

EMPLOYER STATUS DETERMINATION - RECONSIDERATION
JJJ Leasing Company

This is a decision on reconsideration of Deputy General Counsel's Opinion L-91-108. In that opinion the Deputy General Counsel found that JJJ Leasing Company, Inc. (JJJ) was under common control with the Ohio Central Railroad, the Ohio Southern Railroad, and the Youngstown & Austintown Railroad because they were all controlled through stock ownership by the same individual, Mr. Jerry J. Jacobson.

In addition, the Deputy General Counsel found that JJJ was performing services in connection with railroad transportation because approximately 60 percent of its asset value, consisting of locomotives and other railroad equipment, was leased to its affiliate railroads. On reconsideration, JJJ provided additional information concerning its operation and its relationship with affiliate railroads. This new information constitutes a different depiction of operations of JJJ than those described in Legal Opinion L-91-108.

From 1969 to 1988, the predecessor of JJJ, J & J Leasing Company, was involved in selling supplies and equipment to passenger excursion railroad companies. For the majority of that time, the company had no employees. The company was formed as a sole proprietorship with all functions performed by the owner, Mr. Jacobson. There were no leasing activities. Concurrent with the acquisition of the Ohio Central Railroad by Mr. Jacobson, J & J Leasing began primary operations as an excursion railroad. Mr. Jacobson used J & J Leasing to operate the excursion railroad so as to segregate that operation from the freight railroads owned by him. During 1991, J & J was incorporated under the name JJJ Leasing, Inc. The only other change in the company's operations occurred in July 1992 when the excursion operations were transferred to Sugarcreek Amish Tours, Inc. Despite its name, JJJ maintains that its primary business since 1988 has always been the operation of a seasonal excursion railroad which runs tours through Amish country located near Sugarcreek, Ohio. The excursion railroad was determined not to be a covered employer in Legal Opinion L-91-108. JJJ represents that, since the transfer of the excursion railroad, it has had no employees, except presumably for Mr. Jacobson, and has functioned solely as a financing company for the acquisition of locomotives, passenger cars, and heavy equipment. It should be noted, however, that a Coverage Investigation Report prepared in May 1996 states that individuals working on railroads affiliated with JJJ have been reported as employees of JJJ.

In 1988 the various freight railroads owned by Jacobson needed railroad equipment but did not have money to purchase such equipment. Mr. Jacobson advises that he could not obtain conventional loans from commercial lending institutions for equipment for these railroads. No commercial lending institution

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was willing to lend money to the shortline railroads because they were not expected to be profitable. Consequently, Mr. Jacobson used funds from the operation of JJJ's excursion railroad to purchase equipment which was then used by Mr. Jacobson's railroads. This equipment consisted of locomotives, freight cars, maintenance of way equipment, and highway vehicles.

There were no formal lease agreements under which the railroads paid a leasing fee to JJJ for their use of the equipment. In fact, all arrangements were very informal because Mr. Jacobson owns both the railroads and JJJ. There was, however, an informal arrangement under which the railroads repaid to JJJ the money which JJJ had paid for the rail equipment. The amount paid annually to JJJ for the equipment decreased from 1988 through 1991, as the amounts owned by the railroads to JJJ were gradually paid off (\$111,000 in 1988, \$70,176 in 1989, \$73,100 in 1990, and \$18,000 in 1991).

After all the money which JJJ had advanced for the equipment had been repaid, the railroad concerned would make no further payments to JJJ and legal title for the equipment would be transferred to the railroad which had paid for it. Until the equipment was paid for, title remained with JJJ. JJJ performed maintenance on the equipment by means of employees of the railroads owned by Mr. Jacobson. In the event that equipment needed major repairs, JJJ would have provided the funds for such repairs in order to protect its assets. JJJ leasing has had no employees since at least July 1992.

As stated above, in Legal Opinion L-91-108 the Deputy General Counsel found that JJJ was performing services in connection with railroad transportation because of its leasing activities with its affiliates. Section 202.7 of the Board's regulations provides that a service is in connection with railroad transportation if such service is reasonably related, functionally or economically, to a carrier's common carrier obligations.

The provision of locomotives and other railroad equipment to a common carrier may constitute service in connection with railroad transportation. See Livingston Rebuild Center v. Railroad Retirement Board, 970 F.2d 2954 (7th Cir. 1992) (repair and construction of railcars for affiliate common carrier held to be a service in connection with railroad transportation) and Railroad Concrete Crosstie Corporation v. Railroad Retirement Board, 709 F.2d 1404 (11th Cir. 1983) (provision of crossties for parent railroad held to be a service in connection with railroad transportation). However, based upon evidence which JJJ has made available on reconsideration, a majority of the Board finds that virtually all of the services characterized as leasing in Legal

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Opinion L-91-108 were not leasing but rather amounted to a financing arrangement between JJJ and the railroads which permitted the railroads to purchase equipment that the railroads could not purchase directly. In short, Mr Jacobson used money made from the excursion railroad operated by JJJ, with his own finances, to purchase locomotive and other equipment which he, through JJJ, would "lease" to a railroad under an informal arrangement. Since Mr. Jacobson owned JJJ, this arrangement amounted to a loan by Mr. Jacobson to the railroads. JJJ, because it apparently had the necessary credit worthiness, was simply used as the vehicle for the financing. JJJ's leasing activities to non-affiliated railroads (true leasing activities) have accounted for only seven percent of its asset value. Finally, it should be noted that except for the owner, Mr. Jacobson, no employees of JJJ were involved in the "leasing" activities, but rather worked on the excursion railroad, and that all repairs on the leased equipment were performed by covered railroad employees.

The Board has previously held that the provision of financing services to affiliates railroads can constitute service in connection with railroad transportation. See Notice No. 93-73, Canadian Pacific Finance, Inc., issued October 28, 1993, (provision of tax, cash management, internal audit, and financing services to affiliate railroads). However, this case differs from that of Canadian Pacific Finance, Inc., in that the financing provided for its affiliated railroads was an ad hoc, irregular function, which allowed JJJ's affiliate railroads to purchase equipment on an installment basis.


In essence, in the view of the majority, JJJ rendered a one-time financing service to its affiliate railroads. There is no indication that such service will be repeated. A majority of the Board finds, therefore, that JJJ's provision of such financing service to its affiliate railroads was casual service within the meaning of Board regulation 202.6 (20 CFR 202.6).

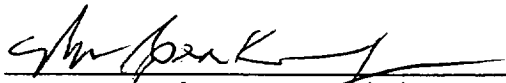
In conclusion, a majority of the Board finds that JJJ's primary business from 1988 until July 1992 was the operation of a non-covered excursion railroad; that it has not engaged in leasing activities with its affiliate railroads since what had been characterized as leasing was simply a financing arrangement whereby the owner of JJJ was able to purchase equipment for the railroads he also owned; that JJJ's provision of financing service to its affiliate railroads was casual service; and that viewing evidence as a whole, JJJ was not performing services in connection with railroad transportation.

Based upon the above, a majority of the Board finds that JJJ is not

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a covered employer under the Acts. Legal Opinion L-91-108 is reversed. However, individuals who perform or performed work for employers under the Acts and who are or have been paid by JJJ are employees of those employers and their compensation and service should be reported by those companies.


Glen L. Bower


V. M. Speakman, Jr. (Dissenting)


Jerome F. Keever