

**Employer Status Determination
Employee Status Determination**

**Lake County of Oregon Board of Commissioners
RS**

This is the decision of the Railroad Retirement Board regarding whether the services performed by RS and the Lake County Board of Commissioners for Lake County Railroad, L.C.R., constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts, or whether Lake County Board of Commissioners should be an employer under those Acts. Lake County Railroad was held to be an employer under those Acts effective November 1, 1997 (B.A. No. 2785).

In a letter dated October 19, 2001, Mr. William D. Barry, Chairperson, Lake County Board of Commissioners, advises that Lake County has owned the railroad since 1985. From 1985 through October 1997, the railroad was operated by Great Western Railway of Oregon, Inc.¹ Effective November 1, 1997, Lake County assumed direct responsibility for management and operations of the railroad. At that time, the Great Western Railway had two employees who became employees of Lake County Railroad.

Also at that time, RS, Assistant to the Board of Commissioners, became Chief Executive Officer of the railroad. He was assigned the responsibility for day-to-day oversight of the operations. Approximately 30 percent of his time is spent on railroad operations.

The Finance Department of the Lake County Board of Commissioners manages county cash and disbursements of approximately \$27 million for this year. Of this amount, railroad operations represent \$550,000.00. The railroad pays the county a monthly administrative fee of 3.5 percent of monthly revenue for financial services.

¹ Formerly an employer under the Acts (B.A. No. 2770). Coverage of Great Western Railway was terminated November 1, 1997.

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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;

(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
* * *

Section 1(a)(1)(ii) of the Railroad Retirement Act provides that a company is a covered employer if it meets two criteria: if it provides "service in connection with" rail transportation and if it is owned by or under common control with a rail carrier employer. Clearly, the Lake County Board of Commissioners meets both of these criteria. However, section 202.6 of the regulations of the Board, implementing the casual service exception contained in section 1(a)(1)(ii) of the Railroad Retirement Act, provides that:

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 CFR 202.6)

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In the opinion of the Board, the service provided by the Lake County Board of Commissioners is so small and also is such a small percentage of the Board of Commissioners' total operations, that it constitutes casual service. Accordingly, Lake County Board of Commissioners is not an employer under the Acts administered by the Board.

This conclusion leaves open, however, the question of whether the persons in the Finance Department of the Lake County Board of Commissioners who perform work for the railroad should be considered to be employees of the railroad. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the Railroad Retirement Act 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 Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. § 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

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The evidence submitted shows that the Finance Department's work is performed under a contract with the railroad, and that the railroad provides no direction regarding the performance of that work.

Accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. The record in this case does not indicate that the employees of the Finance Department are integrated into the operations of the Lake County Railroad. Accordingly, the employees of the Finance Department are not employees of the railroad.

However, in regard to RS, section 203.2 of the Board's regulations provides that "An individual shall be an employee whenever * * * (d) he is an officer of an employer." (20 CFR 203.2). Accordingly, RS, who is the Chief Executive Officer of the railroad, is an employee of the railroad.

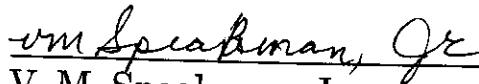
Mr. Barry requests that, if RS is held to be an employee of the railroad, the effective date of the decision be this calendar year for the reasons that Lake County has acted in good faith²; that RS is fully vested in the Oregon Public Employees Retirement System so that retroactive effect of the Board's ruling would negatively affect his retirement benefits within that system; and the work involved in correcting records retroactively involving a number of different benefit systems will be considerable. In response to this request, the Board finds that the service of RS is creditable under the Railroad Retirement Act beginning in 2001 and the Board waives retroactive liability for contributions under the Railroad Unemployment Insurance Act. However, the Board does not have authority to adjudicate liability for taxes under the Railroad Retirement Tax Act, which is administered by the Internal Revenue Service.

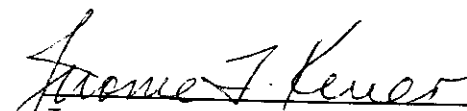
² Lake County became aware of the issues examined in this decision when Ms. DeEtta Vincent, Finance Director of Lake County, attended a regional reporting training seminar recently held in Portland, Oregon.

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Accordingly, it is the decision of the Board that the Lake County Board of Commissioners is not a covered employer under the Acts; that the services performed by employees of the Finance Department of the Board of Commissioners for Lake County Railroad are not creditable under the Acts; and that services performed by RS for the Lake County Railroad are being performed as an employee of the Lake County Railroad effective January 1, 2001, and consequently that that service is creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts.


Cheryl T. Thomas


V. M. Speakman, Jr.


Jerome F. Kever