

**EMPLOYER STATUS DETERMINATION
Tryban Rail Service, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Tryban Rail Service, Inc. (TRSI), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

TRSI is an independent company which provides rail maintenance, construction, and rehabilitation. TRSI has previously informed the Board that it has 10 full time employees and that 90 percent of its business derives from railroads. The balance is from repair of private railways. TRSI has a contract with Lake State Railway, a rail carrier employer, to provide all regular rail maintenance for the railroad. Under the terms of the contract TRSI is to provide 9 qualified maintenance of way personnel. Since TRSI has only 10 employees, we can conclude that a substantial portion of TRSI's business is with Lake State Railway.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (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 * * *.

Section 1(a) and 1(b) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231).

TRSI 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. Therefore, TRSI is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for TRSI under its arrangements with the Lake State should be considered to be employees of that railroad rather than of TRSI. 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:

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(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

(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 although with respect to the final outcome of the work Lake State exercises a significant degree of control over the services performed for it by TRSI employees, evidence does not establish that employees of TRSI are subject to control, supervision, and direction from State Lake as to the manner of performance of their work. Consequently, the control test of paragraph (A) is not met.

Under paragraphs (B) and (C) an individual is a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. When the Board has applied paragraphs (B) and (C), it has followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). Under Kelm paragraphs (B) and (C) are not used 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 TRSI itself may be considered to be 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 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

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trade; e.g. Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968), at 341.


The record establishes TRSI is in the business of providing rail maintenance, construction and rehabilitation to customers other than Lake State. Under the contract with Lake State TRSI is obligated "to provide all hand tools, power tools, automobiles, trucks, vehicles, trailers and all other devises in such quantity and with such capacities as necessary" and is "solely responsible for the maintenance, repair, transportation and licensing" of this equipment. The contract with Lake State also provides that the performance of service is

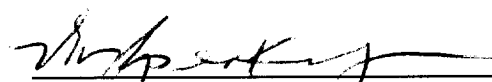
at the risk of [TRSI] in every respect, and [TRSI] shall be responsible for the Services until completed and accepted by [Lake State], except that title to the results of all Services covered by a request for partial or full payment will pass to [Lake State], or to such other authority as appropriate, upon payment therefor by [Lake State], free and clear of all liens, security interests or encumbrances by [TRSI] or TRSI's subcontractors.

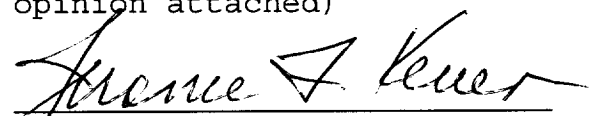
Based on its review of the facts in this case and the contract between TRSI and Lake State, it is the judgment of a majority of the Board that TRSI is an independent contractor.

Turning to the other prong of the Kelm test, no facts which would indicate that TRSI was formed primarily to avoid coverage under the RRA, RUIA, and the Railroad Retirement Tax Act. Accordingly, under Kelm the Board finds the employees of TRSI not to be employees of Lake State under section 1(d)(1)(b) or section 1(d)(1)(c) of the RRA.

Based on the above discussion, the Board finds TRSI not to be a covered employer under the RRA and RUIA and a majority of the Board finds that the employees of TRSI are not statutory employees of Lake State.

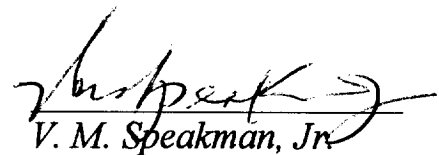

Glen L. Bower


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


Jerome F. Kever

**DISSENT OF V. M. SPEAKMAN, JR.
ON THE EMPLOYER STATUS DETERMINATION
TRYBAN RAIL SERVICES, INC.**

I disagree with the majority's decision in this case and believe that the persons who perform work for Tryban Rail Services, Inc., (TRSI) under its arrangements with Lake State Railway should be considered employees of that railroad, rather than of TRSI. Since 90% of TRSI's work is for Lake State Railway, it is hard to conclude it is an independent contractor. I consider the employees in question to be rendering, on the property used in Lake State's operations, personal services, the rendition of which are integrated into the railroad's operations.


V. M. Speakman, Jr.

8/14/95
Date