



NATIONAL MEDIATION BOARD
WASHINGTON, DC 20572

(202) 692-5000

37 NMB No. 51

July 27, 2010

Susan A. Leverone
Associate Solicitor
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

Re: NMB File No. CJ-6975
Quality Rail Service, Inc.

Dear Ms. Leverone:

This responds to your request for the National Mediation Board's (NMB) opinion regarding whether Quality Rail Service, Inc. (Quality Rail or Employer) is subject to the Railway Labor Act (RLA), 45 U.S.C. § 151, *et seq.* On February 22, 2010, the National Labor Relations Board (NLRB) requested an opinion regarding whether Quality Rail's operations are subject to the RLA.

For the reasons discussed below, the NMB's opinion is that Quality Rail's operations and its employees are not subject to the RLA.

I. PROCEDURAL BACKGROUND

This case arose out of a representation petition filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) on December 7, 2009,¹ with the NLRB seeking to represent all mechanics, electricians, fabricators and maintenance employees in Divisions 500 and 800 employed by the Employer at its Madison, Illinois facility. Quality Rail objected to the NLRB's jurisdiction arguing that its employees and operations are subject to the RLA.²

¹ An amended petition was filed on December 8, 2009.

² At the hearing, the Employer raised two issues: whether the Employer's operations are under the jurisdiction of the RLA; and whether the petition should be dismissed by the NLRB due to contracting of the bargaining unit. This determination addresses the first issue.

A hearing was held in NLRB Region 14 on December 22, 2009. Quality Rail and IAM filed post-hearing briefs with the NLRB. On February 22, 2010, the NLRB requested an NMB opinion regarding the NMB's jurisdiction over Quality Rail's operations. On February 23, the NMB assigned Eileen M. Hennessey to investigate. The NMB provided the Employer and the IAM an opportunity to submit position statements regarding jurisdiction under the RLA. On March 10, 2010, Quality Rail notified the NMB that it would rely on the NLRB hearing transcript and the Employer's post-hearing brief submitted to the NLRB and forwarded to the NMB for its consideration. The IAM filed a submission with the NMB on March 9, 2010.

The NMB's opinion in this case is based upon the request and record provided by the NLRB, including the hearing transcript provided by the NLRB and post-hearing briefs submitted by the parties, and the March 9, 2010 position statement submitted by the IAM to the NMB.

II. QUALITY RAIL'S CONTENTIONS

The Employer contends that due to the indirect control of its operations by railroads, the Employer is subject to the RLA. The Employer states that "the most salient fact demonstrating this indirect control is also the most obvious: 95% of the Employer's business is comprised of work awarded to it by Canadian National Railway Company (CN)." The Employer argues that CN controls the Employer's staffing, hours of work, scheduling of work, inspection of the work, performance standards for the work, and assignment of the work to Quality Rail employees.

III. IAM'S CONTENTIONS

The IAM denies that the work in question is work traditionally performed by employees of a rail carrier and also contends that a common carrier by rail does not exercise direct or indirect ownership or control of Quality Rail. The IAM argues that the control prong of the NMB's two-part jurisdiction test is not met for the following reasons: the Employer sets wages and benefits for its employees without involvement by any railroad; there are no railroad supervisory employees present on the Employer's premises; no railroad personnel are involved in the hiring/firing of Quality Rail employees; railroad personnel cannot discipline or terminate Quality Rail employees; railroad personnel do not assign work or transfer personnel; railroad personnel do not directly train Quality Rail employees; the railroads do not mandate formal training procedures that the Employer must comply with; Quality Rail employees do not wear railroad uniforms; railroad customers do not provide equipment or space used to perform work for the railroads; and railroad personnel are not involved in the performance evaluation of Quality Rail employees. The IAM contends that the Employer makes staffing decisions based upon the volume of work received from its railroad customers; no

railroad personnel are directly involved in deciding how many employees Quality Rail must employ or what classifications will be needed to complete the work.

IV. FINDINGS OF FACT

Quality Rail provides locomotive service and maintenance and field support to railroads. Field support services include assisting after train derailments and making load adjustments and load transfers for their railroad clients. Approximately 75 percent of the Employer's business is locomotive service and maintenance and 25 percent is field support services. The Employer has facilities in Madison, Illinois, Hammond, Indiana and Kansas City, Missouri. Within these facilities, the Employer has divided its business into seven divisions. Divisions 200, 500 and 800 perform the service and maintenance of locomotives on site in Madison, Illinois. Divisions 100, 400, 700 are located in Hammond, Indiana, and Division 900 is located in Kansas City, Missouri. These four divisions are the Employer's field support services divisions which provide service on the railroad customer's property in locations throughout the Midwest. Quality Rail's principal customer is CN but it also provides services to other railroad customers such as Norfolk Southern and Kansas City Southern.

