B.C.D. 01-68

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Employee Service Determination

D. L. S.

This is the decision of the Railroad Retirement Board regarding whether the services performed by D. L. S. for the I & M Rail Link, L.L.C. (BA # 5623) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. The I & M Rail Link, L.L.C. is a covered employer under the Acts.

D. L. S. is a former railroad employee of the Soo Line. He left the employ of the Soo Line on October 31, 1992. Mr. S. is currently receiving an annuity under the Railroad Retirement Act with an annuity beginning date of March 1, 1999. Mr. S. is a sales consultant for the railroad. He acts as a liaison between the railroad and its customers, both new and existing, to develop rail traffic and fulfill both parties' transportation needs. Mr. S. provides his own agenda of activities; he supervises no one and reports to no one at the railroad. He sets his own hours, prepares no reports or memoranda and is not permitted to participate in any of the railroad's training programs. He may be referred to certain customers by the railroad but he never receives instructions as to how to perform his duties. He has been provided a laptop computer by the railroad but is limited to access for e-mail purposes only. He is paid a daily rate based on invoices submitted every two weeks. He pays his own self-employment taxes and receives no fringe benefits from the railroad.

Mr. S. performs services for the railroad under a verbal contract. Mr. S. is reimbursed for any business expenses incurred. Mr. S. operates out of his home, and other than the laptop, provides all the equipment used. Mr. S.'s services are available to the public, although he limits his advertising to word of mouth.

Section 1(b) of the Railroad Retirement Act and section 1(d)(i) 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)(i) 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 Railroad Retirement Tax Act (26 U.S.C. § 3231(b) and (d)). Paragraph (A) of the definition dates from the inception of the railroad retirement system. See Public Law No. 162, 75th Cong., Ch. 382, Part I, (50 Stat. 307).

In Reynolds v. Northern Pacific Railway, 168 F. 2d 934 (8th Cir. 1948), the Eighth Circuit stated that for purposes of liability for taxes under the analogous provision of the Railroad Retirement Tax Act, persons performing services for a railroad may be regarded as railroad employees, even though they are not directly employed or directly paid by the railroad. Id. at 942. The Court further stated that the history of the contracting enterprises, long-recognized economic relations, previous recognition by government agencies, and factors deciding the employment relationship under other Federal laws should all be considered. Id. at 940-941. Under other federal laws, numerous factors are involved in determining whether an individual is engaged in employee service. In the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act, these factors may be useful in determining application of those provisions. An individual may not be self-employed where the employer furnishes without charge the supplies and premises for the work. See Henry v. United States, 452 F. Supp. 253, 255 (E.D. Tenn., 1978). Payment on a hourly basis rather than at a specified amount per job also indicates that the individual is an employee. See Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D. Va., 1962). An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

The Board concludes that the foregoing criteria indicate that D. L. S. is performing his services as an independent contractor. He holds himself out as available to work for other parties. He works at home providing his own supplies and equipment. He is not supervised, as specified in paragraph (A) of the definition, by any of the companies, and it does not appear that he is integrated into the employer's staff or operations, as is specified in paragraphs (B) and (C).

Accordingly, it is the decision of the Board that D. L. S.'s service for I & M. Railink, L.L.C. is performed as an independent contractor for that company and is not performed as an employee of that company. Consequently, the Board finds that that service is not creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever