B.C.D. 01-15

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EMPLOYER STATUS DETERMINATION
Quality Logistic Services, L.L.C. (QLS-LLC)

This is a determination of the Railroad Retirement Board concerning the status of Quality Logistic Services, L. L. C. (QLS-LLC) 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 QLS-LLC was provided by Mr. Mike Ogborn, Manager of QLS-LLC. QLS-LLC was organized as a Colorado Limited Liability Company on May 12, 1998 and began operations "shortly thereafter". QLS-LLC has six employees. Currently, QLS-LLC does not have a Chief Executive Officer. QLS-LLC is owned by MCS Properties, L.L.C (MCS). 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 the sole owner of OmniTRAX, Inc. (OmniTRAX), 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 rail carrier employers, including the Newburgh & South Shore Railroad, L.L.C. (B.A. NO. 3268). OmniTRAX provides certain services to QLS-LLC, such as accounting and human resources, under a management contract between OmniTRAX and QLS-LLC. According to information provided by Mr. Ogborn, Pat Broe also owns 100 percent of Quality Holdings, Inc.

Mr. Ogborn reported that QLS-LLC provides logistic services for Birmingham Steel Company. Mr. Ogborn reported that QLS-LLC "unloads flatcars of heats of steel, inventories them, and then coordinates the delivery of flats to Birmingham Steel according to the needs of that shipper's steel mill production." Mr. Ogborn stated that QLS-LLC operates wholly within the confines of the property of the party with whom it contracts to provide logistics services. Mr. Ogborn reported that QLS-LLC "operates in the yard of Newburgh & South Shore Railroad, L.L.C. ("NSR")", an affiliate railroad controlled by OmniTRAX. In 1998, QLS-LLC had operating revenues of $350,187.

Although Mr. Ogborn states that QLS-LLC provides logistics services for Birmingham Steel, the record establishes that NSR collects the revenue attributable to the logistics services and then pays QLS-LLC for the services rendered.

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;

(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 QLS-LLC is not a rail carrier employer under the definition of employer in subparagraph (i) quoted above since it does not operate, and has never operated, as a common rail carrier in interstate commerce. Rather, it provides logistic service soley for Birmingham Steel Company, a non-carrier entity.

This conclusion, however, leaves open the question as to whether QLS-LLC is an employer under the definition in subparagraph (ii), commonly referred to as the "affiliate definition."

Under section 1(a)(1)(ii), a company is an employer if it meets both of two criteria: if it is owned by or under common control with a rail carrier employer and if it provides "service in connection with" railroad transportation. If it fails to meet either condition, it is not a covered employer within section 1(a)(1)(ii).

The evidence of record shows that QLS-LLC is under common control with a rail carrier employer. Mr. Pat Broe owns 100 percent of OmniTRAX, and also owns a percentage of the controlling shares of QLS-LLC, by holding 12 percent stock ownership in MCS –LLC, the owner of QLS-LLC , and 100 percent of Quality Holdings, Inc. (QHI). As stated earlier, QHI owns 39 percent of MCS-LLC. Therefore, Mr. Broe essentially owns 51 percent of MCS-LLC, which owns 100 percent of QLS-LLC. Mr. Mike Ogborn and Mr. Dwight Johnson serve as managers for both MCS Properties, Inc., and OmniTRAX. Lastly, Mr. Ogborn and Mr. Johnson serve as managers for both OmniTRAX and QLS-

LLC. Accordingly, the Board finds that QLS-LLC is under common control with the rail carriers owned by OmniTRAX.

Section 202.7 of the Board's regulations (20 CFR 202.7) defines service in connection with railroad transportation as follows:

> The service rendered or the operation of equipment or facilities by persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad * * * if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad ... .

According to Mr. Ogborn, QLS-LLC currently performs logistic services for only one entity, Birmingham Steel Company. Mr. Ogborn stated that QLS-LLC does not perform any work for any of the subsidiary railroads of OmniTRAX. However, the evidence of record shows that QLS-LLC performs services in the yard of NSR in Cleveland, Ohio. Those services consist of unloading flatcars of heats of steel, making inventories of them, and coordinating the delivery of the flats to Birmingham Steel according to the needs of that shipper's steel mill production schedule. The record also indicates that NSR collects the revenue from Birmingham Steel and then QLS-LLC is paid out of those funds as a contractor. The evidence indicates that QLS-LLC is performing a service in connection with railroad transportation for NSR. Unloading of rail cars and related activities such as freight transfer have long been held to be a service in connection with railroad transportation, Railroad Retirement Board v. Duquesne Warehouse Company, 326 U.S. 446 (1946); Interstate Quality Services, Inc. v. Railroad Retirement Board, 83 F.3d 1463 (D. C. Cir. 1996). The record in this case indicates that QLS-LLC provides these services in the yard of NSR and is paid for those services by NSR. The Board finds that QLS-LLC is performing service in connection with railroad transportation for NSR within the meaning of section 1(a)(1)(ii) of the RRA and the corresponding provisions in the RUIA.

The information summarized above indicates that QLS-LLC is under common control with and performing a service in connection with railroad transportation for NSR. Accordingly, it is determined that Quality Logistic Services, LLC became an employer within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act [(45 U.S.C. §231(a)(1)(ii)] and the corresponding

provision of the Railroad Unemployment Insurance Act effective May 12, 1998, the date of QLS-LLC's formation.

Cherryl T. Thomas

V. M. Speakman, Jr.

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