UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

REMPREX INTELLIGENT OPERATIONS, LLC

Employer

And **Case 13-RC-253265**

TEAMSTERS LOCAL UNION NO. 705

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended ("Act"), a hearing on this petition was conducted before a hearing officer of the National Labor Relations Board ("Board") to determine whether it is appropriate to conduct an election in light of the issues raised by the parties. Following the hearing, the parties timely filed briefs with me.

I. ISSUES AND PARTIES' POSITIONS

The Petitioner seeks to represent a unit of all crane operators, side loaders, spotters, ground operators, yard checkers and mechanic employees employed by the Employer at its facilities in Franklin Park, Illinois (also referred to as the Bensenville) and Schiller Park, Illinois. The only question presented in the instant case is whether Remprex Intelligent Operations, LLC ("Employer") is subject to the Board's jurisdiction or subject to the Railway Labor Act ("RLA"). The Employer contends the petition must be dismissed because the Employer is subject to the Railway Labor Act (the RLA), and, therefore, it is not an employer within the meaning of Section 2(2) of the Act. The Petitioner maintains the Employer is a non-carrier and therefore covered by the Act and should not be subject to the RLA under the jurisdiction of the National Mediation Board ("NMB").

II. DECISION

As explained below, based on the record and relevant Board law, I conclude the petition must be dismissed as the record establishes that the Board lacks jurisdiction and this Employer along with the petitioned-for employees are subject to the RLA.

III. STATEMENT OF FACTS

The Employer is a wholly owned subsidiary of Remprex, LLC. In January 2019, the Employer was awarded a contract by Canadian Pacific Railways ("CP"), a class 1 carrier subject to the Railway Labor Act, to provide intermodal rail services at four CP intermodal facilities—Bensenville and Schiller Park in the Chicago area which are at issue in this case. Prior to its contract with CP, the Employer did not exist. Currently, CP Railways and its affiliates and subsidiaries are the Employer's sole customers. The Employer provides intermodal and

transportation services consisting of (1) loading and unloading containers on and off Canadian Pacific railcars; (2) maintenance and repair of Canadian Pacific railcars; (3) fueling Canadian Pacific trains and equipment; and (4) general maintenance of the Canadian Pacific rail yard facilities.

The Employer employs a separate Terminal Manager at each facility. Those Terminal Managers report to Dustin Melton, the Employer's Senior Director of Operations who is in charge of the CP contracts. Mr. Melton reports to the General Manager of Operations Craig Zarzecki who in turn reports to Vice President of Operations, Derek Greer. For CP, Ed Chapman is the Director of Intermodal Operations, U.S. East, and is based out of Bensenville where he serves as the primary liaison between CP and the Employer. Under Mr. Chapman are CP managers who work on site and oversee both locations.

Prior to CP awarding the contract to the Employer, the CP's intermodal services were performed by another third-party contractor, Terminal Operations Management Systems ("TOMS"). The Employer retained approximately 80% of the TOMS workforce when it began work for CP in June 2019.

IV. BOARD LAW

An entity may be a carrier directly, by operating a railroad, or indirectly as a subsidiary or derivative carrier. *North Carolina State Ports Authority*, 26 NMB 305 (1999). 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. *Re: Union Pac. Motor Freight,* 27 NMB 441, 443 (June 27, 2000). In specifically addressing the railroad industry, when employees perform work traditionally performed by rail carrier employees and the rail carrier controls the Employer's operations, the NMB should assert jurisdiction. *Evergreen Aviation Ground Logistics Enters., Inc.*, 327 NLRB 869, fn. 1 (1999)

When an employer is not itself a carrier, the NMB applies a two-part test to determine whether that agency nonetheless has jurisdiction over the employer. First, the NMB determines whether the work the employer performs is traditionally performed by carrier employees. 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 met for the NMB to assert jurisdiction. See, e.g., *Air Serv Corp.*, 33 NMB 272, 285 (2006). In determining whether the second part of the test is satisfied, the NMB holds that "the . . . carrier must effectively exercise a significant degree of influence over the company's daily operations and its employees' performance of services in order to establish RLA jurisdiction." *ABM Onsite Services-West*, 45 NMB 27, 34 (2018). Factors the NMB has traditionally considered in making this latter determination include (1) the extent of the carrier's control over the manner in which the company conducts its business, (2) the carrier's access to the company's operations and records, (3) the carrier's role in the company's personnel decisions, (4) the degree of carrier supervision of the company's employees, (5) whether company employees are held out to the public as carrier employees, and (6) the extent of carrier control over employee training. No one factor is elevated above all others. *Id.* at 34-35.

