

**B.C.D. 11-87**  
**EMPLOYER STATUS DETERMINATION**  
**Port of Montana Port Authority**

**August 30, 2011**

This is the determination of the Railroad Retirement Board regarding the status of Port of Montana Port Authority 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).

Information regarding the Port of Montana Port Authority was submitted by Ms. Sheryl Ralph, Financial Manager of Port of Montana<sup>1</sup>. According to Ms. Ralph, Port of Montana Port Authority (the Port) was created by resolution on May 7, 1986, pursuant to authority granted by the 1985 Montana Legislative assembly and the city of Butte-Silver Bow, Montana's Council of Commissioners. The Port is a "component unit of the primary governmental unit, Butte-Silver Bow, Butte, Montana". Ms. Ralph explained that the Port:

is charged with the promotion, stimulation and development of commerce, economic development and prosperity for the State of Montana and its citizens. It does so primarily through the operation of a transload facility. In addition to the transload facility, the Port owns a warehouse at a secondary location which is used exclusively by tenants with long term leases.

The Port has five full-time office employees whose work "includes communications with customers who ship into or out of the Port via truck or rail". The Port also has five full time operations employees whose work "includes direct contact with customer representatives, including employees of the UPRR and BNSF<sup>2</sup> and who also perform switching tasks on a track that is shared between the BNSF, UPRR and the Port". Ms. Ralph stated that at the transload facility, the Port:

switches rail cars into the appropriate area of the facility, upon receipt from the UPRR or BNSF, and loads or unloads them per customer request. Product that comes in on rail is loaded on truck. That which comes in on truck may leave via rail or truck. The Port provides storage as needed for product in the interim and also leases space to tenants who provide their

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<sup>1</sup> It is noted that "Port of Montana, Inc." was an entity incorporated in the state of Montana on September 1, 1972, and dissolved on December 4, 2006. Review of the evidence of record, including a brochure submitted by Ms. Ralph, as well as the official website for Port of Montana ([www.portofmontana.org](http://www.portofmontana.org)) indicates that the Port of Montana Port Authority does business as "Port of Montana".

<sup>2</sup> Both the Union Pacific Railroad Company (UPRR) and the Burlington Northern and Santa Fe Railway Company (BNSF) are employers covered by the Acts (B.A. Nos. 1713 and 1621, respectively).

own transloading services. Although the Port receives rail service from both the BNSF and UPRR, it has business contracts only with the UPRR.

The Port's facility includes rail tracks, an unheated warehouse, an auto facility, a bulk minerals building, fertilizer belt, maintenance shop, truck scales, and an office building. There is also an aviation gas pump, bulk liquid tanks and bladders, and a ramp on the premises for use by customers or the Port in handling products. The Port also owns a locomotive, a backup switch engine, piggy packers, forklifts of various sizes, and an unheated warehouse with office space at a secondary location. Service provided to tenants at this secondary location is limited to maintenance and upkeep of the warehouse.

Ms. Ralph also explained that the UPRR leases the auto facility from the Port, which UPRR then uses under contract with General Motors. Port employees switch auto racks into and out of the auto facility<sup>3</sup>. The Port provides snow removal services for the auto facility.

The Port provides other services to the UPRR including the temporary storage of unused rail cars through December 2009, and participation in the One Plus billing program which allows the UPRR to submit a single bill to the customer which includes rail and transload services. The Port also charges the UPRR a switch fee for each car that enters the facility, regardless of the rail carrier who handles it. According to Ms. Ralph, in 2009, approximately 2,000 man hours were expended to provide these services, which accounted for approximately 23% of the Port's total revenues. Ms. Ralph submitted copies of a maintenance agreement, a lease agreement, and a car storage agreement, all between the UPRR and the Port. Ms. Ralph also submitted a copy of a track lease agreement between the Port and Rhodia, Inc., a chemical company.

