B.C.D. 03-44

MAY 2 2 2003

EMPLOYER STATUS DETERMINATION
Nexterna, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Nexterna, Inc., 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.).

Information regarding Nexterna was provided by William K. Paisley, Vice President, Finance, & CFO of Nexterna, Ellen Curnes, General Counsel, Nexterna, and Patrick J. O'Malley, Assistant Vice President, Federal Taxes, Union Pacific Railroad Company. According to Mr. Paisley, Nexterna, formerly Automated Monitoring & Control International, Inc.[1], was incorporated in December 1986, began doing business in January 1987, and first compensated employees in February 1987. On January 15, 2003, Nexterna transferred its Transportation Business Segment, consisting of the rail-related portion of its enterprise, to Union Pacific[2].

I – Ownership

It was originally intended that Nexterna be owned equally among four publicly-owned companies: Motorola, Tandem Computers, Alcatel, and Union Pacific Corporation. However, negotiations with Motorola failed and Union Pacific ended up with a 50 percent ownership interest in Nexterna. On December 15, 1998, the other 50 percent ownership interest in Nexterna was acquired by Union Pacific. Prior to December 15, 1998, there were three classes of common stock, each with different voting rights. Class A stock, which was entirely owned by Union Pacific, had the right to elect three class 3 directors. Each class 3 director had two votes. Class B stock, which was owned in equal shares by Union Pacific, Tandem Computers, and Alcatel Canada-SEL Division, had the right to elect three class 2 directors, each of which had

[1] For purposes of simplification, the company at issue will be referred to as "Nexterna," regardless of its name at a particular time.

[2] The balance of Nexterna's operation consists of the Field Service Division. It is projected that Nexterna will cease operations by April 15, 2003, and the Field Service Division will be conducted by a separate entity owned by Union Pacific Corporation.

Nexterna, Inc.

one vote. Class C stock, which was owned in equal shares by the three companies, had no voting rights. In addition, there was one Class I Director elected by a majority of the issued and outstanding stock entitled to vote. Union Pacific could elect directors that had seven of the ten director votes. The "Director supermajority vote" rule contained in Article II, Section 3 of the By-Laws, required a two-thirds vote of all class 2 directors and a two-thirds vote of all class 3 directors to amend the By-Laws, approve Nexterna's annual budget and operating plan, and any material change in the budget or operating plan; and to delegate the authority of the Board of Directors. That same Section 3 also provided that a majority of votes of the directors in office constituted a quorum at all meetings of the Board of Directors and that a majority of the votes of the directors at any meeting where there was a quorum constituted the decision of the Board of Directors except for those items mentioned above which required a Director supermajority vote.

The supermajority provision ensured that no single shareholder had control over the "policies and business" of Nexterna. The Nexterna Board of Directors consistently followed the supermajority provision, particularly when dealing with the budget process, spending practices, and other financial issues. For example, any expenditures above the limits specified in the budget could not be undertaken without a supermajority vote. The directors nominated by Union Pacific were aware that they needed the explicit approval of the directors nominated by Tandem and Alcatel regarding any significant financial or operational matter. Those directors were not passive and exerted active control over the Board of Directors by reviewing and approving contracts with major customers (including Union Pacific), by chairing the Compensation Committee, and by reviewing and approving annual budgets and operating plans. The supermajority provision ensured that the directors nominated by Tandem and Alcatel actively participated in all significant policy decisions of Nexterna.

The rationale for this voting system was that Nexterna was intended to be a joint venture among four companies: Tandem Computers, Alcatel

Canada-SEL Division, Union Pacific, and Motorola. As noted earlier, each of these companies was to own a 25 percent interest in the new company. However, Motorola decided not to participate. The three remaining companies decided to proceed, while continuing discussions with Motorola. They agreed that Union Pacific would hold a 50 percent ownership interest, with the understanding that half of this interest could be reallocated to Motorola if it decided to participate. Negotiations with Motorola continued but finally were not successful, and neither were discussions with other prospective investors. As described by counsel for Nexterna, having Union Pacific hold the additional 25 percent share, the Motorola share, was designed in part to facilitate disposition of the Motorola share either to Motorola or to another investor in one transaction (rather than requiring each investor to transfer a share of its ownership) and, by requiring a supermajority vote, was intended to prevent Union Pacific from having sole control of the Board.

