

RAILROAD RETIREMENT BOARD

IN THE MATTER OF CSX INTERMODAL, INC. AND ITS STATUS
UNDER THE RAILROAD RETIREMENT AND RAILROAD UNEMPLOYMENT
INSURANCE ACTS

STATEMENT OF THE CASE

By Order of January 31, 1995, the Railroad Retirement Board appointed Thomas W. Sadler, Assistant General Counsel, to act as designated hearing examiner for the Board under 20 CFR Part 258 and in that capacity, to hold a hearing, receive evidence and argument, and thereafter to formulate findings of fact, conclusions of law, recommendations and reasons therefore on the following question:

Whether CSX Intermodal, Inc. or any of its business segments or subsidiaries is operating a facility or performing any service in connection with the transportation of persons or property by railroad which is not casual service or trucking service within the meaning of the Railroad Retirement Act and Railroad Unemployment Insurance Act.

In accordance with the Board order, a hearing was held on May 22 and 23 at the Board's offices in Chicago, Illinois. Designated as parties to the hearing were CSX Intermodal, Inc., the International Brotherhood of Firemen and Oilers, and the United Transportation Union. Only CSX Intermodal participated in

the hearing. Post hearing briefs and affidavits were submitted by all parties and the record was closed October 1, 1995.

On November 14, 1995, the Report of Designated Hearing Examiner was issued. On December 13, 1995, Exceptions to the Report were filed by CSXI Intermodal Inc. (CSXI) and the United Transportation Union (UTU).

On December 27, 1995, CSXI filed a reply to UTU's Exceptions. On February 22, 1996, a majority of the Board, Labor Member Speakman dissenting, denied the request of the Transportation Communications International Union (TCU) to file Exceptions to the hearing officer's report on the grounds that TCU had waived its right to be considered a party to the proceeding under 20 CFR Part 358. However, TCU's Exceptions were made part of the record.

NATURE OF THE CASE

This case involves difficult issues of first impression for the Board. The issues are difficult because some of the operations of CSX Intermodal Inc., (CSXI) are unique within the transportation industry and because the statutes and regulations under which the Board operates were enacted when trucking conducted by railroads was a small and distinct segment of their business, and the intermodal transportation business, in which CSXI operates, was in its infancy.

Intermodalism may be defined as the movement of cargo from shipper to consignee by at least two different modes of transportation without having to unload, reload or repackage between modes. The goal of intermodal transportation is the continuous and seamless transfer of goods from origin to final destination in the most cost and time effective way. Exh. 37 at 8.¹ (Intermodal Industry Assessment, A. T. Kearney).

The principal participants in the intermodal industry are those companies that provide the packaging of fully-integrated intermodal services. Tr. 314-315 (Zubrod).² Third-party agents such as Intermodal Marketing Companies (IMCs), are among the leading participants in the intermodal industry. Id. at 290. IMCs are typically non-asset owning companies that represent shippers in arranging for intermodal service packages. Id. at 291. CSXI is generally recognized as a leading participant in the intermodal industry. Id. at 357. Although CSXI functions much like an IMC, the company is distinctive because of its significant ownership of assets and direct operation of the drayage part of an intermodal move. Id. at 355-59.

¹ References "Exh." are to exhibits in the List of Exhibits set forth in Appendix B of the Examiner's Report.

²References "Tr." are to the transcript of the hearing conducted May 22 and 23, 1995 by the Examiner.

Intermodal marketers compete directly with over-the-road trucking companies. Both operate in the time-sensitive, time-definite, high value-added market segment. Tr. 318, 367, 384 (Zubrod). Likewise, both offer a similar array of services, including dispatch, equipment supply, information services, direct delivery; and both contract for line-haul transport with multiple rail carriers. Id. at 367. In the case of intermodal marketing, the provision of services requires the coordination by intermodal marketers of drayage companies, terminal operators, railroad companies and steamship operators. Id. at 309-315, 318.

The rapid growth of the intermodal industry has tended to blur the traditional definitions of trucking and railroading. Tr. 413 (Zubrod). The growth of the intermodal industry benefits the rail industry as a whole. Id. at 376. In many marketplaces, intermodal companies, like CSXI, have taken business away from over-the-road trucking companies and provided additional business to railroads. Id. at 377.

STATUTORY AND REGULATORY FRAMEWORK

Railroad Retirement Act of 1974

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (1)(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad, subject to the jurisdiction of the Surface Transportation Board under Part A of

subtitle IV of title 49, United States Code;

(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 (other than trucking service, casual service, and the casual operation of equipment and 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.³

A similar definition is found in section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. 351(a)) and section 3231(a) of the Railroad Retirement Tax Act. (26 U.S.C. § 3231(a)).

³Since the Examiner filed his report section 1(a)(1) was amended to reflect abolition of the Interstate Commerce Commission. There was no substantive change in the definition. Sections 323 and 324 of the Pub. Law 104-88 (109 Stat. 950)

Regulations under this section are found at 20 CFR Part 202 (1995). These regulations were promulgated by the Board in 1939. 4 Fed. Reg. 1478 (1939)

§ 202.7 Service or operation in connection with railroad transportation.

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is 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, 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.

§ 202.8 Controlled company or person principally engaged in service or operation in connection with railroad transportation.

Any company or person owned or controlled by one or more carriers or under common control therewith, whose principal business is the operation of equipment or facilities or the performance of service (other than trucking service) in connection with the transportation of passengers or property by railroad, shall be an employer.

§ 202.9 Controlled company or person not principally engaged in service or operation in connection with railroad transportation.

(a) With respect to any company or person owned or controlled by one or more carriers or under common control therewith, performing a service or operating equipment in connection with the transportation of passengers or property by railroad, or in the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, but which is principally engaged in some other business, the Board will require the submission of information pertaining to the history and all operations of such company or person with a view to determining whether it is an employer or whether some identifiable and separable enterprise conducted by the

person or company is to be considered to be the employer, and will make a determination in the light of considerations such as the following:

(1) The primary purpose of the company or person on and since the date it was established;

(2) The functional dominance or subservience of its business which constitutes a service or operation of equipment or facilities in connection with the transportation of passengers or property by railroad in relation to its other business;

(3) The amount of its business which constitutes a service or operation of equipment or facilities in connection with the transportation of passengers or property by railroad and the ratio of such business to its entire business;

(4) Whether such service or operation is a separate and distinct enterprise;

(5) Whether such service or operation is more than casual, as that term is defined in § 202.6.

(b) In the event that the employer is found to be an aggregate of persons or legal entities or less than the whole of a legal entity or a person operating in only one of several capacities, then the unit or units

competent to assume legal obligations shall be responsible for the discharge of the duties of the employer.

§ 202.11 Termination of employer status

The employer status of any company or person shall terminate whenever such company or person loses any of the characteristics essential to the existence of an employer status.

§ 202.12 Evidence of termination of employer status

(a) In determining whether a cessation of an essential characteristic, such as control or service in connection with railroad transportation, has occurred, consideration will be given only to those events or actions which evidence a final or complete cessation. Mere temporary periods of inactivity or failure to exercise functions or to operate equipment or facilities will not necessarily result in a loss of employer status.

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FINDINGS AND CONCLUSIONS

The Board has considered the Report of the Designated Hearing Examiner and the Exceptions and Reply to Exceptions thereto and decides as follows:

1. A majority of the Board, Labor Member dissenting, adopts the Findings of Fact of the Designated Hearing Examiner numbered 1-164.
2. With respect to the status of CSX Intermodal, Inc., a majority of the Board, Labor Member dissenting, affirms and adopts Conclusion of Law Number 1 of the Designated Hearing Examiner.
3. With respect to the status of CSX Sea-Land Terminals, Inc. (Deferred).
4. With respect to the status of CSX Services, Inc., a majority of the Board, Labor Member dissenting, affirms and adopts Conclusion of Law Number 3 of the Designated Hearing Examiner.
5. With respect to the status of O/O Truck Sales, Inc., the Board affirms and adopts Conclusion of Law Number 4 of the Designated Hearing Examiner.

ANALYSIS

I. Is CSX Intermodal, Inc. performing a service in connection with the transportation of property by railroad?

In his first conclusion of law, the Examiner found that CSXI was not an employer within the meaning of the Acts. The Examiner found that CSXI, which is not a carrier by rail but which concedes that it is under common control with an employer under the Acts, was not performing a service in connection with the transportation of persons or property by railroad and, even if it were performing such a service, the service would be considered trucking.

CSXI, a subsidiary of CSX Corporation, which also owns CSX Transportation (CSXT), an employer under the Acts, is involved in packaging for shippers the movement of freight by a combination of truck, rail, and barge. CSX/Sealand Terminal, Inc. (CSLT) a subsidiary of CSXI, operates CSXI's intermodal terminals for CSXI and CSX Services, Inc. another subsidiary performs ancillary services at those terminals. O/O Truck Sales, Inc. is a subsidiary of CSXI which performs various trucking services for CSXT. The examiner approached his analysis by looking at each component part, as described above. The Board will do the same.

CSXI can be described as an intermodal marketing company which, in connection with that function, also operates a motor

carrier operation and, through subsidiaries, operates intermodal terminals. FOF 58, 59-60, 84-94.⁴

CSXI provides services with respect to freight shipped in containers or trailers that can be stacked on rail cars. It is in the business of providing a door-to-door delivery service under a single bill of lading usually by a combination of truck-rail-truck transportation and in some cases, the use of barge. FOF 29, 34-37, 59. It will arrange for the pick-up of a shipper's containers or trailers, either using its own truck owner-operators or through an independent drayage firm; deliver the containers or trailers to one of its intermodal terminals and place them on flat cars of the carrier that services that terminal for line-haul to another intermodal terminal at which point the trailers or containers are removed from the flat cars and are delivered to their ultimate destination either by CSXI owner- operators or independent drayage firms. Tr. 86-89 (Sorrow). Ideally, the shipper, such as a major ocean carrier like Sea-Land, will have a large enough shipment so that CSXI is able to "purchase" a train dedicated just for that shipment. FOF 65. If a shipper provides its own pick-up and delivery, CSXI will arrange only the rail portion of the trip. FOF 111. If the

⁴ The reference "FOF" is to the Findings of Fact of the Designated Hearing Examiner.

goods will reach their destination more timely by substitute truck-for-rail, CSXI will provide or arrange the substitute trucking. FOF 88-91. If a shipper needs a chassis for the transport of a container or trailer, CSXI will lease it to them. Exh. 67 (Interrogatories # 3). For an additional charge, it will repair a shipper's trailer or container. FOF 164. CSXI will continuously track the loaded trailer or container and, if possible, use the trailer or container for transport on a return trip to avoid charging the shipper the costs of retrieving an empty trailer or container. In short, CSXI offers the whole spectrum of intermodal services and it operates its own drayage and terminals. FOF 57, 61, 81, 94.

In his decision the Examiner traces the history of service in connection with railroad transportation and applies that history in making his recommended findings. He suggests a reasoned, common sense method of applying the service in connection with language in the Railroad Retirement and Railroad Unemployment Insurance Acts so as to give meaning to the spirit of the Acts as well as the language. The Examiner traces his approach to a very early legal opinion in the case of Lenoir Car Works et. al. (Legal Opinion L-38-650), which states that decisions as to whether a particular service is a service in connection with railroad transportation should be made after consideration of all relevant facts and circumstances. Legal

Opinion L-38-650 suggests that factors such as the following should be considered.

1. The physical relation of the affiliates's operations to the rail operations.
2. The history and origin of the affiliate.
3. For whose benefit are the affiliate's services performed.
4. The amount of the affiliate's business with the public.

The Examiner points out that this same type of analysis was applied by the Board in its consideration of the employer status of VMV Enterprises, Inc. (BCD 93-79). We shall now discuss whether CSXI is performing any service in connection with railroad transportation within the framework provided for in L-38-650 and used by the Examiner.

Physical Location

Putting its terminal operations aside, which will be examined later when we look at CSLT, the location of CSXI offices is separate and distinct from that of CSXT's. CSXI is headquartered in Huntsville, Maryland, while CSXT is headquartered in Jacksonville, Florida. FOF 1, 3.

Furthermore, CSXT and CSXI have no officers in common nor are any officers of these companies directors of the other. No officer or senior manager of CSXI reports to anyone at CSXT. Only one senior officer of CSXI came from CSXT. FOF 142-147. CSXI is not subsidized by CSXT. FOF 19.

History and Origin of CSXI

CSXI did not originate as an offshoot of CSXT's intermodal operations. Its predecessor, ISI, was a social security covered subsidiary of Sea-Land and was already involved in the intermodal business with respect to Sea-Land's shipments. FOF 4-11, 21-22.

CSX Corporation's purchase of Sea-Land and its subsidiaries was not primarily for the purpose of increasing traffic for CSXT, although this was a consideration, but rather to enter the intermodal container market on a national level. FOF 20. CSX Corporation later merged CMX Trucking, a social security covered employer, into CSXI to expand CMX Trucking, formerly a regional motor carrier for the Chesapeake and Ohio Railway Company and later, CSXT, into a national operation. FOF 7, 87.

