

## **EMPLOYER STATUS DETERMINATION**

### **GFA Rail Services, Inc. (GFARS)**

This is the determination of the Railroad Retirement Board regarding the status of GFA Rail Services, Inc. (GFARS) 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).

Information provided by Gordon H. Fay, President and apparently the sole stockholder of GFARS, indicates that GFARS is a privately-held corporation which provides railcar repair, car cleaning, and track repair services to both rail carrier and non-carrier companies. GFARS began operations on January 30, 1994, the date it acquired railcar and track repair assets from C&S Maintenance Consultants, Inc., a firm which provided substantially the same services, to substantially the same customers. Gordon Fay is Chairman, a Director, and a primary stockholder in the Bay Colony Railroad (BA No. 3112); a principal partner in Seminole Gulf Railway, L. P. (BA No. 5508); and President and sole stockholder of Gordon Fay Associates, Inc. (BA No. 9353).

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. §231 (1)(a)(1)) 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 \* \* \* 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.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. §3231).

The general rule is that a company, not otherwise a carrier, may nonetheless be a covered employer under the Acts if it is under common control with a carrier and performs service in connection with railroad transportation. Section 202.4 of the Board's regulations (20 CFR 202.4) defines "control" as follows:

A company or person is controlled by one or more carriers, whenever there exists in one or more carriers, the right or power by any one means, method or

circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines "common control" as follows:

A company or person is under common control with a carrier, whenever the control (as the term is used in §202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Section 202.6 of the Board's regulations, 20 CFR 202.6, provides that:

The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is "casual" whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.

Under these criteria, the Board finds that GFARS is under common control with one or more of the three covered employers owned or controlled in part by Gordon Fay, including the Seminole Gulf Railway, L. P. (SGR) and the Bay Colony Railroad (BCR). Mr. Fay is President, and apparently the sole stockholder, of GFARS. Information in the record indicates that Mr. Fay is directly involved in the day-to-day operations of GFARS, SGR, and BCR. Mr. Fay is President of GFARS, Chairman and a Director of BCR, and a principal partner in SGR. He also negotiates and signs leases on behalf of BCR and SGR with their customers.

With respect to the issue of service in connection with railroad transportation, GFARS performs 87.8% of its railcar repair, track repair, and car cleaning services primarily for unaffiliated, non-carrier clients. A list of these clients was provided during a coverage investigation of GFARS by Mr. Fay, C&S Maintenance Consultants, Inc.(CSM), and a former employee of GFARS. The lists are consistent and report that customers of both CSM and GFARS included Mobil Mining, Florida Crushed Stone, Busch Entertainment Corporation, Ringling Brothers, and Vulcan Industries. Although GFARS provides 12.2% of its car and track repair and car cleaning services to rail carrier clients, including SGR, CSX Transportation, Inc.(BA No. 1524), and Florida Midland Railroad Company, Inc. (BA No. 5511), services provided to the only affiliated railroad, SGR, amount to only 4% of GFARS' revenues. Accordingly, a majority of the Board finds that the services rendered to SGR are insubstantial in comparison to overall revenue, and therefore constitute casual service within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act and the Board's regulations at 20 CFR 202.6. This decision is consistent with the Board's previous holding in Coverage Decision No. 93-79, VMV Enterprises, Inc., in which a non-carrier company derived only 2.5% of its business from services performed for its rail carrier affiliate.

A majority of the Board thus finds that the services rendered by GFARS are not service in connection with railroad transportation within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

Information in the record establishes that although GFARS is a privately-held railcar repair, track repair, and car-cleaning company under common control with one or more affiliated carriers or companies, it performs only casual service with respect to an affiliated railroad and therefore does not perform service in connection with railroad transportation. Accordingly, a majority of the Board finds that GFARS is not a covered employer under the RRA and the RUIA.

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Glen L. Bower

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V. M. Speakman, Jr. (Dissenting)

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Jerome F. Kever