EMPLOYER STATUS DETERMINATION
Railroad Ventures, Inc.

This is the determination of the Railroad Retirement Board regarding the status of Railroad Ventures, Inc. (RVI) 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).

Information regarding RVI was provided by attorney Richard R. Wilson. Information was also found in Surface Transportation Board (STB) Decision, Finance Docket No. 33385. Mr. Wilson indicated that RVI was incorporated November 6, 1996, and on that same date acquired by purchase the railroad right of way of the Youngstown & Southern Railroad Company between Youngstown, Ohio and Darlington, Pennsylvania. In a decision in STB Finance Docket No. 33385 entered on July 1, 1997, the 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 in connection with its ownership of the rail line and right of way; service is provided by the Ohio & Pennsylvania Railroad Company, an employer covered by the Acts (BA No. 2264).

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;

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

A majority of the Board, the Management Member dissenting, find, for the reasons set out below, that RVI became a rail carrier employer under the RRA and the RUIA effective November 6, 1996, the date on which it acquired its rail line. Because this decision is a departure from recent Board coverage decisions, a brief history follows.

Background

In Board Order 89-74, entered on February 22, 1989, a majority of the Board, with the Labor Member dissenting, held in the Appeal of the Board of Trustees of the Galveston Wharves, that a lessor employer which had sold all of its railroad assets, so that the lessor no longer had the equipment necessary to resume railroad operations, ceased to be a covered rail carrier employer under the Acts administered by the Board. In four separate decisions issued on January 19, 1996,[1] a majority of the Board, the Labor Member dissenting, voted to extend the rule of the

[1]B.C.D. Nos. 96-2, 96-3, 96-4, and 96-5 held that the following entities were not covered: Port Railroads, Inc., Union County Industrial Railroad Company, Hollidaysburg and Roaring

Galveston Wharves decision to an entity which obtains authority to operate a railroad and then contracts with another entity to provide railroad service instead of providing service itself. Subsequent coverage decisions have also held that 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, is not itself a covered rail carrier employer under the RRA and the RUIA.

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A majority of the Board, the Management Member dissenting, believe that an entity which obtains STB authority to operate a railroad falls within the plain meaning of the carrier definition of employer under the RRA and the RUIA. The very fact that the entity has sought and obtained STB authority to operate a rail line is evidence that it is subject to STB's statutory jurisdiction over railroad transportation. In addition, despite the fact that a particular entity may contract with another company to operate its rail line, the entity which has been certified by the STB to operate the line has a continuing obligation to furnish rail transportation over the line until such time as the STB issues authority permitting the cessation of rail transportation over that line. The STB decision in the Railroad Ventures case illustrates that continuing obligation.

In STB Finance Docket No. 33385, RVI obtained the authority from the Surface Transportation Board both to acquire and operate the rail line in question. The STB noted in its decision that RVI initially acquired the subject lines "without appropriate authority" in November 1996. On January 3, 1997, RVI filed a notice of exemption under 49 CFR 1150.31(a) for retroactive authorization of its purchase, stating that it had been unaware of the need for STB approval of the acquisition. RVI's notice of exemption was rejected because it had not provided sufficient information to determine whether it qualified for the class exemption in light of certain allegations that RVI would not operate the lines or arrange for another party to operate them. In its decision in Finance Docket No. 33385, the STB stated that its "main concern in rejecting the notice the first time was RVI's failure to acknowledge ***its common carrier obligation*** under 49 U.S.C. 11101(a)" (Emphasis supplied.). The STB noted that Section 11101(a) provides in pertinent part that "[a] rail carrier providing transportation or service subject to the jurisdiction of the [Surface Transportation] Board under this part shall provide transportation or service on reasonable request." The STB then stated that RVI had entered into an agreement with the Ohio & Pennsylvania Railroad Company to provide service, noting that if RVI decides to abandon the lines, RVI "must first obtain our [i.e., STB] abandonment authorization."

The portions of the STB decision discussed above provide clear evidence that RVI is subject to the jurisdiction of the STB as a carrier by railroad. RVI sought and obtained STB authority to acquire and operate its line of railroad. Even though railroad operations are currently being performed by another company, RVI has ultimate responsibility either to see to it that railroad operations continue or to obtain authority to discontinue such operations. A majority of the

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Spring Railroad Company, and Greater Shenandoah Valley Development Company a/k/a Shenandoah Valley Railroad Company.

Board, the Management Member dissenting, therefore find that RVI became a rail carrier employer under section 1(a)(1)(i) of the RRA and the corresponding sections of the RUIA beginning November 6, 1996, the date it acquired its line of railroad.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting)

WRITTEN DISSENT

Jerome F. Kever
Management Member

Employer Status Determination: Railroad Ventures, Inc.

With this majority decision, the Board contravenes a well-reasoned and worthwhile policy that reduces the administrative burden of filing and processing reports for entities which are not engaged in railroad activities and which have no railroad employees. The previous reduction in reporting requirements is consistent with the Administration's government-wide goal of eliminating unnecessary reporting and paperwork. The obvious questions to ask are: "For whose benefit is the policy changed?" and "What value is there to the Board in having entities such as Railroad Ventures report each year that they have no employees?" Despite the majority's preference in this instance for the "plain meaning" and a literal interpretation of the Railroad Retirement Act and the Railroad Unemployment Insurance Act (the Acts), that approach is not the only valid legal interpretation, nor the best legal interpretation, of the Acts. In my view, the previous coverage policy on the lessor/lessee issue was a proper legal exercise of the Board's administrative discretion which reflected the intent of the parties and recognized the underlying business transaction.

In this decision, a majority of the Board reasons that Railroad Ventures ultimately maintains an obligation to the Surface Transportation Board (STB) to operate its railroad. While this is a fact, it is unclear as to why the residual obligation to operate the railroad is suddenly a basis for changing the previous lessor/lessee policy. To the contrary, the Board has always recognized the STB's continuing authority over the entities at issue here, and the previous policy simply acknowledged that in a modern business environment, carriers with STB authority do in fact contract out that operating authority to other carriers who are covered under the Acts. I would like to point out that, an entity's continuing obligation to operate the railroad notwithstanding, Labor Member Speakman joined the former Chairman and myself in Board Coverage Decision 94-79, West Central Ohio Port Authority (WESTCO)(August 30, 1994), finding that WESTCO, a governmental entity which owned, but did not operate, the railroad at issue was not covered under the Acts. That decision specifically noted that WESTCO was both a common carrier subject to the Interstate Commerce Act and that, as a common carrier, it had a residual duty to operate the freight line which it had contracted with the Indiana & Central Ohio Railroad Company to operate. A unanimous Board voted in accord with the decision in Galveston Wharves to find that WESTCO was not an employer under the Acts. Similarly, in Board Coverage Decision 93-66, Peninsula Corridor Joint Powers Board and San Mateo County Transit District (September 24, 1993), Labor Member Speakman also joined a unanimous Board in finding that the owner/lessor of the railroad was not a covered entity under the Acts. A similar holding was unanimously reached in B.C.D. 93-17.1, Maybrook Properties Inc.; B.C.D. 93-23, South Charleston Railroad Co.; and B.C.D. 93-64, Carey Short Line Corp. On the other hand, I have voted to find lessors of railroad properties covered under the Acts when they enter into operating agreements which confer specific obligations (B.C.D. 94-112, Texas & Oklahoma Railroad Co.), and when the entity retains not only the residual obligation to operate the railroad, but also the capability to operate the railroad (B.C.D. 93-60, Trinidad Railway, Inc.).

There was virtually no deliberation by the Board of the points I raised in my August 21, 1998 memorandum, including my discussion of the prevalence of municipalities and other government entities which come under the scope of the owner/lessor coverage doctrine and which could be affected adversely by this decision. Accordingly, I will raise my concerns again here for a wider audience.

The business of railroading has changed dramatically in the last 60 or so years since the employer coverage provisions of the Acts were first discussed, negotiated, and enacted. The lessor-lessee type of case is simply one example of an employer status issue which warrants an appropriate exercise of the Board's administrative discretion. Not all entities which delegate (by lease or other arrangement) the responsibility for actual rail operations to another entity initially obtain STB's authority for operating the rail line in question. Further, there can be questions regarding the possible attribution of employees of the operating entities to the lessor; and in other cases, there are entities which simply own the rail line or trackage rights but contract out the operation of the railroad. A fairly large number of these latter cases involve local government entities, such as municipalities, and port or regional authorities, which are formed specifically for the purpose of preserving critical rail lines in danger of abandonment. These governmental entities never intend to operate the rail line, but rather to contract out the operation to a qualified entity. Again, I would have to reference Board Coverage Decisions 94-7 and 93-66, as cited above, which were approved by a unanimous Board, including Labor Member Speakman.

Further, Board assistants from all three offices were previously advised by the General Counsel that the Board could, by regulation, determine that under certain circumstances an owner and designated operator of a railroad that delegates authority for operation of the line to another entity is not a covered employer under the Acts. The General Counsel suggested, however, that while the Board could issue such a regulation, a more desirable and acceptable legal solution would be to "rule that the ICC (predecessor to the STB) authorized entity is the covered employer unless it has leased the operations to another entity or contracted with another entity to operate the line and the other entity is a covered employer or has received ICC authority to operate the line" (memorandum of the General Counsel to Board Assistants dated August 16, 1995). The former majority of the Board adopted the latter approach to ensure that the entity which actually operates the railroad is covered. Thus, I reiterate my view that today's majority decision, while it represents a literal interpretation of the Acts, is not necessarily the only or even the best interpretation of the Acts in all circumstances. The Board does retain administrative discretion, and the previous coverage policy was, in my view, a legally sound and appropriate exercise of the Board's discretion.

Finally, today's decision also quotes portions of the STB's comments that could be interpreted to suggest that Railroad Ventures has been evasive in complying with regulatory requirements. Accordingly, I wish to highlight that portion of the record which indicates that Railroad Ventures initially was not aware of its obligations to the STB with respect to the purchase of railroad tracks.

Date

Jerome F. Kever, Management Member