According to Ms. Ralph, all facilities and equipment are under the control of the Port, unless they are leased to a customer. Ms. Ralph stated that the Port "does not exercise joint control of any asset with another party". The Port has no stockholders or equity holders. A five member Board of Commissions, appointed by the Butte-Silver Bow Chief Executive and confirmed by the Butte-Silver Bow Council of Commissioners, governs the Port. According to Ms. Ralph, none of the Commissioners are affiliated with any railroad. Ms. Ralph stated that the Federal Railroad Administration has not required the Port to pay any user fees; there have been no rulings regarding the status of the Port by the Surface Transportation Board; and the Internal Revenue Service has not ruled on the applicability of the Railroad Retirement Act to the Port.

Review of the brochure submitted by Ms. Ralph, as well as the Port's website, indicates that the Port offers a variety of services to the public, including bonded storage, consulting, customized billing, direct transload for trucks or railcars, container breakdown and transfer, and inventory management and control.

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<sup>3</sup> Other UPRR contractors unload the auto racks, inspect the vehicles, load them onto trucks and provide security for the auto facility.

The Port also offers key contacts and links to different entities “which benefit all customers”, such as the United States Department of Commerce, Montana Departments of Agriculture, Commerce, and Transportation.

Additional information regarding the Port was provided in a letter dated February 3, 2011, from Mr. Thomas Lawrence III, counsel to the Port. According to his letter,

As an independent municipal entity, the Port primarily provides warehouse, distribution and transloading services and building and property leases to its customers. In addition, the Port provides rail switching services on its property to UP and Burlington Northern Santa Fe (“BNSF”). Annually, more than 75% of Port revenues are derived from non-rail customers in the agricultural, mining, construction and forestry industries. For these customers, the Port provides storage, distribution and transload services of their products to or from rail cars. The Port contracts directly with its non-rail customers to provide these services and no rail carrier is a party to the contracts. In fiscal year 2008, services provided to these non-rail customers accounted for 77% of the Port’s total revenues of \$1.145 million; in 2009 it was 76% of \$1.398 million; and in 2010 it was 79% of \$1.478 million.

In addition the Port provides rail switching services to UP and BNSF, which services are billed to and paid for by UP. The Port switches rail cars delivered to its facility by these carriers and moves them to the appropriate location within the facility, where pursuant to contracts with the non-rail recipients of these cars, the Port provides its transloading, storage and distribution services. The Port also provides switching services to UP to move auto racks to and from a UP auto distribution center located on property that the Port leases to UP. The Port charges UP and BNSF a fee for each car switched. In fiscal year 2008, the rail switching services provided to UP/BNSF accounted for 10% of the Port’s total revenue; in 2009 it was 10% and 2010 it was 9%.

Mr. Lawrence further explained that the Port leases property to UP for its auto distribution center, accounting for about 10% of the Port’s total revenues for 2008 through 2010. In 2009 and 2010 the Port also received revenue from UP for storage of rail cars – in 2009 the storage of these cars accounted for 4% of the Port’s total revenues, and in 2010 it accounted for 2% of the Port’s total revenues. Mr. Lawrence concludes:

Hence, although revenues from UP accounted for 21% of total Port revenue in 2010; 24% in 2009, and 23% in 2008, the actual revenue attributable to rail switching services for UP was only 10% in 2008; 10% in 2009 and 9% in 2010.

In response to a request for clarification from the agency’s General Counsel, in a letter dated April 1, 2011, Mr. Lawrence stated that the Port began providing

switching services in 1990. Documentation supplied by Mr. Lawrence supports his statement that:

the switching services represent a minor component of the Port's overall annual revenue. Switching services have historically comprised between 5% - 12% of the Port's annual revenues and have never exceeded 14%.

