EMPLOYER STATUS DETERMINATION
RAILAMERICA AFFILIATES
Huron Transportation Group (HTG)
Huron Development and Construction (HDC)
RailAmerica Services Corporation (RASC)

This is the determination of the Railroad Retirement Board regarding the status of three former and present affiliates of RailAmerica, Inc. (RA), as employers under the Railroad Retirement [45 U.S.C. § 231 et seq.] and Railroad Unemployment Insurance [45 U.S.C.§ 351 et seq.] Acts (Acts). Information used as a basis for this determination was obtained during an audit of the Huron and Eastern Railroad Company, Inc. (HERC), BA No. 3267, a wholly-owned subsidiary of RA. Additional information was obtained through correspondence with Mr. John D. Heffner, counsel for RA.

RailAmerica is a publicly-held corporation which, during the time of the Board's audit, held four wholly-owned railroad subsidiaries, including HERC; the Saginaw Valley Railway Co. (SVRC), BA No. 3282; the Delaware Valley Railway Company, Inc. (DVRC), BA No. 3384; and South Central Tennessee Railroad Company, Inc. (SCTR), BA No. 5561. RA was incorporated on March 31, 1992, for the sole purpose of becoming the holding company for HERC and SVRC. On August 17, 1993, the Board held that RA was not a covered employer under the Acts (Board Coverage Determination No. 93-57). RA describes itself as an owner and manager of short-line railroads and has positioned itself to aggressively acquire and develop additional short-line railroads, intermodal transportation services, and rail transportation support services. Moody's describes RA as a transportation holding company which develops short-line and regional railroads formed primarily through the acquisition of branch and light density rail lines from larger rail lines.

At the close of the HERC audit, RailAmerica also held the wholly-owned subsidiaries of Huron Distribution Services (HDS); RailAmerica Financial Services (RAFS); Kalyn/Siebert, Inc. (a truck manufacturer); RailAmerica Carriers, Inc. (a Canadian trucking firm); RailAmerica Intermodal Services, Inc; and Steel City Carriers, Inc. (also a Canadian trucking firm). More recently, RailAmerica has acquired three additional railroads, the West Texas and Lubbock Railroad, BA No. 2871 (formerly the Seagraves, Whiteface, and Lubbock Co.), the Plainview Terminal Company, BA No. 4863 (formerly the Floydata and Plainview Railroad Co.); and Dakota Rail, Inc., BA No. 3640. RailAmerica has since also formed RailAmerica Equipment Corporation and has acquired Transborder Air Cargo, which provides airport-to-airport surface transportation services for cargo shipped between certain Canadian and American airports.

At issue here is the employer status under the Acts of three former and present affiliates of RailAmerica: the Huron Transportation Group (HTG), formerly owned by certain members of the RA Board of Directors; Huron Development and Construction (HDC), a former wholly-owned subsidiary of HTG; and RailAmerica Services Corporation (RASC), a wholly-owned subsidiary of RA.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (1)(a)(1)), insofar as relevant here, defines a covered employer as:

> (i) any carrier by railroad, subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;
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> (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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The general rule is that a company, not otherwise a carrier, may nonetheless be covered under the Acts if it is under common control with a carrier and performs service in connection with railroad transportation. Section 202.4 of the Board's regulations (20 CFR 202.4) defines "control" as follows:

> A company or person is controlled by one or more carriers, whenever there exists in one or more carriers, the right or power by any one 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.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines "common control" as follows:

> A company or person is under common control with a carrier, whenever the control (as the term is used in § 202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

Section 202.7 of the Board's regulations, 20 CFR 202.7, defines "service 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, or the receipt, storage, or handling of property transported by railroad, if such service of operation is reasonable 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.

Section 202.6 of the Board's regulations, 20 CFR 202.6, provides that:

> The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is "casual" whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.

Under these criteria and consistent with legal precedent, the Board makes the following determinations.

Prior to December 23, 1993, the Huron Transportation Group (HTG) provided executive, management, and administrative support services under a series of management agreements to HERC, SVRC, and later, RailAmerica (RA). On December 23, 1993, HTG merged into RailAmerica Services Corporation (RASC), a wholly-owned subsidiary of RA, in order to facilitate termination of its most recent management agreement with RA. HTG is now defunct.

