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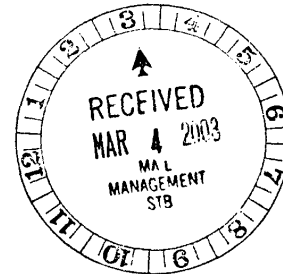
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March 4, 2003



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FEE RECEIVED

The Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

MAR 04 2003

SURFACE
TRANSPORTATION BOARD

Re: STB Finance Docket No. 34277, Petition for Declaratory Order

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and 10 copies of the Petition for Declaratory Order Regarding the Noncommon Carrier Status of H&M International Transportation, Inc. Also enclosed is a check in the amount of \$1,400 to cover the filing fee for this proceeding.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Sincerely,

Jo A. DeRoche

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MAR 04 2003

Enclosures **Part of
Public Record**

cc: Charles Connors
Thomas Curry

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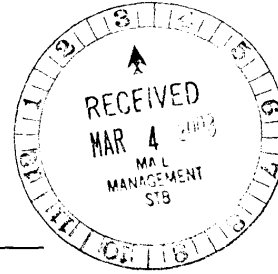
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Public Record**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34277

**PETITION FOR DECLARATORY ORDER
REGARDING THE NONCOMMON CARRIER STATUS OF
H&M INTERNATIONAL TRANSPORTATION, INC.**

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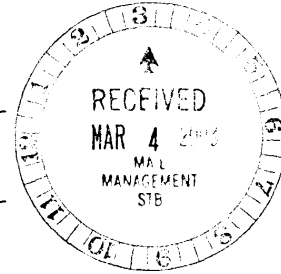
March 4, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34277

PETITION FOR DECLARATORY ORDER

**REGARDING THE NONCOMMON CARRIER STATUS OF
H&M INTERNATIONAL TRANSPORTATION, INC.**



On January 22, 2002, the Railroad Retirement Board (“RRB”) issued a decision (“RRB Decision”),¹ in which it concluded that H&M International Transportation, Inc.’s (the “Company’s” or “H&M’s”) intermodal loading and unloading operations at various locations did not render H&M a common carrier under 49 U.S.C., Subtitle IV, Part A. However, the RRB went on to find that 18 employees of the Company, who moved railroad flat cars between the delivery/receiving tracks (“Delivery Tracks”) where they were spotted/pulled by the Union Pacific Railroad (“UP”) and the loading/unloading tracks within the Company’s facility at Marion, Arkansas (“Facility”), were performing “carrier” duties. The RRB held that this “switching” within the Facility constituted a segregable unit of H&M that is a railroad subject to the jurisdiction of the Surface Transportation Board (“Board”), under part A of Subtitle IV of Title 49, and, therefore, those 18 employees are subject to the Railroad Retirement and Railroad Unemployment Insurance Acts, 45 U.S.C. §§ 231, *et seq.* and 351, *et seq.* (together, “Railroad Retirement”), administered by the RRB.

¹ Employer Status Determination, H&M International Transportation, Inc., B.C.D. 02-6 (Jan. 22, 2002) (copy attached as Exhibit A).

H&M filed a petition for reconsideration with the RRB; however, because the scope of the Board's jurisdiction is the only issue in dispute, the RRB has stayed its reconsideration proceeding to let the Board rule on the matter. Once the Board issues a determination, the RRB will remove the stay, and decide the petition before it based on the Board's determination of its jurisdiction over this work.

Accordingly, the Company hereby petitions the Board to institute a declaratory order proceeding in this matter regarding whether H&M's movement of cars within its intermodal facility in Marion, Arkansas renders that portion of its business a rail carrier subject to the Board's jurisdiction.

I. Background Information.

H&M is a privately held corporation, with principal offices in Jersey City, New Jersey. It is owned by two individuals, Charles T. Connors and Robert Gildersleeve, and it is not affiliated with any rail carrier. The Company operates warehousing, distribution, trucking terminal and intermodal facilities. The Company has truck-rail intermodal facilities at several locations, including Florida, Illinois, New Jersey, North Carolina and Arkansas.

The services the Company provides at each of its intermodal facilities are substantially similar. The Company loads and unloads trailers and containers (together "Trailers") on and off flat cars, moves Trailers between parking places and ramp tracks for loading or unloading; lifts, stacks, flips and racks Trailers and chassis, in connection with the ramping process; ties down, secures and releases equipment loaded onto or unloaded from rail cars; inspects Trailers and cargo for safety and inventory purposes; provides truck mechanic maintenance services; communicates with customers regarding

arrivals, service delays, accessorial charges, holds, customs releases, equipment availability and inventory; monitors and regulates entry and exit through the gatehouse, recording inventory data; and handles various paperwork and data maintenance functions. The Company provides these services pursuant to agreements with the respective railroads serving each facility. Under the agreements, the railroads expressly remain liable for the performance of all common carrier obligations.² The RRB acknowledges that performing this loading and unloading work does not make H&M a carrier. RRB Decision at 3.

The Company's facility in Marion, Arkansas is substantially similar to H&M's other truck-rail facilities and is operated under a similar agreement. Marion is different from the other facilities in two respects: 1) It is the only facility over which the Company has a leasehold interest in the property and 2) it is the only plant within which the Company moves its own cars. For business reasons, the Company leased the Marion Facility from UP pursuant to a one-year lease, which continues year-to-year, until terminated by the parties (the "Lease"). The Facility consists of six storage and four loading tracks, ranging from 6,770 to 8,300 feet in length (the "Facility Tracks") (*see* diagram attached as Exhibit B), several buildings and all the underlying real property. Also within the Facility are various ramps, cranes and other loading equipment owned or leased by H&M; parking lots for trucks, chassis, containers and trailers; and several buildings. Most of the Facility is inside a chain link fence, with rubber-wheeled access controlled at a gatehouse. H&M is responsible for all maintenance work within the

² For example, Section 1A of the Ramp Contractor Agreement between Union Pacific Railroad and H&M for the facility at Marion, Arkansas provides: "Railroad's Obligations[.] With respect to shippers, consignees, and members of the public, [Union Pacific] shall be liable for the performance of all carrier obligations arising in connection with the transportation of the freight in the trailers."

facility, including the track. The UP mainline runs nearby, and two UP lead tracks connect from the mainline to the Facility Tracks, to give the Company rail access.

UP delivers intermodal trains to the Delivery Tracks (tracks 201 or 202 on Exhibit B) which are adjacent to its main line. H&M employees move the cars between the Delivery Tracks, the Storage Tracks (tracks 401-406) and the Loading Tracks (tracks 701-704) as they are needed and at H&M's convenience. Because H&M leases the Facility, it elected to use its own people to move flat cars around within the Facility (rather than contract with a third party switching company), in order to permit the Company to perform its intermodal work in the most efficient manner. The cars are moved solely for the purpose of positioning them for loading and unloading, and then spotting them back to the Delivery Tracks for pick up by the UP. There is no separate subdivision of H&M doing switching; there are just H&M employees who place cars on the tracks for loading/unloading as they are needed. All movement of cars within the Facility is at the direction of, under the supervision of, and for the convenience of H&M. H&M does not move cars to or from any third party.

H&M has never held itself out to anyone as offering rail transportation, and other than the RRB Decision, it is unaware of any federal or state agency asserting that it is performing as a rail carrier. H&M has never sought licensing as a rail carrier from the Board or its predecessor, the Interstate Commerce Commission ("ICC") and, to the best of its knowledge, no regulatory approval was required for the construction of the switching tracks within its Facility. In fact, the Facility has been designated under Arkansas Law as a "trucking sector business."

The Company has never published or participated in any tariffs or rates for rail services, or advertised or announced that it would provide rail service. The Company has no marks or identification with the Association of American Railroads. It does not participate in any interline system. The Company also is precluded contractually from performing any common carrier service, as UP has specifically reserved itself that right by its agreement with H&M.

II. Argument.

H&M asks the Board to issue an order holding that H&M's movement of rail cars within its Facility does not render H&M, or any portion of H&M, a rail carrier subject to the jurisdiction of the Board. H&M has never held itself out as providing common carrier services, lacks the ability to provide such services, and performs no railroad work for itself or any other person that would be subject to the Board's jurisdiction. The movement of railcars between the Delivery Tracks and the Loading Tracks is not part of the common carrier duty required of UP or any line haul carrier. To the contrary, H&M's operations are solely those of an inplant switching operation, outside the Board's jurisdiction.

A. Authority to Institute Declaratory Order.

It is appropriate for the Board to issue an order in this matter. The Board has the authority to issue an order, pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(a). *See, e.g., B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34013, 2001 STB Lexis 767 (served Oct. 1, 2001). In addition, the issue requiring resolution, the scope of the Board's jurisdiction on a particular set of facts, is one which falls squarely within the parameters of the interest and expertise of the agency. *See, e.g., Brotherhood*

of Locomotive Engineers v. United States, 101 F.3d 718, 726 (D.C. Cir. 1996) (reviewing court defers to the Board's interpretation of the scope of its own jurisdiction).

Also, the issue necessarily will be determined by a federal agency, the only question is which one. If the Board declines to issue a ruling in this matter, the RRB will be forced to do so, causing the potential for conflicting decisions and unnecessarily wasted resources. Moreover, if the RRB were to issue a ruling, and the decision were then reviewed by a court, it is not clear the court would defer to the RRB's determination regarding the scope of the Board's jurisdiction, and the Board could be deprived of the chance to offer its expert insight. *See, e.g., Citizens Against Rail-to-Trails v. STB*, 267 F.3d 1144, 1150 (D.C. Cir. 2001) (court does not defer to agency decision on issues regarding statutes other than its own). The RRB has stayed its own proceeding to permit the Board to rule on this issue. The Board should now institute a proceeding and issue a decision in this matter.

B. H&M Is Not a Rail Carrier.

Although the RRB recognized at the outset that H&M's intermodal loading and unloading did not make it a carrier, the RRB Decision found that "H&M is a carrier operating in interstate commerce by reason of the switching operations which it performs at the Marion, Arkansas, terminal." RRB Decision at 2. The RRB's regulations provide that, if an "employer"³ is found to be some portion of a legal entity, "then the unit or units competent to assume legal obligations shall be responsible for the discharge of the duties of the employer. (20 CFR 202.3)." Decision at 3. On that basis, the RRB held that "the switching operation at Marion, Arkansas, operated by H&M is an employer within the

³ The Railroad Retirement Act defines an employer as any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49 of the United States Code. 45 U.S.C. §§ 231(a)(1) and 351(a).

meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of June 1, 1998, the date as of which the switching operations commenced.” *Id.*⁴ As quoted in footnote 3, 45 U.S.C. § 231(a)(1)(i) is that provision that defines a carrier as a railroad subject to the jurisdiction of the Board.

H&M’s switching operation does not satisfy any of the factors that would cause the Board to claim jurisdiction over this portion of its operations.

1. The Board’s Jurisdiction. The Board has jurisdiction over “transportation by rail carrier” as part of the interstate rail network. 49 U.S.C. § 10501(a). A rail carrier over which the Board has jurisdiction is defined as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). The Board, like its predecessor the ICC, has repeatedly found that its jurisdiction is limited to common carriers by railroad. *See, e.g., Ormet Railroad Corporation – Exemption from 49 U.S.C. Subtitle IV*, STB Finance Docket No. 32908, 1996 STB Lexis 246, at *3-4 (served Oct. 16, 1996); *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248, 1994 MCC Lexis 111, at *44 (served Dec. 5, 1994) (“*Hanson*”).

The Board and the ICC have identified common carrier service as that which is provided by an entity that (i) holds itself out as providing common carrier railroad service for hire, (ii) has the ability to provide such service, and (iii) actually provides the service to the public for compensation. *See, e.g., Hanson*, 1994 MCC Lexis 111, at *40. *See also Iverson v. Southern Minn. Beet Sugar Co-Op.*, 62 F.3d 259 (8th Cir. 1995)

⁴ The RRB offered no insight into its conclusion that the 18 people involved in switching were separable from the rest of H&M’s operations within the Facility. Furthermore, June 1, 1998 is the date H&M began operating the Facility in whole, not just the date on which it began switching operations.

(“Iverson”). An entity lacking in any of these attributes is not a common carrier. 49 U.S.C. §§ 10102(5) and 10501(a); Hanson, 1994 MCC Lexis 111, at *44-45. In other words, the Board and the ICC have long recognized that not all movement of steel wheels on steel rails is subject to their jurisdiction.

There are many categories of rail operations that fall outside the Board’s jurisdiction including: (1) when a company serves itself or an affiliate or (2) when a railroad’s service is limited to one or more companies with which it has entered private rail transportation contracts. Hanson, 1994 MCC Lexis 111, at *44-45.

Private operations usually occur on tracks “inside the fence” at a company’s facility, on its own tracks, for its own convenience to facilitate the primary business purpose of the company. Hanson, 1994 MCC Lexis 111, at *44-45; Iverson, 62 F.3d at 263. The operations may be performed by the company’s own employees, by a third party switching company or even by a common carrier under a switching contract. In-plant tracks are connected to common carrier railroads by one or more spur or industry tracks, allowing access to rail service by a common carrier. Iverson, 62 F.3d at 261, 263. The inplant switching is to facilitate the company’s own non-carrier operations. Private operators do not perform transportation for hire between points; are not deemed to be holding themselves out to the public as rail carriers; and are not common carriers, subject to the jurisdiction of the Board. Hanson, 1994 MCC Lexis 111, at *44-45; Iverson, 62 F.3d at 263.

The only activity in question is whether H&M’s inplant movement of flat cars on its own tracks, “inside the fence” at the Facility is work subject to the Board’s

jurisdiction. As will be shown, each of the three necessary attributes of a common carrier is missing for H&M.

First, H&M does not hold itself out as providing common carrier railroad transportation for compensation. H&M's switching is solely to enable it to place flat cars for loading or unloading Trailers, the primary business in which it is engaged. It neither offers to perform switching for third parties nor does it perform switching for third parties. In fact, at the Marion Facility, H&M is contractually barred from doing so. In its Agreement with UP for the operation of the Marion Facility, UP expressly reserved to itself the sole ability to provide common carrier service. *Cf. Brotherhood of Locomotive Engineers v. Interstate Railroad Company, Virginia and Southwestern Railway Company, Norfolk and Western Railway Company, Southern Railway Company, and Westmoreland Coal Company*, ICC Finance Docket No. 31078, 1987 ICC Lexis 49 (served Nov. 20, 1987) (company not a common carrier where agreement precludes it from holding itself out).

Second, H&M has no ability to provide common carrier rail service to the public. *Cf. Hanson*, 1994 MCC Lexis 111, at *40 (to be a common carrier, entity must have the ability to carry for hire); *Northern Plains Railroad Company – Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT*, ICC Finance Docket No. 32077, 1992 ICC Lexis 290 (served Dec. 28, 1992). H&M cannot move cars beyond the bounds of its own inplant facility. The Company does not own or lease any other tracks. It has no trackage rights over the tracks of any carrier. The only rail equipment H&M possesses are two switch engines that H&M leases from a third party leasing company. H&M physically lacks any ability to provide rail service to the public. As

stated above, H&M also is barred from performing as a common carrier in its Agreement with UP, in which UP expressly reserved to itself all rights to provide common carrier service at the Marion Facility. As discussed below, UP performs all of the railroad service that is part of the common carrier duty. Accordingly, H&M also fails to satisfy the second requirement for being deemed a common carrier – it is physically and contractually incapable of providing common carrier service. *See, e.g., Hanson*, 1994 MCC Lexis 111, at *40; *Iverson*, 62 F.3d at 264.

Third, there is no evidence that H&M has ever actually moved traffic for anyone but itself, with or without compensation. *See, e.g., Hanson*, 1994 MCC Lexis 111, at *40, 44-45; *Iverson*, 62 F.3d at 263-64. This is consistent with the fact that H&M has never held itself out to provide service and is both physically and contractually unable to do so. Accordingly, H&M fails to satisfy the third requirement for being a common carrier by rail. *See, e.g., Hanson*, 1994 MCC Lexis 111, at *40, 44-45; *Iverson*, 62 F.3d 259. H&M moves Trailers between trucks and trains, but that activity is not considered part of a railroad's common carrier duty.

2. H&M's Switching Activity is Non-Jurisdictional Work. H&M's switching clearly fits the description of private, inplant activity. A company moving cars for its own convenience, in connection with its own operations, on its own tracks, is not subject to the jurisdiction of the Board. *Hanson*, 1994 MCC Lexis 111, at *40; *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 644 (5th Cir. 1967) ("Courts have long recognized the distinction between plant facilities and 'true agencies of transportation'") (citations omitted); *Iverson*, 62 F.3d at 263 ("Industries operating in-plant rail facilities for their own benefit and not offering transportation to the public for a fee are not considered

common carriers”); Sullivan v. Scoular Grain Co. of Utah, 930 F.2d 798, 800-01 (10th Cir. 1991) (company that receives and unloads grain moving it in railcars to its storage facilities is not a common carrier railroad).

H&M is in the business of operating truck-rail intermodal facilities. The tracks on which loading and unloading are done cannot hold all of the flat cars on an intermodal train. Therefore, in performing its operations, H&M must move cars within its own plant, positioning them for the noncarrier activities of loading and unloading and then placing them at a point where they can be picked up by UP. *See also* McCrea v. Harris County Houston Ship Channel Navig. Dist., 423 F.2d 605, 609 (5th Cir. 1970), 423 F.2d at 609 (entity’s movement of rail cars within facility for the purposes of loading and unloading them is insufficient to render it a common carrier). This movement occurs after the cars have been delivered by the common carrier or prior to being picked up by the common carrier for the line haul movement. While H&M may not be the consignee for the lading in the trailers or containers, it is the noncarrier recipient or shipper at the beginning and end of their movement by rail.

3. Common Carrier Duty. The RRB held that the movement of cars within the Facility was common carrier work subject to the Board’s jurisdiction. That conclusion was wrong. One does not have to go back too far in the history of the railroad industry to discover that not only was such intra-facility work not part of the common carrier duty, but also it was illegal for a common carrier to perform such work without additional consideration. Secretary of Ag. v. United States, 347 U.S. 645, 647 (1954) (“Agriculture”) (the railroad’s obligation ends when it spots the car to the appropriate team track or siding); Pennsylvania R. Co. v. Kittaning Iron and Steel Mfg. Co., 253 U.S.

319, 323 (1920) (“Kittaning”) (duty of loading and unloading rests on the shipper or consignee); Iverson, 62 F.3d at 263-64 (8th Cir. 1995) (operations beyond the lead track into a facility are not part of the common carrier’s obligation).

In United States v. United States Smelting Refining & Mining Co., 339 U.S. 186 (1950) (“U.S. Smelting”) the ICC defended its actions in the Ex Parte 104 proceedings in which it defined the service that could be performed by common carriers under their line haul tariffs. The ICC had found that “the carrier obligation for transportation service ends customarily when delivery is made at a convenient point on the siding inside or outside a consignee’s plant.” (emphasis added). U.S. Smelting, 339 U.S. at 189. To further clarify this service, the ICC described it as that which “may be accomplished in one continuous movement without ‘interruption’ occasioned for the convenience of the industry, and is only the equivalent of team track or simple placement switching.” Id.

This prohibition was lifted by the changes made by the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898 (“Staggers Act”) to the Interstate Commerce Act, 49 U.S.C. § 10101 *et. seq.* But although the Staggers Act revisions gave carriers the ability voluntarily to agree to provide additional service as part of a transportation contract, nothing in the Staggers Act redefined what the common carrier duty was. By contract, UP provides the common carrier service to the Marion Facility. As with most facilities, this obligation stops at the Delivery Track. UP has no obligation to enter into the Facility and position cars for H&M whenever H&M decides it is ready to have them moved. If H&M wanted UP (or anyone else) to perform this service, H&M would have to include this extra service in its contracts with the carriers, and most likely adjust the

consideration. H&M's operations are those of typical inplant switching for H&M's own benefit, and outside the jurisdiction of the Board.

