

EMPLOYER STATUS DETERMINATION

IteI Rail Corporation

This is the determination of the Railroad Retirement Board concerning the status of IteI Rail Corporation (IteI Rail) 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).

COURSE OF PROCEEDINGS

On July 17, 1991, the Bureau of Law sent a proposed coverage determination to the Board recommending that IteI Rail Corporation and related affiliates be found not to be employers under the Acts. On November 29, 1993, a majority of the Board determined that further investigation of the company was warranted. Information was obtained by the Board's Division of Audit and Compliance, which conducted a coverage audit of IteI Rail in July and August 1994 and issued a Coverage Audit Report (BFO/ACD 94-10) in October 1994.

STATEMENT OF FACTS

According to the evidence of record, including the Coverage Audit Report, IteI Rail was originally organized in February 1972, under the name Environmental Leasystems Corporation. Some sixteen years later, in 1988, while operating under the name Pullman Leasing Company, it was acquired by IteI Corporation. During 1989, IteI Corporation reorganized its various subsidiaries in several steps to consolidate its railcar leasing business, maintenance facilities, and all railroads it owned under the direct ownership of one company. As part of the restructuring, in August 1989, IteI Railcar Corporation¹ was merged into IteI Rail Corporation, and the resulting entity was then merged into Pullman Leasing Company. Pullman Leasing Company then changed its name to IteI Rail Corporation, which is the company now under consideration. For the period of the audit, 1989-1992, IteI Rail, which discontinued its business operations effective July 15, 1994, engaged in the business activities of leasing railroad freight cars, operating railcar maintenance facilities, and ownership of shortline railroads.

¹IteI Railcar Corporation was the subsidiary of IteI Corporation which was created to acquire the rail assets of Evans Transportation Company. See Request for Reconsideration of Coverage Audit, dated March 17, 1994.

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According to Consolidated Financial Statements for 1989 through 1991 (Exhibits 10 - 12 of the Coverage Audit Report), IteI Rail owned a varying number of shortline railroads at different times (7 for the year ended on December 31, 1989 and 6 for the years ended on December 31, 1990 and 1991). Four of its shortline railroads are identified in Exhibit 9 of the Coverage Audit Report: (1) Ferdinand and Huntingburg Railroad Company (BA No.2350), which was sold on September 26, 1990 to The Ferdinand Corporation; (2) FRVR/GBW/The Ahnapee & Western (BA No.2601), which was sold on August 28, 1993, to Fox Valley & Western, Ltd. (BA No.5622); (3) Hartford & Slocomb Railroad (BA No.3585), which was sold to H & S Railroad Company, Inc. (BA No.5548) on July 1, 1992; and (4) McCloud River Railroad Company (former BA No.2711), which was sold on February 1, 1992 to 4 Rails, Inc.

In 1989, IteI Rail reported consolidated revenues of \$379,200,000 derived from its leasing, shortline railroad, and maintenance facilities/other operations. Consolidated revenues for years 1990 and 1991 totaled \$387,051,000 and \$406,602,000, respectively, and in 1992, consolidated revenues totaled \$309,740,000.

IteI Rail owned approximately 70,000 railcars which were leased to third parties, including IteI-affiliated railroads. The Coverage Audit Report stated that a total of 5,967 railcars, or 8.5% of the total railcar fleet, was leased to or bore the reporting markings of IteI-affiliated railroads in 1990 and 6,877 railcars, or 9.8% of the total number of railcars, in 1991.

Maintenance shop revenue derived from the repair of railcars owned by IteI Rail and leased to third parties (intercompany billings) was \$17,300,000, or 61.3%, of total maintenance shop revenue of \$28,200,000 in 1989. In 1990, intercompany billings were \$23,411,000, or 57.2%, of total maintenance revenue of \$40,959,000. Intercompany billings were \$15,140,000, or 42.1%, of total maintenance revenue of \$35,948,000 earned in 1991. Through June 1992, intercompany billings totaled \$7,291,000, or 27.9% of total 1992 maintenance revenue of \$26,179,000.

Revenue from maintenance of railcars owned by IteI Rail and leased to IteI-affiliated shortline railroads is included in intercompany billings. In 1989, revenue of \$1,854,619, or 6.67%,

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was derived from Itel-affiliated railroads. During 1990, \$1,064,855, or 2.60%, applied to Itel-affiliated railroads. Revenue from Itel-affiliated railroads in 1991 and 1992 was \$879,978, or 2.45%, and \$747,082, or 2.85%, respectively. Maintenance shop revenue from Itel-affiliated railroads totaled \$4,546,534, or 3.47%, of the total maintenance revenue of \$130,909,679 for the years 1989 through 1992.

The Coverage Audit Report also stated that verification of Itel Rail's listing of employees to the RRB Employment Data Management system did not identify individuals as being removed from railroad service when under an employment arrangement with Itel Rail or one of its subsidiary companies.

