B.C.D. 03-27

MAR 21 2003

**EMPLOYER STATUS DETERMINATION**
**Northern New England Passenger Rail Authority**

This is the determination of the Railroad Retirement Board concerning the status of the Northern New England Passenger Rail Authority as an employer 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.).

The Authority was established in 1995[1] as a state agency by the Maine Legislature for the general purpose of promoting passenger rail service. The Authority was directed to give priority to the restoration of rail service between Portland and Boston and on December 2, 1996, entered into an agreement with Amtrak for the provision by Amtrak of passenger service between Portland and Boston. Amtrak's Portland-Boston service, known as "The Downeaster," began on December 15, 2001. The Authority has five employees. The first date on which an Authority employee was compensated was July 17, 1999.

The Authority does not operate the rail line in question itself and does not have Surface Transportation Board authority to do so. The rail lines involved are owned by Portland Terminal Company, by Boston and Maine Corporation (both covered employers under the Acts; B.A. Nos. 4105, 1102, respectively), and by Massachusetts Bay Transportation Authority (not a covered employer), and are not owned by the Authority.

The Authority derives no revenue from Amtrak's operation of the Downeaster and reimburses Amtrak the difference between the revenue Amtrak receives from passengers and Amtrak's cost of operation of the Downeaster.

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;

[1] The legislation establishing the Authority was effective June 29, 1995. The first meeting of the Authority's board of directors was held in September 1995.

(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 * * *.

The Authority is not a carrier by railroad subject to the jurisdiction of the Surface Transportation Board. Further, it is not owned or controlled by, or under common control with, a railroad employer. Nor does it fall under any other definition of an employer under the Acts administered by the Board.

Accordingly, a majority of the Board determines that the Northern New England Passenger Rail Authority is not an employer within the meaning of section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)) and the corresponding provision of the Railroad Unemployment Insurance Act.

Cherryl T. Thomas

V. M. Speakman, Jr.
(Separate dissenting opinion attached)

Jerome F. Kever

**DISSSENT OF THE LABOR MEMBER**

I dissent from the Board's decision in this case. The Northern New England Passenger Rail Authority should be a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

The Authority administers an interstate rail passenger service involving a number of different rail lines and carriers. It contracts with Amtrak to run a rail operation ("the Downeaster") which, as part of Amtrak, is a covered employer, over rail lines owned by the Portland Terminal Company and by Boston and Maine Corporation, both covered employers. In Railroad Retirement Board v. Duquesne Warehouse Co., 149 F.2d 507 (D.C.Cir. 1945), aff'd 326 U.S. 446, 90 L.Ed. 192, 66 S.Ct. 238 (1946), the Court of Appeals for the District of Columbia stated that the policy of the Railroad Retirement Act was "to cover the business of railroading as it is actually carried on." 149 F.2d at 509.

Without the efforts of the Northern New England Passenger Rail Authority, no passenger rail service would be available between Portland and Boston. The work of the Authority is part of the business of railroading as it is actually carried on.

It was set up to promote passenger rail service in the area, administers an agreement it has with Amtrak, and is involved in the marketing and promoting its service, and administering the agreement with the "Independent contractor" who provide food service. Furthermore, although the Authority currently owns no railroad equipment, it retains the right to purchase Amtrak locomotives. Accordingly, I disagree with the Board's position that the Northern New England Passenger Rail Authority should not be covered under the Acts administered by the Board.

Further, in connection with the development of the record for this coverage determination, as stated, Amtrak has provided information that the Authority contracts for food and beverage service for the Downeaster with L.P.M. Holding Company, d/b/a Epicurean Feast, and that Amtrak contracts with Drummac, Inc., for mechanical services on the Downeaster line. Accordingly, the staff of the Board should assemble information regarding whether the contractors or the employees of the contractors who provide services to the Downeaster operation should be covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

V M Speakman, Jr.

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