

**B.C.D. 14-15**

**April 16, 2014**

**EMPLOYER STATUS DETERMINATION  
Denver Transit Operators, LLC (DTO)**

This is a determination of the Railroad Retirement Board concerning the status of Denver Transit Operators, LLC (DTO) 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 DTO under the Acts has not previously been considered.

DTO is a Delaware limited liability corporation that is owned by Fluor Enterprises, Inc., Alternate Concepts, Inc., and Balfour Beatty Rail, Inc. and was formed in order to provide commuter rail services in the area of Denver, Colorado. DTO entered into an Operation and Maintenance Agreement with Denver Transit Partners, LLC (DTP) dated July 9, 2010. The Regional Transportation District (RTD), a political subdivision of the State of Colorado, is also a party to a July 9, 2010 Concession and Lease Agreement with DTP. DTO is not owned by another covered railroad entity. Mr. James E. Howard, counsel to DTO, provided information on DTO's operations and corporate structure. Mr. Howard provided information in letters dated August 19, 2013 and January 6, 2014. Mr. Howard represented that DTO plans to hire employees for commuter operations beginning on or about February 1, 2014.

Mr. Howard reports that the Denver commuting area does not have any existing commuter rail service. The RTD and the DTP have entered into agreements to begin commuter rail service in the Denver area known locally as the "Eagle Project." RTD has acquired ownership of or easements within portions of certain railroad rights-of-way owned by BNSF Railway Co. and Union Pacific Railway Co. These acquisitions resulted in findings by the Surface Transportation Board (STB) that DTO would not become a rail carrier subject to STB jurisdiction (see STB Finance Docket Decisions No.35394, No.35252, and No.35358).

Pursuant to the Concession Agreement, DTP has undertaken the construction and design of three separate commuter lines. The East Corridor will be approximately 22.8 miles in length between Denver Union Station (DUS) and Denver International Airport; the Gold Line will be approximately 11.2 miles in length between DUS and Ward Road in Wheatridge, Colorado; and the Northwest Electrified Segment will be approximately 5.3 miles in length between DUS and South Westminster, Colorado.

RTD owns DUS and will make it available for the commuter service. Outside of the limits of DUS, the commuter lines will share rights-of-way with Union Pacific and Burlington Northern, but the tracks will be physically separated so that Union Pacific and Burlington Northern will continue to operate and maintain their tracks for purposes of their freight operations and to accommodate Amtrak trains on the Burlington Northern tracks. When the commuter tracks have been completed, the commuter trains will be operated only on tracks dedicated solely to commuter rail operations.

The definition of an employer contained in Section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231(a)), insofar as relevant here, defines a covered employer as:

(1) The term "employer" shall include-

- (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 \*  
\* \*

(2) Notwithstanding the provisions of subdivision (1) of this subsection, the term "employer" shall not include- \* \* \* \* \*

- (ii) any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel-railroad system of transportation, but shall not exclude any part of the general diesel-railroad system of transportation now or hereafter operated by any other motive power. \* \* \*

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 Surface Transportation Board (STB) has jurisdiction over rail transportation in the United States between a place in a State and a place in the same or another State as part of the interstate rail network. See 49 U.S.C. §10501(a)(2)(A). Although local government authorities, such as RTD, may be exempt from STB jurisdiction, the governmental authority is still subject to applicable laws of the United States related to “employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers” including the Railroad Retirement and Railroad Unemployment Insurance Acts (the Acts). 49 U.S.C. §10501(c)(3)(A)(iii). The Board has found that to meet the definition provided by 49 U.S.C. §10501(c)(3)(A) of a local authority subject to the Acts, the commuter rail service conducted by the local authority must have been previously conducted by a rail carrier employer, then assumed by the local authority. To meet § 10501 (c)(3)(B), the service must meet the standards for ICC Jurisdiction prior to January 1996. See Board Coverage Decision (B.C.D.) 09-2, *Tri-County Commuter Rail Organization, South Florida Regional Transportation Authority, Trinity Railway Express—Train Dispatching, Herzog Transit Services, Incorporated*, January 20, 2009 and B.C.D. 13-12, *Bombardier Transportation Services USA Corporation*, May 21, 2013.

The evidence of record establishes that DTO is creating and will operate a rail commuter service that is strictly intrastate. DTO is not involved in the transport of freight or passengers in interstate commerce and is not subject to the authority of the Surface Transportation Board. Further, DTO is the first operator of this service; it is not assuming a service previously performed by a covered railroad employer. Accordingly, it does not fall within the definition of “employer” under the Railroad Retirement Act (45 U.S.C. § 231(a)) and the corresponding provision of the Railroad Unemployment Insurance Act.

The Board holds that Denver Transit Operators, LLC, is not an employer covered under the Railroad Retirement Act or the Railroad Unemployment Insurance Act.

Notwithstanding this holding, the Board reserves a ruling on a limited subset of employees of DTO. Mr. Howard reported that pursuant to the Operation and Maintenance Agreement, DTO has agreed to operate the commuter rail service which will include not only the operation of the commuter trains, but also control of the movement of those commuter trains and the control of the movement of Amtrak trains within the Denver Union Station. Mr. Howard provided an explanation of the planned process by which DTO dispatchers will have limited dispatching authority over Amtrak trains when Amtrak trains and DTO commuter trains must share track space in DUS.

The Board has determined dispatching services to be rail carrier service under the RRA and RUIA. See *Rail-Term Corporation* B.C.D. 11-14, dated January 28, 2011, (Management Member dissenting). Rail-Term appealed the determination to the United States Court of Appeals for the District of Columbia Circuit, which ordered that the Petition for Review be held in abeyance pending a ruling on Rail-Term's status with the Surface Transportation Board. On November 15, 2013, the Surface Transportation Board issued a decision in Finance Docket No. 35582 finding that Rail-Term is a carrier subject to jurisdiction under Title 49 of the United States Code Section 10102(5)<sup>1</sup>. Consistent with the reasoning in the Board's decision in *Rail-Term*, DTO's dispatching services may be rail carrier service covered under the Acts. However, DTO sought an expedited determination. As a result, the Board needs further information concerning the dispatching activities and reserves its determination on this activity until after further review.

For the reasons stated, the Board determines DTO is not a covered employer by reason of operation of commuter rail service. The Board reserves a determination

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<sup>1</sup> Rail-Term Corporation was granted an extension to file a Petition for Reconsideration to the Surface Transportation Board. The Court of Appeals continues to hold Rail-Term Corporation's Petition for Review in abeyance until the administrative process is final with the Surface Transportation Board.

related to the dispatching services performed by dispatchers employed by Denver Transit Operators, LLC, pending its further review of those dispatching services.

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