

**EMPLOYER STATUS DETERMINATION**

Railroad Ventures, Inc.

Decision on Reconsideration

**NOV 07 2000**

This is the decision on reconsideration of the status of Railroad Ventures, Inc. 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).

**PROCEDURAL BACKGROUND**

In B.C.D. No. 98-48, issued on October 20, 1998, a majority of the three-member Railroad Retirement Board, Management Member dissenting, held that Railroad Ventures, Inc. (RVI) became a rail carrier employer under the RRA and RUIA effective November 6, 1996. By letter dated October 30, 1998, RVI submitted a request for reconsideration of that decision.

**DISCUSSION**

There is no dispute regarding the following facts in this case. On November 6, 1996, RVI was incorporated and acquired by purchase the railroad right of way of the Youngstown and Southern Railroad Company between Youngstown, Ohio and Darlington, Pennsylvania. In a decision entered on July 1, 1997, the Surface Transportation Board (STB) indicated that RVI had acquired approximately 35.7 miles of rail line from milepost 0.00, near Struthers, Ohio to milepost 35.7 near Darlington, Pennsylvania, plus an additional 1-mile segment of the Smith Ferry Branch line near Negley, Ohio. RVI does not provide rail service over its rail line, but contracted with the Ohio & Pennsylvania Railroad Company (BA No. 2264), an employer under the RRA and the RUIA, to provide service.

Section 1(a)(1) of the RRA defines an 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 [45 U.S.C. §231(a)(1)(i)].

Section 1 of the RUIA contains essentially the same definition.

In the decision at issue in this appeal, the majority found that because RVI obtained authority from the STB to acquire and operate a railroad, it falls within the plain meaning of the carrier definition of employer under the RRA and the RUIA. In its request for reconsideration, RVI contends that it is not an

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employer under the RRA and the RUIA because it does not operate a train but merely owns the rail line in question.

RVI argues that the Board should not change its policy of holding not to be covered under the RRA and the RUIA an entity which obtains STB authority to operate a railroad but which leases the line to or contracts with another entity to operate the railroad instead of performing that operation itself. In other words, RVI argues that it is not covered under the RRA and the RUIA because it does not run trains over its rail line.<sup>1</sup> In support of its position that it is not a rail carrier employer under the RRA and the RUIA, RVI noted that it has no employees and stated "as a point of correction," that it did not seek both acquisition and operating authority from the STB. RVI maintains that since the Ohio & Pennsylvania Railroad already had operating authority for this rail line, RVI "only obtained acquisition authority from the STB." Two decisions of the STB, however, are in direct conflict with RVI's assertion. The Board finds that those decisions contain clear and undisputable evidence that RVI falls squarely within the definition of a carrier employer under the RRA and the RUIA for the reasons set out below.

Specifically, in a decision in STB Finance Docket No. 33385, published in the Federal Register on April 24, 1997 (62 F.R. 20061), the first sentence stated in pertinent part that, "(RVI) . . . has filed a verified notice of exemption under 49 CFR 1150.31(a)(1) to acquire and operate approximately 35.7 miles of line . . ." In a later decision, decided July 1, 1997, which consolidated Finance Docket No. 33385 and Finance Docket No. 41991, the STB referenced the April decision with a statement that in Finance Docket No. 33385, RVI was "exempted from the prior approval requirements of 49 U.S.C. 10901 to allow it to acquire and operate approximately 35.7 miles of rail line owned by Youngstown & Southern Railroad Company." The STB explained in the July 1997 decision that by virtue of its acquisition of the rail line, RVI undertook a common carrier

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<sup>1</sup>The majority referenced that policy in B.C.D. No. 98-48, and explained its reasons for not applying it to RVI. As the remainder of the discussion above indicates, the obligations placed on RVI by the STB do not support the application of that policy in this case.

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obligation under 49 U.S.C. §11101(a). Noting that section 11101(a) provides in pertinent part that “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide transportation or service on reasonable request,” the STB wrote that:

“RVI has entered into an agreement with OPRC [Ohio & Pennsylvania Railroad Company] to provide service, and, if RVI decides to abandon the lines, it first must obtain our abandonment authorization.” (Footnote omitted.)

Thus, the STB expressly pointed out that RVI has a statutory obligation as a rail carrier to provide transportation or service on its rail line. In fact, the STB indicated that despite the fact that a separate entity, Ohio & Pennsylvania Railroad Company, would operate rail service over the line in question, RVI is the party responsible for ensuring that common carrier service is provided over the rail line. Moreover, in its July 1997 decision, the STB ordered RVI to file a bi-weekly report with the STB’s Office of Compliance and Enforcement detailing all activities and problems in restoring the subject rail lines to a serviceable condition and the extent to which service is currently being provided by the Ohio & Pennsylvania Railroad Company.

Despite the Board having found RVI to have both acquisition and operating authority from the STB, the Board has, prior to the initial decision on RVI in B.C.D. 98-48, found in certain circumstances that an entity with STB authority may still not be a covered carrier. In reviewing those cases along with the record of the public hearing held by the Board<sup>2</sup> on this policy issue, a modified position of the Board is appropriate which balances between the Board’s position prior to RVI and its current position. This position would recognize

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<sup>2</sup>On August 19, 1999, an examiner designated by the Board held a hearing to receive views and comments on whether an entity, which does not itself operate a railroad, but which leases or contracts with another entity to operate a railroad, should be considered an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The designated examiner issued a report in September 1999.

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that certain entities have STB authority to own and operate the line but sought authority only to preserve service or advance the public goal of insuring mass transportation service. To cover these entities would not benefit the Trust Funds but would only complicate the goal of preserving rail service and would also cause confusion where employees are potentially caught between different pension systems.

Therefore, the Board modifies its position upon reconsideration and will apply the following considerations in determining whether an entity with STB authority who contracts or leases the tracks to another entity to operate the line is covered under the RRA and RUIA.

An entity that has STB authority to operate a rail line, but leases or contracts with another to operate the line in question, is covered under the Acts administered by the Board unless the Board determines that the entity is not a carrier. An entity is not a carrier under the Railroad Retirement Act if the Board finds that all three of the following factors exist:

- 1). The entity does not have as a primary business purpose to profit from railroad activities. An entity that owns a railroad line solely to preserve or promote passenger or freight service would not be considered to have as its primary business purpose to profit from railroad activities. The Board will make a finding regarding the primary business purpose of the entity based upon full consideration of all the available facts. Factors that the Board will consider in determining whether a primary business purpose of an entity is to profit from railroad activities include, but are not limited to: (1) the reasons stated in the STB decision for the entity's acquisition of authority to operate the rail line; (2) the existence of a State statute which authorized the formation of the entity and/or authorizes the entity to acquire one or more rail lines for the purpose or purposes set out in the authorizing statute; (3) proof that the entity is considered by the Internal Revenue Service to be a non-profit entity; (4) circumstances surrounding the acquisition of line which would show intent simply to maintain service such as a history of unprofitability of line acquired, potential or actual abandonment of line, or decrease in rail

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traffic over the line; (5) whether the entity is affiliated with other carriers.<sup>3</sup>

- 2). The entity does not operate or retain the capacity to operate the rail line. If another entity is the certified operator of the rail line in question and actually conducts the railroad service over the line, the entity that owns the line will not be considered the operator. An entity that leases out the rail line or grants trackage rights and easements will not be considered to be operating the line if it does not retain control over the day to day operations of the line.
- 3). The operator of the rail line is already covered or would be found covered under the Acts administered by the Board. Where the operator of the line is not covered and could not be found to be covered, the Board will necessarily find the entity owning the rail line to be covered and persons operating the line to be the entity's employees.

Applying this to the facts of RVI, the Board affirms its initial determination that RVI is a covered employer. Based upon the history of RVI's activities with respect to its rail line, it appears the primary purpose was to profit from the railroad by abandoning its assets. The purpose does not appear to be preserving rail service rather to profit from selling of the assets. We do not have to reach the other two considerations since all three need to be present to remain outside the coverage of the RRA and the RUIA.

Therefore, the decision upon reconsideration is affirmed based on the grounds set forward in this decision.

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<sup>3</sup>An entity that is affiliated through common ownership with other for profit carriers will be presumed to have as a primary business purpose to profit from the ownership of the line.

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### CONCLUSION

The decision in B.C.D. No. 98-48 that RVI became a rail carrier employer effective November 6, 1996, is affirmed. The request for reconsideration is denied.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever