General Railway Services, Inc.
Employer Status Determination

This is the decision of the Railroad Retirement Board regarding the status of General Railway Services Inc. (GRS) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Lewis E. Foster, President of GRS.

GRS was incorporated January 23, 1986, and began operations April l, 1986. GRS cleans and repairs railcars; it has no other business. In 1991, 72 percent of that business was for shippers, lease companies, and other non-railroad companies; 28 percent of the repair business was for railroads. GRS has two permanent shops (although it has used other, temporary locations) with an average of 79 employees, who are all directly or indirectly engaged in repairing railcars. GRS sets the hours of work, furnishes tools, equipment, and shop supplies and materials, and directs the sequence in which the work is performed. GRS is a privately held corporation which is not affiliated with a railroad.

GRS also performs maintenance of two steam locomotives used by the Norfolk Southern Railroad on a steam excursion train. This business involves nine employees who work in a locomotive shop owned by the railroad. According to a letter from Mr. Foster dated August 31, 1992, the railroad provides a Master Mechanic who "does not directly supervise the workers but acts much like a general manager and [employs] three (3) independent consultants who [provide] the special knowledge and direction to our employees." Mr. Foster states that the steam train operation is a seasonal operation and in 1991 constituted 5.6 percent of GRS's gross revenue.

Section l(a)(l) of the Railroad Retirement Act (RRA) (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 l(a) and l(b) of the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3231).

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

This conclusion leaves open, however, the question whether the persons who perform railcar cleaning and repair work for GRS under its arrangements with rail carriers should be considered to be employees of those railroads rather than of GRS. Section l(b) of the RRA and section l(d)(1) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section l(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 and rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *.

Section l(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (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.

GRS has permanent repair facilities at Suffolk, Virginia, and at Tampa, Florida; in addition, GRS has a number of temporary repair facilities. A sample contract with CSXT, a rail carrier, shows that at least some work is performed on the premises of CSXT. The evidence developed shows that with the exception of the steam locomotive repair work for the Norfolk Southern excursion train, GRS's work is performed under the directions of GRS staff and generally on GRS premises; accordingly, the control test in paragraph (A) is not met with regard to the car repair operations of GRS.

With regard to the locomotive repair operation, the control test also is not met. The Norfolk Southern's Master Mechanic and

consultants provide the special expertise needed by the nine individuals who work on the locomotives but do not appear to supervise them.

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 GRS 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.g.. Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968, at 341). GRS clearly has some investment in plant and equipment and may suffer a loss if expenses under its contracts exceed the agreed payment. Moreover, GRS is in the business of providing services to the rail industry as a whole and to other non-rail companies, and GRS is an independent business. Under these tests, GRS is an independent contractor; accordingly, its employees are not to be considered employees of the rail carriers with which GRS has contractual arrangements. Kelm, supra.

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

Glen L. Bower

V. M. Speakman, Jr.(Dissenting opinion attached)

Jerome F. Kever

Dissent of V. M. Speakman, Jr.
On the Employer Status Determination of
General Railway Services Incorporated

I agree that General Railway Services Incorporated (GRS) is not a covered railroad employer. However, I do not agree with the coverage decision with regard to the individuals on the GRS payroll, performing steam locomotive maintenance for Norfolk Southern Railroad.

This work is performed under the guidance of a Norfolk Southern master mechanic and its consultants, not under the supervision of GRS. It would be difficult to conclude that these employers are not subject to be in continuing control of Norfolk Southern.

It is not relevant that this work is a small part of the operation of GRS.

We feel that the individuals performing this locomotive maintenance are, in fact, employees of the Norfolk Southern, not GRS.

For the reasons stated I must respectfully dissent from the majority opinion on this issue.

_____
V. M. Speakman, Jr.

_____
Date