B.C.D. 03-22

Employer Status Determination
Cedar American Rail Holdings, Incorporated

FEB 27 2003

This is the decision of the Railroad Retirement Board regarding the status ofCedar American Rail Holdings, Incorporated (Cedar American) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

Information regarding Cedar American was provided by Ms. Kirsti Stein, Assistant Comptroller of Cedar American. In her letter dated September 19, 2002, she advised that the first employee of Cedar American started employment June 17, 2002, and that as of September 1, 2002, Cedar American employed 55 individuals. She described the business of the company as performing administrative functions for the Iowa, Chicago & Eastern Railroad Corporation (IC&E RR) and the Dakota, Minnesota & Eastern Railroad Corporation (DM&E RR).[1] The Surface Transportation Board has described Cedar American as the wholly owned subsidiary of DM&E RR, and the beneficial owner of 100 percent of the common stock of the IC&E RR, placed in a voting trust pending approval of the acquisition action by the STB. See: Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34178, 67 Fed. Reg. 61188, 61190, (September 27, 2002).

Section 1(a)(1) of the Railroad Retirement Act (RRA) (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;

[1] The DM&E RR (BA 2632) has previously been determined to be a rail carrier employer covered by the Acts effective September 5, 1986. See Legal Opinion L-86-123. The status of IC&E RR under the Acts is the subject of a separate decision of the Board considered concurrently with the status of Cedar American.

> (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 * * *.

See also section 202.8 of the Board's regulations (20 CFR 202.8). Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. 351(a) and (b) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3231.

Cedar American is clearly not a carrier by rail. Whether Cedar American is covered as a rail carrier affiliate depends in the first instance on whether it is under common control with a rail carrier. A decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of section 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). As defined by the Union Pacific case, Cedar American as the corporate parent of IC&E RR is not under common control with its subsidiary. However, Cedar American is itself the wholly owned subsidiary of DM&E RR. The DM&E RR, through ownership of Cedar American, thus also owns IC&E RR. In this sense, both Cedar American and IC&E RR are under the control of the DM&E RR. Union Pacific, 5 F. 3d at 527; see also Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358, 363, (10th Cir. 1942) (a railroad and a company providing mechanical repairs for the railroad, both owned by a parent company, are under common control under the Acts). In view of the fact that the Board has determined in a separate decision that IC&E RR is a rail carrier employer under the Acts, the Board now finds Cedar American, by reason of the ownership by DM&E RR of both Cedar American and IC&E RR, to be under common control with the IC&E RR within the meaning of the Acts. See section 202.5 of the Board's regulations (20 CFR 202.5).

The remaining question is whether Cedar American performs a service in connection with the transportation of property by rail. Regulations of the Board provide that service rendered by a carrier affiliate is in connection with the transportation of property by railroad if such service is reasonably directly related, functionally or economically, to the performance of obligations which a company has undertaken as a common carrier by railroad, or to the handling of property transported by railroad. See 20 CFR 202.7. As noted above, Ms. Stein states that Cedar American "performs administrative functions" for the DM&E RR and the IC&E RR. Management and administration have been held to be services within the meaning of the Acts. See Adams v. Railroad Retirement Board, 214 F. 2d 534, 542 (2nd Cir, 1954) (non-carrier affiliate which performed accounting, purchasing, correspondence and stenography for an affiliated railroad performed a service in connection with railroad transportation). Moreover, the evidence is that Cedar American performs these services solely for the affiliated rail carriers. Compare, Standard Office Building v. United States, 819 F. 2d 1371, 1379 (7th Cir., 1987) (property management firm which performs approximately half of its service for unrelated, non-railroad tenants is not performing services in connection with rail transportation within the meaning of the Railroad Retirement Tax Act); and Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F. 2d 295, 298 (7th Cir, 1992) (where a company derives 95 percent of its locomotive and rail car repair business from its rail carrier affiliate, the company performs a service in connection with rail transportation under the Acts). Accordingly, the Board finds that Cedar American performs a service in connection with rail transportation by providing administrative services to its rail carrier affiliates.

Cedar American Rail Holdings, Incorporated

It is therefore the determination of the Board that Cedar American Holdings, Inc., became a covered employer under the Acts effective June 17, 2002, the date it hired its first employee.

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