EMPLOYER STATUS DETERMINATION
Georgetown Rail Equipment Company

This is the decision of the Railroad Retirement Board regarding the status of Georgetown Rail Equipment Company (Rail Equipment) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Rail Equipment was incorporated March 23, 1993, to own and operate special self-unloading railroad equipment which is rented to Class I and short line railroads. Rail Equipment was spun off from Georgetown Railroad Company, a covered rail carrier employer under the Acts (BA No. 2845). The stock of Rail Equipment is entirely owned by Mr. Edwin deS. Snead. Mr. deS. Snead's brother owns Georgetown Railroad. Rail Equipment has performed track and roadbed repair for the Burlington Northern Railroad (BA No. 1621) and the Union Pacific Railroad (BA No. 1715) and supplies self-unloading equipment to Georgetown Railroad. It has also transported iron ore for River Terminal Railroad (BA No. 4346). Rail Equipment employees, other than Mr. deS. Snead, perform their service on the property of rail carriers.

Section 1(a)(1) of the RRA defines the term "employer", insofar as is relevant here, as follows:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49, United States Code;
>
> (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 or facilities) in connection with the transportation of passengers or property by railroad * * *. [45 U.S.C. § 231(a)(1)(i) and (ii). See also P.L. 104-88, section 323, 109 Stat. 950, December 29, 1995.]

Section 1(a) of the RUIA defines "employer" in substantially the same way [45 U.S.C. 351(a); P.L. 104-88, section 324, 109 Stat. 950].

Rail Equipment does not conduct any rail carrier operations itself. It is therefore not a carrier employer under the RRA and the RUIA. Further, since the entire stock ownership of Rail

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Equipment is in the hands of one individual and that individual does not own or control any rail carrier employer, Rail Equipment is not under common control with a rail carrier employer[1]. Accordingly, the Board determines that Rail Equipment is not a carrier affiliate employer under the RRA and RUIA. Rail Equipment meets no other definition of a covered employer under the Acts. Rail Equipment is, therefore, not a covered employer.

This conclusion leaves open, however, the question whether the persons who perform track maintenance work for various rail carriers under Rail Equipment's contracts with those carriers should be considered to be employees of those railroads rather than of Rail Equipment. Section 1(b)(1) of the RRA and section 1(d) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the RRA provides that an individual is "in the service of an employer" when:

> (i)(A) he is subject go 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 of the RUIA contains a definition of employee service substantially identical to the one above.

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of

[1] The mere fact that Mr. deS. Snead's brother owns Georgetown Railroad is not sufficient to presume common control between the two entities.

the service-recipient not only with respect to the outcome of his work but also with respect to the way he performs such work. The evidence in this case indicates that this test is not met.

Specifically, Rail Equipment's business is to own and operate self-unloading railroad equipment which is rented to Class I and short line railroads. Rail Equipment provided a copy of one of its leases, dated August 22, 1995, to Burlington Northern Railroad Company. An Appendix to that lease identifies the equipment and the services to be provided. That Appendix provides in relevant part that:

> The above lease charge includes one equipment operator for this equipment. In the event additional unloading personnel are necessary and not specified in this lease, the Lessee will be charged for the additional personnel at the rate of $_____ per day. (The amount of the charge was blacked out in the copy provided.)

Thus, pursuant to the lease, Rail Equipment provides one or more of its employees to operate the leased equipment. Rail Equipment includes its employees, i.e., operating technicians, in all of its leases. Rail Equipment employees work on the property of the rail carriers which lease its equipment and take instructions from carrier employees as to where to pick up ties, place ballast, stockpile aggregate, etc. The carrier's employees do not, however, supervise the maintenance or the operation of the leased equipment. Rail Equipment supervisors provide bi-monthly supervision by visiting the lessee's premises. No Rail Equipment employees work exclusively for one railroad at any time during their employment or during the duration of any single Rail Equipment service contract. In summary, the record indicates that when Rail Equipment leases equipment to various rail carriers, it also supplies its own employees to operate and maintain that equipment. The Board finds that Rail Equipment retains the right to direct the manner in which its employees render their services to operate the equipment which Railroad Equipment leases to rail carriers. Accordingly, the control test in paragraph (A) is not met.

The tests set forth under paragraphs (B) and (C) do not apply to employees of independent contractors performing services for a railroad where such 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 consistently been followed by the Board.

Thus, under Kelm, the question remaining to be answered is whether Rail Equipment is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability to a company to withhold employment and income taxes under the Internal Revenue Code. In these cases, the courts have noted such factors as whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004, 1012 (Ct. Cl. 1977); and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337, 342 (6th Cir. 1968). The evidence shows that Rail Equipment provides its services to the rail industry as a whole, and that its revenue derives from a number of different customers. Rail Equipment consequently meets the test for independent contractor status, and individuals performing service under its contracts are employees of Rail Equipment rather than employees of the various rail carriers to which the company leases equipment. Kelm, supra.

Accordingly, it is the determination of the Board that service performed by employees of Rail Equipment under contract with Burlington Northern, Union Pacific, and other rail carriers is not covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

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