B.C.D. 03-36

APR 2 2 2003

EMPLOYER STATUS DETERMINATION
Quality Terminal Services, L.L.C.

This is the determination of the Railroad Retirement Board concerning the status of Quality Terminal Services, L.L.C. (QTS), 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 QTS was provided by Mr. Mike Ogborn, Manager of QTS. QTS began operations on April 1, 1994, and is owned by MCS Properties, L.L.C. MCS is a Colorado limited liability company that is owned by Cashel Partners, L.L.C. (50.1%)[1], Quality Holdings, Inc. (38.92%), and Pat Broe (10.98%). Pat Broe is sole owner of OmniTrax, Inc., 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 shortline railroads. OmniTRAX provides certain services to QTS, such as accounting and human resources, under a management contract between OmniTRAX and QTS. Three of the managers of QTS are managers of MCS. According to information provided by Mr. Ogborn, Pat Broe also owns 100 percent of Quality Holdings, Inc.

QTS performs intermodal terminal operations including ramp/deramp services, lift equipment maintenance services, checkpoint services, coordinator/planner services, and notification services. These services are performed for Burlington Northern Santa Fe Railway Company, the Union Pacific Railroad Company, and Triple Crown Services, Inc. In CSX Intermodal, Inc., BCD No. 96-82, decided September 24, 1996, the Board held that, generally, intermodal services are not covered under the Acts. However, QTS also performs switching services at the Alliance Intermodal Facility of the Burlington Northern Santa Fe Railway Company, a carrier employer covered under the Railroad Retirement Act, near Fort Worth, Texas.

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[1] The Board was previously advised that a 49 percent interest in MCS was held by Neptune Partners, Ltd., and Cashel Partners was not mentioned. In view of the Board's decision in this case, which finds, in part, that QTS is not an affiliate employer under the Acts, it is unnecessary to determine the reason for the discrepancy.

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In 1998, 100 percent of QTS's business was with the Burlington Northern Santa Fe Railway Company. In 1999, approximately 80 percent of QTS's business was with the Burlington Northern Santa Fe Railway Company; 10 percent of its business was with the Union Pacific Railroad Company, a carrier employer covered under the Railroad Retirement Act; and the balance was with other customers. With regard to revenues, in 1998, 100 percent of QTS's revenue was attributable to business with the Burlington Northern Santa Fe Railway Company. In 1999, approximately 91 percent of QTS's revenue was from the Burlington Northern Santa Fe Railway Company[2], 3 percent of its revenue was from the Union Pacific Railroad Company, and 6 percent was from Triple Crown Services, Inc. QTS has submitted copies of its contracts with the Union Pacific, which were entered into on April 1, 2000, and June 1, 1999, for equipment maintenance and repair, and gatehouse administration and inspection, respectively.

In 1998, 6.74 percent of QTS' revenues were derived from its switching services, which are performed exclusively for the Burlington Northern Santa Fe Railroad at the Alliance facility; in 1999, 6.13 percent; and in 2000, 4.3 percent. In 1998, 5.8 percent of QTS's employee time consisted of switching services; in 1999, 4.7 percent; and in 2000, 3 percent.

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;

[2] Erroneously stated to be Union Pacific Railroad Company by Mr. Ogborn; clearly the Burlington Northern Santa Fe Railway Company is meant.

> (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 QTS is performing switching service for the Burlington Northern Santa Fe Railway Company. The definitional provision establishing the jurisdiction of the Surface Transportation Board over railroad transportation defines "railroad" to include "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation * * *." 49 U.S.C. § 10102(6)(C). Accordingly, that evidence establishes that QTS is a carrier operating in interstate commerce.

Section 202.3 of the regulations of the Board 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:
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> (1) The primary purpose of the company or person on and since the date it was established;
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> (2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;
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> (3) The amount of its carrier business and the ratio of such business to its entire business;
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> (4) Whether its carrier business is a separate and distinct enterprise.
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> (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.

In this case, QTS is not predominantly engaged in carrier business, and its only carrier business is the switching operation at Alliance. As indicated earlier in this discussion, the evidence of record indicates that the switching operation constitutes a very small percent of QTS's business. Mr. Ogborn advises that QTS can segregate its switching operations from the balance of its operations at the Alliance facility. Accordingly, it is the determination of the Board that section 202.3 of

the regulations applies so that QTS is a covered employer within the meaning of the Acts as of April 1, 1994, the date as of which it commenced operations, only to the extent that its employees engage in the switching operation. The Labor Member of the Board dissents from that portion of this decision which finds that intermodal services performed by QTS are not covered under the Acts.

Original signed by:

Cherryl T. Thomas

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

Jerome F. Kever