

**Employer Status Determination
RailTex Trac Company, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of RailTex Trac Company, Inc. (RTCI) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of RTCI has not previously been considered.

This decision is based on information provided by Ms. Julie Herbort, Tax Manager, of RailTex Service Company. RailTex Service Company is 100% owned by RailTex, Inc. RailTex, Inc. has been determined not to be an employer under the Acts. See B.C.D. No. 95-25, March 16, 1995. RailTex, Inc. also owns several railroad carriers subject to the Interstate Commerce Act.

RTCI was incorporated on January 24, 1991. RTCI began operations on April 1, 1991. RTCI has 18 employees all of whom are engaged in providing construction and maintenance services on property owned by railroads. This work includes the replacement of ties and crossings and the tamping and brooming of the track. All of the revenues of RTCI are derived from track replacement and maintenance operations. RTCI performs this service for several railroads which were listed in an attachment to a letter from Ms. Herbort dated May 24, 1995. All of the listed railroads are affiliates of RailTex, Inc. The vast majority of RTCI's revenues are derived from the maintenance services it performs for its affiliated railroads.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)(i)), defines a covered employer as to include "any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of title 49" of the United States Code. There is no evidence suggesting that RTCI is an employer within this subsection.

However, section 1(a)(1) of the Railroad Retirement Act further defines a covered employer as:

(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 (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a), 1(b) and 1(d)(1) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §§ 351(a), (b) and (d)(1)) contain substantially similar definitions, as does section 3231 of the

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Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231).

The evidence of record shows that RTCI is under common control with the railroad employers as defined in section 1(a)(1)(i) of the Railroad Retirement Act as it is owned and controlled by RailTex, Inc. which also owns several covered rail employers. Thus the question presented is whether RTCI performs any service in connection with rail transportation. If RTCI does perform any service in connection with rail transportation, it will be considered an employer under the Acts. This question has been addressed in many decisions of the Board and in numerous decisions by the United States Courts of Appeals.

As noted earlier, RTCI provides construction and maintenance of railroad trackage for its affiliated railroads. This service includes the replacement of ties and crossings and includes tamping and brooming the track. In Railroad Retirement Board v. Duquesne Warehouse Co., 149 F. 2d 507 (D.C.Cir. 1945), aff'd 326 U.S. 446, the United States Court of Appeals for the District of Columbia Circuit held that a warehouse corporation owned by a railroad and engaged in loading and unloading railroad cars and other handling of property transported by railroad, and in other activities which enabled the railroad to perform its rail transportation more successfully, was performing "services in connection with" the transportation of property by railroad and therefore an employer under the Railroad Unemployment Insurance Act. The Court quoted approvingly from the opinion of the Board that the carrier affiliate coverage provision includes services which are an integral part of or closely related to the rail transportation system of a carrier. The Board stated that the provision includes within its coverage carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, and also carrier affiliates engaged in activities which enable a railroad to perform its rail transportation. Examples of the activities include maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public such as auxiliary bus transportation, dining facilities, and incidental warehousing services.

More recently, the United States Court of Appeals for the Seventh Circuit, in Livingston Rebuild Center, Inc., v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), found that a company

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affiliated with a rail carrier employer, engaged in the business of repairing and rebuilding rail cars and engines and which derived 25% of its revenue from its affiliated railroad, was performing a service in connection with transportation by rail. See also, Railroad Concrete Crosstie Corporation v. Railroad Retirement Board, 709 F.2d 1401 (11th Cir. 1983), wherein the Eleventh Circuit found the manufacture and provision of crossties to be a service in connection with railroad transportation.

Finally, section 202.7 of the Board's regulations (20 CFR 202.7) states that a service is in connection with rail transportation if such service "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...."

Based on a review of the evidence of record, the Board's regulation, and the various court decisions applying section 1(a)(1)(ii) of the Railroad Retirement Act, it is the determination of the Board that the maintenance of way service provided by RTCI is reasonably related to the fulfillment of the common carrier obligations of its affiliated railroads and, therefore, that these services are a service in connection with the transportation of passengers or property by railroad. Therefore, RTCI is an employer under the Acts as of the date it commenced operations, April 1, 1991.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

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TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination

Attached is a proposed coverage ruling for Board approval.

Attachment

RailTex Trac Company, Inc.