B.C.D. 00-13

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Employer Status Determination
ETC Office System Services, Inc.

This is the decision of the Railroad Retirement Board regarding the status of ETC Office System Services, Inc.(ETC) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

The evidence is that ETC was incorporated as a privately held Pennsylvania corporation on March 4, 1985. No railroad owns any stock of ETC, and no directors or principal officers own any railroad stock, or are otherwise officers or directors of a railroad. ETC is a temporary and permanent employment agency with four offices in the Philadelphia area. ETC states that it assigns employees to a client company's location to perform specified duties, and pays its employees weekly. ETC employees may request flexible work schedules, and the client company is then billed for only the time the employee worked. While on assignment to a client, the employees receive work and projects from the client company. ETC reports that individuals it sends to client companies are governed by policies, practices and procedures of ETC, and may be instructed and trained by ETC to satisfy customer requirements as needed.

On March 30, 1994, Conrail and ETC entered into a memorandum agreement in which ETC agreed to provide temporary workers as requested by Conrail departments and as authorized by Conrail's Human Resources department. The agreement was to last from April through October 1994, during which time ETC was to receive no more than $500,000, with a retainer of $20,000 paid in advance. A contract for a total of $200,000 for the period June 1996 through April 1997 was approved by Conrail on June 13, 1996, and later extended through December 1997 for a total of $1.3 million. As of August 1997, providing temporary employees to Conrail constituted approximately 35 percent of ETC's business. The remainder of ETC's business was conducted with non-railroad companies in the Philadelphia area.

An average of 20 to 30 employees were assigned by ETC to Conrail each week in 1997. As of December 1998, 16 individuals remained. Conrail stated that individuals assigned by ETC were assigned work which they did independently. While Conrail stated that individuals providing service under the ETC agreements were required to keep Conrail apprised of the progression of their assignments, they were free to manage their own time in performance of the assigned duties. Some worked at home, others on the property of Conrail. Many worked on specific projects of limited duration. Others were engaged to train

ETC Office System Services, Inc.

Conrail employees, or to fill positions which could not be staffed by permanent employees due to the uncertainties of continued employment after the approaching acquisition of Conrail by CSX Transportation and Norfolk Southern.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (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;
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> (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 (RUIA), 45 U.S.C. §§ 351(a) and (b) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3231.

ETC is clearly not a carrier by rail. Further, there is no evidence that ETC is under common ownership with any rail carrier or controlled by officers or directors who control a railroad. ETC therefore is not a covered rail carrier affiliate employer. As ETC meets no other definition of a covered employer under the Acts, the Board finds that ETC is not a covered employer.

This conclusion leaves open, however, the question of whether the individuals who performed work for ETC under its arrangements with Conrail should be considered to be employees of the railroad rather than of ETC. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA further defines an individual as "in the service of an employer" when:

> (i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property

ETC Office System Services, Inc.

> used in the employer's operations, personal services and rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work.

Although some ETC employees worked on Conrail premises, most set their own hours and were responsible for completion of the projects assigned to them, rather than subject to supervision by Conrail as to how the work was performed. Accordingly, the control test in paragraph (A) is not met. See: Transportation Certification Services, Inc., B.C.D. 95-40 (employees of consulting company providing training to railroad employees on premises were not covered employees), and Battenkill Business Service, B.C.D. 95-49, (individual providing bookkeeping service for public at large not a covered employee with respect to work for railroad).

The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953),

Thus, under Kelm, the question remaining to be answered is whether ETC is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized

ETC Office System Services, Inc.

trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968, at 341). The four ETC offices in the Philadelphia area, and the fact that 65 percent of ETC's business derived from sources other than Conrail, indicate that ETC engaged in the temporary employment business for the general public. Moreover, the terms of the contracts provide only that Conrail may order services up to a specified limit, thereby indicating that ETC may suffer a loss if its operating expenses exceed the income under its contracts with Conrail. ETC consequently meets the test for independent contractor status, and individuals performing service under its contracts are employees of ETC, rather than employees of Conrail while performing those services. Kelm, supra.

Accordingly, it is the determination of the Board that service performed by employees of ETC is not covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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