II – Operational Structure and Operations

Counsel for Nexterna characterizes[3] it as a high-tech startup joint venture that operated independently of its three investors. It has always been managed by its own executive team, which separately manages all significant functions of Nexterna. None of the directors were involved in day-to-day management. Nexterna has its own sales and marketing operations, its own contracting and procurement practices, and separate legal, accounting, and auditing functions. Nexterna has its own human resources operation with separate and distinct policies and practices. None of the members of the executive team managing Nexterna has simultaneous positions with Union Pacific and only 13 of of Nexterna's employees had previously worked for a railroad. There was no transfer of employees from Union Pacific to Nexterna.

Nexterna is primarily a software manufacturer which produces wireless data technology for two-way communications to be used in data

[3] The following description of Nexterna applies only to the operation up until January 15, 2003.

Nexterna, Inc.

exchange such as in vehicle tracking. Nexterna offers software applications, on-board and computing hardware, consulting services, systems integration, installation services, and ongoing support services. Hardware manufacturing is primarily outsourced. Nexterna provides ongoing maintenance and customer service, which Nexterna describes as an ancillary part of its business analogous to services provided by such companies as Microsoft and Xerox, or to a lease of vehicles with maintenance. Nexterna has developed a suite of wireless data solutions, including consulting services and software and hardware products, which provide work order reporting, location tracking, messaging, and other applications. In 1987, 100 percent of its employees worked in providing services to rail carriers; in 1990, 95 percent; in 1995, 80 percent; and in 2000, 40 percent. Nexterna forecasts that the share of Nexterna's revenue attributable to the rail industry will decline from 66 percent over the past 5 years to 7 percent in the next 5 years. Among the railroads for which it provides or has provided services were Burlington Northern, Canadian National, Canadian Pacific, CSX, Norfolk Southern, the Union Pacific, and others.

The following figures show the percentage of sales by Nexterna to Union Pacific and to the railroad industry as percentages of total sales.

1996: Sales by Nexterna to Union Pacific were 17.389 percent of total sales;

1997: " " " " " " " 24.862 " " " " ;

1998: " " " " " " " 28.323 " " " " ;

1999: " " " " " " " 57.958 " " " " ;

2000: " " " " " " " 79.761 " " " " ;

2001: " " " " " " " 80.385 " " " " ;

2002: " " " " " " " 43.335 " " " " .

Nexterna, Inc.

1996:	Sales	by	Nexterna	to	the	railroad	industry	were	54.220	%	of	total	sales;
1997:	"	"	"	"	"	"	"	"	68.445	"	"	"	;
1998:	"	"	"	"	"	"	"	"	86.989	"	"	"	;
1999:	"	"	"	"	"	"	"	"	97.229	"	"	"	;
2000:	"	"	"	"	"	"	"	"	94.385	"	"	"	;
2001:	"	"	"	"	"	"	"	"	91.637	"	"	"	;
2002:	"	"	"	"	"	"	"	"	77.302	"	"	"	.

The percentages for 2002 represent estimates.

Nexterna entered into a contract with Union Pacific to design and manufacture software and install and service hardware and software for a locomotive tracking system, which is what caused the higher percentage of business attributable to Union Pacific in 2000 and 2001. Nexterna is in the final stages of completing performance under this contract, which was for the most part to be completed in 2002. Nexterna continues to provide a limited consulting and servicing of the equipment, which represents a small percentage of the company's business.

Nexterna has always planned to diversify beyond the railroad industry and, since the mid-1990s, it has made a concerted effort to develop non-rail customers. Nexterna's initial investors understood that businesses beyond the rail industry would find a use for wireless technologies, which enable them to extend their computer and information systems to mobile workers. In order to appeal to other non-rail industries, Nexterna has expanded its sales and marketing capabilities and recruited most of its employees from outside the railroad industry. Part

Nexterna, Inc.

of the diversification strategy involved a $50 million investment for products called FieldPro and FreightQuest. FieldPro is a comprehensive field service management software suite and is sold to a variety of industries, but not to railroads. FreightQuest is a software tracking system that allows customers in the commercial trucking industry to track the status of their shipments. FieldPro is a part of Nexterna's growing Field Services business segment, which focuses on marketing Nexterna's products to companies with significant field services or remote employees. Nexterna noted that it suffered an unanticipated shortfall in other business segments with the collapse of the technology section of the economy, but that Nexterna still intends to diversify.

