B.C.D. 01-3

JAN 05 2001

EMPLOYER STATUS DETERMINATION
Rapid Switching Services, LLC (RSS-LLC)

This is a determination of the Railroad Retirement Board concerning the status of Rapid Switching Services, L. L. C. (RSS-LLC) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.).

Information regarding RSS-LLC was provided by Mr. Mike Ogborn, Manager for RSS-LLC. RSS-LLC was organized as Connersville Railroad, LLC, a Colorado Limited Liability Company on November 18, 1994 and began operations on October 18, 1996. The name of the company was subsequently changed to Rapid Switching Services, LLC. RSS-LLC has eight employees. Mr. Michael T. Chilson is the Chief Executive Officer of RSS-LLC. RSS-LLC is owned by MCS Properties, L.L.C (MCS). MCS is a Colorado limited liability company that is owned by Neptune Partners, Ltd. (49%), Quality Holdings, Inc. (39%), and Pat Broe (12%). Pat Broe is the sole owner of OmniTRAX, Inc. (OmniTRAX), a company which was held by the Railroad Retirement Board not to be an employer covered under the Acts (B.C.D. 97-5). OmniTRAX owns a number of rail carrier employers. OmniTRAX provides certain services to RSS-LLC, such as accounting and human resources, under a management contract between OmniTRAX and RSS-LLC. According to information provided by Mr. Ogborn, Pat Broe also owns 100 percent of Quality Holdings, Inc.

Mr. Ogborn reported that RSS-LLC handles switching operations at the facility of Kerr-McGee, formerly Scott Paper Company in Mobile, Alabama, pursuant to a contract. Mr. Ogborn stated that RSS-LLC operates wholly within the confines of the property of the party with whom it contracts to provide switching services, picking up and setting out cars to and from storage tracks and moving loaded and empty cars within the facility of the contracting customer. RSS-LLC owns one locomotive, a backhoe, a truck and a trailer which it uses on site . In 1998, RSS-LLC had operating revenues of $578,182.

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;

Rapid Switching Services, LLC (RSS-LLC)

> (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).

The evidence of record shows that RSS-LLC is a switching railway which provides services to only one customer, Kerr-McGee. 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

Rapid Switching Services, LLC (RSS-LLC)

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, the information contained in the file indicates that RSS-LLC is not a common carrier, but operates instead as a private carrier which performs intraplant switching for a single customer. Consistent with the earlier decisions of the Board, we hold that RSS-LLC is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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