it is not a covered employer within section l(a)(l)(ii).

For the reasons stated below a majority of the Board (Labor Member dissenting) finds that SCC is not an employer under the Acts because it is not performing services in connection with railroad transportation.[1]

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).

The Board has never held that a car repair company which performs no service for its rail affiliate is an employer. 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 91122. 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). See also Despatch Shops, Inc. v. Railroad Retirement Board, 153 F.2d 644 (D.C. Cir., 1946).

In another case that should be considered, Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (llth 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.

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[1] 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. Because of the Board's finding on "service in connection with" it is unnecessary to decide and the Board does not decide whether Mr. Velasquez's being responsible for the day to day running of NVRC as president of that company is sufficient control to find that an otherwise independent business which he operates is under common control of NVRC.

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, RSCC does 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 a covered employer and we are not prepared to establish any minimal affiliate service level in connection with this case.

However, consistent with the rulings in Board Order 85-16 and Board Order 83-113, we do hold that some affiliate service is necessary in order to find a company covered under section l(a)(l)(ii) of the RRA. Accordingly, we find that RSCC is not performing a service in connection with railroad transportation so as to bring it within the definition of an employer under section l(a)(l)(ii).

Based on the foregoing, it is determined that RSCC 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
RAILROAD SIGNAL CONSULTANT COMPANY INC. (RSCC)

I disagree with the majority decision that Railroad Signal Consultant Company Inc. is not a covered employer.

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 25So of LRC's services is for its affiliate, Montana Rail Link (MRL), and only about 255to of MRL's business cornes trom 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.

Finally, in RR Concrete Crosstie Corp. v. RR Retirement Board, which is cited by the majority, the Eleventh Circuit Court made a distinction between the then current case and Pullman Standard Car Manufacturiny 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.

RSCC is under common control with a carrier and does 90% of its work with the railroad industry.

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

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V. M. Speakman, Jr.

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Date