Mr. Lawrence further stated that:

generally more than 75% of the Port's revenues are derived from non-rail customers, with about 10% of its revenues coming from the switching services provided to Union Pacific Railroad Company ("UP"). The remainder is primarily attributable to a lease of property to UP for an auto distribution center and the Port's storage of surplus railcars for UP.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), which 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 definitional provision establishing the jurisdiction of the Surface Transportation Board over railroad transportation defines "railroad" to include "a switch, spur, track, terminal, terminal facility, and 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 the RUIA where they act in the capacity of a common carrier subject to the jurisdiction of the Surface Transportation Board. See, e.g., Camp Chase Industrial Railroad, B.C.D. No. 95-41, and GWJ Switching Services, L.P., Decision on Reconsideration, B.C.D. No. 96-19. Conversely, where switching operations are conducted by an operator that, 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, the Board has held that such operator is a private carrier and not an employer under the RRA and the RUIA. *See, e.g.,* Hardin Southern Railroad Company, B.C.D. 94-29 (“As Hardin conducts rail operations only for one shipper, it operates as a private carrier rather than a common carrier in interstate commerce \* \* \*”); The Great Miami & Western Railway Company, B.C.D. No. 94-105.2 (“GMWR does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question”); Joliet Junction Railroad, Inc., B.C.D. No. 96-48 (“JJR does not fall within the criteria applied by the ICC to determine whether a terminal type company such as JJR, is engaged in interstate commerce”); Port of Palm Beach District, Decision on Reconsideration, B.C.D. 96-59 (“the District is engaged in rail switching only as an ancillary activity to its main governmental purpose, which is the administration of the maritime facilities of the Port of Palm Beach \* \* \* Since the ICC found that the Port of Palm Beach District does not hold itself out to the public as a common carrier by railroad, the Board finds that the District is not now and never has been a rail carrier employer”); Rapid Switching Services, LLC, B.C.D. 01-3 (“RSS-LLC is a switching railway which provides services to only one customer \* \* \*”); Southern California Railroad Company, B.C.D. 01-75 (“There is no evidence that SCRC holds itself out to the public as engaging in the business of transportation of persons or property over the line in question”); R.J. Corman Railroad Switching Company, LLC, B.C.D. 03-49 (“RCSC is not a common carrier, but operates instead as a private carrier which performs intraplant switching for a single customer”); Chicago Heights Switching Company, Decision on Reconsideration, B.C.D. 03-63 (“CHSC provides rail-switching operations only as a private carrier”); and Quincy Railroad Company, Sierra Pacific Industries, Incorporated, B.C.D. 04-11 (“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 {citing Hardin Southern Railroad Company and Great Miami & Western}”).

The evidence of record shows that the Port is performing switching service for the Union Pacific Railroad Company and the Burlington Northern Santa Fe Railway Company, even though it is paid only by the Union Pacific. In his letter of April 1, 2011, Mr. Lawrence argues that “The Port does not advertise switching services to the general public, and it has given no indication that the public may demand switching services from the Port. Such services are only under contract with UP and the Port has no plans to expand its switching service to any other customers”. The evidence of record shows that while the Port offers many of its services to the general public, it does not offer switching services to the general public. *See, for example, its brochure entitled Port of Montana Gateway to Your Destination, stating, “The Port’s Intermodal Hub is ideally positioned to serve all shippers through the Montana corridor.”, and its website which states:*

The Port of Montana offers a wide variety of services at its 55-acre facility located in Silver Bow, Montana. We provide warehouse and storage services, certified scales, distribution services, technical support,

customized billing, railcar and truck transload services, inventory management and control, packaging and shipping, consulting, pricing and logistics.

For over 30 years the Port of Montana has helped customers expand their market areas by providing quality services, equipment and transportation alternatives; thereby strengthening the economic base of Montana. Our client base includes a number of industries such as; railroad, agriculture, automobile, trucking, forest products, silicon, ore concentrates, fertilizer, road treatment, and fuels. The Port of Montana will work to ensure the most competitive cost structure and service for your products helping design business strategies and achieve business goals.

In light of the evidence of record, and consistent with previous decisions cited above, we find that the Port is not an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act.

Original signed by:

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