Common Control

HTG's status as an employer under the Acts prior to its merger into RASC on December 23, 1993, depends first on whether common control existed between HTG and one or more carriers. The evidence establishes that common control existed between HTG and HERC beginning January 29, 1987. Common control extended to SVRC as of April 15, 1991, and to RA at its incorporation on March 31, 1992. HTG was under common control with one or more carriers during the period January 29, 1987 through December 23, 1993.

The evidence establishes that from its inception, HTG was under common control with the carrier HERC. According to ICC Finance Docket No. 30754, dated December 23, 1985, HERC was owned by the Mariner[1] Corporation (50%); John H. Marino (25%); and Eric D. Gerst (25%). Gary O. Marino (CEO and stockholder of the Boca Raton Capital Corporation, f/k/a Mariner), John H. Marino, and Eric D. Gerst served as officers and directors of HERC. HERC began operations in March, 1986. From the date of HTG's incorporation on January 29, 1987, HTG was owned by the Boca Raton Capital Corporation f/k/a Mariner (50%), John H. Marino (25%), and Eric D. Gerst (25%).

In 1991, the three owners of HTG and HERC acquired a second carrier. According to ICC Finance Dockets Nos. 31196 (April 15, 1991), and 32068 (June 12, 1992), the Saginaw Valley Railway Company, Inc. (SVRC) was owned by the Boca Raton Capital Corporation (50%), John H. Marino (24.8%), and Eric D. Gerst (25.2%). As with HERC, Gary O. Marino, John H. Marino, and Eric D. Gerst served as officers and directors of SVRC. Gary O. Marino and John H. Marino have continued to service as officers and directors of SVRC.

Prior to its initial public offering, RA was also owned by the same three stockholders in approximately the same percentages. ICC Finance Docket No. 32068, dated June 12, 1992, reports that RA's principal stockholders (before the initial public offering was made later in 1992) were the Boca Raton Capital Corporation, f/k/a Mariner (50%); John H. Marino (24.8%); and Eric D. Gerst (25.2%). Gary O. Marino, John H. Marino, and Eric D. Gerst were officers and directors of RailAmerica before it obtained status as a publicly-held corporation. Gary O. Marino and John H. Marino have continued to serve as officers and

[1] The Mariner Corporation changed its name to the Boca Raton Capital Corporation on September 21, 1989.

directors of RA.[2]

Substantial common ownership and control continued between HTG and RA, even after RA became publicly-held on November 9, 1992. In a petition to the ICC for a transaction within a corporate family exemption and continuance in control exemption, Finance Docket No. 32068, dated May 15, 1992, the three principal stockholders of RA stated that "At a later date in 1992, RailAmerica anticipates offering additional shares of options/warrants to the public, at which point the present shareholders would own approximately 60% of the common stock, and the public would own approximately 40%." The 1992 RA Annual Report that "[RA] and Huron Transportation Group, Inc. (HTG) a transportation management company which is owned by certain of the Company's current stockholders, have entered into a management agreement pursuant to which HTG provides the Company with executive management, operational and financial services by supplying the Company's executive officers. [emphasis supplied]." The 1992 RA annual report also states that HTG provided services directly to HERC in 1992.

On December 23, 1993, HTG merged with and into RASC, a wholly-owned subsidiary of publicly-held RA. The primary purpose of the merger was to reduce RA's long-term operating expenses by facilitating the termination of RA's management agreement with HTG. HTG became defunct, effective upon the merger with RASC.

Based on the information that HTG was under common ownership with HERC as of the date of its incorporation on January 29, 1987, and that this common ownership and control by officers and directors continued seamlessly until HTG's merger with RASC on December 23, 1993, the Board finds that HTG was under common control with one or more carriers as of January 29, 1987.[3]

Service in Connection with Railroad Transportation

HTG provided management services to HERC and SVRC. Notes to the December 31, 1992 RA Consolidated Financial Statements describe a November 9, 1992 Management Agreement between HTG and RA by which HTG provides "executive management, operational and financial services by supplying the Company's executive officers." The agreement was to be effective through September 30, 2002, although it was terminated when HTG merged into RASC.

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[2] According to the SEC, on September 6, 1994, the Boca Raton Capital Corporation was enjoined from violations of Section 56 of the Investment Company Act of 1940 (ICA). A receiver was appointed and on March 14, 1995, the court approved a newly elected board of directors. It is unclear whether this action had any effect on the ownership and board of directors for RA.

[3] The ICC approved the common control of HERC and SVRC by John H. Marino, Eric D. Gerst, and Boca Raton Capital Corporation in Finance Docket No. 31196.

