

EMPLOYER STATUS DETERMINATION

CSX Technology, Inc.

Chessie Computer Services, Inc.

Cybernetics & Services, Inc.

This is the determination of the Railroad Retirement Board concerning the status of the following companies as employers under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA): (1) CSX Technology, Inc. ("Technology"), (2) Chessie Computer Services, Inc. ("Chessie Computer") and (3) Cybernetics & Services, Inc. ("Cybernetics"). The Board has not previously addressed the employer status of Technology. Both Chessie Computer (BA No. 9345) and Cybernetics (BA No. 9523) have been employers under the RRA and the RUIA, with service creditable from January 1, 1987, and January 1, 1988, respectively.

Information about the organization and operations of these three companies was obtained from various correspondence with CSX officials.

Background Information about Technology

Technology was incorporated on September 15, 1987 as a wholly-owned, first-tier subsidiary of CSX Corporation. CSX Corporation is also the parent company of CSX Transportation ("CSXT"), a Class I rail carrier covered by the RRA and RUIA (BA No. 1524). Technology is the parent corporation of both Chessie Computer, which was incorporated on January 1, 1987, and Cybernetics, which was incorporated on December 31, 1987.¹

¹The dates of incorporation of all three companies were provided on page 4 of a letter dated April 23, 1993, to B.V. Ferguson from D.L. Stoll, Assistant Vice President -- Human Resources, of Technology.

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

In a letter dated July 2, 1996, Mr. David J. Stoyanoff, Tax Counsel for CSX Corporation, provided a general description of the nature of the business conducted by the three companies under consideration herein, as well as by a third first-tier subsidiary of Technology, CSX Professional Services Group ("PSG")². Specifically, Mr. Stoyanoff stated that these four companies design, develop, research, plan, and maintain modern technology systems and applications for various companies within and outside the CSX corporate family. Mr. Stoyanoff also stated, however, that only Chessie Computer and Cybernetics have provided such services to CSXT.

Because previous correspondence regarding Technology, Chessie Computer, and Cybernetics tended to refer to all three companies under the umbrella name of "Technology," Mr. Stoyanoff was asked to describe more precisely the work that has been done by Technology since the time that it was incorporated. In response to that request, Mr. Stoyanoff provided the information set out below.

Through 1991, Technology served as a holding company that had no employees and provided no services of any type. Beginning in 1992 and continuing until April 1995, Technology provided holding company management services, including financial, human resources, facilities and support, security, and quality assurance functions, directly to Chessie Computer and Cybernetics. None of these services was provided to CSXT. With respect to financial services, Technology provided accounting, budgeting, purchasing, and control functions. With respect to human resources, Technology provided staff support in the areas of personnel and employee relations. With respect to facilities and support services, Technology provided the following: general purpose maintenance and building management, space utilization and design, and centralized ordering, stocking, and distribution of office supplies. With respect to quality assurance,

²The Board has not previously considered the employer status of PSG. The Board's Division of Audit and Compliance is currently investigating the status of PSG.

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

Technology provided general purpose support, conducted quality reviews, and managed systems changes and procedures.

On April 1, 1995, Technology and its subsidiary companies underwent a restructuring. That restructuring included the formation of a new subsidiary of Technology, PSG, which was formed on March 1, 1995. In a letter dated August 28, 1995, to the Board's General Counsel, Mr. P. Michael Giftos, Senior Vice President and General Counsel of CSX Corporation, stated that PSG is a Delaware corporation with its principal office in Baltimore, Maryland, and that it performs computer programming service projects for unrelated non-rail business entities.

In his letter of July 2, 1996, Mr. Stoyanoff indicated that after the restructuring, Technology continued to perform the holding company management services noted above and currently provides those services to Chessie Computer, Cybernetics, and PSG. In addition, as of April 1, 1995, the information technology system-related services, which Mr. Stoyanoff called "infrastructure services," were consolidated within Technology. Mr. Stoyanoff stated that such services are categorized by function and include on-line database administration, systems management, network operations, and media management. Technology employees who perform those functions largely deal with what Mr. Stoyanoff called the "nuts and bolts" of CSX Corporation's computer system. For instance, employees in the media management group are responsible for maintaining the computer tape library for all of CSX Corporation. They create, maintain, inventory, and store back-up computer tapes. Employees in the on-line database group design data files and customized database management systems. Mr. Stoyanoff stated that by centralizing these functions for the entire conglomerate, CSX Corporation has achieved cost savings and other efficiencies.

In response to an inquiry as to how Technology's services prior to April 1, 1995 differ from its services after that date, Mr. Stoyanoff stated that following the reorganization on that date, Technology continued to provide holding company management services, such as financial, human resources, facilities, security,

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

and quality assurance functions to its subsidiaries. He stated that after the reorganization, Technology began providing the information technology system-related services that were previously provided by employees of Chessie Computer and Cybernetics whose compensation was reported under FICA.³

Mr. Stoyanoff stated that Technology did not provide service to any rail carrier either prior to or after the restructuring of April 1, 1995. In March 1995, Technology had 48 employees. Mr. Stoyanoff provided the following information as to the number of employees Technology has had as of December 31 in each year since it was incorporated: 12/31/87 - 12/31/91 -- 0 employees; 12/31/92 -- 38 employees; 12/31/93 -- 45 employees; 12/31/94 -- 49 employees; and 12/31/95 -- 241 employees.

³See discussion below regarding segregation.

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

Background Information about Chessie Computer and Cybernetics

In Legal Opinion L-87-130, dated September 16, 1987, Chessie Computer was held to be an employer under the RRA and RUIA effective the date it first began operations, January 1, 1987. Cybernetics was held to be an employer under the Acts effective the date that it commenced operations on January 1, 1988 in Legal Opinion L-89-41, dated April 10, 1989. Both Legal Opinion L-87-130 and L-89-41 found that these two companies were under common control with a covered rail carrier employer and that they performed service in connection with railroad transportation within the definition of "employer" under the RRA and RUIA. Specifically, Legal Opinion L-87-130 indicated that Chessie Computer provided computer support service to the Chessie Railroad System. Legal Opinion L-89-41 noted that approximately 75% of the business of Cybernetics was associated with CSXT.

The Board is now re-examining the status of these two companies because a question has been raised as to whether the concept of segregation should apply to them. See 20 CFR 202.9.

In a letter dated April 23, 1993, addressed to B.V. Ferguson of the RRB, D.L. Stoll, Assistant Vice President - Human Resources of Technology, stated that the CSX Technology business (apparently referring to Technology and its subsidiaries collectively) was established to provide a wide range of information technology support to the CSX Corporation affiliated group of corporations, for development and implementation of hardware and software systems responsive to business demands and wherever possible, to market such of those information technology services as may be feasible and practical from a business standpoint. He described the entities to which services were provided as follows:

One transportation mode served is a major U.S. carrier by rail. However, other major transportation systems are served: direct support is provided to Sea-Land Services, Inc., an international ocean shipping enterprise, the largest U.S. flag ocean carrier, and technical advisory services as needed are provided to American Commercial Barge Lines, Inc., the largest inland waterway

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

transportation operator in the U.S. . . . Additionally, support services are provided to CSX Intermodal, Inc. and to Greenbrier Resort Management, Inc.

Mr. Stoll stated that for 1993, the projections indicated that approximately 83% of the billings for services provided by the Technology companies would be rendered to the railroad.

By letter dated November 3, 1993, addressed to the Board's General Counsel, George F. Sekely, President of Technology, outlined restructured Technology organizational plans which he stated would be implemented December 1, 1993. Mr. Sekely stated that currently Cybernetics and Chessie Computer principally serviced rail carrier operations in addition to furnishing information services for some non-rail entities. He also explained that employees of those two companies designed, built, operated, maintained and supported specific railroad systems such as scheduling, car tracing, billing and operations and communications functions.

