B.C.D. 03-34

APR 1 0 2003

EMPLOYER STATUS DETERMINATION
Fraser, N.H. LLC –c/o Fraser Paper Co.

This is the determination of the Railroad Retirement Board concerning the status of the Fraser N. H. LLC c/o Fraser Paper Company (Fraser) 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.).

According to the evidence of record, Fraser, N. H. LLC c/o Fraser Paper Co. acquired approximately 6 miles of rail line from Berlin Mills Railway, Inc. (BA 4101). The acquisition was part of a larger acquisition by Fraser of various assets of American Tissue, Inc. (ATI) as part of a sale within ATI's bankruptcy proceeding, including the railroad lines and other assets of Berlin Mills Railway, Inc., a subsidiary of ATI. Surface Transportation Board (STB) authority for Fraser's acquisition of the rail line was obtained in STB Finance Docket No. 34222, decided July 16, 2002. The STB decision noted that the St. Lawrence & Atlantic Railroad Company (SLR) would continue to operate over the lines under a lease agreement to be entered into with Fraser. The coverage of Berlin Mills Railway, Inc. as a covered employer under the Acts was terminated effective July 9, 1999. Fraser never operated the rail line. Effective July 12, 2002, Fraser leased the line to the St. Lawrence and Atlantic Railroad Company (BA 2125).

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 * * *.

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.

In this case, Fraser does not operate the rail line in question itself. In its decision on reconsideration of the covered status of Railroad Ventures, Inc. (B.C.D. No. 00-47), the Board enunciated a three-part test to be applied in making a determination as to the coverage under the Acts of an entity in such a case. Such an entity is a carrier under the Railroad Retirement Act unless the Board finds that all three of the following factors exist: 1) the entity does not have as a primary business purpose to profit from railroad activities; 2) the entity does not operate or retain the capacity to operate the rail line; and 3) the operator of the rail line is already covered or would be found to be covered under the Acts administered by the Board.

The evidence in this case indicates that Fraser does not have as a business purpose to profit from railroad activities. The lease agreement between SLR, Fraser, and Fraser's parent company (Fraser Papers, Inc.) [Fraser and Fraser Papers, Inc. are referred to collectively as "Lessor" in this discussion of certain provisions of the lease.] does not provide for payment of rent by SLR to Fraser. Instead, an introductory paragraph refers to the payment of $10 and the "mutual covenants and agreements set forth herein" as consideration for the lease. Additionally, section 2.3(a) of the lease expressly provides that "Lessee [SLR] shall be entitled to all revenues derived from its provision of freight railroad services on the Lease Lines." Section 3.3 gives to both Lessor and SLR the right to terminate the lease upon appropriate notice as described in the lease. However, section 3.3(b) gives only to Lessor the option to terminate the lease if Lessor decides to close permanently either or both of the Berlin and Gorham Mills, or if Lessor

decides to reduce the total production in tons of either mill by 75% or more of its then current production.[1] The Board finds that the evidence in this case indicates that Fraser's purpose in acquiring the rail line was to maintain rail service to and from its paper mill.

Turning to the other two parts of the Railroad Ventures test, the evidence shows that Fraser does not own or operate any rail equipment. The evidence also shows that Fraser does not have the capacity to operate the rail line itself, and the operator of the line is a covered employer under the Acts administered by the Board. A majority of the Board therefore finds that Fraser is not a carrier under the Railroad Ventures test.

Accordingly, a majority of the Board finds that the Fraser N. H. LLC c/o Fraser Paper Company is not an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr. (Dissenting)

Jerome F. Kever

[1] The STB noted in its decision addressing the lease and operation exemption sought by SLR that there are no other shippers on the line. See, STB Finance Docket No. 34239, decided August 28, 2002, St. Lawrence & Atlantic Railroad Company – Lease and Operation Exemption – Rail Lines of Fraser N.H. LLC.

Written Dissent of
Employer Status Determination
Fraser N.H. LLC – c/o Fraser Paper Company

I disagree with majority position on this coverage decision. Specifically, I would find the first of the three factors used in determining whether Fraser would be a covered carrier, does not apply.

Fraser does have a primary business purpose to profit from railroad activities. As stated in the majority opinion, Fraser's purpose in acquiring the rail line was to maintain rail service to and from its paper mill. Thus, it does profit from the rail activities which services its mill. Acquisition of the rail line was a for profit business decision, which should result in coverage.

Original signed by:

V. M. Speakman, Jr.
Labor Member