The evidence of record does not show that CSXI was formed to remove individuals from coverage under the RRA. At its inception, about 87 of CSXT employees were transferred to CSXI to perform such duties as sales, marketing and clerical functions. At that time CSXI had a total work force of approximately 200. FOF 138-139. With the exception of a small number of clerks (and a sizeable number of terminal employees transferred to CSLT), there has been little subsequent movement from CSXT to CSXI, except on a voluntary basis. FOF 139-141.

For Whose Benefit Does CSXI Operate

CSXI is operated as an independent profit center in the CSX family. FOF 19. FOF 148. This is not to say that CSXT does not benefit from the existence of CSXI. CSXI extensively uses the trackage of CSXT. FOF 69. In 1994, 30% of CSXI's rail purchases were from CSXT. FOF 63. These purchases amounted to 2.9% of CSXT's revenue for 1994. For 1993 CSXI purchases were 2.87% of revenue and for 1992, 2.84%. FOF 64. Although this amount may not appear significant, one must keep in mind that the existence of CSXI eliminates the need for CSXT to expend funds to develop its own intermodal operations. Tr. 110-111 (Sorrow). By being under the same corporate umbrella with CSXI, CSXT has enhanced marketability for its own transportation with respect to other shippers. FOF 69. Although CSXT does move some intermodal traffic independent of CSXI, one of the reasons for CSX

Corporation to enter into the intermodal field was to increase CSXT's intermodal traffic which, to date, had not proven very profitable to CSXT. Exh. 61 (Suppl. Dec. of Allen at 7).

However, the decision to use CSXT for the rail portion of a move is not based on CSXT's business goals but rather CSXI's. Thus, CSXT must meet CSXI's price and time constraints or CSXI will contract out to another carrier or use truck only. FOF 75, 88. In the same vein CSXT can refuse CSXI's business if it does not fit CSXT's business goals. FOF 70-71. CSXI has replaced CSXT with other rail carriers for all or a portion of a particular line-haul, where other rail carriers were more competitive. FOF 75.

CSXI negotiates rail purchases with other carriers in the same manner it negotiates with CSXT. FOF 72. CSXI must maintain an arms-length relationship with CSXT so as to maintain leverage with other rail systems that compete with CSXT, such as the Norfolk Southern. FOF 74.

CSX Corporation does not "pressure" CSXI to use CSXT but may question why CSXT was not used for a particular rail move. FOF 149. Although the sales forces of CSXI and CSXT are in frequent contact with each other, CSXI's sales force receives no incentives to use CSXT. FOF 150.

Business with the Public

This criterion set forth in L-38-650 was initially intended to measure a company's sales of products and services to its carrier affiliate compared to its sales to nonrailroads and to other carriers. In the context of CSXI this test does not apply.

This is because CSXI does not exactly sell a product or service to railroads. It sells a service to customers which service usually includes the purchase of rail services from a carrier. Thus, in the context of CSXI's operations one must compare the amount of rail purchases from CSXT verses its purchases from other carriers.

CSXI purchases rail services from every class I carrier. FOF 62. Its biggest supplier is the Southern Pacific. Id. In 1994 37% of CSXI's rail purchases were from the Southern Pacific; 30% from CSXT; 16% from the Burlington Northern; 5% from Conrail; and the remainder from 19 other carriers. FOF 63. CSXI purchases rail services from CSXT on a cost-plus-return-on-investment basis. FOF 70. This is the same basis upon which it purchases rail services from other carriers. In its rail purchases, CSXI approaches CSXT in the same manner it negotiates with other carriers, and attempts to attain the best price for its customers. FOF 71-73.

Based upon the above, a majority of the Board finds that CSXI is not performing a service in connection with railroad transportation as that phrase has been interpreted by the Board.

However, the majority believes that the context in which

CSXI operates places it in an analogous position to companies represented by the Pullman Standard Car Manufacturing Company line of legal opinions and Board decisions, cited by the Examiner, which held that such companies, although providing a product which was supportive of railroad transportation - in the case of CSXI, increased rail traffic - were not performing a service in connection with railroad transportation where they provided this product in the regular course of business to all railroads. The majority puts great weight on these early decisions of the Board and opinions of its General Counsel since these decisions and opinions were written contemporaneously with the enactment of the statutory provisions under examination.

