

EMPLOYER STATUS DETERMINATION
Anacostia Rail Holdings Company

APR 15 1999

This is the determination of the Railroad Retirement Board concerning the status of Anacostia Rail Holdings Company (ARHC), as an employer 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.).

Information regarding ARHC was provided by Mr. John J. Fadden, Director of Corporate Accounting, ARHC. ARHC was incorporated on December 18, 1996. It began operations as a passive holding company on December 31, 1996, and first hired employees on February 2, 1998. It currently has five employees. ARHC is a holding company which owns a number of carrier and non-carrier subsidiaries. ARHC provides financial accounting, tax services, and cash management services to its subsidiaries. Mr. Fadden advises that the five individual owners of ARHC have a controlling interest in the Chicago South Shore & South Bend Railroad, a covered employer under the Acts (B.A. No. 5325). ARHC provides no services to the Chicago South Shore & South Bend Railroad.

There is no evidence that ARHC is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether ARHC is an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it provides "service in connection with" rail transportation and if it is owned by or under common control with a rail carrier employer. If it fails to meet either criterion, it is not a covered employer within section 1(a)(1)(ii).

A decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of § 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). The relevant facts of the Union Pacific case are indistinguishable from those presented by AHRC with respect to its relation to its subsidiaries. Accordingly, AHRC is not under common control with its rail carrier subsidiaries.

AHRC is under common control with the Chicago South Shore & South Bend Railroad because they are both controlled by the same five individuals. However, because AHRC provides no services to this railroad, the coverage decisions discussed below dictate a holding that AHRC does not perform service in connection with railroad transportation.

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Section 202.7 of the Board's regulations provides that service is in connection with railroad transportation:

* * * 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. (20 CFR 202.7).

In Board Order 85-16 the Board ruled that a car repair company affiliated with a railroad that performed only 4.4 percent of its service for the rail affiliate was not performing covered service in connection with rail transportation. See also, Board Order 83-113. In Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir., 1983), the Court reviewed the application of the "service in connection with" language and section 202.7 of the Board's regulations to a company that was engaged in manufacturing crossties. In affirming the Board's ruling that Concrete Crosstie was a covered employer, the Court distinguished Concrete Crosstie, which did 90 percent of its business with Florida East Coast, from the situation addressed in a 1940 decision by the Board's General Counsel (L-40-403) wherein Pullman Standard Car Manufacturing Company was found not covered on the basis that most of Pullman Standard's business was with non-affiliated rail carriers and non-railroad companies.

In B.C.D. 93-79, a majority of the Board, the Labor Member dissenting, held that VMV Enterprises did not perform service in connection with railroad transportation because VMV provided only a minimal amount of service to its affiliated railroad. Specifically, VMV performed 58.2 percent of its business with the railroad industry, but only 2.5 percent of its business was derived from its affiliate railroad. In addition, VMV spent only 3.2 percent of its time performing the repair work for its affiliate railroad. AHRC does no business with the Chicago South Shore & South Bend Railroad, its affiliated railroad. Consistent with the rulings in B.C.D. 93-79, Board Order 85-16, and Board Order 83-113, we hold that some affiliate service is necessary in order to find a company covered under section 1(a)(1)(ii) of the RRA. Accordingly, we find that

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AHRC is not performing a service in connection with railroad transportation for the Chicago South Shore & South Bend Railroad so as to bring AHRC within the definition of an employer under section 1(a)(1)(ii) of the Railroad Retirement Act.

Based on the foregoing, it is determined that AHRC is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr. (Dissenting)

Jerome F. Kever

**DISSENT OF
V. M. SPEAKMAN JR.
ON COVERAGE DETERMINATION OF
ANACOSTIA RAIL HOLDINGS COMPANY**

I dissent from the decision of the majority of the Board in this case.

Initially, it is my position that the Board should not follow the precedent of Union Pacific Corporation v. United States, which involves a misinterpretation of the coverage provisions of the Railroad Retirement Act. It represents the law in the Federal Circuit only, where coverage cases involving the Board are not heard.

Moreover, following the Union Pacific case would permit a parent company to perform substantial services essential to the transportation of passengers or freight by rail, or allow a covered employer to spin off a portion of its rail operation to its parent and avoid coverage under the Acts. Such a result clearly could not have been intended by the drafters of the Railroad Retirement Act.

Assuming, however, that the Board does follow the, Union Pacific case it represents a misinterpretation of the decision to apply it in the instant case. Union Pacific involved a large company with numerous independently operating affiliates. The instant case involves a small, closely held operation.

Further, there is not support for the proposition that a company must be performing service for a railroad affiliate in order to be found to be performing service in connection with railroad transportation. As I stated in my dissent in VMV Enterprises, Incorporation, section 1(a)(1)(ii) of the Railroad Retirement Act provides that an entity which is under common control with a railroad and which is performing rail service is covered by the Act. That provision contains no requirement that rail service be performed for the affiliated railroad.

Original signed by:

V. M. Speakman, Jr.
4-14-99