EMPLOYER STATUS DETERMINATION
Delaware Transportation Group, Inc. (DTGI)

JAN 20 1999

This is a determination of the Railroad Retirement Board concerning the status of Delaware Transportation Group, Inc. (DTGI) 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.).

In Surface Transportation Board (STB) Finance Docket No.33505, decided November 17, 1997, John H. Marino filed a notice of exemption to continue in control of DTGI, the Gettysburg Railway Company, Inc. (GRCI) (BA No. 2380), and the Evansville Terminal Company, Inc. (ETCI) (BA No. 2369). According to the STB decision, DTGI and GRCI would become Class III rail carriers upon conclusion of the transactions covered by two simultaneously filed notices of exemption in (1) STB Finance Docket No 33503, wherein DTGI sought to acquire certain rail lines from the Delaware Valley Railway Company, Inc., and (2) STB Finance Docket No. 33504, wherein GRCI would lease and operate the rail lines being acquired by DTGI in STB Finance Docket No. 33503. Information in the file indicates that those transactions were consummated on November 1, 1997.

Information furnished by Mr. John D. Heffner, Counsel for DTGI, stated that DTGI is a privately held holding company with no employees. DTGI owns railroad right of way and nonoperating real estate and rail assets in Adams and Cumberland Counties, Pennsylvania, has investment income, and leases its rail properties to GRCI. According to Mr. Heffner, DTGI began operations on November 1, 1997 and spends "100%" of its total business time for GRCI. In a letter dated February 6, 1998, Mr. Heffner stated that DTGI provides administrative management services for GRCI. In a subsequent letter dated April 23, 1998, however, Mr. Heffner stated that, "Contrary to our previous representation in our answer to your question 4(d), the only service which DTGI presently provides for Gettysburg is the lease of the subject rail line." Information obtained from the coverage file for GRCI indicates that GRCI is a Class III rail carrier with approximately 2,000 carloads of rail freight interchanged to or from Class I carriers.

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

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> 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 (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).

DTGI sought and obtained from the STB authority to acquire the line of railroad. Although the STB decision noted that DTGI would become a class III carrier upon conclusion of the transactions covered in Finance Docket Nos. 33503 and 33504, the STB also stated that GRCI sought authority to lease and operate the rail lines in this case. In light of the fact that DTGI did not seek or obtain STB authority to operate the rail line, together with the fact that a covered entity, GRCI, operates the line in question, the Board finds that DTGI is not a rail carrier employer under the definition of employer in subparagraph (i) quoted above.

This conclusion, however, leaves open the question as to whether DTGI is an employer under the definition in subparagraph (ii), commonly referred to as the "affiliate definition."

Under section 1(a)(1)(ii), a company is a covered employer if it meets both of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii).

All of the stockholders of DTGI are also stockholders of GRCI. Specifically, John H. Marino and his spouse together own 100 percent of the stock of DTGI. Additionally, they also own 100 percent of the stock of GRCI, a covered class III rail carrier employer under the Acts. Mr. and Mrs. Marino also serve as directors of both companies and act as President and Secretary, respectively, of both companies. Accordingly, the Board finds that DTGI is under common control with the GRCI.

Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

> The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is

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> 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, 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.

Thus, if DTGI performs a "service in connection with" railroad transportation, it is a covered employer under the Acts.

According to Mr. Heffner, GRCI leases the rail line from DTGI, but provides all administrative and management services for itself with its own employees.

DTGI is not providing a service in connection with railroad transportation. Therefore, DTGI is not an covered employer under the Acts.

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