B.C.D. 02-17

MAR 01 2002

Employer Status Determination
CBEC Railway Inc.
Decision on Reconsideration

This is the decision on reconsideration of the status of CBEC Railway Inc., as an employer under 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).

PROCEDURAL BACKGROUND

In B.C.D. No. 01-05, issued on January 10, 2001, the Board held that CBEC Railway Inc. (CBEC) became a rail carrier employer under the RRA and the RUIA effective November 1, 1997. A timely request for reconsideration of that decision was submitted on December 3, 2001.

DISCUSSION

In our decision dated January 10, 2001, we found that CBEC owns a rail line and contracts for operation over that rail line by a number of railroads. CBEC also has contracted for maintenance and repair on the rail line. CBEC has no employees or any locomotives, railcars, or other physical assets. Based on these undisputed facts, the Board applied the three-part test first enunciated in B.C.D. No. 00-47, Employer Status Determination Railroad Ventures Inc., Decision on Reconsideration, to conclude that CBEC was an employer under the Acts.

The three-part test enunciated in Railroad Ventures is that 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.

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In our initial decision regarding CBEC, we concluded that there was no evidence to support a conclusion that CBEC did not have as a primary business purpose to profit from railroad activities. Therefore, we concluded that CBEC was an employer under the Acts. CBEC has now submitted evidence regarding this and the other prongs of the three-part test. In Railroad Ventures, we explained the three-part test as follows:

1). The entity does not have as a primary business purpose to profit from railroad activities. An entity that owns a railroad line solely to preserve or promote passenger or freight service would not be considered to have as its primary business purpose to profit from railroad activities. The Board will make a finding regarding the primary business purpose of the entity based upon full consideration of all the available facts. Factors that the Board will consider in determining whether a primary business purpose of an entity is to profit from railroad activities include, but are not limited to: (1) the reasons stated in the STB decision for the entity's acquisition of authority to operate the rail line; (2) the existence of a State statute which authorized the formation of the entity and/or authorizes the entity to acquire one or more rail lines for the purpose or purposes set out in the authorizing statute; (3) proof that the entity is considered by the Internal Revenue Service to be a non-profit entity; (4) circumstances surrounding the acquisition of the line which would show intent simply to maintain service such as a history of unprofitability of the line acquired, potential or actual abandonment of the line, or decrease in rail traffic over the line; (5) whether the entity is affiliated with other carriers.

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2). The entity does not operate or retain the capacity to operate the rail line. If another entity is the certified operator of the rail line in question and actually conducts the railroad service over the line, the entity that owns the line will not be considered the operator. An entity that leases out the rail line or grants trackage rights and easements will not be considered to be operating the line if it does not retain control over the day to day operations of the line.

3). The operator of the rail line is already covered or would be found covered under the Acts administered by the Board. Where the operator of the line is not covered and could not be found to be covered, the Board will necessarily find the entity owning the rail line to be covered and persons operating the line to be the entity's employees.

According to the submission made in the request for reconsideration and the affidavit submitted by Mr. Paul E. Freund, Vice President Fuel Trading and Transportation for MidAmerican Energy Company, a regulated public utility that in association with two utility cooperatives, Cornbelt Power Cooperative and Central Iowa Power Cooperative, owns CBEC, the formation and operation of CBEC was motivated not by a desire to profit from railroad activities but rather to obtain cheaper transportation costs for the coal shipped to the electrical generating plant owned by the parents of CBEC. Analyzing the facts in this case using the five factors set forth above in the first prong of the three-part test, the Board notes the following facts: 1) according to the ICC documents contained in the record, the purpose of the establishment of CBEC was to provide for the construction of a new alternative rail line to the electrical generating plant, thereby providing competition for the transportation of coal; 2) a state statute that required the electrical utilities to lower their transportation costs; 3) CBEC is a for profit entity for federal tax purposes; 4) according to the evidence of record, the line

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was acquired solely to reduce transportation costs for the utilities that own CBEC by providing competition for the transportation of coal to the electrical generating plants; 5) CBEC is not affiliated with any other railroad carrier. In addition, CBEC does not charge a fee to the railroads that operate over its rail line. Finally, over 95% of CBEC revenues are derived from payments by its owners for each ton of coal received at the generating plant. The Board concludes that given all of the facts in this case, CBEC does not have as a primary business purpose to profit from railroad activities.

CBEC also meets the second and third prongs of the three-part test. Since CBEC has no employees or any locomotives, railcars, or other physical assets, it does not operate or retain the capacity to operate the rail line. The third prong of the test is also met, since the operators of the rail line are covered under the Acts.

Accordingly, the Board finds that CBEC has not been a rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts through the date of this decision. The initial decision, B.C.D. 01-5, is reversed.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever