B.C.D. 03-31

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EMPLOYER STATUS DETERMINATION
British Plasterboard Gypsum Company

This is the decision of the Railroad Retirement Board regarding the status of the British Plasterboard Gypsum Company (BPG), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

BPG manufactures gypsum wallboard and related plaster products for the building materials industry. It mines gypsum for its manufacturing process. It operates a railway which transports its product to the DeQueen and Eastern Railroad Company, a covered employer under the Acts (B.A. No. 2805). Accordingly, BPG's rail operation provides rail services to only one customer, itself. BPG has two employees who perform the rail-related work.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(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;
>
> (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 * * *.

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Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) and (b)) contain substantially similar definitions.

The Surface Transportation Board 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 to transport only for those with whom they see fit to contract individually. The Railroad Retirement Board has followed the distinction made by the Surface Transportation Board, 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).

In this case, BPG does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather it performs services over that line only for itself. Accordingly, the Board determines that BPG is not a carrier under the Acts.

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Finally, BPG is not under common control with a carrier and is not an employer under section 1(a)(1)(ii) of the Railroad Retirement Act.

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