

**Employer Status Determination
RailTex Service Company, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of RailTex Service Company, Inc. (RSCI) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of RSCI has not previously been considered.

This decision is based on information provided by Ms. Julie Herbort, Tax Manager, of RSCI. RSCI is 100% owned by RailTex, Inc. RailTex, Inc. has been determined not to be an employer under the Acts. See B.C.D. No. 95-25, March 16, 1995. RailTex, Inc. also owns several railroad carriers subject to the Interstate Commerce Act.

RSCI was incorporated on January 1, 1991. RSCI began operations on January 1, 1991. RSCI's employees provide other RailTex subsidiaries with consulting services such as financing, accounting, safety, human resources, real estate, tax planning and preparation, electronic data processing, and other managerial services. All of the revenues of RSCI are derived from providing these services to its affiliated railroads.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. § 231(a)(1)(i)), defines a covered employer as to include "any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of title 49" of the United States Code. There is no evidence suggesting that RSCI is an employer within this subsection.

However, section 1(a)(1) of the Railroad Retirement Act further defines a covered employer as:

(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 (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a), 1(b) and 1(d)(1) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §§ 351(a), (b) and (d)(1)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231).

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The evidence of record shows that RSCI is under common control with railroad employers as defined in section 1(a)(1)(i) of the Railroad Retirement Act because it is owned and controlled by RailTex, Inc. which also owns several covered rail employers. Thus, the question presented is whether RSCI performs any "service . . . in connection with [rail] transportation." If RSCI does perform any service in connection with rail transportation, it will be considered an employer under the Acts. The question of what constitutes service in connection with railroad transportation has been addressed in many decisions of the Board and in numerous decisions by the United States Courts of Appeals.

As noted earlier, RSCI provides various consulting services for its affiliated railroads. This service includes financial accounting, electronic data processing, and human resources. 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 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 was 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.

In Adams v. Railroad Retirement Board, 214 F.2d 534 (9th Cir. 1954), the Court held that the provision of "accounting services, the services of a purchasing department, *** correspondence and stenographic services *** bridge and building services, a safety engineer and repairs for its automotive equipment and its general rolling stock" by a carrier's affiliate were services in connection with rail transportation so as to render the affiliate an employer under the Acts. Adams, at 542. In Southern Development Co. v. Railroad Retirement Board, 243 F.2d 351 (8th Cir. 1957), the Court, at 355, held that a railroad affiliate which owned and operated an

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office building "almost exclusively for use by a railroad company for ticket selling and general offices could reasonably be considered [to be performing] a service connected with and supportive of rail transportation" and was an employer under the Acts.

More recently, the United States Court of Appeals for the Seventh Circuit, in Livingston Rebuild Center, Inc., v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), found that a company affiliated with a railroad carrier engaged in the business of repairing and rebuilding railroad cars and engines and which derived at least 25% of its revenue from its affiliated railroad was performing a service in connection with transportation by rail. See also, Railroad Concrete Crosstie Corporation v. Railroad Retirement Board, 709 F.2d 1401 (11th Cir. 1983).

Finally, section 202.7 of the Board's regulations (20 CFR 202.7) states that a service is in connection with rail 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...."

Based on a review of the evidence of record, the Board's regulations, and the various court decisions applying section 1(a)(1)(ii) of the Railroad Retirement Act, it is the determination of the Board that the various consulting services being provided are reasonably related to the fulfillment of the common carrier obligations of its affiliated railroads and, therefore, that these services are services in connection with the transportation of passengers or property by railroad. Accordingly, it is the determination of the Board that RSCI is an employer under the Acts as of the date it commenced operations, January 1, 1991.

Glen L. Bower

V. M. Speakman, Jr.

RailTex Service Company, Inc.

Jerome F. Kever

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TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination
RailTex Service Company, Inc.

Attached is a proposed coverage ruling for Board approval.

Attachment