The majority also believes that the conclusion is consistent with the analytical guidelines set forth in the Standard Office Building case, discussed by the Examiner. The predecessor of CSXI was a social security covered employer and CSXI was not formed to siphon off employees from CSXT, nor to replace an intermodal division of CSXT. The benefits which CSXT derives from CSXI are increased purchases of rail transport which it would not have absent CSXI's business. However, these purchases are not the direct result of efforts by CSXI to increase CSXT's business, but are the indirect result of CSXI promoting its own business goals. In this regard, CSXT is no different from any other class I carrier which benefits by CSXI's business, nor is

CSXI any different from any non-affiliated intermodal agent who would seek to purchase rail transportation from CSXT.

The Transportation Communications International Union (TCU) and the United Transportation Union (UTU) (hereinafter Unions) filed exceptions to the Examiner's conclusions of Law numbers 1 and 2. In a letter dated February 22, 1996, a majority of the Board determined that TCU was not a party to this proceeding on the basis that it had previously waived participation in the proceeding. However, the Board did permit TCU to file exceptions to the Examiner's report.

TCU represents approximately 57 employees of CSXI and 300 employees of CSLT. UTU represents yardmasters who work for CSLT at the CSXI Bedford Park Terminal. Employees of CSXI are not presently covered under the Acts nor has any employee of that company ever asserted a claim for creditable service. Employees of CSLT are presently covered employees.

The Unions initially argue that the Examiner ignored the plain language of section 202.7 of the Board's regulations (cited above) in finding that CSXI was not performing a service in connection with railroad transportation. The majority concedes that the ambit of section 202.7 is broad enough to permit the Board to reach a conclusion that the operations of CSXI are services in connection with railroad transportation. After all, CSXI's intermodal business clearly increases the revenue not only

of its affiliate CSXT, but also of the railroad industry in general.

However, the majority believes that the Examiner's conclusion of law is consistent with interpretations of the coverage provisions of the Acts adopted very early after the inception of the railroad retirement system. These interpretations are represented by legal opinions, such as Lenoir Car Works, cited earlier, and many others cited in the Examiner's report. The majority concedes that CSXI's operations benefit the rail industry by its purchases of rail service for its customers in the ordinary course of its intermodal operations, but this would be true of any intermodal operator whether or not it is affiliated with a carrier. Indeed, the majority is not able to discern how purchases from a carrier in the ordinary course of business even could be characterized as a "service."

Furthermore, as the Examiner pointed out, from its inception the Board, when analyzing whether an affiliate of a carrier is performing a "service" in connection with railroad transportation, has focused on the affiliate's relationship with that carrier not with the railroad industry in general. As we have shown above, in its method and manner of operation, CSXI acts no differently from a nonaffiliated intermodal company that purchases rail service from CSXT in the ordinary course of its business. It sets terms and price in the same manner as it does with any other carrier and is not operated for the benefit of

CSXT as opposed to any other carrier. Thus, CSXI is not performing a service in connection with the transportation of persons or property by railroad as that phrase has been interpreted by the Board.

II. If CSX Intermodal, Inc. is performing a service in connection with the transportation of property by railroad, may such service be characterized as "trucking service" as that phrase is used in section 1(a)(1)(ii) of the RRA?

Even if the Board were to find that CSXI were performing a service in connection with railroad transportation, CSXI claims that such service would be exempted trucking service. Exh. 70 (CSXI's Post-Hearing Brief). Although not necessary to the outcome, because of the importance of the issue, the majority feels it important to discuss the application of the trucking exception to this case. In dealing with the trucking service exception one must keep in mind that in analyzing the questioned activity we are assuming a fortiori that such activity is a "service" in connection with the transportation of property by railroad, but now seek to determine whether such service may be properly characterized as "trucking". The second thing to keep in mind is that just because a company calls itself a trucking company or is a certified motor carrier does not necessarily mean it falls within the exception. As the Examiner indicated in his discussion of the trucking service exception, this exception does

not encompass any use of a truck by a railroad affiliate, but covers certain types of activities which are performed by independent trucking companies with which railroads desire to compete.

The majority believes that CSXI, a certified motor carrier under the Interstate Commerce Act, performs certain services which clearly come within what was intended to be encompassed by the trucking service exception, as originally enacted. See the Examiner's discussion of trucking service in his report. These would include line-haul by motor carrier, substitute truck-for-rail, and pick-up and delivery within the terminal area of a carrier. FOF 80-85, 88-91. It does this through its own independent owner-operators and through contract with other drayage firms. CSXI also operates truck terminals. FOF 95. The question then becomes whether CSXI's involvement in intermodal operations, which includes significant transport by rail, and sometimes only by rail, removes it from this exception.

