Employer Status Determination
Pacific Rail Services

This is the decision of the Railroad Retirement Board regarding the status of Pacific Rail Services (PRS) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Information about PRS was obtained by the Board's Audit and Compliance Division (ACD) as the result of a compliance audit of the Burlington Northern Railroad (BN), a covered employer. During the audit ACD decided to review the coverage of employees of BN America (BNA). During the investigation of BNA's Customer Service Center (CSC) in Seattle, Washington, and the Seattle Hub Center (SHC) intermodal yard, ACD determined the employees of the two facilities were employees of PRS.

PRS is a joint venture between Mr. John J. Gray, an individual, and Stevedoring Services of America, a privately-owned company which operates marine terminal facilities along the west coast. PRS began as a joint venture in 1986, with Mr. Gray as the managing partner. PRS is engaged in the business of operating intermodal terminals, including the loading and unloading of intermodal trains and the operation and maintenance of yard facilities. PRS operates the CSC under a contract with Burlington Northern dated January 1, 1989. Under the same contract PRS also provides intermodal services such as container handling and trailer chassis supply at Burlington Northern hubs in Chicago, Portland, and Seattle. In 1993 PRS entered into a contract with AT&SF (a covered employer) to manage neutral chassis pools at intermodal facilities in Birmingham, Alabama and Memphis, Tennessee.

Investigation by the ACD showed that complete operation of the CSC was run by PRS. BN employees cannot hire or fire PRS employees. No BN employee supervises PRS employees; PRS has its own supervisor, Mr. Mark Davis, who stated that he works for Mr. Gray (the managing partner of the joint venture) and he coordinates the operation of the CSC with Burlington Northern. The CSC operates using a computer system and telephone system which is provided by Burlington Northern. PRS pays BN for use of the telephone system and then is reimbursed on a cost plus basis by BN. The computer system is maintained by PRS but is the property of BN.

In response to inquiries by ACD, PRS provided a copy of a National Mediation Board decision dated August 24, 1989, which held that PRS was not a carrier under the Railway Labor Act. The decision noted that while PRS performs service in connection with the transportation of freight for railroads, it is not owned or controlled by a railroad.

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:

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> (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).

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

This conclusion leaves open, however, the question whether the persons who perform work for PRS under its arrangement with BN should be considered to be employees of BN rather than of PRS. 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
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> (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 PRS'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 PRS 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. The evidence of record establishes that PRS is an established business engaging in a recognized trade or business with at least one other company other than BN; accordingly, it is the opinion of the Board that PRS is an independent business.

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

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