EMPLOYER STATUS DETERMINATION

Linda Drunsic D/B/A/ Battenkill Business Services

This is the determination of the Railroad Retirement Board concerning the status of Linda Drunsic D/B/A/ Battenkill Business Services (BBS) as an employer under the Railroad Retirement Act (45 U.S.C. sec. 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. sec. 351 et seq.) (RUIA).

BBS performed payroll and tax services for the Nashville & Eastern Railroad Corporation (N & E), the Tenneken railroad Company, Inc. (TENN) and the West Tennessee Railroad Corporation (WTRC). Ms. Linda Drunsic was the owner and sole employee of BBS. Effective January 1995, Ms. Drunsic has ceased operations as BBS and has assumed a full time position with a bank. The payroll and tax records were maintained and the work was performed at the offices of Hohorst-Drunsic Transportation Company (HDTC). Since January 1995, the payroll and tax matters have been handled by employees of the various railroads. Ms. Drunsic is shown as an administrative assistant to the President and Chief Operating Officer of the N & E, TENN and the WTRC. The President of those railroads is her husband, Mr. William J. Drunsic.

BBS was started in 1986 and had several clients besides the railroads. However, for several years prior to January 1995 it only provided service for the railroads. During that period BBS did not have a separate telephone listing nor did it advertise. Ms. Drunsic stated that advertising was done by word of mouth. Ms. Drunsic spent about 16-25 hours a month on her work for the railroads. She was paid a total of $5733.84 in 1991 and $5,626.82 in 1992. She was paid for the work she performed after she submitted a bill like any other vendor. Ms. Drunsic also served as a director of the N&E, as the designee, of her husband and was paid $1500 in 1992.

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;
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> (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.

BBS clearly is not a carrier by rail. Further, the available evidence indicates that it is neither controlled by nor under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. There is no evidence that BBS is controlled by any of the carriers for which it performs services unless the Board were to engage in a presumption that such control is established by the fact that Ms. Drunsic is married to the President and Chief Operating Officer of the railroads in question. The Board will not engage in this presumption. Although Ms. Drunsic's husband owns 25.5% of the stock of TENN and 35.1% of the stock of WTRC and under the attribution rules of the Internal Revenue Code(IRC) (§318 of the IRC) these holdings would be attributed to Ms. Drunsic, the level of stock ownership is not sufficient to establish Ms. Drunsic's ownership or control of these railroads. See 20 CFR 202.4. Therefore, BBS would not be considered to have been under common control with a carrier and would not be a covered employer under the Acts.

This conclusion leaves open, however, the question whether Ms. Drunsic, when performing services for the railroads, should be considered to have been an employee of those railroads. 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 in to the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and
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> (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 in the way he performs such work.

Based on the evidence before it, the Board finds that Ms. Drunsic was not subject to control, supervision, and direction from the railroads as to the manner of performance of her work. Consequently, the control test of paragraph (A) is not met.

The tests set forth under paragraphs (B) and (C) 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. In practice, the Board in applying paragraphs (B) and (C) has followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953), and has not used paragraphs (B) and (C) to cover employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts.

The first question to be answered therefore is whether BBS itself may be considered to have been a truly 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 an 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.

The record establishes BBS was in the business of providing tax and payroll services to customers other than the railroads. Although some evidence points to a close relationship between the railroads and BBS, it is the judgment of the Board that BBS was an independent business not formed primarily to avoid coverage under the RRA, RUIA, and the Railroad Retirement Tax Act. Accordingly, under Kelm the Board finds the employee of BBS not to have been an employee of the railroads under section 1(d)(1)(b) or section 1(d)(1)(c) of the RRA.

Based on the above discussion, the Board finds BBS not to be a covered employer under the RRA and RUIA and also finds that the employee of BBS, Ms. Linda Drunsic, was not a statutory employee of any railroad for which she performed services under control.

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