EMPLOYER STATUS DETERMINATION
Softek Contractual Services, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Softek Contractual Services, Inc. (SCSI) 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).

SCSI began providing services to the Escanaba & Lake Superior Railroad (E&LS) in January 1993. SCSI was incorporated in January 1993 as a privately held corporation. Its sole stockholder and Chief Executive Officer is Mr. Gary R. Micheau. SCSI employees are laborers who provide cleaning, welding, sand blasting, painting and mechanical repair for the E&LS. SCSI does not provide service to any other railroad carrier. It does offer some computer related services to the general public and provides computer services and technicians to the Michigan Law Enforcement Network.

In addition to the services shown above, SCSI employees perform service for the E&LS pursuant to a contract between the E&LS and General Electric Railcar Services to repair and refurbish rail cars.

The maintenance and railcar repair work is performed by SCSI on the property of the E&LS. The E&LS provides the facilities, equipment (overhead cranes, car movers, welding machines, scaffolding and other parts needed to perform mechanical maintenance), and supplies (welding rod, blast and paint) used by SCSI personnel. SCSI provides basic tools and safety equipment, however, a review of SCSI billings shows that the E&LS has reimbursed the SCSI for the safety eyeware used by the SCSI employees.

A review of a billing invoice dated December 9, 1993, also shows that approximately 73 SCSI employees were providing services to the E&LS. SCSI derives approximately 75% of its revenues from its contract with the E&LS. There is no written contract between SCSI and E&LS. SCSI is paid on a cost plus fee basis. E&LS pays all employees' wages, FICA, medicare, federal, and state taxes plus pays a service fee of 5% of the total gross payroll to SCSI. In addition, SCSI is reimbursed for workers' compensation insurance premiums, payroll taxes, accident fund of Michigan payments, state unemployment insurance taxes,safety eyeware used by SCSI employees, equipment rental charges, and printing charges.

E&LS employees inspect and have final approval on all railcar repair work performed by SCSI. E&LS employees inspect and approve all welding and mechanical railcar repairs performed by SCSI. An E&LS employee repairs and services the welding equipment used by SCSI employees. Finally, an E&LS employee places orders for and distributes parts to SCSI employees.

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.

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

This conclusion leaves open, however, the question whether the persons who perform work for SCSI under its arrangements with the E&LS should be considered to be employees of that railroad rather than of SCSI. 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 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 E&LS exercises a significant degree of control over the services performed for it by SCSI employees, there is not sufficient evidence to establish that employees of SCSI are subject to control, supervision, and direction from E&LS as to the manner of performance of their 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 SCSI itself may be considered to be 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 SCSI was initially in the business of providing computer hardware, software, and computer support activities to customers other than E&LS. However, in January 1993, SCSI also undertook to provide by contract certain other services for the E&LS not related in any way to SCSI's original business. With regard to these services provided by SCSI to the E&LS beginning in January 1993, a majority of the Board, the Management Member dissenting, finds that SCSI is not truly an independent contractor, and accordingly, that the Kelm decision does not apply. The majority of the Board bases this decision on the facts
described below. First, SCSI was not in the business of providing the types of services at issue here prior to its contract with the E&LS. Along with work that it undertook, SCSI also acquired many of the same employees who performed service for the railroad as employees of another company. SCSI has very little investment in connection with the services it provides for the E&LS. The maintenance and railcar repair work is performed by SCSI on the property of the E&LS. The E&LS provides the facilities, equipment (overhead cranes, car movers, welding machines, scaffolding and other parts needed to perform mechanical maintenance), and supplies (welding rod, blast and paint) used by SCSI personnel. SCSI provides basic tools and safety equipment, however, a review of SCSI billings shows that the E&LS has reimbursed the SCSI for the safety eyeware used by the SCSI employees.

A majority of the Board, the Management Member dissenting, also finds it significant that although SCSI derives approximately 75% of its revenues from its contract with the E&LS, there is no written contract between SCSI and E&LS. Finally, there is no risk of loss for SCSI in connection with the services it provides for E&LS. SCSI is paid on a cost plus fee basis. E&LS pays all employees' wages, FICA, medicare, federal, and state taxes plus pays a service fee of 5% of the total gross payroll to SCSI. In addition, SCSI is reimbursed for workers' compensation insurance premiums, payroll taxes, accident fund of Michigan payments,

state unemployment insurance taxes,safety eyeware used by SCSI employees, equipment rental charges, and printing charges.

Since a majority of the Board has determined that Kelm would not preclude a finding of employee status under either section 1(d)(1)(B) or 1(d)(1)(C) of the Railroad Retirement Act, the Board must now determine whether the individuals in question meet either of those definitions. The evidence of record shows the individuals provided by SCSI perform personal services for E&LS. The evidence also establishes that the individuals are integrated into the operations of the E&LS. Accordingly, in the opinion of a majority of the Board, the individuals furnished by SCSI to the E&LS are employees of the E&LS and their service is creditable as employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts pursuant to sections 1(d)(1)(C) and 1(e) of those Acts, respectively.

Softek Contractual Services, Inc.

Based on the above discussion, the Board finds SCSI not to be a covered employer under the RRA and RUIA but finds that the employees of SCSI performing services for E&LS are statutory employees of that railroad.

__ Glen L. Bower

__ V. M. Speakman, Jr.

__ Jerome F. Kever ***(Dissenting Opinion Attached)***

Attachment

DISSENT OF THE
MANAGEMENT MEMBER
Softek Contractual Services, Inc.

I differ from the majority vote in their finding that Softek contractual Services, Inc. (SCSI) is not an independent contractor and consequently that Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953) does not apply. The key factors that the majority based their decision on is that: 1) SCSI was not performing a similar type of business prior to contracting to do rail car repair for the Escanaba & Lake Superior Railroad (E&LS) and that SCSI only performs these types of services for E&LS; 2) that SCSI acquired the necessary personnel to carry out the contract from a prior company doing business with E&LS; 3) the employees of SCSI perform the work on E&LS's property using E&LS's equipment; and 4) there is no written contract between the parties and SCSI is paid on a cost-plus basis.

The first two factors should not weigh heavily in finding SCSI *not* to be an independent contractor. First, there is no requirement that an independent contractor must perform work for more than one client. Secondly, hiring trained employees from a previous company performing similar work is good business sense and should not be viewed as diminishing the independent nature of the resulting business. Based on the current record under review, I find SCSI to be an independent contractor; and, by application of the Kelm decision, SCSI's employees are *not* covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Jerome F. Kever