Quality Rail's Comptroller, Chris Miller, testified that 70 percent of the Employer's work comes in the form of verbal requests from customers for a specific task to be performed and 30 percent comes in the form of bids submitted by Quality Rail to its customers. After a task is outlined, the Employer generates a work order listing services to be performed. Once the work has been completed, the Employer creates an invoice and submits it to the customer for payment. There are no written contracts between the Employer and any of its railroad customers.

The job titles at issue in this case are:

Mechanics- responsible for repair, overhaul, and upgrade work on locomotives (other than electrical work), removal and installation of engines.

Electricians- responsible for electrical repair, overhaul, and upgrade work, including rewiring, replacing electrical components, creating harnesses, installing and testing digital video monitoring systems and GPS modules; and replacing fuel and other systems' monitoring equipment.

Fabricators- responsible for making replacement parts, brackets, boxes, cabinets, and other mechanical

components needed to augment the work of mechanics.

Maintenance Employees- responsible for general clean up, shop and yard maintenance, and some mechanical work.

Supervision and Scheduling

Miller testified that Quality Rail's workforce has to expand and contract in order to meet the needs of its client customers. The Employer makes work assignments and staffing decisions based upon the volume of work received from the railroads and the timing of the repairs and maintenance agreed upon by the railroad customer and Quality Rail. The railroads do not mandate that Quality Rail provide a particular staffing level or classification of employees in order to complete the work. Miller also testified that the railroads do not have any direct role in setting Quality Rail's staffing levels. The Employer determines the level of staffing based upon the number of employees needed to complete the work by the agreed upon deadline.

Railroad personnel are not permanently present on the Employer's premises. Miller testified that railroad personnel do come to its facilities to participate in joint inspections – inspections where an Employer representative, a manufacturer's representative and a railroad representative meet to determine who is responsible when there is a problem with work that is under warranty. Miller also testified that the railroads also send representatives to Quality Rail's facilities to discuss future work and observe the Employer's capability to perform work. Miller stated that railroad personnel could "send somebody to assist or to point things out and direct our people in terms of what they might do as a next step."

In field service matters, such as derailments, railroad supervisors are present along with Employer supervisors and railroad supervisors direct the Employer supervisors to direct Quality Rail employees on tasks to be performed.

Miller further testified that railroad personnel do not assign work to Quality Rail employees or transfer Quality Rail personnel. There is no direct supervision done by railroad personnel of Employer's employees either in the field or in Quality Rail's facilities.

Hiring, Evaluation, Discipline and Discharge

Miller stated that railroad personnel are not involved in Quality Rail's hiring process in any way. The Employer is solely responsible for hiring,

discipline and discharge of its employees. Railroad personnel do not have any authority to impose or recommend discipline or termination.

Miller also testified that railroad personnel are not involved in the evaluation of Quality Rail's employees. Although railroad personnel visit the facility approximately once per month to perform status checks of the work orders, performance standards are tied to warranty requirements which are determined by the Employer. These warranty requirements are in compliance with specifications created by the manufacturer of the item being maintained, such as General Electric, alone or in conjunction with the railroad customer. Depending on the nature of the work, warranties are anywhere from one to six years. If there is a problem with work that is under warranty, there will be an inspection involving the Employer, the railroad customer, and the manufacturer to determine fault and remedy.

Training

Railroad personnel do not directly train Employer employees. Railroad personnel do not mandate or provide formal training procedures to the Employer. However, in order to gain access to railroad customer property, Quality Rail employees must complete a Contractor Orientation Course, referred to as E-rail certification. This a testing program provided by a third party, which certifies employees in rail safety. Although it is not a condition of employment for any Quality Rail employee to hold this certification, the Employer cannot send employees to a railroad property if they are not certified. Field Services employees typically have this certification because they consistently work on railroad property.

Miller and Samuel Hogue, lead locomotive electrician for Quality Rail, both testified that the railroads do not provide training to Quality Rail employees. Both Miller and Hogue stated that the railroad customer and the equipment manufacturer provide repair manual specifications to the Employer and Quality Rail employees can access this material via a computer provided by the Employer.

Terms and Conditions of Employment

Quality Rail sets the wages and benefits of its employees with no involvement from the railroads. Miller testified that the wage rates of employees are calculated into the repair rate it charges the railroads. If the railroad were to demand that Quality Rail cut the amount it charged for its services it would not have an immediate effect on wages but it would have some effect "at some point."

Quality Rail has its own Safety Procedures and Rules Guideline (Rules) which were submitted into evidence at the NLRB hearing. Quality Rail

employees sign an agreement acknowledging receipt of the Rules and acknowledging that they are “required to have a thorough knowledge and obey these rules during . . . employment with the company.” Miller testified that the railroads did not have any “ownership” of the Rules or any of the Employer’s policies and procedures.

Quality Rail’s Equipment and Premises

The Employer leases its property in Madison, Illinois from Cherokee Properties and does not lease any property from any of its railroad customers. In some cases, a railroad customer may provide the Employer with certain parts to perform a repair if the Employer does not have easy access to the part. Otherwise the Employer supplies the parts and bills the railroad for the part. Quality Rail provides its own equipment to maintain and service its railroad customers.

Access to Records

Miller testified that he had been told by Kevin Turley, Quality Rail President, that its railroad customers have “the ability to audit [the] books.” Miller testified that while he had never seen a written agreement regarding customers’ right to audit the books, it was his understanding that that the Employer had an “open book policy.” As a result, the railroads have the ability to audit the Employer’s records for the sole purpose of determining how the Employer sets its invoicing figures. However, Miller also testified that no railroad customer has actually performed such an audit.

Uniforms

Hogue stated that he has a Quality Rail uniform and that the Employer pays for part of the cost of uniforms. The uniform has the Quality Rail logo on it. Hogue further testified that he does not wear this uniform because he prefers to wear blue jeans.

V. 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. See e.g., *Bradley Pacific Aviation, Inc.*, 34 NMB 119 (2007); *Dobbs Int’l Servs. d/b/a Gate Gourmet*, 34 NMB 97 (2007). First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly 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. *Bradley Pacific Aviation, above; Dobbs Int'l Servs., above. See also Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200 (2006).

Quality Rail is not a rail carrier and is not directly or indirectly owned by a rail carrier. The Quality Rail employees at issue perform work that is traditionally performed by employees in the railroad industry. *See Peatross Servs., Co.*, 21 NMB 139 (1994) (first part of jurisdictional test satisfied where employees perform mechanical and electrical maintenance of locomotives and passenger cars and cleaning of rail cars); *see also Delpro, Inc.*, 8 NMB 6 (1980). Therefore, to determine whether Quality Rail is subject to the RLA, the NMB must consider the degree of direct or indirect control exercised over the Employer's operations by carriers.

Carrier Control Over Quality Rail and Its Employees

The NMB looks to several factors to determine whether there is carrier control over a company, including: the extent of the carrier's control over the manner in which the company conducts its business; access to the company's operations and records; role in personnel decisions; degree of supervision of the company's employees; whether employees are held out to the public as carrier employees; and control over employee training. *Signature Flight Support of Nevada*, 30 NMB 392 (2003); *Aeroground, Inc.*, 28 NMB 510 (2001); *Miami Aircraft Support*, 21 NMB 78 (1993).

Quality Rail's argument that it is indirectly controlled by a rail carrier is governed by the premise that since most, if not all, of its income is generated by work it performs for railroad customers, then those railroad customers indirectly control Quality Rail. This is insufficient to satisfy the control prong of the NMB's two-part test. The record establishes in this case that rail carriers do not exhibit a single indicia of control over Quality Rail personnel.

In *Peatross*, the Board concluded that an employer was not controlled by a carrier and not subject to RLA jurisdiction, finding that Amtrak exercised "virtually no control on a day-to-day basis over the manner in which Peatross does business." *Above* at 146. The facts in the instant case provide even less of a basis for finding RLA jurisdiction. In *Peatross*, the employer provided mechanical and electrical maintenance of locomotives and passenger cars and cleaning of railcars for commuter rail service between Manassas and Fredericksburg, VA and Union Station, Washington, DC, under a contract with Amtrak. Amtrak's contract with Peatross called for certain staffing levels and Amtrak set minimum hiring requirements. However, Peatross determined the work schedules for individual employees and was solely responsible for hiring, supervising, evaluating, disciplining and terminating its employees. In contrast, there are no contracts between Quality Rail and its railroad

customers, nor do the railroad customers set minimum hiring requirements or staffing levels for Quality Rail.

As the NMB recently held in *Talgo, Inc.*, 37 NMB 253, 261 (2010), “[i]n cases involving entities that may be deemed derivative carriers solely because of their operational relationship with an air or rail carrier, employees necessarily perform their duties in close proximity to airports, rail yards, trains and planes. This fact alone . . . cannot confer RLA jurisdiction in the absence of significant indicia of control.” See also *D & T Limousine Co., Inc.*, 207 NLRB 121 (1973) (NLRB cites to an NMB determination that an employer whose sole customer was Penn Central Railroad and whose employees spend all working time within the railroad’s rail yard was not subject to RLA jurisdiction because there was insufficient evidence of direct or indirect ownership or control by a rail carrier).

Accordingly, the NMB finds that there is insufficient evidence of control by a carrier over Quality Rail’s day to day operations to satisfy the second part of the Board’s jurisdictional test.

CONCLUSION

Based on the record in this case and for the reasons discussed above, the NMB’s opinion is that Quality Rail and its employees are not subject to the RLA. This opinion may be cited as *Quality Rail Service, Inc.*, 37 NMB 262 (2010).

By direction of the NATIONAL MEDIATION BOARD.



Mary L. Johnson
General Counsel

Copies to:
Gary Schmidt
Robert Seigel
Carla Siegel