In determining whether Section 2(2) and (3) of the Act preclude the Board from exercising jurisdiction over an employer, the Board gives "substantial deference" to NMB advisory opinions regarding RLA jurisdiction. See, e.g., *DHL Worldwide Express*, 340 NLRB1034 (2003). However, there is no statutory requirement that the Board refer a case to the NMB for an advisory opinion. Moreover, the instant case does not necessitate an advisory opinion as it is clear the NLRB does not have jurisdiction over the Employer.

V. APPLICATION OF BOARD LAW TO THIS CASE

Under NLRB Casehandling Manual Part Two, §11711.1, if it is clear that an employer falls under the coverage of the RLA, the parties should be referred to the NMB and the NLRB petition should be dismissed, absent withdrawal. *Id.* §11711.1. Conversely, if it is clear that the NLRB has jurisdiction over the employer, the Regional Office should proceed with the processing of the case. *United Parcel Serv.*, 318 NLRB 778 (1995). When a railroad carrier exercises control over an Employer such that both the function and control tests are satisfied, the Board does not have jurisdiction but rather the Employer is subject to RLA coverage under NMB.

1. Nature of Work Performed

The Employer performs intermodal transportation services. Section 5.1.1 of the Employer and CP's Services Agreement for both facilities describes services such as lifting, hostling, inspection, fueling, and perishable pre-tripping. Vice President of Operations for the Employer Derek Greer testified how the Employer's employees load and unload containers of several different rail carriers, including but not limited to CP. The containers themselves are owned by intermodal equipment providers ("IEP") like CP, COSCO Container Lines, Ocean Network Express ("ONE"), and Hyundai Container. These railcars and containers are moved by a CP locomotive, not owned by the Employer. The Employer's employees also complete the maintenance and repairs of the containers and equipment such as chassis[1] which are owned by CP and other IEP's. The Employer also fuels refrigerated containers, repairs any Interbox Connectors ("IBC") that can pose a tripping hazard, disposes of waste throughout the CP facility, and repairs minor bent guardrails throughout the facility.

Based on the nature of the work performed, while the Employer is not a carrier itself, I find that it performs work that is traditionally performed by a rail carrier. The record establishes the services rendered by the Employer are like those traditionally performed by railroad employees or are "an integral part of that rail transportation system." O/O Truck Sales, Inc., 21 NMB 258, 272 (1994). The employees load and unload rail carriers and containers found on these carriers pursuant to intermodal industry standards required by CP. In Foreign and Domestic Car Serv., the NMB considered similar facts to this case and found that the company was subject to RLA coverage. 28 NMB 82, 88. In that matter, the Union sought to represent a bargaining unit of rail loaders and unloaders employed by a third-party contractor at Norfolk Southern's Venice, Illinois facility. *Id.* at 82. The NMB concluded that the employees performed functions which have traditionally been performed by employees of rail carriers, and that Norfolk Southern

[1] Chassis are wheels underneath the containers.

exercised substantial control over the company, such that RLA coverage was appropriate. *Id.* at 88. Therefore, the Employer performs work traditionally performed by a rail carrier, meeting the first prong of the two-part test.

2. Carrier Control Over the Employer

In a recent case, the Board in *Oxford Electronics, Inc., d/b/a Oxford Airport Tech. Servs.*, 369 NLRB No. 6 (Jan. 6, 2020), dismissed a consolidated unfair labor practice complaint finding that three factors in the NMB's six-factor test suggested carrier control, and thus RLA jurisdiction. Ultimately, the record in this case and the application of Board law shows that CP indirectly controls the Employer's operations and NMB's six-factor test supports finding that the Employer is subject to the RLA and jurisdiction rests with the NMB.

a. How the Employer Conducts Business

Here, the Employer's sole client is CP, a class 1 carrier. Per the Services Agreement with CP, CP requires the Employer to follow Association of American Railroads (AAR) Guidelines. CP communicates with the Employer on a daily basis twice a day, including at the beginning of every shift to discuss matters such as billing, operations for the day, and adjustments to personnel based on schedules that CP keeps. Members of the Employer and CP's management, staff, and employees are intertwined in these daily meetings. The Employer's employees and CP employees engage in a continual group text message called the "IMS Comm" during shifts in order to address operational needs. For example, CP has a right to change the Employer's operational hours. CP sets the level of service that the Employer is expected to maintain, including but not limited to the length of time it should take to complete a repair. The required length of time is defined by CP's codes. If these repairs are not completed in a timely basis, CP can subject the Employer to tariffs or penalties for failure to maintain compliance.

