



**Canada Industrial Relations Board ● Conseil canadien des relations industrielles**

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## Reasons for decision

United Steelworkers of America, Local 9344,

*applicant,*

*and*

Quebec North Shore and Labrador Railway Company  
Inc.,

*and*

Tshiuetin Rail Transportation Inc.,

*employers,*

*and*

United Transportation Union, Local 1843,

*bargaining agent.*

Board file: 25545-C

CCRI/CIRB Decision no. **392**

August 29, 2007

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The Board, composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Daniel Charbonneau and Patrick J. Heinke, Members, considered the above-noted application.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

## **Appearances**

Mr. Jean-François Beaudry, for the United Steelworkers of America, Local 9344;

Mr. Léo Robichaud, for the United Transportation Union, Local 1843;

Mr. Alexis-François Charette, for Quebec North Shore and Labrador Railway Company Inc.;

Mr. Alexandre W. Buswell, for Tshiuetin Rail Transportation Inc.

## **I - Nature of the Application**

[1] On December 21, 2005, the United Steelworkers of America, Local 9344 (the union), filed an application for a declaration of partial sale of business under sections 44, 45 and 46 of the *Code*, in which it requested that the Board declare that Tshiuetin Rail Transportation Inc. (TRT) is the successor employer to Quebec North Shore and Labrador Railway Company Inc. (QNS&L) and that the successor employer is bound by the collective agreement between QNS&L and the union.

[2] The Board held hearings on the merits of the application on February 1 and March 22, 2007. The union called two witnesses, Mr. Jean-Guy Chassé, maintenance mechanic at QNS&L, and Mr. Lorrie Lavallée, a retired QNS&L employee. The employer called Mr. Richard Bell, General Manager and Chief of Operations at TRT.

[3] The United Transportation Union, Local 1843 (the UTU), was not represented at the hearing. That union was certified by the Board on February 19, 1993, to represent a unit of employees (conductors, brakemen and locomotive engineers) at QNS&L. In a letter to the Board, the UTU stated only that it did not intend to assign any of its rights regarding the Menihék Subdivision. QNS&L was represented by counsel but it did not call any witnesses or intervene during the hearings. It did state, however, in a letter to the Board, that none of its employees had been transferred or laid off as a result of the agreement it signed with TRT in November 2005.

## **II - Background and Facts**

[4] QNS&L is a subsidiary of the Iron Ore Company of Canada (IOC) and operates a railway of more than 400 kilometres between Sept-Îles, Quebec, and Labrador City, Newfoundland and Labrador.

It employs nearly 400 people, 95 percent of whom are located in Sept-Îles. Before the IOC mining facilities in Schefferville were closed, the main purpose of QNS&L was to transport iron ore from Schefferville and Labrador City, Newfoundland and Labrador, to Sept-Îles. In the early 1980s, the IOC ceased its mining operations in Schefferville, and QNS&L consequently ceased to transport iron ore from the Schefferville mine. Since then, it has continued to transport the IOC 's and Wabush Mines' iron ore from Labrador City to Sept-Îles.

[5] On February 19, 1993, the Board certified the union as the bargaining agent of the employees involved in QNS&L operations under a bargaining unit that was defined as follows:

All employees in the operations division of Quebec North Shore & Labrador Railway Co., excluding conductors, brakemen, locomotive engineers, supervisors and those above. (6174-U)

[6] Railway operations include the maintenance of the railway track owned by QNS&L. A collective agreement was signed between the union and QNS&L on November 4, 2004, and was in effect until February 28, 2007.

[7] In addition to transporting iron ore, QNS&L also provided railway passenger and freight services, serving Labrador City and the cottages and outfitting operations close to the railway. In addition to its railway operations, QNS&L used specialized equipment to handle iron ore arriving from Sept-Îles, including unloading railcars, storing the ore, and then loading it onto ore carriers that shipped it to locations worldwide.

[8] QNS&L also maintained the railway track, railcar fleet, locomotives, heavy and maintenance equipment, materials-handling equipment and various other facilities on its site and on the IOC site.

