B.C.D. 98-52

EMPLOYER STATUS DETERMINATION
Allied Enterprises, Inc. (AEI)

NOV 2 0 1998

This is a determination of the Railroad Retirement Board concerning the status of Allied Enterprises, Inc. as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.).

Information furnished by Mr. Larry Bouchet, (President of AEI and Executive Vice President of Arkansas & Missouri Railroad (A&M), BA No. 3867, a Class III rail carrier), indicates that AEI was incorporated on July 15, 1993, and that operations began and employees were hired on August 1, 1997. According to Mr. Bouchet, AEI is a private company owned by ten individuals who also own stock in the A&M.

According to information provided by Mr. Bouchet, at the date of incorporation, AEI bought freight cars to be used in the railroad industry and now buys locomotives and cars to lease to all other kinds of businesses. At the present time, AEI owns 500 freight cars; car shops (to repair and build their own freight cars and perform outside contracts with Class I, regional and short line railroads and private car owners); warehouses and transload operations (to move truck and railroad freight); a railroad manpower service (to supply temporary manpower to railroads or other businesses related to railroads); an airbrake shop (to repair all different kinds of airbrake valves); and a training school (to help train railroaders in different areas).

Mr. Bouchet stated that AEI allows all Class I's, regionals and short lines to use AEI's cars for a fee. Additionally, Iowa Interstate and a few independent companies lease cars and locomotives from AEI. AEI also repairs cars for Louisville Scrap & Material Company. AEI leases land and buildings from A&M and the Burlington Northern Santa Fe for the car shops and leases freight cars from Louisville Scrap & Material Company, Norrail, First Union, David Joseph Company, Greenbrier, and GE Rail. AEI leases freight cars and locomotives to Murphy Farm, Iowa Interstate, Lyndel Vines Corp., and Louisville Scrap & Material Company.

As stated previously, AEI is a privately held company. Mr. Bouchet provided information that no railroad has an interest in AEI but that AEI is "owned by the same parties" as A&M. A list of stockholders of both A&M and AEI provided by Mr. Bouchet shows identical stockholders of both companies, except for three persons who own stock in A&M and not in AEI. Further information supplied by Mr. Bouchet shows that the Hannold family, consisting of J.A. Hannold, his wife Judith and children Andrea, Elizabeth and Randolph, own approximately 75% of both A&M and AEI.

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Information submitted by Mr. Bouchet, President of AEI, indicates that he is also an officer of A&M, serving as A&M's Executive Vice President. Additionally, information submitted shows that Mr. Brent McCready, Vice President of AEI, also serves as A&M's General Manager.

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;
>
> (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***.

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).

AEI is not a carrier by rail within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether AEI is an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii).

All of the stockholders of AEI are also stockholders of A&M. Additionally, the Hannold's own approximately 75 percent of the stock of AEI. Together, they also own approximately 75 percent of the stock of the A&M, a class III rail carrier employer covered under the Acts. Accordingly, the Board finds that AEI is under common control with the A&M. Thus, if AEI performs a "service in connection with" railroad transportation, it is a covered employer under the Acts.

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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, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation 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.

A 1938 opinion of the Board's General Counsel, L-38-650, adopted in part by Board Order 39-291, states that when deciding if a company is performing any service in connection with railroad transportation, each situation should be examined on a case by case basis considering such factors as the physical relation of the company to its affiliate carrier; the history or the origin of the company; for whose benefit the company's operations are conducted; and the amount of business the company does with the general public. Thus, initially, we shall examine whether AEI is performing any service in connection with railroad transportation within the framework provided in L-38-650.

Physical Location

Physical proximity is relevant to show integration of operations and subordination of enterprise. AEI and A&M both have corporate offices located at the same address: 107 North Commercial Street, Springdale, Arkansas 72764-0303. The physical proximity of these two companies distinguishes this case from the facts in Board Coverage Decision (B.C.D.) 96-82, In the Matter of CSX Intermodal, Inc. (hereafter CSXI), where CSXI and its affiliate railroad had corporate offices in two different states (Maryland and Florida). More important than physical proximity for these purposes in this case is whether AEI and A&M have any officers in common. The President of AEI, L. P. Bouchet is also the Executive Vice President of A&M. Additionally, Mr. Brent McCready, Vice President of AEI, also serves as an officer of A&M in the position of Vice President and General Manager. This also differs from the situation in B.C.D. 96-82, where CSXI and its affiliated rail carrier had no officers in common and no officers or senior managers of CSXI reported to anyone at the affiliated railroad carrier.

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History and Origin of AEI

AEI is a provider of railcar repair services and temporary manpower services to A&M. AEI also maintains four locomotives at an outlying point for A&M. In fact, Mr. Bouchet stated that AEI supplies train locomotives and engineers to A&M when the railroad is short of manpower. AEI was incorporated and began operations on August 1, 1997, when AEI purchased the car shop from A&M and ten of A&M's employees were transferred to AEI's payroll. It has no history of being independent of A&M. Mr. Bouchet, who is President of AEI and Executive Vice President of A&M, gives all work assignments to Allied employees. Again, this situation differs from that of CSXI in that CSXI or its direct antecedents had an independent existence.

