

EMPLOYER DETERMINATION

BCD No. 2022-24

P.T. Railroad Services, Ltd. (PTRS)

May 24, 2022

This is a determination of the Railroad Retirement Board (RRB) concerning the status of P.T. Railroad Services, Ltd. (PTRS) as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). 45 USC § 231 *et seq.*; 45 USC § 351 *et seq.*.

Information regarding PTRS was provided by John M. Manos, PTRS' Chief Executive Officer and Managing Member, in correspondence dating from September 2013 through January 2020. Mr. Manos reported that PTRS is owned equally by four partners, himself, Rosemary Manos, PTRS' Comptroller, Larry Kirkeby, and Patti Kirkeby, the latter two being non-managing members. Section IV of the Articles of Organization of PTRS, filed April 1, 1996, states that PTRS was organized to buy, sell, and lease locomotives, and provide parts and services to railroads. Mr. Manos stated that PTRS was also formed, in part, to upgrade the power units available to Peninsula Terminal Company (PTC) (B.A. No. 4722), a short line railroad in Portland, Oregon, which Mr. Manos and Mr. Larry Kirkeby purchased in 1994. PTC owns less than one mile of track, but it has a terminal and interchanges with Class I railroads BNSF Railway Company (B.A. No. 1621) and Union Pacific Railroad (B.A. No. 1713).

PTRS formerly owned 16 locomotives, but has since sold all but three of them. Two of PTRS' three remaining locomotives are leased to PTC, and the other locomotive is a rental unit that is used when a shipping customer needs to use it temporarily. PTRS now primarily provides transloading service and locomotive maintenance service at PTC's terminal. Mr. Manos stated that PTRS employs five transloaders, one administrative employee, and two mechanics. PTRS provides on-site repair services with its maintenance trucks, and for more substantial repairs it has a locomotive maintenance building in a space that it rents from PTC. PTRS is one of seven companies that transload product on PTC premises. Mr. Manos further reported that its service agreements with its external customers require PTRS to maintain worker's compensation insurance on its employees who perform either repair or transloading services.

In February 2019, Mr. Manos provided information regarding which companies PTRS provides transloading and locomotive repair services to, and provided examples, based on January 2019 data, of the frequency with which it provides those services. PTRS provides transloading services for non-rail customers including Chemtrade, Methanex, Phillips 66, ADM, and Valvoline. In January 2020, Mr. Manos specified that PTRS does not provide transloading services to PTC or any other covered rail employer. In addition, the only covered rail employer PTRS provides locomotive repair services to is PTC. Mr. Manos further reported in January 2020 that approximately 68% of PTRS' total revenue for 2019 was derived from the transloading business for its non-railroad customers, while only approximately 16% was derived from mechanical labor. Mr. Manos reported that 25% of PTRS' revenue from mechanical labor was received from PTC, and none of the remainder of its mechanical labor revenue was received from any other covered rail employer.

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

- (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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

45 U.S.C. § 231(a)(1)(i) and (ii). Section 1(a) of the RUIA contains a substantially similar definition. 45 U.S.C. § 351(a).

Sections 202.4 and 202.5 of the Board's regulations define when a company or person is controlled by or under common control with a carrier. Those sections provide as follows:

§ 202.4 Control.

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

§ 202.5 Company or person under common control.

A company or person is under common control with a carrier, whenever the control (as the term is used in § 202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled.

20 C.F.R. §§ 202.4 and 202.5.

PTRS is not itself a carrier by railroad subject to the jurisdiction of the Surface Transportation Board. Therefore, it is not a covered employer under section 1(a)(1)(i) of the RRA and section 1(a) of the RUIA. The Board must next determine if PTRS is controlled by or under common control with PTC, as required by section 1(a)(1)(ii) of the RRA and section 1(a) of the RUIA.

PTC was purchased by Mr. Manos and Mr. Larry Kirkeby, two of the four partners who also own PTRS. Mr. Manos is the president of PTC and the managing member of PTRS. Further, PTC's corporate website lists "P.T. Railroad Services LTD" as a "full-service locomotive repair

facility” without explaining how the two companies are distinct, and without providing a separate website for PTRS. An image on PTC’s website labeled as a “P.T. Railroad Service Truck” is shown with a Peninsula Terminal logo.¹ PTC’s website generally indicates that the individuals who own and control PTC direct the policies and business of PTRS. Based on the above information, the Board finds that PTRS is under common ownership and control with PTC.

