RECORD NO. 12-1150

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

INDIANA BOXCAR CORPORATION,

Petitioner,

v.

RAILROAD RETIREMENT BOARD,

Respondent,

AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION,

Amicus Curiae for Petitioner.

ON APPEAL FROM THE RAILROAD RETIREMENT BOARD

PAGE–PROOF REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

**Chief Authorities are Designated with an Asterisk*

STATUTES

REGULATIONS

THE CASE HAS NOT YET BEEN SET FOR ORAL ARGUMENT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Indiana Boxcar Corporation,	)	
Petitioner	)	
v.	)	
United States Railroad	)	No.12-1150
Retirement Board,	)	
Respondent	)	
_____	)	

REPLY BRIEF OF PETITIONER-APPELLANT INDIANA BOXCAR CORPORATION

I.

STATUTES AND REGULATIONS

The pertinent Statutes and Regulations have been set forth in the Appellant's Brief.

II.

STATEMENT OF FACTS

The Statement of Facts contained in the brief of the Railroad Retirement Board ("the Board" or "Respondent") contains numerous statements that are either contradictory or downright inaccurate. Although none is dispositive on the merits of this case, these inaccuracies illustrate the cavalier nature of the consideration that the Board has given in determining whether or not Petitioner Indiana Boxcar

("IBCX") is a covered entity under the Railroad Retirement Act ("RRA"), the Railroad Retirement Tax Act ("RRTA"), and the Railroad Unemployment Insurance Act ("RUIA").[1] IBCX brings each of these to the Court's attention in order to set the record straight.

First, the Board's brief continues to state erroneously that IBCX acquired control of short line railroad Evansville Terminal Railway Company ("EVT") in 1997. In fact, IBCX acquired EVT on May 28, 1999. After IBCX brought that same error to the Board's attention in its Petition for Reconsideration, the Board acknowledged its mistake in its decision issued January 13, 2012 (herein cited as the "*Reconsideration Decision*") and changed the coverage period to start May 28, 1999. *Id.* at 8-9. While the Board's brief even acknowledges this correction at several places,[2] it nevertheless continues to assert that IBCX acquired EVT in 1997 as shown below:

- Page 7 states "[s]ince 1997, IBCX has provided operations or management of short line railroads."
- The ownership chart on page 8 indicates that IBCX acquired EVT in 1997.
- Page 12 states without identifying EVT that IBCX owner and president Powell Felix had an ownership interest in the company from 1997 to 2000.

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1 Collectively "the Acts."

2 Resp. Brief at 11 and 13.

Second, the Board mistakenly suggested that IBCX's principal business activity from 1997 forward has been the management and operation of short line railroads. Page 7 reads:

> [s]ince 1997, IBCX has provided operations or management of short line railroads (J.A.). IBCX also provides services to its unrelated third-party clients (J.A.). IBCX's services to its third party clients include leasing equipment, consulting services, purchasing, selling, leasing and repairing railroad locomotives, railcars and work equipment (J.A.).

Respondent's brief then identifies 13 services that IBCX allegedly provides its railroad subsidiaries. Resp. brief at 7. This recitation is misleading in several respects. Although management of its portfolio of subsidiary railroads constitutes a significant portion of Mr. Felix's activities today, to say that IBCX or Mr. Felix has done so since 1997 is inaccurate. In fact, neither IBCX nor Mr. Felix provided short line railroad operations or management services until 2003 (except for that short period between May 28, 1999, and April 1, 2000, when IBCX owned the EVT). By reversing the order of what IBCX had said in its Petition for Reconsideration,[3] the Board gives the misleading impression that most of IBCX's activities before 2003 involved the management of short line railroads. This is not

[3] The affidavit accompanying IBCX's Petition for Reconsideration states that IBCX's principle business activity involves owning and leasing rail cars; buying, owning, and leasing locomotives; rerailing derailed rail cars; and railroad-related consulting services for third party clients, including rail-served industries, short line railroads, and state agencies. *See*, IBCX Initial Brief at 4-5; Petition at 2; affidavit at 1-2; cited in *Reconsideration Decision* at 3; J.A. __.

correct. Moreover, the Board's list discloses some services for which there is no evidence in the record that IBCX, Mr. Felix, or his daughter Ms. Kesha Lainhart, provides. According to the Board they include:

- Staffs railroad personnel
- Manages payments of employee wages and benefits
- Collects all revenue due to railroad
- Responsible for payment of all expenses; and
- Manages all railroad, leases, licenses, and agreements

This list of services does not appear to have been taken from any information in this record. Rather, the Board appears to have taken it from the "Administrative Services Agreement" dated January 31, 1996, between the Toledo, Peoria & Western Railway Company and the Delaware Otsego Corporation in a different case [emphasis supplied] that was included in the text of the Board's decision dated April 24, 2002, Employer Status Determination, *Delaware Otsego Corporation*, B.C.D. 02-32 and cited in IBCX's Reconsideration Petition in footnote 6 on page 8.[4] J.A.__. In fact, these services were performed by employees of IBCX's railroad subsidiaries with their wages subject to RRA and RUIA tax withholding. *See also*, IBCX Initial Brief at 6-7, 17; J.A. __.

Finally, the Board's chart at page 8 contains several additional inaccuracies. It shows Tishomingo Railroad Company, Inc., as still being partially owned by IBCX. However, IBCX divested itself of Tishomingo's operations in 2009 by

[4] Copy attached.

transferring them to short line railroad holding company Pioneer Rail Corporation as noted in footnote 7 at page 6 of its Initial Brief. Regarding Ohi-Rail Corporation, the chart indicates that IBCX has served as its contract manager from 2006 to the present. In fact, it is Mr. Felix who serves that function in his individual capacity rather than as an employee or officer of IBCX. J.A. __. Although Mr. Felix (and not IBCX) owned a very small interest in Ohi-Rail during the period from 1982 to 2001, there is no evidence in the record of that irrelevant fact. Furthermore, IBCX did not even exist as a company until 1988!

III.

SUMMARY OF ARGUMENT

The Board wants this Court to believe that its decision finding IBCX an entity covered as an employer under the Acts is one supported by substantial evidence and entitled to deference under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Nothing could be further from the truth.

Although the Board variously views this proceeding as involving the interpretation of the terms "employer," "affiliate employer," "common control," or some combination of them,[5] the term "common control" at issue here is determinative of the outcome of this proceeding. Absent a finding of common

[5] *See*, Resp. Brief at 16-21 (employer), 16 (affiliate employer), and 21 (control).

control between IBCX and its corporate subsidiaries, the Board concedes there is no basis for taxing IBCX and its employees even if they perform services for the railroads. Resp. brief at 22. (The Board does not contend that Mr. Felix and his daughter might be taxable as employees of the subsidiary railroads under 49 U.S.C. §§ 231(b)(1) and (d)(1)).

There is but one federal appeals court ruling on this issue, *Union Pacific Corporation v. United States*, 5 F.3d 523 (Fed. Cir. 1993) (hereafter cited as "*Union Pacific*"). It holds clearly that a parent corporation and its subsidiaries are *not* under common control by the very nature of their relationship. The Board's *Reconsideration Decision* cannot stand because it deviates from almost 20 years of consistent agency precedent applying that ruling without providing any sort of rational explanation for its departure. Moreover, the meaning of the term "common control" is clear on its face both from the statute and its ordinary dictionary meaning. Accordingly, no deference is due under *Chevron* to the Board's interpretation of its own statute and regulations as to the meaning of the terms "employer," "affiliate employer," and "common control."

Finally, while the Board's brief contains a dissertation on the substantial evidence standard in administrative law, it fails to show how these ruling apply to the facts here. In fact, the agency simply chose to ignore the evidence submitted by IBCX in response to the Board's request.

IV.

ARGUMENT

A. The Board's decision lacks a reasonable basis and is arbitrary and capricious as it fails to explain its departure from long established precedent and is contrary to the plain language of the statute

The Board recognizes that the critical issue for the Court's consideration is one of common control. Resp. brief at page 21 (subsection entitled "Indiana Boxcar is under common control with its railroad subsidiaries"). The Board acknowledges, both in its brief as well as its *Reconsideration Decision* that employer coverage depends upon *both of two* [emphasis supplied] findings:

> (1) a company is a covered employer if the Board finds that the company is owned by or under the same control with a rail carrier covered under the [Acts] **and**
>
> (2) if that company performs any service in connection with railroad transportation.

Reconsideration Decision at 2 and Resp. brief at 22. In the next sentence the Board went further stating, "[i]f a company does not meet both of these criteria, then the Board must find that the company is not a covered employer under the RRA and RUIA. Resp. Brief at 22.

The existence (or absence) of common control is crucial to a resolution of this proceeding because it is the predicate upon which the Board found that the services that IBCX as a noncarrier entity provides its carrier affiliates renders it subject to coverage under the Act.

In 1992 the Federal Claims Court issued a ruling entitled *Union Pacific Corporation v. United States*, 26 Cl. Ct. 739, finding that parent Union Pacific Corporation ("UP"), a holding company, was not under common control with its subsidiaries, including the Union Pacific Railroad Company. Accordingly, that Court found Union Pacific not subject to coverage under the Acts despite the fact that its subsidiary railroad was covered. In 1993, the Federal Circuit[6] upheld that ruling. Significantly, it held that where two corporate entities are not "under common control," the question of whether one entity performs services "in connection with the transportation of passengers or property by railroad" is never reached. 5 F.3d at 527.

