

JAN 19 1996

**EMPLOYER STATUS DETERMINATION
RAILCAR MANAGEMENT, INC.**

This is the decision of the Railroad Retirement Board concerning the status of Railcar Management, Inc. (RMI) as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA).

Information regarding RMI was provided in letters dated March 20, 1995, and May 2, 1995, from James A. Day, Vice President and CFO of RMI. According to Mr. Day, RMI is a privately held corporation which began operations on June 28, 1979. It initially began operations as a data service bureau (primarily accounting) for investor owned railway equipment leased to various railroads. Since the mid 1980's, RMI has been processing accounting data and developing and licensing software used in the railroad industry to perform management, accounting and recordkeeping functions. According to Mr. Day, since 1990 RMI has also performed administrative and accounting services for the Georgia Northeastern Railroad Company, Inc. (GNRR), a short line carrier.¹

RMI and GNRR share two common officers/directors. Mr. Wilds Pierce is Chairman of the Board of RMI and President of GNRR. In addition to being Vice President and CFO of RMI, Mr. James Day is Vice President - Finance of GNRR. Information provided by Mr. Day also shows that Mr. Wilds Pierce owns 78.8% of the stock of RMI and 50% of the stock of GNRR. In addition, Mr. James Day owns 1.1% of the stock of Railcar Management, Inc. and 1% of the stock of GNRR. Mr. Day stated that the services for GNRR account for "less than 2.5% of RMI's revenue."

Mr. Day provided a list of the rail carriers for which RMI provides services; this list contains approximately 45 carriers, of which about one-fourth have been found not to be covered employers under the Acts. GNRR is the only rail carrier with which RMI has any affiliation.

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

(i) any express company, sleeping-car company, and carrier by railroad, subject to the 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,

¹ GNRR has been found to be an employer covered by the Acts.

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refrigeration or icing, storage, or handling of property transported by railroad. [45 U.S.C. § 231 (a)(1)(i) and (ii)].

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

Section 202.7 of the Board's regulations (20 CFR 202.7) provides that service is in connection with railroad transportation:

* * * if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Finally, section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier.

RMI is itself not a carrier by rail under section 1(a)(1)(i) of the RRA. Whether RMI is a covered employer therefore turns upon the two questions; the first being whether RMI is under common control with a rail carrier and the second question being whether it provides a service in connection with rail transportation. For the reasons set forth below, a majority of the Board finds RMI does not provide a service in connection with rail transportation, therefore, in the view of the majority we do not need to address the issue of ownership or control.

The United States Court of Appeals for the District of Columbia has held that a rail carrier affiliate which repaired and rebuilt rail cars performed a service in connection with rail transportation. Despatch Shops, Inc., v. Railroad Retirement Board, 153 F.2d 644, 646 (D.C. Cir., 1946). However, in Board Order 85-16 the Board ruled that a car repair company affiliated with a railroad that performed only 4.4 percent of its service for the rail affiliate was not performing covered service in connection with rail transportation. See also, Board Order 83-113. The Board has also determined that a rail carrier affiliate which performed car and locomotive repairs performed a service in connection with rail transportation where 95 percent of the company's business derived from the rail industry, including approximately 25 percent from its affiliated railroad. In Re Appeal of Livingston Rebuild Center, Inc., Board Order 91-122. The decision of the Board was affirmed

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by the Court of Appeals for the Seventh Circuit in Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, (7th Cir. 1991). More recently, a majority of the Board has determined that a company which performs 58.2% of its business with the railroad industry, but only 2.5% of its business with its rail carrier affiliate, was not an employer under the Acts because it provides only a minimal amount of service to its affiliate railroad. Board Coverage Decision 93-84.

As noted earlier, the facts in this case are that RMI performs only 2.5 percent of its business for its affiliate rail carrier. This is considerably less than the 25 percent level of affiliate service at issue in the Livingston Rebuild case. The 2.5 percent is also less than the level of affiliate service found insufficient for coverage in Board Order 85-16, and the same level of affiliate service found insufficient for coverage in Board Coverage Decision 93-84.

Based on our review of relevant court decisions and prior decisions of the Board, a majority of the Board finds that RMI is not an employer under Railroad Retirement and Railroad Unemployment Insurance Acts because it provides only a minimal amount of service to its affiliated railroad.

Original signed by:

Glen L. Bower

V. M. Speakman, Jr. (Dissenting)

Jerome F. Keever