B.C.D. 02-12

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EMPLOYER STATUS DETERMINATION
Southern California Regional Rail Authority
Segregation of Dispatching Department

This is the decision of the Railroad Retirement Board with respect to a request by the Southern California Regional Rail Authority (SCRRA) that the Board rule as to whether its employees that will be organized into the Dispatching Department are covered by 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). Specifically, SCCRA has requested the Board to address the status of the dispatch employees who currently work for AMTRAK and who would be hired as employees of SCRRA in its Dispatching Department. The Dispatching Department will be established effective October 1, 2002. The dispatchers will be responsible for dispatching all traffic on SCRRA's lines, which consist of: (1) Metrolink intrastate commuter lines; (2) the "Coaster" intrastate commuter train administered by public transit agencies in San Diego County; (3) AMTRAK interstate and intercity passenger trains; and (4) Burlington Northern Santa Fe and Union Pacific interstate freight trains. SCRRA also requests that the Dispatching Department be segregated for coverage purposes in accord with 20 CFR 202.3.

Background Information

In Board Coverage Decision (B.C.D). No. 94-116, issued December 14, 1994, the Board found that the SCRRA was not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. That decision was based on the Board's finding that SCRRA is a governmental entity that is charged with the administration of commuter rail operations in Southern California. SCRRA operates no trains but contracts that function to AMTRAK. Based on previous agency decisions that had held that a public entity that lacks the capability of operating a railroad but rather contracts with an employer under the Acts to operate the rail line is not a covered employer under the Acts, the Board found that SCRRA was not an employer under the Acts.

A recent Board Coverage Decision in Railroad Ventures, Inc. (B.C.D. 00-47, November 7, 2000) refined the standard that the Board would use to determine when an entity that has its railroad functions performed by another would be found to be an employer under the Acts. In Railroad Ventures, the Board set forth a three-part test that it would use to determine the employer status of such an entity. The three-part test is as follows:

1) whether the entity does not have as a primary purpose to profit from railroad activities;
2) whether the entity does not operate or retain the capacity to operate the rail line;
3) whether the operator of the rail line is already covered under the RRA and RUIA. B.C.D 00-47, at pages 4-5.

SCRRA would continue not to be an employer under the three-part test set forth in Railroad Ventures. SCRRA is a public entity charged with the provision of commuter rail service in Southern California. As such, it does not have as a primary purpose to profit from rail activities. Its primary purpose is the provision of rail commuter service, rather than any profit from that service. SCRRA does not retain the capacity to operate a rail line. Finally, SCRRA has contracted with AMTRAK, an employer under the Acts, to operate the trains. In conclusion, even under the test set forth in Railroad Ventures, SCRRA remains not covered by the RRA and the RUIA.

FUTURE ACTIVITIES

According to the record before us, the Dispatching Department is to be established October 1, 2002. That Dispatching Department will employ former employees of AMTRAK. The former AMTRAK employees previously provided dispatch services for SCRRA on a contract basis. Effective October 1, 2002, SCRRA has decided to

provide its own dispatching services rather than rely on AMTRAK for this service. AMTRAK will continue to provide other railroad services on a contract basis.

Before deciding whether the Dispatching Department 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 the Dispatching Department actually begins operations. In a recent decision, the Board provided a coverage opinion with regard to future operations. See Keokuk Electric Railway, Inc., B.C.D. 01-83 (December 3, 2001). As in that case, there is no doubt that the Dispatching Department will begin operation October 1, 2002. In order to provide for as smooth a transition as possible, a decision by the Board regarding the coverage status of the Dispatching Department will facilitate rail operations in the United States. Therefore, the Board will issue a decision regarding the Dispatching Department at this time.

Discussion

As noted in the background information, SCRRA is not an employer under the RRA and the RUIA. As noted above, SCRRA's principal business is not as a rail carrier employer under the RRA and the RUIA, but rather, SCRRA is a public entity charged with the provision of commuter rail service in Southern California. Section 202.3 of the Board's regulations states that:

> (a) With respect to any company or person **principally engaged in business other than carrier business**, but which, in addition to such principal business, engages in some carrier business, the Board will require submission of information pertaining to the history and all

> operations of such company or person with a view to determining whether some identifiable and separable enterprise conducted by the person or company is to be considered to be the employer. The determination will be made in the light of considerations such as the following:
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> (1) The primary purpose of the company or person on and since the date it was established;
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> (2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;
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> (3) The amount of its carrier business and the ratio of such business to its entire business;
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> (4) Whether its carrier business is a separate and distinct enterprise.
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> (b) In the event that the employer is found to be an aggregate of persons or legal entities or less than the whole of a legal entity or a person operating in only one of several capacities, then the unit or units competent to assume legal obligations shall be responsible for the discharge of the duties of the employer. (Emphasis supplied.) (20 CFR 202.3).

Information provided regarding SCRRA, demonstrates clearly that SCRRA is not principally engaged in the railroad business and that segregation is applicable to SCRRA. The number of employees employed in the Dispatching Department will be less than 14% of SCRRA's total employees.

The Dispatching Department will be an identifiable and separable enterprise. The Dispatching Department will have a separate payroll. Employees in the Dispatching Department will be supervised solely by

the Dispatching Manager. It is the intent of SCRRA to maintain strict personnel separation between the Dispatching Department and the rest of SCRRA's operations. Employees not assigned to the Dispatching Department will have no involvement with dispatching.

In summary, the Board finds that the evidence of record overwhelmingly demonstrates that the principle business of SCRRA is not rail service. The Dispatching Department, however, will be performing rail related duties. As provided for in section 202.3 of the Board's regulations, the Dispatching Department is properly segregated from the other activities of SCRRA. The Board finds that the Dispatching Department will be a covered employer under the RRA and the RUIA effective October 1, 2002, and its employees' service and compensation should be reported to the Board accordingly.

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