[9] On November 28, 2005, pursuant to a document called the "Asset Purchase Agreement" (the agreement), TRT purchased a section of the QNS&L railway track that was known as the Menihek Subdivision, as well as the land on which that section is located. The Menihek Subdivision is located between Emeril, Labrador and Newfoundland, and Schefferville, Quebec. Article 3 of the agreement signed in November 2005 describes the assets purchased by TRT as follows:

### **Article 3 - SALE OF PURCHASED ASSETS**

#### **3.1 Purchased Assets**

On the terms and subject to the fulfillment of the conditions hereof, QNS&L hereby agrees to sell, transfer and assign to TRT, and TRT hereby agrees to purchase and accept from QNS&L, as at the Closing Date, all of QNS&L's right, title and interest in the following real and personal property comprising QNS&L's Menihek Subdivision, but excluding the Excluded Assets:

(a) the Purchased Land;

(b) all attached railway works and facilities, whether main line or sidings, including subgrade, grade, rails, ties, rail fastening, frogs, switches, ballast, other track structure and materials, track inventory, trestles, bridges, culverts, signals, communication and signals facilities (radio and microwave towers, signal bungalows, pole lines), buildings, parking and storage areas, depots, yards, crossing protection devices, and other railway improvements, fixtures, structures and appurtenances located on the Purchased Land, and, generally, all other immovable property used in connection with the operation of the Menihek Subdivision and all the usual inventory of replacement rails, ties and related track material, as is customarily kept in place by QNS&L on the Menihek Subdivision, if any;

(c) all those hand tools in the engineering section buildings located on the Purchased Land, subject to ordinary wear and tear and such other changes thereto as may occur in the ordinary course of business up to the Closing Date, and any materials, parts, equipment, machinery and supplies for the maintenance of trackage or railroad rolling stock or locomotives, in each case located on the Menihek Subdivision on the Closing Date;

(d) all Assumed Contracts listed in Schedule C subject, however, to the limitations set out in Article 8.2 on the assignment of leases, licenses, contracts and agreements without consent;

Should QNS&L locate, after the Execution Date, any other similar agreements, it shall cause them to be transferred to TRT, subject to Article 8.2;

(e) originals (where available) or copies of the Right-of-Way Plans, acquisition deeds and other title documents for the Purchased Land, contracts included in the Purchased Assets and plans and information with respect to land evaluation and municipal taxation, engineering drawings, schematics, reports, inspection, test and similar documents relating to the construction, modification, inspection and testing of the Menihek Subdivision;

(f) except as otherwise provided in this Agreement or in other agreements referred to herein, all of the rights and benefits and all of the duties and obligations associated with the Menihek Subdivision and the operation of the railroad business thereon, to which TRT shall hereby succeed and assume.

[10] The contract did not provide for the transfer of any QNS&L employees. The sale price that both parties consented to under the agreement was one dollar. The agreement was filed at the hearing under Exhibit P-2 (tab C-1).

[11] The TRT employees responsible for maintaining the railway track are not represented by a bargaining agent.

### **III - The Evidence**

#### **A - The Union**

##### **1 - Mr. Jean-Guy Chassé**

[12] Mr. Chassé has worked for QNS&L since March 14, 1988. He is a maintenance mechanic. He has taken on union duties since 1979 and he participated in the negotiations for the last collective agreement. He described the transportation activities carried out by QNS&L on the Menihek Subdivision, that is, the railway section that was sold to TRT in November 2005.

[13] According to the witness, QNS&L provided railway passenger and freight services on that section. Each week, one train provided round-trip passenger transportation and another transported freight, mainly for local residents in Schefferville. He stated that very few, if any, QNS&L workers used the passenger train.

[14] Still in reference to the Menihek Subdivision, the witness also noted that, in 2004, six employees were responsible for maintaining the railway; they patrolled and inspected the track twice a week and made any necessary repairs before each train ran. Mr. Chassé confirmed that, since November 2005, QNS&L has assigned no employees to the Menihek Subdivision or to Schefferville.

[15] On cross-examination, Mr. Chassé indicated that the railway signalling system was abandoned in 1982, when QNS&L ceased to transport iron ore. He stated that a subcontractor was hired to remove the snow from the railway in 2004–2005, and that, since 1988, workers have had no camp where they could stay. The witness said that he had not returned to that section of track since 1999. With regard to the condition of the track, he made a vague statement about his not being aware of the number of defective joints.

