**EMPLOYER STATUS DETERMINATION**
**R. J. CORMAN d/b/a R. J. CORMAN RAILROAD CONSTRUCTION**

This is the determination of the Railroad Retirement Board regarding the status of R. J. Corman d/b/a R. J. Corman Railroad Construction Company, (CRC) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). CRC has not previously been determined to be an employer under the RRA and the RUIA.

Information about CRC was furnished by Mr. Kenneth Adams. CRC is a sole proprietorship which began operations in 1973. It currently has approximately 165 employees. Mr. R. J. Corman, who owns a controlling interest in CRC, also has a controlling interest in several railroads covered under the Railroad Retirement Act. Those railroads as follows:

R. J. Corman Railroad Corporation/Bardstown Line
R. J. Corman Railroad Company/Memphis Line
R. J. Corman Railroad Company/Cleveland Line
R. J. Corman Railroad Company/Western Ohio Line
R. J. Corman Railroad Corporation
R. J. Corman Railroad Company/Pennsylvania Lines, Inc.

CRC has approximately 30 employees in its administrative offices. This group spends about 50 percent of its time on business related to rail carriers. Of this 50 percent approximately 11 percent is business done for CRC's affiliated rail carriers and 39 percent is for non-affiliated rail carriers. CRC also employs approximately 67 employees in its general construction division. These employees perform track maintenance and repair work and capital projects for railroads and other industries. Employees in this group spend approximately 73 percent of their time on business connected with rail carriers, of which 11 percent is for affiliated rail carriers.

CRC also has three derailment divisions employing approximately 31 employees. Approximately 80 percent of their time is spent on business related to rail carriers none of which is for affiliated carriers. Finally, CRC operates two warehouse/distribution centers, which employ approximately 25 employees who spend no time on business connected to rail carriers.

For the last three years (1993, 1994 and 1995), approximately 66 percent of CRC's revenues were derived from rail related business. Approximately 5 percent of CRC's revenue was derived from its affiliated carriers. For this same period, approximately 57.6 percent of CRC's hours worked were in connection with rail related business. Of this total approximately 5 percent was for its affiliated carriers.

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

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV 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(a) of the RUIA (45 U.S.C. § 351(a)) contains essentially the same definition.

Section 202.7 of the Board's regulations 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. [(20 CFR 202.7)].

The Board has never held that a company which performs service for the railroad industry in general, but performs no service for its rail affiliate, is an employer. 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 ruled that a company which only derives 2.5% of its revenues from its affiliated railroads is not performing a service in connection with railroad transportation. See Board Coverage Decision 93-79, In Re VMV Enterprises Incorporated. In that case VMV performed only 2.5% of its services for its rail affiliate and derived only 2.5% of its revenues from that business. VMV did perform a substantial amount of its work, 55.7%, for the rail industry as a whole. Because of the small amount of work performed by VMV for its affiliated

railroad, a majority of the Board found that VMV was not performing a service in connection with railroad transportation.

The Board has determined that a rail carrier affiliate which performed car and locomotive repairs performed a service in connection with rail transportation where 95% 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 by the Court of Appeals for the Seventh Circuit in Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295, (7th Cir. 1991). See also Despatch Shops, Inc. v. Railroad Retirement Board, 153 F.2d 644 (D.C. Cir., 1946).

In another case that should be considered, Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir., 1983), the Court reviewed the application of the "service in connection with" language and section 202.7 of the Board's regulations to a company that was engaged in manufacturing crossties. In affirming the Board's ruling that Concrete Crosstie was a covered employer, the Court distinguished Concrete Crosstie, which did 90 percent of its business with Florida East Coast, from the situation addressed in a 1940 decision by the Board's General Counsel (L-40-403) wherein Pullman Standard Car Manufacturing Company was found not covered on the basis that most of Pullman Standard's business was with non-affiliated rail carriers and non-railroad companies.

The Court in Railroad Concrete Crosstie declined to provide guidance as to the amount of business that must be conducted with an affiliated railroad in order for a company to be a covered employer, and we are not prepared to establish any minimal affiliate service level in connection with this case.

In the instant case CRC performs approximately 57.6 percent of its hours and derives approximately 66 percent of its revenues from rail carriers, but does only about 5 percent of its business with affiliated rail carriers. Consistent with prior decisions of this agency, it is the determination of the majority of the Board, with Labor Member Speakman dissenting, that the level of service preformed by R. J. Corman Railroad Construction is not sufficient to bring it within the definition of employer in section 1(a)(1)(ii) of the RRA.

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Based on the foregoing, it is the determination of the majority of the Board that CRC is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

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

Jerome F. Kever

# DISSENT OF
# V. M. SPEAKMAN, JR.
# ON COVERAGE DETERMINATION OF
# R. J. CORMAN
# d/b/a R. J. CORMAN RAILROAD CONSTRUCTION

Section 1(a)(1)(ii) of the Railroad Retirement Act of 1974, in plain language with plain meaning, provides that an entity which is under common control with a railroad and which is performing rail service is covered by the Act. That section of law contains no requirement that rail service be performed for the affiliated railroad.

It is true that Board Order 85-16 (Labor Member dissenting) held that Emons Industries and its non-rail subsidiaries were not providing transportation within the meaning of Section 1(a)(1)(ii) of the Railroad Retirement Act and corresponding provision of the Railroad Unemployment Insurance Act, because they did not exist primarily or substantially to serve the rail carrier subsidiaries. The Seventh Circuit decision in Itel Corp., v. U.S. Railroad Retirement Board was cited in the Board Order.

However, a subsequent decision by that same court that ruled on Itel held Livingston Rebuild Center (LRC) to be a covered employer. This decision is totally contrary to Board Order 85-16 and Itel, as LRC clearly does not exist primarily to serve the rail carrier affiliate. Only about 25% of LRC's services (locomotive rebuilding) is for its affiliate, Montana Rail Link (MRL), and only about 25% of MRL's rebuilding business comes from LRC.

As the Court pointed out in the LRC decision:

> "Although the Center is thus not a captive in the sense that it is devoted predominantly to serving one railroad's needs, it is nonetheless 'under common control with' MRL, making it a statutory 'employer' if rebuilding rolling stock is a 'service... in connection with the transportation of passengers or property by railroad.'"

Thus, this decision departs completely from Itel and the previously cited Board Order.

The determining factor in the LRC decision was the amount of service LRC performed for the railroad industry, in general, not the amount of service for the rail affiliate.

We must look to this same Court's decision in LRC to get a clearer picture of the Court's interpretation. That decision does not hinge on the percentage of service for the affiliate.

Finally, in RR Concrete Crosstie Corp. v. RR Retirement Board, the Eleventh Circuit Court made a distinction between the then current case and Pullman Standard Car Manufacturing Company. It stated that:

> "The General Counsel found that 'most of their business has been with unaffiliated railroad and non-railroad companies.' That factor is in marked contrast to the case at hand, where not only 'most' but 90%, of the subsidiary's sales are to the parent company."

This decision was in response to RR Concrete's argument, that it should be considered in the same vein as Pullman. The Court's explanation correctly contrasted the two cases, but this doesn't lead one to conclude that it agreed or disagreed with the General Counsel's determination in Pullman.

For the reasons stated, I must respectfully dissent from the majority on this coverage decision.

V. M. Speakman, Jr.

11/15/96
Date