

EMPLOYER STATUS DETERMINATION DECISION ON RECONSIDERATION

JOPPA & EASTERN RAILROAD COMPANY

This is a reconsideration determination as to the employer status of Joppa & Eastern Railroad Company (Joppa and Eastern) under the Railroad Retirement Act (RRA) (45 U.S.C. § 231, et. seq.) and the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. § 351, et. seq.). Joppa and Eastern was held to be an employer under the Acts administered by the Board effective May 1, 1991, the date on which it began operations.

Joppa & Eastern was incorporated on April 4, 1990, and is wholly owned by Electric Energy, Inc., a non-railroad employer. Its president and vice president represent Electric Energy, Inc. as general counsel and its treasurer is the comptroller of Electric Energy, Inc..

In Interstate Commerce Commission (ICC) Finance Docket No. 31656, decided June 29, 1990, the ICC granted to the Joppa & Eastern Railroad Company an exemption under 49 U.S.C. § 10505 from the prior approval requirements to 49 U.S.C. § 10901 for construction of a 4.5-mile rail line to connect the Joppa Steam Electric Station at Joppa, Illinois, to a main line of the Burlington Northern Railroad Co.. Joppa & Eastern interchanges with the Burlington Northern Railroad and, through operating rights agreements, with the Illinois Central Railroad, the Union Pacific Railroad, and the Paducah and Louisville Railroad. Burlington Northern, as the connection line railroad for Joppa & Eastern, has the responsibility for operating and dispatching authority pursuant to agreement. Track and roadway maintenance and inspections are performed by Track Tech, Inc. and corporate and regulatory compliance for Joppa & Eastern is done by a law firm which is general counsel for Electric Energy, Inc.. Mr. T. Richard Mager, President of Joppa & Eastern, stated that at no time has the railroad employed any individual pursuant to an hourly wage, salary or otherwise, except as an independent contractor, and that the railroad has never purchased locomotives, nor does it contemplate such purchase.

The definition of an employer contained in section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term "employer" shall 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 tracking 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 * *
*.

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

The evidence presented by Joppa & Eastern in connection with its request for reconsideration establishes that although Joppa & Eastern owns 4.5 miles of track, it does not own any railroad equipment, is not itself conducting rail operations over the line, and does not have the capability to conduct rail operations.

In Board Order 89-74, the Board held that a lessor employer, which had sold all its railroad assets so that the lessor no longer had the equipment necessary to resume railroad operations, was no longer an employer under the Acts. See Appeal of Board of Trustees of the Galveston Wharves, B.O. 89-74, April 25, 1989. The facts with respect to Joppa & Eastern are indistinguishable from those in Galveston Wharves.

Accordingly, upon reconsideration, a majority of the Board holds that the Joppa & Eastern Railroad Company is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

V. M. Speakman, Jr. (dissenting)

Jerome F. Kever

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