B.C.D. 03-49

JUN 1 0 2003

EMPLOYER STATUS DETERMINATION
R. J. Corman Railroad Switching Company, LLC

This is a determination of the Railroad Retirement Board concerning the status of R. J. Corman Switching Co. (RCSC) 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.).

There was no verified notice of exemption filed with the Surface Transportation Board (STB).

Information regarding RCSC was furnished by Mr. Brad Brown, Contracts/Property Manager for RCSC. According to Mr. Brown, RCSC is owned by R. J. Corman Railroad Group, LLC and does not have a Chief Executive Officer. Mr. Brown stated that RCSC began operations on January 3, 2001 and has five employees, 3 full time employees and 2 part-time employees, who were first compensated on January 3, 2001. RCSC does not own any railroad track and does not interchange with any railroads, according to Mr. Brown. Mr. Brown stated that RCSC spends 100 percent of its time providing "intra-plant switching services for ThyssenKrupp Budd Company at its automotive stamping and assembly plant in Shelbyville, Kentucky" and that RCSC's "operations are not subject to STB jurisdiction and therefore STB approval was not sought for such operations." Mr. Brown stated that Norfolk Southern Railway Company delivers and removes railroad cars to and from the ThyssenKrupp Budd Company plant. RCSC does not own any railroad equipment, according to Mr. Brown. Mr. Brown stated that RCSC uses two locomotives that it leases from R. J. Corman Railroad/Memphis Line (B.A. No. 2598). RCSC is owned and operated by the same persons as R. J. Corman Railroad Company/Memphis Line, R. J. Corman Railroad Company/Cleveland Line (B.A. No. 5333), R. J. Corman Railroad Company/Pennsylvania Lines Inc. (B.A. No. 2367), R. J. Corman Railroad Company/Western Ohio Lines (B.A. No. 2356) and R. J. Corman Railroad Company/Allentown Lines, Inc. (B.A. No. 2370).

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;

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> (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 RCSC is a switching railway which provides services to only one customer, ThyssenKrupp Budd Company. 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 transport only for those with whom they see fit to contract individually. The RRB has followed the distinction made by the Surface Transportation Board, 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 ICC Termination Act of 1995 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 ICC Termination Act of 1995.

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In this case, the information contained in the file indicates that RCSC is not a common carrier, but operates instead as a private carrier which performs intraplant switching for a single customer. Consistent with the earlier decisions of the Board, we hold that RCSC is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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