B.C.D. 01-21

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EMPLOYER STATUS DETERMINATION
Rail Terminal Services, L.L.C.

This is the determination of the Railroad Retirement Board concerning the status of Rail Terminal Services, L.L.C. (RTS), as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.).

Information regarding RTS was provided by Ms. Adele Hedley Page, counsel for RTS. According to Ms. Page, RTS was incorporated and began doing business March 1, 1997. It currently has 886 employees. RTS is a subsidiary of Rail Management Services and performs intermodal services including placing trailers and containers on and off railroad flatcars, maintaining lift equipment, container and chassis repair, and performing in and out gate equipment inspections and related administrative services. All of RTS's work is performed under contracts with the Burlington Northern Santa Fe (45 percent) and the Union Pacific Railroad (55 percent).

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).

RTS clearly is not a carrier by rail. Rail Management Services was previously found by the Board not to be an employer. The evidence of record establishes that RTS is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Therefore, RTS is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for RTS under its arrangements with rail carriers should be considered to be employees of those railroads rather than of RTS. 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 RRA further defines an individual as "in the service of an employer" when:

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> (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.

There is no evidence that work by employees of RTS is performed under the direction of employees of the carriers with which it contracts; the sample form contract provided by Mr. Paisley states that RTS "shall employ and direct all persons performing any service hereunder. Such persons shall be and remain the sole employees of and subject to the control and direction of the Contractor and not the employees or subject to the direction and control of the Railroad." 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 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. 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 RTS 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 trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968) at 341. While these may be rather close questions in cases such as this one, where the contractor contracts with only two customers, it is apparent that RTS has a number of permanent employees (886) and a substantial investment in equipment: 175 hostling tractors (for trailer/container lift on and off services); 75 vehicles used for the administration of the lift on and off operations; and 40 miscellaneous pieces of equipment including repair vans and manlifts. Accordingly, it is the opinion of a majority of the Board, Labor Member dissenting, that RTS is an independent business.

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Based on that finding that RTS engages in an independent business, a majority of the Board finds that neither paragraph (B) nor (C) of the definition of covered employee applies to this case. The Labor Member would find that employees of RTS perform employee service under paragraph (C). Accordingly, it is the determination of a majority of the Board that service performed by employees of RTS is not covered under the Acts.

Cherryl T. Thomas

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

Jerome F. Kever