B.C.D. 01-54

JUN 04 2001

EMPLOYER STATUS DETERMINATION
V & S Railway, Inc. (V&SR)

This is a determination of the Railroad Retirement Board concerning the status of V & S. Railway, Inc. (V&SR) 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.).

In Surface Transportation Board (STB) Finance Docket 33964, decided November 29, 2000, V&SR filed a verified notice of exemption to acquire and to operate the Medicine Lodge Subdivision (line) of Central Kansas Railway, L.L.C. (CKR) (B. A. No. 2765). The line acquired from CKR extends between milepost 0+1016 in Attica, and the end of the line at milepost 41.0, in Sun City, serving the intermediate points of Sharon, Medicine Lodge, and Lake City, a distance of approximately 41 miles in Harper and Barber Counties, Kansas. According to the STB decision, this transaction was to be consummated on or after November 28, 2000. This transaction is related to STB Finance Docket No. 33965, decided November 29, 2000, wherein Mr. Kern W. Schumacher and Mr. Morris H. Kulmer filed a verified notice of exemption to continue in control of V&SR, upon V&SR's becoming a Class III railroad. The STB decision in Finance Docket No. 33965 stated that Mr. Schumacher and Mr. Kulmer indirectly control two existing class III railroads: Tulare Valley Railroad Company[1] and Kern Valley Railroad Company.[2]

Information regarding V&SR was furnished by Mr. Fritz R. Kahn, an attorney representing V&SR. According to Mr. Kahn, V&SR "will assume responsibility for rendering service on the line" and further, V&SR "anticipates engaging a contractor to operate the line for its account." Mr. Kahn stated that V&SR "plans no operations and anticipates having no employees."

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.

Section 1 of the RUIA contains essentially the same definition.

In its decision regarding the employer status of Railroad Ventures, Inc. (B.C.D. 00-47), the Board held that an entity that has STB authority to operate a rail line, but leases or contracts with another to operate the line in question, is covered under the

[1] Tulare Valley Railroad Company was held not to be a covered employer in B.C.D. No. 94-1.
[2] The Board's Audit and Compliance Section is investigating the status of Kern Valley Railroad Company.

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Acts administered by the Board unless the Board determines that the entity is not a carrier. The Board enunciated a three-part test in B.C.D. 00-47 to be applied in making this determination. An entity that leases a line to another company or contracts with another company to operate the line is a carrier under the Railroad Retirement Act unless the Board finds that all three of the following factors exist: 1) the entity does not have as a primary business purpose to profit from railroad activities; 2) the entity does not operate or retain the capacity to operate the rail line; and 3) the operator of the rail line is already covered or would be found to be covered under the Acts administered by the Board.

We pointed out in our decision in the case of Railroad Ventures that an entity that is affiliated through common ownership with other for-profit carriers will be presumed to have as a primary business purpose to profit from the ownership of the rail line. We find that that presumption applies in this case to V & S Railway, Inc., which is under common control with Tulare Valley Railroad Company and Kern Valley Railroad Co. Accordingly, we do not have to reach the other two considerations, since all three need to be present to remain outside the coverage of the RRA and the RUIA.

Accordingly, it is determined that V & S Railway, Inc. became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act effective November 28, 2000, the date on which the STB decision indicates it acquired its rail line.

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