

**EMPLOYER STATUS DETERMINATION**

Patriot Rail, LLC (PRL)  
Patriot Rail Corporation (PRC)  
Patriot Rail Holdings, LLC (PRH)

This is the determination of the Railroad Retirement Board concerning the status of Patriot Rail, LLC (PRL), Patriot Rail Corporation (PRC), and Patriot Rail Holdings, LLC (PRH) 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.).

In Surface Transportation Board (STB) Finance Docket No. 35118, decided on February 7, 2008, PRL and its subsidiaries, Patriot Rail Holdings, LLC (PRH), and Patriot Rail Corp. (PRC) all non-carriers, jointly filed a verified notice of exemption to continue in control of Sacramento Valley Railroad, Inc. (SAVR), upon SAVR's becoming a Class III rail carrier<sup>1</sup>. According to the STB decision, PRL owns 51% of the equity interests in PRH, and PRH owns 100% of the stock of PRC<sup>2</sup>. SAVR is directly controlled by PRC. Additionally, the STB decision stated that PRL, PRH and PRC collectively control three other Class II rail carriers: Tennessee Southern Railroad Company (TSRR) (BA No. 5509), Rarus Railroad Company (Rarus) (BA No. 3649), and Utah Central Railway Company (UCRC) (BA No. 3785).

In STB Finance Docket No. 35138, decided on May 8, 2008, PRL and its subsidiaries PRH and PRC jointly filed a verified notice of exemption to acquire control of the Louisiana and North West Railroad Company, LLC (L&NW) (BA No. 2810). STB Finance Docket 35138, like Finance Docket 35118 decided February 7, 2008, states PRL owns 51% of the equity interests in PRH, and PRH owns 100% of the stock of PRC. PRC is described as a noncarrier holding company that controls the TSRR, Rarus, UCRC, SAVR, and the L&NW.<sup>3</sup>

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<sup>1</sup> SAVR has been found to be an employer covered by the Acts. See, Board Coverage Decision 08-23.

<sup>2</sup> It is noted that in STB Finance Docket No. 35013, decided April 4, 2007, stated that PRL owned 51% of the stock of PRC, and PRC owns 100% of the stock of TSRR as well as 100% of the stock of Patriot Acquisition Corporation (PAC) the holding company which owns 100% of the stock of Rarus. The STB decision further states that through PRC's control of PAC, PRC "will acquire indirect control of Rarus", and through PRL's control of PRC, "PRL will also acquire indirect control of Rarus".

<sup>3</sup> Information obtained from PRC's website, [www.patriotrail.com](http://www.patriotrail.com), states that PRC currently owns and operates five short line freight railroads comprising 321 total rail miles in seven states: TSRR in Tennessee and Alabama; Rarus in Montana; UCRC in Ogden, Utah; SVRR in California; and LNWR in Louisiana and Arkansas

Information regarding PRL was provided by Mr. Robert I. Schellig, Jr., Vice-President – Law for PRH<sup>4</sup> in a letter dated March 31, 2008. According to Mr. Shellig, PRL which began operations on January 18, 2005, is a privately held Delaware limited liability company, and controlling interest in the company is held by Patriot Equity, LLC (PEL), with minority interests being held by several investors. Mr. Gary O. Marino is the Chief Executive Officer.

Mr. Shellig stated that PRL has two employees who were first compensated on August 31, 2005. The two employees provide consulting and advisory services for (1) the company's 51% owned subsidiary, PRH, a non-carrier railroad holding company, (49% owned by a non-carrier private equity fund), and 2) other businesses unrelated to railroads. Mr. Shellig stated that the employees do not perform work on property owned by a railroad. Additionally, Mr. Shellig stated that PRL "does not engage in traditional rail related business with rail carriers and does not receive revenue from rail carriers".

No railroad has a financial interest in PRL, either through direct or indirect stock ownership, as a parent corporation or indirect stock ownership through a parent company (brother/sister corporation), according to Mr. Shellig. Mr. Shellig reported that there are no individuals who own a controlling interest in PRL and a controlling interest in any rail carrier. However, the officers and directors of PRL, Mr. Gary Marino and Bennett Marks, are officers and directors in the following rail carriers: SAVR, TSRC, UCRC, and Rarus d/b/a Butte, Anaconda & Pacific Railway Company. Mr. Shellig stated that Mr. Marino and Mr. Marks do not have an active role in the day-to-day operations of these carriers.

Mr. Shellig reported that PRL does not own any railroad equipment or assets and does not jointly control railroad equipment and facilities with another entity. PRL is not a party to written agreements with rail carriers and is not a lessee or lessor of railroad track or equipment. Mr. Shellig stated that PRL does not intend to lease rail line to rail carriers.

Mr. Shellig was asked to describe the nature of the "consulting and advisory services" provided by PRL, as well as for whom they are provided. In a letter dated July 17, 2008, Mr. Shellig explained that the two employees provide consulting and advisory services to PRL's subsidiary company PRC "in furtherance of its efforts to acquire railroad companies". Mr. Shellig also confirmed that Mr. Marino, Mr. Marks and Mr.

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<sup>4</sup> Mr. Shellig is also Vice-President – Law for PRC.

Stanley Wlotko are directors and officers of TSRC, Rarus, UCRC, L&NW, and SAVR.

Information about PRC was provided by Mr. Shellig in a letter dated April 15, 2008. PRC began operations in November 2006, the stock of PRC is owned by PRH, "a noncarrier company that has no employees". Mr. Marino is the Chief Executive Officer. PRC has eight employees; one of the employees was first compensated in November 2006. Three of the employees "provide consulting and advisory services in connection with efforts to acquire railroads". The other five employees provide "office support services, clerical services and consolidated accounting services to PRC".

PRC's "sole purpose is to acquire railroad companies as a non-carrier holding company" and "does not engage in traditional rail related business with rail carriers and does not receive revenue from rail carriers". No railroad has a financial interest in PRC, either through direct or indirect stock ownership, as a parent corporation or indirect stock ownership through a parent company (brother/sister corporation), according to Mr. Shellig. Mr. Shellig reported that there are no individuals who own a controlling interest in PRC and a controlling interest in any rail carrier. However, the officers and directors of PRC, Mr. Marino and Mr. Marks, and Mr. Stanley Wlotko are officers and directors in the following rail carriers: SAVR, TSRC, UCRC, and Rarus d/b/a Butte, Anaconda & Pacific Railway Company. Mr. Shellig stated that these individuals do not have an active role in the day-to-day operations of these carriers.

Mr. Shellig reported that PRC does not own any railroad equipment or assets and does not jointly control railroad equipment and facilities with another entity. PRC is not a party to written agreements with rail carriers and is not a lessee or lessor of railroad track or equipment. PRC does not intend to lease rail line to rail carriers.

In a letter dated May 5, 2009, Mr. Schellig was asked to confirm that the above statements remain correct at this point, as well as to provide a detailed explanation of what is meant by the statement that PRC's "sole purpose is to acquire railroad companies as a non-carrier holding company".

Mr. Schellig was also asked to describe in detail the operations in which PRC has been engaged from the date of incorporation to the present, including any business not related with the railroad industry; details about the services PRC provides to PRH and PRL; and details about the services PRC provides to other rail carriers, including the name of the rail carrier(s); the percentage of total business time spent doing business with the rail carrier(s); the percentage of

revenue received from the rail carrier(s); and a detailed description of the services provided to the rail carrier(s).

In a letter dated May 29, 2009, Mr. Schellig confirmed that statements provided regarding PRC remain correct with one change: PRC now has eleven employees rather than eight<sup>5</sup>. Regarding the purpose of PRC, Mr. Schellig stated

PRC does not *operate* railroad companies or otherwise engage in services related to rail transportation. It does not operate locomotives; it does not own or lease railroad tracks; it does not own or lease railroad rolling stock. Instead, PRC *invests* in shortline railroad companies, *finances* those investments, and *investigates and oversees* those investments. PRC is a shortline railroad acquirer, investor and holding company (emphasis in original).

In support of PRC's argument that it should not be considered a rail employer, Mr. Schellig cites our decision in RailAmerica, Inc. (Board Coverage Decision 93-54), noting that Mr. Gary O. Marino, the CEO of PRC, was the Chairman, President and CEO of RailAmerica, Inc. Mr. Schellig further states that the plan of Mr. Marino and his fellow executives for PRC is "virtually identical" to the operations of RailAmerica, Inc.

In response to the questions about PRC's activities since its incorporation, Mr. Schellig explained that

PRC provides certain management oversight and administrative services for its five shortline railroad subsidiaries, including corporate planning, financial and legal services. PRC's Holding-company-level management services are virtually identical to the services provided by the holding company described in *Pioneer Railcorp*, B.C.D. 95-23, in which the Board ruled that the company in question was not a rail employer.

In response to the questions about PRC's activities with non-railroad entities, Mr. Schellig explained that PRC deals with lenders and other financing companies, suppliers doing business with its shortline rail subsidiaries, government entities and regulators, as well as its non-railroad affiliates PRH and PRL. PRC spends about 50% of its total business time dealing with these non-railroad parties. PRC receives no revenue from

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<sup>5</sup> The eleven employees consist of two accounting personnel, four clerical and administrative personnel, and five employees "dedicated to the due diligence process of deciding which shortline railroads might be suitable prospects for acquisition".

non-railroad entities, PRH or PRL. PRC also provides no services to PRH or PRL.