Nexterna has diversified its customer base in its Transportation unit as well. Nexterna's transportation-related business generally involves an on-board computer, a satellite antenna provided by Wireless Matrix USA, Inc., and various software products, including Opti-Track AVL (automatic vehicle location), a vehicle locator, whereby the user can look at a map and determine location, speed, and other information regarding use of vehicles. Opti-Track is an on-board computer which can speed up maintenance since it has a system of monitors which measure oil, temperature, etc. Opti-Track can also measure fuel usage. Nexterna has entered into a license agreement with Wireless Matrix, a leader in the satellite data transmission business, which has obtained a license to offer OptiTrac. The contract with Union Pacific referred to above involves installing Opti-Track in locomotives at a cost of $6,000.00 to $8,000.00 per locomotive. The contract includes technical support ("help line") and updates (which are required when bugs in the programs are found). The installation covers about one-half of Union Pacific's locomotives. Other software products include OptiPath and OptiWorkOrder.

Nexterna's contracts with Union Pacific are based on bids submitted to Union Pacific and on arms-length bargaining with Union Pacific. Nexterna does not get better terms from Union Pacific than does its competitors. It appears from Nexterna's business plan that it intends

Nexterna, Inc.

to increase its percentage of rail industry business as compared to that for its affiliate Union Pacific. Nexterna's contract with Union Pacific covers about one-half of Union Pacific's over-the-road locomotive fleet, and does not cover any of Union Pacific's approximately 440 switch engines.

Some of the other products sold by Nexterna are described as follows. OptiWorkOrder is a graphical user interface that enables railroads to report work in the field including current train arrivals and departures; manage train and track inventory; send new or updated work order information to the field; receive real time updates on completed work; etc. Mobile Resource Management is an evaluation of a company's potential for use of mobile resource management. ARC^2 is an onboard computer to monitor locomotive functioning and to report data. OptiSoft is a suite of software applications for mobile resource management including fuel management, fleet location and tracking, etc. OptiPath consists of wireless messaging middleware. OptiFuel monitors remote fuel usage. Other software offered includes FieldPro Escalations, which tracks the status of field service calls and automatically notifies technicians, dispatchers, managers, or customers of status changes; FieldPro, which "provides an electronic interface for connecting the FieldPro service management system with financial and Enterprise Resource Planning applications;" FieldPro Service Projects, which provides support for managing projects; Antenna Tools for FieldPro, which is a web-based application for using FieldPro service management on the internet; FieldPro Remote Tech, which is a laptop-based application used by technicians to download service order dispatches and upload completed work orders and expense reports; FieldPro Sales Order Entry, which supports sales and distribution with packaging, pricing, quotations, orders, shipping, and billing; and FieldPro Message Centre, which is "an integrated communications hub for managing contacts with customers, technicians, vendors and other groups who interact with [the] service team;" FieldPro Business Intelligence, which is a software program to help measure trends, monitor performance indicators, and investigate sources of performance

Nexterna, Inc.

variation. Other related programs are FieldPro Service Inventory and FieldPro IVR Module.

Nexterna stresses that the products Nexterna designs, markets, and installs are not unique to the railroad industry and contends that they are not essential to rail transportation. Nexterna uses wireless computing technologies to allow for the most effective use of mobile workers – combining fleet management with remote computing for field service workers. A significant number of companies in various industries have purchased Nexterna's mobile tracking applications. Nexterna states that, although its wireless data solutions are useful for managing the mobile data communications in the railroad industry, the design, manufacture, and installation of wireless communication services is not a core function historically performed by railroads. Nexterna states that its chief competitors are not railroads, but other large technology companies, such as Microsoft, PeopleSoft, Siebel, and Astea, and manufacturers such as General Electric, Wabtec, Raytheon, and Lockheed Martin.

III – Legal Analysis

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 * * *.

Nexterna, Inc.

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).

Prior to December 15, 1998

Nexterna clearly is not a carrier by rail. Accordingly, we turn to section 1(a)(1)(ii) of the Railroad Retirement Act in order to determine whether it is an employer within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it provides "service in connection with" rail transportation and if it is owned by or under common control with a rail carrier employer.

Until December 15, 1998, Union Pacific Corporation had a 50 percent ownership interest in Nexterna. The two other companies which had an interest in Nexterna each had a substantially smaller interest. Section 202.4 of the Board's regulations provides that:

> A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

In the opinion of the Board, the supermajority rule for certain fundamental actions by the board of directors, and the intent of the parties in creating this rule, means that Union Pacific Railroad did not control Nexterna. It was the intent of the parties, in entering into this arrangement, to protect the holders of the two lesser interests by carrying out the intent of the original plan which contemplated four equal shareholders. Accordingly, the Board finds that prior to December 15, 1998, Nexterna was neither owned by nor under common

control with a rail carrier employer and was thus not a covered employer under the Acts.

After December 15, 1998

On or about December 15, 1998, Union Pacific Corporation, which is the holding company for Union Pacific Railroad, acquired a 100 percent interest in Nexterna. Accordingly, Nexterna has been under common control with Union Pacific Railroad since that date. Therefore, the remaining issue in regard to the coverage of Nexterna from and after that date is whether Nexterna is providing a service in connection with railroad transportation.

Section 202.7 of the Board's regulations provides that service is in connection with railroad transportation:

> * * * if such service or operation 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, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (20 CFR 202.7).

Nexterna contends that the provision of software and hardware constitutes sales and not a service, and therefore ought not to be covered under the Acts unless the product sold is essential to or unique to rail transportation. Nexterna further contends that the provision of software and hardware for various purposes by Nexterna as described above is not necessary to the function of railroads, and is not used only by rail carriers, as is evidenced by Nexterna's provision of these products to non-rail companies.

The Board does not adopt Nexterna's interpretation of the Acts, and finds that in the manufacture, sale, and servicing of computer software

Nexterna, Inc.

and hardware, Nexterna is providing services in connection with the railroad industry which is "reasonably directly related, functionally or economically, to the performance of obligations * * * " undertaken as a common carrier by rail.

In Railroad Concrete Crosstie Corporation v. Railroad Retirement Board, 709 F.2d 1404, 1408 (11th Cir. 1983), in response to the argument that the manufacture of crossties cannot be construed as a service, the Court stated that "it is the *provision* of the crossties by Railroad Concrete to Florida East Coast which constitutes the 'service.'" In support of its decision, the Court cited 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), where the Court of Appeals for the District of Columbia held that a warehouse corporation owned by a railroad and engaged in loading and unloading railroad cars and other handling of property transported by railroad, and in other activities which enabled the railroad to perform its rail transportation more successfully, was performing "services in connection with" the transportation of property by railroad and therefore was an employer under the Railroad Unemployment Insurance Act. The Court of Appeals quoted from the opinion of the Railroad Retirement Board which had held that Duquesne was an employer under the Act:

> In light of the general purpose of the * * * [Railroad Unemployment Insurance Act] and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (l) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroad; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such

> as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public such as auxiliary bus transportation, dining facilities, and incidental warehousing services.
>
> We agree with the Board's construction of the Act. It follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i.e., to cover the business of railroading as it is actually carried on. (Footnote omitted.) 149 F.2d at 509.

The Court in Railroad Concrete Crosstie also cited Despatch Shops, Inc. v. Railroad Retirement Board, 153 F. 2d 644 (D.C. Cir. 1946), which involved a subsidiary of the New York Central Railroad Company which owned and operated railroad freight car shops which manufactured and repaired railroad cars for its parent. The court concluded that the primary purpose of Despatch Shops was to aid the transportation operations of its parent company, the New York Central. The Court did not find persuasive an argument that because Despatch manufactures new cars it should be considered an independent manufacturing company, rather than a carrier affiliate which performed services for the carrier. 153 F. 2d at 646.

