

MAY 24 2004

EMPLOYER STATUS DETERMINATION
FNG Logistics Company

This is the determination of the Railroad Retirement Board concerning the status of FNG Logistics Company (FNG) as a covered 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).

Mr. Daniel A. LaKemper, Attorney for FNG, provided the following information. FNG is a subsidiary of Flex-N-Gate Corporation (Flex). Flex filed an offer of financial assistance to purchase a railroad line being abandoned by New York Central Lines, LLC (NYC) and CSX Transportation, Inc. (CSX) (see STB Finance Docket No. AB-565 (Sub-No. 4x), decided April 25, 2003). FLEX substituted FNG as the purchaser. Vermillion Valley Railroad Company, Inc. (VVRR) (B.A. No. 2396), an employer covered under the RRA and RUIA, operates the rail line under contract with FNG (see STB Finance Docket No. 34340, decided May 7, 2003). According to the STB decision, the rail line in question is approximately 6.12 miles between milepost QSO-5.18 near the Illinois/Indiana State line and milepost QSO-11.30 near Olin, in Vermillion and Warren Counties, Indiana. VVRR operates on approximately 5.91 miles of this trackage and interchanges with CSX near Danville, Illinois.

Mr. LaKemper stated that FNG purchased the rail line in order to provide continued service to the Flex-N-Gate facility at Olin, Indiana. VVRR began operations on April 24, 2003.

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.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The Board notes that in its decision regarding Railroad Ventures, Inc. (B.C.D. 00-47), the Board held that an entity that has STB authority to operate a rail line, but leases or contracts with another to operate the line in question, is covered under the

Acts administered by the Board unless the Board determines that the entity is not a carrier. The Board enunciated a three-part test in B.C.D. No. 00-47 to be applied in making this determination. An entity that leases a line to another company or contracts with another company to operate the line, is a carrier under the Railroad Retirement Act unless the Board finds that all three of the following factors exist: 1) the entity does not have as a primary business purpose to profit from railroad activities; 2) the entity does not operate or retain the capacity to operate the rail line; and 3) the operator of the rail line is already covered or would be found to be covered under the Acts administered by the Board.

FNG was created for the sole purpose of insuring that continuing railroad service would be provided to its parent corporation's facility at Olin, Indiana. This was accomplished through intervention in the abandonment proceedings of the rail line owned by NYC and CSX and FNG's ultimate purchase of the rail line. Thus, since the primary purpose of FNG is to maintain continued rail service on a rail line that would otherwise have been abandoned, the Board finds that FNG does not have a primary business purpose to profit from railroad activities. FNG does not have the capacity to operate itself on the rail line which it owns and contracts with VVCR for railroad operations inasmuch as FNG has no railroad assets. VVCR is a covered employer under the RRA and RUIA.

In view of the foregoing, the Board finds that the three part test set forth in the Railroad Ventures decision has been satisfied. It is the determination of the Railroad Retirement Board that FNG Logistics Company is not an employer under the RRA or RUIA.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever