

EMPLOYER STATUS DETERMINATION NORTHERN RAIL CAR LEASING

This is a determination of the Railroad Retirement as to the status of Northern Rail Car Leasing, Inc. (NRCL) as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). The status of NRCL as an employer under the Acts has not previously been considered.

Information about NRCL was furnished by Mr. Roger Schrieber, its Executive Vice President of Finance. According to Mr. Schrieber, NRCL was incorporated on April 12, 1988. Mr. William Gardner is the President of both NRCL and of Wisconsin & Southern Railroad Co. (WSR),¹ which Mr. Gardner purchased on August 12, 1988. Mr. Schrieber is the Secretary of WSR.

NRCL owns locomotives, freight cars, aircraft, vehicles and machinery. Mr. Schrieber stated that locomotives, freight cars, vehicles and machinery are on lease to a railroad company and that in most cases the lease requires the railroad company to pay a monthly fee. In another case, NRCL agreed to pay the railroad a fee based upon the revenue earned by a certain group of freight cars. NRCL also owns and operates an air charter operation. In addition, NRCL leases rail cars and vehicles to non-railroad companies.

According to Mr. Schrieber, NRCL collects lease payments amounting to 18% of its revenue from WSR. In response to a question as to what percentage of its total revenue is derived from other railroads, Mr. Schrieber explained that the majority of NRCL's revenue (60%) comes from a revenue sharing arrangement which NRCL has with WSR. Under that arrangement, rail cars owned by NRCL and exhibiting the WSR logo are leased to railroads other than WSR. The lessees pay leasing fees to WSR, which then gives those fees to NRCL. For WSR's service as a payment agent, NRCL pays WSR a percentage fee based upon the earnings of the leased cars.

Mr. Schrieber stated that the fee which NRCL pays to WSR is small, covering WSR's cost and a little "pocket money." Mr. Schrieber also stated that prior to January 1991, NRCL had no employees on its payroll and that since that time it has had 3 employees, himself, Mr. Gardner, the owner and a bookkeeper.

Section 1 (a)(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 [the Interstate Commerce Act];
- (ii) any company which is directly or indirectly owned or controlled by, or

¹ Wisconsin & Southern Railroad Co. (B.A. No. 3635) is an employer under the RRA and the RUIA, with service creditable from July 1, 1980 to date.

under common control with, one or more employers as defined in paragraph 1(i) of the 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 * * *. [(45 U.S.C. § 231(a)(1)(i) and (ii))].

Section 1 of the RUIA contains essentially the same definitions.

Section 202.5 of the Board's regulations provides that a company is under common control with a carrier whenever the control of such company is in the same person, persons, or companies as that by which the carrier is controlled.

In this case, the same individual, William Gardner, owns NRCL and WSR, a rail carrier employer under the RRA and the RUIA. In addition, both Mr. Gardner and Mr. Schrieber are officers of both NRCL and WSR. It is therefore the Board's opinion that NRCL has been under common control with a rail carrier employer since August 12, 1988, the date on which Mr. Gardner purchased WSR. The question then becomes whether NRCL is providing a service in connection with railroad transportation.

Section 202.7 of the Board's regulations provides that 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 * * *. [20 CFR 202.7].

The United States Court of Appeals for the Seventh Circuit held that a car leasing business did not constitute service in connection with railroad transportation in Itel Corporation v. U.S. Railroad Retirement Board, 710 F.2d 1243 (7th Cir. 1983). ITEL was primarily a computer-leasing company. Its Rail Division was established in the early 1970's. At the time of the Court's decision, the Rail Division had a fleet of 15,600 railroad cars and the bulk of its business involved leasing railcars to short-line railroads. In 1975, ITEL acquired the first of four small railroads. About 12 percent of the Rail Division's railcars were leased to those subsidiaries and less than 5 percent of Rail Division employees were involved with transactions with the subsidiary railroads. After the acquisition of the railroads, the Rail Division did not perform any transportation service for the railroad subsidiaries that the railroads had previously provided for themselves. The Court wrote that rail car leasing was not a transportation service, that Rail Division's primary function was not to serve ITEL's rail carrier subsidiaries, and that the Rail Division did not attempt to subvert the RRA and the RUIA by removing workers formerly covered by those Acts.

In a later decision, Standard Office Building Corporation v. U.S., 819 F. 2d 13781 (7th Cir. 1987), the Seventh Circuit was somewhat critical of its reading of section 1(a)(1)(ii) in the Itel decision, and

more recently, in Livingston Rebuild center, Inc. v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1991), the court declined to follow Itel in regard to limiting the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts to services which are covered under the Interstate Commerce Act. Livingston Rebuild Center rebuilt locomotives and other rolling stock, about 25 percent of its business being with its affiliated carrier. The court found that rebuilding locomotives constituted a service in connection with rail transportation, stating in regard to the legislative history of the Railroad Retirement Act that:

* * * Nothing in what Congress enacted links the Railroad Retirement Act to the Interstate Commerce Act; neither the phrase "service . . . in connection with the transportation of passengers or property by railroad" nor any close approximation appears in the jurisdictional provisions of the Interstate Commerce Act. Senator Wagner thought the text of the Railroad Retirement Act encompassed more than the Interstate Commerce Act did, 81 Cong. Rec. 6223 (1937), and the committee report implies that the Railroad Retirement Act is broader. S. Rep. No. 6976, 75th Cong. 1st Sess. 7 (1937). [970 F. 2d at 298.]

The facts in this case are similar to those in Livingston. The level of NRCC's service performed for its affiliated railroad is substantial (18%) and the proportion of its services performed for the railroad industry in general is also quite high. Consistent with Livingston, a majority of the Board finds that the services performed by NRCL constitute service in connection with railroad transportation within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act. Accordingly, it is a majority of the Board's determination that NRCL is a covered employer under the RRA and RUIA effective August 12, 1988, the date on which NRCL came under control with WSR.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever (dissenting)