Further, the Court in Railroad Concrete Crosstie also cited Southern Development Co v. Railroad Retirement Board, 243 F. 2d 351 (8th Cir. 1957), which concerned a real estate investment subsidiary of the Kansas City Southern Railroad Company that purchased a building which it rented to the railroad to house its general offices. Employees of the subsidiary cleaned and maintained the building. In affirming the Board's decision that the company was an employer under the Acts, the Court noted that the furnishing of offices and their maintenance and repair were certainly supportive of transportation and essential to its proper functions 243. F. 2d at 355.

Nexterna, Inc.

It is clear from Despatch Shops and Railroad Concrete Crosstie that the fact that a concern manufactures or constructs a product does not remove it from the "service in connection" language of the Acts. Despatch Shops constructed rail cars and Railroad Concrete Crosstie supplied crossties, just as Nexterna supplies Union Pacific and other rail carriers with computer hardware and software.

Nexterna contends that its principal business is not the performance of service in conection with rail transportation, and cites section 202.8 of the Board's regulations, which provides that a company under common control which is principally engaged in service in connection with rail transportation is a covered employer. Although the Board finds that Nexterna *is* principally engaged in service in connection with rail transportation, the fact that a company is not principally engaged in service in connection with rail transportation does not mean that the company is not covered under the Acts. If the company performs some railroad service, then section 202.9 of the Board's regulations may apply. That section provides that, under certain circumstances, only part of the enterprise may be a covered employer.

The following cases cited by Nexterna do not seem to apply to the instant case. Parker LaFarge, Inc., B.C.D. No. 94-18, involved payroll services being performed by a quarrying company for an affiliate railroad. The decision held that payroll services constituted services in connection with railroad service, but ruled that the services in that case represented such a small percentage of the company's operations that the service constituted casual service under section 202.6[4] of the Board's regulations. Trans-Global Solutions, Inc., d/b/a Austin Area Terminal Railroad, Inc., B.C.D. 01-41, did not, as Nexterna suggests, hold a company not to be covered because it was principally engaged in non-carrier business. That decision held the company to be covered as a carrier, but, under section 202.3 of the Board's regulations, only to the extent of its operation performing rail-related service (that decision also

[4] "The service rendered * * * is 'casual' whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service is insubstantial."

Nexterna, Inc.

held that a subsidiary that took over the operation of the rail line was a carrier employer). Green Hills Rural Development, L-87-156, cited by Nexterna for the same purpose as Trans-Global Solutions, is substantially identical to that case: Green Hills Rural Development was held to be a carrier employer only to the extent of its carrier operations. These cases would not appear to have any bearing on the case of Nexterna.

Nexterna cites a number of legal opinions[5] involving large manufacturing companies which happened to be under common control with a railroad. These companies held themselves out in the market place as major producers and suppliers of certain products. Substantial sales were made by all of them to non-affiliated customers both in and outside the railroad industry. In the case of Ford, the opinion noted that sales to railroads were only an insignificant amount of its business. Likewise, Carnegie and Wheeling had substantial sales to non-railroad concerns and Pullman had only a small quantity of sales to its rail affiliate. The Board does not rule here that all manufacturing affiliates of railroads who sell their products to their affiliate carriers are performing services in connection with the transportation of passengers or property by railroad. However, although language contained in those decisions suggest that the provision of manufactured items may not constitute a service in connection with rail transportation, the Board in its decision regarding Railroad Concrete Crosstie concluded that, at least where the product manufactured is integral to rail transportation and where the amount of business done with the rail affiliate is not insubstantial, that manufacturing may constitute a service in connection with rail transportation.

Other opinions cited in regard to this area also do not seem applicable. In Pabtex, Inc., B.C.D. 95-112, Pabtex operated a bulk handling facility which transferred coal and coke from trucks and rail cars to ships and barges. The Board found that Pabtex did not perform a service for its affiliate but rather that its operations were performed pursuant to

[5] Carnegie-Illinois Steel Company, L-39-811; Wheeling Steel Corporation, L-39-571; Pullman Standard Car Manufacturing Company, L-40-403; and Ford Motor Company, L-40-304.

