

Employer Status Determination

Bankhead Enterprises, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Bankhead Enterprises, Inc. (BEI) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

BEI was formed by a merger on December 22, 1986 of the following companies: 1) Kehely & Company, Inc., 2) Bankhead Asphalt Paving, Inc., 3) All South Supply Company, Inc., 4) Bankhead Railway Welding, Inc., 5) Bankhead Systems and Controls, Inc., and 6) Railtrack Services, Inc.. According to BEI all BEI stock is owned by Glen Taylor.

The business operations of BEI may be generally divided into railroad and non-railroad concerns. The non-railroad operations are conducted by Bankhead Welding Service (general welding), Bankhead Transportation Equipment (automobile carrier trailer manufacture), Bankhead Asphalt Paving (street and parking lot paving), and Bankhead Asphalt Trucking (construction material delivery). BEI had four divisions that have performed, at least in part, or are performing work for a carrier. 1) Bankhead Railway Services, 2) Railtrack Services, 3) Bankhead Maintenance Company, and 4) Bankhead Railway Welding. BEI's principle business is welding and asphalt paving.

Bankhead Railway Services

Bankhead Railway Services, Inc. (BRS) for the period 1985 through 1990 had a contract to run the intermodal operations at the Norfolk Southern Railroad (NSR) Inman yard terminal. The intermodal operations included BRS personnel who performed crane operations, groundmen, truck drivers, mechanics, and clerical functions. A contract dated 9/13/85 between BRS and NSR includes the following:

- BRS will supply personnel, equipment, parts and supplies for the intermodal facility,
- BRS will provide all paperwork and administrative functions,
- BRS will conduct equipment inspections and track maintenance records,
- NSR does not have any authority to directly supervise BRS employees,
- The contract can be terminated by either party with 60 days notice,

Bankhead Enterprises, Inc.

- BRS agrees to furnish a detailed accounting of the expenses of operation verified by a Certified Public Accountant at the request of NSR,
- BRS shall require its employees to follow NSR rules while on NSR property,
- BRS agrees to cooperate with NSR for background checks of BRS employees, drug testing, or other investigation at the request of NSR,
- BRS will furnish certified urinalysis testing of BRS employees to NSR prior to their coming onto NSR property,
- NSR can bar any BRS employee from NSR property for various reasons,
- BRS is required to pay minimum wage of at least \$6.50 per hour,
- NSR will pay BRS \$60,000 per month with an extra \$8.47 for each lift in excess of 6,500,

The BRS employees involved in intermodal operations were found to be employees of NSR for purposes of the Railway Labor Act by the National Mediation Board in 1990 (17 NMB 153) due to the supervision by NSR employees. In-Terminal Services, a non-covered employer (Legal Opinion L-90-159) took over the intermodal operations in 1990.

BEI, through BRS, had a second contract to maintain the welding shop located at Inman Yards. The welding operations involved approximately 20 employees who would weld 80 foot lengths of rail into quarter mile lengths to be loaded on flat cars and transported to other NSR locations. The employees glued crossing track and switches together instead of just using bolts. They also did ballast cleaning. A contract dated January 30, 1984, between BEI and NSR includes the following:

- BEI will perform welding and mechanical maintenance work as ordered by NSR,
- BEI will provide all necessary equipment for welding,
- BEI will furnish (1) welder/foreman with truck and (4) welders with trucks for which [BEI] will pay an hourly rate and overtime rate,

Bankhead Enterprises, Inc.

- All overtime work must be authorized by NSR in advance,
- All days will be considered work days except for holidays observed by NSR,
- BEI employees must live in the Atlanta area,
- A time clock will be punched daily by BEI workers and verified by an NSR supervisor,
- Time cards and production reports will be furnished to NSR,
- NSR reserves the right to extend the scope of the work covered under the agreement and the contractor must perform the extra work,
- The contract can be terminated by either party with 90 days notice.

Railtrack Services

Railtrack Services, Inc. (RSI) was acquired by BEI through an asset purchase from the former operator in 1986. RSI hired the former employees of the contractor. RSI performs continuous track welding and rail cropping for Consolidated Rail Corporation (Conrail). RSI had approximately 44 employees working at the Harrisburg, Pennsylvania, plant. The contract between RSI and Conrail provides in part:

- Conrail can terminate the contract on 10 days notice,
- RSI shall work as an independent contractor and be subject to the general oversight of Conrail's Chief Engineer-Maintenance of Way,
- RSI is subject to audit by Conrail,
- RSI agrees to accept responsibility for payment of all employment taxes,
- Conrail has a pre-emptive right to purchase RSI's materials and equipment at fair market value in the event of a sale of RSI,
- For rail cropping services, Conrail agrees to pay actual labor costs plus 10% for overhead, 38% for fringe benefits, including extra pay for overtime,

Bankhead Enterprises, Inc.

- Conrail agrees to pay for repair parts, maintenance parts and expendable supplies,
- For rail welding, Conrail agrees to pay \$17.25 for welds made during the first 8 hours of a shift, and \$23.29 for welds made during overtime and weekends,
- For rail welding, RSI will submit invoices weekly, and Conrail will pay as promptly as possible,
- RSI will observe the same holiday schedule as Conrail,
- RSI's work is open to inspection by Conrail inspectors at all times,
- Conrail will lease work locations to RSI for \$1 per year, which are subject to inspection by Conrail inspectors at all times,
- RSI is to submit a daily production report signed by both the plant superintendent and Conrail's Chief Engineer-Maintenance of Way.

Invoices for rail cropping services show that daily time sheets signed by the RSI employees were submitted to Conrail. Invoices for supplies show that RSI bills Conrail for the cost of supplies plus ten percent for overhead.

Bankhead Maintenance Company

During the period 1985 through 1990, Bankhead Maintenance Company (BMC), operating as a division of BEI, had eight teams of two employees each assigned to eight different cities working on NSR property performing electric welding on track switches. This work was performed by a different contractor prior to BMC obtaining the contract. The contract dated December 15, 1981, between BMC and NSR included the following:

- BMC will perform electric welding on rails, frogs, railroad crossings, switch points, and other track components as designated by NSR's Division Engineer,
- BMC must submit daily reports to include crew identification, hours worked, overtime, work performed, truck odometer reading, signature of NSR representative, and any other information as requested by NSR,
- BMC must provide its own tools,

Bankhead Enterprises, Inc.

- NSR will provide a minimum of 50 hours of work per crew per week,
- NSR will pay an hourly wage and overtime wage,
- BMC will observe NSR holidays,
- NSR will reimburse BMC for welding rods, gasoline, and telephone calls,
- BMC will be responsible for meals and lodging, licensing, insurance, maintenance, supplies, and equipment,
- BMC will submit monthly invoices for each gang,
- The agreement is cancelable upon 120 days notice.

Bankhead Railway Welding

Bankhead Railway Welding (BRW), a division of BEI, also performed welding and other maintenance work under contract with NSR. BEI stated this work was previously performed by a different contractor. An attorney for BEI, stated in a letter dated September 17, 1993, that approximately 10 BEI employees would perform welding and other mechanical maintenance work on railroad support equipment at the NSR rail plant at Inman Yard. The letter stated the employees were working under the name Bankhead Welding Service, however, a review of the invoices for the period states the name as Bankhead Railway Welding. A review of BRW invoices indicates that BRW performed the following work for NSR:

<u>DATE</u>	<u>INVOICE</u>	<u>AMOUNT</u>	<u>DESCRIPTION</u>
11/26/86	1610	\$12,817.47	Bonding joint for the month of October.
11/14/86	1614	2,883.29	Repairs to a crossing in BEI's shop.
11/19/86	1616	26,674.91	Ballast cleaning for October, less cooks.
12/23/86	1647	8,514.68	Permitte welding for November.

Bankhead Enterprises, Inc.

12/23/86	1666	10,096.06	Loading , unloading , warehousing, and railroad supervision.
----------	------	-----------	--

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 [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 * * *.

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).

BEI clearly is not a carrier by rail. There is no evidence that BEI 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, BEI is not a covered employer under the Acts.

This conclusion leaves open, however, the question of whether the persons who perform work for BEI and its divisions under its arrangements with rail carriers should be considered to be employees of those railroads rather than of BEI. 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:

Bankhead Enterprises, Inc.

(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 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.

As noted earlier, the NLRB/NMB found the employees of BRS to be covered under the Railway Labor Act. The bargaining unit at issue in the NLRB/NMB proceedings included individuals performing intermodal freight handling at Gate 6 in the Inman Yard Terminal of the Norfolk Southern in Atlanta, Georgia, under contract with BEI's BRS. BRS characterized the employees working at Gate 6 as crane operators, ground men, truck drivers, equipment mechanics, clerks, shift supervisors, and division manager. All individuals performing these services were on BRS's payroll. Norfolk Southern supplied overhead cranes and all other equipment at this location, excluding pickup trucks used to tow truck trailers on and off flat cars. Work was assigned by BRS's five shift supervisors on site without reference to BRS headquarters. Individuals working under the contract were required to comply with Norfolk Southern's rules.

