EMPLOYER STATUS DETERMINATION
National Railway System, Inc.

This is the final determination of the Railroad Retirement Board concerning the status of National Railway System, Inc. (NRSI) (BA No.9743) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Procedural History

NRSI was held to have become an employer under the Acts effective August 1, 1989, in Legal Opinion L-90-63. In a letter dated June 21, 1990, NRSI requested reconsideration of that determination. On July 31, 1990, the Board's Deputy General Counsel issued a decision on reconsideration in Legal Opinion L-90-119, wherein he upheld his initial determination. On August 29, 1990, NRSI appealed to the Board. The Board stayed issuing a decision on NRSI's appeal, pending the outcome in the case of Union Pacific Corporation v. United States, 5 F.3d 523 (Fed. Cir. 1993).

Discussion

The evidence shows that NRSI is a holding company which owns two subsidiary railroads: (1) Denver Railway, Inc. (BA No.4781) and (2) Fore River Railway Company, Inc. (BA No.3116). NRSI also owned Council Bluffs and Ottumwa Railway, Inc. (BA No.4782), which was a covered rail carrier employer under the Acts from August 1, 1989 until May 17, 1991.

Section 1(a) of the RRA defines "employer" to include:

> (i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
>
> (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 of the RUIA (45 U.S.C. §351) and section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. §3231) contain essentially the same definition.

NRSI is not a carrier by railroad within the meaning of section 1(a)(i) of the RRA. Accordingly, it would be a covered employer

only if it falls within section 1(a)(ii) of the Act. A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of §3231. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993).

The facts in the Union Pacific case are indistinguishable from those presented by NRSI. Accordingly, a majority the Board finds that National Railway System, Inc. is not and has never been an employer covered by the RRA and the RUIA because it is not under common control with its rail carrier subsidiaries.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting opinion attached)

Jerome F. Kever

NATIONAL RAILWAY SYSTEMS, INC.
DISSENT OF V.M SPEAKMAN, JR.
LABOR MEMBER

I disagree with the decision of the majority in this case. Over the years, the Board has ruled many times that a parent-subsidiary relationship constitutes "common control" with respect to both the parent corporation and the subsidiary. The Board's decisions were consistent over time and well reasoned. A contrary decision in a single circuit, citing no authority, and interpreting a different law than we administer, should not be accepted as definitive with respect to an issue on which the Board's Bureau of Law has reached a different conclusion in many cases over many years. Such precipitous capitulation by the Board flagrantly disregards the expertise and experience of our legal decision makers and makes every circuit court the Supreme Court with respect to Board issues. The Union Pacific decision would erode coverage and threaten our solvency. I find it interesting but sadly ironic that the Board majority would accept a single decision like Union Pacific as definitive, even though the Board was not a party before the court, whereas on issues that require some degree of compassion for spouses and widows rather than for corporations, the Board majority seems willing to nonacquiesce to court of appeal rulings directly reversing the Board several times on the same issue. I dissent.

V. M. Speakman, Jr.

1/16/85

Date