

**Employer Status Determination
Drummac, Inc.**

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

Drummac is a privately held company which began operations on January 1, 1993, and has approximately 120 full-time and part-time employees. Drummac provides cleaning, maintenance, and routine inspection services. While currently Drummac provides these services for Virginia Rail and New England Rail, and approximately 75% of the work performed by Drummac is in connection with contracts between Drummac and Amtrak, Drummac is pursuing contracts to provide these services with air and sea transportation companies. No railroad has a financial interest in Drummac, and none of the owners of Drummac have any ownership interest in a rail carrier.

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).

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

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This conclusion leaves open, however, the second question submitted for decision by the Board, that is, whether the persons who perform work for Drummac under its arrangements with Amtrak should be considered to be employees of that railroad rather than of Drummac. 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 Drummac'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 Drummac 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

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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. The facts in this case show that Drummac is an established business engaging in a recognized trade or business with several railroads, and companies other than railroads as well. Accordingly, it is the opinion of the Board that Drummac is an independent business.

It is the determination of the Board that service performed by employees of Drummac, Inc. is not covered under the Acts.

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