Nexterna, Inc.

contractual arrangements with brokers[6]. Nexterna points out that the Court in Interstate Quality Services v. Railroad Retirement Board, 83 F.3d 1463 (D.C. Cir. 1996), in affirming the Board's decision holding Interstate Quality Services to be an employer under the Acts, distinguished the Board's earlier decisions regarding Carnegie and Pullman, mentioned above, by stating that the company "is not in the business of manufacturing or selling but instead provides services to its customers * * *." This case, which concerned a rail affiliate which performed loading, unloading, and warehousing, does not hold that manufacturing cannot constitute a service in connection with rail transportation[7]. The Court was attempting to distinguish the cases involving manufacturing, such as Carnegie and Pullman, which are addressed above.

Nexterna also cites VMV Enterprises, B.C.D. 93-79, to the effect that in order for a company to be considered to be providing services in connection with rail transportation, it must be providing something greater than a minimal amount of service to its rail affiliate. Nexterna's contention is that the effort of its organization for its rail affiliate Union Pacific does not constitute service. However, since the Board finds that Nexterna's efforts do constitute service, VMV does not apply in this case, where a substantial portion of Nexterna's operations are performed for Union Pacific. Similarly, Nexterna's citation of the Board's decision regarding A & K Railroad Materials, Inc., B.C.D. 94-07, is inapposite. That company was found to be performing very little business with its affiliate railroad. Accordingly, that service was found to be "casual."

The Court in Livingston Rebuild Center v. Railroad Retirement Board, 970 F.2d 295 at 298 (7th Cir. 1992), characterized the Railroad Retirement Act as "a creaky statute, presuming that 'railroads' are distinct entities * * *." As mentioned above, the

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[6] The Board did state that the operations performed by Pabtex "are analogous to a manufacturing operation and not rail-related services * * *." To the extent that this language suggests that a manufacturing operation cannot constitute rail-related services, the Board does not follow it.

[7] The court cites Railroad Concrete Crosstie, which affirmed the Board's decision that a manufacturer of rail ties was a covered employer and is addressed above.

Nexterna, Inc.

Court in Duquesne Warehouse Company stated that the Board's construction of the Act "follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i.e., to cover the business of railroading as it is actually carried on. (Footnote omitted.) 149 F.2d at 509." See also Interstate Quality Services, cited above, wherein the Court stated that:

> Reloads first argues that the services it performs, including the loading, unloading and storage of rail freight, are not 'obviously essential to the functioning of the railroad' or 'inextricably linked to the operation of the railroad.' [Citations omitted.] Perhaps so – but they need not be. The statutes require that services be performed merely 'in connection with' rail activity * * *.[8]

Accordingly, since Nexterna did a substantial portion of its business with the railroad industry (66 percent of its revenue over the past 5 years is attributable to the rail industry), and a substantial portion of that business with its affiliate carrier, the Board finds that Nexterna provided services in connection with railroad transportation. However, as mentioned above, on January 15, 2003, Nexterna transferred its rail-related operations to Union Pacific[9].

Accordingly, it is determined that Nexterna became an employer within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(ii)) and the corresponding provision of the Railroad Unemployment Insurance Act as of December 15, 1998, the date as of which it came under common control with Union Pacific. The Board finds further that Nexterna ceased to be a covered employer

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[8] In this connection it should be noted that the November 2002 issue of Railway Age contains an article at page 21, "KCS Moves to Scheduled Operations" concerning the adoption by the Kansas City Southern of an information technology system, developed in-house, which seems similar to that provided by Nexterna for Union Pacific. Consequently, it appears that the product produced by Nexterna is at least not atypical of that used by carriers, and is perhaps widely, if not universally or exclusively, used by carriers.

[9] At that time, Nexterna laid off approximately 33 employees with an additional 33 to be laid off no later than April 15, 2003. Union Pacific has hired approximately 40 of these individuals.

Nexterna, Inc.

January 15, 2003, the date as of which the portion of its operation which provides rail-related services was transferred to Union Pacific.

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