

## **Employer Status Determination Maher Terminals, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Maher Terminals, Inc. (MTI), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

MTI was incorporated June 2, 1949. It is a privately held company which is not affiliated with any railroad. It is a marine terminal operator with approximately 1,300 employees who are members of the International Longshoremen's Association and approximately 200 non-union, salaried employees. Eighteen employees (13 members of the International Longshoremen's Association and 5 non-union employees) perform railroad related service under a contract between MTI and Conrail pursuant to which MTI receives, loads or unloads, and delivers cargo containers to and from rail cars. MTI provides the labor and equipment to perform this function and receives an agreed rate per lift from Conrail. The percentage of operations which is non-railroad related is 98.8 percent. No employees of MTI work on property owned by a railroad and all MTI employees are supervised and directed by MTI only.

The definition of an employer contained in section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

The term "employer" shall include--

(i) any express company, sleeping car company, and carrier by railroad, subject to [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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad \* \* \*.

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

There is no evidence that MTI is an employer within the meaning of section 1(a)(1)(i) of the Railroad Retirement Act. Further, the

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available evidence indicates that it is neither controlled by nor under common control with any rail carrier. Therefore, MTI is not an employer within section 1(a)(1)(ii).

This conclusion leaves open, however, the question whether the persons who perform work for MTI under its arrangements with Conrail should be considered to be Conrail's employees rather than employees of MTI. Section 1(b) of the Railroad Retirement Act and section 1(d) 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)(1) 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 service 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 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 the way he performs such work.

The available evidence indicates that MTI's employees act under the sole authority and direction of MTI and that all of MTI's operations are under the direction of MTI management. MTI's employees therefore are not subject to the continuing authority of Conrail to supervise and direct the manner of rendition of service. Accordingly, the control test in paragraph (A) is not met.

Based on the facts in this case, the Board concludes that MTI is engaged in an independent business. Accordingly, the tests set

forth in paragraphs (B) and (C) are not relevant to employees of MTI. Under an Eighth Circuit decision consistently followed by the Board for more than forty years, paragraphs (B) and (C) do not

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apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Accordingly, it is the determination of the Board that service performed by employees of MTI under a contract with Conrail is not covered under the Acts.

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