

EMPLOYER STATUS DETERMINATION**Rescar, Inc.****Rescar Industries, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of Rescar, Inc. (RI) and Rescar Industries, Inc. (RII) as employers 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 RI and RII was provided by Mr. Dan Madock, attorney for RI and RII. According to Mr. Madock, RI is a privately held company established in the early 1970's, and owned by a single individual, Mr. Joseph Schieszler, Sr. Mr. Schieszler owns no railroads, and is not an officer or director of any railroad. RII is also a privately held company which was established in 1992. RII is owned equally by five qualified subchapter S Trusts. None of the Trust shareholders have ownership interest in any railroad, and none share shareholders, beneficiaries, officers, directors, trustees, or employees with any railroad.

RI and RII (jointly known as "Rescar") employ approximately 1,000 employees who perform rail car repair, maintenance and cleaning for owners and lessors of railcars. Rescar does the vast majority of its business with non-railroad companies involved with the railroad industry, such as paper mills, smelting and mining companies, agriculture companies, petroleum refineries, chemical companies, steel manufacturing and processing companies, private car owners, and others. Rescar has six major facilities located in Elk Mills, Maryland; DuBois, Pennsylvania; Channelview, Texas; Orange, Texas; Longview, Texas; and Gordon, Georgia, and provides its own internal switching at these locations. Rescar also has approximately 64 field service repair and cleaning locations consisting of in-plant operations (located within customer facilities), fast-track locations (located as leased track within a rail yard or similar location), and "mobile" crews that respond to repair or cleaning requests from customers throughout the United States. All of Rescar's switching service primarily concerns in-plant movement of railcars, i.e., either on the client's premises or within a private industrial park, and not movement over the interstate rail network. Other than in-plant switching for ExxonMobil at its Baytown, Texas and Beaumont, Texas facilities¹, Rescar provides no other external (i.e., third party) switching

¹ Only the switching services at the Baytown facility are under consideration in this decision.

services. Rescar currently has no separate division which performs the switching services.

Rescar has recently entered a business venture in which it would provide expanded switching services at ExxonMobil's Baytown, Texas facility². Rescar has three locations at this facility: 350, 420 and 710. Locations 350 and 420 perform only railcar repair and cleaning services and have approximately a total of thirteen employees. Location 710 performs the in-plant switching and has approximately twelve employees. Switching services for this facility were provided by the Union Pacific (UP), a covered railroad employer. The track involved is owned by the UP and leased by ExxonMobil. Under the new agreement, the UP will continue to own the track, and ExxonMobil (by its switching service provider, Rescar) will be given limited, exclusive access across the UP mainline to traverse with trains from the refinery side of the facility bound for the chemical plant and back. The UP will drop trains at ExxonMobil Refinery along the Dock Lead, where Rescar will disassemble and assemble railcars while also providing in-plant movement of railcars for ExxonMobil. Rescar will acquire and operate two locomotives, and the personnel which Rescar assigns to ExxonMobil will be FRA trained and certified according to the position held. Rescar intends to add a new location number for the Baytown facility, and approximately twelve employees to perform the in-plant switching for the chemical side of the facility. The switching services provided ExxonMobil will be a 24/7 operation. Rescar's total revenues at the Baytown facility are currently approximately \$3 million, of which \$1 million is revenue from switching activities. The addition of the chemical side of the facility will add approximately another \$1 million in switching revenue. This revenue represents approximately 1.6% of Rescar's total revenues. The total number of switching employees (22³) represents approximately 2.4% of all Rescar employees.

Because the UP will no longer be serving the Baytown facility, there are two⁴ additional third party industries which will require minimal switching services. Both of these entities, Rhodia and Advanced Aromatics, are located within the Baytown facility and will be without rail service if the UP no longer switches within the facility. Rescar argues that the services provided to these two entities will be *de minimis* and merely incidental to Rescar's in-plant switching for ExxonMobil. Rescar anticipates monthly total switching of less than fourteen cars for both third party industries combined. This will be less than 1% of the total monthly

² Rescar initially provided switching services for the ExxonMobil Refinery Complex on the refinery side of the Baytown Complex, but not the chemical side of the facility.

³ The initial twelve employees, plus the additional twelve employees who would be hired.

⁴ Initially there were three third party industries involved; however the entity NGO is no longer in business.

railcars (1,859) Rescar will switch in-plant for ExxonMobil. Rescar will enter into separate switching agreements with Rhodia and Advanced Aromatics.

Regarding the switching services which Rescar provides at ExxonMobil's Beaumont, Texas facility⁵, information provided indicates that Rescar's total revenue at that plant is approximately \$2 million, of which \$900,000 is from switching activities. Rescar provides switching services only for ExxonMobil, and all services are provided within the plant. No third party customers are served, and Rescar is not contemplating expansion of switching services at the Beaumont facility.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer" to include:

- (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;
- (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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. 45 U.S.C. §231(a)(1)(i) and (ii).

Section 1 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

The evidence of record indicates that with the switching services Rescar previously provided to ExxonMobil at the Baytown, Texas and Beaumont, Texas facilities, Rescar would be operating as a switching railway which is providing services to only one customer, ExxonMobil. Rescar does not hold itself out to the public as a provider of switching services. The expansion of Rescar's switching services for ExxonMobil at the Baytown facility as described above would not change that description. Decisions of the Board in prior cases have concluded that where a short line of track is operated as a common carrier, the operator is a rail carrier operator under the Acts. B.C.D. 96-19, *GWI Switching Services, L.P.* Whether the operator owns the rail line, or leases the line from another company

⁵ All switching services at the Beaumont facility are within the plant and no third party customers are served.

does not affect the outcome, but where the operator does not hold itself out as a common carrier, the Board has concluded that the track is operated as a private carrier, and consequently is not a covered rail carrier employer. See e.g., B.C.D. 94-29, *Hardin Southern Railroad Company*; B.C.D. 94-105.2, *Great Miami & Western Railway*.

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 to transport only for those with whom they see fit to contract individually. The Board has followed the distinction made by the STB, 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.

In this case, the information contained in the file indicates that Rescar is not a common carrier, but operates as a private carrier which performs intraplant switching for a single customer, ExxonMobil. Even with Rescar providing switching services to two additional clients, it would still be considered a private carrier. The track it uses is leased by ExxonMobil, and runs through the ExxonMobil facility, making the process akin to intraplant switching. Rescar does not hold itself out as providing services from this facility to any and all who would

like to use it – the number of clients is finite, i.e., the two entities described above, Rhodia and Advanced Aromatics.

Consistent with earlier decisions of the Board, we hold that Rescar is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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