

**EMPLOYER STATUS DETERMINATION****Texas Railroad Switching, Inc.****n/k/a Border Transload and Transfer, Inc.**

This is the determination of the Railroad Retirement Board concerning the continuing status of Texas Railroad Switching, Inc. (TRS) (B.A. No. 4861) 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). TRS was initially found to be an employer under the RRA and RUIA with service creditable from April 2, 1990.

In May 1995, TRS and Crystal City Railroad, Inc. (CCR)<sup>1</sup> sought and received exemptions from the Interstate Commerce Commission (ICC)<sup>2</sup> for CCR to abandon and TRS to discontinue service over the line. See, ICC Dockets No. AB-427X and AB-428X. In a letter dated May 4, 1995, the Railroad Retirement Board's (RRB's) division of Audit and Compliance contacted TRS requesting information about TRS's cessation of service. In a letter dated June 24, 1996<sup>3</sup>, Mr. Barry S. McClure, Controller for TRS explained that TRS was the operator of the CCR; that CCR applied for and received permission to abandon the line; that TRS applied for and received permission to discontinue operations in 1995; and that TRS "will maintain its corporate existence, although no operations are currently in the planning stage".

On January 5, 2001, TRS changed its corporate name from Texas Railroad Switching, Inc. to Border Transload Transfer, Inc. (BTT). There is no indication in the file that the RRB was advised of this name change until 2003. Review of records maintained on the RRB's Employment Data Maintenance (EDMA) system indicates that TRS last filed reports February 26, 2001.

In 2003 the employer status of CGX, Inc., Mississippi Tennessee Railroad LLC, Mississippi Tennessee Holdings, LLC, and Ironhorse Resources, Inc. was under consideration. CGX, Inc. is the parent company of Ironhorse Resources, Inc. (IR); CSC Enterprises, Inc. (CSC); Crystal City Railroad, Inc. (CCR); JME Enterprises, Inc. (JME); Lone Star Railroad, Inc. (LSRR); Rio Valley Railroad, Inc. (RVRR); and Mississippi Tennessee Holdings, LLC (MTH). As stated above, CCR was found not to be a covered employer; LSRR has been found not to be a covered employer as well; and both RVRR and MTH have been found to be covered employers. IR in turn is the parent of Railroad Switching Service of Missouri, Inc. (RSM); Rio Valley Switching Company (RVSC); Southern Switching Company (SSC);

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<sup>1</sup> CCR initially acquired the line which TRS leased and operated. CCR has been found not to be a covered employer under the Acts. See, L-91-121.

<sup>2</sup> Now the Surface Transportation Board (STB).

<sup>3</sup> This letter is in reply to a letter from the RRB dated June 20, 1996; however, no copy of this letter is in file.

Mississippi Tennessee Railroad, LLC (MTR), and BTT. RSM, RVSC, SSC, and MTR have all been found to be covered employers under the Acts. Both parent companies, CGX, Inc. and Ironhorse Resources, have been found to be employers covered under the Acts. See, B.C.D. 04-16, and B.C.D. 06-44, respectively. CGX, Inc. is a privately held corporation owned by Mr. Greg Cundiff, who is the Chief Executive of IR and BTT.

As part of the review for this coverage determination, a letter dated December 15, 2003, was sent to Mr. McClure requesting information about Ironhorse Resources, "Transload & Transfer, Inc." and Las Cruces New Mexico Transload. In a letter dated December 23, 2003, Mr. McClure provided the RRB with information regarding Ironhorse Resources and Border Transload & Transfer<sup>4</sup>, explaining that BTT is now the name of the entity which was formerly known as TRS, and TRS "ceased operations numerous years ago with the discontinuance of operations of Crystal City Railroad, Inc."

In a letter dated February 2, 2004, Mr. McClure was asked for a detailed description of the operations of IR and BTT. In his response dated February 6, 2004, Mr. McClure reiterated the information he previously provided, *i.e.*, that BTT is now the name of the entity formerly known as TRS, and that TRS ceased operations. Mr. McClure also explained that BTT "operates a transloading facility in Las Cruces, New Mexico. The vast majority of their operations consist of transloading fructose and glucose from railcars to tank trucks".

In a letter dated October 17, 2005, Mr. McClure was asked to provide additional information to clarify the operating relationship of BTT. Mr. McClure responded with a letter dated October 27, 2005, in which he explained:

BTT operates a transloading facility in Las Cruces, NM which transfers glucose/fructose from railcars to trucks. Our plant, while served by the Burlington Northern, does not provide any railroad transportation services \*  
\* \* our primary customers are Archer Daniels Midland (ADM) and Cargill.

