

**EMPLOYEE SERVICE DETERMINATION
FM**

This is the decision of the Railroad Retirement Board regarding whether the services performed by FM for the National Railroad Passenger Corporation (Amtrak) from November 1997 through August 2000 constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

According to information submitted by FM, he was first hired by Amtrak in January of 1976. He left Amtrak in May 1997, and returned in November 1997 as a "contracted employee". FM continued in this status through August 2000. In September 2000, he returned to Amtrak as a salaried employee, which he remains to this date. In a letter dated February 25, 2005, and received by the Railroad Retirement Board's Bureau of Assessment and Training on February 28, 2005, FM stated that "It has just come to my attention that the status of my employment for the years 1997 to 2000 should be considered as an Amtrak/railroad employee". In a letter dated November 2, 2005, FM was advised by the Chief of Compensation and Employer Services that his service with Amtrak for the period November 1997 through August 2000 is not creditable under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA) because he was a contracted employee during this period and as a contractor, he would be considered self-employed. In a letter dated December 23, 2005, FM requested reconsideration of this determination.

In a letter dated October 6, 2006, William Herrmann, Deputy General Counsel for Amtrak, describes the period of work under contract by FM as December 1997 to August 2000. Mr. Herrmann advises that Amtrak has no record of the types of services FM was providing and no record of a contract or purchase order. More specifically, Mr. Herrmann states that, "While we know he was providing consultant services to Amtrak, the period of time involved is more than six years ago and consequently we have no records that provide any details about the type of services FM was providing". He also states that it is believed that Amtrak did not provide FM with training or secretarial support.

Pursuant to section 259.3 of the Board's regulations (20 C.F.R. 259.3) this matter is now before the Board for consideration.

At the outset it is noted that Section 211.16 of the Board's regulations provides in pertinent part as follows:

Finality of records of compensation.

(a) Time limit for corrections to records of compensation. The Board's record of the compensation reported as paid to an employee for a given period shall be conclusive as to amount, or if no compensation was reported for such period, then as to the employee's having received no compensation for such period, unless the error in the amount of compensation or the failure to make return of the compensation is called to the attention of the Board within four years after the date on which the compensation was required to be reported to the Board as provided for in Sec. 209.6 of this chapter.

(b) Correction after 4 years. (1) The Board may correct a report of compensation after the time limit set forth in paragraph (a) of this section where the compensation was posted or not posted as the result of fraud on the part of the employer.

* * * * *

(c) Limitation on crediting service. (1) Except as provided in paragraph (b)(1) of this section, no employee may be credited with service months or tier II compensation beyond the four year period referred to in paragraph (a) of this section unless the employee establishes to the satisfaction of the Board that all employment taxes imposed by sections 3201, 3211, and 3221 of title 26 of the Internal Revenue Code have been paid with respect to the compensation and service.

Section 209.8 of the Board's regulations provides that:

Each year, on or before the last day of February, each employer is required to make an annual report of the creditable service and compensation (including a report that there is no compensation or service to report) of employees who performed compensated service in the preceding calendar year.

Section 9 of the RRA and the above-cited sections of the Board's regulations are designed to preserve the integrity of the Board's records of earnings and service and place the burden on the employee to bring to the attention of the Board

any problems with reported earnings and service within four years. Employees are notified annually of their reported earnings and given the right to contest those earnings records. As FM did not contact the Board regarding his service and compensation records until February 2005, only the period January 2000 through August 2000 is properly before the Board for review; the period of November 1997 through December 1999 is outside the four-year time limit for correction of records.

In his letter of December 23, 2005, FM explains that for the period at issue he worked a 40 plus hour workweek, with directions and assignments being given to him by his supervisor, the Senior Director of Reservation Sales National Operations. FM's duties are described as follows: developed and monitored operating and capital budgets, assembled data, wrote Capital Authorization Requests, and paid departmental bills for the Reservations Sales National Operations Department; developed purchase orders for hired contractors; tracked capital expenditures; developed financial costs for the operation of new Amtrak railroad services; directed the travel services section for the company overseeing the travel agency contract with the travel provider for Amtrak; and attended departmental staff meetings. FM also stated that he received daily direction from his supervisor for all projects, as well as discussed and received supervisor direction for all reports and documents that were generated. FM's duties were not to be assigned to anyone else. These assignments had specific due dates and were to be accomplished utilizing Amtrak methodology as assigned. The order of completion of the assignments was always subject to change at the request of FM's supervisor.

FM also explained that he was provided space at Amtrak headquarters in Washington, D.C., was given a computer and access to all necessary Amtrak computer systems, and was given a telephone and all office supplies necessary to do his assigned tasks. FM had no unreimbursed expenses, and Amtrak paid all travel costs and other daily incidental expenses. FM hired one temporary employee to assist him with his daily duties; this hiring was done under the direction and approval of FM's Amtrak supervisor. According to FM, numerous Amtrak employees were instructed by his supervisor to assist FM in his daily duties. FM did not have a formal written contract with Amtrak, but was issued a Purchase Order by Amtrak with a short description of his duties. He was paid an hourly rate, and worked exclusively for Amtrak. FM received no employee benefits from Amtrak.

Section 1(b) of the Railroad Retirement Act and section 1(d) (1) 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) 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)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

Under federal laws numerous factors are involved in determining whether an individual is engaged in employee service and in the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act these factors may be useful in application of those provisions. A few of these are particularly noteworthy in FM's case. 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 an 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).

Applying the foregoing criteria to the facts of this case, the Board finds that FM performed his service during the period in question as an employee of Amtrak. He worked on its premises, using its supplies and equipment, at an hourly rate. He could not have arranged for another person to perform the work in his place. There is no evidence in the record that he held himself out as available to work for other parties. FM was supervised, as is evidenced by the fact that the order of completion of his assignments was always subject to change at the request of FM's supervisor and by the fact that the supervisor provided direction governing FM's performance of the work.

Accordingly, it is the decision of the Board that FM's services for Amtrak from January 2000 through August 2000 were performed as an employee of Amtrak pursuant to section 1(d)(i)(A) of the Railroad Retirement Act and the corresponding provision of the Railroad Unemployment Insurance Act. The Board therefore finds that that service is creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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V. M. Speakman, Jr.

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