Employer Status Determination
Contract Rail Service Company

This is the decision of the Railroad Retirement Board regarding the status of Contract Rail Service Company (CRS) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.
CRS is a privately held company which builds concrete pads, environmental retention ponds and related appurtances. CRS is involved in water, sewer and storm sewer construction, and road building. CRS also provides plant and equipment maintenance, snow plowing, fabrication, commercial painting and temporary help. CRS has 12-15 employees yearly. Currently it has one employee working on the property of Lake State Railway Company (LSR). The CRS employee first began providing a service to LSR on November 23, 1995. The employee receives work orders from an LSR dispatcher. Thereafter CRS supervises, instructs and controls its employee. The CRS employee must comply with Federal Railroad Administration requirements with regard to safety and work rules. The CRS employee is not integrated into the operations of LSR and most tools and materials are provided by CRS. CRS is paid a daily rate for the employee providing temporary services to LSR. Approximately 0-15% of CRS's revenue is derived its work for LSR.

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;
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> (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).

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

This conclusion leaves open, however, the question whether the persons who perform work for CRS under its arrangement with LSR should be considered to be employees of LSR rather than of CRS. 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 CRS'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 CRS 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 CRS is an established business engaging in a recognized trade or business with many other companies other than LSR; accordingly, it is the opinion of the Board that CRS is an independent business.

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

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