The relevant terms of the 1992-2002 management agreement included the services of "secretarial, administrative, clerical, bookkeeping, and other personnel support," "Office space in HTG's premises, and the use of office equipment on such premises and all utilities other than telephone, telecopy, or other electronic transmission charges," "the services of the Executive Officers to serve as officers of RailAmerica," and "responsibility for the corporate accounting, financial planning, personnel policy, insurance, acquisition analysis, contract negotiations, legal matters and operations oversight functions." RA agreed to indemnify HTG for against liabilities incurred and to reimburse HTG executives for out-of-pocket and travel expenses. The agreement also stated that "[RA] is not and shall not be obligated to make, and it is and shall be the sole responsibility of HTG to make on behalf of personnel supplied to [RA] hereunder, all periodic filings and payments required to be made in connection with withholding taxes, FICA taxes, federal unemployment taxes, and any other federal or state taxes, payments, or filings. . . ." Consistent with the Board's regulations and legal precedent, these activities are reasonably functionally and economically related to the performance of obligations of the railroads, and thus constitute service in connection with railroad transportation. See Adams v. Railroad Retirement Board, 214 F.2d 534 (9th Cir. 1954), and Southern Development Co. v. Railroad Retirement Board, 243 F.2d 351 (8th Cir. 1957)

Prior to 1992, HTG provided similar management services to HERC and SVRC through a predecessor management agreement in effect during 1992, 1991, and 1990. Under that predecessor management agreement, HERC and SVRC incurred management fees and expenses of $321,379; $367,516; and $461,196; respectively (including a one-time $100,000 charge for special management services). During 1992, HTG also provided additional services to HERC for $96,983.

According to SSA wage records, several former HERC employees were paid from 1988 through 1993 by HTG. From 1988 - 1993, John H. Marino received compensation and reimbursement for expenses through HTG. Although a record of SSA wages is missing for John Marino for the year 1990, an HTG invoice to HERC, dated November 27, 1990, purports to be for reimbursement expenses to John Marino and Boca Raton Corporation. A December 1, 1990 HTG invoice to HERC purports to be for a $30,000 management fee. Ralph Iden, Director of Real Estate and Industrial Development for HERC, and David McCloud, Office Manager for HERC, were paid through HTG during 1991 and 1992. David McCloud was a HERC employee until July 1991. Gail Piccalo, accounting specialist for HERC, was paid through HTG in 1992.

Although it appears that HTG provided services to HERC through John H. Marino as early as 1988, when SSA wage records show that John Marino was compensated by both HTG and HERC, the Board determines that January 1, 1990, is the earliest verifiable date that HTG rendered management services to HERC. That date is consistent with the $30,000 management fee assessed on December 1, 1990, and with statements in the 1992 RA annual report and RA's 1992 SEC Form 10-KSB (and consolidated financial statements) that HTG had a management agreement with HERC in 1990.Those documents report management expenses to HTG pursuant to a management agreement of $461,196 for the fiscal year ending December 31, 1990. Finally, a February 28, 1990 agreement that Phillip Kus (RA's current chief mechanical engineer) would perform locomotive and freight car maintenance for HERC states that "Contractor will participate in the group health plan of Huron Transportation Group on the same terms as other employees, the cost of which shall be borne by Huron and Eastern Railway."

Accordingly, the Board determines that HTG was a covered employer under the Acts beginning January 1, 1990, and ending on December 23, 1993, when HTG merged into RASC.

Huron Development and Construction (HDC) was incorporated on August 31, 1988 as a wholly-owned subsidiary of HTG. It began operations in June 1989 and was dissolved when HTG merged into RASC on December 23, 1993.

As HDC was a subsidiary of HTG when HTG was under common control with HERC (and later, SVRC), HDC was also under common control with one or more carriers as of August 31, 1988.

The services performed by HDC included maintenance-of-way to HERC, CSX, and other carriers. 80% of HDC's staff, ranging from 1-7 employees, worked in positions related to business connected with rail carriers. According to John D. Heffner, counsel for RA, "The major portion of HDC's payroll was paid to an individual whose principal activities for HDC consisted of consulting and due diligence in connection with possible future corporate acquisition, real estate valuations, property management (negotiating and collecting property leases), public relations, supervising insurance coverage and risk management efforts for affiliated entities. The activities of HDC's part-time employees representing less than half of its payroll included warehouse management (loading and unloading of freight), maintaining and constructing privately-owned side tracks for railroad shippers, cleaning and maintaining freight cars for both private (shipper) owners and railroad owners (CSX Transportation) and Huron and Eastern Railway."

