

DEC 21 2000

EMPLOYER STATUS DETERMINATION

Bound Brook & Raritan River Railroad Company, Inc. (BB&RR)

This is the determination of the Railroad Retirement Board concerning the status of the Bound Brook & Raritan River Railroad Company, Inc. (BB&RR), 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 BB&RR was furnished by Mr. Kean Burenga, Owner and President of BB&RR. According to Mr. Burenga, BB&RR has four employees who were first compensated on June 16, 1995, the date BB&RR commenced operations. Mr. Burenga stated that BB&RR owns no track and operates exclusively within the facilities of Union Carbide Corporation (UC), at its Bound Brook, New Jersey facility. BB&RR provides switching services for UC on a contract basis, generally three days per week. Mr. Burenga stated that approximately 2500 railcars are switched annually. BB&RR does not interchange with any railroad and has no relationship with the general railroad network, according to Mr. Burenga. Mr. Burenga further stated that BB&RR contracts with the Black River & Western Railroad (BRW) (B. A. No. 2327) for crews and equipment maintenance. Other evidence in the file indicates that Mr. Burenga owns BRW and another railroad, the Belvidere & Delaware River Railway (BDRR) (B. A. No. 2371). Evidence obtained during a coverage investigation of BRW indicates that BB&RR employees are reported to the Railroad Retirement Board on the BA-3's for the BRW.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)), 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).

Bound Brook & Raritan River Railroad Company, Inc. (BB&RR)

The evidence of record shows that BB&RR is a switching railway which provides services to only one customer, Union Carbide. 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 transport only for those with whom they see fit to contract individually. The RRB has followed the distinction made by the Surface Transportation Board, 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).

Additionally, the term "railroad" under the Interstate Commerce Act includes a switch, spur, track, terminal, or terminal facility as well as 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 RUIA where they act in the capacity of a common carrier subject to part I of the Interstate Commerce Act.

In this case, BB&RR does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather, it performs switching services over that line only for the one company with which it has contracted. Accordingly, the Board determines that BB&RR is a private carrier and is not a common carrier under the Acts administered by the Board.

BB&RR is owned by Mr. Burenga who also owns both the BRW and the BDRR. BB&RR is therefore, under common control with employers under the Acts. However, BB&RR, which is a private carrier, does not provide any services for

Bound Brook & Raritan River Railroad Company, Inc. (BB&RR)

its affiliates. It operates the yard for Union Carbide, an unaffiliated company. Accordingly, the Board determines that BB&RR is not providing service in connection with rail transportation. Since it is also not a carrier, as defined in paragraph (i) of section 1(a)(1) of the Railroad Retirement Act, it is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever