Employer Status Determination

**Interstate Quality Services, Inc.
doing business as Interstate Reloads, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Interstate Quality Services, Inc., doing business as Interstate Reloads, Inc., (Reloads) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. In a decision dated December 17, 1991, the Board's Deputy General Counsel determined that Reloads had been an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since March 15, 1989 (R. 56-61)[1]. Reloads filed a timely request for reconsideration of the prior decision.

The evidence on reconsideration is that Reloads was incorporated in Illinois on March 15, 1989 (R. 16) as a wholly owned subsidiary of Iowa Interstate Railroad (Iowa Interstate) (R. 21). Iowa Interstate, which operates as a rail carrier between Blue Island, Illinois and Council Bluffs, Iowa, has previously been determined to be a covered employer under the Acts effective October 13, 1984. See Legal Opinion L-85-4 (R. 97), and Iowa Interstate Railroad, Ltd., -- Lease and Operate -- Exemption, Finance Docket No. 30554, 49 Fed. Reg. 39245 (October 4, 1984). Reloads owns five warehouses on 33 acres of land in Blue Island (R. 80) which are served by one railroad siding owned and serviced by an unrelated rail carrier, CSX Transportation.

Reloads uses its facility to load and unload freight from both trucks and rail cars; to store freight which arrives by truck or rail; to dispatch freight by rail or truck according to customer's directions; and to arrange for delivery of received goods by truck (R. 80). Reloads also leases a small amount of its space to a lumber wholesaler (R. 84). In performing its freight handling service, incoming freight is consigned to the customer's name in care of Reloads, while outbound freight is consigned to the customer's name to consignee (i.e., final destination) via Reloads (R. 46). The information provided by Reloads regarding its revenue from each activity (R. 91-92) is summarized as follows:

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[1]References in this fashion are to pages of the Administrative Record before the Board.

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TABLE ONE RELOADS REVENUE (Percent of Total)					
Year	**Railcar Handling**	**Warehouse Storage**	**Truck Unloading**	**Trucking**	**Other**
1989	49.6	2.9	9.1	36.0	2.4
1990	51.3	4.5	7.0	35.3	1.8
1991	54.5	12.2	3.1	22.9	7.4
1992	39.7	29.4	2.8	16.5	11.6

Reloads uses seven to nine individuals to perform its freight handling service who are furnished by a temporary employment firm (R. 16). The status of these individuals as covered employees under the Acts is the subject of a separate decision of the Board. Reloads has furnished information regarding the proportion of staff time devoted to loading and unloading freight hauled or switched by Iowa Interstate, the proportion devoted to freight hauled or switched by other railroads, and proportion expended in other activities (R. 90). This information may be summarized as follows:

TABLE TWO RELOADS STAFF ACTIVITIES (Percent of Total)				
Year	**Iowa Line Haul and Switching**	**Other RR Line Haul and Switching**	**Total Rail-Related**	**Total Non-Rail**
1989	35.8	27.8	63.6	36.4
1990	39.0	31.1	70.1	29.9
1991	31.8	55.4	87.2	12.8
1992	36.7	50.5	87.2	12.8

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The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

> The term "employer" shall include--
>
> (i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;
>
> (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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *.

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

It is clear, and Reloads does not contest (R. 79), that it is under common control with a rail carrier employer, in that it is a wholly-owned subsidiary of Iowa Interstate, a rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Thus, if Reloads performs a "service in connection with" railroad transportation it is a covered employer under the Acts. Reloads argues that it does not perform such a service.

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

> * * * such service * * * 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.

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Section 202.6 of the Board's regulations defines service in connection with railroad transportation as casual when it is so "irregular or infrequent" that it may be inferred that such service will not be repeated or where such service is insubstantial.

In the initial determination that Reloads was a covered employer, the Deputy General Counsel found that 60 percent of Reloads' business constituted loading carload freight for shippers on Iowa Interstate (R. 60). Relying on Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, (1946), the Deputy General Counsel determined that this activity constituted a service in connection with railroad transportation. On appeal to the Board, Reloads argues that the additional information it has furnished establishes that Reloads' activities and operation are so unlike those of Duquesne that Reloads does not engage in a service in connection with railroad transportation in the manner of Duquesne.

Initially, Reloads contends (R. 87-88) that it conducts nothing like the proportion of business with Iowa Interstate that Duquesne Warehouse did with the Pennsylvania Railroad. As summarized by table two above, in 1989 and 1990 Reloads conducted about equal portions of its business with Iowa Interstate and with other rail carriers, and in 1991 and 1992, about twice as much work was done transferring freight for unrelated railroads as for Iowa Interstate. In contrast, Duquesne Warehouse conducted 100 percent of its freight transfer business for its railroad affiliate. 326 U.S. 449, 450. Because the proportion of staff time connected with Iowa Interstate shipments during the 1989-1992 period never exceeded 40 percent of the total, Reloads contends that it does not perform a service in connection with railroad transportation. The Board does not agree.

The recent case of Livingston Rebuild Center, Inc., v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), considered whether a company which rebuilt locomotives and other rolling stock performed a service in connection with railroad transportation under the Acts. Livingston obtained about 95 percent of its business from railroads, but only about 25 percent of its business was with its affiliated rail carrier. 970 F. 2d at 296, 298.

The Board believes that the Livingston decision controls the outcome with respect to Reloads. The Board notes that the

amount of service Reloads performed for the railroad industry in general falls below the 95 percent figure in Livingston, and the proportion of staff time and revenue attributable to business with Iowa Interstate has declined slightly in 1991 and 1992. However, the amount of service Reloads performed for its rail carrier affiliate, Iowa Interstate, ranged from a low of 31.8 percent to a high of 39 percent over the four years of record, at all times exceeding the 25 percent level between carrier and affiliate in Livingston. The evidence also shows that the proportion of staff time from all railroad freight has increased over the four years of record from 63 to 87 percent of total, and the revenue increased for three of the four years. The Board believes that the services Reloads performs for both its rail affiliate and the railroad industry in general cannot be considered insubstantial.

Reloads also argues that it is distinguishable from Duquesne because Reloads does not lie directly on the line of its affiliated railroad (R. 88). Thus, unlike the facility in Duquesne, Reloads does not have a rail connection with a rail carrier. However, given the fact that a significant proportion of freight handled by Reloads is destined for or received through shipment on Iowa Interstate, the Board finds the lack of a physical rail connection to the Iowa Interstate line is not determinative.

Finally, Reloads argues that it does not perform a service in connection with railroad transportation because unlike Duquesne Warehouse, while some of the freight is transferred between truck shipments, and other freight is transferred or stored between rail and truck shipments, none is "in transit" freight stored between freight movements by rail (R. 88-89). However, black-letter law holds that a rail carrier's duty to protect goods in its care does not end with the last rail movement, but extends to storage of the goods for a reasonable time after arrival while awaiting pick-up by the owner. 13 AM JUR 2d Carriers § 395 (Goods Awaiting Delivery, Generally). The Interstate Commerce Act thus provides that the term transportation includes storage of goods. 49 U.S.C. 10102(25)(B); See also, Western Transit Co. v. A. C. Leslie & Co., 242 U.S. 448, 452, (1916); General American Transportation Corp. v. Indiana Harbor Belt Railroad, 191 F. 2d 865, 871, (7th Cir., 1951). As between 63 and 87 percent of Reloads' staff time is devoted to handling goods shipped by rail, a substantial proportion of goods which Reloads stores are beginning or ending a rail shipment, and hence fall within the compass of rail transportation within the Interstate Commerce

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Act. The Board is therefore persuaded that the warehousing activities conducted by Reloads are sufficiently similar to those conducted by Duquesne Warehouse as to constitute service in connection with the transportation, transfer in transit, or storage or handling of property transported by railroad in the same fashion as those considered by the Supreme Court in Duquesne.

Accordingly, upon reconsideration of the initial decision of the Deputy General Counsel in Legal Opinion L-91-136, the Board determines that Interstate Quality Services, Inc., doing business as Interstate Reloads, Inc., is under common control with a rail carrier and is performing a service in connection with transportation, transfer in transit, or storage or handling of property transported by railroad, and that such service is not casual in nature.

Consequently, Interstate Reloads is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective March 15, 1989, and must file the appropriate returns of compensation and contributions as required under those Acts.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever
(Dissenting)

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