**Employer Status Determination**
**Eagle Systems, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Eagle Systems, Inc. (ESI) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

ESI is a privately held company which holds itself out as a general commodity carrier providing general and contract services to the general public. ESI also provides intermodal terminal management at its trucking locations. ESI currently has 425 employees and first began providing services December 24, 1979. ESI is independent of any railroad, and no railroad owns any part of ESI. All of the work ESI does for railroads is done in a highly competitive environment through a bid system. ESI serves approximately 400 customers other than railroads. Approximately 65% of ESI's revenue is derived from its work for railroads.

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 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 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).

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

This conclusion leaves open, however, the question whether the persons who perform work for ESI under its arrangements with any

railroads should be considered to be employees of those railroad rather than of ESI. 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 ESI's work is performed under the direction of its own supervisors; accordingly, the control test in paragraph (A) is not met. Moreover, under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) do not apply to employees of an independent contractor performing services for a railroad where such contractor is 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 ESI 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 where

the contractor performs a service for only one railroad and performs that service on the premises of the railroad, in this case it is apparent that ESI is an established business engaging in a recognized trade or business with at lease four railroads, and in fact, companies other than railroads; accordingly, it is the opinion of the Board that ESI is an independent business.

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

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