

B.C.D. 17-64

November 3, 2017

EMPLOYEE SERVICE DETERMINATION –

Carolina Coastal Railway, Inc.

Employees Operating Kings Creek Line

Johnny S. Palmer

William L. Lovelace

Floyd Latham

BA # 5517

Carolina Coastal Railway, Inc. (Carolina Coastal - BA No. 5517) is a carrier covered by the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA), collectively known as the Acts. This decision is regarding an operation that began in 2011 and continued until mid-2013, where three retired, non-Carolina Coastal personnel were used as part-time crew members. Based on the facts available, the Board finds that these three employees were not covered by the Acts for services provided.

In a letter dated February 21, 2014, Douglas Golden, the President of Carolina Coastal, informed the Board of the history related to the employees at issue. Norfolk Southern, also a covered employer, had operated a rail line between Shelby, North Carolina, Blacksburg, South Carolina, and Kings Creek, South Carolina. Norfolk Southern discontinued service to the 4-5 customers on the line in late 2010 and the line was dormant. A customer at Kings Creek, Industrial Minerals (not a covered employer), asked Carolina Coastal if it would provide service to them. Industrial Minerals needed rail service to stay in business, but Norfolk Southern had discontinued that service due to poor track conditions, to include a major bridge that posed a serious maintenance issue with track in need of repair. Carolina Coastal's rail lines do not link to the King's Creek Line.

Carolina Coastal agreed to provide service for Industrial Minerals until the condition of the bridge prevented operations or until Industrial Minerals went out of business (both of which were expected to happen in 2013). Carolina Coastal agreed to operate the section of the line from the Industrial Minerals plant at Kings Creek to the Norfolk Southern trackage at Blacksburg (about 7 miles), serving no other customers. The initial plan was that Industrial Minerals would lease the line from Norfolk Southern and Carolina Coastal would operate the line for them. However, due to insurance issues, the plan changed and Carolina Coastal leased the line from Norfolk Southern and filed through the Surface Transportation Board for permission to do so (see STB Finance Docket No.35461).

Carolina Coastal provided service to Industrial Minerals from approximately March 1, 2011 to mid-May 2013, when Industrial Minerals shut down. Carolina Coastal also had other private switching operations in the area. To provide some additional manpower for these operations and the Kings Creek line, Coastal Carolina went through a third-party non-carrier and retained some retired railroad personnel on a contract basis. The third-party company (Mainline Rail Management, MLRM) retained the services of these workers and billed Carolina Coastal for this service. A total of three individuals provided services, one for approximately a year and two for the entire period. During the 27 months of operations, trains ran about twice weekly. Service was determined by Industrial Minerals, calling the crew on days it was going to need service. The crew worked out of Industrial Minerals offices in Kings Creek and handled all paperwork there using Industrial Minerals resources.

Carolina Coastal states that it believed that this was a private industrial switching operation and did not believe the individuals were providing covered service. Therefore, service and compensation was not initially reported. Based on information from the Office of Inspector General, Carolina Coastal reported the 2013 earnings of these individuals. The Railroad Retirement Board then informed Carolina Coastal that it should seek an opinion regarding whether these employees were providing covered service. This determination is a response to that request.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Railroad Retirement Board, an employee must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) 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 * * *.

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 Railroad Retirement Tax Act (RTTA) (26 U.S.C. § 3231(b) and (d)).

A determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board considers criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, the Board considers whether the individual is integrated into the employer's operations.

The facts described support the conclusion that the individuals were not the employees of Carolina Coastal as defined in 1(d) of the RRA and the analogous provisions of section 1(e) of the RUIA. The individuals were employed by a third-party company that billed Carolina Coastal, as is routine for the hiring of temporary or contract workers. The services provided were neither integrated into the staff, nor into the overall operations of Carolina Coastal. Rather, Industrial Minerals determined when the crew would work, what it would do, and provided the space at its facilities to complete necessary paperwork related to the services. As a result, the employees would not be considered employees of Carolina Coastal for the purpose of coverage under the Acts.

It appears that if anything, Industrial Minerals may have been the employer of the individuals at issue. As such, it would be considered a private carrier not subject to the Acts. Section 1(a)(1) of the Railroad Retirement Act, 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;

Section 1 of the RUIA contains essentially the same definition, as does section 3231 of the Railroad Retirement Tax Act.

The definition section of Part A of Subtitle IV of Title 49 of the United States Code defines "railroad" to include a switch, spur, track, terminal, or terminal

facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. § 10102(6)(C)). That statute also provides that the Surface Transportation Board has jurisdiction over “transportation in the United States between a place in – (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 terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. *U.S. v. California*, 297 U.S. 175 (1936).

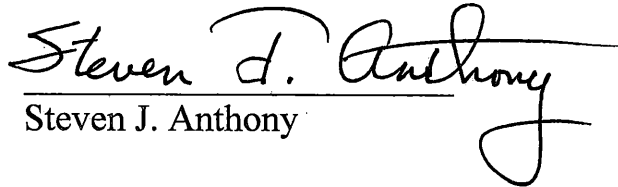
Where a plant owner conducts rail operations for itself, these operations do not result in the plant owner being a covered employer under the Acts. In other words, where a manufacturer ships its goods to a carrier, that activity does not result in the manufacturer being a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. Analogously, where a company contracts with a manufacturer to ship the manufacturer’s goods to a carrier, that activity will not result in the company being a covered employer. In both cases, the shipper is a private carrier. This is consistent with the decision in B.C.D. 04-21, *Escalante Western Railway* (April 8, 2004). In that decision, the Board found that Escalante Western Railway (EWR) was not a covered railroad entity because EWR was created and operated solely to transport coal from a the Lee Ranch coal mine to the Escalante Generating Station power plant. The Board determined that the rail operations of EWR were created solely to transport the raw material (coal) from the mine to the power plant which results in EWR performing private carrier operations.

In the present case, Industrial Minerals would be considered a private carrier; it moved freight only for itself from its own facility to where the rail cars are interchanged with the Norfolk Southern. Main Line Rail Management (MLRM) did not hold itself out to the general public to provide carriage over the rail line, and neither did Carolina Coastal. Therefore, Industrial Minerals did not meet the definition of an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Since neither Carolina Coastal nor MLRM are found to be the employer of the individuals who operated the Kings Creek line and Industrial Minerals is not considered an employer as defined by the Railroad Retirement and Railroad Unemployment Insurance Acts, the three individuals who operated the Kings Creek line are not subject to the Acts for such work performed.

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Walter A. Barrows

A handwritten signature in cursive script, appearing to read "Steven J. Anthony", written over a horizontal line.

Steven J. Anthony