

**RECONSIDERATION OF EMPLOYER STATUS DETERMINATION
RAILAMERICA AFFILIATES
Huron Transportation Group
Huron Development and Construction
RailAmerica Services Corporation**

This is the determination of the Railroad Retirement Board on reconsideration of the status of RailAmerica Services Corporation as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.), and the status under those Acts of individuals formerly on the payrolls of Huron Transportation Group (HTG) and Huron Development and Construction (HDC).

The Board previously held that RASC was a covered employer effective January 1, 1993, that HTC was a covered employer beginning January 1, 1990, through December 23, 1993, and that HDC was a covered employer beginning June 31, 1989 (sic), to December 23, 1993. In its request for reconsideration, counsel for RailAmerica, Inc. (a company which has been previously held not to be an employer under the Acts), requests that only a separable portion of RASC be held to be an employer. The decision that HTG and HDC were employers under the Acts is not disputed; rather counsel requests that certain employees of those companies who performed services for RailAmerica be held to be employees of RailAmerica. Counsel also mentions that RASC ceased operations December 1995, and merged into RailAmerica on February 1, 1996.

RASC was a subsidiary of RailAmerica. Counsel's contention regarding RASC is that more than half of its operation did not constitute service in connection with rail transportation but rather constituted performance of holding company functions for the RailAmerica conglomerate. These functions are described as including "shareholder related functions," "monitoring and oversight of a subsidiary," "strategic planning and acquisition evaluation," "accounting, benefit plan administration and income tax preparation," and:

evaluation of sources of funds; solicitation of funds; acquisition lending; evaluation and acquisition of insurance; Securities and Exchange Commission filings; obtaining debt and equity financing; press, public and governmental relations; capital allocation among subsidiaries; risk management for all subsidiaries; stock offerings; stock warrant issuance and redemption; cash management; preparation of tax returns for rail and non-rail subsidiaries; maintaining computer and information systems; relations with outside auditors; and, administering employee benefit plans for rail and non-rail employees. [Footnote 8, Page 10 of the Request for Reconsideration.]

Counsel's contention appears, in the view of the majority, to be based on a misapprehension of Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). That case held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of § 3231 of the Railroad Retirement Tax Act. It did not hold that

RAILAMERICA AFFILIATES
Huron Transportation Group
Huron Development and Construction
RailAmerica Services Corporation

the type of functions performed by such a parent company did not constitute services in connection with rail transportation.

The Board addressed a similar contention in regard to RASC in its initial determination. On page 12 of that determination, the Board recognized that RASC performed services as described above for its rail and non-rail affiliates. These services, if performed for rail carriers, as they were in the instant case, constitute services in connection with rail transportation. Accordingly, a majority of the Board sees no basis on which to hold only a separable portion of RASC to have been a covered employer. However, based on information supplied by counsel that RASC has ceased operations and merged into RailAmerica, the Board concludes that RASC's status as a covered employer terminated as of the date of that merger, February 1, 1996.

Counsel also contends that John Marino, Ralph Iden, and Karen Krozek, who were formerly on the payrolls of HTG and HDC, should be held to have not been employees of those companies but of RailAmerica. The basis for this contention is that these three individuals performed "holding company functions" for RailAmerica.

John Marino was on the payroll of HTG from June 1989 to December 21, 1993. He was on the RASC payroll from January 1, 1994, to December 31, 1995. Thereafter he was on the RailAmerica payroll. Ralph Iden was on the payroll of HDC from June 1989 to April 1991. He was on the HTG payroll from April 1991 to December 31, 1992. He was on the RASC payroll from January 1, 1993, to December 31, 1995. Thereafter he was on the RailAmerica payroll. Karen Krozek was on HDC's payroll in 1992 and on RASC's payroll in 1993 and 1994.

While on HTG's and RASC's payrolls, Mr. Marino "spent almost all of his time screening potential candidates for acquisition by [RailAmerica]" (page 22, Request for Reconsideration) and on "government and public affairs" (Mr. Marino's affidavit at tab G of the Request). While on RASC's payroll Mr. Iden:

was responsible for handling real estate related matters, including evaluating potential acquisitions by reviewing title and property values, monitoring and administering the performance of lease obligations, and overseeing the disposition of surplus property. He also served as editor of a newsletter [RailAmerica] distributed to current and potential investors and lenders. Mr. Iden also served as [RailAmerica's] liaison with various government agencies and officials, and was charged with keeping the government informed of [RailAmerica's] growth, and

RAILAMERICA AFFILIATES
Huron Transportation Group
Huron Development and Construction
RailAmerica Services Corporation

maintaining the government's good will toward [RailAmerica] and its subsidiaries.
[page 18 of the Request for Reconsideration; see also his affidavit at tab C of the Request.]

Ms. Krozek worked as Mr. Iden's secretary.

Counsel's request in regard to Mr. Marino, Mr. Iden, and Ms. Krozek is that they should be considered to be employees of RailAmerica. During the period at issue, none of these individuals were paid by RailAmerica, and Mr. Marino and Mr. Iden were not in positions to be supervised by other employees (Ms. Krozek was presumably supervised by Mr. Iden). Essentially the contention regarding them must be based on the conclusion that they were performing holding company-type functions which could have been performed for RailAmerica and would generally be performed by a holding company. While this may be true, in the opinion of the majority, it is insufficient to support their being considered employees of RailAmerica. Accordingly, a majority of the Board concludes that Mr. Marion, Mr. Iden, and Ms. Krozek should be considered to be employees of the companies whose payrolls they were paid through.

The request for reconsideration is denied. The employer status of RASC is terminated as of February 1, 1996.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting)