



**NATIONAL MEDIATION BOARD**  
WASHINGTON, DC 20572

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In the Matter of the  
Application of the

**BROTHERHOOD OF  
LOCOMOTIVE ENGINEERS AND  
TRAINMEN**

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

involving employees of

**RAIL LINK**

35 NMB No. 66

FILE NO. CR-6930

FINDINGS UPON  
INVESTIGATION-  
DISMISSAL

September 2, 2008

This determination addresses the application of the Brotherhood of Locomotive Engineers & Trainmen (BLET or Organization) alleging a representation dispute pursuant to the Railway Labor Act\* (RLA or Act), 45 U.S.C. § 152, Ninth (Section 2, Ninth), among Train and Engine Service employees of Rail Link. At the time this application was received, these employees were not represented by any organization or individual.

For the reasons set forth below, the National Mediation Board (NMB or Board) finds that Rail Link is not a carrier subject to the Act. Therefore, the Board dismisses the application.

PROCEDURAL BACKGROUND

On March 7, 2008, the BLET filed an application alleging a representation dispute among Rail Link's Train and Engine Service employees. The Board assigned Harry E. Jones to investigate. By letter dated March 13,

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\* 45 U.S.C. § 151, *et seq.*

2008, Rail Link stated that the Board has no authority to investigate a representation dispute between Rail Link and its employees because it is not a carrier by rail as defined by the Act. The Investigator requested that the parties provide position statements on the question of whether Rail Link's operations at Chambersburg, Pennsylvania are subject to the RLA, and, on April 11, 2008, the participants each filed a statement addressing the jurisdictional question. On May 1, 2008, the case was reassigned to Maria-Kate Dowling.

### ISSUE

Is Rail Link subject to the jurisdiction of the RLA?

### CONTENTIONS

#### BLET

BLET contends that Rail Link is a carrier since it performs traditional railroad work and is directly owned by Genesee & Wyoming, Inc. (GWI), a carrier by rail. BLET notes that GWI's website, [www.gwrr.com](http://www.gwrr.com), identifies Rail Link as its subsidiary and that Rail Link offers its customers "a full range of rail-related services, including rail switching, track maintenance, locomotive maintenance, in-plant trailer/container drayage and rail car tracking and monitoring." Applying the NMB's two-part jurisdictional test, BLET asserts that not only is the work performed by Rail Link work traditionally performed by carrier employees, but that Rail Link is directly owned by a carrier. Accordingly, BLET states that both parts of the NMB's jurisdictional test are met and the NMB has the jurisdiction to proceed with the investigation of the representation dispute.

#### Rail Link

Rail Link contends that its employees do not perform work traditionally performed by rail carriers since its employees perform private industrial, in-plant rail switching for CSX Intermodal, Inc. (CSXI). Rail Link contends that it is not directly or indirectly owned or controlled by a carrier. Rail Link states it is a wholly owned subsidiary of GWI, a non-carrier holding company. Although GWI owns 48 railroads operating in the United States as well as Rail Link, Rail Link asserts that none of these carriers exercise any control over its operations.

## FINDINGS OF LAW

Determination of the issues in this case is governed by the RLA, as amended, 45 U.S.C. § 151, *et seq.* Accordingly, the Board finds as follows:

### I.

45 U.S.C. § 151, First, defines the term carrier to include:

[A]ny railroad subject to the jurisdiction of the Surface Transportation Board, any express company that would have been subject to subtitle IV of title 49, United States Code, as of December 31, 1995, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such “carrier.”

### II.

The BLET is a labor organization and/or representative as defined in 45 U.S.C. § 151, Sixth.

## STATEMENT OF FACTS

### Background

Rail Link, a Virginia corporation, is headquartered in Jacksonville, Florida. According to the declaration of William Jasper, President of Rail Link, the company offers a range of rail-related services, including rail switching, track maintenance, locomotive maintenance, in-plant trailer/container drayage, and rail car tracking and monitoring to industrial, non-railroad entities. Rail Link is a wholly owned subsidiary of GWI. GWI is a non-carrier holding company that also owns 48 railroads operating in the United States. Rail Link does not perform any services in connection with rail transportation for any railroad in the GWI corporate family. Because of geographical proximity to Rail Link’s headquarters, Rail Link’s corporate staff provides some limited administrative services such as payroll input, accounting, and human

resources services to short line and port terminal railroads operating in GWI's Southern Region.

Rail Link performs its rail-related services pursuant to contractual arrangements with its customers. Jasper stated that Rail Link provides the manpower and equipment to perform these services on its customer's property.

For example, at the Chambersburg, Pennsylvania operation, Rail Link employees perform rail car switching services for CSXI. According to Jasper, the work at Chambersburg is performed entirely at CSXI's intermodal facility pursuant to a contract between CSXI and Rail Link. Rail Link provides personnel including labor, management and supervision as well as the equipment and materials to perform its contractual duties. Rail Link owns and maintains its own equipment, hires its own employees, and provides both classroom and on-the-job training for those employees.

According to Jasper, Rail Link's Service Manager provides direct supervision and discipline to its Chambersburg employees. CSXI notifies Rail Link's Service Manager of work to be performed at the terminal, but Rail Link employees carry out those duties independently of CSXI. Rail Link's employees follow CSXI's operating and safety rules. At the intermodal facility, Rail Link employees spot flat cars for loading and/or unloading of containers and trailers that are arriving and departing the facility by train. Although Rail Link employees use Rail Link equipment to move CSXI rail cars, from time to time, they do use locomotives made available to them by CSXI to move the cars. CSXI does not have access to Rail Link's records although it may furnish CSXI with training records to verify employee qualifications. Finally, Jasper states that Rail Link's employees are not held out to the public as CSXI employees.

## DISCUSSION

### Applicable Legal Standards

Under Section 151, First, an entity may be a carrier either directly, by operating a railroad, or indirectly as a subsidiary or derivative carrier. *Georgia Ports Auth.*, 31 NMB 303 (2004). *See also N. Carolina State Ports Auth.*, 26 NMB 305 (1999); *Fed. Express Corp.*, 23 NMB 32 (1995). A derivative or subsidiary carrier is one that is "directly or indirectly owned or controlled by or under common control with any carrier by railroad." 45 U.S.C. § 151, First.

When the Board seeks to determine whether an entity is a subsidiary or derivative carrier, it applies a two-part test. The Board determines whether the nature of the work is that traditionally performed by employees of rail or air carriers and whether the company at issue is directly owned or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be satisfied for the NMB to assert jurisdiction. *Georgia Ports Auth.*, *above*; *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007); *Dobbs Int'l Servs. d/b/a Gate Gourmet*, 34 NMB 97 (2007).

#### Rail Link Employees Perform Work Traditionally Performed by Employees of Rail Carriers

Applying the function part of the NMB's two-part test, the functions performed by Rail Link's employees are functions traditionally performed by rail employees. The Board has long found that loading and unloading cargo and operating and maintaining equipment, locomotive engineering and switching related to the handling and moving of cargo is work traditionally performed by carrier employees. *Georgia Ports Auth.*, 5 NMB 269 (1970). *See also Georgia Ports Auth.*, 31 NMB 303 (2004) (finding that loading and unloading of containers on and off rail cars is work traditionally performed by employees of rail carriers); *Glenway, Inc.*, 17 NMB 257 (1990). Therefore, the Board finds that the work performed by Rail Link employees in the instant case satisfies the first part of the two-part test. Accordingly, RLA jurisdiction in this case depends on satisfying the second part of that test.

#### Direct or Indirect Ownership or Control

BLET argues that RLA jurisdiction is established solely on the basis of GWI's ownership of Rail Link. The Board, however, has held that common ownership of a carrier and a non-carrier by a non-carrier holding company is insufficient to satisfy the ownership requirement of the second part of the Board's jurisdictional test. *Signature Flight Support*, 34 NMB 1, 5 (2006) (rejecting contention that second part of the jurisdictional test is satisfied solely when the employer in question is a subsidiary of a company that owns another subsidiary that is an RLA carrier). *See also Bombardier Transit Sys. Corp.*, 32 NMB 131, 146 (2005); *TNT Skypak, Inc.*, 20 NMB 153, 159 (1993). In the instant case, BLET asserts that GWI is a common carrier by rail. There is no evidence to support this assertion. In a 2003 decision, the Railroad Retirement Board (RRB) held that GWI was neither a carrier by rail nor a rail carrier affiliate under the Railroad Retirement Act, 45 U.S.C. § 231(a)(1). *Genesee & Wyoming, Inc.*, B.C.D. 03-6 (January 16, 2003). Applying the United States Court of Appeals for the Federal Circuit's decision in *Union Pacific Corp. v.*

*United States*, 5 F.3d 523 (Fed. Cir. 1993), in which the court, under a similar definition of rail carrier in the Railroad Retirement Tax Act, held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary, the RRB found that “GWI as the corporate parent of its rail carrier subsidiaries is not under common control with those subsidiaries,” and therefore is not a covered employer. *Id.* Since GWI is a non-carrier, its common ownership of subsidiaries Rail Link and 48 railroads is insufficient to confer RLA jurisdiction.

The second part of the Board’s jurisdictional test can be met where a carrier exerts a material degree of control over the day to day business operations of the employer in question. *Georgia Ports Auth., above*, 31 NMB at 319. BLET does not dispute Jasper’s statement that CSXI has no control over the hiring, firing, supervision and direction, and training of Rail Link employees. It is also undisputed that Rail Link owns and maintains its own equipment and that its employees do not hold themselves out as CSXI employees. Based on this undisputed evidence, the Board finds insufficient control to establish RLA jurisdiction.

CONCLUSION AND DISMISSAL

The Board finds that Rail Link is not directly or indirectly owned or controlled by a carrier subject to the RLA. Accordingly, Rail Link does not fall under the Board’s jurisdiction. Therefore BLET’s application is dismissed.

By direction of the NATIONAL MEDIATION BOARD.



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