Missouri Pacific Truck Lines, Inc. v. United States, 3 Ct. Cl. 14 (1983); affirmed 736 F. 2d 706 (Fed Cir. 1984), discussed by the Examiner at pages 41-43 of his report, appears to hold that the fact that a trucking subsidiary of a carrier moves a substantial portion of its freight by rail as part of an intermodal operation does not place the subsidiary outside the scope of the trucking exception. As indicated earlier, CSXI

originated with ISI, a subsidiary of Sea-Land. ISI possessed a motor carrier certificate. CSXI later merged with CMX Trucking, a railroad-controlled company exempted from the RRA by the trucking exception, and retained its motor carrier certificate. FOF 7, 87. As noted earlier, CSXI performs pick-up and delivery, line-haul by motor carrier, substitute truck- for-rail and operates truck only terminals. Its focus is the same as a trucking company, that is, door-to-door delivery of high value goods with emphasis on timeliness of delivery as opposed to rail terminal to rail terminal delivery. Tr. 383, 388 (Zubrod). More importantly, it competes for the same traffic as do independent trucking firms. Indeed, its main competitors are independent trucking firms, and it is truck prices which drive the economics of the intermodal industry. FOF 77-78. In this respect, CSXI does serve the purpose of the trucking service exemption, which is to permit railroads to compete for truck traffic through truck-like operations. Tr. 376-378 (Zubrod). The majority of the Board emphasizes that not all intermodal operations would necessarily fall within the ambit of the trucking exception. However, CSXI retains the motor carrier certificate of CMX Trucking which was covered by the trucking service exception. It operates its own drayage and competes in a market against other independent trucking companies. Granted that it also moves a significant amount of freight by rail, but as the court in Motruck pointed out, the fact that a truck trailer or container

is moved by rail or a flat car does not compel the conclusion that the movement of the trailer or container has been transformed from "trucking to "railroading" supra at 28.

The Unions also argue that CSXI's activities should not be considered exempted trucking services. As noted earlier, a decision on this question is not essential to resolution of this case in light of the majority's finding on the first issue. However, the majority wishes to address two arguments raised by the Unions on this issue. First, they appear to argue that CSXI cannot be exempted by the trucking exception since it neither owns trucks nor employs drivers. However, under this theory a company which leases tractors (as opposed to making a capital investment by their purchase) and who uses independent contractors can never be considered a trucking company. The majority rejects this reasoning. CSXI engages independent owner-operators who work full-time for CSXI and transport trailers and containers with the CSXI placard on their tractors. This method of operation is common within the trucking industry.

Secondly, the Unions argue that because 68% of CSXI's move segments involved some portion of purchased rail service while only 32% involved truck only moves, CSXI should not be considered a trucking company. However, the predominance of rail move segments would also be the case with respect to an independent trucking concern engaged in intermodal operations since the nature of intermodalism is to maximize efficiencies by use of

rail wherever possible. Thus, CSXI operates much like and competes with independent trucking concerns engaged in intermodal operations. This is by no means to say that any affiliate of a railroad engaged in intermodal operations is exempted from coverage by virtue of the trucking service exemption. As stated earlier, the majority's decision is based on the uniqueness of CSXI's operations within the intermodal industry.

III. Is CSX Sea-Land Terminals, Inc. (CSLT) performing any service in connection with the transport of property by railroad which is not casual or trucking service? If not, when did CSLT's employer status terminate? (Deferred)

IV. IS CSX SERVICES, INC. PERFORMING ANY SERVICE IN CONNECTION WITH THE TRANSPORTATION OF PROPERTY BY RAILROAD?

The Examiner found that CSX Services, Inc. was not an employer under the Acts. No exceptions were filed to this conclusion. A majority of the Board, Labor Member dissenting, affirms and adopts the findings and conclusions of the Examiner on this issue.

V. IS O/O TRUCK SALES, Inc. PERFORMING SERVICE IN CONNECTION WITH THE TRANSPORTATION OF PROPERTY BY RAILROAD WHICH IS NOT CASUAL OR TRUCKING SERVICE?

The Examiner found that O/O Truck Sales, Inc. was an employer under the Acts. No exceptions were filed with respect to this conclusion. The Board affirms and adopts the findings and conclusions of the Examiner on this issue.

