

EMPLOYER STATUS DETERMINATION
Little Kanawha River Rail, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Little Kanawha River Rail, Inc. (LKRR), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

LKRR was held to be an employer under the Acts effective August 1, 1989 (B.A. Number 3372). On July 31, 1995, LKRR was merged into Marietta Industrial Enterprises, Inc. (MIE), a company under common ownership with LKRR. Accordingly, the Board holds that LKRR ceased to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective with the close of business on July 31, 1995.

In a decision of March 7, 1995, MIE was ruled by the Board not to be a covered employer under the Acts. However, service performed by MIE employees as crew for LKRR trains was held to be creditable service under the Acts. In view of the merger of LKRR into MIE, the Board finds that a re-examination of the status of MIE under the Acts is now appropriate.

In correspondence of January 30, 1997, counsel for MIE advised that the railway operation operates primarily to move MIE products, and that any other work involved bringing rail cars of other companies to be cleaned. The cleaning work does not involve the transportation of goods. The rail operation formerly provided services for Ames Company, but has ceased to do so.

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

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Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions.

The Surface Transportation Board 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 Railroad Retirement Board has followed the distinction made by the Surface Transportation Board, 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, MIE 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 moves its own products and also moves the cars of railroads over that line only for those companies with which it has contracted to clean those cars. Accordingly, the Board determines that MIE is not a carrier under the Acts.

With the merger of MIE and LKRR, MIE is not under common control with a carrier and in any case it is not providing any services to any affiliated rail company. Accordingly, MIE is not providing service in connection with rail transportation. Since

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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.

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