

## **EMPLOYER STATUS DETERMINATION**

**CSX Real Property, Inc.**

**CSX Realty, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of CSX Real Property, Inc. (RPI), and CSX Realty, Inc. (Realty), as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.).

RPI is a subsidiary of CSX Corporation. Realty was formerly a subsidiary of CSX Corporation; however, its function was combined with RPI and it has ceased to exist. RPI performs real estate development, sales, and management activities for CSX Corporation, including those relating to surplus or non-operating property owned by CSX Transportation (CSXT), an employer under the Acts. RPI has an agreement with CSXT which designates RPI as exclusive manager of non-operating property and as non-exclusive manager of operational property. RPI is paid a monthly management fee. CSXT also maintains its own real estate departments to manage real property aspects of its on-going rail operations.

RPI currently has 70 employees. Approximately 45 RPI employees previously worked as employees of CSXT (of those, about one-half have not worked for CSXT since 1987). RPI estimates that 96-97 percent of RPI employee time is spent dealing with non-operating properties. Approximately 75 percent of RPI's revenues are derived from the sale, marketing, and management of CSXT owned property. RPI provides no services for any other carrier.

Information provided by employees of RPI regarding the operations of RPI is not, on its face, consistent with that provided by RPI. Although a majority of the Board finds the statements by the employees credible, a majority of the Board also finds RPI's explanations of the inconsistencies persuasive. For example, RPI objects that the positive responses of some of the former CSXT employees to the inquiry as to whether they are performing the same work as that which they performed for CSXT are misleading; RPI states that the employees in question may be doing the same work in the sense that they are performing the same tasks, but they are performing it under different direction for a different operation and purpose. RPI also contends that its own use of the terms "operating properties" and "non-operating properties" is misleading and when used by the Board in inquiries to employees of RPI resulted in ambiguous responses: RPI points out that the property owned and managed by RPI consists in part of rights which may be related to operational properties but are unrelated to rail transportation such as, for example, water rights.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," in pertinent part, as follows:

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The term "employer" shall include--

(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 (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 \* \* \*.

RPI and Realty are not carriers by rail. They are, however, under common control with CSXT, an employer under the Acts. Therefore, the question to be answered in regard to these companies is whether the services performed constitute the performance of a service in connection with the transportation of passengers or property by railroad.

A majority of the Board, for the reasons stated above, accepts RPI's description of the services it performs as involving non-operating properties, or surplus properties, or non-rail-related property rights. In addition, a majority of the Board notes that CSXT continues to have a property management department, which manages rail-related properties.

The issue of whether the management of non-operating property constitutes services performed in connection with rail transportation has not been previously considered by a majority of the Board, but has been addressed by the then-General Counsel in Legal Opinions L-41-614 and L-78-61 and the Deputy General Counsel in Legal Opinion L-89-42. In those opinions it was concluded that the property in question was not being used in connection with

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rail transportation, and that, therefore, the services involved in managing the property did not constitute services in connection with rail transportation. A majority of the Board agrees with and adopts this conclusion, and further finds that it applies to the instant case where the property in question may include rights unrelated to rail transportation. A majority of the Board finds therefore that RPI and Realty are not performing services in connection with rail transportation, except for the performance of management by RPI of operational property which a majority of the Board finds constitutes casual service as defined in section 202.6 of the Board's regulations.

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Glen L. Bower

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V. M. Speakman, Jr. (Dissenting)

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Jerome F. Kever