

EMPLOYER STATUS DETERMINATION

OCT 14 1997

Railcar Repair of the South, Incorporated Arkansas Motive Power Services, Inc.

In an opinion dated October 12, 1995 (B.C.D. 95-101), the Board held that Railcar Repair of the South, Incorporated and Arkansas Motive Power Services, Inc. were not employers under the Railroad Retirement and Railroad Unemployment Insurance Acts. The Board also held that employees of Railcar Repair and Arkansas Motive Power should be considered employees of Dardanelle & Russellville Railroad, Inc. (D&R). In a letter dated July 3, 1997, submitted by counsel for D&R, D&R requests reconsideration of the Board's decision holding that those employees are employees of D&R.

Submitted with the request for reconsideration is an affidavit of Mr. William K. Robbins, Jr., President of D&R, to the effect that he had received no notice of the Board's decision until he received a letter of November 22, 1996, from Wayne J. Scharnak, Chief of Compensation and Certification requesting D&R to submit service and compensation reports for the employees concerned.

Section 259.3 of the Board's regulations provides in pertinent part that:

- (a) A party to an initial decision issued under § 259.1 shall have the right to request reconsideration of that decision. A request for reconsideration shall be in writing and must be filed with the Secretary to the Board within one year following the date on which the initial determination was issued. * * *
- (b) A party who claims to be aggrieved by an initial decision of the Board but who fails to timely request reconsideration under this section shall forfeit any further right to appeal under this part.

A copy of the Board's decision was mailed to Mr. Robbins on October 23, 1995, and was not returned to the Board. It was mailed to the address provided to the Board by counsel in connection with the Board's investigation, which is the same address as that found in the articles of incorporation for the two companies at issue, and counsel for D&R does not contend that the decision was mailed to an incorrect address. Also, auditors of the Board were in contact with officers of the two companies involved for some time prior to January 1995 and Mr. Robbins is or was a principal shareholder and officer of each of these companies. In this connection, it should be considered that draft audit reports regarding the Board's coverage investigation of these companies were submitted to Mr. Robbins by the Board's auditors, and comments were received from Mr. Robbins regarding each of the reports. Accordingly, the Board finds that the request for reconsideration was not filed timely and that there is insufficient evidence to support a finding that there exists good cause for failure to file the appeal timely.

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However, in view of information submitted by counsel relating to the substantive issues involved, which is inconsistent with the information upon which the determination of the Board was based, the Board will consider the coverage issues raised in this case on its own motion. Accordingly, this decision is not a decision on reconsideration, but is a new initial decision.

Section 1 of the Railroad Retirement Act defines the term "employer" to include:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;

(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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. [45 U.S.C. §231(a)(1)(i) and (ii)].

Section 1 of the Railroad Unemployment Insurance Act contains essentially the same definition.

B.C.D. 95-101 found that both Railcar Repair and Arkansas Motive Power are under common control with the Dardanelle & Russellville Railroad (D&R) (BA No. 3813) and the Ouachita Railroad, Inc. (ORI) (BA No. 3882). All four of these companies are subsidiaries of a holding company named Arkansas Short Line Railroads, Inc. Nothing in the July 1997 letter from D&R's attorneys challenges or contradicts that finding.

The previous decision of the Board in regard to employees of Railcar Repair was based on findings that those employees performed all their work on property of D&R or Ouachita Railroad, Inc., also a covered employer (BA No. 3882), and were supervised by employees of the rail affiliates. The decision of the Board in regard to employees of Arkansas Motive Power was based on findings that those employees performed all their work on D&R property, that one of those employees was on the D&R payroll, and that the other employee was supervised by D&R employees.

In support of its contentions as to employees of Railcar Repair, counsel for D&R submits payroll summaries for April 15, 1991, through September 30, 1996 (the date as of which Railcar Repair ceased operations), and a revenue summary by location for 1991 through 1996. In support of its

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contentions as to employees of Arkansas Motive Power, counsel for D&R submits payroll summaries for August 1, 1993, through May 15, 1995 (the date as of which Arkansas Motive Power ceased operations), and statements of revenue for August 1, 1993, through April 30, 1995.

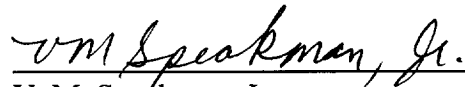
The Board's ruling that Railcar Repair and Arkansas Motive Power were not employers under the Railroad Retirement and Railroad Unemployment Insurance Acts was based on a finding that the percentage of operations performed by those two companies for their rail affiliates was negligible. The statements of revenue submitted show the following: percentage of Railcar Repair revenue from rail affiliates: 4/15/91-12/31/91, 100 percent; 1992, 86 percent; 1993, 70 percent; 1994, 23 percent; 1995, 45 percent; 1/1/96-9/30/96, 20 percent; percentage of Arkansas Motive Power revenue from rail affiliates: 8/1/93-12/31/93, 28 percent; 1994, 25 percent; 1/1/95-4/30/95, none.

The percentages of revenue attributed to the rail affiliates are significant and the rationale of Board Coverage Decision 93-79, In re VMV Enterprises Incorporated, which involved a negligible percentage of work for an affiliate, does not apply to the instant case. Accordingly, the Board finds that Railcar Repair and Arkansas Motive Power were performing service in connection with rail transportation. See Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), wherein the Court affirmed the Board's decision that a company which provided 25% of its business to its affiliated rail carrier was performing service in connection with railroad transportation.

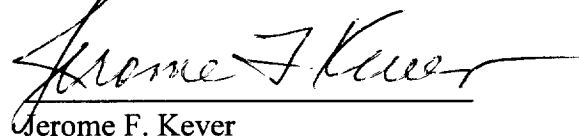
Since Railcar Repair and Arkansas Motive Power are under common control with rail carriers, the Board finds that they were employers under the Acts for the periods during which they operated, March 19, 1991, to September 30, 1996, and May 25, 1991, to May 15, 1995, respectively. Service may be credited in accordance with section 9 of the Railroad Retirement Act (45 U.S.C. § 231h) and Part 211 of the Board's regulations (20 CFR Part 211).



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