

B.C.D. 12-5
EMPLOYER STATUS DETERMINATION
Commercial Transload of Minnesota

February 9, 2012

This is the determination of the Railroad Retirement Board concerning the status of Commercial Transload of Minnesota (CTM) 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 CTM under the Acts has not previously been considered.

CTM is a subsidiary of Minnesota Commercial Railway Company (MCR) (B.A. 3656). Review of the record indicates that at the time of the coverage determination for MCR, MCR did not yet have the subsidiary which would become CTM (Legal Opinion L-87-96). In an e-mail dated October 31, 2006, Mr. Craig Benson of MCR contacted the agency about two individuals "not working in the RR part" of MCR's business, and asking if was possible to "remove them from the RR and switch them over to just straight Payroll?". Mr. William Wolfe, former Chief of the agency's Audit and Compliance Division (ACD), replied in an e-mail dated November 1, 2006, "We will forward a coverage questionnaire for you to complete regarding the individuals in question. Individuals cannot arbitrarily be removed from railroad coverage nor can they elect how they are to be classified". Mr. Benson responded, "Your response is what I was expecting. So, for now they will still be covered".

Mr. Wolfe sent a questionnaire to Mr. Benson on November 13, 2006, requesting information about the individuals. In his response, Mr. Benson indicated that there were two individuals, working as truck drivers, for CTM, a "div. of MCR". In a memorandum dated December 21, 2006, the General Counsel advised Mr. Wolfe that MCR "should be informed that it must report all of its employees as railroad employees". Mr. Wolfe so advised MCR in a letter dated January 9, 2007.

In a letter dated August 6, 2008, Ms. Becky Kotz of MCR explained that in 1997 MCR:

established a subsidiary called Commercial Transload of Minnesota, which conducted rail to truck transload, as well as over the road trucking not associated with any railroad revenue waybill, with several trucks operating in the region as well as all over the USA carrying goods tendered for motor freight movement.

Ms. Kotz further stated that "an estimated 85% of the revenues of Commercial Transload have no relationship to any rail movement on Minnesota Commercial or any other railroad". According to Ms. Kotz, when CTM was being established:

We sought the advice of then Railroad Management Member John Crawford, and, heads of Railroad Retirement Board Divisions, including John Thoresdale * * * and Roland Wiebking * * * It was their advice and direction, unequivocally, that Commercial Transload employees were not covered by the Railroad Retirement Act.

Ms. Kotz also provided copies of the following documents: 1) the Department of Transportation (DOT) Permit to allow MCR to engage in transportation as a contract

carrier of property (except household goods) by motor vehicle (dated December 7, 1999); 2) the DOT Certificate of MCR's authority to engage in transportation as a common carrier of property (except household goods) by motor vehicle (dated November 22, 2000); and the DOT License for MCR to engage in operations, in interstate or foreign commerce, as a broker, arranging for transportation of freight (except household goods) by motor vehicle (dated December 14, 1999).

In a letter dated October 8, 2008, to Ms. Kotz, the agency requested a definitive explanation of the corporate relationship between MCR and CTM. A response dated December 8, 2008, was received from Mr. James Helenhouse, counsel for MCR. According to Mr. Helenhouse:

Historically, CTM has been a division of MCR, and has been the d/b/a entity providing motor carrier services. * * * the Board of Directors of Minnesota Commercial Railway Company held a meeting on January 18, 1991 at which the Board authorized the establishment of a new operating division called, Commercial Transload of Minnesota, to engage in trucking operations. * * *

According to Mr. Helenhouse, on April 14, 1993, the Board of Directors approved an additional resolution recognizing that CTM had been operating as an independent subsidiary for over one year, and formally granting CTM powers to operate as a separate entity or company, including but not limited to the right to hire and fire employees; the right to make rates and contracts for service with CTM's customers; the right to make contracts with truckers, owner operators and trucking companies, brokers, and vendors for services performed; the right to obtain Minnesota intrastate and federal interstate authority for trucking and broker operations and use same as CTM legally sees fit; the right and duty to issue all billing, statements and invoices for services performed; the right to purchase materials, supplies, office supplies and equipment as may be necessary to conduct the business of CTM; the right to obtain and use credit cards and establish its own bank and checking accounts if necessary; and the right to conduct business freely in all ways not inconsistent with any of these rights.

Mr. Helenhouse, like Ms. Kotz, argued that based on advice received from RRB personnel (as well as outside consultants) MCR did not separately incorporate CTM. Mr. Helenhouse argued MCR was advised that:

the RRB did not distinguish trucking operations that were a separately incorporated company or corporation from those who were just operating a division for purposes of the trucking exception to employer status.