The next step the Board must undertake in determining whether PTRS is an employer is to analyze whether PTRS performs services “in connection with the transportation of passengers or property by railroad.”

Section 202.7 of the Board’s regulations defines service or operation in connection with railroad transportation as follows:

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad . . . if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad.

20 C.F.R. § 202.7.

While there is no question that the service PTRS provides to PTC in the form of locomotive repair is service in connection with rail transportation, in order to come within the definition of "employer" in section 1(a)(1) (ii) of the RRA the final question that must be answered is whether a company provides more than minimal service to its rail affiliate, otherwise known as “casual service.”

Section 202.6 of the Board’s regulations defines when a company is providing “casual service” or “the casual operation of equipment or facilities” as follows:

The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is “casual” whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.

20 C.F.R. § 202.6.

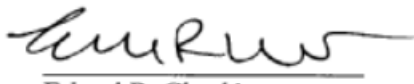
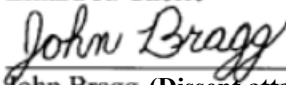
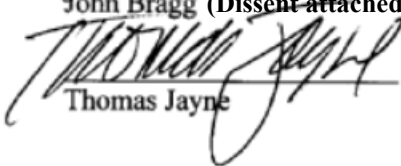
In Board Coverage Decision 93-79, the Board considered the issue of “casual service” in determining the status of VMV Enterprises (VMV), which was affiliated with the Peducah and Louisville Railway, a covered rail employer. VMV provided “repair, maintenance and reconditioning of railroad locomotives,” as well as leasing and maintaining locomotives.

¹ This information was taken from <http://www.peninsulaterminal.com/mechanical.php> and is up-to-date as of July 30, 2020.

However, VMV performed 55.7 percent of its business with railroads other than its covered affiliate, and only 2.5 percent of its business with its covered rail affiliate Peducah and Louisville Railway. Because such a small percentage of VMV's business was derived from its affiliate rail carrier, the majority of the Board found that VMV was only performing "casual service" under 20 C.F.R. § 202.6, and therefore VMV was not a covered employer.

Here, Mr. Manos reports that PTRS only provides 25% of its mechanical labor service for PTC, and none of its remaining mechanical labor service is for any other covered rail employer. Because mechanical labor accounts for approximately 16% of PTRS' total revenue, only approximately 4% of PTRS' total revenue is derived from covered rail employers, of which PTC is the only one PTRS services. The Board, Labor Member dissenting, therefore, finds that such service performed for PTC is casual in nature.

Accordingly, the Board, Labor Member dissenting, finds that PTRS is not an employer within the meaning of section 1(a)(1) of the Railroad Retirement Act and section 1(a) of the Railroad Unemployment Insurance Act.


Erhard R. Chorlé

John Bragg (Dissent attached)

Thomas Jayne

**Dissenting Opinion of
John Bragg, Labor Member
Employer Status Determination
P.T. Railroad Services, Ltd.
Docket No. 17-CO-0016**

The majority decision finds that P.T. Railroad Services, Ltd. (PTRS) meets the statutory requirements of Section 1(a)(1)(ii) of the Railroad Retirement Act (RRA) but that the service provided is casual and therefore PTRS is not an employer covered by the Acts. I believe that the totality of the facts and law have not been properly considered. As a result, I respectfully dissent.

As noted, it is uncontested that PTRS meets the two main provisions of section 1(a)(1)(ii) of the RRA, which refer to “common control” and “service in connection with the railroad industry”. The majority decision recognizes that PTRS is under common control with covered employer Peninsula Terminal Company (PTC), and that PTRS is providing “service in connection with rail transportation”. The majority’s determination that PTRS is not an employer under the RRA is based on whether the service is casual and cites to Board regulations. According to Board regulations, service is casual when it is “so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated”. 20 CFR §202.6 (2021). On its face, PTRS’s service is clearly not casual since its Articles of Organization state that it was organized to buy, sell, and lease locomotives, and provide parts and services to railroads. It continues to lease locomotives, perform maintenance for PTC and other customers, as well as transload goods for shippers. PTRS is not primarily engaged in some other non-railroad business that happens to occasionally have railroad customers. Rather, its entire purpose is to provide service in connection with rail transportation.

In looking to agency history, I believe this case is similar to *Livingston Rebuild Ctr., Inc. v. R.R. Ret. Bd.*, 970 F.2d 295 (7th Cir. 1992). Livingston Rebuild Center (Center) was a railroad repair service in Livingston, Montana. It was under common control with Montana Rail Link (MRL), a covered employer, and did about 95% of its business rebuilding railroad locomotives and other rolling stock. MRL placed approximately 25% of its rebuilding business with the Center and the court noted “[a]lthough the Center is thus not a captive in the sense that it is devoted predominantly to serving one railroad's needs, it is nonetheless "under common control with" MRL, making it a statutory "employer" if rebuilding rolling stock is a "service . . . in connection with the transportation of passengers or property by railroad". *Livingston* at 296. The Court concluded, “Montana Rail Link is a railroad and nothing but; the Center gets 95% of its business from railroads, and the service it provides is not only connected with but also essential to rail transportation.” *Livingston* at 298. In this case, the conclusion should be the same—PTC is a railroad and nothing but; PTRS derives its business from railroads and rail shippers and the service provided is essential to rail transportation. Like Livingston Rebuild Center, PTRS meets the statutory definition of a railroad employer.

Today's majority decision relies on *VMW Enterprises B.C.D.* 1993-79 (November 3, 1993) (VMV) which focuses on the percentage of service that an employer provides to the rail carrier affiliate. The majority in that decision relied on *R.R. Concrete Crosstie Corp. v. R.R. Ret. Bd.*, 709 F.2d 1404 (11th Cir. 1983) where the employer in question manufactured crossties and was under common control with a covered employer. The Court found Railroad Concrete Crosstie covered, but had to distinguish it from several Board legal opinions, including *Pullman Standard Car Manufacturing Company*, General Counsel Opinion L40-403 where the General Counsel found that the Pullman Standard Car Manufacturing Company was not a covered employer. The Court distinguished Railroad Concrete Crosstie because it provided so much of its product to the parent company, whereas Pullman mainly sold cars to unaffiliated railroad and nonrailroad companies. *R.R. Concrete Crosstie* at 1411. Importantly, although the Court referenced the percentage of service the subsidiary provided the parent company, it went on to state that its decision was limited to the facts at hand and it did *not*, "attempt to set any guidelines for determining when the amount of sales are substantial enough and the type of product so inextricably linked to the operation of the railroad that the sale of the product constitutes a 'service . . . in connection with the transportation of passengers or property by railroad. . . .'" *R.R. Concrete Crosstie Corp.* at 1411. The Labor Member's dissent in VMV notes that this discussion was in response to Railroad Concrete Crosstie's argument that it should have been considered in the same vein as Pullman. But the Labor Members goes on to state, "[t]he Court's explanation correctly contrasted the two cases, but this doesn't lead one to conclude that it agreed or disagreed with the General Counsel's determination in *Pullman*." In fact, the Court specifically avoided creating any test that required a certain percentage of sales to go to the affiliate. Yet the majority decision applies such a test without any indication to the public as to what amount of service is enough and what amount is too little.

A more reasonable interpretation of the RRA would be to follow *Livingston* and *Interstate Quality Servs. v. RRB*, 317 U.S. App. D.C. 415, 83 F.3d 1463 (1996). Interstate Quality Services (Reloads) was a wholly owned subsidiary of Iowa Interstate Railroad operating a freight transfer and storage business which primarily unloaded and reloaded freight from trains or trucks as well as stored freight. Reloads argued that it was not an employer because its rail services was not "functionally dominant in relation to its other business". However, the Court found:

But, again, "functional dominance" is not required under the statute or under the Board's regulations which construe "in connection with" to mean "reasonably directly related, functionally or economically." 20 C.F.R. 202.7. Both the statutes and the regulations exempt from coverage companies that perform only "casual" rail service, which the regulations define as service that either "is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated" or "is insubstantial." 20 C.F.R. § 202.6. Here, however, the Board correctly concluded that Reloads' rail-related service "cannot be considered insubstantial" and "is not casual in nature." B.C.D. No. 95-26 at 5, 6. *Interstate Quality Servs.* at 1464-65