The Board has consistently followed that precedent in the 19 succeeding years until now. Here in violation of that sacrosanct rule of administrative law that agencies must provide a rational explanation for any departure from precedent,[7] the Board has decided to use *Indiana Boxcar* as an opportunity to change its policy. The *amicus* support brief submitted by the American Short Line and Regional Railroad Association, to which the Board has not even responded, identifies the many attempts made over the years by the Board's Labor Member to persuade his

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[6] In an opinion cited at 5 F.3d 523.

[7] *See, e.g., National Fed'n of Fed. Emples., Local 951 v. FLRA*, 412 F.3d 119, 120, 124 (D.C. Cir. 2005); *Louisiana Pub. Serv. Comm'n v. FERC*, 337 U.S. App. D.C. 312, 184 F.3d 892, 897 (D.C. Cir. 1999); and *New York Cross Harbor Railroad v. Surface Transportation Board*, 374 F.3d 1177, 1181 (D.C. Cir. 2004).

colleagues to change its precedent so as to deny the use of the *Union Pacific* ruling to privately held short line railroads. *Amicus* brief at 9-12. Realizing that application of the *Union Pacific* ruling to IBCX would be fatal to its efforts to find coverage here, the Board offered several explanations as to why IBCX could not avail itself of that decision. But each fails under closer examination.

First, the Board cited to its own regulations at 20 C.F.R. §§ 202.4 and 202.5 to show "control" exists here because Mr. Felix has the complete right of power, directly or indirectly, to control the policies and business of IBCX and its railroad subsidiaries. Resp. brief at 22-23. The Board devoted a portion of its argument to showing that Mr. Felix as the sole owner (with his wife) and president of IBCX has such power to directly or indirectly control the day-to-day operations of IBCX and its railroad subsidiaries that control exists. Accordingly, the Board asserted, IBCX's corporate structure is distinguishable from that of Union Pacific. Resp. brief at 22-23, and 26. Given that control and the enumerated services that IBCX allegedly provides its railroad subsidiaries, the Board argued that IBCX is providing "service in connection with railroad transportation" rendering it covered under the Acts. Resp. brief at 29-30.

But IBCX's corporate structure is very similar to that of another small "mom and pop" short line holding company, CGX, Inc., owned by two individuals. In a 2004 decision the Board found that the facts in that employer status determination

proceeding were in its words "indistinguishable" from those in *Union Pacific*.[8] Although the Board's ruling contains few facts, the owners of CGX presumably had the same amount of power to control the policies and business of their company that Mr. and Mrs. Felix have here.

Second, the Board suggested that *Union Pacific* should not apply because it is a tax case to which the agency was not a party. Resp. brief at 24-5. However, that argument is unconvincing because the Board itself has cited *Union Pacific* in many, if not all, of its post 1992 rulings finding no coverage for short line railroad holding companies.[9] In addition, the Board's brief relies on two other tax cases supporting its argument that IBCX is a covered entity.[10] As the old saying goes, "what's good for the goose is good for the gander."

Third, the Board conceded that the *Union Pacific* is good law for large, publicly held companies like Union Pacific and that it has "initially and in the

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[8] Employer Status Determination, *Mississippi Tennessee Railroad, LLC, Mississippi Tennessee Holdings, LLC, CGX, Incorporated*, B.C.D. 04-16, cited in the short line railroad association's *amicus* brief at 9-12. CGX was owned by two family members Gregory and Connie Cundiffe. It owned a series of short line railroads and other railroad-related companies through an intermediate holding company.

[9] *See, e.g., CAGY Industries, Inc*., B.C.D. 95-92; *Iowa Pacific Holdings, LLC, Employer Status Determination*, B.C.D. 04-47; and *Patriot Rail, LLC, et al, Employer Status Determination*, B.C.D. 09-39. The *amicus* brief filed by the short line railroad association lists many of those decisions at pages 8 and 9.

[10] *Standard Office Building Corporation v. United States*, 819 F.2d 1371 (7th Cir. 1987); and *Trans-Serve, Inc. v. United States*, No. 00-1017, 2004 U.S. Dist. LEXIS 7784 (W.D. La., March 31, 2004).

past" even applied that ruling in cases involving privately held short line railroad holding companies. Based upon the facts of each case, the Board concluded that "it had made the correct determinations." Resp. brief at 26. For example, the Board identified *Delaware Otsego* as a case where it properly found no coverage for that short line railroad holding company based upon its perception that Delaware Otsego's corporate structure did not lie under the sole control of a majority shareholder.[11] In fact, the Board initially found Delaware Otsego covered under the Acts but reversed itself on reconsideration stating

> [n]evertheless, the Board recognizes the impact of the Union Pacific decision and the Board's application of the Union Pacific decision in other coverage determinations. Given the history of the Board's consideration of the covered status of this company and the intervening decision in Union Pacific, the Board has determined to reverse its finding in the initial decision and find DOC not to be covered. Slip op. at 4.

