

EMPLOYER STATUS DETERMINATION

Transco Railway Products, Inc.

Transco Railcar Repair, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Transco Railway Products, Inc. (TRPI) and Transco Railcar Repair, Inc. (TRR) 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.).

Information regarding TRPI and TRR was provided by Mr. Ronald A. Lane, attorney for TRPI and TRR. According to Mr. Lane, as well as information obtained from TRPI's website, TRPI, a privately owned entity, is an independent provider

of freight car repair, modification and rebuilding services to the rail transportation industry. The Company was organized in its current form in 1967 as a combination of certain predecessor companies that had been in the railcar repair and component manufacturing business since 1936.

TRPI operates rail car repair shops at seven locations throughout the Great Lakes region, Iowa, Montana and Georgia. TRPI also operates a rail car component fabrication facility in Ohio.

TRR, a subsidiary of TRPI, was created in 2004 to purchase most of the repair shop assets of Trinity Railcar Repair, Inc., (Trinity) including the shops at Miles City, Montana, Sioux City, Iowa and Waycross, Georgia. TRR also hired the Trinity employees at these locations. TRR performs the same services which Trinity performed. These services are performed for car owners, some of which are railroads, but, according to Mr. Lane, most of which are leasing companies or shippers which own their own car fleets. Trinity had been found by the Board to not be a covered employer under the Acts¹.

¹ See, Trinity Railcar Repair, Inc., Board Coverage Decision 03-75. It is further noted that the Interstate Commerce Commission (the predecessor of the Surface Transportation Board), found that PLM Railcar Maintenance Company, the predecessor to Trinity, was not subject to regulation to the extent that it performed car repair and maintenance operations, and this exemption was not lost by virtue of incidental switching service provided to neighboring industries. See, Interstate Commerce Commission Decision, Finance Docket No. 30453, decided May 10, 1984.

TRPI is also part-owner of a non-operating carrier, D&W Railroad, LLC (D&W), which owns approximately 29 miles of rail line which is operated by Iowa Northern Railway. D&W conducts no operations and has no employees. The Board has found D&W not to be a covered employer under the Acts². Neither TRPI nor TRR own or control any other rail carrier, and TRR performs no services for D&W. No railroad owns any direct or indirect interest in TRR. The officers and directors of TRR are also officers or directors of TRPI and D&W.

The Miles City facility (which was the initial subject of the Board's inquiries to TRPI) is, as explained above, owned and operated by TRR. According to Mr. Lane, BNSF Railway Inc. (BNSF) delivers and picks up rail cars for repair in the Miles City yard. BNSF also delivers and picks up cars in the yard for three other shippers whose facilities adjoin TRR's yard. One of the three shippers is Peavey Grain (Peavey). Mr. Lane explained that both of TRR's predecessors, PLM Railcar and Trinity, had agreed to pull Peavey's cars in and out of its elevator facility incidental to moving cars for repair in and out of its shops, and TRR has continued that practice. TRR also provides the same service on a "sporadic basis" for an adjacent scrap dealer and a car cleaning operation which operates within TRR's yard and performs cleaning services incidental to repair work performed at the TRR shop.

TRR began operations in May 2004, and employs 102 people, 46 of whom work at the Miles City facility. No TRR employee at Miles City works on property owned by any rail carrier. According to Mr. Lane, at the Miles City facility, TRR generated about \$7.9 million in revenue from 28 different customers during fiscal year 2006-07. Of that revenue, about \$1.5 million (18%) was from four unrelated Class I carriers. TRR's assets include railcar repair shops and related equipment, including a locomotive engine at Miles City, which is used for moving cars within the TRR yard and to and from adjoining shipper facilities. Railcar repair is performed pursuant to standard purchase orders, as well as a wide variety of contracts with different car owners.

Section 1(a)(1) of the Railroad Retirement Act defines the term "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

² See, Board Coverage Decision 05-34.

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 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

The evidence of record establishes that TRPI is not operating as a rail carrier in interstate commerce. In addition, TRPI is not under common control with nor is it owned or controlled by a rail carrier employer. Furthermore, the evidence also establishes that TRR is not operating as a rail carrier in interstate commerce. While TRR is under common control with D&W Railroad, that entity has been found not to be a covered employer under the Acts. Accordingly, TRR is not under common control with nor is it owned or controlled by a rail carrier employer.

Regarding the limited movement of cars which TRR provides Peavey, as well as the sporadic movement of cars for the scrap dealer and car cleaning operation, decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. See, for example, B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway*.

The Surface Transportation Board (STB) has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of Title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or

persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, formerly the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also, International Detective Service, Inc. v. Interstate Commerce Commission, 595 F. 2d 862, 865 (D.C. Cir. 1979).

Additionally, the term "railroad", under the Interstate Commerce Act as amended includes a switch, spur, track, terminal, or terminal facility as well as a freight depot, yard, and ground used or necessary for transportation (49 U.S.C. §10102(6)(C)). It is well settled that a terminal or switching company is a common carrier rather than a private carrier if it holds itself out to be one, acts in that capacity, and is dealt with in that capacity by railroads in general. U.S. v. California, 297 U.S. 175 (1936). Consistent with this, the Board has held terminal railroads to be covered employers under the RRA and RUIA where they act in the capacity of a common carrier subject to the Interstate Commerce Act as amended.

In this case, the information contained in the file indicates that TRR is not a common carrier, but performs limited car movement for a single entity, Peavey Grain. Even with the additional sporadic movement of cars for two additional entities, TRR would still be considered a private carrier. It is also noted that Trinity, TRR's predecessor, which operated the Miles City facility, performing the same services as TRR, as well as providing limited car movement for Peavey Grain, was found not to be a covered employer under the Acts.

Consistent with earlier decisions of the Board, we hold that neither Transco Railway Products, Inc. nor Transco Railcar Repair, Inc. is an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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