Mr. McClure further provided information regarding BTT's revenue; in 2005 TRS received \$303,400 from transload services, and \$103,200 from "cleaning-trucks"; in 2004 revenues were \$232,300 from transload services and \$87,900 from truck cleaning, and in 2003 TRS received \$184,200 from transload services and \$72,400 from truck cleaning. Mr. McClure also provided a copy of the Certificate of Amendment indicating TRS's name change to BTT.

Mr. McClure also provided information that BTT's two largest customers for transloading are Cargill and ADM, who provide "the vast majority" of the railcars that are delivered to BTT's plant by BNSF. Mr. McClure also advised that none of

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<sup>4</sup> Mr. McClure also explained that the entities "Transload & Transfer, Inc." and "Las Cruces New Mexico Transload" do not exist.

the railcars that are unloaded are owned by any entity which is an affiliate of BTT, or Ironhorse Resources.

Section 202.11 of the Board's regulations provides that:

The employer status of any company or person shall terminate whenever such company or person loses any of the characteristics essential to the existence of an employer status.

As TRS no longer operates in the same manner as it did when it was first found to be an employer covered by the Acts, a determination needs to be made if it is a covered employer in its new incarnation.

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 \* \* \*.

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).

TRS is clearly no longer a carrier by rail. However, TRS, along with the covered employers Railroad Switching Service of Missouri, Inc. (B.A. No. 4397), Rio Valley Switching Company (B.A. No. 2869), Southern Switching Company (B.A. No. 2868), and Mississippi Tennessee Railroad, LLC (B.A. No. 4578), are all owned by a covered employer, Ironhorse Resources. Furthermore, as stated above, BTT's Chief Executive is Mr. Greg Cundiff, the Chief Executive of BTT's parent company, IR. We therefore find that the available evidence indicates that TRS is under common ownership with rail carriers and controlled by officers or directors who control a railroad.

With respect to the question of whether TRS is performing a service in connection with the transportation of passengers or property by railroad, we have previously

found the business of loading and unloading freight and cargo from freight cars to be service in connection with the transportation of passengers or property by railroad. However, inasmuch as Mr. Barry S. McClure, Executive Vice President of BTT, has reported that Burlington Northern personnel, not BTT employees, actually

remove and deliver railcars to and from the BTT plant, where BTT unloads glucose/fructose from the railcars and transfers it to semi-tractor trailers of private trucking companies, we find that BTT is not performing service in connection with the transportation of passengers or property by railroad. Therefore, based on the information set forth above, it is the determination of the Railroad Retirement Board that Texas Railroad Switching, Inc. n/k/a Border Transload & Transfer, Inc. is no longer an employer under the RRA and RUIA as of June 9, 1995, the service date on which the ICC approved its discontinuance of operations. RRB records should be amended to reflect the corporate name change.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr. (concurring opinion  
Attached)

Jerome F. Kever

**Concurring Opinion of V. M. Speakman, Jr.**  
**Labor Member**  
**Texas Railroad Switching, Inc., n/k/a**  
**Border Transload and Transfer, Inc.**

I concur with the result in this case, but feel compelled to comment on the scope of the "service in connection with" clause as it relates to loading and unloading. Section 1(a) (1) (ii) of the Railroad Retirement Act and sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act provide that any company controlled or under common control with a carrier is covered under these statutes, if it performs any service (trucking service and casual service excepted) in connection with the transportation of passengers and property by railroad.

In *Duquesne Warehouse v. Railroad Retirement Board*, 326 U.S. 446 (1946) the Court held, the "service in connection with clause" at a minimum encompasses transportation services within the meaning of the Interstate Commerce Act. Services related to the transfer in transit or the interchange of property in transit by rail are transportation services within the meaning of the Interstate Commerce Act. See 49 U.S.C. & 10102(9) (B).

Under *Duquesne*, the unloading of BN&SF cars by BTT would appear to be a covered service, as BTT is under common control with a covered carrier. However, the inquiry does not stop with *Duquesne*. Section 202.7 of the Board's regulations defines a service in connection with transportation by rail as a service which is reasonably directly related, functionally or economically, to the performance of carrier's common carrier obligations. This entails looking at all the facts surrounding the performance of the service. Specifically, for whose benefit is the service performed? Does the service promote the operations of its affiliate carrier or the railroad industry in general? Who are the customers of the service?

With respect to the case at hand, I note that, unlike in *Duquesne*, BTT's facilities are not owned by any carrier. Again, unlike in

*Duquesne*, BTT's services do not support the operations of any of its affiliate carriers or any carrier in particular. Its unloading of BN&SF rail cars to trucks is done for the benefit Cargill and ADM, its primary customers, and from whom it derives most of its revenues. In light of all these circumstances, I would conclude that BTT's services do not fall within the ambit of section 202.7 of the Board's regulations. Thus, I would conclude that BTT is not performing services in connection with railroad transportation.

Original signed by:

V. M. Speakman, Jr.