Employer Status Determination
Donahue Brothers, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Donahue Brothers, Inc. as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

According to information submitted by Mr. James W. St. Clair, Attorney for Donahue Brothers, Inc. (DBI), the company, incorporated in September 1972, "is in the business of renting various types of construction equipment with or without operators and operating a sand and gravel sales and trucking operati[on]." According to Mr. St. James, the number of employees "varies from time to time", and

> (T)here are no employees regularly engaged in services connected with the railroad industry. From time to time, certain equipment with associated operators and service personnel perform services for the railroad industry. Projects require from 4 to approximately 22 employees. These employees work on railway projects for short durations.

DBI is not affiliated with any railroad or railroad association, and no directors or officers of DBI are directors, officers or employees of any railway company. DBI

> from time to time rents equipment with or without operators and service personnel to CSX, Norfolk and Southern, Conrail, South Carolina Piedmont, and numerous small feeder rail lines. * * * Services are from time to time concurrently provided to more than one railway company.

On occasion DBI employees perform work on railroad property.

> The work is performed for the railroads listed above and is performed on an "as need basis". * * * The employees, at all times, remains [sic] under the direct control of Donahue Brothers. * * * None of Donahue Brothers employees are directed or supervised by employees of the railroad.

Mr. St. James was unable to provide information as to what portion of DBI's revenue comes from the rail industry in general. As DBI is not affiliated with any railroad, there is no revenue from any affiliated railroad.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 U.S.C.

§ 231(a)(1)) provides in pertinent part as follows:

> The term "employer" shall include --

> (i) any express company, sleeping car company and carrier by railroad, subject to subchapter I of [the Interstate Commerce Act];
>
> (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 * * *.

A similar provision is contained in section 1(a) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. § 351(a)).

DBI clearly is not a rail carrier, and hence is not a covered employer within the meaning of section (a)(1)(i) of Railroad Retirement Act. Further, based upon the evidence in the file, DBI is neither under common ownership with a rail carrier nor controlled by officers or directors who control a railroad, and is, therefore, not an employer within the meaning of section 1(a)(1)(ii).

This conclusion leaves open, however, the question as to whether the persons who perform work for its various railroad clients on behalf of DBI should be considered to be employees of those carriers rather than of DBI.

Section 1(b) of the RRA and section 1(d) of the RUIA 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 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 3232(d) of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. §§ 3232(b) and (d)).

The focus of the definition set forth 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 the way he performs such work.

It is possible for services such as those performed by DBI for its clients to be performed by employees of a railroad, but there is no evidence in the file that the services in question here are subject to control as to the manner of their performance by the rail carrier for whom DBI performs them; rather, the evidence in file shows that the personnel performing the services in question are not under the control of the carrier.

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. 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 DBI itself is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401 (c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has an opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl., 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968), at 341. DBI has been in business since 1972 and has a substantial investment in plant and equipment. The facts provide ample support

for a conclusion that DBI is an independent business; i.e., an independent company providing professional services on a contract basis. Since DBI is an independent contractor, its employees are not to be considered employees of the rail carriers with which DBI has contractual arrangements. Kelm, supra.

Based on the foregoing discussion, it is concluded that DBI is not a covered employer and DBI employees are not covered employees under the Acts.

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