

**GREAT MIAMI INCORPORATED
THE GREAT MIAMI & SCIOTO RAILWAY COMPANY
THE GREAT MIAMI & WESTERN RAILWAY
INDIANA & OHIO EASTERN RAILROAD, INC.
EMPLOYER STATUS DETERMINATION**

This is the decision of the Railroad Retirement Board regarding the status of Great Miami Incorporated, The Great Miami & Western Railway Company, The Great Miami & Scioto Railway Company, and the Indiana & Ohio Eastern Railroad, Inc., as employers under the Railroad Retirement and Railroad Unemployment Insurance Acts. The first three companies are owned by Mr. Frederick L. Stout.

I. THE GREAT MIAMI & SCIOTO RAILWAY COMPANY

The Great Miami & Scioto Railway Company (GMSR) was formed to acquire operating rights to a rail line owned by the city of Jackson, Ohio, and formerly operated by The Indiana & Ohio Eastern Railroad. A notice of exemption was filed with the Interstate Commerce Commission and operations began January 1, 1994. The line interchanges with CSXT.

The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term "employer" shall include--

(i) any express company, sleeping car company, and carrier by railroad, subject to [the Interstate Commerce Act];

(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 * * *. [Emphasis supplied.]

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

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GMSR transports property by railroad in interstate commerce in the United States. Accordingly, the Board holds that it is a rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts from the date on which it began to operate, January 1, 1994.

II. THE GREAT MIAMI & WESTERN RAILWAY COMPANY

The Great Miami & Western Railway Company (GMWR) performs a switching operation under a contract with Champion International in Hamilton, Ohio. GMWR interchanges with CSX in Woods Yard which is owned by Great Miami Incorporated and leased to GMWR. Great Miami Incorporated leases 3.8 miles of track to GMWR.

GMWR is a switching railway which provides services to only one customer, Champion International. The Interstate Commerce Commission 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 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).

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In this case, GMWR 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 and provides no services to its railroad affiliates or to the railroad industry. Accordingly, GMWR is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

III. GREAT MIAMI INCORPORATED

Great Miami Incorporated (GMI) is an equipment-leasing company with, according to Mr. Stout, no employees. Effective January 1, 1994, it commenced leasing track, locomotives, and other equipment to its affiliate, GMWR and also began leasing locomotives and other equipment to its other affiliate, GMSR. These leases to its affiliates represent the entire operation of GMI. The proportion of assets leased by GMI to GMSR is 51 percent. In the past the percentage of revenue attributable to GMSR leases has been 38 percent; this percentage will increase with provision of an additional locomotive to GMSR. Accordingly, a significant portion of the service performed by GMI is represented by leases of equipment to GMSR, a covered employer. GMI was incorporated April 1988 and began operations October 1, 1988. From October 1, 1988, to January 1, 1994, it performed the switching operation now performed by GMWR under a contract with Champion International in Hamilton, Ohio.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. The absence of actual exercise of that control does not determine whether common control as provided in section 1(a)(1)(ii) exists; the right or power to exercise control is sufficient. See 20 CFR 202.4. The GMI, GMWR, and GMSR are under common control in that they are all owned by the same individual.

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Section 202.7 of the Board's regulations provides that service is in connection with railroad transportation:

* * * if such service or operation is reasonably directly related, functionally or economically, to the performance or obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property by railroad. [20 CFR 202.7].

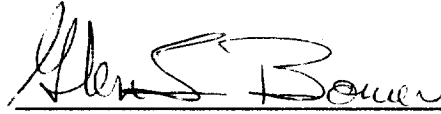
GMI is not a carrier by rail under section 1(a)(1)(i) of the Railroad Retirement Act. However, it is under common control with a rail carrier employer and therefore whether GMI is a covered employer turns upon whether it provides a service in connection with rail transportation.

A company which repairs and rebuilds rail cars for its rail carrier affiliate is performing a service in connection with rail transportation. Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1991); Despatch Shops, Inc. v. Railroad Retirement Board, 153 F. 2d 644, 646 (D.C. Cir. 1946). Livingston rebuilt and repaired locomotives and other rolling stock. About 25 percent of its business was with its affiliated carrier. The court found these activities to constitute services in connection with the transportation of property by rail. Just as in Livingston, GMI is under common control with a carrier. Likewise, as in Livingston, a substantial amount of railroad related services, about 38% in terms of total revenue, are performed by GMI for its affiliated carrier. It is the opinion of a majority of the Board, Management Member Kever dissenting, that the leasing of locomotives and other equipment to a rail carrier affiliate, like repair of that equipment, is reasonably directly related to the performance of obligations of the rail carrier affiliate, and is thus service in connection with rail transportation. Accordingly, a majority of the Board determines that Great Miami Incorporated became a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since January 1, 1994, when it began providing services in connection with rail transportation by the leasing of rail equipment to its affiliates.

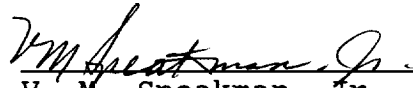
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IV.

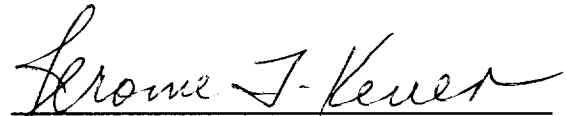
The Indiana & Ohio Eastern Railroad, Inc. (IOE), was held to be an employer under the Acts effective April 1, 1987 (BA No. 3366). It ceased operations December 30, 1993, when GMSR was given authority by the ICC to operate the former line of that carrier. Consequently, the IOE ceased to be an employer effective with the close of business December 30, 1993.



Glen L. Bower



V. M. Speakman, Jr.



Jerome F. Kever (Dissenting
as to GMI)