EMPLOYER STATUS DETERMINATION
St. Louis Car Company d/b/a
Cumbres & Toltec Scenic Railroad

MAY 24 1999

This is the determination of the Railroad Retirement Board concerning the status of the St. Louis Car Company d/b/a Cumbres & Toltec Scenic Railroad ("C&T Scenic Railroad") as an employer 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).

Procedural Background

By cover letter dated February 11, 1999, C&T Scenic Railroad submitted to the Railroad Retirement Board ("the Board") a petition to commence an expedited coverage proceeding and set a briefing schedule. The Petition requested the Board to render a determination of the status of the C&T Scenic Railroad as an employer under the RRA and the RUIA for the period beginning January 1, 1989 and ending December 31, 1996. The Petition explained that the C&T Scenic Railroad is under investigation by the Office of Inspector General of the Railroad Retirement Board "with respect to alleged 'filing of false compensation and service reports with the U. S. Railroad Retirement Board.' Subpoena of Office of the Inspector General directed to the Custodian of the Records of StateRail [sic], f/k/a Kyle Railway, Inc., dated August 20, 1998." (Petition, pp. 1-2). By letter dated February 26, 1999, the Board granted the petition and set a briefing schedule. C&T Scenic Railroad submitted an Opening Brief on March 29, 1999.

Factual Background

On October 9, 1946, the then General Counsel of the Railroad Retirement Board issued Legal Opinion L-46-645, which held that the St. Louis Car Company had never been an employer within the meaning of either the RRA or the RUIA. The legal opinion noted that the St. Louis Car Company had been incorporated on October 28, 1925, as a successor to a company of the same name incorporated in April 1887, and was engaged, as was its predecessor, in the manufacture of passenger coaches, combination passenger, baggage and mail coaches, and other steam and electric railway equipment and buses. The St. Louis Car Company was not, however, associated or connected with any other corporation and thus was found not to be performing services in connection with the transportation of passengers or property by railroad within the meaning of the RRA and the RUIA.

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On June 10, 1971, the Board's General Counsel held, in Legal Opinion L-71-182, that the Cumbres and Toltec Scenic Railroad would become a rail carrier employer under the RRA and the RUIA effective June 26, 1971, the date it would commence operation pursuant to authority obtained from the Interstate Commerce Commission ("ICC") in Finance Docket No. 26232. That Finance Docket addressed the joint application filed on June 12, 1970, by the Colorado Railroad Authority and the New Mexico Railroad Authority, corporations organized by the Legislatures of those two states:

> . . . for the purpose of jointly acquiring and operating any historical and scenic railroad, for a certificate of public convenience and necessity . . . authorizing the acquisition and operation, or lease for operation, of all of the railroad properties and system between Antonito, Colo., and Chama, N. Mex., including a line of railroad between these two points extending a distance of 64 miles, presently owned by the Denver and Rio Grande Railroad and for which permission to abandon was granted in Finance Docket No. 24745 dated December 23, 1969 . . . (ICC Finance Docket No. 26232).

In a conference telephone conversation [1] on April 5, 1999 (hereafter "the Conference Call"), attorney Kevin Sheys, of the law firm of Oppenheimer, Wolff, Donnelly & Bayh, LLP, which is representing the C&T Scenic Railroad before the Board, advised a member of the Board's legal staff that sometime between 1946 and 1982, the St. Louis Car Company became an affiliate of Kyle Railways, Inc. ("Kyle"). Legal Opinion L-80-313, issued December 1, 1980, found that Kyle was under common control with rail carrier employers under the RRA and the RUIA and that Kyle performed services in connection with railroad transportation. Legal Opinion L-80-313 held that Kyle had become an employer under the Acts administered by the Board effective July 1, 1978.

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[1]Participants in the conference telephone call were Kevin Sheys, John Korns, and Tracie Spear of Oppenheimer, Wolff, Donnelly & Bayh, LLP and Marguerite Dadabo of the Board's Bureau of Law.

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In its Opening Brief, C&T Scenic Railroad provided the following information about the rail line in question. The rail line consists of 65 route miles between Chama, New Mexico and Antonito, Colorado ("the Subject Line"). Chama and Antonito are two small towns, neither of which is served by airlines, passenger railroads or scheduled bus service. The "Subject Line" runs through mountains, climbing and descending steep grades. Because of the elevation of a portion of the Subject Line, snow makes the Subject Line impassable during the winter months. The Brief stated that at all times relevant to the Petition filed by the C&T Scenic Railroad, the Subject Line was a historical, narrow-gauge excursion railroad, operated with steam-powered locomotives, not connected on either end with a national railroad network and owned by the Cumbres and Toltec Scenic Railroad Commission ("the C&T Commission"), which was organized sometime after the ICC issued its decision in Finance Docket No. 26232 and is controlled by the States of Colorado and New Mexico. The purpose of the C&T Commission is to own and administer contract operations on the Subject Line.

