B.C.D. 01-11

JAN 1 8 2001

Employer Status Determination
Heavy Railroad Excavations, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Heavy Railroad Excavations, Inc. (HRE), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Don Duncan, General Manager of HRE.

HRE was incorporated in March 1990, and engages in removal of used railroad ties (the enterprise began operations in 1977, but was not incorporated until 1990). All of its work is performed for Burlington Northern Santa Fe Railway, although it apparently recently also performed this work for the Union Pacific Railroad Company. No HRE employees are directed or supervised by employees of a railroad. The ties are picked up, bundled, and loaded on property owned by Burlington Northern. HRE is a privately held corporation which is not affiliated with a railroad. Lynda K. Etheridge and Lane C. Etheridge own 60% and 40%, respectively, of HRE.

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

HRE clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Therefore, HRE is not a covered employer under the Acts.

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This conclusion leaves open, however, the question whether the persons who perform work for HRE under its arrangements with Burlington Northern should be considered to be employees of that railroad rather than of HRE. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the Railroad Retirement Act 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 Railroad Unemployment Insurance Act 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 evidence submitted shows that HRE's work is performed under the direction of Mr. Duncan, an employee of HRE; accordingly, the control test in paragraph (A) is not met. Further, the services provided by HRE do not constitute professional or technical services as those terms are used in paragraph (B). Finally, a majority of the Board, Labor Member dissenting, finds that HRE's services are not personal services under section 1(d)(1)(i)(C).

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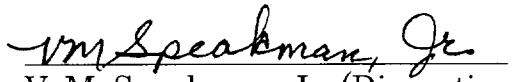
Accordingly, it is the determination of a majority of the Board that service performed by employees of HRE is not covered under the Acts.

Cherryl T. Thomas



V. M. Speakman, Jr. (Dissenting in part)

Jerome F. Kever