B.C.D. 09-9 **MAR 18 2009**

EMPLOYEE SERVICE DETERMINATION
MLS
S.S.A. No. XXX-XX-5430

This is the decision of the Railroad Retirement Board regarding whether the services performed by MLS for Kelly-Hill Company (KHC) for the period March 2007 through the present constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

The question of MLS's service was first raised in an undated letter received by the agency on February 4, 2008. MLS signed the letter along with LPM and MKD[1] which stated "Kelly Hill also has KMD & MS who would like to pay into their railroad retirement".

No further information or inquiry was received from MLS until he sent an e-mail to the agency on September 7, 2008, stating "I've got over 18 years of RR built up; I am now working for a railroad contractor who would keep paying into my RR fund if he can * * * Company name is Kelly Hill * * *". In a letter dated September 10, 2008, MLS was asked to complete the "Employee Questionnaire" regarding the services he provided through KHC.

While the questionnaire contains 14 questions regarding the services provided, MLS only answered five of the questions. MLS stated that he provided services to "BN, UP, Iowa Interstate, CNN, etc". When asked to "describe fully the nature and extent of all the services you performed for each company", MLS stated "Install crossings, install turnouts, build the yard tracks for the ethanol plants they service". MLS stated his title was track foreman, and in response to the question requesting "the date you began providing services to each company and KHC", he replied "3-07".

When asked if he was under a written contract for the work he performed for each railroad company, MLS responded "I believe so"[2]. Finally, when asked to describe the terms and conditions of the compensation arrangements, MLS stated "have to talk to my bosses at (KHC)". MLS also provided a W-2, Wage and Tax Statement for 2007, which indicates KHC paid him wages, from which it withheld federal income tax, social security tax, and Medicare tax.

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[1] The Board has found LPM to be an employee of Kelly Hill Company, and not an employee of the railroads for whom he provided services through Kelly Hill. The question of MKD's service is addressed in a separate decision.

[2] MLS was also asked for a copy of the contract(s); none were provided.

As KHC has been found not to be an employer under the Acts administered by the Board (Board Coverage Decision 08-39), service provided to that company are not creditable under the Acts[3]. The question remains whether the services MLS performed for those railroad clients of KHC which are employers covered by the Acts may be considered creditable service under the Acts.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, MLS must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) 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 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
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> (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 Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(b) and (d)).

A 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

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[3] The Board's regulations provide that an employee of a company is not a party to any coverage determination with respect to that company. *See* section 259.2(a) of the Board's regulations.

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.

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. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. The Board has in recent years not applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business, relying on the decision of the United States Court of Appeals for the 8th Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). The Kelm decision distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10th Cir., 1996), at 891(holding with respect to an attorney's agreement to perform professional services for the railroad as an independent contractor that " * * *merely to state that such a relationship exists does not necessarily make it so * * * .")

According to the "Contract for Work or Services", supplied by KHC in connection with its coverage determination, work is performed at times and locations authorized by the railroad client, and work is done in accordance with the conditions, requirements, and stipulations contained in the particular proposal and bid form/schedule of billable service items. KHC furnishes all superintendence, labor, tools, equipment, materials, and supplies, and all other things requisite and necessary to perform the work under the agreement. KHC and the employees of KHC are not considered employees of the railroad; KHC pays the wages and salaries of KHC employees performing the services; KHC provides safety training for its employees; KHC requires its employees to wear personal protective equipment as required by regulations (hardhats are affixed with KHC's logo); and KHC will maintain payroll records for its employees. These records will include time and day of week when employee's work week begins, hours worked each day, total hours worked each workweek, basis of

compensation (hourly, weekly, piecework), regular hourly pay rate, total overtime; total wages paid; client for whom work is performed; job location; and Forms W4, W-2, 1099. The agreement also states that KHC is required to maintain daily employee timesheets for both hourly and salaried employees. The agreement further states that the railroad client has "no control over the employment, discharge, compensation of and service rendered by" KHC's employees.

A majority of the Board, Labor Member dissenting, finds that the evidence of record indicates that MLS has been performing services as an employee of KHC, rather than as an employee of KHC's railroad clients. While the nature of the work (installing crossings, turnouts, and building track) may require that MLS work on the premises of a particular railroad, information from KHC is that he did not use that railroad's supplies or equipment, but the supplies and equipment of KHC. He was trained by KHC, and paid by KHC. The railroad client, according to the written agreement, had no control over the services rendered by MLS.

MLS has provided no information to rebut the information provided by KHC. Accordingly, it is the decision of a majority of the Board that the services performed by MLS for various railroad employers were performed as an employee of Kelly-Hill Company. As Kelly-Hill Company has been found not to be an employer under the Acts, a majority of the Board therefore finds that these services are not creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts. The Labor Member dissents for the reasons stated in his dissent in B.C.D. 08-39.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr. (dissenting)

Jerome F. Kever