For Whose Benefit Does AEI Operate

Information provided by Mr. Bouchet in May 1998 indicates that AEI is a car repair company which provides services to A&M, all Class I, regional and short line railroads and private freight car owners. In addition, AEI owns and leases freight cars to all Class I, regional and short line railroads for a fee. Mr. Bouchet indicated that approximately 10 percent of AEI's time is spent repairing A&M's sand and log cars and that "less than 5% of weekly time" was spent providing temporary manpower services. Mr. Bouchet stated that "5% of AEI's total revenue comes from A&M." However, an additional breakdown of revenue provided by Mr. Bouchet stated that 5 percent of AEI's revenue was from repairing freight cars for A&M, with an additional 2 percent coming from A&M for the leasing of locomotives. Additionally, Mr. Bouchet stated that AEI has an agreement to provide temporary manpower service to A&M; however, he does not list the amount of revenue received in return for this service. Further, the percentage totals for the amount of revenue received by AEI provided by Mr. Bouchet do not total 100 percent, but rather total only 50 percent. A majority of the Board, Mr. Kever dissenting, finds from the evidence in the file that AEI provides approximately 85 percent of its car repair, leasing and manpower services for the railroad industry and approximately 15 percent for its carrier affiliate (A&M) and receives approximately 85 percent of its revenue from the railroad industry and approximately 15 percent from its carrier affiliate (A&M).

Court opinions regarding similar services support the conclusion that performance of these functions constitutes a service in connection with railroad transportation. In Railroad Retirement Board v. Duquesne Warehouse Co., 149 F. 2d 507 (D.C. Cir. 1945), aff'd 326 U.S. 446, 90 L. Ed. 192, 66 S.Ct. 238 (1946), the Court of

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Appeals 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 of Appeals 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.

In Railway Express Agency v. Railroad Retirement Board, 250 F.2d 832 (7th Cir. 1958), the Court of Appeals for the Seventh Circuit held that individuals working as "merchant agents" for REA were employees of that company (and not independent contractors); the merchant agents represented REA as agents and conducted express business, essentially a marketing or sales function. That decision was partly based on the Court's finding that the merchant agent's work is an integral part of REA's service. See also Standard Office Bldg. Corp. v. U.S., 819 F. 2d 1371, 1376 (7th Cir. 1987), where the Court, quoting the legislative history of the Railroad Retirement Act, stated that the Act covers "substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States. S. Rep. No. 818, 75th Cong. 1st Sess. 4 (1937)."

The Court of Appeals for the Seventh Circuit, in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), refused to limit the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts to services which are covered under the Interstate Commerce Act and rebutted contentions to the contrary deriving from the legislative history of the Railway Labor Act and the Railroad Retirement Act. Livingston Rebuild Center, which was held to be an employer under the Acts, rebuilt locomotives and other rolling stock, about 25 percent of its business being with its affiliated carrier. These are similar, if not identical, to the services which AEI provides to A&M.

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In contrast, a majority of the Board held in VMV Enterprises (Board Coverage Decision 93-79) that a non-carrier deriving only 2.5 percent of its total business from its affiliated carrier, and which performed only 3.2 percent of that affiliate's repair work, was not a covered employer under the Acts. Unlike the facts in VMV Enterprises, in the instant case, based on evidence in the file, AEI derives almost 15 percent of its total business from A&M.

In Canadian Pacific Finance, Inc., (B.C.D. 93-69), financial services such as tax, cash management, and internal audit, were performed by a company for its affiliated railroads. A majority of the Board found these services to be in connection with railroad transportation.

In Interstate Quality Services, Inc. d/b/a/ Interstate Reloads, Inc. v. Railroad Retirement Board, 83 F.3d 1463, at 1465 (D.C. Cir. 1996), the Court approved the decision of the Board holding the company to be an employer under the Acts since it provided a steady source of services to its customers, including its rail carrier affiliate. Similarly, AEI supplies a steady source of car repair and manpower services to its rail carrier affiliate.

Business with the Public

Almost 100 percent of AEI's business is conducted with covered employers (i.e. most Class I, regional and short line railroads; a minor portion is conducted with private car owners). Therefore, AEI is providing its product, which is basically car repair and manpower services, in its regular course of business to almost all covered railroads, but approximately 15 percent is specifically benefitting A&M. It can reasonably be concluded that AEI derives a significant portion of its business from the services it provides for A&M.

Service in connection with railroad transportation does not rise to a level warranting coverage under the Acts if it is insubstantial or "casual" in nature.

Section 202.6 of the Board's regulations (20 CFR 202.6) provides as follows:

> 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.

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A majority of the Board, Mr. Kever dissenting, finds that since it appears from the evidence in the file that AEI is deriving approximately 15 percent of its total business and revenue from A&M, such service is not "irregular or infrequent" and that such service cannot be considered "insubstantial." Therefore, a majority of the Board, Mr. Kever dissenting, finds that services performed by AEI for A&M are more than "casual".

The foregoing criteria show that AEI is a car repair and leasing company, which also furnishes employees and training to railroads and which does approximately 15 percent of its business with its affiliate rail carrier. Based on the foregoing criteria, it is the conclusion of a majority of the Board that AEI is under common control with and performing a service in connection with railroad transportation for A&M.

Therefore, it is determined by a majority of the Board, Mr. Kever dissenting, that AEI became an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective August 1, 1997, the date it hired employees and commenced operations.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting opinion attached)

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DISSENT OF THE
MANAGEMENT MEMBER
JEROME F. KEVER

My dissent is based upon the holding in Itel Corporation v. U.S. Railroad Retirement Board, 710 F. 2d 1243 (7th Cir. 1983). The Court held that leasing of railroad equipment was not considered a service in connection with transportation. It is not clear from the majority's decision what percentage of revenues earned by AEI, for service to its affiliate A & M, result from the leasing of railcars or equipment. Therefore, I cannot join the majority in finding that AEI's service to A & M is not of a casual nature.

Original signed by:

Jerome F. Kever
Management Member