

EMPLOYER STATUS DETERMINATION**Riverport Mortgage, LLC**

This is the determination of the Railroad Retirement Board concerning the status of Riverport Mortgage, LLC (RPM) as an employer 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 RPM was provided by Ms. Aimee Malon, Senior Accountant for RPM. According to Ms. Malon, RPM was incorporated in Illinois on October 22, 2009. Mr. John C. Koster owns RPM, and is the Chief Executive Officer and President. Mr. Koster is also the Chief Executive Officer/President of Riverport Railroad, LLC (RVPR), an employer under the Acts (B.A. No. 4650). RPM is a 50% owner of RVPR.

Ms. Malon stated that RPM has one employee who began May 1, 2010. While Ms. Malon responded to the question "what proportion of employees work in positions related to business connected with rail carriers" with "0%", she also stated that "the sole employee of RPM works on maintaining RVPR's grade crossings and replacing ties and materials in the grade crossings". Ms. Malon described the business of RPM as "operations consist of owning various properties (some of which are used by RVPR and other are used by RPM or other entities). RPM also leases equipment to RVPR that RPM owns". According to Ms. Malon, RPM spends 95% of its total business time doing business with its affiliate, RVPR, and 95% of RPM's revenue is received from RVPR.

As stated above, RPM is a 50% owner of RVPR, and Mr. Koster is the CEO/President of both RPM and RVPR. No railroad has a financial interest in RPM, either through direct or indirect stock ownership, as a parent corporation or indirect stock ownership through a parent company (brother/sister corporation), according to Ms. Malon. Other than Mr. Koster, there are no individuals who own a controlling interest in RPM and a controlling interest in any rail carrier, or are an officer/director of RPM and an officer/director of any rail carrier. In addition to owning the equipment used for maintaining the tracks and crossings of RVPR, RPM, along with RVPR, jointly controls the 72 miles of track, "along with 3 locomotives, 2 engine houses and various warehouses with track access along with various pieces of equipment". No decision by the Surface Transportation Board (STB) has been sought.

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 * * *.

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 shows that RPM is clearly not a rail carrier employer under the definition of employer in subparagraph (i) quoted above. This conclusion, however, leaves open the question as to whether RPM can be considered an employer under the definition in subparagraph (ii). Under section 1(a)(1)(ii), a company is an employer if it meets both of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii). In considering questions of coverage within the meaning of section 1(a)(1)(ii), courts have generally looked to the type of service being provided, the amount of work being performed for the railroad affiliate, and the amount of work being performed for the railroad industry.

The evidence of record shows that RPM is under common control with a rail carrier employer. Mr. John C. Koster is the Chief Executive Officer and President of RPM and RVPR, a rail carrier. Accordingly, the Board finds that RPM is under common control with its rail carrier subsidiary, RVPR.

The question still remains whether RPM performs a "service in connection with" railroad transportation. Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is 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, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

As stated previously, Ms. Malon advised that "the sole employee of RPM works on maintaining RVPR's grade crossings and replacing ties and materials in the

grade crossings". Ms. Malon further stated that the services provided by RPM "consist of owning various properties (some of which are used by RVPR and others are used by RPM or other entities). RPM also leases equipment to RVPR that RPM owns". RPM and RVPR jointly control the 72 miles of track, 3 locomotives, 2 engine houses, various warehouses with track access, as well as other pieces of equipment. RPM spends 95% of its total business time doing business with its affiliate, RVPR, and 95% of RPM's revenue is received from RVPR.

The evidence of record indicates that RPM is under common control with RVPR, an employer under the RRA and RUIA, and that RPM is performing a service in connection with railroad transportation. Accordingly, it is determined that Riverport Mortgage, LLC became an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts as of May 1, 2010, the date as of which its employee was first compensated.

Original signed by:

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