In *Interstate Quality Servs.*, as in *Livingston*, the Court looked at the amount of business that the company did with the rail industry as a whole, not just the affiliate. These cases establish a

framework where if the company does more than minimal business with its affiliate, then the amount of business the company does with the railroad industry generally is considered. This insures that companies that are primarily engaged in non-railroad business do not become covered by virtue of their parent company acquiring a railroad. But this reasoning does include companies that are engaged in the traditional railroading work as intended by the statute.

Even if the majority of the Board insists on focusing on the percentage of service provided to the affiliate which may be continuously changing depending on market conditions, it should not supersede all other factors. At a minimum, an analysis of “service in connection with” should be viewed through the factors set forth in Board Order 39-29 *Lenoir Car Works* which looked at not just the amount of the affiliate’s business done with the public but also: for whose benefit the affiliate’s services are performed; the physical location of the affiliate’s operations to the rail operations and; the history and origin of the affiliate.

In this case, the record shows that PTRS and PTC are under common ownership and PTRS was initially created in order to upgrade the power units available to PTC. Regarding its maintenance work, PTRS rents space for its locomotive maintenance building from PTC. It provides 25% of its mechanical labor service to PTC. The majority decision observes that PTRS’s service trucks use the PTC’s logo. PTRS owns three locomotives, two of which are leased to PTC. PTRS employs two mechanics whose normal routine is to report to work in the morning, start the locomotives for the PTC train crew, and then address customer repair needs. The record shows that in January 2019, PTRS mechanics provided service for 4 customers, one of which was PTC which had service on 12 days. Only one other customer had more service at 18 days. Although PTRS services other customers, from its inception through today, it is interconnected with PTC.

Regarding transloading, Mr. Manos, President of PTC and managing member of PTRS (though his title on PTRS stationery is “President”), states, “Over time and for various reasons, the owners of products began asking if Peninsula Terminal Company could transload product. Our answer was and has always been no, our railroad employees do not touch product, but we have a sister company that will. This is how P.T. Railroad Services got into the transload business.” He indicates that PTC makes its money on the interchange, switching and car storage and that third party transloaders has increased its car count from 60 cars per month to 200 cars per month. As referenced above in *Interstate Quality Servs.*, transloading has been considered service in connection with rail transportation. In *R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446, 66 S. Ct. 238 (1946), Duquesne was a company that operated two warehouses owned and leased to it by the Pennsylvania Railroad Company. The work of unloading and loading was performed for the owner of the property by Duquesne who would then bill the owner for that service. In finding that Duquesne was a covered employer, the Supreme Court noted that although unloading carload freight ordinarily rests with the shipper, it was transportation within the meaning of the Interstate Commerce Act and the cost may be included in the line-haul tariffs or separately fixed or allowed. Since this could be reasonably considered part of railroad transportation, the Court concluded:

In other words if a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts. It then makes no difference that it is

performed by a carrier affiliate rather than by the carrier itself. We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate. *Duquesne* at 466

Similarly here, PTC chose not to offer transloading services but rather, used PTRS to perform such work. The transloading service PTRS performs not only benefits the company itself, but also allows PTC to move more trains through the terminal.

The record establishes that the creation of the company was in order to service the covered affiliate. This type of relationship was the type envisioned by the statutes and similar to *Lenoir Car Works*. The business may have evolved over time which in turn may have diluted the percentage of business that it provides to the affiliate, but that does not negate the purpose for which the company was created. In addition, this evolving percentage does not erase the fact that both businesses are intertwined. The service rendered by PTRS is not so irregular or infrequent as to afford no substantial basis for an inference that such service will be repeated and such service is not insubstantial. Simply put, PTRS is under common control with a covered employer and provides more than casual service in connection with railroad service to its affiliate and to the railroad industry at large thereby meeting the definition of an employer under the RRA.

For the reasons stated above, I respectfully dissent.

A handwritten signature in cursive script that reads "John Bragg". The signature is written in dark ink and is positioned above a horizontal line.

John Bragg
Labor Member