B.C.D. 02-63

SEP 04 2002

EMPLOYER STATUS DETERMINATION
Colorado Central Railroad Company
Kern Valley Railroad Company

This is the determination of the Railroad Retirement Board concerning the status of Colorado Central Railroad Company and Kern Valley Railroad Company as employers 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.).

Information regarding these companies was provided by Court R. Hammond, Chairman of Colorado Central, and Fritz B. Kahn, counsel for Kern Valley. Kern Valley acquired a rail line from Trinidad Railway, Inc.[1], and contracted with Colorado Central to operate it. According to Mr. Hammond, Colorado Central began doing business October 28, 2001. Colorado Central currently has two employees. It acts as agent for the Kern Valley Railroad in operating a rail line of 28.5 miles which interchanges with the Burlington Northern Santa Fe and the Union Pacific Railroad.

Colorado Central moves coal from a mine at Lorancito, Colorado, to the New Elk Mine and the Picketwire Processing plant where the coal is processed and stockpiled for movement on Burlington Northern Santa Fe trains[2].

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(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,

[1] The coverage of Trinidad under the Acts was terminated effective October 31, 2000 (B.C.D. 02-53). However, the service agreement dated October 25, 2001, between Colorado Central and Kern Valley states that Trinidad is attempting to obtain Surface Transportation Board authority to operate the line in question, and that Colorado Central is intended to be merely an interim operator. Accordingly, the Board is re-examining the status of Trinidad.

[2] As of July 15, 2002, the Lorancito Coal Company closed its mining operations at Lorencito. Consequently, no trains are currently operating .

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> 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.

The evidence of record establishes that Colorado Central is a carrier operating in interstate commerce. Accordingly, it is determined that Colorado Central is 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 as of October 28, 2001, the date as of which it commenced railroad operations.

In regard to the cessation of operations by Colorado Central, it should be noted that section 202.11 of the Board's regulations provides that:

> The employer status of any company or person shall terminate whenever such company or person loses any of the characteristics essential to the existence of an employer status.

Although Colorado Central is not currently transporting coal, it has not lost the characteristics essential to the existence of an employer status. Accordingly, the Board does not find that Colorado Central ceased to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

With respect to Kern Valley, the Board notes that in its decision regarding 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 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. No. 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

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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. The evidence in this case indicates that Kern Valley owns a rail line and contracted with Colorado Central to be the operator of the line as the "Agent" of Kern Valley. The preamble of the Service Agreement provides that Kern Valley "desires to remain the sole common carrier on the Rail Line." The Service Agreement between Kern Valley and Colorado Central states in section 8 that Kern Valley shall be reimbursed for its expenses. There is no information that would indicate that Kern Valley's intent in acquiring the rail line was primarily designed to preserve rail service rather than profit from railroading activities. Accordingly, not of all of the factors set out in the Railroad Ventures decision may be found to exist in this case. Therefore, the Board finds that Kern Valley is also an employer under the Acts as of the date on which Colorado Central began operations, October 28, 2001.

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