

Employer Status Determination James Edwards Railroad Service

This is the decision of the Railroad Retirement Board regarding the status of James Edwards Railroad Service (JERS) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

JERS is a sole proprietorship which cleans rail cars under contracts with the St. Louis Southwestern Railway (SLSR). It is paid on a per car basis and does all of its work on the property of the SLSR. This arrangement has been in effect since 1973. Mr. Edwards pays self-employment tax and withholds taxes from his employees' compensation. They receive holiday pay. They do not receive sick leave or insurance. The SLSR cannot select the employees who do the work. Mr. Edwards furnishes all supplies and equipment such as trucks, fork lifts, dust masks, brooms, and cleaning supplies; he is not reimbursed for these expenditures. He pays for workers' compensation and business liability, property damage, and automobile insurance. He states that he controls and directs the employees in the performance of their work.

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 *

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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).

JERS 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, JERS is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for JERS under its arrangement with SLSR should be considered to be employees of SLSR rather than of JERS. 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 as to the way he performs such work.

The evidence submitted shows that JERS's work is performed under the direction of Mr. Edwards; accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and 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. However, under an Eighth Circuit decision consistently followed by the Board, these tests 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 JERS 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. While these may be rather close questions in cases such as this one, where the contractor performs a service for only one railroad and performs that service on the premises of the railroad, it is apparent that JERS is an established business engaging in a recognized trade or business; accordingly, it is the opinion of the Board that JERS is an independent business.

Accordingly, it is the determination of the Board that service performed by employees of JERS is not covered under the Acts.

Glen L. Bower

V.M. Speakman, Jr.

Jerome F. Kever

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C. 2918-95
JERS.COV

TO: Robert E. Bergeron
Assistant to the Management Member

FROM: Catherine C. Cook
General Counsel

SUBJECT: Employer Status
James Edwards Railroad Service

In reply to your inquiry of February 2, 1996, James Edwards Railroad Service provides service for the St. Louis Southwestern Railway only.

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5 February 1996

Steve -

My records are not complete on this case. Apparently a couple of weeks ago I provided you answers to questions regarding James Edwards Railroad Service.

The original proposed decision is clear in stating that James Edwards Railroad Service provides services for the St. Louis Southwestern Railway only. I don't know what the subsequent information from the bureau of law mentioned by Bergeron is, but if it is the answers referred to above, those also stated that the services were provided for the railroad only.

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