The Board identified five cases[12] supporting its position that it does not "conclusively" apply *Union Pacific* to every "common control" case without examining the underlying facts in order to determine the existence or absence of

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[11] The Court should take judicial notice of the fact that BNSF Railway Company, one of the nation's four largest railroads, is owned by one individual, Warren Buffett, through his investment company. Will the Board now find BNSF's holding company covered because of the control that Mr. Buffett presumably has as the sole shareholder?

[12] *Nexterna, Inc*., Reconsideration Decision, B.C.D. 07-8; *Mars Steel Corporation*, B.C.D. 08-38; *Rail Investments, Inc*., Reconsideration Decision (no B.C.D. number); *American Railroads Corporation* Reconsideration Decision, B.C.D. 04-64; and *Trans-Serve, Inc. v. United States*, No. 00-1017, 2004 U.S. Dist. LEXIS 7784 (W.D. La., March 31, 2004).

control. Resp. brief at 26-28. However, each of the four Board rulings that it cited is easily distinguishable from IBCX. *Nexterna*, a company wholly owned by the Union Pacific Railroad that was providing services to its corporate parent, would be subject to Railroad Retirement coverage as a company owned by an employer carrier under the RRA. 45 U.S.C. § 231(a)(ii). The three other agency decisions, *Mars Steel, Inc.*, *Rail Investments, Inc*., and *American Railroads Corporation*, each involved the coverage status of an intermediate holding company that itself was the subsidiary of another entity that owned one or more rail carriers and was a corporate sibling of the rail carrier(s) for which it provided services. The court cases relied upon by the Board either involved a commonly owned corporate sibling that provided services to an affiliated railroad[13] or a noncarrier subsidiary of a railroad that provided services to its owner.[14] The fact is that none of these precedents deals with the coverage status under the Acts of a railroad holding company as an affiliate.

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[13] *Livingston Rebuild Center, Inc. v. Railroad Retirement Board*, 970 F.2d 295 (7th Cir. 1992); *Adams v. Railroad Retirement Board*, 214 F.2d 534 (7th Cir. 1954); *Utah Copper Co., et al v. Railroad Retirement Board, et al*., 129 F.2d 358 (10th Cir. 1942).

[14] *Railroad Concrete Crosstie Corporation v. Railroad Retirement Board*, 709 F.2d 1404 (11th Cir. 1983); *Universal Carloading & Distributing Co., Co., Inc*., *v. Railroad Retirement Board*, 172 F.2d 22 (D.C. Cir. 1948); *Southern Development Company v. Railroad Retirement Board*, 243 F.2d 351 (8th Cir. 1957); *Railroad Retirement Board v. Duquesne Warehouse Co*., 326 U.S. 446 (1946); *Despatch Shops, Inc., et al. v. Railroad Retirement Board, et al.*, 153 F.2d 644 (D.C. Cir. 1946); and *Despatch Shops, Inc., et al. v. Railroad Retirement Board, et al.*, 154 F.2d 417 (2d Cir. 1946).

There is a second reason why the Board's decision lacks a rational basis and is arbitrary and capricious. It is contrary to the plain language of the statute as well as the commonly accepted dictionary definition of "common control." Because there is no ambiguity in the plain language of the statute, *Chevron* holds that there is no need to defer to the Board's interpretation of either the statute or its regulations defining control. 467 U.S. at 842, 104 S. Ct. at 2781. As the Claims Court so aptly stated in *Union Pacific* and the Federal Circuit cited with approval,

> "[a] company which controls another is not 'under common control' with the second company. Necessary to a finding of common control is the existence of corporate entities which exercise shared control over each other, or corporate entities which are in parallel position, both controlled by a single additional corporate entity, such as subsidiaries owned by a common parent. A parent company of a wholly-owned subsidiary clearly does not share control with its subsidiaries." 26 Cl. Ct. 739, at 749-750; 5 F.3d 523, at 525-6.

The Board attempts to sidestep IBCX's "plain language" argument by citing the inapposite common control decisions distinguished above and the regulations on common control that were rejected by the Courts in *Union Pacific.* Resp. brief at 22, 25, 27-33. The simple fact is that it has offered no response to IBCX's argument because none exists. No court has ever questioned *Union Pacific's* conclusion that a holding company cannot be under "common control" with its own railroad subsidiary. Until this case the Board also has not concluded that a railroad holding company could be under common control with its railroad subsidiary. The Board advances no good reason to change that policy now.

B. The Board's decision is not supported by substantial evidence

The Board begins its argument with the bare assertion that its decision should not be set aside if it is supported by substantial evidence and is not based upon an error of law. Resp. brief at 14. It ended the section with the conclusory statement "[t]here is substantial evidence of record supporting the finding of the Board that IBCX is a covered employer under the [Acts]" without identifying any specific evidence. Resp. brief at 15.

The Board's error is that it refuses to take cognizance of the fact that when IBCX employees Felix and Lanhart were providing these services to IBCX's railroad affiliates they were receiving railroad paychecks for their work with RRA and RUIA taxes withheld.[15] This should not come as a great surprise to the Board as IBCX made this point in its filings with the agency and in its Initial Brief. Initial Brief at 24-27; Petition for Reconsid. at 4-5, 10-12; Powell Felix Aff. 6-9, J.A.__. To paraphrase the Board's admonition in its brief, the Board had plenty of time and opportunity to review the documentation regarding the services that Mr. Felix and Ms. Lainhart had provided to the railroad subsidiaries and to reach the correct conclusion that IBCX is not a covered entity. But it did not. There is no evidence that IBCX provided any services to its railroad subsidiaries.

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[15] IBCX notes that the Board in the *Delaware Otsego* advised that holding company employees performing services for the railroad subsidiary may be found to be employees of the railroad. Slip op. at 5. IBCX has followed that practice in compensating Mr. Felix and Ms. Lainhart. J.A. __.

Accordingly, there is no substantial evidence supporting the Board's finding that IBCX is a covered employer.

IV.

CONCLUSION

The Court should reverse the Board's *Reconsideration Decision* finding IBCX subject to coverage under the Acts. It lacks a reasonable basis and is arbitrary and capricious because it does not provide a rational explanation for its departure from years of established precedent and is contrary to the plain language of the statute. Moreover, the decision is unsupported by substantial evidence. It ignored evidence submitted by IBCX that services rendered by IBCX employees to its railroad subsidiaries were paid for by those subsidiaries with RRA and RUIA taxes withheld.

Respectfully submitted,

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Dated: August 31, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: August 31, 2012

/s/ John D. Heffner
Attorney for Petitioner

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 31st day of August, 2012, I caused this Page–Proof Reply Brief of Petitioner to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 31st day of August, 2012, I caused the required copies of the Page–Proof Reply Brief of Petitioner to be hand filed with the Clerk of the Court.

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ADDENDUM

TABLE OF CONTENTS

B.C.D. 02-32

APR 24 2002

EMPLOYER STATUS DETERMINATION

Delaware Otsego Corporation

This is the determination of the Railroad Retirement Board of the employer status of Delaware Otsego Corporation (DOC) 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).

Legal Opinion L-81-23, issued November 19, 1981, found that DOC was under common control with rail carriers because it had five rail subsidiaries,[1] but that it was not an employer because it performed no services for its subsidiaries. An audit of a separate company, the Toledo, Peoria and Western Railway Corporation (B.A. 2346), completed in November 2000, indicated that there had been significant changes in the operations and ownership of DOC.

DOC was a publicly held company until October 4, 1997, when Walter G. Rich purchased 80 percent of its common stock and the Norfolk Southern Corporation and CSX Transportation acquired ten percent each. At the time of the stock purchase, DOC had a substantial interest in the Toledo, Peoria, and wholly owned the New York, Susquehanna and Western Railway (B.A. No. 3251). DOC sold its interest in the Toledo, Peoria to Rail America Services Corporation effective August 31, 1999.

The Toledo, Peoria and DOC entered into an "Administrative Services Agreement" on January 31, 1996, under which DOC agreed to function as the agent of the Toledo, Peoria to supervise and manage the operation and maintenance of the Toledo, Peoria rail properties. DOC's services under that Agreement included performance of the following duties: the supervision of all railroad operations on rail properties; the supervision of the maintenance of rail properties; employment of personnel as might be required for the proper operation and maintenance of rail properties, including payment of salaries, wages, payroll taxes, premiums and charges for insurance, etc., and including the discharge and other disciplining of personnel; the incurring and payment of all charges and operating expenses of rail properties; the billing and collecting of all charges for transportation services, rents, fees, and other amounts due the Toledo Peoria, and the negotiation and execution of leases and licenses and other agreements. As of September 15, 1999, DOC employed 94 individuals, of whom 26 performed services for the Toledo, Peoria.

