



NATIONAL MEDIATION BOARD

WASHINGTON, DC 20572

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In the Matter of the
Application of the

COMMUNICATIONS WORKERS
OF AMERICA

alleging a representation dispute
pursuant to Section 2, Ninth, of
the Railway Labor Act, as
amended

involving employees of

INTER-RAIL TRANSPORT OF
JACKSONVILLE, LLC

31 NMB No. 104

CASE NO. R-7019
(File No. CR-6849)

DETERMINATION OF
JURISDICTION-
DISMISSAL

August 19, 2004

This decision addresses the application of the Communications Workers of America (CWA or Organization) alleging a representation dispute pursuant to the Railway Labor Act (RLA) 45 U.S.C. § 152, Ninth, (Section 2, Ninth) among “Unloaders” at Inter-Rail Transport of Jacksonville, LLC (Inter-Rail). At the time this application was filed, these employees were not represented by any organization or individual.

For the reasons set forth below, the National Mediation Board (Board) finds that Inter-Rail and its employees are not subject to the RLA, and, therefore, the Board dismisses the application.

PROCEDURAL BACKGROUND

On April 22, 2004, CWA filed an application alleging a representation dispute among Inter-Rail's Unloaders. The application was assigned NMB File No. CR-6849 in order to conduct a pre-docketing investigation.

On May 13, 2004, Inter-Rail submitted a List of Potential Eligible Voters and signature samples. Inter-Rail also filed a position statement that it was not under RLA jurisdiction. On June 15, 2004, CWA filed a position statement. Pursuant to a request from the Board, on July 21, 2004, Inter-Rail supplied a copy of the Agreement between Total Distribution Services, Inc. (TDSI) and Inter-Rail.

ISSUE

Are Inter-Rail and its employees subject to the RLA?

CONTENTIONS

CWA

CWA states that the Board should not dismiss its application. CWA states that on January 12, 2004, it filed a petition with the National Labor Relations Board (NLRB) for certification as the exclusive bargaining representative for the Unloaders at Inter-Rail. CWA further states that on January 14, 2004, Ross Licare, III, a Field Examiner for NLRB, Region 12, informed the CWA that the NLRB had made a decision in a similar case, *Foreign and Domestic Car Serv., Inc.*, 333 NLRB 96 (2001), that operations like Inter-Rail are under the jurisdiction of the NMB. Based on the advice of the NLRB Field Examiner, the CWA withdrew the petition and filed the application with the NMB.

INTER-RAIL

Inter-Rail states that its employees have previously been represented by the International Brotherhood of Teamsters (IBT) pursuant to a certification issued by the NLRB in 1998.

On October 8, 2001, the IBT disclaimed interest in further representation and on November 1, 2001, the NLRB revoked the certification.

Inter-Rail states that it is an independent, privately-held company that contracts to perform loading and unloading services. Inter-Rail states that it currently has a contract with TDSI to unload Chrysler, General Motors, and Honda automobiles.

Inter-Rail asserts that it is not a carrier under the RLA, and that it is not directly or indirectly controlled by a carrier. Inter-Rail also argues that TDSI, with whom it contracts, is not a carrier. Moreover, Inter-Rail contends that it has complete authority over the management of its employees, and that TDSI plays no role in the creation or implementation of Inter-Rail policies. Inter-Rail further states that TDSI has no role in the day-to-day supervision of Inter-Rail employees and TDSI has no role in the hiring, promotion or discipline of employees. Based on the evidence presented, Inter-Rail urges the NMB to dismiss the application.

STATEMENT OF FACTS

TDSI and Inter-Rail

Inter-Rail is a privately-held company that contracts to perform loading and unloading services at an automobile distribution facility operated by TDSI in Jacksonville, Florida. At this facility, Inter-Rail unloads Chrysler, General Motors, and Honda automobiles for TDSI.

TDSI is a subsidiary of CSX Corporation. TDSI provides automobile distribution services through automobile distribution centers and storage locations along the CSXT rail network, and at facilities servicing eastern, gulf and southeastern ports. TDSI operates through leasing arrangements with independent contractors, such as Inter-Rail, to transload customer products from railcars to trucks, trucks to railcars, and railcars to ships. TDSI is not directly

owned by CSXT, the railroad, it is a transportation business unit of CSX Corporation.

Inter-Rail Agreement with TDSI

Inter-Rail and TDSI have an “Automobile Terminal Operation Agreement” (Agreement) dated February 1, 1988, with a September 1, 2003, amendment. Under Paragraph 4 of the Agreement, it states:

Contractor shall be and remain an independent contractor with respect to performance of Terminal Services and Contractor shall have full, complete and exclusive authority to employ and direct all persons engaged in performance thereof. Terminal shall have no authority to supervise or direct the manner in which the Contractor performs the Terminal Services; provided, however, Terminal reserves the right to review Contractor’s performance and to recommend changes to assure compliance with industry standards.

Appendix A of the Agreement at Paragraph 2 is the only reference to Inter-Rail personnel. It states that Inter-Rail shall provide a “sufficient number of supervisors, drivers, clerks and other personnel necessary to . . . handle all aspects of loading and unloading Vehicles to and from railcars and bay area on a daily basis and as requested by the Terminal.”

The Agreement stipulates that Inter-Rail provide TDSI with a monthly itemized statement of all services performed by Inter-Rail and will permit TDSI to inspect Inter-Rail’s books and records pertaining to the performance of the Terminal Services.

Employee Supervision and Benefits

Inter-Rail has complete authority over the daily supervision of its employees. Inter-Rail has its own management structure at the facility, which consists of a terminal manager and two assistants. Inter-Rail employees

conform to standard railroad safety rules and the rail schedule. TDSI has no role or authority in the hiring, promotion, discipline, or discharge of Inter-Rail employees. Inter-Rail trains its employees and TDSI plays no role in that process.

Equipment

Inter-Rail provides its own computer and office equipment. Inter-Rail provides safety equipment and tools for unloading vehicles and owns the shuttle vans that transport its employees. Inter-Rail uses some TSDI equipment such as buck ramps to off-load cars and hand-held scanners. Inter-Rail operates out of a facility owned by TDSI.

DISCUSSION

APPLICABLE LEGAL STANDARD

When an employer is not a rail or air carrier engaged in the transportation of freight or passengers, the NMB applies a two-part test in determining whether the employer and its employees are subject to the RLA. *AvEx Flight Support*, 30 NMB 355, 361 (2003). First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers – the function test. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with a carrier or carriers – the control test. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Avex Flight Support, above*. See also *Argenbright Sec., Inc.*, 29 NMB 340 (2002).

Inter-Rail does not operate a railroad and is not directly or indirectly owned by a rail carrier. Therefore, to determine whether Inter-Rail is subject to the RLA, the NMB must consider the nature of the work performed and the degree of control exercised by a rail carrier.

The fact that the NLRB has previously asserted jurisdiction is not relevant, because there is no evidence that the jurisdictional issue was raised by any party in proceedings before the NLRB.

There is no evidence that TDSI is a rail carrier, or that it is directly owned by a rail carrier. It is a corporation wholly owned by CSX Corporation which owns, among other businesses, CSXT.

Inter-Rail Employees Perform Work Traditionally
Performed by Employees of Rail Carriers

Applying the function part of the two-part test, the functions performed by the Inter-Rail employees are functions generally performed by rail employees. Inter-Rail employees unload automobiles from CSXT rail cars, and the employees drive the automobiles to a staging area to load them onto trucks. The unloaded automobiles are scanned by Inter-Rail employees for inventory tracking. The unloaders are then shuttled from the staging area back to the rail cars in Inter-Rail vans. Loading and unloading containers onto and off rail cars is a service in connection with the transportation of freight by railroads. *Union Pacific Motor Freight*, 27 NMB 441, 444 (2000); *see also Glenway, Inc.*, 17 NMB 257, 258 (1990) (finding that employees who use specialized container handling equipment to load and unload ocean and marine steamship containers on and off rail cars perform work traditionally performed by employees of rail carriers); *Georgia Ports Auth.*, 5 NMB 269, 276 (1970) (finding that employees engaged in activities relating to the loading, unloading, receipt, delivery, transfer in transit, storage and handling of property transported by railroad are performing work of carrier employees). Therefore, the Board finds that the work performed by Inter-Rail's employees meets the first part of the two-part test.

Inter-Rail Employees are not Directly or Indirectly
Controlled by a Carrier

With regard to the second part of the test, the Board looks for evidence of whether a material degree of control exists between the rail carrier and the entity in question for the latter to be deemed a carrier. *C.W.S., Inc.*, 17 NMB 371, 373 (1990). Here, the issue is far more attenuated because Inter-Rail's agreement is with TDSI, which itself is not a rail carrier. TDSI is not a wholly-owned subsidiary of CSXT, but of CSX Corporation. Moreover, there is very little evidence that TDSI exercises sufficient control over Inter-Rail employees and there is no evidence that Inter-Rail employees are held out as agents of TDSI or of CSXT. See *Bankhead Enters.*, 17 NMB 153, 157 (1990); *Inter Mobile Co.*, 17 NMB 223, 225 (1990); *Pacific Rail Servs. d/b/a Intermodal Mgmt. Servs.*, 16 NMB 468, 471 (1989); *Track Maint., Inc.*, 8 NMB 86, 89 (1980).

There is no evidence that TDSI managers or supervisors provide any day-to-day supervision, assignment or direction of Inter-Rail employees. There is only minimal interaction between CSXT employees and Inter-Rail employees as they perform their work assignments.

TDSI does not hold itself out as providing services. It holds itself out as providing services to "automobile industries through automobile distribution centers and storage locations across the CSXT rail network"

This case is distinguishable from the Board's opinion in *Foreign and Domestic Car Serv.*, 28 NMB 82 (2000). In that case, Foreign and Domestic Car Services (FDCS) provided services directly to a rail carrier, Norfolk Southern Corporation, which exercised substantial control over FDCS.

CONCLUSION AND DISMISSAL

The Board finds that Inter-Rail is not a carrier and is not directly or indirectly owned or controlled by a carrier. Accordingly, Inter-Rail does not fall under the Board's

jurisdiction. Therefore, the case is docketed as NMB Case No. R-7019, and the CWA's application is dismissed.

By direction of the NATIONAL MEDIATION BOARD.

A handwritten signature in black ink that reads "Mary L. Johnson". The signature is written in a cursive style with a large initial 'M' and a long, flowing tail on the 'n'.

Mary L. Johnson
General Counsel

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