

EMPLOYER STATUS DETERMINATION

WCL Railcars, Inc.

This is the determination of the Railroad Retirement Board concerning the status of WCL Railcars, Inc. (WCLR) 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 Railcars was obtained in conjunction with an audit of Wisconsin Central Ltd. (BA No. 2633) (WCL) and Fox Valley & Western Ltd. (BA No. 5622) (FV&W). WCL, WCLR, and FV&W are wholly-owned subsidiaries of Wisconsin Central Transportation Corporation (Wisconsin Central), a holding company which operates through its six wholly owned subsidiaries. In addition to WCL, WCLR, and FV&W, those subsidiaries include: Wisconsin International, Inc. (which owns a 27.7% interest in New Zealand Rail Limited), Sault Ste. Marie Bridge Company (BA No. 4271), and Algoma Central Corporation (a Canadian operation).

The officers and directors of WCLR are also officers and directors of Wisconsin Central and WCL. Specifically, the following individuals are officers and/or directors of all three companies: Edward A. Burkhardt (President of WCLR), Thomas F. Power, Jr. (Executive Vice President of WCLR), Thomas W. Rissman (director of WCLR), and Robert H. Wheeler (director of WCLR). In addition, Mr. Burkhardt and Mr. Power are employees of WCL.

WCLR was incorporated on August 27, 1987 and began operations on October 11, 1987. The business of WCLR consists of owning and leasing locomotives, various types of freight cars and other miscellaneous work equipment. WCLR's sole customers are its affiliated subsidiaries, WCL, FV&W, and Algoma Central Railways, Inc. (ACRI). The most recent formal lease agreement is between WCLR and WCL and is dated November 23, 1992. That lease states that it will expire on December 31, 2001, subject to such extensions as the Lessor (WCLR) and Lessee (WCL) may agree upon in writing. When FV&W and ACRI were acquired in 1993 and 1995, respectively, the formalized agreement between WCLR and WCL was not revised. Accounting for the payments of lease charges from WCLR to WCL are re-allocated by WCL's accounting department to include FV&W and ACRI in the charges, since these companies benefit from the equipment leased from WCLR.

All lease agreements between WCLR and WCL, FV&W, and ACRI are negotiated by two WCL employees, Thomas F. Powers, Jr. (Chief Financial Officer of WCL) and Susan H. Norton (Treasurer of WCL). The accounting for

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the business functions of WCLR, including the tracking of the intercompany leases, payables and receivables, is performed by members/employees of the WCL general accounting department.

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

(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;

(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, 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 of the RUIA contains essentially the same definitions.

The Board finds that WCLR is under common control with WCL and FV&W, two covered rail carrier employers under the RRA and the RUIA. All three companies are wholly-owned subsidiaries of the same parent company, Wisconsin Central. In addition, Wisconsin Central, WCL, and WCLR share officers and directors.

Turning to the second part of the statutory definition in section 1(a)(1)(ii), the Board notes that WCLR's entire business consists of owning and leasing locomotives, various types of freight cars, and miscellaneous work equipment. Further, WCLR only leases those items to its affiliated rail carriers. Those carriers could not operate without locomotives and freight railroad cars. Cf. Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295, 297 (7th Cir. 1992) and Despatch Shops, Inc. v. Railroad Retirement Board, 153 F.2d 644, 646 (D.C. Cir. 1946). A majority of the Board finds that WCLR performs service in connection with railroad transportation.

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A majority of the Board finds that this case is distinguishable from the case of Itel Corporation v. U.S. Railroad Retirement Board, 710 F.2d 1243 (7th Cir. 1983). The U.S. Court of Appeals for the Seventh Circuit held in that case that the Rail Division of Itel Corporation, which was involved in leasing rail cars to railroads, was not a covered employer under the RRA and RUIA. However, the Rail Division conducted only 12% of its business with its affiliated rail carriers. In addition, Itel Corporation had acquired its affiliated rail carriers quite some time after its Rail Division came into existence. The Court concluded that the Rail Division's primary function was not to serve Itel Corporation's rail carrier subsidiaries, Id. at 1247. The same conclusion is not true in the case of WCLR, which commenced operations the same year as its parent corporation, and which conducts 100% of its business with its affiliated rail carriers. Finally, the Court in Itel based its decision on the premise that Congress chose to limit the RRA and RUIA to services covered by the Interstate Commerce Act, Id. at 1249. The Seventh Circuit has discredited that premise in two of its subsequent decisions, Standard Office Building Corporation v. United States, 819 F.2d 1371, 1378 (7th Cir. 1987); Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295, 298 (7th Cir. 1992).

Thus, for the reasons set forth above, a majority of the Board, the Management Member dissenting, finds that WCLR is under common control with rail carrier employers subject to the RRA and RUIA and that WCLR provides service in connection with railroad transportation. A majority of the Board finds that WCLR has been an employer under the RRA and the RUIA since August 27, 1987, the date on which it was incorporated.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting)

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