4. No Imputed Relationship to an Affiliate. H&M's operations are clearly distinguishable from the facts involved in the ICC's decision in Association of P&C Dock Longshoremen v. The Pittsburgh and Conneaut Dock Company, et al, 8 I.C.C. 2d 280, 1992 ICC Lexis 27 (1992) ("P&C Dock"). That case involved corporate affiliates, one a common carrier railroad, and the other a dock company. Id., at *6. The railroad brought cars to a certain point on its tracks, where it interchanged with the dock company. Id., at *8-9. The dock company completed the steel wheel move to the water carrier, which was its business; the dock company did not have any function other than that.

The ICC noted that the railroad and the dock company were bother-sister corporations, wholly owned by a single parent. P&C Dock, 1992 ICC Lexis 27, at *6-7 and n.6. The companies had a "common general manager, common officers and boards of directors, and common labor, financing, leasing, law, and marketing departments." Id., at *6. There was some evidence that the railroad made most of the operational and management decisions affecting the dock company's day to day operations. Id., *6-7.

Perhaps most importantly, however, the railroad specifically offered the rail/lake transfer as "an integral element of its railroad service and [expressly stated] separate charges for it in its tariff." P&C Dock, 1992 ICC Lexis 27, at *6. The railroad also paid the dock company on a cost-plus basis, negating any business risk the dock company otherwise would have had. Id., at *7. In other words, there was an identity of interests and activities between the two affiliates, and the dock company's services and rates were

expressly provided for in the railroad's published tariffs. The corporate distinction between the affiliates was largely ignored. On these facts, the ICC found that the holding out by the railroad also constituted a holding out by its affiliated dock company.⁵ P&C Dock, 1992 ICC Lexis 27 at *29. See also Lone Star, 380 F.2d at 647-48 (finding a holding out by the corporate parent of a railroad, where the parent and subsidiary ignored corporate form and the parent provided a substantial amount of the subsidiary's common carrier rail services as an "integral part" of the subsidiary's system, with which its operations were "interwoven").

This case is quite the opposite. H&M is a wholly independent company, which lacks corporate affiliation to any rail carrier. Unlike in P&C Dock, H&M has no officers or directors in common with any carrier. Unlike P&C Dock, H&M's business is the non-railroad activities involved in TOFC/COFC traffic; it moves rail cars only to facilitate its provisions of those services. H&M's only relationship with a carrier at the Facility is with UP, and that is the product of standard arm's-length negotiations and two contracts, the Lease and the Agreement. These contracts contain fair and reasonable terms common to businesses in the industry, and each company bears its own risk of loss. Accordingly, there can be no finding that H&M holds itself or its switching operations out to the public through its relationship with a railroad, as was the case in P&C Dock and Lone Star. These cases are inapposite.

⁵ We also point out that, although P&C Dock may seem to suggest that loading and unloading are part of the overall railroad transportation service, the Supreme Court of the United States has repeatedly held that this is typically not so. See, e.g., Agriculture, 347 U.S. at 647; Kittanning, 253 U.S. at 323. On closer inspection, the case that P&C Dock cites as support for this proposition was one where the underlying tariff specifically provided a charge for loading and unloading. P&C Dock, 1992 ICC Lexis 27, at *23.

To summarize, H&M is not a carrier and its intermodal services are not part of the common carrier service by railroad. H&M has never held itself out to the public to perform rail services, has not moved rail cars for anyone other than itself, and lacks the ability to do so. The only movements on steel wheels that the Company performs are wholly within its own facility, on its own tracks, for its own convenience, and incidental to the Company's loading and unloading work. This constitutes private, rather than common, carriage, and does not render H&M a common carrier within the jurisdiction of the Board.

III. Conclusion.

For these reasons, the Company requests that the Board issue a decision in this matter, finding that H&M International Transportation, Inc. is not in whole or in part a rail carrier subject to its jurisdiction under Part A of Subtitle IV of Title 49 of the United States Code.

