

**EMPLOYER STATUS DETERMINATION
Foster Townsend Rail Logistics, Inc. (FTRL)**

This is a determination of the Railroad Retirement Board concerning the status of Foster Townsend Rail Logistics (FTRL) 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). The status of FTRL under the Acts has not previously been considered.

FTRL is a privately held corporation that is 100% owned by Aaron Broyles, Bill Broyles and Larry Malashock. FTRL does not have any parent company or affiliated company that has been ruled to be covered under the RRA or RUIA. Mr. Aaron Broyles, the managing partner of FTRL, provided information on FTRL's operations and corporate structure. Mr. Broyles provided information in a response dated March 30, 2012 to an initial Audit and Compliance questionnaire and then responded to a follow-up questionnaire in a letter dated July 5, 2012. Mr. Broyles represented that FTRL began operations in July of 2008. FTRL was first incorporated in the State of Illinois on February 20, 2002. FTRL's corporate office is in Fairview Heights, Illinois.

The Surface Transportation Board (STB) has not ruled on any aspect of FTRL at this time. FTRL is a private contract company that does not have STB authority to interchange with common carrier railroads. FTRL exclusively operates in industrial plants and provides switching operations wholly on industrial property. FTRL does not interchange with any railroads. All customer cars are delivered only to a zoned industry track and switched from industry track. Mr. Broyles reports that there is no passenger or freight traffic. FTRL has not acquired any line of railroad track from another railroad and does not conduct any business with rail carriers. All of FTRL's operations are conducted on track owned or leased by the industry customer under permission granted by the industry customer. FTRL's contracts are with industry customers only.

Mr. Broyles further reports that FTRL does not hold itself out to the public as a railroad carrier. FTRL's switching services are limited to three industrial plant locations to include the private plant grounds of AB InBev, Inc. (Formerly Anheuser Busch) in St. Louis, Missouri, the private plant grounds of the Gateway Terminals LLC facility at Sauget, Illinois, and limited seasonal switching inside a

private facility on the plant grounds of Gavilon Group LLC's fertilizer plant in Sauget, Illinois. Mr. Broyles also indicated that FTRL was ceasing switching operations inside a leased facility at Alton, Illinois. Alton, Illinois activity was terminated effective August 1, 2012.

Mr. Broyles also described the services FTRL performs. The switching services FTRL provides includes moving rail cars, coupling and uncoupling rail cars using FTRL's own crews (all located within the industrial park) and moving these rail cars from one point in the industrial park to other locations in the park on rail owned by the company for whom services are performed. In the case of Gateway Terminals LLC, Gateway leases the track inside the facility from Alton & Southern Railroad. The seasonal switching for Gavilon Group, LLC is performed on track owned by Gavilon.

FTRL works under direct contract with AB InBev, Inc. and Gateway Terminals LLC. Separate contracts are used for each industrial customer. FTRL does not have a written contract for the seasonal switching with Gavilon Group, LLC.

Section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)), 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 or passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. 45 U.S.C. section 231(a)(1)(i) and (ii).

Section 1 of the RUIA (45 U.S.C. § 351) contains essentially the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

The evidence of record establishes that the switching service FTRL provides to its industry customers is within the exclusive boundary of the customer's own industrial sites. FTRL is operating as a switching railway providing services only to customers within the industrial site. Decisions of the Board in prior cases have concluded that 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 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).

In this case, the information contained in the file indicates that FTRL is not a common carrier, but operates as a private carrier which performs intraplant switching for customers located exclusively in the company's industrial site. FTRL does not hold itself out as providing services from this facility to any and all who would like to use it – the number of clients is finite, i.e., the industrial clients located at the clients' own industrial site.

Consistent with earlier decisions of the Board, we hold that Foster Townsend Rail Logistics, Inc. is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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