B.C.D. 03-76

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Employer Status Determination
Canadian National Railway Properties, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Canadian National Railway Properties, Inc. (CNR Properties) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

The evidence is that CNR Properties was incorporated as a wholly owned subsidiary of the Canadian National Railway (CN).[1] CNR Properties has 84 employees, all of whom are located in Montreal, Quebec. CNR Properties first compensated employees and began real estate operations on January 1, 1999. The Chief Legal Officer, Senior Vice President and Corporate Secretary of CN, advises that CNR Properties owns 11,760 miles of track in Canada which CN operates under a license agreement dated January 1, 2000. CNR Properties derives substantially all its revenues from this agreement. The Chief Legal Officer further advises that CNR Properties also provides "asset management services" for both the CN and CN subsidiary railroads operating within the United States.[2] He describes these services as assisting employees of the U.S. subsidiaries "in the acquisition, management and disposition of real and personal properties. For example, CN[R Properties] will review and evaluate sale proposals, or review plans for acquiring new properties for operation."

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 * * *.

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1 The Canadian National Railway Company was first organized in 1922 as a dominion corporation of the Canadian Government. On November 28, 1995, the Government of Canada completed the sale of all its shares in the Company to the public pursuant to the CN Commercialization Act, and the CN became a private company. Mergent Transportation Manual, 2001 ed., at 202.

2 CN subsidiary railroads operating in the United States include the Illinois Central Railroad (BA 1516), the Grand Trunk Western Railroad (BA 1208), the Duluth, Winnipeg and Pacific Railway Corporation (BA 1607), and the Wisconsin Central Transportation Corporation (BA 2633).

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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.

The evidence does not show that CNR Properties owns any line of rail within the United States, and that CNR Properties does not conduct rail carrier operations itself. CNR Properties is therefore not a carrier by rail as defined by section 1(a)(1)(i) of the RRA and section 1(a) of the RUIA. However, CNR Properties is a wholly owned subsidiary of CN, which also owns the Illinois Central Railroad, Grand Trunk Western Railroad, and the Wisconsin Central Transportation Corporation, all of which are rail carrier employers operating in the United States. Accordingly, the Board finds that CNR Properties is under common ownership with a rail carrier as defined by section 1(a)(1)(ii) of the RRA and section 1(a) of the RUIA. Utah Copper Co. et al. v. Railroad Retirement Board, et al., 129 F. 2d 358, 363, (10th Cir. 1942).

The question remains as to whether CNR Properties performs a service in connection with railroad transportation within the meaning of section 1(a)(1)(ii) of the RRA and section 1(a) of the RUIA. Aside from the right of way license agreement with CN, the business activities of CNR Properties are described as "acquisition, management and disposition of real and personal properties." There is no evidence that these services are or will be performed for any business entity other than CN and the related railroads operated in the United States. The Board notes that management of property used by a rail carrier has long been determined to be a service in connection with the transportation of property by rail. Very early in administration of the Railroad Retirement Act of 1937, the Board determined that where a company owned property including land, railway terminals, railroad equipment, and an office building used almost exclusively by the affiliated railroad, the company performed a service in connection with the affiliated rail carrier's transportation of passengers and property. See: Board Order 39-766, Status of Rock Island Improvement Company, 2 RRB Law Bulletin 266 (1940). In Southern Development Company v. Railroad Retirement Board, 243 F. 2d 351, (8th Cir. 1957), the Court of Appeals affirmed a decision of the Board which held that a company operating an office building principally occupied by offices of the affiliated railroad was performing a service in connection with the railroad's transportation operations under the Railroad Retirement Act. More recently, the Board has determined that a company performed a service in connection with railroad transportation when it provided general management service to the affiliated railroad, including negotiation and execution of all contracts and leases relating to property owned by the railroad, and contraction for and supervision of repair and alterations to that property. See: Rail Investments, Inc., B.C.D. 95-19. On the other hand, the Board notes that in Standard Office Building v. United States, 819 F. 2d 137, (7th Cir.,1987) the Court found that a non-carrier affiliate which owned and operated an office building, about half occupied by the affiliated railroad and about half occupied by non-related businesses, was not a covered employer under the Railroad Retirement Tax Act.

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There is no evidence that CNR Properties performs less than half of its services to affiliated railroads; rather, CNR Properties exists primarily to serve these affiliates. Accordingly, the Board finds that the property management services which CNR Properties provides to affiliated railroads constitutes a service in connection with the transportation of property by rail. However, the Board further notes that section 1(d)(2)(i) of the Railroad Retirement Act qualifies the definition of covered employment with respect to employees of non-United States companies as follows:

> (i) an individual shall be deemed to be in the service of an employer * * * not conducting the principal part of its business in the United States only when he is rendering service to it in the United States;

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as does section 3231(d) of the RRTA (26 U.S.C. 3231(d)).

The evidence available indicates that CNR Properties is a Canadian company, which derives the principal portion of its income from the license of property in Canada. The Board therefore finds pursuant to section 1(d)(2)(i) that effective January 1, 1999, CNR Properties is an employer only with respect to any service by its employees which is performed within the United States. Service performed within Canada, whether by Canadian residents or citizens, or by citizens or residents of the Untied States, is excluded from coverage under the Acts.

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