A representative of DOC advised that DOC employees also perform administrative services for the New York, Susquehanna. Approximately 94 percent of DOC's operating revenue derived from Toledo, Peoria and New York, Susquehanna. Services, which DOC employees perform for the New York, Susquehanna include accounting, payroll, legal and other services.

Four of the five officers of DOC are also officers of the New York, Susquehanna[2]; three of the five officers of DOC are directors of the New York, Susquehanna[3]; and one director of DOC is a director of the New York, Susquehanna[4]. Until the October 4, 1997 transaction, Mr. Rich was the President and Chief Executive Officer of DOC and the Toledo, Peoria, which also had a number of other officers in common.

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

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV 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 transit, refrigeration or icing, storage, or handling of property transported by railroad. [45 U.S.C. § 231(a)(1)(i) and (ii)].

As mentioned above, on November 18, 1981, DOC was found to be under common control with rail carriers, but was found not to be an employer because it performed no services for its subsidiaries. However, three significant events occurred after that date. First, DOC entered into the administrative services agreement with the Toledo, Peoria in 1996. Second, Walter Rich purchased a majority of shares of DOC in 1997. Third, the D.C. Circuit Court of Appeals issued its decision defining "under common control" in the Union Pacific case. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993).

In examining the relationship between DOC and Toledo, Peoria, the record indicates that on January 31, 1996, these two companies entered an agreement under which DOC agreed to function as the agent of the Toledo, Peoria. Essentially, the contract with the Toledo, Peoria provided for DOC to run its rail operation. The Board concludes that DOC became a covered employer under the Acts effective January 31, 1996 because as of that date, DOC took on the job of running the Toledo, Peoria rail carrier operation.

DOC sold its interests and discontinued its administrative agreement with Toledo, Peoria on August 31, 1999. Therefore, we need to examine the relationship between DOC and its subsidiary New York, Susquehanna to determine if DOC remains covered under the Acts.

The majority of the Board has previously held that a holding company will not be under common control with its subsidiary based the Union Pacific case, a 1993

decision of the United States Court of Appeals for the Federal Circuit. The Court held, regarding a claim for refund of taxes under the Railroad Retirement Tax Act, that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of §3231 of the Act. Union Pacific, 5 F.3d 523 (Fed Cir. 1993). The Court wrote that, "The term 'under common control' does not usually apply to two companies in a parent-subsidiary relationship." Union Pacific, 5 F.3d at 525.

Applying the Union Pacific decision, a majority of the Board would find DOC not to be under common control with its subsidiary prior to October 4, 1997. However, beginning on that date, eighty percent of DOC was purchased by Walter G. Rich. Walter Rich controlled the parent corporation, DOC, and was also President of the subsidiary railroad, New York, Susquehanna. Unlike the Union Pacific case, the ownership of the DOC was not diversified, since a single shareholder owned a majority of the shares of the parent corporation.

Section 202.5 of the Board's regulations defines "common control" as follows:

> 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 CFR §202.5)

Section 202.4 of the Board regulations defines control as follows:

> 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. (20 CFR §202.4).

The Union Pacific decision held that the existence of common officers or directors between the parent and subsidiary would not render the parent to be under common control with the subsidiary. See, Union Pacific at P.526. The Court noted that officers and directors serve "the shareholders of the corporate entity or as authorized by the corporate charter". The Court concluded, "the shared individuals within the leadership of these separate corporations do not make the Corporation an employer under Section 3231 (a)". However, the Court was considering a publicly traded entity with a very diversified share ownership. The instant case presents different factual circumstances.

DOC was a publicly held company until October 4, 1997. There is no evidence that a majority of ownership was concentrated in anyone shareholder or entity. However, after October 4, 1997, Walter G. Rich owned 80% of the shares of DOC. The New York, Susquehanna, in turn, is wholly-owned by DOC. Furthermore, Walter Rich was President and director of the subsidiary railroad, New York, Susquehanna. Therefore the Board finds that DOC and New York Susquehanna have been under common control within the meaning of that phrase in the Board's regulations since October 4, 1997.

The record in this case indicates that DOC provides substantial services for the New

York, Susquehanna. Accordingly, the Board finds that when DOC ceased to operate the Toledo, Peoria at the time it sold its interest in that company on August 31, 1999, DOC nevertheless remained an employer under the Acts because it was under common control with a carrier for which it performed substantial services.

For the reasons explained above, the Board holds that DOC became an employer under the RRA and the RUIA effective January 31, 1996.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever

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1 rail subsidiaries were: (1) the New York, Susquehanna and Western Railroad Corporation, (2) Cooperstown and Charlotte Valley Railway Corporation, (3) the Fonda, Johnstown & Gloversville Railroad Company, (4) the Central New York Railroad Corporation, and (5) the Lackawaxen and Stourbridge Railroad Corporation.
2 Rich, Joseph Senchyshyn, Nathan Fenno, and Tabetha Rathbone.
3 Rich, Joseph Senchyshyn, and Nathan Fenno,
4 Rich

B.C.D. 04-16

March 22, 2004

EMPLOYER STATUS DETERMINATION
Mississippi Tennessee Railroad LLC
Mississippi Tennessee Holdings LLC
CGX, Incorporated

This is the determination of the Railroad Retirement Board concerning the status of Mississippi Tennessee Railroad LLC (MsTn RR), Mississippi Tennessee Holdings LLC (MsTn Holdings), and CGX, Incorporated, as employers 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.). The status of these companies has not previously been considered by the Board.

In Surface Transportation Board (STB) Finance Docket No. 34355, decided June 5, 2003, MsTn RR filed a verified notice of exemption to operate an approximately 87.7 mile line of track between Houston, Mississippi and Middleton, Tennessee, formerly owned and operated by Mississippi Tennessee Railnet, Inc., (Ms Tn Railnet) (B.A. No. 5570). The STB decision stated that MsTn RR intended to consummate the transaction on or after May 27, 2003. See: Mississippi Tennessee Holdings, LLC and Mississippi Tennessee Railroad LLC--Acquisition and Operation Exemption—Rail Lines of Mississippi Tennessee Railnet, Inc, Finance Docket No. 34355, 68 Fed. Reg. 35255, June 12, 2003.

Additional information regarding MsTn RR and MsTn Holdings was provided by Mr. Barry S. McClure, Assistant Secretary, Ironhorse Resources, Inc. Ironhorse Resources is a subsidiary of CGX, which Mr. McClure describes as the holding company for a series of asset holding companies, including MsTn Holdings.[1] Mr. McClure states Ironhorse Resources owns MsTn RR. According to Mr. McClure, MsTn Holdings purchased the entire rail line of MsTn Railnet, and leases it to MsTn RR. MsTn RR interchanges with the Burlington Northern Santa Fe Railroad at New Albany, Mississippi; with the Norfolk Southern Railway at Middleton; and with the Kansas City Southern Railway at Corinth, Mississippi. MsTn RR hired 3 employees of the former operator and began operating May 31, 2003. MsTn Holdings has no employees, and evidently exists solely to hold title to the rail line. A companion filing to Mississippi Tennessee Holdings, LLC, supra, further explained that CGX is a privately held corporation, owned by Gregory and Connie Cundiff. See: Gregory B. Cundiff, Connie Cundiff, CGX, Inc., and Ironhorse Resources, Inc.—Continuance in Control Exemption—Mississippi Tennessee Holdings, LLC and Mississippi Tennessee Railroad, LLC, Finance Docket No. 34356, 68 Fed. Reg. 35254, June 12, 2003.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. §? 231(1)(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 (45 U.S.C. §? 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. §? 3231).

The evidence of record establishes that MsTn RR is a rail carrier operating in interstate commerce. The Board has previously determined that the status of Mississippi & Tennessee Railnet, Inc. as a rail carrier employer under the Acts terminated June 30, 2003, the last date employees were compensated following sale of the rail assets to MsTn RR. See: B.C.D. 03-68, Mississippi & Tennessee Railnet, Inc. Accordingly, it is determined that Mississippi Tennessee Railroad LLC became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act and its corresponding provision of the Railroad Unemployment Insurance Act effective May 31, 2003, the date as of which it began operations.

Neither CGX nor MsTn Holdings is a carrier by rail. However, CGX, the parent of MsTn Holdings, is also parent company to Ironhorse Resources, which owns MsTn RR. CGX thus controls both MsTn Holdings and, through ownership of Ironhorse Resources, the MsTn RR. See regulations of the Board at 20 CFR 202.4. A decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of section? 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). Though CGX is privately held by two individuals rather than publicly owned as the parent holding company was in Union Pacific Corporation, a majority of the Board believes the Union Pacific case is indistinguishable from the facts presented by CGX. See B.C.D. 97-49 North American Railnet (privately held parent company not under common control with subsidiary); and B.C.D. 94-40, CCP Holdings, Inc. (incorporating representations by three shareholders of privately held parent company to the former Interstate Commerce Commission in Donald R. Wood, Jr., CCP Holdings, Inc., Chicago, Central & Pacific Railroad Co. and Cedar River Railroad Company—Corporate Family Exemption, Finance Docket No. 32373, 58 Fed. Reg. 59277,

November 8, 1993.) Accordingly, a majority of the Board determines that CGX is not under common control with its rail carrier subsidiaries, and CGX is not a covered employer under the Acts.

However, MsTn Holdings is owned by CGX, which also, through ownership of Ironhorse Resources, owns MsTn RR. Accordingly, as control of both MsTn Holdings and MsTn RR ultimately lies with CGX, the Board finds that MsTn Holdings is under common control with MsTn RR. See regulations of the Board at 20 CFR 202.5 and Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358 (10th Cir., 1942). If MsTn Holdings performs a service in connection with the transportation of property by rail, it is a rail carrier affiliate employer under section 1(a)(1)(ii) of the RRA and 1(a) of the RUIA.

The evidence is that CGX utilized MsTn Holdings to acquire the rail line to be used by MsTn RR in its rail carrier business. Early in the administration of the Railroad Retirement Act of 1937, the Board considered the status of the Rock Island Improvement Company. See Board Order 39-766, adopting the opinion of the General Counsel in Legal Opinion L-39-822. The operation of the Improvement Company was stated in that opinion as follows:

One of the chief purposes of the Improvement Company was to permit acquisition of property, such as land, railway terminals and equipment, in such manner that the title would be in the Improvement Company but the use thereof be made by the [affiliated] Railway Company. * * *

The Improvement Company has not engaged in any outside commercial business. In fact, it has not engaged in business activity of any sort except that for a few years it operated certain railroad owned coal properties in Oklahoma, the entire output of which was taken and used by the Railway Company for company fuel. Its principal, if not sole, function, has been to take title to and hold various properties for and on behalf of the Railway Company. Practically all of these items of property are used for common carrier purposes by the Railroad Company. (emphasis in original).

There is no evidence that MsTn Holdings engages in any outside commercial business. Rather, the record shows "the principal, if not sole function" is to hold title to the rail line used by MsTn RR. Accordingly, the Board finds MsTn Holdings, by owning the rail line of the affiliated rail carrier MsTn RR, performs a service in connection with the transportation of property by rail. See regulations of the Board at 20 CFR 202.7., and Southern Development Co. v. Railroad Retirement Board, 243F. 2d 351 (8th Cir., 1957).
As it is under common control with MsTn RR, and performs a service in connection with railroad transportation, MsTn Holdings is a covered employer under the Acts, effective May 31, 2003, the date the rail carrier began operations.

It should be noted that any officer of CGX who is also an officer of CGX covered subsidiaries may be considered an employee of the subsidiary for any work done for the subsidiary. Similarly, any employee of CGX that is performing day to day work for any carrier or affiliate covered under the Acts may be considered an employee of the carrier or affiliate.

Michael S. Schwartz

V. M. Speakman, Jr.
(Dissenting in part in separate opinion)

Jerome F. Kever

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1 Ironhorse Resources itself owns Railroad Switching Service of Missouri, which operates St. Louis Railroad (BA 4397); Southern Switching Company, which operates the Lone Star Railroad (BA 2868); Rio Valley Switching Company, which operates the Rio Valley Railroad (BA 2869); and Border Transload & Transfer, Inc., which operates Las Cruces New Mexico Transload. The status of Ironhorse Resources and Border Transload & Transfer has not been considered.

Dissenting Opinion of V. M. Speakman, Jr.

While I agree any officer of the parent company CGX, Inc. who is also an officer of one its covered subsidiaries, and employees of CGX, Inc. who are involved in the day-to-day operations of the subsidiaries should be considered employees of the carrier, I would also find that CGX, Inc. is under common control with Mississippi Tennessee Railroad LLC, its subsidiary carrier.

The majority found that CGX was not under common control with its subsidiary carrier based upon the decision in Union Pacific v. United States, 5 F.3d 523 (Fed. Cir. 1993. In Union Pacific the court held that for purposes of administration of the Railroad Retirement Tax Act, a parent company cannot be said to be under common control with its parent company. I will not take the time here to debate the merits of that decision, but only point out that, even if one assumes that Union Pacific was correctly decided, there are limits to its application in light of

the Board's own regulations. Specifically, where the parent and subsidiary are owned by a small number of shareholders, in the case of CGX, two, in my view Union Pacific is not applicable and the parent and subsidiary may be said to be under common control. In such a case the common control exists because the shareholders of the parent also directly control the subsidiary. The parent and subsidiary are essentially one economic enterprise. This is not necessarily true in the case of a publicly held corporation where ownership is generally too diffuse to allow control of the organization to be directly vested in the shareholders. Consequently, I would find that section 202.5 of our regulations controls. That section provides that a carrier and non-carrier are under common control when the power to direct the business of these companies is vested in the same person or persons. Thus, CGX, Inc. is under common control with its subsidiary carrier and to the extent CGX performs services in connection with railroad transportation would be a covered employer.

V. M. Speakman, Jr.

3-17-04

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Rev. 04/03/2006 16:47:36