

EMPLOYER STATUS DETERMINATION
Great Southern Contracting, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Great Southern Contracting, Inc. (GSCI) as an employer 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).

Information regarding GSCI was provided by Robert M. Menzies, sole shareholder of Aberdeen Carolina & Western Railway (ACWR) and Chief Executive Officer/President of GSCI, and Patricia Shenkle, Controller for GSCI. Mr. Menzies stated that GSCI became incorporated and began its operation on June 19, 1990. The Articles of Incorporation state as one of GSCI's purposes as follows:

- (a) To conduct a general contracting, excavation and construction business; to construct, enlarge, repair, demolish and engage generally in any work upon buildings, roads, highways, streets, railroads, bridges, waterworks and sewers...

GSCI, located in Aberdeen, North Carolina, is owned by Norman C. Orfall of Barstow, California.

GSCI has a contract agreement with Aberdeen Carolina and Western Railway, Inc. (ACWR), a covered employer under the Railroad Retirement Act. The contract agreement states in part:

GSCI agrees to provide ACWR the services as described below:

- (a) Maintenance of way services to include maintenance, repair, and installation of crossties, rail, ballast, and all accessory materials (spikes, bolts, joint bars, etc). GSCI will provide the labor to perform these services. GSCI will supervise track rehabilitation, including bid solicitation, under the NC Department of Transportation (DOT) Grant Program to insure adherence to NC DOT requirements.
- (b) Track inspection services, in compliance with FRA regulations, as a routine maintenance measure in an effort to minimize derailments...

ACWR agrees to:

- (a) furnish all material, supplies, tools, and equipment necessary to carry out these services.
- (b) provide administrative office space and equipment for GSCI to

conduct all of their business in order to effect, as much as possible, immediate accessibility to GSCI's expertise when needed by ACWR.

- (c) agrees to reimburse GSCI for office space rental, if administrative office space is not provided by ACWR.
- (d) understands that GSCI provides services for other customers and ACWR shall not interfere in any way with such customers or service.

GSCI has a total of eight (8) employees. Mr. Menzies stated that the employees perform office and maintenance-of-way duties on Aberdeen Carolina & Western Railway on a weekly basis and other railroad properties on an as needed basis. No employees are supervised by employees of a railroad.

The terms of the agreement are for one year and are automatically renewed for successive one year periods unless either party gives the other written notice. The payment terms for special projects are negotiated separately. Charges for services rendered are \$15.00 per hour with a minimum monthly charge of \$2,000. Mr. Menzies stated that 60% of GSCI business is associated with ACWR; 20% with railroad industry in general; and 20% with non-railroad businesses.

Section 1 of the RRA defines an employer to include the following:

- (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 operates any equipment or facility or performs any services (except trucking service, casual service, and the casual operations of equipment or facilities) in connection with the transportation of passengers or property by railroad.... [45 U.S.C. §231(a)(1)(i) and (ii)].

The RUIA contains the same definition.

Sections 204.4 and 202.5 of the Board's regulations, define when a company or person is controlled by or under common control with a carrier. Those sections provide as follows:

§ 202.4 Control.

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.

§ 202.5 Company or person under common control.

A company or person is under common control with a carrier whenever the control of such company or person is in the same person, persons, or company as that by which such carrier is controlled. [20 CFR 202.4 & 202.5]

According to the information provided, Mr. Menzies serves as President of GSCI and ACWR. Mr. Menzies is the sole owner of the stock of ACWR. GSCI is located in the same office facility as ACWR. Clearly, Mr. Menzies controls ACWR and as President of GSCI directly influences the policies and operations of that company. Control may be manifested by means other than by stock ownership. 20 CFR 202.4. Based on the facts in this case the Board finds that GSCI is controlled by and under common control with ACWR. The question then becomes whether GSCI performs services "in connection with the transportation of passengers or property by railroad".

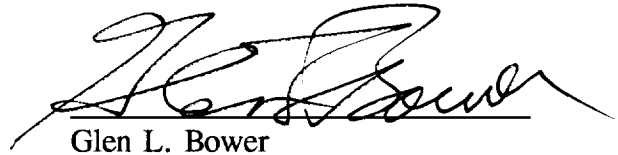
Section 202.7 of the Board's regulations defines service or operation in connection with railroad transportation as follows:

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad...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.... [20 CFR 202.7].

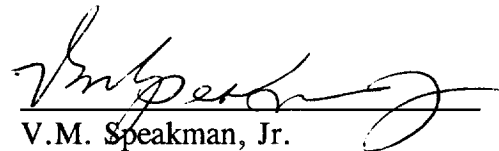
A recent decision addressing the meaning of service in connection with railroad transportation is Livingston Rebuild Ctr. v Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), wherein the court found that Livingston Rebuild Center was an "employer" as defined by the Acts. Livingston repaired and rebuilt locomotives for an affiliate company, Montana Rail Link, a covered employer under the Acts. Approximately 25% of the Livingston's business came from MRL. Approximately 95% of the Livingston's business was railroad related. In finding Livingston to be a covered employer the court examined the applicable statutes and found that a plain reading of section 1(a)(1)(ii) compelled a conclusion that under the facts presented Livingston was performing services in connection with railroad transportation.

According to the information Mr. Menzies and Ms. Shenkle have provided, GSCI provides office and maintenance of way services for ACWR. GSCI also provides track inspection to insure compliance with FRA regulations. ACWR furnishes GSCI all materials, supplies, tools, and equipment necessary to carry out these services. Approximately 80% of GSCI's business comes from the railroad industry, with 60% coming from ACWR. GSCI provides services that are intimately connected with railroad operations and such services would fall within the definition of service in section 202.7 of the Board's regulations. In addition, the levels of services provided both to ACWR and to the railroad industry in general compare favorably to the levels of service found sufficient for coverage in Livingston. Accordingly, the Board finds that the services, described above, being performed by GSCI constitute services in connection with railroad transportation within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act.

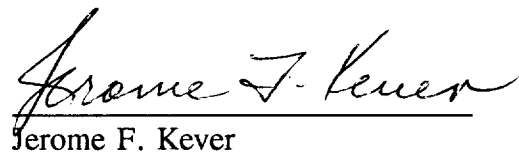
The Board finds that Great Southern Contracting, Inc. is an employer under the RRA and the RUIA, as of June 19, 1990.



Glen L. Bower



V.M. Speakman, Jr.



Jerome F. Keever