

Employer Status Determination
Triple Crown Services Company

This is the decision of the Railroad Retirement Board regarding the status of Triple Crown Services Company as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

In a decision dated December 18, 1990, the Deputy General Counsel held that Triple Crown Services had been an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since December 31, 1986. Triple Crown Services has requested that the prior decision be reconsidered.

Since April 1, 1993, the Triple Crown business has been conducted by Triple Crown Services Company (hereafter TCS Company). This decision will encompass both Triple Crown Services and TCS Company since they have been conducting the same business since December 31, 1986.

Information concerning TCS Company operations has been obtained from the request for reconsideration and a subsequent letter from Mr. Timothy D. Minnich, Vice President for Finance of TCS Company. Later information was received in a letter dated April 29, 1996, from Mr. Arthur C. Litton, II, General Counsel of TCS.

TCS Company is a Delaware general partnership which is 50% owned by NS Crown Services, Inc. which is affiliated with the Norfolk Southern Railway Company and 50% owned by TCV, Inc. a wholly owned, indirect subsidiary of Conrail. TCS Company provides door to door intermodal service to shippers using RoadRailer units. RoadRailer units are hybrid trailers equipped with both truck and rail wheels that can be operated either over the road or on rails. TCS Company owns or leases the Road Railer units but contracts with motor companies or railroads to move the RoadRailer units under TCS Company's bill of lading.

Shippers contract directly with TCS Company a pre-negotiated price for this door to door intermodal service. TCS Company contracts with and separately pays the trucking company or railroad which actually moves the RoadRailer unit.

TCS Company has 173 employees, 148 of whom are involved exclusively in securing truck transportation and 25 of whom are involved in securing both truck and rail transportation. Approximately 37.1% of TCS Company's expenses are attributable to the purchase of rail services. About 94 % of these purchases are made from its affiliated rail carriers.

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The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term "employer" shall include--

(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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *. [Emphasis supplied].

Sections 1(a) and (b) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a) and (b)) provide a substantially identical definition.

It is clear, and TCS Company does not contest, that it is under common control with rail carrier employers, in that it is a wholly-owned subsidiary of affiliates of the Norfolk Southern Railway Company and Conrail, both of which are rail carrier employers under the Railroad Retirement and Railroad Unemployment Insurance Acts. Thus, if TCS Company performs a "service in connection with" railroad transportation, and is not a trucking company, it is a covered employer under the Acts. Since, for the reasons explained below, the Board finds that TCS falls under the trucking service exception, it is not necessary to determine if TCS is performing a service in connection with railroad transportation.

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TCS Company is a wholly-owned subsidiary of its affiliated rail carriers which was incorporated and began operations in 1986. At the end of 1986, a Norfolk Southern subsidiary, North American Van

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Lines, a trucking company, transferred ownership of one of its trucking subsidiaries, Pioneer Motor Freight, to Norfolk Southern. Pioneer Motor Freight held a motor carrier certificate from the Interstate Commerce Commission. Triple Crown now provides motor carrier transportation under its own authority. This includes the placement of TCS placards on its cabs and independent contractor cabs.

This subsidiary, Pioneer Motor Freight, was renamed Triple Crown Services, Inc. in early 1987. At that time no railroad employees were transferred to Triple Crown, although subsequently several railroad employees were hired by Triple Crown. In April 1993, TCS Company was formed when Conrail took a 50% interest in Triple Crown Services.

TCS Company argues that its service is trucking service. TCS now provides motor carrier transportation under its own authority.

The trucking service exception can cover services incidental to trucking, if conducted by a company engaged in actual trucking service. Cf. Missouri Pacific Trucklines, Inc., v. United States, 3 Cl. Ct. 14 (1983) aff'd. 736 F.2d 706 (Fed. Cir. 1984).

The principal focus of TCS Company is transporting goods and services from point A to point B. This is done by a combination of truck and rail. As the Board stated in B.C.D. 96-82, In the Matter of CSX Intermodal, the trucking service exception "covers certain types of activities which are performed by independent trucking companies with which the railroads desire to compete." B.C.D.

