

**EMPLOYER STATUS DETERMINATION
CDL Electric Company, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of CDL Electric Company, Inc. (CDL) as an employer under the Railroad Retirement Act (RRA) 45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. § 351 et seq.) The following information was provided by Mr. Larry Seward Jr., President and owner of CDL, Mr. Marc McNeely, controller of CDL, and Mr. Craig R. Richey, General Counsel of Watco Companies, Inc. (Watco).

Initial information was provided by Mr. McNeely, who described CDL as "a commercial electrical contractor that provides signal installation and maintenance for multiple railroad lines". Mr. Seward advised the Board that CDL was incorporated on October 25, 1996 as a privately held corporation, and first began operations on that date with 33 employees. Of the 33 individuals, 23 work in positions related to business connected with rail carriers. Mr. Seward stated that 85% of CDL's business and revenues is rail carrier related¹. Mr. Seward further explained that CDL has provided services for Watco under a verbal agreement since CDL's inception in 1996. According to Mr. Richey, CDL performs its work directly for the following railroads: Watco Transportation Services, Inc.; Eastern Idaho Railroad, Inc.; Appalachian and Ohio Railroad, Inc.; Stillwater Central Railroad, Inc.; Mission Mountain Railroad, Inc.; South Kansas and Oklahoma Railroad, Inc.; Kansas & Oklahoma Railroad, Inc.; Great Northwest Railroad, Inc.; Kaw River Railroad, Inc.; Pennsylvania Southwestern Railroad, Inc.; Palouse River and Coulee City Railroad, Inc.; Mississippi Southern Railroad, Inc.; and Timber Rock Railroad, Inc.²

According to Mr. Seward, no railroad has a financial interest in CDL, no individual has both a controlling interest in CDL and a controlling interest in a rail carrier, and no officers or directors of CDL are also officers or directors of a rail carrier. CDL does not own any equipment or facility with a rail carrier; it is not a lessee or lessor of railroad track or equipment; the Federal Railroad Administration has not required CDL to pay user fees; the Surface Transportation Board has not ruled regarding the status of CDL;

¹ According to Mr. Seward, other than railroad work, CDL is a general electrical contractor and performs electrical jobs in and around the state of Kansas.

² Watco Transportation Services, Inc. owns these entities; Watco Companies, Inc. owns Watco Transportation Services.

and the Internal Revenue Service has not ruled on the applicability of the Railroad Retirement Tax Act to CDL. Mr. Seward stated "all work is commissioned through Watco. CDL deals exclusively with Watco. Work is requested by Watco, which CDL then performs and bills Watco who pays CDL directly."

Mr. Richey, General Counsel of Watco Companies, Inc., described CDL as

an independent contractor. The type and nature of work requested is made by the railroad personnel. The method, manner and timing of performing the requested work are dictated by CDL management and by applicable rules and regulations.

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).

CDL is clearly is not a carrier by rail. Further, the evidence of record establishes that it is not under common ownership with any rail carrier and that it is not controlled by officers or directors who control a railroad. Therefore, CDL is not a covered employer under the Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.
(Dissenting opinion attached)

Jerome F. Kever

**DISSENT OF
V. M. SPEAKMAN, JR.
EMPLOYER STATUS DETERMINATION
CDL ELECTRIC COMPANY, INC.**

I believe that we do not have enough information upon which to make a decision in this case. It appears that CDL is not controlled, or under common control, with an employer covered under our statutes by virtue of stock ownership or interlocking directors and officers. However, since CDL clearly performs services for employers covered under our statutes, there should have been some development by the General Counsel's office as to whether by virtue of its contractual arrangement with various carriers, CDL is controlled by the carriers.

Section 202.4 of the Board's regulations provides that control may be established, irrespective of stock ownership, where an employer under the Acts directly or indirectly controls the business decisions of a company.

The Board's criteria for control by contractual arrangement is set forth in General Counsel's Opinion L-79-41.

Finally, if CDL is not alleging that it controlled or under common control with an employer under the Railroad Retirement Act, either actually or constructively, I am not sure why we are issuing a decision in this case. Is CDL alleging its employees should be covered under our statutes even though the company is not? Under what theory of law? If CDL simply is seeking an advisory opinion? If so, this could be handled by the General Counsel without Board member involvement.

Original signed by:

V. M. Speakman, Jr.
Labor Member