B.C.D. 00-5

EMPLOYER STATUS DETERMINATION
DECISION ON RECONSIDERATION
Pacstan, Inc.
Iron Horse Development, LLC

FEB 02 2000

This is the determination of the Railroad Retirement Board on reconsideration of the employer status of Pacstan, Inc. (Pacstan) and Iron Horse Development, LLC (IHD), 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).

BACKGROUND

On February 3, 1999, it was determined: (i) that Pacstan became an employer under the RRA and the RUIA effective January 1, 1992; and (ii) that IHD was a covered employer under the Acts from January 1, 1995 through December 4, 1996. Pacstan and IHD submitted a timely request for reconsideration of those decisions.

Ms. Jo A. DeRoche and Mr. Todd A. Newman, attorneys for Pacstan and IHD, filed a brief in support of the request for reconsideration. Additionally, Mr. Nicholas B. Temple, Jr., President of the Columbia Basin Railroad Company (CBRC) (BA No. 2644), submitted a Verified Statement regarding the formation and functions of Pacstan, Inc. Previously, Mr. Todd Leinbach, controller of Pacstan, Inc., provided information used by the Board in determining employer coverage of Pacstan and IHD.

The Board takes notice that Pacstan, Inc. has changed its corporate name from Pacstan, Inc. to Pacific Standard Corporation effective July 17, 1997. For ease of reference, this entity will be referred to herein as Pacstan[1].

DISCUSSION

Part 1 — Pacstan

In B.C.D. No. 99-7, the Board found that Pacstan became an affiliate employer under section 1(a)(1)(ii) of the RRA and the corresponding provision of the

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[1]This entity is not the same Pacific Standard Corporation that was the subject of RRB Legal Opinion L-91-125. The original Pacific Standard Corporation was a Temple entity established primarily to provide car repair and related services to WCRC. The original Pacific Standard Corporation discontinued operations and was dissolved in 1991.

RUIA effective on January 1, 1992, the date on which it was incorporated and began operations. Section 1(a)(1) of the RRA defines an "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;
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> (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)].

In order to be an "affiliate employer" under section 1(a)(1)(ii) of the RRA, an entity must meet both of the requirements included in the statutory definition. In B.C.D. No. 99-7, the Board found that Pacstan was under common control with the Columbia Basin Railroad Company (CBRC) because the same two individuals[2] who own 100 percent of the stock of CBRC also own 52 percent of Pacstan. The Board found that Pacstan met the second requirement for an affiliate employer because it is a management company which conducts 30 percent of its business with CBRC.

In its request for reconsideration, Pacstan argues initially that it should not have been held to be an employer because it has operated as a "constructive holding company" and, therefore, like Union Pacific Corporation,[3] was not under common control with a rail carrier employer. Pacstan argues that it

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[2]Brothers, Eric Temple and Nicholas B. Temple, Jr.

[3]Union Pacific Corporation v. United States, 26 Cl. Ct. 739 (1992), *aff'd.*, 5 F. 3d 523 (Fed. Cir. 1993).

should be found not to be under common control with a railroad because it differs from Union Pacific Corporation ("UPC"):

> . . . in only one respect. Whereas UPC technically "holds" the stock of UPRR [Union Pacific Railroad] and the other entities within the UP family, Pacstan is not the corporate "parent" of the entities it oversees. This distinction, however, exists only on paper. As the foregoing demonstrates, Pacstan was created for the same purpose as UPC, performs the same role within the Temple corporate family that UPC performs within its own corporate family, and — like UPC — was not created to evade the railroad retirement system. Under these circumstances, the RRB should not treat Pacstan differently than UPC just because, in a flow chart, Pacstan would not be connected by vertical lines to the Temples' other corporate ventures. (Request for Reconsideration, page 9. Emphasis supplied.)

Pacstan proposes that the Board use a four-part test to determine whether an entity should be deemed to be a "constructive holding company" and therefore not covered by the Acts. The proposed test focuses on the purpose for which an entity is formed and on the functions which the entity performs. Under the proposal, a company which meets the following four factors would be found not to be a covered employer: (1) The company's purpose is to enable the individual corporations within the corporate family to focus solely on their day to day operations. (2) The company was not created to evade the railroad retirement system. (3) The company manages the growth and oversight of a family of corporations that includes a common carrier by rail. (4) The company does not primarily perform "traditional railroad functions".

In the Union Pacific case, the United States Court of Appeals for the Federal Circuit held that Union Pacific Corporation was not under common control with its wholly owned subsidiary, the Union Pacific Railroad. The Court reached its decision, however, not because of the purpose for which Union Pacific Corporation was created or based upon the functions which Union Pacific Corporation performed, but solely because Union Pacific Corporation

owns the Union Pacific Railroad. The Court wrote that, "The term `under common control' does not usually apply to two companies in a parent-subsidiary relationship." 5 F.3d at 525.

Similarly, in the case of Pacstan, the Board finds that the purpose for which Pacstan was created is not relevant to a determination of whether it is under common control with a rail carrier. The term "control" is defined in the Board's regulations as follows:

> A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any 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. (20 CFR 202.4).

Section 202.5 of the Board's regulations 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. (20 CFR 202.5).

Thus, the Board's regulations provide that a company is under common control with a rail carrier within the meaning of section 1(a)(1)(ii) of the RRA if the same person or persons have the right to direct the policies and business of that company. In the case of Pacstan, brothers Eric Temple and Nicholas B. Temple, Jr. own 52 percent of Pacstan and also own 100 percent of the stock of Columbia Basin Railroad Company. By virtue of their ownership interest, Eric and Nicholas B. Temple, Jr. have the right to control both CBRC and Pacstan. The Board therefore affirms its initial finding that Pacstan is under common control with a rail carrier employer.

Pacstan makes two other arguments in its request for reconsideration. First, Pacstan maintains that coverage could not begin until May 1, 1994 and in connection with that argument, offers the following explanation. The corporation which later was renamed Pacstan was incorporated under the name Spirit of Washington, Inc. on January 1, 1992. The sole business activity of Spirit of Washington, Inc. was to operate a dinner train of the same name. On February 21, 1994, Spirit of Washington, Inc. changed its name to Pacstan, Inc. However, the business of the entity continued to be the operation of the dinner train until May 1, 1994. On that date, Pacstan simultaneously spun off the dinner train operation into a new corporation called Spirit of Washington, Inc. ("SOW-II"), and began to provide management oversight to both SOW-II and Washington Central Railroad Company (WCRC) (former BA No. 3651). WCRC was a covered rail carrier employer from October 12, 1986 to December 4, 1996. (See B.C.D. No. 98-3, issued January 28, 1998.) Prior to its merger into BNSF Acquisition, Inc., WCRC was owned by the Temple family and was an affiliate of Pacstan. Beginning December 4, 1996, Pacstan ceased to serve WCRC and began to serve Columbia Basin Railroad Company (CBRC), a rail carrier employer wholly owned by Nicholas B. Temple, Jr. and Eric Temple.[4] The Board finds that the additional information summarized in this paragraph demonstrates that Pacstan did not begin to furnish service in connection with railroad transportation until it began to perform service for WCRC on May 1, 1994. The Board therefore finds that Pacstan became a rail affiliate employer under the RRA and the RUIA effective May 1, 1994, rather than on January 1, 1992.

Pacstan's final argument is that segregation should be applied to its operation. Section 202.9 of the Board's regulations describes the concept of segregation, providing in pertinent part as follows:

> (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 . . . but which is principally engaged in some other business, the Board will require

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[4]CBRC was held to be a rail carrier employer effective December 4, 1996 in B.C.D. No. 97-33, issued February 26, 1997.

> 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:
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> (1) The primary purpose of the company or person on and since the date it was established;
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> (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;
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> (4) Whether such service or operation is a separate and distinct enterprise;
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> (5) Whether such service or operation is more than casual, as that term is defined in §202.6. [20 CFR 202.9(a)].

In support of this argument, Pacstan cites the following factors. First, Pacstan was established to provide management oversight to all of the corporate entities within the Temples' corporate family, and not just to the rail carriers, Washington Central Railroad Company and Columbia Basin Railroad Company. The management oversight functions performed by Pacstan are not railroad specific. Pacstan performs essentially the same functions, e.g., payroll, assessing and reviewing current and prospective business development opportunities, and providing general direction and support as to operational and managerial issues, for both its railroad and non-railroad affiliates. Since its beginning, Pacstan has consistently derived less than half of its revenue from and spent less than half of its time on its single railroad affiliate. From May 1, 1994 to December 3, 1996, when the railroad affiliate was Washington Central Railroad Company, the revenue and time figures attributable to Pacstan's railroad-related activities were 49 percent and 40 percent, respectively. From December 4, 1996 to the present, Pacstan's sole railroad affiliate has been Columbia Basin Railroad Company.

During that time period, Pacstan has derived 30 percent of its revenue from and spent 25 percent of its time on matters related to CBRC. Pacstan also stated that its railroad-related work has consistently been performed by a core group of individuals familiar with railroad operations, along with its support staff. Other Pacstan employees perform little or no rail-related work at all. Pacstan provided a chart showing the percentage of time each employee was estimated to have spent on each corporate affiliate from May 1994 through 1998. Pacstan acknowledged that the level of attention consistently dedicated to its railroad affiliate by certain Pacstan employees has been neither irregular nor infrequent and, therefore, is more than casual service under section 202.6 of the Board's regulations.

