

Employer Status Determination Transportation Certification Services, Inc. (TCS)

This is the decision of the Railroad Retirement Board regarding the status of Transportation Certification Services, Inc. (TCS), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

TCS provides training and other services to the rail industry and to other, non-rail, companies. Training services provided include locomotive engineer certification (centralized paperwork management only); engineer, trainman, and yardman training, hazardous materials operating rules training, etc. TCS also offers orientation to railroad operations; a derailment analysis and prevention course; signal and communication consulting; human resources consulting; and representation in connection with labor relations and legal issues. It also has provided consultant services for the aviation industry and the film industry. TCS is a privately held corporation which is not affiliated with a railroad. It has four employees and occasionally uses outside independent contractors.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(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).

TCS clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. Therefore, TCS is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for TCS under its arrangements with rail carriers should be considered to be employees of those railroads

rather than of TCS. 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 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 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 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 evidence submitted shows that TCS's work consists of the provision of many different consultant services for many different clients and that the service is performed under the direction of TCS; accordingly, the control test in paragraph (A) is not met. Moreover under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) do not 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).

Thus, under Kelm, the question remaining to be answered is whether TCS 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; see e.g. Aparacor, Inc. v. United States, 556 F. 2d 1004, 1012 (Ct. Cl., 1977); and whether the contractor engages in a recognized trade; see e.g. Lanigan Storage & Van Co. v. United States, 389 F. 2d 337, 341 (6th Cir., 1968). In the instant case, where the contractor contracts with many companies (there are over 30 railroads listed on TCS's sample list of clients) to provide a variety a recognized consultant services such as training and legal representation; accordingly, it is the opinion of the Board that TCS is an independent business.

Because TCS is an independent contractor, TCS is not a covered employer within the meaning of paragraphs (B) and (C). Accordingly, it is the determination of the Board that service performed by employees of TCS is not covered under the Acts.

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