Mr. Sekely stated that at that time, Technology provided executive and administrative support for its operating subsidiaries and certain other non-rail entities. Included in the support functions were executive staff, finance, purchasing, payroll, accounting, facilities services and human resources. Mr. Sekely stated that Technology also provided and maintained the computer infrastructure which was utilized by other CSX affiliates, including the parent organization (CSX Corporation), Sea-Land Services, Inc., CSX Resort Management Company, Inc., and CSX Intermodal, Inc. Mr. Sekely indicated that the infrastructure was also used to provide services to businesses not affiliated with CSX Corporation. Mr. Sekely stated that it was the company's present intention that effective December 1, 1993, Technology would merge into its parent, CSX Corporation, and that an information technology function would be established at the parent company.

The reorganization mentioned in Mr. Sekely's letter did not occur in the manner and at the time originally outlined above. Technology never merged into CSX Corporation. However, Technology and its subsidiaries were restructured

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

effective April 1, 1995. As part of the restructuring, a new Technology subsidiary, PSG, was formed on March 1, 1995. In a letter dated August 28, 1995, addressed to the Board's General Counsel, P. Michael Giftos, Senior Vice President and General Counsel of CSX Corporation, stated that PSG performs computer programming service projects for unrelated non-rail business entities. As indicated in the background discussion of Technology, following the April 1, 1995 reorganization, Technology began to provide the information technology system-related services that were previously provided by Chessie Computer and Cybernetics employees whose compensation was reported under FICA. Chessie Computer and Cybernetics have provided computer-related services to only CSXT since the 1995 reorganization.

Applicable Law and Regulations

Section 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 of the RUIA contains essentially the same definition. [45 U.S.C. §351(a) and (b)].

Section 202.5 of the Board's regulations (20 CFR 202.5) provides in pertinent part that:

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

A company or person is under common control with a carrier, whenever the control . . . of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Section 202.7 of the Board's regulations (20 CFR 202.7) provides that:

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.

Section 202.9 of the Board's regulations provides in pertinent part that:

(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 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:

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

(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.

Discussion and Conclusions

Neither Technology, Chessie Computer, nor Cybernetics operates a railroad. Thus, the question to be answered is whether Technology and/or its subsidiaries fall under the "affiliate" definition of an "employer" under the RRA and the RUIA, i.e., an entity which is owned or controlled by or under common control with a rail carrier employer and which provides service in connection with railroad transportation. Both Chessie Computer and Cybernetics were previously held to be covered entities under this definition. Therefore, the specific question with reference to the two Technology subsidiaries is whether they continue to fall under that definition.

Technology is a subsidiary of CSX Corporation, which also owns CSXT, a covered rail carrier employer under the RRA and RUIA. Technology is therefore under common control with a rail carrier employer within the definition of "employer" in those Acts. A majority of the Board finds, however, that

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

Technology does not currently provide, and has not since the time it commenced operations provided, service in connection with railroad transportation as that phrase is used in the statutory definition of "employer" under the RRA and RUIA.

The following facts form the basis for the majority's conclusion. From the time that it was incorporated on September 15, 1987, through 1991, Technology served as a holding company that had no employees and provided no services of any type. Beginning in 1992 and continuing until April 1995, Technology provided holding company management services directly to its two subsidiaries, Chessie Computer and Cybernetics. Those management services included financial, human resources, facilities and support, security, and quality assurance functions which have been described in more detail in the statement of facts about Technology's operations. None of these services was provided to CSXT.

After the restructuring which occurred on April 1, 1995, Technology continued to perform the management services for its subsidiaries, including for its new subsidiary, PSG. In addition, the information technology system-related services called "infrastructure services" in Mr. Stoyanoff's letter of July 2, 1996, were consolidated in Technology. The "infrastructure services" included performing work in the areas of on-line database administration, systems management, network operation, and media management. Mr. Stoyanoff explained that Technology employees who perform these functions largely deal with the "nuts and bolts" of CSX Corporation's computer system. He gave as an example employees in the media management group who are responsible for maintaining the computer tape library for all of CSX Corporation. Those employees create, maintain, inventory, and store back-up computer tapes. Mr. Stoyanoff stated that employees in the on-line database group design data files and customized database management systems. Since April 1, 1995 (as was the case in the years prior to that date), Technology has provided no services to any rail carrier covered by the RRA and RUIA.

Since a majority of the Board finds that Technology does not provide service in connection with railroad transportation, the majority also finds that Technology is not and never has been an employer under the RRA and RUIA.

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

Turning to Chessie Computer and Cybernetics, the Board finds that these two companies remain employers under the RRA and the RUIA for the reasons set out below. Both of these companies are subsidiaries of Technology, which is a subsidiary of CSX Corporation. Since CSX Corporation is also the parent company of CSXT, the Board finds that Chessie Computer and Cybernetics remain under common control with a rail carrier employer under the Acts.

The evidence also indicates that both companies continue to provide "service in connection with railroad transportation" as that phrase is used in the "affiliate" definition of "employer." The original opinions which found these companies to be covered employers noted that Chessie Computer is "a computer service organization providing computer support to the Chessie Railroad System" (Legal Opinion L-87-130) and that approximately 75% of the business of Cybernetics is associated with CSXT (Legal Opinion L-89-41). In his April 23, 1993 letter, Mr. Stoll stated that for 1993, the projections indicated that approximately 83% of the billings for services provided by the Technology companies -- which at that time consisted of Technology, Chessie Computer, and Cybernetics -- would be rendered to the railroad. Since Technology itself provided services only to its subsidiaries, all services for the railroad which generated that 83% were provided by Chessie Computer and Cybernetics. Finally, after the reorganization of the Technology companies which occurred on April 1, 1995, Chessie Computer and Cybernetics have provided computer-related services only to CSXT. The Board therefore finds that Chessie Computer and Cybernetics have continuously provided service in connection with railroad transportation since each began operations and that each of those companies remains an employer under the RRA and the RUIA.

The suggestion has been made that "segregation" should be applied to Chessie Computer and Cybernetics. Section 202.9 of the Board's regulations is the regulation which governs segregation for rail carrier affiliates. Section 202.9 provides standards for determining whether or not some identifiable and separable enterprise of a company which is owned or controlled by or under common control with a carrier employer and which is principally engaged in non-carrier business, but also conducts some service in connection with railroad transportation, should be considered to be an employer under the RRA and the

CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

RUIA. The evidence in this case does not support a finding that segregation should be applied to either of these companies because the record demonstrates that the principal business of each of these companies, from and after the beginning date of operations for each, has been to provide computer-related services to the rail carrier employer with which they are under common control. Since the principal business of both companies has always been rail-related, segregation does not apply to Chessie Computer or to Cybernetics.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting in part)

Jerome F. Kever

DISSENT IN PART OF
V. M. SPEAKMAN, JR.
CSX Technology, Inc.
Chessie Computer Services, Inc.
Cybernetics & Services, Inc.

I hereby dissent from the conclusion of the majority that CSX Technology, Inc. (“Technology”) is not an “employer” under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (herein, “the Acts”).

As the majority observes, two of Technology’s subsidiaries (Chessie Computer Services and Cybernetics) devote all of their services to CSX Transportation and are thus, as the Board affirms, “employers” covered by the Acts. The Board’s conclusion in that regard is correct, because both Chessie Computer and Cybernetics provide services to their rail affiliate which are “reasonably directly related ... to the performance of (CSX Transportation’s) obligations ... as a common carrier by railroad,” 20 C.F.R. § 202.7.

The majority goes astray, however, with respect to Technology itself. As the majority acknowledges, both Chessie Computer and Cybernetics have transferred their essential management functions to Technology. Technology thus provides “substantial management services, including financial, human resources, facilities and support, security, and quality assurance functions” to both Chessie Computer and Cybernetics.

