Employer Status Determination
MGM Company, Inc.

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

MGM is an independently owned company which perform repairs to intermodal equipment. It has 111 employees who work at several locations. It has about 35 customers including The Atchison, Topeka and Santa Fe Railway Company (ATSF).

MGM repairs intermodal equipment, including semi-trailers, containers, and chassis; it also sells and repairs trailer tires. MGM began providing these services to ATSF in 1986 on a bid basis. MGM's customers give their work requests to the manager or appropriate shift foreman who then assigns the work to MGM's employees. MGM derived less than 10 percent of its revenues from ATSF during the period 1986-1990. For 1991-1994 MGM derived its revenues as follows.

Year	ATSF Business	Other Railroad Business	Non-railroad Business
1994	46%	13%	41%
1993	63%	1%	36%
1992	60%	1%	39%
1991	51%	1%	48%.

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 Subchapter I of Chapter 105 of Title 49;
>
> (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 * * *.

Sections 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).

MGM is not a carrier by rail. There is no evidence that it is controlled by a carrier or by individuals who control a carrier. Rather, the available evidence indicates that it is not under common ownership with any rail carrier. Therefore, MGM is not a covered employer under the Acts.

This conclusion leaves open, however, the question of whether the persons who perform work for MGM under its arrangement with ATSF should be considered to be employees of those ATSF rather than of MGM. 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 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 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 definition 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 in the way he performs such work.

The employees of MGM work at the direction of MGM supervisory personnel, do not work alongside ATSF employees, and are not trained or paid by ATSF. Accordingly, the control test in paragraph (A) is not met. The definitions set forth under paragraphs (B) and (C), which are broader than that contained in paragraph (A), do not apply to employees of independent contractors performing services for a railroad if the 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). This Eighth Circuit decision has been consistently followed by the Board for over forty years.

Thus, under Kelm the question remaining to be answered is whether MGM 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.

It is apparent that MGM is independently capitalized, and is engaged in a recognized trade or business; accordingly, it is the opinion of the Board that MGM is an independent business.

Because MGM engages in an independent business Kelm would prevent applying paragraphs (B) and C) of the definition of covered employee to this case. Accordingly, it is the determination of the Board that service performed by employees of MGM is not covered under the Acts.

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