

## **EMPLOYER STATUS DETERMINATION**

### **Gordon Fay Associates, Inc.**

This is the determination of the Railroad Retirement Board as to the status of Gordon Fay Associates, Inc. (GFAI), as a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (Acts). GFAI began operations as a transportation management and consulting firm in 1973 and was incorporated in 1974. It currently has eleven employees.

Information about GFAI was obtained during an audit of the Bay Colony Railroad (BCR), BA No. 3112, and the Seminole Gulf Railway (SGR), BA No. 5508; and from correspondence with Mr. Gordon Fay, GFAI's president and sole stockholder. In a letter dated August 26, 1994, Mr. Fay states that "GFAI does not own any railroad stock. The holder of the GFAI stock does own a portion of the stock of BCRR [Bay Colony Railroad] and of the limited partnership interests of SGLR [Seminole Gulf Railway]." He further states that "GFAI is not affiliated with any railroads or railroad associations. "

Information obtained during the audit, however, indicates that GFAI is substantially affiliated with the two railroads. A 1991 GFAI statement of related party transactions reports that "In November 1987, Gordon Fay Associates, Inc. received a 20% interest in Seminole Gulf Railway Limited Partnership as a fee for services rendered in organization and start up of that railway. The investment is currently carried at zero book value. Management believes the fair market value of this interest to be approximately \$600,000." A 1993 issuance and exchange of BCR stock lists the four primary stockholders of BCR as Gordon Fay, 360 shares; George Bartholomew, 360 shares; Edward Perry, 98 shares; and James Handan, 56 shares. A 1993 SGR Form 1120S, Schedule K-1, reports Gordon H. Fay and George Bartholomew as holding 66% and 33% of SGR stock, respectively. While the information reported in the 1993 Schedule K-1 is consistent with Mr. Fay's statement that GFAI does not own stock in SGR, it is inconsistent with the 1991 GFAI financial statement.

The railroads themselves describe GFAI as an affiliate. Notes to the 1992 BCR financial statement reported, "The Company is affiliated with Gordon Fay Associates, Inc. and other affiliated entities, through substantial common ownership. Gordon Fay Associates, Inc. performs various administrative and accounting functions for the Company on a per diem basis." Similarly, notes to the 1992 SGR financial statement reported that "The Partnership is affiliated with Gordon Fay Associates, Inc. and other affiliated entities through substantial common ownership. Gordon Fay Associates, Inc. performs various administrative and accounting functions for the partnership on a per diem basis. Amounts charged to the partnership for these services for the year ended December 31, 1992, amounted to approximately \$925,000."

GFAI has also accommodated the railroads in ways which evidence its special relationship to them. When the railroads recently encountered financial difficulty, accounts payable to GFAI were converted to notes payable, and although some invoices were unpaid or untimely paid, GFAI took no collection measures.

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Aside from his substantial ownership interests in the three companies and other non-carrier affiliates, Gordon Fay is also directly involved in the day-to-day operations of GFAI and the two railroads. Mr. Fay issues general orders for BCR and SGR employees, and is primarily responsible for contracting on behalf of the railroads. Mr. Fay is President of GFAI, Chairman of BCR, and principal partner in SGR. Mr. Fay negotiates and signs leases on **behalf of the railroads with** customers and the Commonwealth of Massachusetts. Mr. Fay, George Bartholomew (the second partner in SGR), and Susan Fay (officer and director of GFAI) are all authorized to sign checks for BCR and SGR.

The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)) reads in part as follows:

The term "employer" shall 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 and 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\* \* \*

Substantially the same definitions are contained in the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a); (d); and (e)).

The Board's regulations at 20 CFR 202.4 state 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.

The Board's regulations at 20 CFR 202.5 state that:

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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.

BCR and SGR have been held to be employers under the Acts as class m line-haul carriers subject to the jurisdiction of the Surface Transportation Board. It is clear that GFAI is affiliated with these carriers and other non-carrier companies mentioned in the 1992 BCR and SGR financial statements. It is also clear that these carriers and GFAI are under the common direction of Gordon Fay and, less directly, Susan Fay and George Bartholomew. Under the Board's regulations, GFAI is under common control with two or more railroad employers.

The Board next determines whether the services performed by GFAI are services performed in connection with transportation of passengers and property by rail.

Section 202.7 of the Board's regulations explains that service is in connection with railroad 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, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

As a transportation~management and consulting firm, GFAI provides services to a number of private and governmental entities. Its mere status as a transportation management firm is not enough to impart coverage under the Railroad Retirement and Railroad Unemployment Insurance Acts. However, pursuant to both written and oral agreements, GFAI provides comprehensive accounting, contracting, purchasing, and other administrative and managerial services that are necessary for the functioning of its affiliated railroads. These services are outlined in great detail in the written management and consulting agreements between GFAI and each railroad.

In his correspondence to the Board, Mr. Fay describes services performed by GFAI for BCR and SGR as accounting, marketing and sales, executive management, passenger service reservations and ticket sales, real estate management, and management of outside party contracting services. Accounting, purchasing, and other administrative services clearly constitute service in connection with railroad transportation. Adams v. Railroad Retirement Board, 214 F. 2d 534 (9th Cir. 1959). GFAI also leases office space to BCR for that railroad's general offices. GFAI employees sell tickets and coordinate a dinner train on site, on SGR property. See Southern Development Co. v. Railroad Retirement Board, 243 F. 2d

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351 (8th Cir. 1957); and Atlantic Land & Improvement Co. v. United States, 790 F.2d 853 (11th Cir. 1986). GFAI also provides sickness and disability benefits to the two railroads' employees under GFAI's insurance plan.

Further, a substantial portion of GFAI's revenue is accrued through its relationship with the two railroads. GFAI employees bill in excess of 1800-2000 hours annually to the BCR and the SGR. Approximately 66% to 70% of GFAI's 1992-1993 revenues were received from BCR and SGR. Payment terms are cost, plus labor and materials.

Based on the above information, the Board determines that GFAI is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. By virtue of Gordon Fay's substantial ownership and direct involvement in the day-to-day operations of all three businesses, GFAI is clearly under common control with BCR and SGR, and performs significant service in connection with the transportation of passengers and property by rail.

For purposes of establishing a coverage date, the Board finds that while Mr. Fay owned a 41 % interest in BCR on or about June 15, 1982, the date of the consulting agreement between GFAI and BCR, such interest alone is insufficient to establish common control for that date. On November 13, 1987, however, GFAI entered into a management agreement with SGR. It appears that Mr. Fay had a 66.66% interest in SGR as of that date. The Board finds that this level of interest, combined with his high level of day-to-day managerial participation in all three companies, is sufficient to establish common control as of November 13, 1987. Accordingly, GFAI has been an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts since November 13, 1987.

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Glen L. Bower

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V. M. Speakman, Jr.

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