

**B.C.D. 11-56**  
**EMPLOYER STATUS DETERMINATION**  
**Drake Switching Company, LLC**

**June 29, 2011**

This is the determination of the Railroad Retirement Board concerning the status of Drake Switching Company, LLC (DSC) 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 DSC was provided by Carlos Freire, Traffic Manager for DSC. According to Mr. Freire, DSC began doing business January 8, 2010. DSC reportedly has three employees.

In Surface Transportation Board Finance Docket No. 35350, Drake Cement, LLC (DC), a non-carrier cement manufacturer, filed a notice of exemption to acquire approximately 4.12 miles of rail line owned by Clarkdale Arizona Central Railroad, LLC (AZCR), located near Drake, Arizona. The line includes a railroad yard with six tracks within the yard, and two tracks which extend approximately .66 miles between Track C in the yard and facilities to be owned and operated by DC.

In Surface Transportation Board Finance Docket No. 35351, DSC filed a notice of exemption to operate the 4.12 miles of rail line described above. According to Mr. Freire, there is a 1.3 mile segment of track between the BNSF and AZCR, and DSC will provide an immediate switch between the two railroads, while primarily switching for DC's cement plant. All switching will be performed on property owned by DC, and the operating personnel will be regular employees of DC who will be qualified to do the industrial switching.

In a letter dated February 25, 2011, Mr. Friere stated that DSC is owned by Skanon Investments, Inc. He further explained that the three employees are employees of DC; were first compensated on June 16, 2009, March 8, 2010, and October 10, 2010; and spend 4% of their time working in positions related to business connected with rail carriers. No railroad has a financial interest in DSC, no individual has a controlling interest in DSC and any other rail carrier, and no DSC officers/directors are officers/directors of a rail carrier. DC owns the power Unit, Shuttlewagon SWX735, which DSC operates. According to the Rail Track Operating and Switching Agreement between DC and DSC, DC operates and maintains the tracks as "a track to its facility and potential industrial park"; the tracks which DC owns are used by DC "and in the future, other tenants and/or occupants" of the rail yard. Access to the track is from a rail from BNSF at Drake, Arizona. Under the Agreement, DSC provides rail car switching to DC "and other potential future tenants and/or occupants" of the rail yard.

In answer to a request for additional information, Mr. Freire stated that DC is a cement plant in the final phase of construction, and owns the rail track in question. Three of the rail tracks "are part of the General Railroad system" and the remaining tracks are plant tracks. Mr. Freire also stated that both DC and DSC have Skanon Investments, Inc. as a member. Mr. Freire also submitted a copy of an e-mail exchange from the Federal

Railroad Administration (FRA) in which DSC is described as a "plant railroad" and not subject to FRA's jurisdiction.

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 definition section of Part A of Subtitle IV of Title 49 of the United States Code defines "railroad" to include 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). The portion of Title 49 that is cited in the definition of "employer" in the Railroad Retirement Act gives to the Surface Transportation Board jurisdiction over railroad transportation in the United States between a place in "a State and a place in the same or another State as part of the interstate rail network" (49 U.S.C. § 10501(a)(2)(A)). Consistent with the foregoing, the Board has held switching railroads to be covered employers under the Railroad Retirement and Railroad Unemployment Insurance Acts where they act in the capacity of a common carrier subject to the jurisdiction of the Surface Transportation Board.

Although DSC may conduct the majority of its operations within DC's industrial park, it performs those operations as a liaison between BNSF and AZCR and DC, and any other future occupants of the rail yard. The Board therefore finds that DSC became a rail carrier employer within the definition set out in section 1(a) (1) (i) of the Railroad Retirement Act (45 U.S.C. § 231(a) (1) (i)) and the corresponding provision of the Railroad Unemployment Insurance Act effective January 8, 2010, the date as of which it commenced operations.

Original signed:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever