

Employer Status Determination

Gulf Rail Car Company

This is the decision of the Railroad Retirement Board regarding the status of Gulf Rail Car Company (GRCC) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Heywood C. Massara.

GRCC is a sole proprietorship owned by Mr. Massara which began operations in October 1989. GRCC has one employee in addition to Mr. Massara. Mr. Massara is not affiliated with any railroad. GRCC performs various maintenance, repair, and service functions in connection with privately owned rail freight cars. Mr. Massara advises that GRCC performs no services for any railroad other than repair of privately owned freight cars damaged by a railroad, although 98 percent of GRCC's business is with the rail industry in general. GRCC's operation consists of a mobile repair facility with an office maintained at Mr. Massara's home.

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 express company, sleeping-car company, and carrier by railroad, subject to part 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 (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad
* * *

Section 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).

GRCC clearly is not a carrier by rail. Further, there is no evidence that GRCC is under common ownership with any rail carrier or controlled by officers or directors who control a railroad. Therefore, it is the determination of the Board that GRCC is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether Mr. Massara and his employee who perform freight car repair and maintenance for GRCC under its arrangements with freight car owners could be considered to be employees of some other entity than GRCC.

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 and 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)).

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.

Mr. Massara advises that although some work is done on the property of railroads which use the freight cars being repaired, no employee of GRCC is directed or supervised by employees of a railroad. It should be noted that this conclusion is consistent with the characterization by Mr. Massara of GRCC's work as being performed for the freight car owners and not for the railroads using the cars. Accordingly, based upon the evidence of record Mr. Massara and the other GRCC employee are found not to be "subject to the continuing authority" of an employer within the meaning of section 1(d)(i)(A)

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 GRCC 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 any 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.a. Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968, at 341). GRCC clearly has some investment in its repair facility and may suffer a loss if expenses under its contracts exceed the agreed payment. Under these tests, GRCC is an independent contractor; accordingly, its employees are not to be considered employees of rail carriers for whom GRCC may perform services. Kelm, supra.

Accordingly, it is the determination of the Board that service performed by employees of GRCC is not covered under the Acts.

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