

**EMPLOYEE SERVICE DETERMINATION  
National Railroad Passenger Corporation (Amtrak)  
Data Processing Services Provided by  
Integrated Systems Solutions Corporation**

This is the determination of the Railroad Retirement Board concerning the question of whether certain individuals furnished by Integrated Systems Solutions Corporation (ISSC) should be considered to be employees of the National Railroad Passenger Corporation (BA No.8301) (Amtrak) under the definition of "employee" in 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). The employees involved perform data processing services for Amtrak that used to be performed by Amtrak employees. Information about ISSC's contract with Amtrak was obtained during a compliance audit of Amtrak by the Board's Division of Audit and Compliance.

ISSC is a wholly-owned subsidiary of the International Business Machines Corporation (IBM). ISSC was incorporated on March 19, 1991 and began operations on May 17, 1991. On April 1, 1994, ISSC entered into a Services Agreement with Amtrak to provide data processing services, voice and data network services, training of Amtrak personnel in information technology subjects and other services related to Amtrak's voice and data equipment. ISSC uses the services of two subcontractors in the performance of its contract with Amtrak: (1) Advantis, which is a partnership owned 70% by IBM and 30% by Sears, Roebuck and Company, and (2) OAO, Inc., an independent corporation formed in December 1971.

The Services Agreement between Amtrak and ISSC required ISSC and its two subcontractors to offer full-time employment to at least 65 Amtrak employees. A total of 113 Amtrak employees were affected by the outsourcing of work to ISSC. Amtrak employees who were not offered employment or who chose not to accept employment with ISSC were eligible for severance payments and benefits from Amtrak.

The Division of Audit and Compliance mailed questionnaires to 48 Amtrak employees affected by the outsourcing. Of the 26 employees who responded, fifteen accepted positions with ISSC, one remains employed by Amtrak, and ten left Amtrak employment. The work location of those who responded are as follows: four work at Amtrak's administrative offices in Washington, D.C.; six

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transferred to ISSC's facility in Boulder, Colorado; and four work at ISSC's facility in Manassas, Virginia. All fifteen former Amtrak employees who now work for ISSC or one of its subcontractors stated that all of their time is spent on Amtrak business. Four of the former Amtrak employees also indicated that they work in the same office that they worked in when they were employed by Amtrak.

Information provided by ISSC also indicated that former Amtrak employees are working only on Amtrak related projects. However, in the future, they will be assigned to work on other accounts for either part or all of their time. ISSC stated that it has 57 employees engaged in performing service for Amtrak, twenty-three of whom are former Amtrak employees.

An ISSC information brochure, entitled "Vision and Values: Winning Ways in a Changing World," indicates that ISSC has on its books more than 2,000 contracts with a cumulative value of more than \$15 billion. Another ISSC brochure, entitled "ISSC Solution Centers," states that ISSC has some 15,000 U.S. employees serving more than 3,000 customers. A description of ISSC in Moody's Industrial Manual states that ISSC offers information technology services that provide enterprise solutions including systems integration, consulting, business recovery services, voice and data networking, systems operations, and applications software development to both external customers and internal IBM customers in the United States.

Section 1(b)(1) of the RRA [45 U.S.C. §231(b)(1)] provides that the term "employee" means any individual in the service of one or more covered employers for compensation. Section 1(d)(1) provides that an individual is in the service of an employer if:

- (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

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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. [45 U.S.C. §231(d)(1)(i)].

Section 1(e) of the RUIA [45 U.S.C. §351(e)] contains essentially the same definition.

Information gathered in the audit of Amtrak indicates that Amtrak entered into a contract with ISSC for data processing services formerly performed by Amtrak employees. A number of former Amtrak employees are now employees of ISSC and perform work only for Amtrak. However, in the view of the majority, none of the information gathered indicates that Amtrak retains the right to direct how any ISSC employees perform their work. In fact, the information indicates that ISSC controls the manner in which it performs its services, since ISSC trained its own employees, and ISSC supervisors are solely responsible for assignment of work to ISSC employees, for determining its order, sequence and priority, and for ensuring that the work is performed in a satisfactory manner. In addition, former Amtrak employees who now work for ISSC will be assigned by ISSC to work on other accounts in the future. A majority of the Board therefore finds that the definition of employee in section 1(d)(1)(i)(A) of the RRA does not apply to ISSC employees performing services for Amtrak.

Turning to the definitions in section 1(d)(1)(i)(B) and (C), a majority of the Board notes that in making a determination of employee status under these two sections, it has followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953). Under Kelm, paragraphs (B) and (C) are not used to cover employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts.

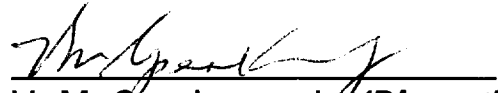
ISSC was established in 1991, three years before it entered into a contract with Amtrak. ISSC has hundreds of contracts in addition to its contract with Amtrak. ISSC is a subsidiary of IBM, which is a manufacturer of information processing equipment and systems. ISSC provides a range of information services that are compatible with the business conducted by its parent

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corporation. There is no indication in the record that ISSC was established to avoid coverage under the RRA and the RUIA. Accordingly, under Kelm, a majority of the Board finds that ISSC employees who perform work for Amtrak are not employees of Amtrak under section 1(d)(1)(i)(B) or (C) of the RRA.



Glen L. Bower



V. M. Speakman, Jr. (*Dissenting  
Opinion Attached*)




Jerome F. Keever

## Dissenting Opinion of the Labor Member

I hereby dissent from the opinion of the majority of the Board concerning the status of former Amtrak employees who now are on the payroll of Integrated Systems Solutions Corporation (ISSC). Prior to the time that they became employees of ISSC, the former Amtrak employees in this case performed data processing services for Amtrak. Although they are now on the payroll of ISSC, one hundred percent of the work that those employees continue to perform consists of data processing services for Amtrak, with much of it being done on Amtrak property. The railroad seniority of these employees was used in determining vacation and 401(k) vesting with ISSC. In fact, little has changed for many of these former Amtrak employees, e.g., work location, pay, duties and interaction with railroad employees. Questionnaires completed by former Amtrak employees indicate that they are assigned work and have their work reviewed by current Amtrak employees. In my view, the evidence establishes that the ISSC employees meet the definition of employee in section 1(d)(1)(i)(A) of the Railroad Retirement Act in that they are subject to supervision by Amtrak employees.

In addition, in connection with the status of ISSC employees under sections 1(d)(1)(i)(B) and (C) of the Railroad Retirement Act, I find that the majority's reliance on the decision in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953) is suspect, given the facts in this case. The railroad involved in the Kelm case had historically contracted for the services in question. That fact is in direct contrast to the situation in this case. In this case, little has been done to change the identity of the former Amtrak employees who now work for ISSC, while they in fact remain integrated into the operations of Amtrak. The assertion of ISSC that the duties and focus of these employees will change is simply not relevant to this decision, which should address the nature of their current services. In my view, the ISSC employees also meet the definition of employee found in section 1(d)(1)(i)(B) and (C) of the Act.

For these reasons, I respectfully dissent from the decision of the majority.

  
V. M. Speakman, Jr.