B.C.D. 01-25

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Employer Status Determination
Employee Service Determination
Adecco Employment Services, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Adecco Employment Services, Inc., as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Scott J. Rynearson, Assistant General Tax Counsel, The Burlington Northern and Santa Fe Railway Company (BNSF).

Adecco is an employment agency engaged in the business of providing staffing for the temporary clerical and administrative support, light industrial, and accounting needs of its customers. Adecco currently has approximately 600,000 employees through 4,500 offices in 60 countries. Since May 31, 1996, Adecco has provided individuals to perform "temporary clerical and administrative support assistance" services for BNSF[1]. Currently three Adecco employees perform services as administrative assistants at BNSF's San Bernardino facility. A fourth is a file clerk. Adecco also provides individuals for BNSF at eight other facilities and is currently providing 74 individuals for BNSF.

Mr. Rynearson states that "BNSF managers determine what work needs to be done and, where appropriate, the priority of the work. How the work is completed, however, is a matter left to the expertise and discretion of the Adecco employee and his or her Adecco supervisor." He describes the work involved as follows:

> Work products of the Adecco employees are those generally associated with administrative support/clerical functions. They include the processing of dictated letters, memorandums and spreadsheets, and the filing and physical compilation of reports and records. Adecco employees do not author the letters, memorandums, spreadsheets or reports they process.

He states that Adecco "oversees associate work by various methods depending on the assignment location. There is an on-site [Adecco] supervisor located at Fort Worth, Texas, due to the relative number of assigned workers at that location. However, at locations where on-site [Adecco] supervision is not practical or cost effective, the associate is monitored from a nearby branch office location."

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[1] Mr. Rynearson provided a copy of a contract dated April 1, 1999, entered into between Adecco and BNSF.

Employer Status Determination
Employee Service Determination
Adecco Employment Services, Inc.

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;
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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 (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).

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

This conclusion leaves open, however, the question whether the persons who perform work for BNSF under its arrangement with Adecco should be considered to be employees of the BNSF rather than of Adecco. 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:

> (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

Employer Status Determination
Employee Service Determination
Adecco Employment Services, Inc.

> 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 or she performs such work.

The evidence submitted shows that BNSF 's work is performed under the direction of Adecco personnel. 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 Adecco is an independent contractor. The evidence of record indicates that Adecco employs over 600,000 individuals through 4,500 offices in 60 countries. As mentioned above, Adecco provides 74 individuals for BNSF. It is apparent that Adecco is in the business of providing its services to many customers, only a small percentage of which are for BNSF. Adecco is engaged in a recognized trade or business; accordingly, it is the opinion of the Board that Adecco is an independent business.

Because Adecco engages in an independent business, Kelm would prevent applying paragraphs (B) and C) of the definition of covered employee to this case.

Employer Status Determination
Employee Service Determination
Adecco Employment Services, Inc.

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

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