B.C.D. 03-6

JAN 1 6 2003

EMPLOYER STATUS DETERMINATION
Genesee & Wyoming, Inc.

This is the decision of the Railroad Retirement Board with regard to the coverage of Genesee & Wyoming, Inc. (GWI) 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).

According to information supplied by Shayne L. Magdoff, Senior Vice-President – Administration and Human Resources, GWI was incorporated in 1977. GWI is a publicly held company that is a holding company that owns or controls several railroad carriers. GWI states that it has no employees and performs no services for its subsidiary railroads. According to the record before the Board, subsidiary railroad carriers include the Illinois & Midland Railroad, Inc. (BA 2366), the Buffalo & Pittsburgh Railroad, Inc. (BA 2249), the Rochester & Southern Railroad, Inc. (BA 2247), and the Portland & Western Railroad, Inc. (BA 2776).

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;
>
> (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 (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.

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GWI is clearly not a carrier by rail. Whether GWI 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). A majority of the Board finds that as defined by the Union Pacific case, GWI as the corporate parent of its rail carrier subsidiaries is not under common control with those subsidiaries. Therefore, regardless of whether or not it performs any service for those railroad subsidiaries, a majority of the Board finds that it could not be found to be a covered employer under the Acts.

GWI is not an employer subject to the Acts administered by the Board.

Cherryl T. Thomas

V. M. Speakman, Jr. (Dissenting)

Jerome F. Kever