

**EMPLOYER STATUS DETERMINATION RailTex, Inc.**

This is a determination as to the employer status of RailTex, Inc. (RailTex) 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.). RailTex has previously been held to be an employer under the Acts because it was under common control with a rail carrier employer and performed services in connection with rail transportation, and has filed a timely request for reconsideration of that initial decision.

At the time of the original determination, RailTex was parent company of five rail carrier subsidiaries. In addition, the Vice President of RailTex's Rail Division, and the RailTex's Vice President of Operations, also served as the President and Vice President, respectively, of each of the five rail carrier subsidiaries. It was therefore concluded that:

The Board has by regulation defined a company as being under common control with a covered railroad employer whenever the control of that company is in the same persons as that of a railroad employer. The majority ownership of the railroad subsidiaries by RailTex and the mutual use of directors and principal officers (who are employees) by RailTex and its subsidiaries clearly falls within this provision of the Board's regulations. Therefore, RailTex is under common control with one or more railroad employers. (citations omitted).

Section 1 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.

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 Court reasoned that the phrase "any company which is directly or indirectly controlled by one or more such carriers" would be rendered superfluous if the term "common control" by itself included parent-subsidary corporate relationships. Id. at 8.

The facts in the Union Pacific case are indistinguishable from those presented by RailTex. Accordingly, a majority of the Board determines on reconsideration that RailTex Incorporated 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.

An appropriate Form G-215 is attached.

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Glen L. Bower

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V. M. Speakman, Jr.

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DISSENT OF V. M. SPEAKMAN, JR.  
ON THE EMPLOYER STATUS DETERMINATION OF  
**RAILTEX, INC.**

RailTex has the mutual use of directors and officers of its railroad subsidiaries, and majority ownership of stock in each subsidiary. Furthermore, it is clearly performing railroad related services.

The position taken by the United States Court of Appeals for the Federal Circuit, Union Pacific Corporation v. United States, is contrary to the longstanding policy of the Railroad Retirement Board, and I do not subscribe to it.

Consequently, I dissent from the majority and feel strongly that RailTex should be held covered **under the Railroad Retirement Act** and Railroad Unemployment Insurance Act.

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V. M. Speakman, Jr.

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Date