

PACIFIC STANDARD CORPORATION EMPLOYER STATUS DETERMINATION

This is a decision on reconsideration of the employer status of Pacific Standard Corporation (PSC). PSC was found to be an employer under the Acts in Legal Opinion L-91-125 and timely filed a request for reconsideration of that decision.

PSC is wholly owned by Central Partnership, a partnership comprised of Mr. Nicholas B. Temple and Washington Central Railroad Company (hereafter WCRC). WCRC is a carrier by railroad, which at its inception operated approximately 433 miles of track in the state of Washington. See ICC Finance Docket No. 308876. WCRC has been held to be an employer under the Acts (BA No. 3651) since October 12, 1986. See Legal Opinion L-86-132.

WCRC has a 40 percent interest in the partnership which owns PSC, and Mr. Temple has a 60 percent interest in the partnership. Mr. Temple is the sole shareholder of WCRC. He is the president and a director of WCRC and PSC. Ms. Patricia Temple is the secretary/treasurer and a director of each company. Each company has a two-member board of directors.

In Legal Opinion L-91-125 PSC was found to be under common control with WCRC, a finding that PSC does not dispute. In addition, it was determined that PSC was performing services in connection with the transportation of persons or property by railroad based on the fact that 31% of PSC's revenue and 36.67% of its staff time was related to car repair and other support services performed for its affiliate WCRC. In addition, it was noted that PSC received substantial revenues from other railroads for mechanical repair and railroad construction. Based upon these findings, PSC was determined to be an employer under section 1(a)(1) of the Railroad Retirement Act (RRA) and its companion section under the Railroad Unemployment Insurance Act (RUIA).

Section 1 of the RRA defines the term "employer" to include:

(i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 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 * * * performs any service * * * in connection with the transportation of passengers or property by railroad. [45 U.S.C. § 231(a)(a)(i) and (ii)].

Section 1 of the RUIA contains essentially the same definition.

Section 202.7 of the Board's regulations provides in pertinent part that service is considered to be service 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].

Section 202.6 of the Board's regulations (20 CFR 202.6) defines casual service as "service [which] is * * * irregular or infrequent * * * or * * * whenever such service * * * is insubstantial."

Although it does not dispute the factual findings in Legal Opinion L-91-125, PSC argues on reconsideration that based upon the holding in Standard Office Building v. United States, 819 F. 2d 1371 (7th Cir. 1987), the earlier opinion incorrectly concluded that as a matter of law it was an employer under the Acts.

Standard Office Building was owned by the Atchison, Topeka and Santa Fe Railway and operated a building in which the railroad had approximately 57% occupancy. Standard's employees maintained the building. In holding that Standard was not performing a service in connection with railroad transportation, the court relied on a number of factors peculiar to Standard. First, the court noted that Standard was formed long before the existence of the railroad retirement system, and that Santa Fe was initially only a minor tenant in the building. Furthermore, none of the employees of Standard had ever been covered under railroad retirement nor did they belong to any railroad union. The services Standard's employees performed were not inherently railroad related and could easily be contracted out. The court cautioned that its decision might have been different if Standard was formed by Santa Fe after the inception of railroad retirement or if Santa Fe were the sole tenant of the building.

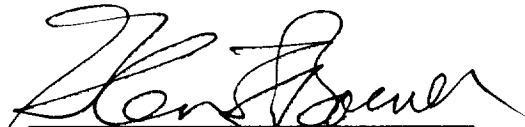
In contrast, PSC was formed by a partnership consisting of a railroad covered under the Acts and the sole shareholder of that railroad. PSC was formed for the purposes of performing railroad related services such as car repair, locomotive repair, maintenance of way, railroad construction and tourism (operation of a dinner train). Unlike Standard it has actively solicited business from common carrier railroads, in addition to private carrier railroads, governmental bodies and private industry.

Subsequent to its decision in Standard Office Building v. United States, the U.S. Court of Appeals for the Seventh Circuit again addressed the issue of service in connection with railroad

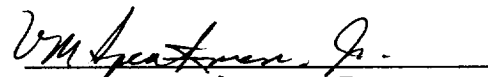
transportation in the case of Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1992). Livingston rebuilt and repaired locomotives and other rolling stock. About 25 percent of its business was with its affiliated carrier. The court found these activities to constitute services in connection with the transportation of property by rail.

Just as in Livingston, PSC is under common control with a carrier. Likewise, as in Livingston, a substantial amount of railroad related services, about 30% in terms of total revenue, are performed by PSC for its affiliated carrier. PSC argues on reconsideration that, unlike Livingston, it receives a substantial portion of its revenues from nonrailroads. Although, the Seventh Circuit certainly considered the amount of business done by Livingston for the railroad industry to be important, the Board does not read Livingston Rebuild as turning on the fact that 95% of Livingston's business was with railroads. The facts presented by a particular case must be viewed in their totality. Level of service performed for the railroad industry is important, but so too is the level of service performed for the affiliated railroad. The facts in this case establish that PSC performs substantial services for the railroad industry and for its railroad affiliate and that those services are essential to railroad transportation. It is the Board's opinion that PSC is performing services in connection with the transportation of property by railroad and is covered under section 1(a)(1)(ii) of the RRA and its companion section in the RUIA.

The Board finds that PSC has been a covered employer under the Acts since January 1, 1987. The request for reconsideration is denied.



 Glen L. Bower



 V. M. Speakman, Jr.



 Jerome F. Kever