

B.C.D. 13-09

March 25, 2013

**EMPLOYER STATUS DETERMINATION
Appalachian Railcar Services, Inc. (ARS)**

This is a determination of the Railroad Retirement Board concerning the status of Appalachian Railcar Services, Inc. (ARS) 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 ARS has been addressed in past Board Coverage Determinations. ARS was found to be covered under the Acts effective August 20, 2000 (B.A. No. 9410) in B.C.D. 02-47 and ARS' coverage was terminated September 18, 2003 in B.C.D. 03-72.

In its present status, ARS is a privately held corporation that is 100% owned by Trina Higginbotham (51%) and Warren Higginbotham (49%). ARS has several affiliate companies. Rail Connection, Inc. provides railcar sales and leasing services to its customers throughout the rail industry. Short Line Services, Inc. operated (operations have been suspended) a short-line railroad moving coal from mine site to loading site (B.A. 2415). Quality Railcar Solutions manufactures hydraulic hoses which are sold to customers throughout the rail industry. Warren Industries, LLC is a small real estate holding company which leases space to the rail affiliates previously noted as well as leases to other tenants. All affiliates are owned in the same manner as ARS with Trina owning a 51% share and Warren owning a 49% share. Mr. Jeffrey W. McKeny, the Chief Financial Officer (CFO) of ARS, provided information on ARS' operations and corporate structure. Mr. McKeny provided information in a response dated October 2, 2012 to an initial Audit and Compliance questionnaire. Mr. McKeny represented that ARS began operations in Wilsonville, Alabama in August of 2011. ARS was incorporated on February 29, 2000. ARS' corporate office is in Eleanor, West Virginia.

The Surface Transportation Board (STB) has not ruled on the current aspect of ARS at this time. ARS is a private contract company that does not have STB authority to interchange with common carrier railroads. ARS exclusively operates in industrial plants (the EC Gaston Power Plant) and provides switching operations wholly on private industrial property. ARS exclusively interchanges with CSX and Norfolk Southern on track owned by the Southern Electric Railroad Company (SERC) within the boundary of the power plant. There is no passenger or non-coal freight traffic. ARS has not acquired any line of railroad track from another railroad and does not conduct any business with rail carriers. All of ARS' operations are conducted on track owned or leased by the industry customer under permission granted by the industry customer. ARS was invited to bid, as a private

contractor, to take over the coal unloading services for Alabama Power at the EC Gaston Plant. Formerly, SERC provided these unloading services to its affiliate, Alabama Power until requesting bids from private parties. ARS did not advertise to the public to acquire this private contract and does not hold itself out to the public as a railroad carrier. ARS' switching services are limited to EC Gaston Power plant.

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 of 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 coal unloading service ARS provides to its industry customer is within the exclusive boundary of the customer's own industrial site. ARS is operating as a switching railway providing services only to one customer 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 track is operated as a private carrier, and the operator consequently is not a covered rail carrier employer. See e.g., 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 ARS is not a common carrier, but operates as a private carrier which performs intraplant switching for a customer located exclusively in the company's industrial site. ARS 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 power plant customer located at the client's own industrial site.

Consistent with earlier decisions of the Board, we hold that Appalachian Railcar Services, Inc. is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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