

**B.C.D. 11-63**  
**EMPLOYER STATUS DETERMINATION**  
**HC Railroad, LLC**

**July 13, 2011**

This is the determination of the Railroad Retirement Board concerning the status of HC Railroad, LLC (HC) 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.). The status of HC under the Acts has not previously been considered.

Information about HC was provided by Attorney Andrew P. Goldstein, Counsel for HC. In Surface Transportation Board Finance Docket No. FD 35434, HC filed a notice of exemption to acquire and operate the 6.4 miles of rail line located in Rushville, Indiana, which interchanges with CSX owned by Honey Creek Railroad Company, Inc., an employer under the Acts. According to Finance Docket No. FD 35434, HC stated that the trackage serves only one shipper, Morristown Grain Company, Inc., which was to be separately purchased by an affiliate of HC.

In a letter dated February 2, 2011, Mr. Goldstein stated that HC is owned by BNA Marine, LLC, which has no other subsidiaries which include railroads, railroad part suppliers, or rail repair facilities. HC has no compensated employees, and does not conduct any railroad operations. Mr. Goldstein explained that HC has decided to lease the acquired trackage for industrial use to Morristown Grain Company, Inc. (Morristown Grain) for use by Morristown Grain as industrial track in connection with Morristown Grain's primary non-transportation grain elevator business. According to Mr. Goldstein, CSX will place and remove cars at the interchange point between itself and Morristown Grain, and Morristown Grain will be responsible for moving cars to and from that interchange point using the industrial track.

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).

The evidence of record shows that while HC owns the track in question, it performs no services, having leased the track and rail equipment to Morristown Grain for Morristown

Grain's use. The evidence of record further establishes that Morristown Grain conducts its operations within an industrial park, servicing only one customer (itself), and does not hold itself out to the public as engaging in the business of transporting freight to and from CSXT. As explained by Attorney Goldstein, neither HC nor Morristown Grain provides switching services, those are performed by CSXT, an employer covered by the Acts. Morristown Grain merely moves cars from the grain elevator to the interchange.

Neither HC nor Morristown Grain hold themselves out to the public as a provider of switching services. 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. 08-10, Rescar, Inc.; 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 HC is not a common carrier. Consistent with earlier decisions of the Board, we hold that HC Railroad, LLC is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts<sup>1</sup>.

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FOR THE BOARD  
Martha P. Rico  
Secretary to the Board

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<sup>1</sup> We note that there is no evidence in the record to indicate that Morristown Grain is an employer under the Acts.