B.C.D. 01-17

FEB 02 2001

EMPLOYER STATUS DETERMINATION
LeGere Investors, Inc.

This is the determination of the Railroad Retirement Board concerning the status of LeGere Investors, Inc., 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.).

Information regarding LeGere was provided by Chris W. Damiano, President of LeGere, or was contained in documents submitted by Thomas Planera II, counsel for LeGere, including affidavits by Mr. Damiano and by Raquel Swan, Executive Vice President and Assistant Secretary of Illinois & Midland Railroad, Inc. (I&M), and Vice President of LeGere. On February 8, 1996, Stamford Capital purchased all of the stock of Pawnee Railroad, the parent company of the Chicago & Illinois Midland Railway Company, an employer under the Acts (B.A. No. 1306) and of Pawnee Transportation Company. According to Mr. Damiano, Pawnee Transportation Company entered into a coal conveyor operating and maintenance agreement with Commonwealth Edison Company pursuant to which Pawnee agreed to operate a conveyor system owned by Commonwealth Edison. Pawnee and Commonwealth Edison also entered into a coal transfer contract pursuant to which Pawnee agreed to operate a coal unloading facility. Also, on February 8, 1996, Stamford sold substantially all of the railroad operating assets of the Chicago & Illinois Midland to I&M, an employer under the Acts (BA No. 2366).

On July 31, 1997, Stamford sold the assets of Pawnee to LeGere and transferred its interest in the above contracts to LeGere. LeGere subcontracted with I&M to continue to provide management services for the operation of the facilities. LeGere reports that it has three permanent employees and hires temporary employees as needed for the unloading functions. Under the contract between LeGere and I&M, I&M is responsible for all capital improvements needed and for maintaining specified liability insurance coverage. I&M receives a monthly fee based on the quantity of coal unloaded. LeGere leases locomotives from I&M, as well as the land where the facility is located and track which provides access to the facility.

LeGere employees move rail cars containing coal and slag to the unloading facility and transload location, where they unload them. According to Mr. Damiano, LeGere employees are not supervised by I&M employees. LeGere unloads coal for Kincaid Generation, LLC[1], and slag for Reed Mineral. LeGere and

[1]Commonwealth Edison was acquired by Kincaid Generation, LLC, so that the coal unloading service is now provided to Kincaid, and the slag unloading function for Reed Mineral.

LeGere Investors, Inc.

I&M have one officer and no directors in common and no common ownership interest.

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 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).

LeGere clearly is not a carrier by rail. Further, a majority of the Board, Labor Member dissenting in a separate opinion, find that the available evidence indicates that it is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Therefore, a majority of the Board find that LeGere is not a covered employer under the Acts.

This conclusion leaves open, however, the question of whether the persons who perform work for LeGere should be considered to be employees of I&M rather than of LeGere. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

LeGere Investors, Inc.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231 (b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he or she performs such work. A majority of the Board finds that the evidence submitted shows that the unloading services provided by LeGere are performed under the direction of LeGere's permanent employees; accordingly, a majority of the Board finds that the control test in paragraph (A) is not met.

In regard to paragraphs (B) and (C), a majority of the Board finds that LeGere employees are not integrated into I&M's operations, are not providing services to the I&M, and are not rendering technical, professional, or personal services. Accordingly, a majority of the Board finds that the LeGere employees are not employees of I&M.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr. (Dissenting, separate opinion attached)

Jerome F. Kever

DISSENT OF
V. M. SPEAKMAN, JR.
ON EMPLOYER STATUS DETERMINATION
LEGERE INVESTORS, INC.

It is my position that LeGere Investors, Inc., and Illinois & Midland Railroad, Inc., (I&M) are under common control. The Executive Vice President and Assistant Secretary of I&M is also the Vice President of LeGere. I&M provides certain administrative, management and oversight services including hiring full-time LeGere employees. Moreover, as part of its commercial arrangement with LeGere, I&M purchases certain parts and materials used by LeGere in its operations and passes on the volume discount it obtains. Locomotives that LeGere uses to move cars within the facility are leased from I&M pursuant to a written contract, from which it pays I&M only $10 per hour, a seemingly token amount.

The work that LeGere performs, unloading services after I&M has completed delivery of the coal trains, clearly enhances I&M's business and this facility is LeGere's only business operation. Furthermore, I&M and LeGere show a common interest in that both entities petitioned the Railroad Retirement Board for a coverage determination.

The United States Supreme Court, early in the Board's history, agreed with the Board, that loading and unloading are services in connection with railroad transportation, Railroad Retirement Board v. Duquesne Warehouse. Co. Unloading services are services that could be performed by the carrier and charged for under the line haul tariffs. If it is such a service, it is a transportation service within the meaning of the Acts.

It is difficult to determine where the operations of I&M leave off, and LeGere's begin. I would argue that LeGere employees are in fact covered since they are performing service for the railroad, on I&M's property. Absent that I would find that LeGere and I&M are under common control and that LeGere is performing service in connection with transportation of property by railroad.

Original signed by:

V. M. Speakman, Jr.
1-24-01