B.C.D. 02-23 MAR 1 5 2002

EMPLOYER STATUS DETERMINATION
White Pass Enterprises LLC

This is the decision of the Railroad Retirement Board concerning the employer status of White Pass Enterprises LLC 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).

Background Information

In B.C.D. No. 00-9, issued on March 24, 2000, the Board held that Pacific and Arctic Railway and Navigation Company (PARN) was an employer under the RRA and the RUIA from December 20, 1979 to April 30, 1988. PARN is an Alaskan corporation which merged with a West Virginia corporation of the same name on December 20, 1979. The West Virginia corporation had been a rail carrier employer with service creditable from its commencement of rail service in 1898. B.C.D. No. 00-9 also held that the West Virginia corporation ceased to be a covered employer on the date of its merger with PARN, and that PARN subsequently ceased to be a covered employer on April 30, 1988, because it operated a passenger excursion service that did not operate as part of an interstate rail network. On November 2, 2000, the Board reopened that decision and reversed that part of it which held that PARN ceased to be an employer effective April 30, 1988, finding that PARN had been and continued to be a rail carrier employer since December 20, 1979 (B.C.D. No. 00-44).

Subsequently, PARN requested that certain categories of its employees, (1) retail sales employees, consisting of tour guides (on board train clerks), gift shop clerks, espresso makers (barista), and re-stockers; and (2) shuttle drivers, be held not to be covered under the Acts. This request was later withdrawn.

PARN is one of three related railroads which conduct service under the trade name of the White Pass and Yukon Route (White Pass). The other two related railroads are the British Columbia-Yukon Railway Company (BCYR) and British-Yukon Railway Company Limited (BYR).

White Pass Enterprises LLC

White Pass Enterprises, LLC was organized on November 5, 2001, as a limited liability company in the State of Alaska. It is a wholly owned subsidiary of White

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Pass & Yukon U.S. Inc., which is also the parent company and sole owner of PARN. Information about White Pass Enterprises, LLC was furnished by Fred McCorriston, President of PARN.

PARN has owned and operated a gift shop that was constructed in 1997 as an attachment to PARN's existing depot. PARN has subsequently expanded sales operations to a small shop situated on one of its port dock facilities as well to the internet. Historically, individuals hired for retail sales positions were employed by PARN. There are three categories of retail sales employees involved: gift shop clerks, espresso makers (barista), and re-stockers who maintain adequate inventory levels of gift shop merchandise. PARN has also employed shuttle drivers who transport cruise passengers on the dock. Except for one retail manager who is employed throughout the year, the retail sale positions and shuttle driving positions are seasonal employment, and the employees are not entitled to company funded benefits, such as health insurance and retirement other than those benefits required by law.

During the height of the 2001 operating season, PARN employed a total of 148 employees, 17 of whom worked in the gift shops, including clerks, re-stockers, and espresso makers. There were also 3 shuttle drivers. These 20 employees were paid 4.9 percent of company-wide wages for the fiscal year ended June 30, 2001. PARN's operations are closed for the year and the seasonal workers referenced above have been laid off. White Pass Enterprises plans to hire employees to perform retail sales and shuttle driving for PARN's next season of operations beginning next spring.

In order to provide additional perspective, Mr. McCorriston provided the following summary of all revenues reported for PARN for the fiscal year that ended June 30, 2001:

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Revenue Source	Dollars *(thousands)*	
Rail Passenger Service	$17,568	71.4%
Port Facilities	4,519	18.4%
Retail Sales	1,390	5.7%
Joint Venture	1,086	4.4%
Other	37	.1%
Total	$24,600	100 %

Authority

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).

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Section 202.7 of the Board's regulations defines "service in connection with railroad transportation" in pertinent part as service that "is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad. . ." (20 CFR 202.7).

Discussion and Conclusion

White Pass Enterprises LLC is not operating a railroad and thus does not fall under the first definition of an employer under the RRA and RUIA. However, since White Pass Enterprises is owned by White Pass & Yukon U.S., Inc., the same company which owns PARN, it is under common control with a rail carrier employer under the Acts. The question thus becomes whether White Pass Enterprises performs any service in connection with railroad transportation. White Pass Enterprises was formed to staff the retail sales and shuttle driver positions which support PARN's tourist business. While the work performed by the holders of those positions complements PARN's tourist business, the majority of the Board finds that those positions are separate from the rail transportation that PARN furnishes. PARN could provide its rail transportation without the work done in those positions. In fact, PARN did provide such transportation without the work done in the retail positions for years until it constructed the gift shop in 1997. In effect, what PARN did in 1997 was to expand into another type of business (i.e., retail sales). The formation of White Pass Enterprises now formally separates that new (retail) business, as well as the shuttle drivers, from PARN's rail transportation business. A majority of the Board finds that the record as a whole in this case does not support a finding that White Pass Enterprises performs service in connection with railroad transportation.

White Pass Enterprises LLC

Accordingly, it is determined that White Pass Enterprises is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Cherryl T. Thomas

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

Jerome F. Kever

DISSENT OF V. M. SPEAKMAN, JR.
EMPLOYER STATUS DETERMINATION
WHITE PASS ENTERPRISES, L.L.C.

I disagree with the majority of the Board's decision on this coverage issue and would find White Pass Enterprises, L.L.C., (WPE) to be a covered entity. The majority's decision states that WPE was formed to staff the retail sales and shuttle driver positions which support PARN's tourist business. However, WPE was not formed to staff these positions, rather these positions were staffed to perform the respective duties prior to the existence of WPE, as PARN employees.

PARN could provide rail transportation, without the work done by the WPE employees, but, the fact remains that WPE still performs service in connection with the transportation of passengers by railroad. The establishment of a separate payroll should not change the status of these employees.

Accordingly, I dissent from the majority opinion on this decision.

VM Speakman, Jr.
V. M. Speakman, Jr.
Labor Member

3-13-02
Date