Glen L. Bower
Chairman

V. M. Speakman, Jr.
Labor Member (Dissenting in
part, opinion
attached)

Jerome F. Kever,
Management Member

DISSENT OF THE LABOR MEMBER ON CSXI

I must dissent from the decision of the majority of the Board holding CSX Intermodal (“CSXI”) and CSX Services not to be employers under the Railroad Retirement and Railroad Unemployment Insurance Acts (“the Act”).

In my view, the majority has misapplied the Act, the Board’s own prior rulings, and judicial precedent in its rush to exclude CSXI from coverage. The Hearing Examiner’s findings establish that CSXI markets intermodal services and that it operates an intermodal network -- including the operation of intermodal terminals -- which had been previously operated, in large part, by its own rail affiliate. These functions are CSXI’s primary purpose, and render it an employer covered by the Act, 45 U.S.C. § 231(a) (1) (ii), as interpreted by the Supreme Court in Duquesne Warehouse, by the Board’s General Counsel in CSLT, L-90-18, Florida East Coast Railway Co., L-79-76, and National Fitch Corp., L-40-260, and by the National Mediation Board (applying the same standard) in Bankhead Enterprises, 17 NMB 153 (1990) and Pacific Rail Services, 16 NMB 468 (1989).

Indeed, the Board’s analysis is flatly contrary to the position we recently -- and successfully -- advanced before the United States Court of Appeals for the District of Columbia Circuit in the Reloads case, Interstate Quality Services v. Railroad Retirement Board, 83 F.3d 1463 (D.C. Cir. 1996), raising questions concerning the rationality of the Board’s action here.

The majority has rejected this substantial body of law, however, and relies instead on a fifty-eight year old legal opinion by the General Counsel, Lenoir Car Works. But that opinion has been supplanted by later holdings of the courts and this Board, and can no longer be used to resolve a question concerning the Act’s application to a situation of recent vintage. It is odd that the Board relies so heavily on an opinion formulated when this segment of the rail industry was in its infancy.

Viewed within the proper framework, as established by the relevant precedents, it is clear that CSXI is an employer covered by the Act.

The record establishes that CSXI markets intermodal services and operates an intermodal network which had, in large part, previously been operated by its rail affiliate, CSX Transportation (CSXT). CSXI thus operates facilities and performs services “in connection with the transportation of property by railroad, or the receipt, delivery ... transfer in transit, ... or handling of property by railroad,” 45 U. S. C. § 231(a) (1) (ii), and is covered by the Act.

The record is also clear that CSXI is intimately involved in the business of CSXT, a covered rail carrier employer. Approximately 30% of CSXI's business is with CSXT, and a CSXI executive testified that CSXT is the preferred carrier for shipments arranged by CSXI. In 1994, for example, only 20% of CSXI's operating revenue came from traffic which did not include line-haul freight movement by CSXT. Indeed, CSXI and CSXT are so interrelated that, in 1992, CSXI absorbed a \$45-million charge for a CSXT buyout of locomotive engineers. The majority's conclusion that CSXI is meaningfully independent of CSXT, for purposes of the analysis here, simply cannot bear scrutiny.

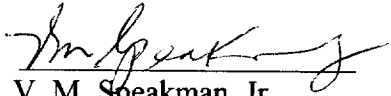
In any event, the majority has mistakenly assumed that the determination of whether a carrier's affiliate performs a covered "service" involves looking only to the affiliate's relationship with that carrier, and not at its relationship with the railroad industry in general. We rejected that notion in VMV Enterprises, B-93-79, as have two courts of appeals, Interstate Quality Services, 83 F.3d at 1464-65; Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295, 296 (7th Cir. 1992). The majority's abrupt reversal of position here is simply unwarranted. Under the settled standard, if the company does more than minimal business with its affiliate, we look to the amount of its business with the rail industry generally. Here, two-thirds of CSXI's 1994 "move segments" involved rail service, and the vast bulk of its revenue came from rail shipments. Accordingly, CSXI is a covered employer providing rail service as defined by the Act.

Independently, the majority has concluded that CSXI would be exempt from the Act under the trucking service exemption. This finding is also without any legal or factual basis and, accordingly, I must dissent from it as well.