Norfolk Southern (NSR) refutes the NLRB/NMB finding and points out that pursuant to the contract referenced above BRS agreed to furnish various vehicles and equipment; to perform loading and unloading of containers and trailers; to under take certain equipment inspection and repair; and to perform all necessary paperwork and administrative functions.

NSR denies the statement by BRS to the NMB that the railroad had any control over the rate of pay of the individuals performing service under the contract, stating that BRS hired, trained and discharged the individuals providing the service under the contract, and set the individuals' wages and fringe benefits. NSR also denied that it could require Bankhead to discharge an

Bankhead Enterprises, Inc.

employee, stating that it could only exclude an unsatisfactory individual from NSR property. In addition, NSR states that its supervisory employees did not communicate with individuals performing the contract service, but rather directed the result of the service by informing the supervising Bankhead employee of defects to be rectified. Finally, NSR states that following termination of the contract with BRS, NSR contracted with In-Terminal Services for the operation of the Inman yard.¹

Based on the evidence before it, the NMB concluded that "Norfolk Southern exercises a significant degree of control over the BRS division of BEI." 17 NMB at 158. The evidence on some issues of fact is inconclusive. Both BRS and the railroad furnished tools and equipment. BRS had direct control of the manner of performance through first level supervision, while Norfolk retained a more remote control at a higher level. However, in the view of a majority of the Board, other evidence points strongly to the conclusion that the individuals were controlled by BRS. BRS controlled wages and hours and whether the individuals were assigned to the Inman Yard or another location. Moreover, that Norfolk terminated the contract in favor of another firm, previously determined not to be engaged in providing service covered under the Acts, indicates that BRS performed an independent trade, and that the contract was entered at arms length.

On these facts, in the opinion of a majority of the Board, case law supports a finding that the individuals in question were not railroad employees. In two cases decided in 1948, the Eighth Circuit Court of Appeals found that contractors who transferred shipments from damaged freight cars in railroad yards were not employees of the respective railroads under language of the Railroad Retirement Tax Act substantially identical to present paragraph (A). See Reynolds v. Northern Pacific Railway, 168 F. 2d 934; and Reynolds v. Chicago, St. Paul, Minneapolis & Omaha Railway, 168 F. 2d 943.

Moreover, courts deciding cases under the Federal Employers' Liability Act (FELA) have held individuals loading and unloading trucks in rail yards under contract to be employees of the contractor rather than the railroad. Because FELA defines the term "employee" in much the same way as the Railroad Retirement Act, an

¹ In-Terminal Services is a division of Mi-Jack Products Incorporated. In Legal Opinion L-90-159, the Deputy General Counsel determined that In-Terminal Services was not a covered employer, and that work performed by In-Terminal on railroad property was not covered employee service under the Acts.

Bankhead Enterprises, Inc.

employee, cases under FELA are useful in interpreting paragraph (A) of the Railroad Retirement Act. Thus, in Fawcett v. Missouri Pacific Railroad Company, 242 F. Supp. 675 (W.D. La. 1965), affirmed, 347 F. 2d 233 (5th Cir. 1965), an employee of a truck company affiliated with the railroad was killed on railroad property while loading truck trailers on a rail car. The court found that where no railroad employee was present when the injury occurred, and where the individual was not on the railroad payroll and was not subject to discharge by the railroad, the railroad did not control the employees of the truck company. Similarly, in Williams v. Chicago & Eastern Illinois Railroad, 300 N.E. 2d 766 (Ill. App., 1973), an individual driving a tractor used to pull truck trailers on and off rail cars was not the railroad's employee under the FELA where he did not work with or under supervision of the railroad's employees was hired and paid by the contracting firm, and used the contractor's tractor on the railroad's property. See also, Turpin v. Chicago, Burlington & Quincy Railroad Co., 403 S.W. 2d 233 (Mo, 1966), cert. den. 384 U.S. 1003 (1966); and Kelley v. Southern Pacific Co., 419 U.S. 318 (1974).

The terminal freight service performed by BRS in the Inman Yard is indistinguishable from that described in the Fawcett and Williams cases. Moreover, transfer of loaded containers is similar to transfer of the freight itself performed by the contractor in the Northern Pacific Railway and Chicago, St. Paul, Minneapolis & Omaha Railway cases under the Railroad Retirement Tax Act.

Accordingly, in the view of a majority of the Board, 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 BRS 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


Bankhead Enterprises, Inc.

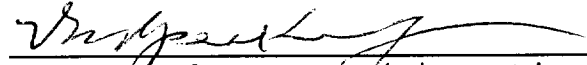
whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968, at 341.

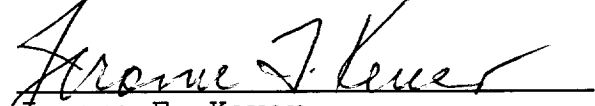
It is apparent that BRS is independently capitalized, and is engaged in a recognized trade or business; accordingly, it is the opinion of the Board that BRS is an independent business.

Because BRS 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 a majority of the Board that service performed by employees of BRS is not covered under the Acts.

The other contracts described in this decision do not differ significantly from the BRS contract analyzed above. Therefore, a majority of the Board finds that employees of BRS performing welding services under contract with NSR, employees of RSI performing welding services under contract with Conrail, and employees of BMC and BRW performing services for carriers under contracts are not covered under the Acts.


Glen L. Bower


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


Jerome F. Kever

Attachment

**DISSENT OF V. M. SPEAKMAN, JR.
EMPLOYER STATUS DETERMINATION
BANKHEAD ENTERPRISES, INC.**

Bankhead Enterprises, Inc. (BEI), formed in 1986, is a company that conducts both railroad and non-railroad business in several corporate divisions. The BEI employees in question, in the first part of this decision, performed intermodal service in the Norfolk Southern Railway (NSR) Inman Yard Terminal in Atlanta, Georgia under a contract between BEI Bankhead Railway Services (BRS) and NSR.

In a review by the National Labor Relations Board, BEI previously stated that the services performed by these employees constituted railroad service under the Railway Labor Act. The case was then referred to the National Mediation Board (NMB), who agreed in 1990. The NMB stated that NSR exercises a significant degree of control over the BRS division of BEI. This is compelling documentation.

The employees in question were on the BEI payroll, but worked at the NSR yard. BEI on-site supervisors assigned work exclusive of BEI headquarters. Employees were required to comply with NSR rules and were required by the contract to pay at least \$6.50 an hour to the employees. This is consistent with BEI's advising that the railroad had control over the rate of pay of the individuals performing service, and is contrary to the majority statement that BRS controlled wages.

It appears from the documentation that NSR, in fact, supervised BEI supervisors and other BEI employees through the railroad's own supervisors. The railroad exercised considerable control over the employees in question and furnished overhead cranes and all other equipment at the worksite. Work was performed at the railroad site at the supervision of the NSR supervisors and under NSR rules. As a result, I feel these individuals should be considered covered employees.

The employees performing service under BRS' second contract for welding services at the Inman Yard, also appeared to have been integrated into NSR operations and work was performed on railroad property. NSR also reserved the right to extend the scope of the work covered by the contract. As a result, I feel these individuals should also have been considered covered employees.

The third contract in question between Railtrack Services, Inc. (RSI), and Conrail seems to be a contract in name only. I note that the contract showed:

- RSI shall work as an independent contractor and be subject to the general oversight of Conrail's Chief Engineer - Maintenance of Way.
- For rail welding, Conrail agrees to pay \$17.25 for welds laid during the first eight hours of the shift and \$23.29 for welds laid during overtime and weekends.
- RSI's work is open to inspection by Conrail inspectors at all times.
- Conrail gives RSI a work location virtually free of charge, which is subject to inspection by Conrail inspectors at all times.

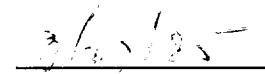
- Invoices for supplies show that RSI bills Conrail for the cost of supplies plus 10 percent of overhead. There appears to be very little opportunity for RSI to take a loss on the contract, based on the "cost plus" aspects of the contract.

The fourth contract between Bankhead Maintenance Company (BMC) and NSR was to perform electric welding on track switches. These employees also appear to be, in reality, under the control of NSR and thus covered.

The fifth contract between Bankhead Railway Welding (BRW) and NSR has too little information available for me to determine whether coverage should be applied.

Finally, I disagree with the majority's statement that the Terminal Freight Service performed by BRS at the Inman Yard is indistinguishable from that described in the Fawcett and Williams cases. I find that there was significant degree of supervision in the current cases and the tasks performed were not "identical."


V. M. Speakman, Jr.


Date