It is unclear which individual, as reported by Mr. Heffner, constituted the major portion of HDC's payroll, because SSA wage records do not show an individual who fits that job description. It is clear, however, that from June 1989 through December 23, 1993, the only affiliated entities of HDC were HTG, HERC, and SVRC. Two of those affiliated entities are rail carriers, and HTG performed service in connection with those rail carriers.

Mr. Heffner adds that "The percentage of time and payroll dollars represented by activities on behalf of railroads or in connection with rail transportation was in the range of 15-20% of the total time and dollars." Other sources of information, however, indicate that most, if not all, of HDC's services were connected to rail transportation. In a May 10, 1994 telephone conversation, Mr. David L. McCloud, a former HDC employee and now RASC and HERC employee, generally described HDC as a subcontractor for maintenance-of-way work. In a May 11, 1994 conversation, Mr. John H. Marino stated that HDC performed car-cleaning for CSX, maintenance-of-way work for HERC, and maintenance-of-way work for one other carrier. Finally, SSA wage reports show four compensated employees through 1991 and six compensated HDC employees through 1992. A May 10, 1994 memorandum from Jack F. Conser, V. P. of Operations for RA, identified two of those HDC employees as "considered independent contractors until hired full time," and stated that "Messrs. . . Roberts. . . and Roberson performed track maintenance duties."

According to SSA wage records, Mr. Phillip Kus was the most highly compensated employee of HDC. It does not appear, however, that Mr. Kus was the "individual" mentioned by Mr.

Heffner who performed acquisition and development consulting. Rather, Mr. Kus appears to have provided locomotive and freight car maintenance and contract repair to HERC and other railroads. According to SSA wage records, Mr. Kus was compensated $27,500 from HDC in 1991; he also received a Form 1099 from HERC in the amount of $6,250.00. In 1992, Mr. Kus was paid $33,432.26 in SSA wages, and received no Form 1099 from HERC. Mr. Kus' job description in 1991 and 1992 is suggested by a document supplied to the Board by Mr. Jack Conser, V. P. of Operations for RA. On May 12, 1994, Mr. Conser responded to the following question, "Please provide the amount paid to Phillip Kus in 1992, invoices, and how he was paid," by submitting a copy of an independent contractor agreement for Mr. Kus dated February 28, 1990. The services requested of Mr. Kus included, but were not limited to, locomotive and freight car maintenance and contract repairs to HERC and third parties.

Although it purports to be an agreement for independent contractor services, the employment relationship actually established pursuant to the agreement is, under section 1(d)(1) of the Railroad Retirement Act (Act), an employer-employee relationship. Section 1(d)(1) of the Act states that:

> An individual is in the service of an employer * * * if --
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> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
> (ii) he renders such service for compensation * * *

According to the independent contractor agreement, Mr. Kustra was paid an annual, bi-weekly salary. He was subject to the direction of the Vice President of Operations. His hours are stipulated "at least forty (40) hours per week" or "[i]t is contemplated that Contractor shall work approximately 1,920 hours in each calendar year." Under the agreement, Mr. Kus participated in a group health plan provided by HDC's parent company, HTG, the cost of which was borne by HERC. There is no evidence suggesing that Mr. Kus could incur profit or loss from his services.

On the basis of the information obtained, the Board determines that HDC operated as a subcontractor of maintenance-of-way and locomotive and freight-car repair to its affiliate HERC, CRX, and other carriers. Accordingly, the Board determines that HDC was a covered employer effective June 31, 1989, the last day of the first month in which operations began, and ending December 23, 1993 when HDC's parent, HTG, merged into RASC.

RailAmerica Services Corporation, a wholly-owned subsidiary of RailAmerica, was incorporated on July 15, 1992, and began operations on January 1, 1993 for the purpose of providing support services to HERC and SVRC. As a wholly-owned subsidiary of RA, the Board determines that RASC is under common control with RailAmerica's wholly-owned carrier subsidiaries. A majority of the Board determines that RASC performs service-in-connection with railroad transportation, as follows.

On December 23, 1993, HTG merged into and with RASC. As a result of the merger, HDC, which had provided maintenance-of-way and car cleaning services to HERC and other carriers, dissolved. A number of those former HDC employees were hired by RASC, where they continued to provide similar services to RA's carrier subsidiaries. The remainder of RASC's employees perform administrative and supervisory management services for RA and its subsidiaries, similar to those provided under the former HTG management agreement. At the close of the audit and investigation of RASC, it had 16 employees.