CP conducts weekly safety efficiency testing of the Employer's staffing by observations of personnel, including but not limited to, third-party truck drivers at the Employer's facility, observations of janitors, snow removers, and/or anyone within the property. CP can ban the Employer's staff from the facility if their CP credentials have been removed. CP requires the Employer to have safety data sheets ("SDS") regarding hazardous materials for contractors or anyone on the property.

CP provides the Employer's employees an area to plug in laptops, a changing area, lunchroom, and a place to park. Further, CP gives the Employer's management and office staff access to their owned laptops and office furniture.

The record shows that CP has a significant degree of control over the manner in which the Employer conducts their day-to-day operations. This factor favors coverage under the RLA.

b. Access to the Employer's Operations and Records

The Services Agreements at both the Bensenville and Schiller Park location require the

Employer to maintain true and correct copies of all books and records for seven years, and permits CP to inspect, make copies of, and audit such records. Specifically, in 3.2.1 of the agreement, CP reserves the right to observe, inspect, test and audit the Employer's personnel for compliance and can demand that the Employer provide all relevant records. In addition, the Employer provides CP with end-of-month invoicing.

The record shows CP has access to the Employer's operations and records. CP has the right to inspect and audit records if the audit is related to services provided and, upon request, the Employer must provide CP with these records. CP requires the Employer to provide efficiency test results and irregularities in background checks. With respect to training, CP trains the Employer's management employees, who in turn train employees working under the CP contract, a circumstance the NMB has long found significant. See, e.g., *Bradley Pacific Aviation, Inc.*, 34 NMB 119, 131 (2007); *Prime Flight Aviation Servs.*, Inc., 367 NLRB No. 81 (Jan. 29, 2019) control for purposes of the RLA. The record on this factor favors coverage under the RLA.

c. *Role in the Employer's Personnel Decisions*

The Employer is responsible for its own hiring and firing within the parameters of the Services Agreements with CP. There are certain staffing requirements set forth in the Services Agreements. The record shows that CP has indirect involvement in the hiring process by requiring employees apply for and obtain an eRailSafe System Badge specific to CP. This process requires a background check. If the background check comes back with a blemish, the Employer forwards the results to CP and CP ultimately determines whether the employee is hired or not. The Employer cannot override CP's decision.

Even after employees of the Employer are hired, CP has the ability to ban employees, effectively terminating the Employer's employee since CP is the Employer's only customer. In an incident at one of the non-petitioned locations, Shoreham, the CP police staff was called because an employee of the Employer was involved in a fight on CP property (the CP police has federal jurisdiction over several rail carrier facilities and have the authority to arrest). While CP police staff did not arrive in time to act, they were nonetheless called in to address the incident. The record does not contain any instances of CP exercising its authority to remove an employee of the Employer from service, however, under Section 10.2.2 of Schedule C of the Services Agreement, Minimum Safety Requirements for Contractors Working on CP Property in the United States, uttering of threats or committing acts of violence will result in removal of the responsible contractor personnel from CP property among other possible ramifications. The Agreement does not qualify any reference of the Employer being able to have its own distinct decision on the matter.

Therefore, the record on this factor appears to lean towards coverage under the RLA.

d. The Degree of Supervision Exercised

Through efficiency tests,[2] CP frequently inspects and reviews the workplace performance of both the Employer's employees and its own CP employees. Starting on about the end of September 2019, CP created an excel document to capture data involving efficiency testing done at both facilities. There have been approximately 50-100 CP inspections resulting in disciplinary action and hundreds of other CP inspections that did not result in any discipline because the Employer's employees were performing the job correctly. On at least one occasion, CP requested to see the associated discipline and/or consequence ultimately imposed by the Employer to its employees based on the CP's feedback of the Employer's employees' efficiency test failure. In two other occasions the CP and Employer's management staff reported cell phone usage violations, resulting in the Employer disciplining the Employer's employee. While the actual disciplinary decision resides with the Employer, CP has made it clear that there must be consequences for employees when they violate work rules as evinced by the CP checking with the Employer that some sort of consequence was applied.

