

EMPLOYER STATUS DETERMINATION
Total Logistic Control, LLC

This is the determination of the Railroad Retirement Board concerning the status of Total Logistic Control, LLC (TLC) 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).

A review of TLC's operations began with an inquiry into Rochelle Railroad Company (RRC), which was an employer covered under the Acts from April 13, 1996, through November 30, 1998 (B.A. No. 2778). In Board Coverage Decision (B.C.D.) 99-36, coverage of RRC was terminated. As explained in that decision, in Surface Transportation Board (STB) Finance Docket AB-549, decided May 21, 1999, the STB granted the application of the City of Rochelle, Illinois (City) requesting the authorization of the discontinuance by RRC of service over 2.06 miles of track that the City owns in an industrial park within the City. According to the STB decision, the City is operating the line through a contractor. That contractor is TLC.¹ In a letter dated June 7, 2006, from Mr. Mike Carr, CEO-President of Pioneer Railcorp., the owner of RRC, RRC discontinued operations in May 1999, when TLC became the sole operator of the track².

Total Logistics, Inc. is a Milwaukee-based public company which operates through two wholly-owned businesses, TLC, and Zero Zone³. TLC is the tenth largest provider of refrigerated warehousing services in the United States. TLC is a national provider of integrated logistic services which include refrigerated and dry warehousing, supply chain management, dedicated third-party facility and operations management, food distribution, bottling and packaging, and fulfillment services. TLC provides end-to-end supply chain services to a number of major U.S. food and consumer product companies. TLC operates a fleet of over 435 tractors with over 825 refrigerated and dry trailers. It has five maintenance facilities and more than 30 logistic centers.

In response to inquiries from the agency, Peter Westermann, Chief Operating Officer of TLC advised that TLC owns no rail assets other than its own spurs. Although TLC owns track-mobiles, it does not own locomotives. Mr. Westermann stated further that TLC has

¹ Documentation in the file from Jason T. Anderson, Economic Development Director for the City of Rochelle indicates that the City of Rochelle has no employees engaged in the operations of the railroad and it is TLC who is the rail operator of the railroad.

² Mr. Carr noted that TLC actually began operations before May 1999, working with RRC.

³ Zero Zone is a manufacturer of high quality refrigerated and freezer display cases used in grocery, convenience, dollar and drug store chains for retail merchandising of food, beverage and floral products, as well as refrigeration houses and racks to power and control the refrigeration systems, electrical panels, and stand-by power for both retail and industrial applications.

no employees engaged full time in the exclusive business of railcar moving. Any man-hours spent shuttling, spotting or switching

railcars are a tiny fraction of our total man-hours, and the vast majority of that tiny fraction is to move cars to and around our own warehouse. We do this under a contract with the city in the industrial park.

TLC started warehousing in Rochelle in 1986, and had one agreement with the City from 2002. TLC has a current contract with the City, dated October 1, 2004, to shuttle all cars within the industrial park with TLC's track-mobile. Mr. Westermann explained that because the industrial park is growing, in January 2006 TLC sought bids from short-line rail companies to perform the work TLC was performing. This was done in anticipation of more railcar volume which would necessitate the use of a locomotive rather than a track-mobile. TLC selected the Burlington Junction Railway. The Burlington Junction Railway has been an employer under the Acts since 1985 (B.A. No. 4777)⁴. In a letter dated September 25, 2006, Mr. Westermann stated that the Burlington Junction Railway was on-site in September 2006, performing functions in preparation "for the volume to come in November". According to a letter dated November 17, 2006, from Mr. Robert Wingate, General Manager of the Burlington Junction Railway, there are three employees working out of the Rochelle operation, and service and compensation for all three is reported under the appropriate Acts.

The limited amount of spotting, shuttling or switching railcars which TLC did before entering into the contract with Burlington Junction Railway was done with track-mobiles (not locomotives), and was done pursuant to a contract with the City of Rochelle to shuttle cars within the industrial park to move cars to and around TLC's own warehouse. According to Mr. Westermann, TLC performed the final delivery of approximately 4,000 railcars per year to the facilities in the Rochelle industrial park. About 3,700 of these were to TLC's own facility, with the balance spread across four other buildings in the park. Using a track-mobile, TLC placed at designated individual company locations railcars delivered by Class I railroads. Ninety percent of this volume went to TLC's own warehouse, and ten percent went to the other facilities in the industrial park. The percentage of revenue TLC received from this service was approximately two tenths of one percent (.002). This is based on \$800,000.00 in shuttle revenue against \$350 million in TLC sales. When measured against total company revenues, the percentage becomes two thousandths of one percent (0.0020%)⁵. The approximate proportion of TLC employees who worked in a capacity related to the shuttle services was two tenths of one percent. No employees worked full time related to shuttle activities.

⁴ Effective March 7, 1997, Burlington Junction Railway changed its name to Burlington Shortline Inc. d/b/a Burlington Junction Railway.

⁵ As of January 2005, TLC is a wholly owned subsidiary of SUPERVALU INC. SUPERVALU sales are approximately \$40 billion; \$800,00.00 is 0.0020% of \$40 billion.

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 similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The question before us is whether TLC should be considered a covered rail carrier for the period May 1999 (when Rochelle Railroad Company ceased providing services and TLC took over) through September 2006 (when the Burlington Junction Railway took over operations).

The evidence of record indicates that with the switching services which TLC provided at the Rochelle industrial park TLC would be operating as a switching railway providing services for itself. TLC did not hold itself out to the public as a provider of switching services. The limited provision of TLC's switching services for the other four facilities in the industrial park 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 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 TLC was not a common carrier, but operated as a private carrier which performed intraplant switching primarily for itself. Even with the limited switching services provided to the four other buildings, it would still be considered a private carrier. TLC 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, TLC itself, and the entities which used the other four buildings in the park.

Consistent with earlier decisions of the Board, we hold that TLC was not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts for the period May 1999 through September 2006. See, B.C.D. 08-10, Rescar, Inc. and Rescar Industries, Inc. decided February 21, 2008.

Original signed by:

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