B.C.D. 03-67

SEP 09 2003

Employer Status Determination
Decision on Reconsideration
Rail Temps, Inc.

This is the decision on reconsideration of the Railroad Retirement Board regarding the status of Rail Temps, Inc. as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA).

Procedural History

By letter dated May 16, 2002, the Board was requested to issue a determination regarding the status of Rail Temps under the RRA and the RUIA by Mr. Ronald A. Lane, Fletcher & Sippel, LLC, counsel for Rail Temps. Based on information provided by Mr. Lane, a majority of the Board held that Rail Temps became a rail carrier employer under the Acts effective April 1, 2002. See Board Coverage Decision (B.C.D.) No. 03-38, issued May 6, 2003. In a letter dated August 6, 2003, Rail Temps requested reconsideration of B.C.D. No. 03-38.

Discussion of Rail Temps' Operations

As noted above, the Board's determination in B.C.D. 03-38 was based on information provided by Mr. Lane. Because the request for reconsideration identifies "factual error" as the initial basis for that request, we set out below the description included in our initial determination.

> * * * Rail Temps is an Illinois corporation incorporated October 3, 2001, for the purpose of conducting "a temporary worker referral service for railroads and industries that operate non-

carrier railroad facilities." It began operations in April 2002. Its owners are Homer C. Henry and Terese M. Jones * * *. Neither Mr. Henry nor Ms. Jones owns a railroad carrier.

Rail Temps refers qualified individuals to perform railroad operating functions on a temporary basis. Those individuals include locomotive engineers, conductors, trainmen, dispatchers, and other railroad operators. Rail Temps contracts with these individuals and pays them based on the time they spend performing services for a rail client of Rail Temps. Rail Temps is in turn compensated by its rail clients for services performed for them by Rail Temps' contractors.

Under the contracts with the individual contractors, Rail Temps refers the individuals for a specific assignment for a specified length of time, which may be extended. The rail client has a right to reject the individual or to terminate the assignment. Rail Temps pays the individual a daily service fee and reimburses him or her for certain specified expenses. Payment to the contractor is made by Rail Temps after Rail Temps is paid by the rail client. The individual agrees to perform all train operation services as requested by the rail client (subject to legal restrictions). Under those contracts, the individuals are referred to as independent contractors. However, the contract also provides that the rail client will pay the appropriate taxes under the RRTA and the RUIA.

Under the contracts with its rail client(s), Rail Temps agrees to establish a pool of qualified locomotive engineers and other operators and to make a good faith effort to supply the needs for temporary employees. Rail Temps will invoice the clients for fees and certain specified expenses.

During its existence, Rail Temps has had only two clients: Portland & Western Railroad, Inc., a covered employer under

> the Acts (B.A. No. 2776) and Caliber Auto Transport, an automobile ramp operator. It provided individuals who performed train and engine work to Portland & Western for the period May 1 through May 22, 2002 [footnote omitted]. These individuals were then hired directly by Portland & Western.

In the request for reconsideration, Mr. Lane stated that Rail Temps has never operated as described in his letter dated May 16, 2002. More specifically, Mr. Lane explained that Rail Temps does not compensate and has not compensated the individuals provided by Rail Temps as "Temporary Train Operators" who perform services for the benefit of railroad clients. Mr. Lane reported that all individual Temporary Train Operators are compensated exclusively by the railroad client of Rail Temps, all compensation received by Temporary Train Operators has been reported by that rail client, and, to the best of Rail Temps' knowledge, that rail client has withheld and paid all applicable railroad retirement and railroad unemployment insurance taxes on those earnings. Under the contract between Rail Temps and Portland & Western, which was entered into December 23, 2002, Portland & Western is obligated to comply with the requirements of the Railroad Retirement Act, Railroad Unemployment Insurance Act, and Railroad Retirement Tax Act with regard to the individuals supplied by Rail Temps to Portland & Western. That contract provides that Rail Temps is obligated to attempt to refer qualified "locomotive engineers, conductors, brakemen/yardmen, dispatchers or other individuals" to the Portland & Western as requested. The Portland & Western is obligated to qualify Temporary Train Operators, "including providing any necessary territorial familiarization, and any other training, testing or examining as may be required by" the Portland & Western. Under paragraph 4, the Portland & Western is obligated to pay Rail Temps "the Daily Referral Fee, and to pay each Temporary Train Operator the Daily Service Fee specified * * *." Paragraph 9 of the contract provides that Temporary Train Operators are not employees of Rail Temps but are employees of the Portland & Western.

Mr. Lane states that Rail Temps has signed a Temporary Train Operator Agreement with Northern Plains Railroad dated June 9, 2003. Under that agreement, the railroad is obligated to comply with the requirements of the Railroad Retirement Act, Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act with regard to the temporarily-employed individuals (paragraph 10 of the contract). The requirements of that contract are substantially identical to those of the contract between Rail Temps and the Portland & Western.

Statutes

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).

Discussion and Conclusion

The information submitted in the request for reconsideration indicates that Rail Temps has not taken on the responsibility for operation of either of the two railroads with which it currently has contracts. Instead, the evidence on reconsideration shows that Rail Temps is acting as a referral agency that has contracted to supply individuals to Portland and Western and to Northern Plains Railroad for short-term assignments while the railroads hire and train their own permanent workers. The contract with each of these two railroads describes the object of the contract as the provision of "referrals of qualified train operators for temporary full-time employment * * *." However, each contract also expressly provides that, "Rail Temps does not guarantee that it will meet Railroad's requests, and it will have no liability in the event that it cannot or does not meet Railroad's needs or requests for train operator applicants." Thus, with a contract that specifically states that Rail Temps will only make a "good faith attempt" to refer individuals to perform certain functions for the railroad, it is not possible to conclude that Rail Temps became a rail carrier by virtue of its contracts with the railroads.

It is also significant that each contract with the two railroads provides that the railroad agrees to pay Rail Temps the "Daily Referral Fee", and to pay each Temporary Train Operator the "Daily Service Fee" specified in [an attachment to the contract] for each day each Temporary Train Operator is available to work.

The evidence on reconsideration shows that Rail Temps is acting as an employment agency for Portland & Western and for Northern Plains Railroad. Based on the evidence of record, the Board finds on reconsideration that Rail Temps is not a carrier under the Acts. Since

it is not owned by or under common control with a carrier, it is also not an affiliate employer under the Acts. Accordingly, the Board reverses its decision dated May 6, 2003, and finds that Rail Temps is not an employer under the Acts administered by the Board.

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