## **2 - Mr. Lorrie Lavallée**

[16] Mr. Lavallée is a QNS&L employee who retired in March 2005. During his time at QNS&L, he held various positions, including machine operator. He also worked at the Menihek Subdivision every summer from 1998 to 2004, and was responsible for maintaining the track. He stated that, in December 2004—before he had retired—the TRT Director of Operations contacted him. Given the witness's experience at QNS&L, TRT was hoping that he would work for it, since it intended to acquire the Menihek Subdivision. The witness rejected TRT's offer, but informed it that he would be retiring in a few months and that he would then be interested in the offer. After retiring, Mr. Lavallée worked for TRT on contract from April to the end of December 2005. Mr. Richard Bell, Chief of Operations and Director General, had asked him to inspect the railway. He worked with Mr. Lorrie Galichon, who was also a retired QNS&L employee.

[17] As a TRT employee, Mr. Lavallée had to submit a report to Mr. Galichon on the condition of the railway and on the type of repair that was required to put it in good condition. The witness said that he trained TRT employees. Mr. Lavallée referred to a list of TRT employees filed as Exhibit P-2 (tab C-2) and confirmed that he provided training to the employees named on that list and that only two of those employees had any experience.

[18] On cross-examination, Mr. Lavallée said that he recognized a document entered as Exhibit P-7, a report on the inspection of the Menihek Subdivision railway carried out by the witness and Mr. Galichon. That report was given to TRT in June 2005. The witness submitted that the poor condition of the railway could have caused a derailment and that the trains therefore had to run at reduced speed. The witness also stated that significant repairs to the railway were necessary.

## **B - TRT**

### **1 - Mr. Richard Bell**

[19] Mr. Bell has been employed at TRT since September 2004 as Director General and Chief of Operations. TRT retained his services because he had tremendous expertise in the railway industry,

as indicated in his resume. TRT is a railway transportation company that consists of three native band councils. Mr. Bell stated that it was created in September 2003 in order to operate a passenger and freight train on the Menihek Subdivision railway for the surrounding native communities. The company does not transport any iron ore. TRT hired Mr. Bell before the agreement with QNS&L was entered into in November 2005. He said that he worked for TRT on contract. His mandate was to restore the Menihek Subdivision railway to working condition. To do that, he identified the equipment that TRT would need to operate its new company. He described the acquisitions that he has made since November 2004, such as the purchase of two locomotives, railcars, a restaurant car, a generator car, railway equipment trucks, ballast regulators, a rail changer, a crane and other specialized equipment for several million dollars.

[20] Mr. Bell indicated that TRT's operations were completely funded by Transport Canada. According to him, the capital budget that Transport Canada gave TRT totalled more than 17 million dollars and its annual operating budget was approximately 6 million dollars.

[21] He added that most TRT employees are native, except for those hired to train the natives. Some retired QNS&L employees, such as Mr. Lavallée and Mr. Galichon, were temporarily hired by TRT in order to train the new native employees who had no experience in the railway industry. Moreover, the acquisition of the Menihek Subdivision did not involve the transfer of any QNS&L employees.

[22] Mr. Bell explained the context in which the Menihek Subdivision was acquired. According to the witness—and these facts have not been contested by the other party—in 2004, QNS&L announced its plans to cease providing railway transportation on the Menihek Subdivision, specifically the round-trip railway passenger and freight services that it operated once a week up to then.

[23] However, the witness added that the Minister of Transport at the time had apparently declared that the maintenance of railway passenger and freight services between Emeril and Schefferville was essential. The witness also stated that Transport Canada had tried in vain to find a company that could ensure the Menihek Subdivision's railway transportation. It was in this context that TRT was founded. It is the first native railway company in Canada.

[24] The witness indicated that, in June 2005—before the transaction in November—TRT obtained authorization from QNS&L to inspect the Menihek Subdivision railway. He indicated that that inspection revealed serious lacks that compromised the safe use of the track. To illustrate the poor condition of the railway in question, the witness referred to the photographs taken before TRT acquired that rail section that were filed in evidence. The witness explained that the photographs show an abandoned railway track overgrown with vegetation. He maintained that those photographs show that the railway was not safe.

[25] The witness stated that, although TRT did not own the Menihek Subdivision, it requested and obtained authorization to proceed with some urgent repairs to ensure that the railway could be used safely. According to the witness, those repairs were carried out in the fall of 2005. At the same time as those repairs—and before TRT came into ownership of the Menihek Subdivision—TRT also renovated the Schefferville train station and built a maintenance shop in Schefferville and a camp for its employees in Esker. The witness stated that TRT would not receive any compensation for the work it carried out if its transaction with QNS&L fell through.

[26] TRT finally acquired the Menihek Subdivision railway and the land on which the track is located on November 28, 2005. The witness admitted that TRT also purchased materials and equipment under that agreement, but that the immovable property was so old that it was unusable. Mr. Bell stated that none of the tools, equipment, machinery or supplies was in fact transferred from QNS&L to TRT, contrary to the terms of the agreement. He added that some tools and equipment were abandoned by QNS&L, but that they were in such poor condition that they were unusable.

[27] The witness admitted that, in relation to the transaction, five contracts for the use of the railway tracks located on the outskirts of the Menihek Subdivision were transferred to TRT. However, he also stated that, except for the contract with Imperial Oil Limited, which brings in \$700 annually, the other contracts had expired.

[28] Mr. Bell added that TRT has been operating its new railway transportation company since December 1, 2005. It uses its own equipment and financial and material resources, and relies on its own employees—mostly natives—who are responsible for maintaining the railway. The witness



stated that the employees working out of Schefferville can use TRT's new facilities at the Esker and Emeril camps.

[29] TRT operates two passenger trains per week, while QNS&L operated only one. The witness indicated that new services are also available to passengers, including the sale of hot meals and the transport of canoes. He said that, contrary to QNS&L, TRT does not transport any iron ore.

#### **IV - Positions of the Parties**

##### **A - The Union**

[30] Counsel for the union referred to and commented on some important Board decisions to support his evidence, which he claims shows that TRT continued and benefited from QNS&L operations. He also referred to the terms of the agreement, which indicate that QNS&L railway transportation operations were transferred to TRT.

[31] He also noted the legislative context in which the discussions and negotiations leading up to the agreement entered into on November 28, 2005, took place. He referred the Board to Exhibit P-1 (tab 5), which is the certificate of fitness issued to TRT by the Canadian Transportation Agency, and to certain sections of the *Canada Transportation Act* to show that QNS&L had to first cease providing railway passenger and freight services for TRT to become the acquiring company. Counsel argued that that was solid proof that the company's activities continued.

[32] Counsel reminded the Board that QNS&L did not provide only iron ore transportation but also passenger and freight transportation. Therefore, the railway passenger and freight services on the Menihek Subdivision are severable from the rest of QNS&L's operations. He finally argued that TRT called on the knowledge of two retired QNS&L employees, which was enough to return the facilities to good condition and bring the railway up to industry standards. He is of the opinion that even if TRT made a significant investment in restoring the railway, the fact remains that there was a transfer or sale within the meaning of the *Code*. Counsel referred the Board to *Ivanhoe inc. v. TUAC, section locale 500*, [2001] 2 R.C.S. 565, and pointed out that QNS&L had assigned its

railway operation rights to TRT and that that constitutes—like in *Ivanhoe inc. v. TUAC, section locale 500, supra*—a transfer of business. He is asking the Board to declare that a sale of business has occurred within the meaning of the *Code*.

## **B - TRT**

[33] Counsel for TRT argued that, for a sale of business to have occurred within the meaning of section 44 of the *Code*, there must have been a sale or transfer of a going concern. In this case, counsel is of the opinion that, aside from the transfer of the railway track and land, the essential components of QNS&L were not transferred. He referred to the Supreme Court of Canada's decision in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, in which Justice Beetz adopted the following definition for the concept of business:

... an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities. ... the undertaking may be said to be constituted when, because a sufficient number of those components that permit the specific activities to be conducted or carried out are present, one can conclude that the very foundations of the undertaking exist: in other words, when the undertaking may be described as a going concern. ...

(page 1105)

[34] According to counsel for TRT, the notion of transfer or sale of business requires the sale or transfer of an organization of resources or of a functional economic vehicle that can be independently operated. Counsel argued that the transfer resulting from the November 28, 2005, agreement between QNS&L and TRT was not that of an organization of resources or of a functional economic vehicle that could be independently operated. He also noted that QNS&L's core activity was not the transport of passengers, but the transport of iron ore—the passenger train was merely a subsidiary activity. He maintained that when QNS&L ceased to transport iron ore in 1980, it also ceased to operate the railway.

[35] Counsel for TRT also stated that the evidence indicates that TRT is a native business whose purpose is to serve native clients. He is of the opinion that it is not the same type of business as that operated by QNS&L.

[36] With regard to the two retired QNS&L employees who worked at TRT, counsel is of the opinion that the evidence shows that they worked there for a short time in order to inspect and repair the railway.

[37] Counsel added that the evidence indicates that the railway was unusable and that a railway without equipment or personnel is useless. According to counsel, the evidence also shows that QNS&L had abandoned the section of track that was transferred and that, consequently, it could not be sold. Moreover, QNS&L did not transfer the operating rights to TRT because only the Government of Canada was authorized to do so. He referred to section 90 of the *Canada Transportation Act* to prove that a certificate of fitness must be issued by the Canadian Transportation Agency for any project regarding railway construction or operation.

[38] Lastly, counsel argued that the burden of proof was on the union to prove that a sale of business occurred within the meaning of the *Code* and that it has not discharged that burden. He concluded that there was no transfer of employees or contract and that it was a simple sale of assets and not a sale of business.

## **V - Analysis and Decision**

[39] The effects of a sale of business declaration under section 44 of the *Code* are clear. The bargaining agent for the employees employed in the business sold continues to represent them, and any collective agreement in force at the time of the sale is binding on the purchaser.

[40] The relevant provisions of the *Code* read as follows:

44.(1) In this section and sections 45 to 47.1,

“business” means any federal work, undertaking or business and any part thereof;

“provincial business” means a work, undertaking or business, or any part of a work, undertaking or business, the labour relations of which are subject to the laws of a province;

“sell”, in relation to a business, includes the transfer or other disposition of the business and, for the purposes of this definition, leasing a business is deemed to be selling it.

(2) Where an employer sells a business,

(a) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;

(b) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;

(c) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and

(d) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

...

46. The Board shall determine any question that arises under section 44, including a question as to whether or not a business has been sold or there has been a change of activity of a business, or as to the identity of the purchaser of a business.

[41] This application was filed by the union in its capacity as certified bargaining agent for all employees involved in the operation of QNS&L, excluding conductors, brakemen, locomotive engineers, supervisors and those above. The employees represented by the union maintain the railway, including removing the snow and repairing the track. On November 28, 2005, QNS&L disposed of **part** of the railway it owned, that is, the Menihék Subdivision connecting Emeril and Schefferville.

[42] In *Parrish & Heimbecker, Limited*, [2004] CIRB no. 264; and 117 CLRBR (2d) 201, the Board stated the following regarding the purpose of section 44 of the *Code*:

[14] The purpose of section 44 of the *Code* is not intended to restrict nor limit the manner in which an employer disposes of its business. Section 44 ensures that bargaining rights are not suddenly extinguished by a change in the ownership of a business or the structural change of a corporation. According to author *George W. Adams*, *Canadian Labour Law*, 2d ed. (Aurora: Canada Law Book Inc., 1993), successorship has been analyzed by the various boards by asking whether there has been a sale within the extended statutory definition of the term and whether what has been disposed of or sold constitutes a business or part of a business. Both the provincial and federal boards have consistently adopted a broad and liberal interpretation of the related sales provisions (see *Seaspan International Ltd.* (1979), 37 di 38; and [1979] 2 Can LRBR 213 (CLRB no. 190); *Terminus Maritime Inc.* (1983) 50 di 178; and 83 CLLC 16,029 (CLRB no. 402); *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *U.S. Airways Inc. et al., supra*; and *Canadian Pacific Railway Company et al.*, October 25, 2001 (CIRB LD 530)).

(pages 6; and 205)

[43] Also in *Parrish & Heimbecker, Limited, supra*, the Board repeated the four-pronged test outlined in *Halifax Grain Elevator Limited* (1991), 85 di 42; 15 CLRBR (2d) 191; and 91 CLLC 16,033 (CLRB no. 867) that must be applied when determining whether a sale of business has occurred within the meaning of the *Code*:

1. Is the alleged buyer indeed operating a federal business or “going concern”?
2. Was the alleged seller indeed operating or otherwise controlling as his own that said federal “going concern” in whole or in part before the sale took place?
3. Were union bargaining rights in some way tied to the seller’s business or part thereof that was presumably sold?
4. Has there been an actual sale or transfer of that same business or part thereof to the buyer?

(pages 46; 195; and 14,393)

[44] Since the first three parts of the above test are not contested, the only issue to decide based on the facts in this case is whether there has been an actual sale or transfer of **part of the QNS&L business within the meaning of section 44 of the Code**. In other words, did QNS&L dispose of part of its business when TRT acquired the Menihék Subdivision on November 28, 2005?

[45] The Board is of the opinion that the following facts on record regarding the agreement signed in November 2005 are material to deciding this application:

- QNS&L disposed of part of the railway that it owned to TRT, namely the section of track between Emeril and Schefferville called the Menihék Subdivision, for a symbolic amount of one dollar;
- QNS&L had not used that section of track to carry out its core activity of transporting iron ore since 1982, the same year the IOC ceased to operate the Schefferville mine;
- according to the evidence submitted, none of the employees were in fact transferred under the November 2005 agreement;

- the Canadian Transportation Agency issued a certificate of fitness to TRT for the operation of the section of track that it had acquired;
- TRT's operations are completely funded by Transport Canada at both the capital and operating budget levels, and its services cater to the needs of native passengers;
- the section of track purchased by TRT was in poor condition, and significant repair work was carried out in order to commence railway transportation; moreover, large sums of money were invested in acquiring equipment;
- the Schefferville station was reopened after TRT acquired the rail section;
- the TRT employees responsible for maintaining the railway are all based in Schefferville, and the camps in Esker and Emeril were renovated.

[46] In *Saskatoon Airport Authority et al.*, [2005] CIRB no. 340, the Board considered the case law on applications for declarations of sale of business. In particular, it referred to a decision from the Ontario Labour Relations Board (OLRB), *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, in which the OLRB dismissed an application for a sale of business declaration. In its decision, the OLRB set out principles applicable to situations that involve disposing of a business:

“36. Despite the labour relations focus of the statute ‘the business’ is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employees may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor’s employees is only one factor to be considered. ....

...

**44. For a transaction to be considered a ‘sale of a business’ there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a ‘going concern.’** A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did

not do so. Bargaining rights are continued only when the employer transfers his business. The use of the active verb and possessive pronoun is not insignificant.

(pages 1209-1211 and 1214)”

(pages 22 and 23; emphasis added)

[47] The principles enunciated in *Metropolitan Parking Inc., supra*, were endorsed by the Board in subsequent decisions. In *CAFAS Inc.* (1984), 56 di 54; 7 CLRBR (NS) 1; and 84 CLLC 16,034 (CLRB no. 463), the Board’s reconsideration panel rejected the original panel’s conclusion that a sale of business had occurred, and it confirmed its adoption of the principles set out in *Metropolitan Parking Inc., supra*:

Finally, in *Terminus Maritime Inc., supra*, and as indicated earlier, the Board, sitting in plenary session, decided to adopt the principles outlined in *Metropolitan Parking Inc., supra*, as a means of determining whether a sale under section 144 [now section 44] has taken place. To us, the adoption by the full Board of the principles of *Metropolitan Parking Inc., supra*, indicates a clear and overt acceptance of the decision of the Ontario Board in that case.

(*CAFAS Inc., supra*, pages 70; 18-19; and 14,297)

[48] In this case, the Board agrees that, up to 2005, QNS&L was providing railway passenger and freight services even though the railway track was in poor condition. According to the evidence heard, a systematic inspection of the railway had to be carried out before running the passenger and freight trains, which ran once a week. The Board also agrees that QNS&L had to cease its railway transportation operations on the Menihek Subdivision before the Canadian Transportation Agency could issue a certificate of fitness to TRT for that section of the railway.

[49] However, despite the sale of part of the railway that it operated, namely the Menihek Subdivision, QNS&L did not cease its operations, particularly its core activity of transporting iron ore. Moreover, the union retained its bargaining rights regarding QNS&L’s railway transportation, despite the fact that the Menihek Subdivision was sold to TRT.

[50] As noted earlier, a business is not synonymous with its employees or their work. Therefore, the fact that TRT employees carry out railway transportation activities on the section of track on which QNS&L provided passenger and freight transportation in the past is not a determining factor for a

declaration of sale of business under section 44 of the *Code*. As *Metropolitan Parking Inc., supra*, reminds us, an actual sale of business or of a distinct part of a business must have occurred. There must be a transfer from the predecessor of the essential elements of the business as a block or as a “going concern.”

[51] Moreover, the Board has stated on several occasions that a set of circumstances must be considered before it can conclude that a sale of business has occurred within the meaning of the *Code*. In *Parrish & Heimbecker, Limited, supra*, the Board stated the following on the subject:

[19] In deciding whether a transaction amounts to a transfer of business, consideration must be given to the whole of the circumstances, weighing the factors that point in one direction against those that point in another. Many factors may be relevant, though few are conclusive or sufficient in themselves.

(pages 8; and 206)

[52] The union in that case filed an application for a declaration of sale of business after the Saskatchewan Wheat Pool had permanently closed a grain elevator and sold its assets to another business. The successor employer contested the union’s application and argued that, when it took possession of the facilities, it did not contain any grain, the office was empty and none of the other articles required to operate the business could be found. The Board concluded that **a transfer of chattels from a business to another had taken place**, but that nothing allowed it to conclude that a sale of business had occurred within the meaning of section 44 of the *Code*. The Board therefore dismissed the application for a sale of business declaration and stated the following:

[34] Looked at as a whole, the written sales agreement, the facts surrounding the sale, including the intention of the parties that can be drawn from the above, nothing supports the GSU’s allegation that SWP provided a continuity of management, continuity of product and an actual transfer of goodwill. ...

(*Parrish & Heimbecker, Limited, supra*, pages 13; and 211)

[53] As for the facts and circumstances surrounding TRT’s acquisition of the Menihek Subdivision in this case, can the Board conclude that this is a situation in which part of the business was transferred? The Board is of the opinion that, in order to answer that question, it is important to keep in mind what the nature of the QNS&L business was before and after it sold the Menihek Subdivision to TRT.



[54] The evidence shows that QNS&L's core activity is the transport of iron ore. QNS&L transports the IOC's and Wabush Mines' iron ore. QNS&L transports more than 240 cars of Wabush Mines' iron ore daily. As for the IOC, it entrusts more than 700 cars of iron ore to QNS&L every day. The evidence also indicates that, since the early 1980s, QNS&L ceased to transport iron ore from Schefferville, and that had a certain impact on the part of the railway between Emeril, Newfoundland and Labrador, and Schefferville, Quebec, namely the Menihek Subdivision.

[55] The evidence also indicates that, since QNS&L ceased to transport iron ore on the Menihek Subdivision, it progressively abandoned the capital assets on site, including the track itself. It closed the employee camps and stopped maintaining the signalling system to the point that it had become impossible to operate that section of track without making major repairs and investing significant sums of money in equipment.

[56] There is also the fact that none of the QNS&L employees were laid off or transferred to TRT after the sale of the Menihek Subdivision. In that regard, it is worth noting that, above all, the purpose of the provisions of section 44 of the *Code* are to protect the bargaining rights of the employees affected by the sale of a business. In this case, the QNS&L employees represented by the union continued to work for that company and the agreement signed with TRT regarding the Menihek Subdivision does not prejudice their bargaining rights or their employment in any way.

[57] It is true that upon reading the November 28, 2005, agreement, it appears to be a contract of sale of part of the QNS&L business. The evidence, however, indicates that, contrary to the terms of the agreement, no tools, equipment, machinery or supplies could in fact be used by TRT because they were obsolete. Moreover, TRT had to make urgent repairs for the railway to be safe for operations. In fact, the equipment had been practically abandoned by QNS&L since it had ceased to transport iron ore on that section of the railway. Also of great significance is the fact that the transaction was made for the symbolic sum of one dollar.

[58] The evidence also indicates that, since December 1, 2005, TRT has operated its new railway transportation business using its own equipment, financial and material resources, and employees, who are mostly natives. All of these factors have satisfied the Board that QNS&L merely divested

itself of some assets that it had practically abandoned, namely the section of the railway connecting Emeril and Schefferville.

[59] Based on the evidence and the written submissions presented in this case, the Board is of the opinion that a transfer of assets from one business to another has taken place. However, nothing leads the Board to conclude that there was in fact a transfer of a going concern within the meaning of section 44 of the *Code*.

[60] For all the reasons cited above, the application is dismissed. This is a unanimous decision of the Board.

***Certified Translation  
Communications***

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Louise Fecteau  
Vice-Chairperson

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Daniel Charbonneau  
Member

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Patrick Heinke  
Member