The Subject Line had been constructed in the 1880's as part of the Denver & Rio Grande Western's ("DRGW") San Juan Extension, which provided freight and passenger service in southern Colorado and northern New Mexico. DRGW was granted authority to abandon the Subject Line in an ICC decision dated December 23, 1969. As discussed above, the States of New Mexico and Colorado subsequently obtained ICC authority to acquire and operate over the Subject Line.

The Opening Brief noted that from June 26, 1971 through March 1, 1982, the Subject Line was operated by Scenic Railways, Inc., a company unaffiliated with C&T Scenic Railroad. C&T Scenic Railroad began to operate over the Subject Line on "approximately" March 1, 1982, pursuant to a one-year agreement between Kyle and the C&T Commission. On January 5, 1983, the C&T Commission and Kyle entered into a twenty-year lease of the Subject Line ("the Lease") effective February 1, 1983. Kyle assigned its obligations under the Lease to C&T Scenic Railroad. The Opening Brief stated that at all times relevant to the Petition filed with the Board, C&T Scenic Railroad had no other businesses or operations. The Lease stated in paragraph 4(a) that:

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> The primary interest of the [C&T] Commission is that the Cumbres and Toltec Scenic Railroad be operated as a recreational, scenic, historical and educational attraction for visitors to and residents of the States of Colorado and New Mexico. Accordingly, the Lessee covenants to operate excursion trains. (p. 4, Lease, Exhibit 2 of Opening Brief).

Paragraph 14 of the Lease included a requirement that a sign be prominently posted at each terminal identifying the Subject Line as the "Cumbres and Toltec Scenic Railroad Owned Jointly by the State of Colorado and the State of New Mexico, Leased to and Operated by Kyle Railways, Inc." Paragraph 15 provided that the C&T Commission would provide and keep in force at its own expense whatever railroad operating authority was required by the ICC and the Department of Transportation. The Opening Brief stated that the C&T Commission did not secure any operating authority from the ICC. In addition, neither Kyle nor C&T Scenic Railroad sought any operating authority from the ICC for the C&T Scenic Railroad. The Brief also noted that where Kyle's ICC filings required listing all rail carrier operations within Kyle's control, C&T Scenic Railroad was either not mentioned or was listed as a non-carrier. There were no freight operations on the right-of-way used by the C&T Scenic Railroad. C&T Scenic Railroad provided scenic train passenger service on the Subject Line until approximately November 30, 1996, when pursuant to an agreement with the C&T Commission, the service was ended and the Lease was terminated.[2]

The Opening Brief stated that for the entire time of C&T Scenic Railroad's operation, service was on a seasonal basis from June through the middle of October. Exhibit 3 submitted with the Opening Brief is a brochure about the service conducted over the Subject Line while it was leased to Kyle Railways. That brochure states that the Subject Line is a Registered National Historic Site operated as a tourist attraction by Kyle Railways, Incorporated. The

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[2]The Opening Brief stated that it is C&T Scenic Railroad's understanding that the C&T Commission thereafter engaged another operator to continue scenic train service on the Subject Line.

brochure describes the service over the Subject Line as a recreational excursion, calling it a "special journey into yesterday, this enchanting narrow-gauge steam railroad . . ." The brochure also details the trip options offered, consisting of: (1) a round trip from either Chama or Antonito, to the Osier[3] stop and return; (2) through trip from Chama to Antonito, for which a customer had to choose to travel to Antonito by train and return to Chama by van or to travel to Antonito by van and then return to Chama by train; or (3) through trip from Antonito to Chama, for which a customer had to choose to go to Chama by train and return by van or to travel to Chama by van and return by train.

The Opening Brief explained that the one-way trip between Chama and Antonito took approximately seven hours because of the mountainous terrain and steep grades involved on the Subject Line and the stop at Osier, noting for comparison that the driving time between Chama and Antonito is approximately 90 minutes. C&T Scenic Railroad offered sightseers "loop" scenic rides: passengers would begin their rides in Antonito or Chama and were returned to their points of origin on the same day, with a few exceptions for some riders who had made personal arrangements to be picked up by private automobile or charter bus at one end of the ride.

In view of the reason that C&T Scenic Railroad filed a petition with the Board for a coverage ruling at this particular time, one additional set of circumstances must be included in this factual background portion. During the Conference Call, it was discussed that it appears in part from conversations that Mr. Korns has had with individuals who have worked for or managed the Cumbres & Toltec Scenic Railroad, that when the St. Louis Car Company took over the operation of the scenic railroad in 1982, the individuals who took over the reporting responsibility simply continued the reporting of service and compensation that had been done by the prior operator of the scenic railroad. Service and compensation of certain employees of St. Louis Car Company d/b/a Cumbres & Toltec Scenic Railroad was reported as covered under the RRA and the RUIA. The reports used the BA number assigned to the Cumbres & Toltec

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[3]Osier, Colorado was the center stopping point of the excursion, where, according to the brochure, hot lunches were available.

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Scenic Railroad Commission as a result of the coverage ruling issued in Legal Opinion L-71-182 (BA No. 2747).

Applicable Law and Regulations

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer" to include:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49 [45 U.S.C. §231(a)(1)(i)].

Section 1 of the RUIA contains essentially the same definition.

Prior to January 1, 1996, section 1(a)(1)(i) of the RRA defined a carrier employer as "any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49." Section 1 of the RUIA contained the same definition. The wording of the carrier definition of an employer was amended by the ICC Termination Act of 1995, Public Law (P.L.) 104-88. The changes in the definition of carrier employer were, however, conforming amendments made to reflect the fact that P.L. 104-88 gave to the new Surface Transportation Board (STB) jurisdiction over railroad transportation previously conferred on the Interstate Commerce Commission. [4] P.L. 104-88 made it clear that it enacted no changes in the coverage of employers or employees under the RRA and the RUIA, providing that:

> The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment

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[4] The amendments to the definition of "employer" were, in fact, set forth in Title III of P.L. 104-88, entitled "Conforming Amendments."

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> Insurance Act. [P.L. 104-88, Title I, section 102(a), 109 Stat. 808, codified at 49 U.S.C. §10501(c)(3)(B)].

Thus, P.L. 104-88 made no substantive changes in coverage under the RRA and the RUIA.

Section 202.2 of the Board's regulations states that:

> Any company or person principally engaged in carrier business is an employer. [20 CFR §202.2].

Section 201.1 of the regulations defines the term "person" as follows:

> (j) *Person.* The term "person" includes an individual, trust, estate, partnership, association, joint stock company, company, corporation, and institution. [20 CFR §201.1(j)].

Discussion

In view of the procedural and factual background of this case, it is important to point out at the beginning of this discussion that a coverage ruling issued by the Board applies to a "person" as that term is defined in section 201.1(j) of the Board's regulations. See 20 CFR §§259.1(b)(1) and 259.2(a).[5] Thus, a coverage ruling may apply to a business organized as a sole proprietorship, a partnership, an association, a joint stock company, or a corporation. A coverage ruling does not, however, apply to a particular line of railroad: a rail line does not fall within the definition of "person." In a case where a new entity takes over the railroad operations previously carried on by another entity, the Board separately considers whether the new entity falls within the definition of a

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[5]Section 259.1(b)(1) provides in pertinent part that the General Counsel shall make the initial investigation with respect to the "status of any *person* as an employer" under the RRA and the RUIA. Section 259.2(a) provides that with respect to a determination "concerning the status of a *person* as an employer . . . that *person* shall be a party to such determination . . ." (Emphasis supplied.).

carrier employer under the RRA and the RUIA. The coverage ruling with respect to the status of the former operator of the rail line does not automatically carry over and apply to the new operator. [6]

In this case, the coverage ruling issued in Legal Opinion L-71-182 applied to the Colorado Railroad Authority and the New Mexico Railroad Authority, corporations organized by the legislatures of those two states for the purpose of acquiring and operating an historic, scenic railroad. Since the Authorities planned to operate the railroad under the name "Cumbres and Toltec Scenic Railroad," Legal Opinion L-71-182 was issued to cover an entity by that name. The ruling in Legal Opinion L-71-182 did not and does not apply to the St. Louis Car Company d/b/a the Cumbres & Toltec Scenic Railroad, which is a different company from the entity covered by that legal opinion, and therefore a different "person" under the Board's regulations.

The agency has previously ruled on the coverage status of the St. Louis Car Company, as noted earlier, in Legal Opinion L-46-645. However, Legal Opinion L-46-645 was based upon the business which the company conducted at that time. St. Louis Car Company did not operate a train in 1946. The question now facing the Board is whether its operation of the Cumbres & Toltec Scenic Railroad brought it within the definition of "employer" under the RRA and the RUIA.

The evidence shows that from approximately March 1, 1982 until November 30, 1996, C&T Scenic Railroad operated an excursion railroad between Antonito, Colorado and Chama, New Mexico. C&T Scenic Railroad did not conduct freight operations over the Subject Line. Nor did it operate a passenger service which connected with any other railroad. C&T Scenic Railroad was required by its lease to operate a recreational, scenic, historical and educational attraction, and the evidence indicates that it did so, operating only from June until mid-

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[6]See, for example, Board Coverage Decision No. 98-44, wherein the Board held that Golden Isles Terminal Railroad, Inc. became a rail carrier employer on the date that it began operations over the rail line previously operated by Colonel's Island State Docks Railroad.

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October each year, using steam locomotives, and publicizing its service in its brochure in terms aimed to attract railroad enthusiasts and other tourists (inviting patrons to enjoy a "special journey into yesterday," on an "enchanting narrow-gauge steam railroad").

Amendments made by the ICC Termination Act of 1995 make it clear that after December 31, 1995, C&T Scenic Railroad was not subject to the jurisdiction of the Surface Transportation Board (STB). Section 10501 of Title 49 of the United States Code provides in pertinent part that the STB has jurisdiction over rail carrier:

> . . . transportation in the United States between a place in --
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> > (A) a State and a place in the same or another State as part of the interstate rail network. [49 U.S.C. §10501(a)(2)(A)].

Since C&T Scenic Railroad did not operate its railroad as part of an interstate rail network, it was, according to the plain language quoted above, not subject to STB jurisdiction. Consequently, it also clearly did not fall within the carrier definition of "employer" under the RRA and the RUIA. See Board Coverage Decision (B.C.D.) No. 97-85, Indiana and Ohio Rail Passenger Corporation, issued August 28, 1997.

Since, however, the ICC Termination Act of 1995 specifically provided that its enactment did not change coverage under the RRA and the RUIA, we must also consider whether C&T Scenic Railroad fell within the definition of "employer" prior to the effective date of P.L. 104-88. In addressing this issue, prior Board Coverage Decisions are not only instructive, but decisive.

In B.C.D. No. 93-36, issued June 15, 1993, the Board considered the status of Grand Canyon Railway, Inc., which operated over 65 miles of track between Williams and Grand Canyon, Arizona. The track was physically connected to the east-west track of the Atchison, Topeka & Santa Fe Railway pursuant to a "standard form contract" for industry track for a private railroad connection. Grand Canyon Railway, Inc. operated an entertainment business, including the tourist railroad, which offered excursions between Williams, Arizona and the

south rim of the Grand Canyon, a museum, and a gift shop. The Board found that although Grand Canyon Railway, Inc. operated a passenger railway, it did not interchange with any railroad and did not through-ticket any passengers or freight onto any other rail carrier. B.C.D. No. 93-36 held that Grand Canyon Railway, Inc. was not a covered employer.

Since Grand Canyon Railway, Inc. operated only within one state, however, we are still faced with the question as to whether an excursion service which crossed state lines prior to January 1, 1996 was a covered employer under the RRA and the RUIA. B.C.D. No. 94-14 answers that question. In that coverage determination, the Board considered the status of Minnesota Transportation Museum, Inc. (MTM). MTM was a non-profit corporation founded in the early 1960's which operated a street car and rail museum. In ICC Finance Docket No. 32146, a notice of exemption was filed for MTM to obtain trackage rights to conduct passenger operations over a line of the Wisconsin Central, Ltd. The exemption was granted effective September 5, 1992, and on that date, MTM began excursion operations consisting of round trips over a Wisconsin Central line of 39.4 miles between Osceola, Wisconsin, and Marine, Minnesota. The Board held that MTM's operation of a tourist railroad did not constitute an operation in interstate commerce since it conducted only excursions of passengers and did not connect with interstate transportation. B.C.D. No. 94-14 thus held that MTM was not a covered employer under the RRA and the RUIA. See also, B.C.D. No. 94-9, which held that only the freight portion of the railroad operation of the Santa Cruz, Big Trees & Pacific Railway Company, and not its excursion service, was covered under the RRA and the RUIA.

In this case, C&T Scenic Railroad operated a seasonal excursion railroad for tourists for about four and a half months a year from March 1982 through the end of 1996. C&T Scenic Railroad did not interchange with any other railroad and did not "through-ticket" any passengers or freight onto any other rail carrier. The Board finds that St. Louis Car Company d/b/a/ Cumbres & Toltec Scenic Railroad did not operate a railroad in interstate commerce and thus did not fall within the carrier definition of an "employer" under the RRA and the RUIA at any time during the almost 15 year period that it operated the excursion service.

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Conclusion

For the reasons discussed above, the Board finds that the St. Louis Car Company d/b/a Cumbres & Toltec Scenic Railroad for the period March 1, 1982 through December 31, 1996 was not an employer under the RRA and the RUIA.

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