In answer to the questions about the services PRC provides to other rail carriers, Mr. Schellig reiterated that PRC's only business is investing in shortline railroad companies, financing those investments, and investigating and overseeing those investments. Mr. Schellig describes PRC as a shortline railroad holding company which owns 100% of the stock of SAVR, TSRC, UCRC, Rarus d/b/a Butte, Anaconda & Pacific Railway Company, and L & NW and

Provides financial and managerial oversight and administrative services to its railroad subsidiaries of the kind that are typical for a corporate holding company and substantially the same as provided by RailAmerica, Genesee and Wyoming, Pioneer Railcorp and other rail holding companies.

Information about PRH was provided by Mr. Shellig in a letter dated July 17, 2008. PRH began operations on November 6, 2006. Controlling interest in PRH is held by PRL; minority interest in held by a private equity fund. Mr. Marino is the Chief Executive Officer. PRH has no employees

PRH "provides a vehicle for the ownership interest of the entity providing financing for acquisitions made by PRC" and "does not engage in traditional rail related business with rail carriers and does not receive revenue from rail carriers". PRH owns 100% stock interest in PRC. No railroad has a financial interest in PRH, either through direct or indirect stock ownership, as a parent corporation or indirect stock ownership through a parent company (brother/sister corporation), according to Mr. Shellig. Mr. Shellig reported that there are no individuals who own a controlling interest in PRH and a controlling interest in any rail carrier. However, the officers and directors of PRH, Mr. Marino and Mr. Marks, are officers and directors in the following rail carriers: SAVR, TSRC, UCRC, and Rarus d/b/a Butte, Anaconda & Pacific Railway Company, and L&NW. Mr. Shellig stated that these individuals do not have an active role in the day-to-day operations of these carriers.

Mr. Shellig reported that PRH does not own any railroad equipment or assets and does not jointly control railroad equipment and facilities with another entity. PRH is not a party to written agreements with rail carriers and is not a lessee or lessor of railroad track or equipment. PRH does not intend to lease rail line to rail carriers.

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;

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

The evidence of record shows that PRL, PRC, and PRH are clearly not rail carrier employers under the definition of employer in subparagraph (i) quoted above.

This conclusion, however, leaves open the question as to whether PRL, PRC, or PRH can be considered an employer under the definition in subparagraph (ii). Under section 1(a)(1)(ii), a company is an employer if it meets both of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii). In considering questions of coverage within the meaning of section 1(a)(1)(ii), courts have generally looked to the type of service being provided, the amount of work being performed for the railroad affiliate, and the amount of work being performed for the railroad industry.

Initially, the Board notes that neither PRL nor PRH are performing "services with" in connection with railroad transportation, as provided for in section 1(a)(1)(ii). PRH is essentially a holding company and its parent, PRL, provides consulting services with respect to the acquisition of railroads. Thus, the focus of the rest of this decision is on PRC.

In his letter of May 29, 2009, Mr. Schellig compares the relationship of PRC to its rail carrier affiliates to the relationship considered in our decisions in

RailAmerica, Genesee and Wyoming, and Pioneer Railcorp., and argues that PRC is not under common control with its rail carrier affiliates. In those decisions we considered a decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act. In that case the Court held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of §3231. Union Pacific Corporation v. United States, 5 F. 3d 523 (Fed. Cir. 1993).

Union Pacific held that a parent company was not under common control with its subsidiary; however, the corporate structure in Union Pacific is different than in this case. Union Pacific Corporation was the ultimate parent company above its railroad subsidiary while PRC and PRH are both under the corporate ladder of PRL, with PRL controlling PRH and PRH in turn controlling PRC. Therefore, the evidence establishes that PRC is under common control with its rail subsidiaries within the meaning of section 202.5 of the Board's regulations.

The question still remains whether PRC performs a "service in connection with" railroad transportation. Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is 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, if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Mr. Schellig stated that PRC provides financial and managerial oversight and administrative services to its railroad subsidiaries. These types of services have been found to be service in connection with railroad transportation. See Adams v. Railroad Retirement Board, 214 F. 2d 534, 542 (2nd Cir, 1954) (non-carrier affiliate which performed accounting, purchasing, correspondence and stenography for an affiliated railroad performed a service in connection with railroad transportation).

Moreover, the evidence is that PRC performs these services solely for the affiliated rail carriers. Compare, Standard Office Building v. United States, 819 F. 2d 1371, 1379 (7th Cir., 1987) (property management firm which performs approximately half of its service for unrelated, non-railroad tenants is not performing services in connection with rail transportation within the meaning of the Railroad Retirement Tax Act); and Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F. 2d 295, 298 (7th Cir, 1992) (where a company derives 95 percent of its locomotive and rail car repair business from its rail carrier affiliate, the company performs a service in connection with rail transportation under the Acts).

Accordingly, it is determined that Patriot Rail, LLC and Patriot Rail Holdings, LLC are not employers under the Railroad Retirement and Railroad Unemployment Insurance Acts. Patriot Rail Corporation is found to be an employer under the Acts effective November 2006, when it began operations.

Original signed by:

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