B.C.D. 03-39

MAY 21 2003

EMPLOYER STATUS DETERMINATION
Southern Gulf Railway Company

This is the determination of the Railroad Retirement Board concerning the status of Southern Gulf Railway Company 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 Southern Gulf was provided by Jeffrey G. Herndon, Manager, Coal Supply, for Entergy Services, Inc. According to Mr. Herndon, Southern Gulf is a wholly-owned subsidiary of Entergy Gulf States, Inc., which in turn is a wholly-owned subsidiary of Entergy Corporation, an investor-owned public utility holding company.

Southern Gulf owns a rail line of approximately 4.28 miles which connects with a line jointly owned by Burlington Northern and Santa Fe Railway Company (BNSF) (B.A. No. 1621) and Union Pacific Railroad Company (UP) (B.A. No. 1713). Southern Gulf reports that it has no employees and serves as connector track between the Roy S. Nelson Generating Station and the connection with the BNSF and UP.

Rail operations over the track began in February 2000 after the signing of a contract between Entergy Gulf States and BNSF for the transportation of coal to the Generating Station. Maintenance and rail operations over the track are performed by TimberRock Railroad, Inc., a covered employer under the Acts (B.A. No. 2877).

In Interstate Commerce Commission Finance Docket No. 32321, Southern Gulf filed a notice of exemption to construct and operate[1] the rail line described above (August 27, 1993). In Surface Transportation Board Finance Docket No. 34184, Southern Gulf filed a notice of exemption to grant trackage rights over the line to BNSF.

---

[1] The notice of exemption was not for operating authority. However, the decision pointed out that, nevertheless, "Southern Gulf will be a rail carrier and have a common carrier obligation to provide service regardless of whether it obtains formal operation authorization."

Southern Gulf Railway Company

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.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The Board notes that in its decision regarding Railroad Ventures, Inc. (B.C.D. 00-47), the Board held that an entity that has STB authority to operate a rail line, but leases or contracts with another to operate the line in question, is covered under the Acts administered by the Board unless the Board determines that the entity is not a carrier. The Board enunciated a three-part test in B.C.D. No. 00-47 to be applied in making this determination. An entity that leases a line to another company or contracts with another company to operate the line, 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. A majority of the Board finds that in this case, the purpose of Southern Gulf is to enable its affiliate to market coal, a primary business purpose being therefore to enable that company to profit from the operation of the Southern Gulf rail line. Accordingly, a majority of the Board finds that Southern Gulf does not meet all three factors listed above, and that the evidence of record establishes that Southern Gulf is a carrier operating in interstate commerce. Therefore, it is determined by a majority of the Board that Southern Gulf is an employer within the meaning of section 1(a)(1)(i) of the

Southern Gulf Railway Company

Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of February 1, 2000, the date as of which it commenced operations.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting, separate dissenting opinion attached)

DISSENT OF THE MANAGEMENT MEMBER
SOUTHERN GULF RAILWAY COMPANY

May 8, 2003

I hereby dissent from the majority decision finding Southern Gulf Railway Company (Southern Gulf) to be an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (Acts).

The majority determined that the Railroad Ventures, Inc. (Railroad Ventures) decision (B.C.D. 00-47) did not apply to Southern Gulf because Southern Gulf has as its primary business purpose to profit from railroad activities. I disagree with the majority for the following reasons.

Southern Gulf was built to provide new rail access to its parent electric company's (Entergy Gulf States, Inc.) facility and hence provide more options for supply of coal. This lowered the costs for purchasing and transporting coal and in turn, reduced the costs of electricity sold to the public. Southern Gulf does not operate nor does it have the means to operate the railroad. Operations are provided through a license with a carrier covered under the Acts. Southern Gulf does not share in any transportation fees collected by this carrier. Any profit from reduced transportation costs benefits the public utility and the general public not Southern Gulf. These profits however are not related to railroad activities of Southern Gulf.

Therefore, I find that Southern Gulf is not a covered employer under the Acts because it does not have as its primary business purpose to profit from railroad activities. Also, the other two tests in Railroad Ventures are met since Southern Gulf does not have the means to operate the railroad and it licenses a covered carrier to provide the service.

Original signed by:

Jerome F. Kever
Management Member