

Employer Status Determination MidSouth Corporation

This is the decision of the Railroad Retirement Board regarding the status of MidSouth Corporation as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

MidSouth was incorporated March 13, 1986, and began operations March 31, 1986. It is the parent company of MidSouth Rail Corporation, MidLouisiana Rail Corporation, SouthRail Corporation, and TennRail Corporation, rail carrier employers under the Acts (B.A. Numbers 2567, 2597, 5512, and 5542, respectively). MidSouth merged into Kansas City Southern Industries, Inc., effective June 10, 1993.

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 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 * * *.

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

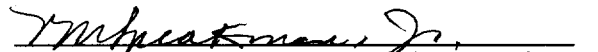
There is no evidence that MidSouth was an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether MidSouth was an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it provides "service in connection with" 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 1(a)(1)(ii).

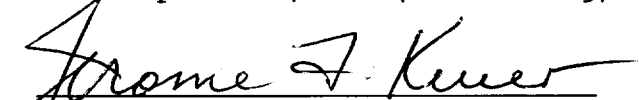
A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the

Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of § 3231 of that Act. Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir. 1993).

The relevant facts of the Union Pacific case are indistinguishable from those presented by MidSouth. Accordingly, a majority of the Board determines that MidSouth was not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts as it was not under common control with its rail carrier subsidiaries.


Glen L. Bower


V. M. Speakman, Jr. (Dissenting)


Jerome F. Kever