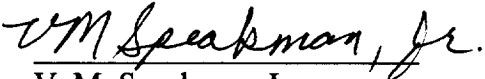
These services, which are ultimately services provided to CSX Transportation, render Technology an employer under the Acts. It has long been settled that a rail affiliate providing a service which was or could have been performed by a rail carrier itself is covered under the Acts. See Railroad Retirement Board v. Duguesne Warehouse Co., 326 U.S. 446, 454 (1946); Interstate Quality Services v. Railroad Retirement Board, 83 F.3d 1463, 1465 (D.C. Cir. 1996). Thus, for example, an affiliate which provides accounting, purchasing, correspondence and stenography services to a carrier is an “employer” under the Acts. Adams v. Railroad Retirement Board, 214 F.2d 534, 542 (9th Cir. 1954). And the Board has similarly concluded that the marketing of rail services constitutes a covered service under the Acts. National Fitch Corp., L-40-260. As one court has explained, the Acts would plainly cover an affiliate “to which a railroad spun off its entire non-operating staff.” Standard Office Building v. United States, 819 F.2d 1371, 1376 (7th Cir. 1987) ; see also Southern Development Co. v. Railroad Retirement Board, 243 F.2d 351, 355 (8th Cir. 1957.)

Similarly here, The record shows that Technology devotes a substantial portion of its activity to the provision of management, financial, human resources, and related functions to the two-thirds of its subsidiaries which exist solely to service CSX Transportation. The provision of these services to the rail affiliate renders Technology a covered employer. If Technology provided these services directly to CSX Transportation it would no doubt be a covered employer (just as Chessie Computer and Cybernetics are covered by today’s ruling). The simple transfer of functions to Technology does not change the character, and cannot change the legal significance, of the work at issue. The Board’s contrary conclusion is both internally inconsistent and out of step with previous holdings of the Board and of the federal courts.

The majority seems to place great weight on the fact that Technology also provides management services to a third subsidiary, Professional Services Group, which itself allegedly does not deal with the rail affiliate. But nothing in the record supports a finding that this relationship with a much smaller start-up subsidiary so overwhelms the remainder of Technology's work as to remove the rail-related services from coverage. To the contrary, the record shows that a substantial part of Technology's business remains rail related. The majority's decision states that in 1993, CSX projected that 83% of the billing for services provided by the Technology Companies would be rendered to the railroad. Effective with the April 1, 1995, reorganization, Technology began to provide services that were previously provided by Chessie Computer and Cybernetics employees who were incorrectly reported under FICA. CSX Technology's workforce increased by almost 200 employees at that time. Adding to this was the formation of CSX Professional Services Group which does work previously performed by Chessie Computers and Cybernetics. If such a high percentage of work was rendered to the railroad prior to the reorganization, it is highly unlikely that so many employees could be involved in non-railroad work now. Absent, at a minimum, a finding that the rail-related work for Chessie Computer and Cybernetics (which comprised some 83% of Technology's business in 1993) is now "insubstantial," no such conclusion could be reached. See Interstate Quality Services, 83 F.3d at 1465. Because the only record here shows that Technology's work for these rail-related subsidiaries is far more than "insubstantial," such a finding is unlikely indeed.

Currently, as Technology employees, these individuals are apparently doing the same work in the same place as when on the payroll of the covered affiliates. To conclude that these employees are not covered because they allegedly performed no service directly for a rail carrier, is clearly putting form over substance. Since Chessie Computer Services and Cybernetics could not successfully avoid coverage for a large number of their employees through "segregation," they are now allowed to accomplish that goal merely by removing the employees from one payroll onto another.

Because I can endorse neither the unexplained rejection of the long-settled construction of the Acts, nor the apparent embrace of corporate shell-games transparently designed to evade coverage, I respectfully dissent from the majority's conclusion with regard to CSX Technology.


V. M. Speakman, Jr.

2-21-97
Date