

EMPLOYER STATUS DETERMINATION

OmniTRAX Leasing, Ltd.

This is the determination of the Railroad Retirement Board concerning the status of OmniTRAX Leasing, Ltd. (OLL) 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 about OLL was furnished by its Controller, Mr. James A. Mogen. OLL owns, rebuilds, and leases locomotives and freight cars to railroads. OLL owns 270 older locomotives which have been rebuilt, are in the process of being rebuilt, are awaiting rebuilding or are awaiting determination as to whether they can be effectively rebuilt. In addition, OLL owns 50 freight cars which are under lease to a related railroad. OLL has 37 employees who were first compensated in June 1994. OLL began operation in July 1994.

OLL is owned by OmniTRAX Equipment, Inc., which in turn is owned by Patrick D. Broe. Mr. Broe also owns OmniTRAX, Inc., which in turn owns the majority interest in each of the following railroads: (1) Central Kansas Railway, LLC (BA No. 2765); (2) Kansas Southwestern Railway, LLC (BA No. 3774); (3) Chicago Rail Link, LLC (BA No. 4713); (4) Panhandle Northern Railway, LLC (BA No. 5816); (5) Newburgh and South Shore Railroad, LTD. (BA No. 3268); (6) Great Western Railway of Colorado, LLC (BA No. 2706); (7) Manufacturers Junction Railway, LLC (BA No. 4609); (8) Great Western Railway of Iowa, LLC (BA No. 3779); (9) Georgia Woodlands Railway, LLC (BA No. 5513); (10) Great Western Railway of Oregon, Inc. (BA No. 2770); and (11) Chicago, West Pullman and Southern Railway, LLC (BA No. 4317). Mr. Broe personally owns the majority in the Northern Ohio and Western Railway, Ltd. (BA No. 2263). OLL leases locomotives and freight cars to these railroads and does repair work for several of them. In 1994, more than 50% of OLL's business was with its affiliated railroads. From January through September 1995, 20% of OLL's business was conducted with its affiliated railroads. Mr. Mogen explained that these percentage figures represent lease and sales revenue compared to total revenue.

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 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

OmniTRAX Leasing, Ltd.

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)(i) and (ii)].


Section 1 of the RUIA contains essentially the same definition.

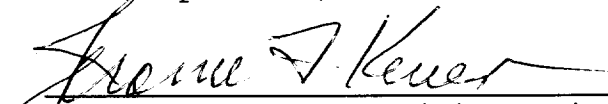
Looking at the definition of "employer" set out above, the Board notes that one individual, Patrick D. Broe, owns a majority interest in the company which owns OLL and owns another company (OmniTRAX, Inc.) which owns the majority interest in 11 carrier employers. In addition, Mr. Broe personally owns the majority interest in a twelfth railroad. The Board therefore finds that OLL is under common control with rail carrier employers within the definition of "employer" in section 1 of the RRA and the RUIA.

Turning to the second part of the definition of "employer" in section 1(a)(ii), the Board notes that courts have found that rebuilding locomotives and freight cars constitutes service in connection with railroad transportation. See Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992); Despatch Shops Inc. v. Railroad Retirement Board, 153 F.2d 644 (D.C. Cir. 1946). OLL's entire business consists of owning, rebuilding and leasing locomotive and freight cars. In addition, more than 50% of OLL's business in 1994 was with railroads with which OLL is under common control ("affiliated railroads"); and 20% of its business for the first 9 months of 1995 was with affiliated railroads. It is the opinion of a majority of the Board that OLL provides service in connection with railroad transportation.

A majority of the Board thus concludes that OmniTRAX Leasing, Ltd. became an employer under the RRA and the RUIA effective June 1, 1994, the first day of the first month in which it compensated employees.


Glen L. Bower

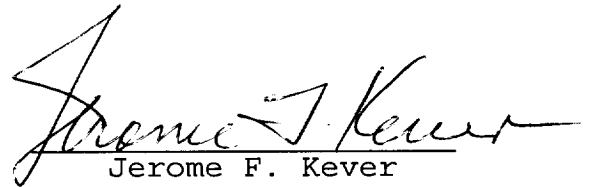

V. M. Speakman, Jr.


Jerome F. Keever (Dissenting
opinion attached)

DISSENT

Jerome F. Kever
Management Member
OmniTRAX Leasing, Ltd.

I take exception to finding leasing activities to be service in connection with transportation based on Itel v. U.S. Railroad Retirement Board, 710 F. 2d 1243 (7th Cir. 1983). While the decision finds that 50 percent of OmniTRAX's Leasing, Ltd. 1994 revenue was with affiliated carriers, it does not distinguish the level of locomotive repair and rebuilding services performed versus the leasing activity. Therefore, I cannot reach a determination as to whether the other than leasing services are more than casual service exempt from coverage.


Jerome F. Kever

11/20/95
Date