The Board has consistently held that when a substantial amount of a company's business is rail-related, the presence of some trucking functions will not exempt it from the Act. CSXI easily fits in this category; it operates 33 Intermodal terminals, and only 3 trucking terminals; two-thirds of its "move segments" in 1994 involved no truck activity whatsoever; and, perhaps even more to the point, it owns no trucks and employs no truckers. As the Hearing Examiner's Finding of Fact 111 shows, 95% of CSXI's trucking traffic is handled by independent drayage companies. The majority's conclusion that, under these facts, CSXI performs "trucking services" which should exempt it from the Act's coverage, allows the exception to swallow the rule.

Nor is the majority's conclusion supported or compelled by Missouri Pacific Truck Lines, Inc. v. United States, 3 Cl. Ct. 14 (1983), aff'd, 736 F.2d 706 (Fed. Cir. 1984). There, the company in question did own and operate trucks; it derived most of its revenue from over-the-road trucking; and it did not own or operate any rail facilities whatsoever. 3 Cl. Ct. at 16, 19. Nothing suggests that a decision under those facts is applicable here. I note that the Board's General Counsel, in a memorandum addressed to the Board dated May 21, 1996 agreed, in effect, with my reading of the statute and the Missouri Pacific Trucking case.

In sum, the majority has mistakenly concluded that CSXI does not perform services which bring it within the Act's coverage, and has compounded that error by assuming that CSXI would be exempt from coverage under the trucking service exception. Because the majority is in error on both counts, I must dissent.


V. M. Speakman, Jr.

9/17/96
Date

DISSENT OF THE LABOR MEMBER ON CSXI

I must dissent from the decision of the majority of the Board holding CSX Intermodal (“CSXI”) and CSX Services not to be employers under the Railroad Retirement and Railroad Unemployment Insurance Acts (“the Act”).

In my view, the majority has misapplied the Act, the Board’s own prior rulings, and judicial precedent in its rush to exclude CSXI from coverage. The Hearing Examiner’s findings establish that CSXI markets intermodal services and that it operates an intermodal network -- including the operation of intermodal terminals -- which had been previously operated, in large part, by its own rail affiliate. These functions are CSXI’s primary purpose, and render it an employer covered by the Act, 45 U.S.C. § 231(a) (1) (ii), as interpreted by the Supreme Court in Duquesne Warehouse, by the Board’s General Counsel in CSLT, L-90-18, Florida East Coast Railway Co., L-79-76, and National Fitch Corp., L-40-260, and by the National Mediation Board (applying the same standard) in Bankhead Enterprises, 17 NMB 153 (1990) and Pacific Rail Services, 16 NMB 468 (1989).

Indeed, the Board’s analysis is flatly contrary to the position we recently -- and successfully -- advanced before the United States Court of Appeals for the District of Columbia Circuit in the Reloads case, Interstate Quality Services v. Railroad Retirement Board, 83 F.3d 1463 (D.C. Cir. 1996), raising questions concerning the rationality of the Board’s action here.

The majority has rejected this substantial body of law, however, and relies instead on a fifty-eight year old legal opinion by the General Counsel, Lenoir Car Works. But that opinion has been supplanted by later holdings of the courts and this Board, and can no longer be used to resolve a question concerning the Act’s application to a situation of recent vintage. It is odd that the Board relies so heavily on an opinion formulated when this segment of the rail industry was in its infancy.

Viewed within the proper framework, as established by the relevant precedents, it is clear that CSXI is an employer covered by the Act.

The record establishes that CSXI markets intermodal services and operates an intermodal network which had, in large part, previously been operated by its rail affiliate, CSX Transportation (CSXT). CSXI thus operates facilities and performs services “in connection with the transportation of property by railroad, or the receipt, delivery ... transfer in transit, ... or handling of property by railroad,” 45 U. S. C. § 231(a) (1) (ii), and is covered by the Act.

The record is also clear that CSXI is intimately involved in the business of CSXT, a covered rail carrier employer. Approximately 30% of CSXI's business is with CSXT, and a CSXI executive testified that CSXT is the preferred carrier for shipments arranged by CSXI. In 1994, for example, only 20% of CSXI's operating revenue came from traffic which did not include line-haul freight movement by CSXT. Indeed, CSXI and CSXT are so interrelated that, in 1992, CSXI absorbed a \$45-million charge for a CSXT buyout of locomotive engineers. The majority's conclusion that CSXI is meaningfully independent of CSXT, for purposes of the analysis here, simply cannot bear scrutiny.

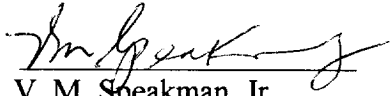
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V. M. Speakman, Jr.

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