B.C.D. 02-44

**EMPLOYER DETERMINATION**
**Progressive Rail, Incorporated**

JUN 19 2002

This is a determination of the Railroad Retirement Board concerning the status of Progressive Rail, Incorporated (PRI) 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).

In 1998, the Board's Audit and Compliance Section requested information from PRI to determine whether PRI's operation was covered under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. On July 24, 1998, Mr. Byron D. Olsen, legal counsel for PRI, advised the Board that PRI began operations on October 1, 1996. Mr. Olsen stated that PRI had three part-time and two full-time employees who were first compensated on October 1, 1996. PRI's function was to facilitate intermodal transfers within the Airlake Industrial Park located in Lakeville, Minnesota. PRI employees loaded and unloaded trucks and rail cars and worked directly for shippers and receivers. One of PRI's employees worked full-time as a forklift operator. Mr. Olsen stated that PRI operated industrial switching trackage consisting of approximately 2.25 miles of rail line which is located entirely within the confines of Airlake Industrial Park. It had no terminal points and no carrier reporting marks. Mr. Olsen stated that PRI did not request or obtain operating authority from the Surface Transportation Board because it operated a private industrial switching service solely within the Airlake Industrial Park. Mr. Olsen further stated that all contracts with the railroad industry were handled by Canadian Pacific Railway (CPR), B.A. No. 1606. PRI did not interchange with other railroad carriers and had no relationship with the railroad industry, except through CPR. Mr. David Fellon owned PRI and served as its President.

In Surface Transportation Board Finance Docket No. 33943, decided November 22, 2000, PRI filed a verified notice of exemption to acquire from CPR and operate CPR's Richfield Line located in Bloomington, Richfield and Minneapolis, Minnesota. The rail line extends from Auto Club, Minnesota at milepost 25.63 to the end of track at Pleasant Avenue South and West 60th Street, Minneapolis, a total distance of approximately 9.1 miles (hereinafter referred to as the "Rail Line").

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Additional information regarding PRI was provided by Mr. David Fellon, who is still the owner and President of PRI. Mr. Fellon stated that PRI initially commenced operations on September 26, 1996; however, on February 5, 2001, PRI first conducted railroad operations over the 9.1 miles of the Rail Line leased from the Soo Line Railroad Company. He further stated that PRI currently has seven employees, some of whom are employed on a part-time basis. He stated that two of PRI's employees will service the 9.1 mile Rail Line. Mr. Fellon also stated that PRI provides industrial switching, car spotting, and removal for businesses operating within the Airlake Industrial Park. PRI handles approximately 3,500 railroad cars in the Airlake Industrial Park. With respect to PRI's operation of the Rail Line, PRI will provide similar switching services and will handle approximately 1,500 cars annually. He also stated that PRI interchanges with CPR.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer" to include:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of Title 49;

(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. 45 U.S.C. §231(a)(1)(i) and (ii).

Section 1 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

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The evidence of record establishes that prior to February 5, 2001, PRI did not operate as a rail carrier in interstate commerce. In addition, the evidence indicates that PRI is not under common control with nor is it owned or controlled by a rail carrier employer. However, when PRI began to conduct railroad operations over the 9.1 miles of the Rail Line on February 5, 2001, it became a rail carrier operating in interstate commerce. Accordingly, it is determined that Progressive Rail, Inc. became an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. 231a(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act effective February 5, 2001, the date on which it began railroad operations over the 9.1 miles of the Rail Line.

Original signed by:

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