In support of this position, Mr. Helenhouse cites the agency's decision in Legal Opinion L-74-10. In that opinion, operations of Holston Transportation Company (formerly Holston Land Company) were found to constitute the operation of a facility and the performance of services in connection with the transportation of property by railroad within the meaning of section 1(a) of the RRA. Since Holston Transportation Company

was owned and controlled by the Clinchfield Railroad Company, it was found to be an employer under the Acts with respect to the services of loading and unloading freight and cargo from railroad freight cars by the use of a "piggypacker" and tractors. The opinion noted that the loading and unloading of freight and cargo from railroad freight cars, by whatever means, is a service in connection with the transportation of property by railroad within the meaning of section 1(a) of the RRA, and, regardless of what equipment may be used, the operation would not lose its essential nature as covered service by reason of the trucking exception. The opinion went on to state that delivery work may involve excepted activity if it includes movement of the goods by tractor and trailer over public streets or highways, "for at this point it would take on the nature of pickup and delivery service by the truck which has been considered not to be employer covered activity because of the trucking exception * * *"

Mr. Helenhouse further explained that CTM operates as a trucking company distinct from MCR, headquartered in Fridley, Minnesota, where it maintains a warehouse which is served by truck and MCR, while MCR is headquartered in St. Paul, Minnesota. Less than 5% of the carloads handled by MCR are transloaded at CTM's warehouse in Fridley. CTM bills separately for transloading and storage, that is, MCR does not bundle services with CTM to MCR's rail customers. CTM also has its own tariffs for its customers. No freight is shipped from the warehouse via rail, but is moved from the warehouse via motor carrier. Mr. Helenhouse stated that 95% of those movements are made by unaffiliated motor carriers. CTM also has a management team separate from the management team of MCR, and CTM's management team does not report to MCR's team, making all decisions with respect to CTM's employees, quotes, pricing and operations. CTM maintains its own financial reports, has its own insurance, is not covered by MCR's general liability insurance, follows a separate DOT drug testing policy for motor carrier employees, and contributes to the Minnesota worker compensation and unemployment systems. Mr. Helenhouse also enclosed a copy of CTM's Articles of Incorporation, which were filed November 24, 2008.

On January 8, 2009, Mr. Helenhouse submitted a decision from the Federal Motor Carrier Safety Administration (FMCSA) ordering that FMCSA's records should be amended to reflect CTM's name as "Commercial Transload of Minnesota - Trucklines, Inc."

In a letter dated June 16, 2009, the agency's General Counsel advised Mr. Helenhouse that:

Review of agency files for MCR indicate that there has not been a Board decision finding that CTM was, as a division segregated from MCR, not an employer covered by the Acts. In fact, in response to an e-mail inquiry from Mr. Craig A. Benson, Accounting Manager for MCR, asking whether MCR could remove employees who were "not working in the RR part" of MCR's business from coverage under the Acts, Mr. William Wolfe, then-Chief of the agency's Audit and Compliance Division advised Mr. Benson in a letter dated January 9, 2007, that

MCR must report all of its employees as railroad employees (copy enclosed for your reference).

Even if MRC believed that CTM should be segregated from MRC and found not to be considered an employer covered by the Acts, my review of this matter suggests that a determination by the three-Member Board would have found that segregation does not apply to MRC and CTM.

After citing section 202.3 of the Board's regulations, the General Counsel stated:

As you see from the above, section 202.3 can only be applied to an entity which is engaged primarily in **non-carrier** business, but in addition, also is engaged in some carrier business. In the case of MCR and CTM, the principal business of MCR is carrier business; the CTM division engaged in non-carrier business. Therefore, even if MCR had presented the question of segregation to the three-Member Board for formal determination, segregation of CTM would not have been allowed, pursuant to section 202.3.

The General Counsel also addressed section 202.9 of the Board's regulations, stating that:

This section also does not apply to the case of MCR and CTM. At the time... (July 2006 through June 2008) CTM was not a company controlled by a carrier; it was a division of the carrier company.

The General Counsel concluded:

In light of the above, as well as the fact that MCR was put on notice in the letter dated January 9, 2007, that MCR must report all of its employees as railroad employees, please be advised that all MCR and CTM employees will continue to be considered railroad employees of MCR. MCR should therefore take the steps necessary to file amended reports which would report service and compensation... for any other CTM employees who may not have been reported as employees of MCR.

A letter dated December 8, 2009, from Mr. Helenhouse, responding to a letter from the agency's Compensation and Employer Services Division to MCR regarding a claim for service for CTM, was accepted as a request from CTM for a formal Board decision as to the status of CTM as an employer under the Acts. In a submission dated March 10, 2010, Mr. Helenhouse presented his argument as to why CTM should not be considered an employer under the Acts. In addition to the information and argument already provided, Mr. Helenhouse also explained that:

In 2005 the IRS audited MCR, and specifically asked about how the truck drivers were being treated, *i.e.*, under social security or railroad retirement. MCR explained that they were being treated as social security employees. MCR's

Director of Accounting, Joseph Richardson, indicates that he is certain the IRS examiner contacted personnel at the RRB¹, and Mr. Richardson indicates also he showed the auditor, Thomas Healy, the trucking exception in the law. See Richardson statement at 4, attached hereto as Exh. M. The nature and scope of the audit was broad and lasted several weeks, and, the auditor went over all payroll records of CTM and the Railroad, and also involved questions of whether meal allowances paid by MCR were subject to income and RRB assessments. The IRS auditor took several months to complete his audit. His final findings, which are enclosed herewith as Exh. N, only took issue with respect to the failure to pay railroad retirement taxes on meal allowances being paid to certain employees in 2002. In other words, he took no exception to the manner in which the truck drivers were being paid.