96-82, page 20. As was true in CSXI, TCS is performing these trucking activities. TCS competes with other trucking companies for business. Missouri Pacific held that a trucking subsidiary of a carrier which moves a substantial portion of its freight by rail as part of an intermodal operation does not fall outside of the trucking service exception.

TCS is a motor carrier affiliate which moves a substantial portion of its freight by rail. However, as was true of CSX Intermodal, TCS is a motor carrier, it competes with other motor carriers, and its focus is the same as a trucking company, the door to door movement of high value goods with an emphasis on timeliness of delivery.

Accordingly, the Board, upon reconsideration of the initial decision of the Deputy General Counsel, determines that TCS Company is under common control with a rail carrier. However,

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the Board finds that the service performed by TCS falls under the trucking

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service exception contained in the Act. Consequently, the Board finds that TCS Company is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The decision of the Deputy General Counsel is reversed.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

Triple Crown Services Company

**DISSENT OF THE LABOR MEMBER
TRIPLE CROWN SERVICES COMPANY**

I dissent from the decision of the majority of the Board holding that Triple Crown Services Company is not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts ("the Acts"). The finding of the majority of the Board that the service provided by Triple Crown falls under the trucking service exception to the definition of "employer" under the Acts ignores the bulk of the evidence. That evidence shows that Triple Crown offers door-to-door transportation service for its customers, providing intermodal freight service using RoadRailer units.

Virtually all of the shipments brokered by Triple Crown have a rail carrier involved, with Triple Crown's largest purchase of rail services being made from its affiliated carriers, to whom its senior managers report. The economic effect of Triple Crown's transactions is, in great part, to market the services of its affiliated railroads.

The majority of the Board finds that Triple Crown falls within the trucking exception. However, the evidence of record establishes that the company's primary focus is not trucking, but is the transportation of freight from point A to point B. The trucking is merely incidental to Triple Crown's primary focus, which is transportation. The decision in Missouri Pacific Truck Lines, Inc. v. United States, 3 Cl. Ct. 14 (1983), aff'd., 736 F.2d 706 (Fed. Cir. 1984) does not support the majority's decision. There, the company did not own or operate any rail facilities. The evidence in this case establishes that almost all of the shipments made by Triple Company move by rail at some point. The trucking simply allows Triple Crown's rail carrier affiliates to extend their service beyond the physical location of the railroad tracks. The evidence clearly demonstrates that the primary business of Triple Crown is not trucking, but rather is the enhancement and promotion of the rail transportation provided by its rail carrier affiliates.

Moreover, the very fact that Triple Crown uses RoadRailer units, which can travel by rail and on roads, also supports the conclusion that enhancement of rail service is the company's goal: a trucking company does not have a business

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need to offer its customers the option of travel by rail. Triple Crown, however, has chosen to rely primarily on RoadRailer units, instead of conventional trailers, in order to give its rail carrier affiliates the flexibility of providing a more complete freight transportation service.

The trucking exception to the definition of employer in the Acts was intended to exclude from coverage those companies whose business consists of a motor carrier operation. While Triple Crown's business includes transportation by truck, its overriding purpose is the marketing of the transportation provided by its rail carrier affiliates. For example, an October 9, 1989, article in Crain's Detroit Business stated that an average haul involved 600 miles by rail and 40 miles on each end by truck drivers who are sub-contracted by the railroad. Marketing is a function that is generally performed by railroads and is integral to the railroading business. Triple Crown offers a rail/truck combination for customers desiring door-to-door service which its affiliated carriers cannot offer alone. Triple Crown has no independent existence. Because the service provided by Triple Crown enables its affiliate rail carriers to operate their rail systems more successfully and to improve their service to the public, that service is clearly service in connection with railroad transportation within the definition of employer under the Acts.

For the reasons set forth above, I must respectfully dissent from the decision of the majority.

V. M. Speakman, Jr.

Date