On December 12, 1994, RA's attorney, John D. Heffner, stated that RASC "does not maintain records of specific services performed for its parent that may be related to railroad subsidiaries. The time spent on matters related to the day to day operations of RailAmerica's specific rail carrier subsidiaries is minimal." However, on May 1, 1995, RA assigned two former RASC employees, an accountant and an office manager, to work full-time for railroad subsidiaries. RASC determined that these employees spent the majority of their time working on day-to-day matters for the railroads. In addition, RASC adjusted the compensation of two other former full-time RASC employees so that each was compensated 50% by a railroad and 50% by RASC. The adjustment in compensation was also designed to better reflect the percentage of time spent working directly for the railroads.

The adjustment in compensation for four RASC employees notwithstanding, the Board determines that RASC provides significant service in connection with railroad transportation. The Board notes that executive and management services provided by the officers Gary O. Marino and John H. Marino are creditable compensation under sections 1(h) and (k) of the Railroad Retirement Act and sections 1(d) and (i) of the Railroad Unemployment Insurance Acts. According to SSA wage reports, both individuals are compensated (receive management fees and expense reimbursement) through RASC.

Another RASC employee received compensation through RASC but was also the project engineer for HERC and worked out of the HERC office on a daily basis performing track inspections. In his self-reported job description, Mr. Mark Garvin stated that as Manager of Engineering, he was responsible for engineering for all properties, evaluating track structure for new acquisitions, preparing or reviewing bids relating to track work; preparing or reviewing contracts for track work; purchasing or assisting in purchasing of material; communicating with state and local government agencies concerning funding and billing; preparing weekly and quarterly [sic] to a railroad operated by SVRC; and preparing monthly and capital projects for HERC and SVCR.

Similarly, another RASC employee, controller Larry Bush, reported that he supervised the day-to-day operations of the accounting department for RailAmerica and all subsidiaries; prepared and/or reviewed monthly financial statements for each individual company; prepared monthly consolidated financial statements; prepared all SEC financial filings including Form 10-KSB, Form 10-QSB, Form 8-K's, etc.; prepared annual reports and tax returns for all subsidiaries in all states in which they operate; reviewed all quarterly filings including payroll taxes; monitored on a daily basis the revolving line of credit facility at Kalyn/Siebert and prepared weekly and monthly reports; oversaw the audit of RailAmerica and its subsidiaries, including the separate audit which was performed on Kalyn/Siebert, Inc.; that he was in charge of LAN and computers in the Boca Raton office; supervised annual budgeting for all subsidiaries, and prepared the annual budget for RailAmerica and RailAmerica Services.

RA's Assistant Treasurer, an RASC employee, administered all bank accounts for Rail America and subsidiaries; administered all lines of credit and loan relationships with all Rail America's banks and other institutional lenders; supervised payables of the Company and its subs, as well as payroll, loan payments and all other payments; and prepared periodic cash flow projections for RailAmerica and its subs. The assistant controller, another RASC employee, was responsible for updating the cash activity report for RailAmerica and subsidiaries; compiling and implementing a weekly payment schedule report and distributing approved payments to vendors; dataprocessing of cash receipts, accounts receivable invoices, and general ledger entries for RailAmerica and subsidiaries; monthly reconciliation of all bank accounts for RailAmerica and subsidiaries. Finally, the Chief Mechanical Officer of HERC receives compensation through RASC. The Director of Real Estate and Industrial Development for HERC also receives compensation through both RASC and HERC.

On December 12, 1994, Mr. Heffner also stated in a letter to the Board that "All services are performed for RailAmerica in leased facilities of RailAmerica principally at the locations referred to in paragraph 1A [RASC's Alexandria, VA, office, and RASC's Boca Raton office]." However, a number of RASC employees, including some of those listed above, were observed working along side railroad employees at HERC's Saginaw, Michigan address, where RASC also maintains an office. Services "principally" performed at the Alexandria and Boca Raton offices appear to be those executive, management, and administrative services performed by John H. Marino, Gary O. Marino and their staffs.

Mr. Heffner stated that RASC's services included, ". . . administrative and supervisory management services for RailAmerica and its various railroad and non-railroad subsidiaries . . . relations with shareholders, investors, and lenders; obtaining debt and equity financing; identifying and evaluating corporate acquisitions; press, public, and governmental relations; strategic planning; preparation of corporate budgets; corporate accounting and money management; general corporate and legal matters; real estate and property management; risk management; purchasing; personnel policies and office management; and oversight of subsidiary business."