In another instance, one of the Employer's management staff failed an efficiency test by not ensuring employees were going out with proper tools. The efficiency failure was noted in the CP's system. The manager was then given constructive feedback by CP's Director of Intermodal Operations and required to retest within 7 days. The retest consisted of undergoing another efficiency test to ensure there were no further failures. The record shows the Employer was not allowed to override CP's decision to provide constructive feedback and/or to retest the employee or manager in question.

In summary, between the efficiency testing, requirements to retest, and constructive feedback administered by CP, the record tends to show CP plays a role in the supervision of the Employer's employees. Thus, this factor leans toward coverage under the RLA.

e. Whether the Employees are Held out to the Public as Carrier Employees

Employer's employees are required to wear a safety vest and hard hat, also known as Personal Protective Equipment ("PPE"), bearing the Employer's name. The employees also wear badges that show the CP logo and identify them as a "contractor". Mr. Greer testified that since trespassing and theft are concerns on railroads, CP Police can question employees for not wearing these badges and will scan badges to make sure that an employee has the required credential and is allowed on CP property.

Overall, employees bear the logo of both the Employer and CP on the job and there is limited evidence of communications using CP's e-mail. This factor is neutral.

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[2] Schedule C, 2.1 Definitions (h) of the service agreement defines eTest ("Efficiency testing ") as a planned procedure to evaluate compliance with rules, instructions and procedures, with or without the employee's knowledge. The record shows that this procedure consists of physical observations of employees or third parties that are on the properties. The observation of employees can involve the Employer's staff, CP staff, third-party truckdrivers on the facility, janitors, someone removing snow, and/or anyone involved in joint efficiency testing surrounding safety.

f. Control over Training

Next, in examining the carrier's control over training, the Services Agreements lay out the guidelines for inspection of intermodal equipment and state that the Employer is required to ensure that all yard employees are provided with training acceptable to CP. The record is unclear if the Employer ever submitted a copy of any trainings to CP.

Nonetheless, CP's expectations include but are not limited to: Guidelines for the Inspection of Intermodal Equipment (Appendix A), employees completing CP's Workplace Health & Safety Training (Appendix B), and Minimum Safety Requirements for Contractors Working on CP Property in the United States (Appendix C, Schedule C). The record shows the Employer provided a summary of the training the Employer has completed. While Greer admits CP has never requested to see a copy of these trainings, Section 5.2.2 of Schedule C entitled Minimum Safety Requirements states that CP does have the right to request copies of these training materials.

Mr. Greer testified that CP requires employees follow the Association of American Railroads ("AAR") Guidelines. These guidelines deal with intermodal securement, that is containers being secured to a rail car so they don't fall off or cause a derailment. They explain how the loading environment should be for containers on a flat car, explain guidelines for the locking mechanism and defines a secure versus an unsecure locking mechanism.

While much of the training required by CP is required of all rail carriers under industry standards, all trainings have to meet CP's expectations. Additionally, in referencing Schedule A Subsection 32.3 of the Services Agreement, Mr. Greer testified that the Employer came up with the Emergency Response Plan solely because of the contract requirement versus the regulatory standard. The record leans to a showing of control by CP with regard to training and thus RLA jurisdiction.

VI. CONCLUSION

Mindful of its statutory mission, the Board finds that the rail or air carrier must effectively exercise a significant degree of influence over the company's daily operations and its employees' performance of services in order to establish RLA jurisdiction. No one factor is elevated above all others in determining whether this significant degree of influence is established. *ABM Onsite Services-West*, 45 NMB 27, 34 (2018)

The record evidence shows that the Employer performs work traditionally performed by carrier employees, and the Employer is at least indirectly controlled by, or under common control with, the carrier, CP. The Employer is not subject to the Board's jurisdiction and instead subject to the jurisdiction of the RLA. It is hereby ordered that the petition in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor

Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **March 3**, **2020.**

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: February 18, 2020

/s/Daniel N. Nelson

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