B.C.D. 03-2 **JAN 08 2003**

EMPLOYEE STATUS DETERMINATION
G.L.B.
Decision on Reconsideration

This is the decision on reconsideration of the status of GLB as an employee under the Railroad Retirement Act (45 U.S.C. §§ 231-231v) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351-369) (RUIA).

PROCEDURAL HISTORY

In B.C.D. No. 02-10, issued on February 11, 2002, the three-member Board of the Railroad Retirement Board (RRB) held that services performed for Utah Railway (URC) by GLB are being performed as an employee under the RRA and RUIA and that services for Salt Lake City Southern (SLCSR) performed by GLB during the period April 1, 1993 through October 18, 1999 were performed as an employee under the RRA and RUIA. Accordingly, such service was found to be creditable under the Acts insofar as permitted by RRB regulations.[1] By letter dated May 10, 2002, GLB submitted a request for reconsideration of that decision. This request was followed by a letter dated September 19, 2002, that contained argument in support of GLB's contention.

BACKGROUND

As set forth in the initial decision, the facts in this case are as follows:

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[1] Section 211.16 of the Board's regulations (20 CFR 211.16) provides that the period of time within which compensation may be reported is limited to four years after the date on which such compensation is required to be reported to the Board. The four-year rule is subject to certain exceptions including when the earnings were erroneously reported to the Social Security Administration in the good faith belief that the Social Security Act covered the employment. No service or tier II compensation may be credited beyond the four-year period unless the appropriate railroad retirement taxes have been paid.

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The Utah Railway is a covered employer under the RRA and RUIA (B.A. No. 2746). The Utah Railway is the parent of the Salt Lake City Southern Railroad Company, a covered employer under the Acts from April 1, 1993, until October 18, 1999 (B.A. No. 5730), and a subsidiary of Arava Natural Resources Company, Inc., which in turn is owned by Mueller Industries, Inc. GLB is the President and Chief Operating Officer of the Utah Railway and the Salt Lake City Southern. GLB was not reported as an employee of either railroad. GLB performs the following services for the Utah Railway: inspects locomotives for purchase and lease; approves locomotive repair and maintenance agreements; participates in union management meetings; meets with customers and suppliers to negotiate shipping contracts and resolve trackage and switching billing disputes; hires and discharges railroad employees; conducts employee salary negotiations, as well as disciplinary and arbitration hearings; approves professional service contracts; and executes instruments and documents including checks, notes, mortgages, deeds, security agreements, and contracts. GLB is also the president, and, in some cases, a director, of twelve natural resource and mining companies. Estimates were that GLB spends between 25-50 percent of his time providing managerial services to the Utah Railway. Utah Railway pays a monthly management fee to Arava, which includes GLB's salary.

APPLICABLE LAW AND REGULATIONS

Section 1(b) of the RRA (45 U.S.C. § 231(b)) defines the term "employee" to mean any individual in the service of one or more employers for compensation. Section 1(d)(1) of the RRA provides that an individual is in the service of an employer if:

> (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. (45 U.S.C. § 231(d)(1)(i)); and
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> (ii) he renders such service for compensation***.

Section 1(e) of the RUIA (45 U.S.C. § 351(e)) contains essentially the same definition.

Section 1(k) of the Railroad Retirement Act states as follows:

> The term "employee" includes an officer of an employer.

While the regulations of the Board generally merely restate these provisions, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *," and that section 203.2 (20 CFR 203.2) provides in pertinent part that "An individual shall be an employee whenever * * * (d) he is an officer of an employer."

DISCUSSION

In his submission in support of his request for reconsideration, GLB states that he does not spend 25 – 50 percent of his time on management activities for URC. He concedes that he does devote some time to management time for URC, but does not state how much.

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GLB's first allegation of error is that he was not an employee of URC since he was paid no compensation by URC. GLB argues that since the general definition of an employee contained in section 1(d) (1) cited above is that the employee must render the service to the railroad employer for compensation. GLB further argues that since he never received any compensation directly from either URC or SLCSR he could not be an employee.

It is uncontroverted that URC paid a management fee to Arava. It is also uncontroverted that GLB was an officer of URC and SLCSR and performed services, as set forth above, for those railroad employers. GLB was also an officer of Arava and was paid a salary directly by Arava. The Board's regulations provide that compensation may be in any form. See 20 CFR 211.2. It is reasonable to conclude that the salary GLB received from Arava was in part based on the management fee paid by URC to Arava and the services performed by GLB for URC and SLCSR. The payment of the compensation for the services GLB rendered to URC and SLCSR was by a third party, Arava. This does not mean that GLB was not paid compensation by the railroads.

GLB also argues that URC and SLCSR are unable to determine the amount of compensation that was paid to GLB since Arava paid that amount. Difficulty in determining the amount of compensation to be reported does not relieve URC and SLCSR of the responsibility to report compensation for services rendered to the two employers by GLB. The amount to be reported should reflect the value of GLB's services to the covered employers.

GLB's next argument is that the language in section 1(k) of the Act that defines the term "employee" to include an officer of an employer is not conclusive. He argues that an officer must still meet the definition of employee contained in section 1(d)(1) of the Act. Interpretation of a statute is to begin with the statute's language. Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296,

300, 109 S. Ct. 1814, 1818, 104 L. Ed 2d 318,326 (1989). If that language is plain, that is also where the inquiry into the meaning of the statute must end, for statutes are to be implemented according to their terms. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1889). There is no more persuasive evidence of the purpose of a statute than the very words by which the legislature undertook to give expression to its wishes. United States v. American Trucking Associations, Inc., 310 U.S.534, 543 (1940). The only recognized exception to this rule occurs when a literal reading of a statute would produce a result demonstrably at odds with the intentions of the statute's drafters. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S. Ct. 3245, 73 L. Ed 2d 973,981 (1982).

In the present case, the plain meaning of section 1(k) of the Act is that officers of a railroad employer are employees. An officer does not have to also meet the definition of employee found in section 1(d)(1) of the Act. Acceptance of GLB's argument would make section 1(k) of the Act superfluous. GLB is an officer of covered railroad employers and, as such, is an employee of those employers.

GLB's final argument is that the decision of the Board undermines "the humanitarian intent of Congress". It is unclear what that humanitarian intent is. GLB meets the definition of an employee contained in the Act. The fact that he might not obtain sufficient service to qualify for an annuity is immaterial.

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DECISION

Upon reconsideration, the Board finds that GLB was an employee of URC and SLCSR within the definitions of employee in sections 1(d)(1)(i)(A), 1(d)(1)(i)(B) and section 1(k) of the RRA for the period in question.

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