Mr. Heffner further stated that, "The services which RASC provides its affiliates do not constitute service in connection with the transportation of passengers or property by rail. Each of RailAmerica's four shortline railroad subsidiaries is managed by a resident General Manager, who is on the payroll of that company, and each of which is subject to Railroad Retirement coverage. . . To the extent that RASC provides limited administrative coordination, or oversight functions or advisory services that benefit its rail carrier affiliates, it does not keep records of the amount of time spent on these functions and does not invoice these companies for the services provided." Mr. Heffner states that RASC provides "limited administrative or management oversight functions" for Delaware Valley Railway Carrier Company, HERC, SVRC, and SCTR. Presumably, newly acquired railroad subsidiaries will receive similar services from RASC.

Since the final audit report was prepared, RailAmerica has acquired at least three additional short-line railroad subsidiaries and it states in its Form 10-QSB for the quarterly period ending March 31, 1996 that "The Company's objectives are to foster the growth of its existing subsidiaries and to create a diversified transportation company by acquiring additional railroads and other transportation-related companies. . . The Company intends to increase traffic on its existing rail lines by offering additional services such as intermodal transportation, distribution and logistic services, and through the integration of Steel City into the Company's transportation division. Further, Kalyn has the capability of manufacturing trailers and other types of intermodal equipment for use by Steel City and the Company's railroads. . . ."

While RASC appears to believe that a direct working relationship with a railroad is necessary before a determination of service-in-connection with railroad transportation may be made, it is clear that the intention of RailAmerica is to acquire and foster the growth of short-line railroads as the core of its multi-modal transportation services and as the primary means of generating transportation-related revenue. To the extent that RailAmerica owns non-railroad subsidiaries, and to the extent that RASC employees provide services to those subsidiaries and the short-line railroad subsidiaries, it is incontrovertable that the primary purpose of such ownership and service is to increase the competitiveness of RA's short-line railroads as against traditional motor carrier services.

In sum, in the view of the majority, the evidence establishes that RASC employees provide substantial administrative and support services, both directly and indirectly, to RA's railroad subsidiaries. <u>See</u> <u>Adams</u> v. <u>Railroad Retirement Board</u>, 214 F.2d 534 (9th Cir. 1954), and <u>Southern Development Co.</u> v. <u>Railroad Retirement Board</u>, 243 F.2d 351 (8th Cir. 1957). As RASC is a wholly-owned subsidiary of RA, under common control with RA's seven railroad subsidiaries, a majority of the Board finds that RASC is a covered employer under the Railroad Retirement Act, effective January 1, 1993, the first day operations began.

Independent Contractor Status

RASC also contends that a number of its employees are "independent contractors." Mark Garvin, managing engineer for HERC, and Phillip Kus, chief mechanical officer for HERC, are two such examples. However, under section 1(d)(1) of the Railroad Retirement Act, these employees and others similarly situated are employees of RASC. The Railroad Retirement Act at section 1(d)(1) states:

> An individual is in the service of an employer * * * if --
>
> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
> (ii) he renders such service for compensation * * *

In the case of maintenance-of-way and engineering employees paid as "independent contractors," by RASC, a majority of the Board finds that the evidence suggests that such employees are subject to the continuing authority of RASC officers to supervise and direct the manner of rendition of their service, that they are rendering professional or technical services on RASC premises or the premises of its railroad affiliates, and that these professional or technical services are integrated into the operations of RASC. Accordingly, a majority of the Board finds that these persons are employees of RASC for purposes of coverage under the Acts administered by this agency.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever (dissenting as to the coverage of RASC; separate opinion attached)

Dissenting Opinion of the Management Member
Jerome F. Kever
in the
Employer Status Determination of
RAILAMERICA AFFILIATES
Huron Transportation Group (HTG)
Huron Development and Construction (HDC)
RailAmerica Services Corporation (RASC)

I concur with the majority of the Board on the coverage decisions for Huron Transportation Group (HTG) and the Huron Development and Construction (HDC). I dissent from the majority's decision in the RailAmerica Services Corporation (RASC). I do not believe that there is a sufficient factual basis to determine the extent of , nor type of services performed for affiliated carriers.

Jerome F. Kever

Jerome F. Kever, Management Member

11/1/96
Date