

EMPLOYER STATUS DETERMINATION
Wilson Railway, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Wilson Railway, 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).

According to information submitted by Mr. David Carroll, attorney for Wilson & Company, Inc. (WCI), WCI is an engineering and architectural firm which, among other independent consulting services, also provides design engineering services to the rail transportation industry. These services to the railroad industry comprise about 12% of WCI's total revenue.

Wilson Railway, Inc. (WRI) is owned by two shareholders, WATCO Transportation Services, Inc. (WATCO) and WCI. WATCO, an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (B.A. No. 9848), has the controlling interest in WRI, as well as the right to elect all directors of WRI.

WRI is a new entity which has not yet begun operations. Before deciding whether WRI will be an employer under the Acts administered by the Board, we must address the issue of whether the Board should at this time issue a ruling or delay until WRI actually begins operations. We have previously provided coverage opinions with regard to future operations. See B.C.D. 01-83 (Keokuk Electric Railway, Inc.), B.C.D. 02-12 (Southern California Regional Rail Authority), and B.C.D. 03-23 (Massachusetts Bay Commuter Railroad). In those cases we issued decisions prior to the commencement of rail operations because definite start dates had been provided to the agency. In view of the assurances of Mr. Carroll that WRI will begin operations immediately upon the issuance of a Board determination, and in order to provide for as smooth a transition as possible, a decision by the Board regarding the coverage status of WRI will facilitate rail operations in the United States. Therefore, the Board will issue a decision regarding WRI at this time.

According to Mr. Carroll, WCI is planning to enter into a contractual agreement with WRI, by which WCI will use WRI to provide design railroad engineering services¹ to WCI's clients. The employees involved in performing these services will all at times remain employees of WRI on WRI's payroll. While WRI does not yet have employees, it is anticipated that WRI would have at least 5 (five) employees in its first year of operation.

¹ The design engineering services are, according to Mr. Carroll, in the nature of professional services directly affecting the configuration of property owned by one or more railroads.

In addition to the design engineering services provided by WRI, it is anticipated that WRI's services would include track inspection, bridge inspection, image and emergency services, and capital and maintenance programs for property

owned by one or more railroads. It is anticipated that at least 90% of WRI's revenue will be (either directly or indirectly) from a rail carrier, including WATCO, short line railroads, regional railroads, private and public industries with rail infrastructure, and communities developing rail infrastructure for economic development. WRI will provide its services under written agreements, and it is not anticipated that WRI will lease any railroad track or equipment.

Section 1(a) (1) of the Railroad Retirement Act (45 U.S.C. § 231(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;
- (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 (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

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

WRI is clearly not a carrier by rail. By reason of its ownership and control by WATCO, WRI is under common control with a rail carrier employer. Furthermore, as stated above, WATCO retains the right to elect all directors of WRI. We therefore find that the available evidence indicates that WRI is under common ownership with a rail carrier and controlled by officers or directors who control a railroad.

Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by

railroad, if such service or operation 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, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

As stated above, the evidence of record shows that WRI's services would include design engineering services, track inspection, bridge inspection, image and emergency services, and capital and maintenance programs for property owned by one or more railroads. It is anticipated that at least 90% of WRI's revenue will be from rail carriers, including WATCO (WRI's rail carrier affiliate), short line railroads, regional railroads, private and public industries with rail infrastructure, and communities developing rail infrastructure for economic development. According to Mr. Carroll, 10-15% of WRI's services will be performed for WATCO alone.

In Adams v. R.R.B., 214 F.2d 534 (9th Cir. 1954), the Court of Appeals for the Ninth Circuit held that a non-carrier subsidiary which was in the electric utility business was found to be a covered employer on the grounds that it was also engaged in accounting, purchasing, and stenographic services; caring for and replacing poles in an overhead trolley system; and bridge building and general repair services for its carrier affiliate. Similarly, among the services WRI will provide to its rail carrier affiliate as well as other rail carriers are track inspection, bridge inspection, capital programs, and design engineering services. Accordingly, we find WRI will be performing service in connection with the transportation of passengers or property by railroad.

Therefore, based on the information set forth above, it is the determination of the Railroad Retirement Board that Wilson Railway, Inc. is a covered employer under the RRA and RUIA as of the date of this ruling.

Original signed by:

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