The Board finds that segregation is appropriate in this case. The evidence demonstrates that while Pacstan has done and continues to do a substantial amount of service for its rail carrier affiliate, more than one-half of its revenue has consistently been derived from and more than one-half of its time has routinely been spent performing work for its non-rail affiliates. The source of Pacstan's revenue and its allocation of time is consistent with the purpose for which Pacstan maintains it was established; i.e., to provide management oversight to all of the corporate entities within the Temple family of corporations. Additionally, although Pacstan does not have a railroad department *per se*, it has a separate group of core group employees who provide a regular level of service to its railroad affiliate. There is no serious question as to the nature of the services being performed for the railroad affiliate, the identity of the employees providing those services, or the portion of their remuneration attributable to the performance of those services. The Board therefore finds that Pacstan is an affiliate employer under the RRA and the RUIA only with respect to the services provided for its rail carrier affiliates, initially to WCRC and subsequently to CBRC.

Part 2 — Iron Horse Development, LLC

In B.C.D. No. 99-7.1, the Board held that Iron Horse Development, LLC (IHD) was a rail affiliate employer from January 1, 1995 to December 4, 1996. The Board based its decision on information that IHD was a real estate lease management company which obtained essentially all of its revenue from the management of railroad property.

Pacstan, Inc.
Iron Horse Development, LLC

In its request for reconsideration, IHD argues that it was never an employer under the RRA and the RUIA because it was created to manage railroad owned property that is either idle or leased to third parties for non-railroad purposes. IHD explained that when, in previous information submitted to the Board, it had indicated that it derived "virtually 100 percent" of its revenue from the management of "railroad property," it was referring to real estate owned by railroads, but used for non-railroad purposes. IHD stated that most of the real estate is either chartered right of way or fee simple property that has been leased to non-carrier third parties. IHD appended Exhibit D to its request for reconsideration to provide what it called "a representative sample of IHD-managed property." IHD states that Exhibit D shows that IHD, among things, manages property leased to: Boise Cascade Corporation in connection with a pipeline permit, Ellensburg Telephone Company in connection with a wireline permit, Del Monte Foods Plant 125 for use as a private crossing, Hansen Fruit & Cold Storage Company for use in connection with a storage building and parking lot, Inland Pipe & Supply Company for use in connection with warehouse and office functions, Valley Leasing Company for use as an employee parking lot, Central Salvage & Auto Company for use in connection with an auto wrecking facility, Nakano Foods, Inc. for use in connection with a vinegar and juice processing plant. IHD has indicated that it has not performed any services in connection with rail transportation functions of either of its rail carrier affiliates. Based upon the additional information submitted by IHD, a majority of the Board accepts IHD's description of the services it performs as involving "non-operating properties."

The question of whether the management of non-operating property constitutes service in connection with rail transportation was considered by the Board in B.C.D. No. 97-18 and B.C.D. No. 97-18.1, where a majority of the Board found that CSX Real Property, Inc. and CSX Realty, Inc. were not employers under the RRA and the RUIA because the property which they managed was not used for railroad operations. Those coverage decisions cited and followed the ruling of the Board's then General Counsel in Legal Opinion L-41-614, an early coverage case which decided that Santa Fe Pacific Railroad Company (the Santa Fe) was not covered under the RRA and the RUIA. The Santa Fe was controlled through stock ownership by The Atchison, Topeka and Santa Fe Railway Company (Atchison), a rail carrier employer under the Acts. After selling its common carrier property to Atchison in 1902, Santa Fe managed and sold land-grant lands, which consisted

almost entirely of grazing lands. Its activities included contracting to sell, selling, leasing and paying taxes on lands it owned, making exchanges of land with the United States under acts of Congress, procuring patents, and paying surveying costs to the United States as required by law. The net revenues from Santa Fe's activities were transferred to Atchison in the form of dividends upon its stock in the Santa Fe and were commingled with other funds of Atchison. Legal Opinion L-41-614 concluded that:

> The liquidation of non-common-carrier lands, the proceeds of which are not set aside for any specific railroad purpose, does not constitute the performance of a service in connection with railroad transportation.

In the case of IHD, the additional explanation and information provided in the request for reconsideration demonstrates that IHD manages property that is not used in connection with railroad transportation. A majority of the Board therefore finds that IHD did not provide service in connection with railroad transportation and was thus never an employer under the RRA and the RUIA. The ruling in B.C.D. No. 99-7.1 is reversed.

FINDINGS

1. Pacstan became a rail affiliate employer under section 1(a)(1)(ii) of the RRA and the corresponding section of the RUIA effective May 1, 1994 only with respect to the services provided for its rail carrier affiliates.

2. Iron Horse Development, LLC was never an employer under the RRA and the RUIA because it did not provide service in connection with railroad transportation.

CONCLUSION

For the reasons explained above, the request for reconsideration is denied in part and allowed in part.

Original signed by:

Cherryl T. Thomas

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

Jerome F. Kever