

**EMPLOYER STATUS DETERMINATION ON RECONSIDERATION
RAIL INVESTMENTS, INC.**

This is the decision of the Railroad Retirement Board regarding the request for reconsideration of the Board's decision holding Rail Investments, Inc., to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. In a decision dated February 9, 1995, the Board held that Rail Investments is an employer by reason of its being under common control with a carrier and its performing services in connection with rail transportation.

In its request for reconsideration, Rail Investments argues that it is not under "common control." Rail Investments is a corporation owned entirely by Mr. Wade W. Larkin. Mr. John C. Larkin and Ms. Avis K. Larkin serve as officers and directors of Rail Investments. The Escanaba & Lake Superior Railroad Company is a corporation owned by Mr. Wade W. Larkin, Mr. John C. Larkin, and Ms. Avis K. Larkin. It is controlled by a voting trust agreement of which Mr. Wade W. Larkin and Mr. John C. Larkin each control 49 percent and Ms. Avis K. Larkin controls 2 percent.

Section 202.4 of the Board's regulations provides that:

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any 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 provides that:

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.

Rail Investments contends that according to the decision in Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir. 1993), there is no common control in this case. A majority of the Board does not agree with Rail Investments' reading of that case. Union Pacific held that a parent company was not under common control with its subsidiary. In the view of the majority, Union Pacific did not hold that companies could not be under common control by reason of common ownership or management. In

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the instant case Rail Investments and the Escanaba and Lake Superior Railroad Company are not parent and subsidiary but have common ownership and management in that the same three persons have the right to control the management and operations of both companies. Mr. Wade Larkin owns Rail Investments and Mr. John C. Larkin and Ms. Avis K. Larkin are officers and directors of that company, and those three persons own the Escanaba and Lake Superior Railroad Company and control it through a voting trust agreement. In the opinion of the majority, the evidence establishes that both Rail Investments and the Escanaba and Lake Superior Railroad are under control of the same persons within the meaning of sections 202.4 and 202.5 of the Board's regulations. Accordingly, it is the determination of a majority of the Board that Rail Investments is under common control with a covered rail carrier employer, the Escanaba and Lake Superior Railroad Company.

Rail Investments does not challenge the Board's finding in its February 9, 1995, decision that Rail Investments performs a service in connection with rail transportation. A majority of the Board agrees with the earlier decision that Rail Investments does provide a service in connection with rail transportation.

The previous decision of the Board is affirmed by a majority of the Board on reconsideration.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting)

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