B.C.D. 02-11

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EMPLOYER STATUS DETERMINATION
Transworks of Indiana
Transworks Company
NS Crown Services, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Transworks of Indiana, Transworks Company, and NS Crown Services, Inc., as employers 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).

NS Crown Services is an indirect subsidiary of the Norfolk Southern Corporation, an employer under the Acts (B.A. No. 9408). NS Crown Services owns Transworks of Indiana and Transworks Company. Transworks of Indiana, which was formed March 22, 2001, provides services to the Norfolk Southern Railway Company, a covered employer under the Acts (B.A. No. 1525), and a subsidiary of Norfolk Southern Corporation. These services include accounts payable management as well as development and support of software applications related to intermodal transportation provided by the Norfolk Southern Railway.

Transworks Company, which was formed March 12, 2001, provides services to non-railroad affiliates and railroads unrelated to Norfolk Southern Railway. These services include application service provider services which allow customers to track in-transit shipments; document management; accounts receivable and accounts payable management; cash management; asset management; accounting services; and tax compliance and audit services.

NS Crown Services will provide holding company management services to Transworks of Indiana and Transworks Company and make available office space and equipment and furniture.

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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 the same definition, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

There is no evidence that any of the three companies is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Accordingly, we turn to section 1(a)(1)(ii) in order to determine whether they are employers within the meaning of that section. Under section 1(a)(1)(ii), a company is a covered employer if it meets <u>both</u> of two criteria: (1) if it provides "service in connection with" rail transportation <u>and</u> (2) if it is owned by or under common control with a rail carrier employer. If it fails to meet either criterion, it is not a covered employer within section 1(a)(1)(ii).

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NS Crown Services is an indirect subsidiary of Norfolk Southern Corporation. Since Norfolk Southern Corporation also owns the Norfolk Southern Railway, NS Crown Services is under common control with a rail carrier employer. However, a majority of the Board finds that NS Crown Services provides no services to any railroad. The Labor Member believes that NS Crown Services, Inc. does meet the definition of covered employer since it provides service in connection with the transportation of property by rail through its service for Transworks of Indiana. A majority of the Board therefore finds that NS Crown Services is not a covered employer under the RRA and the RUIA.

Transworks of Indiana is under common control with a carrier, since it is indirectly controlled by the Norfolk Southern Corporation which also controls the Norfolk Southern Railway Company, a covered rail carrier employer. The sole enterprise of Transworks of Indiana is to provide services to the Norfolk Southern Railway Company. Accordingly, we find that Transworks of Indiana became an employer under Acts as of the date of its formation, March 22, 2001.

Transworks Company is also under common control with the Norfolk Southern Railway Company, but provides no services to its rail affiliate, although it does provide services to unaffiliated railroads. See Board Coverage Decision 93-79, In Re VMV Enterprises Incorporated. In that case VMV performed only 3.2% of the car repair services for its rail affiliate and derived only 2.5% of its revenues from that business. VMV did perform a substantial amount of its work, 55.7%, for the rail industry other than its rail affiliate. Because of the small amount of work performed by VMV for its affiliated railroad, a majority of the Board found that VMV was not performing a service in connection with railroad transportation. In this case, Transworks Company is providing

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no services to rail affiliates. Accordingly, a majority of the Board finds that Transworks Company is not a covered employer under the Acts.

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V M Speakman, Jr.

V. M. Speakman, Jr. (Dissenting in part)

Jerome F. Kever

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