

EMPLOYER STATUS DETERMINATION

Indiana & Ohio Rail Passenger Corporation

This is the decision of the Railroad Retirement Board regarding the status of the Indiana & Ohio Rail Passenger Corporation (I&O) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

The evidence is that the I&O is a close corporation owned by Mr. Thomas B. McOwen, who also serves as Chief Executive Officer. On April 23, 1996, the Surface Transportation Board approved a notice of exemption filed by the I&O to acquire and operate over trackage rights in Ohio and Indiana from the Cincinnati Terminal Railway Corporation, the Indiana and Ohio Railroad Company, the Indiana & Ohio Railway Company, and the Indiana & Ohio Central Railroad Company. See: Indiana & Ohio Rail Passenger Corporation--Acquisition by Trackage Rights and Operation Exemption, STB Finance Docket No. 32893, 61 F.R. 19112. The latter three companies are rail carrier employers under the Acts, owned by the Indiana & Ohio Rail Corporation, a holding company which in turn is also owned by Mr. McOwen. The I&O began operations with 5 employees on June 4, 1996, running passenger excursion service beginning and ending in Lebanon, Ohio. Each trip covers 14 miles and is of approximately one hour duration. Service is provided twice daily on Wednesday and Friday from May through October and three times on Saturday and twice on Sunday, from April through mid-November. The I&O conducts no freight service and there is no evidence that I&O performs any services for railroads, including those owned by the Indiana & Ohio Rail Corporation.

Section 1(a)(1) of the Railroad Retirement Act 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, 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 * * *.

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 jurisdiction of the Surface Transportation Board (STB) over transportation by rail is set forth by section 10501(a) of Title 49 of the United States Code. Section 10501(a)(1) provides that the Board has jurisdiction over transportation by rail. Section 10501(a)(2) further provides in pertinent part that:

(a) (2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in-

(A) a State and a place in the same or another State as part of the interstate rail network; * * * .

The rail service provided by the I&O may be characterized as a tourist or excursion railroad operated solely for recreational and amusement purposes. Moreover, although the trains operated by the I&O may cross the Indiana and Ohio border during an excursion, since passengers are transported only in a circuit back to the state of origin, the use of the trackage rights is not part of the interstate rail system. The I&O would not be subject to STB jurisdiction and would therefore also not fall within the definition of "employer" set out in section 1(a)(1)(i) of the Railroad Retirement Act.

As a company owned entirely by Mr. McOwen, the I&O is under common control with a railroad employer by reason of his ownership of the Indiana and Ohio Rail Corporation and its rail carrier subsidiaries. However, the evidence shows that the I&O operates over the rail carrier trackage rights solely to provide public passenger tours using its own rail cars. Because the I&O does not perform a service in connection with rail transportation, it does not meet the second prong of the definition of covered rail carrier affiliate.

Accordingly, the Board finds that the Ohio & Indiana Rail Passenger Corporation is not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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