

EMPLOYER STATUS DETERMINATION
North San Diego County Transit Development Board

This is the determination of the Railroad Retirement Board concerning the status of North San Diego County Transit Development Board (NCTD) 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).

NCTD is a public agency created by Sections 125000 et seq. of the California Public Utilities Code. NCTD is the recipient of state and federal grant funding through which NCTD acquired certain railroad right-of-way assets from Atchinson, Topeka and Santa Fe Railroad Company (B.A. No. 1702) in December 1992. San Diego Northern Railway, Inc. (SDNR) was formed by NCTD as a subsidiary public entity which has the responsibility for overseeing the operation of the rail line and equipment.

Information regarding NCTD was provided by Mr. Robert Lee Kessler, attorney for NCTD who provided the Board with copies of the contract agreements between NCTD and SDNR and SDNR and National Railroad Passenger Corporation (Amtrak), a covered employer under the Acts (B.A. No. 8301). According to Mr. Kessler, NCTD through its subsidiary, SDNR, entered into a contract agreement with Amtrak to operate the commuter rail services. Mr. Kessler stated that Amtrak will provide all daily services for the operation of the commuter rail and maintenance of the right-of-way and rail equipment, subject to the supervision of SDNR. NCTD does not have employees who are engaged in rail transportation.

Section 1 (a) of the RRA (45 U.S.C. § 231(a)) defines the term employer, in pertinent part, as to include the follows:

- (1) The term "employer" shall 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 an services (except trucking service, casual service, and the casual operations of equipment or facilities) in connection with the transportation of passengers or property by railroad.....

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- (2) Notwithstanding the provisions of subdivision (1) of this subsection, the term "employer" shall not include--

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(ii) any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel-railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter operated by any other motive power. * * *

Section 1 of the RUIA (45 U.S.C. §351) contain essentially the same definition.

In the view of a majority of the Board, the evidence establishes that NCTD is not engaged in transportation of passengers or freight in interstate commerce. Rather, NCTD is merely a subsidy disbursing entity of state government which contracts with a rail operator through its subsidiary, SDNR, to provide commuter service. Further, there is no evidence that NCTD or SDNR provides any service in connection with the interstate transportation of freight or passengers by rail within the meaning of section 1(a)(1)(ii) of the Act. Consistent with the Board's decision regarding the Orange County Transportation Authority, B.C.D. 94-47, (April 25, 1994), a majority of the Board finds that North San Diego County Transit Development Board is not now and never has been an employer covered by the RRA and the RUIA.

Glen L. Bower

V. M. Speakman, Jr. (*Dissenting*)

Jerome F. Kever