As indicated earlier in this discussion, Itel Rail discontinued its business operations effective July 15, 1994. In June 1992, Itel completed a series of transactions in which Itel Rail transferred substantially all of its railcars to a subsidiary of General Electric Capital Corporation through a trust and partnership arrangement. Effective August 1993, Itel Rail no longer owned any operating railroads in the United States. The last operating maintenance facility was sold in September 1993. Most employees of Itel Rail were terminated in 1992 and 1993, and those remaining were terminated in 1994.

LEGAL ANALYSIS

Section 1(a)(1) of the RRA defines an "employer" to include:

(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(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, or the receipt, delivery, elevation, transfer in

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transit, refrigeration or icing, storage, or handling of property transported by railroad.

Section 1 of the RUIA contains essentially the same definition.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. Section 202.7 of the regulations (20 CFR 202.7) defines a service as being in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations.

Since prior to the time that it ceased business operations in July 1994, IteI Rail was not itself a rail carrier, it would have had to fall within the definition of "employer" in subparagraph (ii) of section 1(a)(1) of the RRA in order to be a covered employer.

Looking first to whether IteI Rail performed service in connection with railroad transportation, the facts regarding the services performed by IteI Rail are similar to the facts in the case of IteI Corporation v. U.S. Railroad Retirement Board, 710 F.2d 1243 (7th Cir. 1983). In that case, the Seventh Circuit Court of Appeals held that the Rail Division of IteI Corporation was not a covered employer under section 1(a)(1)(ii) of the RRA where only about 12 percent of the railcars owned by the Rail Division were leased to affiliated railroads. The Rail Division was also responsible in some cases for the repair and maintenance of its railcars. The Court concluded that the facts failed to show that the "Rail Division exists primarily or even substantially to serve the rail carrier subsidiaries, or that IteI's actions removed previously-covered workers from the Acts." 710 F.2d at 1248.

In 1990, only 8.5% of IteI Rail's total railcar fleet was leased to or bore the reporting markings of IteI-affiliated railroads; and in 1991, the percentage was 9.8%. Similarly, IteI Rail's maintenance shop revenue from its affiliated railroads equaled only 3.47% of its total maintenance revenue for the years 1989 through 1992. The Coverage Audit Report includes no evidence

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which would tend to show that IteI Rail existed primarily or even substantially to serve its rail carrier subsidiaries. Moreover, the matching of IteI Rail employees to the RRB Employment Data Maintenance system showed no evidence of employees' being removed from compensated railroad service when under an employment arrangement with IteI Rail or one of its subsidiary companies.

In both the 1983 IteI case and this case, we are dealing with the same parent corporation, i.e., IteI Corporation. In 1983, the U.S. Court of Appeals for the Seventh Circuit held that the rail leasing business of IteI Corporation was not a covered employer under the RRA and the RUIA. Although the entity considered by the Seventh Circuit was the Rail Division of IteI Corporation, and the business under consideration in this case is a separate corporation, the type of business is virtually identical, i.e., the leasing and maintenance of rail cars. Moreover, since IteI Rail Corporation is owned by the same parent corporation as was IteI Rail Division, what is essentially at issue here is whether the rail leasing activities and railcar maintenance activities of IteI Corporation are covered by the RRA and the RUIA. The Seventh Circuit held in 1983 that those activities were not covered. The facts with respect to the level of service provided to affiliated railroads and the other issues considered by the Seventh Circuit are not significantly different from those litigated in IteI Corporation. Despite the change in corporate structure, the Board finds that insofar as IteI Corporation is concerned, the Board is bound by the Seventh Circuit's 1983 decision.

CONCLUSION

For the reasons explained above, a majority of the Board finds that IteI Rail Corporation was never an employer under the RRA and the RUIA.

Glen L. Bower

(Dissenting

V. M. Speakman, Jr.
opinion attached)

Jerome F. Kever

DISSENT OF V. M. SPEAKMAN, JR. EMPLOYER STATUS DETERMINATION - ITEL RAIL CORPORATION

I dissent from the majority decision in this case. Itel Rail met the definition of “employer” under the Railroad Retirement Act from August 1989 to August 1993, because it was performing railroad service and it was under common control with a number of railroads.

The majority again gets bogged down in the analysis of what percent of business is done with affiliates and what percent is done for the rail industry as a whole. This analysis, while fascinating, takes place without any kind of statutory foundation to make it in any way relevant. The majority cites Itel Corporation v. U.S. Railroad Retirement Board, 710 F.2d 1243 (7th Cir. 1993). However, I consider that case entirely inapposite in view of the much later pronouncements of the same Court in Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F.2d 295 (7th cir. 1992).

The determining factor in Livingston was the amount of service LRC received from the railroad industry in general, not the amount of service from the rail affiliate.

Clearly, Itel was reorganized in 1989 in an effort to consolidate its railroad service holdings, and services. In this reorganization Itel Corporation consolidated its railcar leasing operation with its maintenance facilities and all of the railroad it owned under this direct ownership of one company. Itel, was performing rail service and clearly that company was a covered employer.

V. M. Speakman, Jr.

Date