B.C.D. 01-7

JAN 1 0 2001

# EMPLOYER STATUS DETERMINATION
## Bellingham International Railroad, LLC

This is the determination of the Railroad Retirement Board regarding the status of Bellingham International Railroad, LLC (BIR) 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).

Information regarding BIR was provided by Ms. Cynthia Thomas, attorney for BIR. Ms. Thomas stated that BIR was formed on April 24, 1998. It is a privately held limited liability company owned by the Bellingham Cold Storage Co. BIR reportedly has no employees and owns the track and signaling equipment between milepost 2.98 and 4.98 in Bellingham, Washington. In a decision in Surface Transportation Board (STB) Finance Docket No. 33635 entered on July 27, 1998, the STB indicated that BIR had filed an exemption under 49 CFR 1150.31 to acquire from the Burlington Northern and Santa Fe Railway Company (B.A. No. 1621) (BNSF) the exclusive rail freight easement and all track, track materials, and related structures and to operate 2.0 miles of rail line between the above cited mileposts. Information obtained indicates that on December 11, 1998, BIR began operating, via an Agency Agreement with BNSF, under which BNSF operates the rail line for BIR. BIR received reporting marks from the Association of American Railroads (AAR) and is considered to be a class III rail carrier by both the AAR and the STB. [See letter to Attorney Thomas from J. J. Carroll, of the AAR dated January 15, 1999, and footnote 1 to STB Finance Docket No. 33635 (63 F.R. 41619, Aug. 4, 1998)].

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).

In its decision regarding the employer status of 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

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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.

The Surface Transportation Board (STB) decision cited above notes that BIR certified to the STB that its projected revenues would not exceed those that would qualify it as a Class III rail carrier and that its revenues were not projected to exceed $5 million. There is no information that would indicate that Bellingham International Railroad, LLC's intent in purchasing the line is primarily designed to preserve rail service rather than profit from railroading activities. The Board therefore finds that BIR is an enterprise which is intended to profit from railroad activities. The Board therefore finds that BIR became a rail carrier employer under the RRA and RUIA effective December 11, 1998, the date rail operations began on its rail line.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever