B.C.D. 02-6

JAN 2 2 2002

EMPLOYER STATUS DETERMINATION
H & M International Transportation, Inc.

This is the determination of the Railroad Retirement Board concerning the status of H & M International Transportation, Inc., 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 H & M was provided by Thomas Vasiljevich, outside counsel for H & M. According to Mr. Vasiljevich, H & M began doing business in 1968 and is jointly owned by Charles T. Conners and Robert Gildersleeve. H & M currently has 968 employees, 397 or 41 percent of whom are in positions related to business connected with rail carriers.

H & M performs intermodal terminal operations at five sites. It operates side loaders and cranes to load and unload trailers and containers from railroad flat cars. It hostles trailers and containers to and from parking places, and inspects containers and trailers to determine any damages. It provides customer service and clerical support at one terminal. Clerical support includes providing systems input, trailer and container inventory, car programming, and office administration. H & M also operates local area trucking terminals throughout the country; provides custom examination sites; and performs warehousing and distribution facilities. Effective June 1, 1998, under contract with the Union Pacific Railroad, H & M began operating locomotives at the Marion, Arkansas, terminal to move intermodal cars to and from operating tracks and to and from departure tracks and arrival tracks.

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:

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> (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 evidence of record establishes that H & M is a carrier operating in interstate commerce by reason of the switching operations which it performs at the Marion, Arkansas, terminal. Although this operation represents only a very small proportion of H & M's enterprise, there is no exclusion from coverage under the Railroad Retirement Act of a carrier for that reason.

However, section 202.3 of the Board's regulations provides that:

> (a) With respect to any company or person principally engaged in business other than carrier business, but which, in addition to such principal business, engages in some carrier business, the Board will require submission of information pertaining to the history and all operations of such company or person with a view to determining whether some identifiable and separable enterprise conducted by the person or company is to be considered to be the employer. The determination will be made in the light of considerations such as the following:
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> (1) The primary purpose of the company or person on and since the date it was established;

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(2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;

(3) The amount of its carrier business and the ratio of such business to its entire business;

(4) Whether its carrier business is a separate and distinct enterprise.

(b) In the event that the employer is found to be an aggregate of persons or legal entities or less than the whole of a legal entity or a person operating in only one of several capacities, then the unit or units competent to assume legal obligations shall be responsible for the discharge of the duties of the employer. (20 CFR 202.3).

H & M's switching operation consists of 18 employees out of a work force of 968. H & M began operations in 1968 and did not begin switching operations until 30 years later. H & M performs operations at five separate railroad terminals, only one of which involves switching operations, and at many other sites, where it operates local area trucking terminals, custom examination sites, and warehousing and distribution facilities. Accordingly, the Board finds that H & M would be an appropriate case for the application of section 202.3 so that only the switching operation portion of H & M's enterprise is considered to be a covered employer under the Acts.

Accordingly, it is determined that the switching operation at Marion, Arkansas, operated by H & M is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C.§ 231

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(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of June 1, 1998, the date as of which the switching operations commenced.

Original signed by:

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