B.C.D. 00-57

DEC 1 8 2000

EMPLOYER STATUS DETERMINATION
Marksman Corporation

This is a determination of the Railroad Retirement Board concerning the status of the Marksman Corporation (Marksman) as an 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).

In Surface Transportation Board (STB) Finance Docket No. 33481, decided October 8, 1997, Marksman filed a verified notice of exemption to lease from J. K. Line, Inc. (BA No. 3371) and to operate 17 miles of rail line in the State of Indiana from milepost 183 near Monterey to milepost 199 near North Judson. In Finance Docket No. 33659, decided September 29, 1998, Toledo, Peoria & Western Railway Corporation (TPW Railway) (BA No. 2346), a Class III rail common carrier, filed a verified notice of exemption to lease, by assignment, from Marksman, a Class III rail carrier, that same 17 miles of rail line between milepost 183 near Monterey, Indiana and milepost 199 near North Judson, Indiana (the Rail Line). The STB decision stated that the purpose of the transaction was to simplify the arrangements for the operation of the Rail Line. The decision noted that prior to filing the notice, TPW Railway already performed operations on the Rail Line on behalf of Marksman pursuant to an unwritten agreement with Marksman, and that assignment of the lease to TPW Railway would allow it to assume common carrier responsibilities in conjunction with its other rail operations.

Information regarding Marksman was furnished by Nathan R. Fenno, Vice President-Law of Marksman. Mr. Fenno stated that Marksman is owned by the Toledo, Peoria and Western Railroad Corporation (TPW Railroad). TPW Railroad reportedly has no employees and is a holding corporation whose sole asset is 100% of the outstanding stock of Marksman. Marksman also reportedly has no employees and is a holding corporation whose sole asset is 100% of the outstanding stock of TPW Railway. Marksman and TPW Railway have common management. According to Mr. Fenno, Marksman commenced operations on October 14, 1997. [1]

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)), insofar as is relevant here, defines a covered employer as :

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[1]This date of commencement of operations was provided by Mr. Fenno in a letter dated November 21, 1997, although in a letter dated June 3, 1998, he indicated that Marksman notified the STB that it had commenced operations on October 31, 1997.

(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 (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).

In B.C.D. 00-47, the Board held in its decision on reconsideration of the employer status of Railroad Ventures, Inc. that an entity which 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 then set out a three-part test which it will apply in order to determine whether an entity is a carrier. Specifically, an entity is a carrier under the RRA and the RUIA 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 covered under the Acts administered by the Board. With respect to the first factor, a note in B.C.D. No. 00- 47 states that an entity that is affiliated through common ownership with other for profit carriers will be presumed to have as a primary business purpose to profit from the ownership of the line. In this case, Marksman is affiliated through common ownership with its wholly-owned subsidiary, Toledo, Peoria & Western Railway Corporation (BA No. 2346). The Board thus finds, in accord with its decision in B.C.D. No. 00-47, that Marksman has as a primary business purpose to profit from railroad activities. The Board finds that Marksman became a rail carrier employer under the RRA and the RUIA effective October 14, 1997, the date on which it commenced operations.

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