B.C.D. 01-14

JAN 24 2001

EMPLOYER STATUS DETERMINATION
OmniTRAX Logistics Services, L.L.C. (OTL-LLC)

This is the determination of the Railroad Retirement Board concerning the status of OmniTRAX Logistics Services, L.L.C. (OTL-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 OTL-LLC was provided by Mr. Mike Ogborn, Manager of OTL-LLC. OTL-LLC began operations on October 24, 1996, and is owned by MCS Properties, L.L.C. (MCS-LLC). MCS –LLC is a Colorado limited liability company that is owned by Neptune Partners, Ltd. (NPL) (49%), Quality Holdings, Inc. (QHI) (39%), and Pat Broe (12%). Pat Broe is 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 OTL-LLC, such as accounting and payroll services, under a management contract between OmniTRAX and OTL-LLC. According to information provided by Mr. Ogborn, Pat Broe also owns 100 percent of Quality Holdings, Inc.

Mr. Ogborn reported that OTL-LLC has 14 employees. In addition, Mr.Ogborn reported that OTL-LLC neither owns nor operates over any track, has no terminal points and does not interchange with any railroad. Mr. Ogborn stated that OTL-LLC provides warehousing, just-in-time inventory management, product distribution services, palletizing, and freight distribution. Its annual volume of business for 1998 was $1,122,280, of which only about 5% was paid to OTL-LLC directly by railroads. Mr. Ogborn stated that OTL-LLC spends approximately 4% of its time doing business for Wisconsin Central, Ltd. (B. A. No. 2633), 1% for CSX Transportation, Inc. (B. A. No. 1524), and 2% for the Burlington Northern Santa Fe (B. A. No. 1621). Mr. Ogborn further stated that OTL-LLC's only relationship to the railroad industry is to "coordinate the movement of freight on behalf of shippers to or from the OTL-LLC warehouse and thereafter the storage of goods until the goods are transported to the ultimate destination by truck or rail. Mr. Ogborn stated that OTL-LLC "does not perform any services whatsoever" for any of the affiliated railroads of OmniTRAX. OTL-LLC operates on the property of Hawthorne Street Properties, Inc., according to Mr. Ogborn. Information found on OmniTRAX's web page shows that OTL-LLC 's services are advertised to the general public.

In his original submission to the Board dated October 5, 1999, Mr. Ogborn stated the following regarding OTL-LLC:

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- No railroad employee supervises any aspect of the operations of [OTL-LLC]. Employees of [OTL-LLC] supervise the day-to-day operations.

- With one exception, [OTL-LLC] only enters into written contracts with members of the shipping or warehousing community and does not contract with any railroads.

- [OTL-LLC] does not own, lease or operate any rail equipment. Nor does it own, lease or operate over any rail tracks.

- A rail carrier does not own the property on which [OTL-LLC] operates.

- No rail carrier has a financial interest in [OTL-LLC], either through direct or indirect stock ownership, as a parent corporation or indirect ownership through a parent company.

- No individual owns a controlling interest in [OTL-LLC] and in any rail carrier.

- [OTL-LLC] does not provide any services other than logistical services to customers of rail shippers to any carrier.

According to Mr. Ogborn, OTL-LLC ceased doing business effective January 31, 2000. Mr. Ogborn stated, however, that OTL-LLC has not yet filed Articles of Dissolution with the State of Colorado.

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

The evidence of record shows that OTL-LLC is clearly not a rail carrier employer under the definition of employer in subparagraph (i) quoted above.

This conclusion, however, leaves open the question as to whether OTL-LLC is an employer under the definition in subparagraph (ii), commonly referred to as the "affiliate definition."

Under section 1(a)(1)(ii), a company is an employer if it meets both of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii).

The evidence of record shows that OTL-LLC is under common control with a rail carrier employer. Mr. Pat Broe owns 100 percent of OmniTRAX, and also owns a percentage of the controlling shares of OTL-LLC, by holding 12 percent stock ownership in MCS –LLC, the owner of OTL-LLC, and 100 percent of Quality Holdings, Inc. (QHI). As stated earlier, QHI owns 39 percent of MCS-LLC. Therefore, Mr. Broe essentially owns 51 percent of MCS-LLC, which owns 100 percent of OTL-LLC. Additionally, Mr. Mike Ogborn and Mr. Dwight Johnson serve as managers for both MCS Properties, Inc., and OmniTRAX. Lastly, Mr. Ogborn serves as a manager for both OmniTRAX and OTL-LLC. Accordingly, the Board finds that OTL-LLC is under common control with the rail carriers owned by OmniTRAX.

Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

> The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is 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, if such service or operation is reasonably directly related functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer

> in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Thus, if OTL-LLC performs a "service in connection with" railroad transportation, it is a covered employer under the Acts.

According to Mr. Ogborn, almost all of the work of OTL-LLC is done directly for shippers or receivers of freight. In addition, only a small percent of its business comes directly from rail carriers, namely Wisconsin Central Ltd. (4%), CSX Transportation, Inc. (1%), and Burlington Northern Santa Fe Railroad (2%). Mr. Ogborn stated that OTL-LLC does not perform any work for any of the subsidiary railroads of OmniTRAX. Accordingly, since OTL-LLC performs no "service in connection with" any affiliated railroads, it is determined that OmniTRAX Logistic's Services, LLC is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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