Respectfully submitted by,



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March 4, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34277

**PETITION FOR DECLARATORY ORDER
REGARDING THE NONCOMMON CARRIER STATUS OF
H&M INTERNATIONAL TRANSPORTATION, INC.**

**EXHIBIT A
EMPLOYER STATUS DETERMINATION**

JAN 22 2002

**EMPLOYER STATUS DETERMINATION
H & M International Transportation, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of H & M International Transportation, Inc., 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 H & M was provided by Thomas Vasiljevich, outside counsel for H & M. According to Mr. Vasiljevich, H & M began doing business in 1968 and is jointly owned by Charles T. Connors and Robert Gildersleeve. H & M currently has 968 employees, 397 or 41 percent of whom are in positions related to business connected with rail carriers.

H & M performs intermodal terminal operations at five sites. It operates side loaders and cranes to load and unload trailers and containers from railroad flat cars. It hostles trailers and containers to and from parking places, and inspects containers and trailers to determine any damages. It provides customer service and clerical support at one terminal. Clerical support includes providing systems input, trailer and container inventory, car programming, and office administration. H & M also operates local area trucking terminals throughout the country; provides custom examination sites; and performs warehousing and distribution facilities. Effective June 1, 1998, under contract with the Union Pacific Railroad, H & M began operating locomotives at the Marion, Arkansas, terminal to move intermodal cars to and from operating tracks and to and from departure tracks and arrival tracks.

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:

H & M International Transportation, Inc.

(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;

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).

The evidence of record establishes that H & M is a carrier operating in interstate commerce by reason of the switching operations which it performs at the Marion, Arkansas, terminal. Although this operation represents only a very small proportion of H & M's enterprise, there is no exclusion from coverage under the Railroad Retirement Act of a carrier for that reason.

However, section 202.3 of the Board's regulations provides that:

(a) With respect to any company or person principally engaged in business other than carrier business, but which, in addition to such principal business, engages in some carrier business, the Board will require submission of information pertaining to the history and all operations of such company or person with a view to determining whether some identifiable and separable enterprise conducted by the person or company is to be considered to be the employer. The determination will be made in the light of considerations such as the following:

(1) The primary purpose of the company or person on and since the date it was established;

H & M International Transportation, Inc.

(2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;

(3) The amount of its carrier business and the ratio of such business to its entire business;

(4) Whether its carrier business is a separate and distinct enterprise.

(b) In the event that the employer is found to be an aggregate of persons or legal entities or less than the whole of a legal entity or a person operating in only one of several capacities, then the unit or units competent to assume legal obligations shall be responsible for the discharge of the duties of the employer. (20 CFR 202.3).

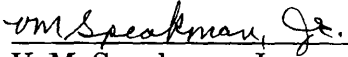
H & M's switching operation consists of 18 employees out of a work force of 968. H & M began operations in 1968 and did not begin switching operations until 30 years later. H & M performs operations at five separate railroad terminals, only one of which involves switching operations, and at many other sites, where it operates local area trucking terminals, custom examination sites, and warehousing and distribution facilities. Accordingly, the Board finds that H & M would be an appropriate case for the application of section 202.3 so that only the switching operation portion of H & M's enterprise is considered to be a covered employer under the Acts.

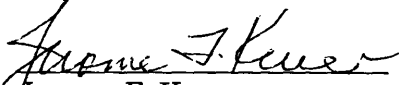
Accordingly, it is determined that the switching operation at Marion, Arkansas, operated by H & M is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231

H & M International Transportation, Inc.

(a)(1)(i)) and the corresponding provision of the Railroad Unemployment Insurance Act as of June 1, 1998, the date as of which the switching operations commenced.


Cheryl T. Thomas


V. M. Speakman, Jr.


Jerome F. Kever

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34277

**PETITION FOR DECLARATORY ORDER
REGARDING THE NONCOMMON CARRIER STATUS OF
H&M INTERNATIONAL TRANSPORTATION, INC.**

**EXHIBIT B
DIAGRAM OF FACILITY TRACKS**

VERIFICATION

I, Charles T. Connors, Chief Executive Officer of H&M International Transportation, Inc., certify that those facts asserted in the foregoing petition for declaratory order are true and correct to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to cause this petition for declaratory order to be filed.



Charles T. Connors