

EMPLOYER STATUS DETERMINATION
EJK Services, Inc.

This is the determination of the Railroad Retirement Board concerning the status of EJK Services, Inc. (EJK), as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.).

Information regarding EJK was provided by Laura M. Shriver of EJK. According to Ms. Shriver, EJK's five employees were first compensated May 4, 1996. Edward J. King is owner and president of EJK. The Elk River Railroad, Inc., an employer under the Acts (BA Number 2411), contracts with EJK for the operation of Elk River's rail enterprise. EJK has no other customers or clients. The ownership of Elk River and EJK are unrelated.

Since the Board concludes that the individuals performing services under the contract are employees of Elk River, the Board does not address the question of the coverage under the Acts of EJK.

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 Railroad Retirement Act 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 the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * *

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Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (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 the way he performs such work. The evidence submitted shows that EJK has taken over the entire operation of the railroad. It therefore cannot be said that the individuals performing the service are subject to the control of Elk River with respect to the performance of work.

The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are 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 EJK 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.

EJK appears to have no investment in its enterprise, but merely functions as an operator of Elk River, and does not provide services for any other company or individual. The Board therefore finds that EJK is not an independent contractor under Kelm, and that therefore the individuals working under the contract in question are covered under paragraphs (B) and (C). Accordingly, for the purposes of the Railroad Retirement Act and Railroad Unemployment Insurance Act, the employees of EJK are employees of Elk River.

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rendering professional or technical services and are integrated into the staff of the employer or are rendering, on the property used in the Elk River's operations, personal services which are integrated into Elk River's operations