

**CANAC INTERNATIONAL LTD.
EMPLOYER STATUS DETERMINATION**

This is the decision of the Railroad Retirement Board concerning the status of CANAC International Ltd. (CANAC Ltd.) as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA).

CANAC Ltd., a Delaware corporation which was incorporated on July 6, 1988, is owned by CANAC International Inc. (CANAC Inc.), a Canadian based subsidiary of Canadian National Railways (CN). CN is a Crown corporation of Canada which is not an employer under the Acts administered by the Board. However, CN has affiliates which it owns directly or indirectly, and which are covered rail employers. CN directly owns CN (Noyes Division), CN d/b/a Minnesota and Manitoba Railroad, and CN d/b/a New England Lines, all covered employers. CN owns indirectly the Grand Trunk Western Railroad Company, a covered employer as well as other affiliated companies including non-railroad and railroad employers covered under the Acts administered by the Board which it classifies as CN North America.

CANAC Ltd. currently provides consulting services and construction services to the railroad industry. From 1992 through August 1994, CANAC Ltd. also sold computer software to various non-railroad clients. The software sales were conducted exclusively by two individuals who devoted 100 per cent of their time to this operation. Both of these individuals were terminated by the end of August 1994. The remaining employee of CANAC Ltd. is Mr. Howard Tischler, its vice president and general manager. Mr. Tischler provided a revenue chart which shows that 12.58 percent of CANAC Ltd's revenue from 1988 through 1994 was derived from its services to non-railroad sources. The balance of CANAC Ltd's revenues during this period was derived from services to the railroad industry, including no less than 18 percent from affiliated railroads.

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

(i) any express company, sleeping-car company, and carrier by railroad, subject to the 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 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,

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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)].

Section 1(a) of the RUIA (45 U.S.C. § 351(a)) contains essentially the same definition.

Section 202.7 of the Board's regulations (20 CFR 202.7) 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.

Finally, section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. The Tenth Circuit has held that where a company and a railroad are jointly owned by a parent company, the non-carrier company is under common control with the railroad. Utah Copper Co. v. Railroad Retirement Board, 129 F.2d 358, 363 (10th Cir., 1942)., See also, Livingston Rebuild Center, 970 F. 2d at 296.

CANAC Ltd. is itself not a carrier by rail under section 1(a)(1)(i) of the RRA. However, it is under common control with one or more rail carrier employers within the meaning of the Acts because CANAC Ltd. is a subsidiary corporation of CANAC Inc. which is a subsidiary of CN, a company which also owns covered rail carrier employers such as CN (Noyes Division), CN d/b/a New England Lines, and the Grand Trunk Western Railroad Company. Whether CANAC Ltd. is a covered employer therefore turns upon whether CANAC Ltd. provides a service in connection with rail transportation.

Service in connection with rail transportation has been found to exist where a rail carrier affiliate repaired and rebuilt rail cars. Despatch Shops, Inc. v. Railroad Retirement Board. 153 F.2d 644,646 (D.C. Cir. 1946). In another case, service in connection with rail transportation was found to exist where a company which

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repaired locomotives and track was ruled to be a covered employer when 95% of its business was with the railroad industry, 25% of which was with its affiliated railroad. Livingston Rebuild Center v. Railroad Retirement Board, 970 F 2d 295, (7th Cir. 1991). More recently, service in connection with rail transportation was found to exist where 31% of a company's revenue and 36.67% of its staff time was related to car repair and other support services

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performing for its affiliate railroad. Reconsideration of employer status of Pacific Standard Corporation, B.C.D. 94-104, decided November 15, 1994.

In Board Order 85-16, 4.4% of service for the rail affiliate was held not to be service in connection with rail transportation. Likewise, in B.C.D. 93-79, 2.5% of service for the rail affiliate was held not to be service in connection with rail transportation.

In this case, only 12.58% of CANAC Ltd.'s revenues from 1988 through 1994 were derived from non-railroad business, while the remaining 87.42% of its business is railroad related. Moreover, that portion of CANAC Ltd.'s revenues based on non-railroad business began in 1992 and ceased in August 1994. Of the railroad related business, at least 18.15% is conducted for CN affiliates. It is clear from the facts that CANAC Ltd. provided more than casual service to its CN affiliates. In fact, its only non-railroad business was the sale of software which is no longer conducted by CANAC Ltd.

Based on the above, it is the Board's determination that Canac Ltd. is performing services in connection with the transportation of property by railroad and is a covered employer under section 1(a)(1)(ii) of the RRA and its companion section in the RUIA.

The Board finds that CANAC ltd. has been a covered employer under the Acts since July 6, 1988.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

CANAC INTERNATIONAL LTD.

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C. 1537-95
CANAC.COV

TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination
CANAC International Ltd.

Attached is a proposed coverage ruling for Board approval.

Attachment