BCD 00-27

JUL 26 2000

EMPLOYER STATUS DETERMINATION
OmniTrax Switching Services, L.L.C.

This is the determination of the Railroad Retirement Board concerning the status of OmniTrax Switching Services, L.L.C. (OSS), 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 OSS was provided by Mr. Mike Ogborn, Manager, OSS. OSS began operations on September 15, 1994, and is owned by MCS Properties, L.L.C. MCS is a Colorado limited liability company that is owned by Neptune Partners, Ltd (49%), Quality Holdings, Inc. (39%), and Pat Broe (12%). 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 provides management services to OSS under a contract.

OSS handles switching operations pursuant to individual contracts. It operates entirely within the property of the party with which it contracts to provide switching services, picking up and setting out cars to and from storage tracks and moving loaded and empty cars within the facility of the contracting customer. It provides switching services for International Paper Company and Celanese, Ltd. It does not provide services to any rail carrier.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(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 (other than 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).

OSS is clearly not a carrier subject to the jurisdiction of the Surface Transportation Board. It is also not owned or controlled by a rail carrier employer or employers under the Acts. In addition, a majority of the Board finds that OSS is not under common control with a rail carrier employer. Accordingly, it is determined that OSS is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Cherryl T. Thomas

V. M. Speakman, Jr. (Concurring opionion attached)

Jerome F. Kever

Concurring Opinion of the Labor Member
OmniTrax Switching Services, L.L.C.

I do not find Omnitrax Switching Services, LLC to be a covered employer under the Acts. However, it is my position that it is under common control with an employer under the Acts, namely Omnitrax, Inc. (see my dissent in B.C.D. 97-5). Omnitrax Switching Services, LLC and Omnitrax, Inc. share a common manager, Michael Ogborn.

V M Speakman, Jr.

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