In April 2009, MCR was advised that the agency's Audit and Compliance Division (ACD) would be conducting an audit of MCR for calendar years 2007 and 2008. Mr. Helenhouse provided requested information to ACD on April 26, 2010 and February 22, 2011. The preliminary draft report was issued July 2011. ACD, relying on the letter of January 9, 2007, advising MCR that all its employees should be reported as railroad employees, as well as the June 16, 2009, letter of the agency's General Counsel, and noting that CTM requested a coverage determination on March 10, 2010, included a finding that MCR report CTM employees' earnings as creditable compensation for 2007 and 2008. Mr. Helenhouse responded to the draft report on November 10, 2011, reiterating the arguments made in CTM's request for a coverage determination.²

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 * * *.

¹ Review of Board records does not show any evidence of contact from the IRS regarding this audit.

² The final audit report, dated December 2011, notes that MRC disagreed with ACD's finding and recommendation concerning CTM's coverage status, and that information on CTM was provided to the Office of General Counsel "and will be reviewed for possible referral to the RRB's three member board to determine CTM's coverage status under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. ACD is not able to comment on CTM or MCRC's response to Issue #1 until the RRB Board Members make a coverage determination on this matter."

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 establishes that CTM is not operating as a rail carrier in interstate commerce. However, prior to its incorporation in November 2008, CTM was a division of MCR, a covered employer under the Acts. Since its incorporation, CTM has been owned by a rail carrier employer. Therefore, if CTM provides a service in connection with the transportation of property by rail, it is an employer under the Acts.

CTM argues that it is a trucking company which has always operated separately from MCR. CTM is a licensed motor carrier under its own authority, and maintains a warehouse in Fridley, Minnesota, separate from MCR headquarters in St. Paul, Minnesota. CTM bills separately for transloading and storage, has its own rules, rates and tariffs for its customers, and has a management team separate from the management team of MCR. CTM's management team does not report to MCR's team, makes all decisions with respect to CTM's employees, quotes, pricing and operations. CTM maintains its own financial reports, has its own insurance, is not covered by MCR's general liability insurance, follows a separate DOT drug testing policy for motor carrier employees, and contributes to the Minnesota worker compensation and unemployment systems. CTM operates in three different areas: long haul trucking, regional trucking, and local. The long haul truckers are dispatched all over the United States, with schedules that change every week, depending on where loads are available on internet "truckload" websites. The regional trucking operation is concentrated in the states surrounding Minnesota – North and South Dakota, Wisconsin, Iowa, Illinois, western Indiana, Missouri, and eastern Nebraska. CTM's local trucks operate under the Federal Motor Carrier Safety Administration 100 air mile radius regulations for hours of service from CTM's headquarters in Fridley. CTM must compete with other trucking companies for handling freight which was moved by MCR. CTM's freight which was handled by MCR has historically been less than 2% of CTM's total business.

As noted above, service in connection with rail transportation which is trucking service is excepted from coverage under the Acts. The Board has stated that the trucking service exception "covers certain types of activities which are performed by independent trucking companies with which the railroads desire to compete." *In the Matter of CSX Intermodal*, B.C.D. 96-82; See also, *Missouri Pacific Truck Lines, Inc. v. United States*, 3 Cl. Ct. 14 (1983) aff'd. 736 F. 2d 706 (Fed. Cir. 1984). The evidence of record detailed above establishes that CTM was operated as a de facto corporation separate and apart from the carrier. While the Board has not previously ruled on this type of arrangement; all indicia indicate that the intent of the parties was to coordinate all trucking operations in CTM, separate and apart from the rail carrier. Further, where the evidence of record shows that the entity under review was given corporate authority to operate as a separate entity with its own management team, financial reports and insurance; had commercial trucking license under the U.S. Department of Transportation, making it subject to the regulations of the Federal Motor Carrier Safety Administration; and was fully

reviewed by the IRS and found compliant, it is logical to treat this entity as separate and apart from the rail carrier and consider it subject to the trucking exception. Accordingly, consistent with its decisions in *In the Matter of CSX Intermodal*, B.C.D. 96-82; *Triple Crown Services Company*, B.C.D. 97-53; and *Total Distribution Services, Incorporated*, B.C.D. 99-38, the Board finds that CTM is performing trucking activities and falls within the trucking service exception contained in the Act. As this decision is specifically limited to the unique facts set forth above, this ruling should not arbitrarily be relied upon as precedent.

Original signed by:

Michael S. Schwartz

Walter A. Barrows

Jerome F. Kever