EMPLOYER STATUS DETERMINATION

Ellis & Eastern Company

This is the decision of the Railroad Retirement Board concerning the status of Ellis & Eastern Company (E&E) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

On June 8, 1988, the Interstate Commerce Commission granted the Chicago and North Western Transportation Company (C&NW) permission to abandon 65.1 miles of track between Agate, Minnesota and Ellis, South Dakota. Findings; Chicago and Northwestern Transportation Company., Abandonment in Nobles and Rock Counties, Mn., and Minnehaha County, SD, Docket No. AB-1 (Sub. No. 202), 53 Fed. Reg. 22586 (June 18, 1988). In a later transaction, 45 miles of the former C&NW track from Agate, Minnesota to Brandon, South Dakota were acquired by the Buffalo Ridge Railroad, Inc.[1] Buffalo Ridge Railroad, Inc.; Acquisition and Operation Exemption of Certain Abandoned Lines of Chicago and Northwestern Transportation Co., Finance Docket No. 31389, 54 Fed. Reg. 8245 (February 27, 1989). The remaining 16.5 miles from Brandon to Ellis in South Dakota were acquired by the Ellis & Eastern Company (E&E), incorporated under the laws of South Dakota on October 17, 1988, as the wholly-owned subsidiary of Sweetman Construction Company (Sweetman). Sweetman operates stone quarries and formed E&E to preserve rail service to these facilities. Sweetman advises that no rail carrier is in any way affiliated with Sweetman through equity ownership or common directors or officers. On May 1, 1989, E&E began rail service to two Sweetman plants in Sioux Falls, South Dakota, and to other unrelated industries located on its line, using five employees and one diesel locomotive. E&E has never applied to the Interstate Commerce Commission for authority to operate as a rail carrier under the provisions of the Interstate Commerce Act.

Sometime after its acquisition of the line in question, E&E sold two miles of track near Sioux Falls, South Dakota, including a switching yard, to the Burlington Northern Railroad (BN). On November 10, 1989, E&E and BN entered into an interchange and joint trackage agreement. Section 1.1 of the agreement allows E&E the right to run trains over the portion of the Sioux Falls line which E&E sold to BN. Section 1.2 of the agreement grants E&E the right to spot outgoing freight cars on designated interchange track for BN pick-up, and specifies that incoming cars set out on interchange track by BN shall be moved away by E&E. In section 1.4 of the

[1]Buffalo Ridge Railroad, Inc., (BA number 2636) has been determined to be a covered rail carrier employer with service creditable from February 1989, the date that it began operations. See Notice No. 89-31.

agreement, as amended by an addendum signed at the time the agreement was executed, the parties agree that "Northern tariff rates and charges shall apply to any traffic delivered to or

received from Eastern the same as they apply to industries located on Northern at Sioux Falls * * *." Section 3.1 of the agreement states that E&E will pay BN a flat annual $10 fee in payment for its rights under the agreement, plus a $1.50 fee for each car or locomotive moving across the joint trackage and an additional fee of $1.00 for each car delivered to the interchange track for pickup by BN. For its part, BN agrees in section 3.2 to pay E&E $160 for each loaded freight car interchanged between E&E and BN "that originates and/or terminates on Eastern's trackage at Sioux Falls". Finally, section 1 of the Addendum to the agreement states that "Ellis and Eastern represents and warrants that Eastern is a valid South Dakota corporation in good standing and owns and operates a private railroad as a private carrier."

In a letter dated July 13, 1992, E&E advised the Chief of Compensation of the Bureau of Research and Employment Accounts that E&E was a private rail carrier which "provides contract services for the Burlington Northern for other industries located along our private line." BN collects freight charges from shippers, and pays E&E as per the agreement. Sweetman products account for 40 to 50 percent of the freight car traffic of the E&E, and 20 to 25 percent of E&E revenue is attributable to moving Sweetman products. The remaining 75 to 80 percent apparently is attributable to payments from BN for moving traffic originating from or destined for delivery to other industries on the E&E line.

Section 1(a)(1)(i) of the Railroad Retirement Act provides that the term employer includes any "carrier by railroad, subject to part I of the Interstate Commerce Act".[2] Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act contain an essentially identical definition. As there is no evidence that indicates E&E is under common control with a rail carrier or that E&E meets any other definition of covered employer under the Acts, E&E may be determined to be a covered employer only if its rail operation renders E&E a rail carrier employer under the Acts.

Section 10501(a)(1)(A) of Title 49 U.S.C. provides that the ICC

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[2] Public Law 95-473 (92 Stat. 1337) re-enacted Part I of the Interstate Commerce Act into law as Subtitle IV of Title 49 of the United States Code without substantive change. H. Rep. No. 1395, 95th Cong., 2d Sess. 9, (1978), reprinted in 1978 U.S. Code, Cong., and Ad. News. 3009, 3018.

shall have jurisdiction over transportation of property by rail carriers. Section 10102(20) simply defines a rail carrier as a person providing railroad transportation for compensation. The term railroad includes terminals, spurs and yards either owned by a carrier or operated under an agreement; and transportation includes equipment of any kind related to the movement of property, including interchange. (49 U.S.C. §§ 10102(21), 10102(26)).

However, section 10501(b)(1) excludes from ICC jurisdiction transportation entirely within one State. To be subject to "Part I of the Interstate Commerce Act" within the meaning of the Acts administered by the Board, E&E must move property over its road in interstate commerce.

E&E characterizes itself as a private carrier, in effect contending that it is not a "common carrier" by rail and therefore not conducting an activity regulated by the ICC. In support of this contention, E&E states that "cars remain in BN's account and BN handles all billing and car accounting" and that "BN collects all charges from shippers." However, the ICC has recently noted that:

> The Commission and the courts have set forth standards to determine whether * * * terminal-type companies that * * * contract with railroads to perform services are rail carriers themselves * * * : First-actual performance of rail service, second-the service being performed is part of the total rail service contracted for by a member of the public, third-the entity is performing as part of a system of interstate rail transportation * * * by contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth, remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad. Association of P&C Dock Longshoremen v. Pittsburgh and Conneaut Dock Company, 8 ICC 2d 280, (1992), at ___, 1992 ICC LEXIS 27, at 20-21.

The ICC applied these longstanding standards to circumstances strikingly similar to the E&E's operation in Status of Allegheny & South Side Railway Company, 277 ICC 119 (1950). Allegheny was a subsidiary of Oliver Iron and Steel Company which performed in-plant switching services for its parent. In addition, Allegheny performed switching service for 13 other industries and for two large railroads under agreements. Allegheny operated over rail lines owned about equally by the two railroads, Oliver, and the customer industries. The railroads handled all billing and collection of freight charges, and compensated Allegheny for the actual cost of switching the cars, with no compensation for cars

switched to the parent. The ICC held Allegheny to be a common carrier subject to regulation because it completed the common carrier obligations of the connecting rail carriers to the shipping public. The ICC noted that the performance of the incidents of operation such as the issuance of bills of lading or the collection of freight charges could not control the result. 277 ICC at 121, 122. See also, Lone Star Steel Company v. McGee, 380 F. 2d 640, 646 (5th Cir., 1967) (Steel company operating a rail line which delivers shipments to 14 shippers under the rate charged by the

connecting trunk line railcarrier held a common rather than a private carrier under the Federal Employers' Liability Act); and Annotation, Company Engaged Exclusively or Mainly in Furnishing Switching Service as Carrier Engaged in Interstate Commerce, 38 A.L.R. 1147 (1925).

In the instant case, the E&E picks up and drops off freight cars at the BN interchange track, and delivers and removes cars from industries along its line, including facilities of its parent company. The service performed by E&E is an integral step in the interstate movement of freight by the BN. Association of P&C Dock Longshoremen, supra. The Board finds that E&E's operation is that of a rail carrier in interstate commerce which is subject to the jurisdiction of the ICC.

Accordingly, it is the determination of the Board that E&E is and has been a rail carrier employer under the RRA and RUIA from the date that it began operations, May 1, 1989.

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A threshold question is whether the Board may determine E&E to be a rail carrier employer under the RRA and RUIA without a prior determination by the ICC that the E&E is a rail carrier subject to the Interstate Commerce Act. As a general matter, section 7(b)(1) of the RRA and section 12(l) of the RUIA both provide the Board with all powers necessary to administer the Acts. It is axiomatic that administrative agencies in discharge of their duties necessarily have the power to construe and apply the provisions of the law under which they function. 2 Am Jur 2d Administrative Law § 233. Specifically, section 5(g) of the RUIA, incorporated by reference into section 8 of the RRA, provides that the Board's findings of fact and conclusions of law with respect to the liability of a company for contributions as an employer under the RUIA (see RUIA section 5(c)(4)) are binding and conclusive for all purposes and upon all persons, including any other agent of the United States. Conclusions of law regarding the definition of covered employer are necessarily a part of a determination of a company's liablity for contributions under the RUIA, and its duty to file reports of compensation under section 9 of the RRA. The Board therefore concludes that the absence of an ICC determination regarding the status of a company as subject to the jurisdiction of that agency does not prevent the Board from determining under the RRA and RUIA that the company is a "carrier by railroad, subject to Part I of the Interstate Commerce Act". The ICC itself has recognized this principle. North Carolina Ports Railway Commission -- Petition for Declaratory Order or Prospective Abandonment Exemption, Finance Docket No. 31248, 1988 ICC LEXIS 282, (September 21, 1988), at 13, note 9. (ICC refrained from commenting upon the impact of a declaratory order sought by a company in order to resolve the company's status as an employer covered by the Acts administered by the Board).