B.C.D. 00-52

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Employer Status Determination
Jeff's Construction Company, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Jeff's Construction Company, Inc. (JCC) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Ms. Laurali B. Moore, General Manager, The Huntsville & Madison County Railroad Authority, and Mr. Roy K. Newton, President of JCC.

Under a contract entered into by JCC in 1984 with The Huntsville and Madison County Railroad Authority, a covered employer under the Acts since June 5, 1984 (BA No. 3597), JCC provides maintenance and repair of active warning devices. Maintenance is provided on a monthly, quarterly, and annual basis. Repairs are provided as needed. Supervision of the individuals performing the work is provided by Mr. Newton. JCC also has contracts with International Paper Mill and the Huntsville and Madison County Airport Authority.

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).

JCC clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership or control with any rail carrier or controlled by officers or directors who control a railroad. Therefore, JCC is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for JCC under its arrangements with The Huntsville & Madison County Railroad Authority should be considered to be employees of that railroad rather than of JCC. Section 1(b) of the RRA and section 1(d) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) 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 used in the employer's operations, personal services the 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. The information obtained by the Board indicates that Mr. Newton, President of JCC, supervises the individuals performing the work under the contract between JCC and The Huntsville and Madison County Railroad Authority. Accordingly, the control test in paragraph (A) is not met. 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 (s)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. See 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 JCC is an independent contractor. Based on the absence of any evidence of control of JCC by The Huntsville and Madison County Railroad Authority and on JCC's providing services to other companies, the Board concludes that JCC is an

independent contractor. Because JCC engages in an independent business, Kelm would prevent applying paragraphs (B) and C) of the definition of covered employee to this case. Accordingly, it is the determination of the Board that service performed by employees of JCC is not covered under the Acts.

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