

**EMPLOYER STATUS DETERMINATION
Respondek Railroad Corporation**

This is the determination of the Railroad Retirement Board concerning the continued status of Respondek Railroad Corporation (Respondek Corp.), 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.). In Board Coverage Decision 00-38, the Board previously determined Respondek Corp. to be a covered employer (BA 3731) under the Railroad Unemployment Insurance Act and the Railroad Retirement Act of 1974, with service creditable from August 3, 1999. As explained below, the Board finds that Respondek Corp. ceased to be a covered employer effective August 1, 2006. The Board further finds that for the period August 3, 1999 through July 31, 2006, Respondek Corp. conducted the rail carrier service as an identifiable and separable enterprise from its non-carrier operations within the meaning of section 202.3 of the Board's regulations.

I. Non-Carrier Rail-Related Operations.

Information regarding Respondek Corp. has been obtained from published filings with the former Interstate Commerce Commission and successor Surface Transportation Board; from Respondek Corp. officials and the company internet web site; and from prior Board Coverage Decisions. Together, this evidence shows that at its inception, Respondek Corp. was wholly owned by Terry and Jerry Respondek until 1998, when Terry Respondek became sole owner. Respondek Corp. began by conducting in-plant switching operations in 1987 for an oil refinery in Wood River, Illinois, and added in-plant switching for a second Wood River refinery in 1990. Respondek Corp. switched rail cars for a coal mine near Percy, Illinois from 1998 until the mine closed in 2000; and began a second coal mine switching contract in 2006 in Evansville, Indiana. Respondek Corp. began in-plant switching for a chemical/plastics firm at a plant in Burkville, Alabama in 1999, and at a second chemical/plastics plant in Mt. Vernon, Indiana in 2000. Most recently, the company began switching coal cars at an Alcoa plant near Newburgh, Indiana in 2007. Respondek Corp. owns locomotives and other equipment necessary to perform these switching services.

In addition to in-plant switching, Respondek Corp. began a track replacement and repair business with work at the Alcoa Newburgh plant in 2002. Finally, since 2003 Respondek Corp. has operated a railcar repair

shop near Evansville, Indiana. Repair clients include a coal company and a private railcar company.

II. Rail Carrier Operations.

On October 28, 1994, Respondek Corp. employees began operating rail carrier service over a 5½ mile line of track in Cape Girardeau, Missouri, which was acquired from the Missouri Pacific Railroad by SEMO Port Railroad, Inc (SEMO). SEMO is a subsidiary of the South East Missouri Regional Port Authority. See: SEMO Port Railroad, Inc.—Acquisition and Operation Exemption—Certain Lines of Missouri Pacific Railroad Company, Interstate Commerce Commission Finance Docket No. 32543 (August 22, 1994). In a decision dated January 10, 1996, the Railroad Retirement Board determined that SEMO was a covered rail carrier employer under the Acts. *SEMO Port Railroad, Inc.*, B.C.D. 96-13. The Board further determined that although Respondek Corp. itself was not a rail carrier employer, the Respondek Corp. employees running the SEMO trains were employees of SEMO for purposes of reporting covered railroad service under the Acts. In 1998, Respondek Corp. advised the Board that as a result of the transfer of all ownership interest to Terry Respondek, Respondek Corp. assigned its duties under the SEMO agreement to Motive Rail, Inc. The Board determined that Motive Rail became a covered employer under the Acts effective August 27, 1998, the date of the assignment from Respondek. See *Motive Rail, Inc.* B.C.D. 00-56.

A year after Motive Rail assumed the Cape Girardeau operation, in August 1999, Respondek Corp. entered into a new contract with the Bi-State Development Agency of the Missouri-Illinois Metropolitan District (Bi-State Development) to operate freight rail service over a 1½ mile section of track in the city of St. Louis, Missouri. Bi-State Development is a public entity organized pursuant to a 1949 agreement between the States of Missouri and Illinois, which proposed to initiate light rail passenger service connecting Lambert-St. Louis International Airport in Missouri to St. Louis, Missouri and East St. Louis, Illinois. The 1½ miles of track to be operated by Respondek Corp. were acquired in 1989 by Bi-State Development as part of an 8 mile rail line previously owned by the Wabash Railroad Company and operated by the Norfolk and Western Railway. See: Bi-State Development Agency of the Missouri-Illinois Metropolitan District—Acquisition and Operation Exemption—Norfolk and Western Railway Co. and Wabash Railroad Co., ICC Finance Docket No. 31425, 54 *Fed. Reg.* 28519 (July 6, 1989). From 1989 until 1999, Bi-State Development contracted with Railroad Switching Services of Missouri (BA 4397) to provide freight service over the line. In that transaction, Railroad

Switching Services was determined to be a covered employer under the Acts, but Bi-State Development was not. See Legal Opinion L-91-86. Beginning August 3, 1999, the contract for freight operation was transferred to Respondek Corporation. Accordingly, the Board then held Respondek Corp. to be a rail carrier employer under the Acts from the date Respondek Corp. replaced Railroad Switching Services as freight rail service operator of Bi-State Development's rail line. See: *Respondek Railroad Corporation*, B.C.D. 00-38, (September 19, 2000).

In 2002, Respondek Corp. formed Squaw Creek Southern Railroad, Inc. (Squaw Creek So. RR), as a wholly owned subsidiary to operate freight service over approximately 22 miles of track between Lynnville and Yankeetown in Warwick County, Indiana. See: Squaw Creek Southern Railroad, Inc.—Operation Exemption—Line of Norfolk Southern Railway Company, Surface Transportation Board Finance Docket No. 34230, (August 9, 2002). Respondek Corp. notified the Board that freight operations by Squaw Creek So. RR would be conducted with employees of Respondek Corporation. The Board determined Squaw Creek So. RR to be a covered rail carrier employer effective August 17, 2003, the date operations began. See: *Squaw Creek Southern Railroad, Inc.*, B.C.D. 03-17.

Sometime in early 2006, the Audit and Compliance Division of the Board's Bureau of Fiscal Operations learned that although the Board had determined Respondek Corp. to be a rail carrier employer, Respondek Corp. reported some employees as subject to the Railroad Retirement and Railroad Unemployment Insurance Acts, and other employees as subject to the Social Security Act. By letter dated March 3, 2006, the Chief of Audit and Compliance requested that Respondek Corp. provide a description of the duties of the employees reported as subject to the Social Security Act, and the basis for Respondek Corp.'s decision not to report these individuals as employees of a rail carrier.

By letter dated January 11, 2007, Respondek Corp. first responded that effective August 1, 2006, the contract with Bi-State Development was assigned to Squaw Creek So. RR, and that all freight service since that date had been performed by individuals reported to the Board as employees of that covered employer. Respondek Corp. further advised prior to August 2006, only those company employees engaged in the operation of freight service over the Bi-State Development rail line in St. Louis had been reported to the Board. Respondek Corp. stated that only one office position devoted any time to the Bi-State Development freight line. Over the period August 1999 to July 2006, the incumbent of that position performed record keeping functions totaling two to twelve hours

per year. The company explains that in 2005, the last full year of operation of the Bi-State Development line, the freight service accounted for only 3 percent of Respondek Corp. revenue; in prior years the Bi-State Development contract accounted for less than 3 percent. Based on the foregoing, Respondek Corp. requests that the Board determine that the portion of the corporation's business as the rail carrier over the Bi-State Development rail line is an identifiable and separable enterprise under section 202.3(a) of the Board's regulations.

III. Discussion.

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;

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

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 employer 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; Sierra Pacific Industries*, B.C.D. 04-11.

Section 202.11 of the regulations of the Railroad Retirement Board also state that the status of any company as a covered employer shall terminate when the company loses any of the characteristics essential to the existence of an employer status.

Finally, section 202.3(a) of the regulations of the Railroad Retirement Board lists the following as factors to be considered when determining segregation of the rail carrier business of a company principally engaged in non-carrier business:

- 1) The primary purpose of the company or person on and since the date it was established;

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

The Board finds that the operations for various oil refineries, coal mines, and chemical plants which Respondek Corp. has conducted since formation in 1987, constitute in-plant switching on privately-owned track. The Board notes that Respondek added track replacement and repair business in 2002, and railcar repair business in 2003. It may thus be said that from its inception, every aspect of Respondek Corp. business relates to railroad track, rail cars, and the movement of freight by rail. However, these pursuits are conducted independently from each other, and for various unrelated clients. Moreover, while Respondek Corp. offers these rail-related services to the general public, offering these services is not an offer to the public to conduct common carriage of freight by rail which would constitute rail carrier operations.

On the other hand the Respondek Corp. employees who operated the 5½ mile line of track in Cape Girardeau for SEMO from October 1994 through August 1998 were considered employees of the rail carrier SEMO for purposes of reporting under the Acts. The Board determined in *SEMO Port Railroad, Inc.*, B.C.D. 96-13, that Respondek Corp. itself was not a covered employer during that time. Afterward, Respondek Corp. clearly engaged in rail carrier business with respect to the 1½ mile section of track in the city of St. Louis, Missouri which Respondek Corp. employees operated for Bi-State Development during the period August 1999 to July 2006. The ultimate conclusion by the Board in *Respondek Railroad Corporation*, B.C.D. 00-38, that Respondek Corp. performed rail carrier service by operating that rail line was therefore correct.

However, the evidence now is that the Bi-State Development rail line operation was small in comparison with Respondek's more extensive rail-related but non-carrier business. The Board therefore finds pursuant to section 202.3(a) of the regulations that beginning August 1999, Respondek

Corporation was a covered rail carrier employer under the Acts only with respect to the Bi-State Development line of track in St. Louis.¹

Finally, the evidence of record establishes that effective August 1, 2006, Respondek Corp. has ceased operation of the Bi-State Development rail line, and the contract with Bi-State Development was assigned to Squaw Creek So. RR. As Respondek Corp. was only an employer with respect to the Bi-State Development line, when that operation ceased Respondek Corp. lost the characteristics essential to the existence of an employer status within the meaning of section 202.11 of the Board's regulations. Accordingly, the Board finds that the status of Respondek Corporation as an employer covered by section 1(a)(1)(i) of the Railroad Retirement Act and its corresponding provision of the Railroad Unemployment Insurance Act terminated effective with the close of business July 31, 2006.

Original signed by:

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¹ The Board notes that Respondek Corporation is not under common control with its rail carrier employer subsidiary Squaw Creek So. RR merely because it is parent company of that rail carrier. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993). However, it is unclear whether ownership of Respondek Corporation is concentrated in so few individuals that it places both parent and subsidiary carrier under common ownership and control. *American Railroads Corporation*, B.C.D. 04-64.

Assuming common control exists, though, the evidence is that the services Respondek Corporation has performed for affiliated rail carriers is so insubstantial that it fails to meet the definition of service in connection with transportation of property by rail under section 1(a)(1)(ii) of the RRA.