DETERMINATION OF EMPLOYER STATUS AND EMPLOYEE SERVICE
Industrial Temps, Inc. -- Services Performed for Interstate Quality Services, Inc. d/b/a Interstate Reloads

This is the determination of the Railroad Retirement Board concerning the status of Industrial Temps, Inc. ("Industrial Temps") as an employer under 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 status of this company has not previously been considered.

Industrial Temps came to the attention of the Board as a result of information provided by Interstate Quality Services, Inc., doing business as Interstate Reloads, Inc. (Reloads). Reloads has been determined to be a covered carrier affiliate employer under the Acts, by reason of the warehouse services it performs for Iowa Interstate Railroad. See Interstate Quality Services, Inc. v. Railroad Retirement Board, 83 F.3d 1463 (D.C. Cir. 1996). These services were described in that opinion as loading, unloading and storing freight for shipment by trains or trucks. In connection with the determination regarding its status as an employer, Reloads has stated that Industrial Temps provides seven to nine individuals who perform warehouse services for Reloads' rail carrier affiliate. From information provided by Reloads, Reloads' entire work force is made up of temporary employees leased from Industrial Temps.

The evidence regarding Industrial Temps is that it is a privately held Illinois corporation incorporated on March 10, 1988. Industrial Temps is not affiliated through equity ownership or through common directors or corporate officers with any rail carrier. Industrial Temps states that it provides temporary employees to industry on a contract or "leased" basis. In recent correspondence with the agency (letter dated October 23, 1996, addressed to the Board's Deputy General Counsel), Harry Nissenson, President of Industrial Temps, stated that the corporation provides skilled and semi-skilled factory, shipping, receiving and labor temporary services. Mr. Nissenson indicated that since the company was incorporated, it has performed services for various clients, but that since January 1, 1993, Reloads has been its sole customer.

In response to an inquiry as to whether it holds itself out to the public as a provider of any goods and/or services, Mr. Nissenson stated that Industrial Temps "has attempted to obtain other clients through telemarketing and direct communication with potential and existing clients." Mr. Nissenson included with his letter lists of the clients of Industrial Temps for each year beginning with 1988

through 1992. These lists are quite lengthy and include a variety of names, including Citicorp Services, Comdisco, Metpath, Inc., Square "D", and Xerox (List with title "1988-1"); Alexian Bros. Med. Center, Kinkos Copies, and Zwick Construction ("1988-2"); American Banner Company, Marshall Fields & Company, and Toshiba America ("1992-2"). The Board notes that the list for 1988 includes "Interstate Reloads, Inc." as a client although Reloads was not incorporated until March 1989. A separate enclosure with Mr. Nissenson's letter which he stated represents a summary of the work performed for Reloads in comparison to the work performed for Industrial Temps' other clients since 1988 attributes $327,382.00, or 16.94%, of Industrial Temps' total sales for 1988 to Reloads.

Section 1(a)(1) of the Railroad Retirement Act (RRA) [45 U.S.C. § 231(a)(1)], insofar as relevant here, defines a covered employer as including rail carriers, and companies owned or controlled by or under common control with rail carriers which provide service in connection with railroad transportation. Section 1(a) and 1(b) of the RUIA [45 U.S.C. §§ 351(a) and (b)] contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (RRTA), (26 U.S.C. § 3231).

Industrial Temps is clearly not a carrier by rail. Further, there is no evidence that Industrial Temps is either owned by or under common ownership with any rail carrier or controlled by officers or directors who control a railroad. Industrial Temps therefore is not a covered rail carrier affiliate employer. As Industrial Temps meets no other definition of a covered employer under the Acts, it is therefore not a covered employer.

This conclusion leaves open, however, the question whether the persons who perform temporary labor for Reloads under contract between Reloads and Industrial Temps should be considered to be employees of Reloads rather than of Industrial Temps for purposes of the Acts administered by the Board. In this regard, section 1(b) of the RRA and section 1(d) of the RUIA 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 the rendition of which is integrated into the employer's operations; and
>
> (ii) he renders such service for compensation * * *. [45 U.S.C. §231(d)(1)].

Section 1(e) of the RUIA [45 U.S.C. §351(e)] 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 with respect to the way he performs such work. The decision of the United States Supreme Court in Nationwide Mutual Insurance Company v. Darden, 503 U.S. 318, 117 L.Ed. 2d 581 (1992), is helpful in addressing this question. The issue in that case was whether the definition of "employee" in the Employee Retirement Income Security Act of 1974 (ERISA) applied to an insurance agent. ERISA defined "employee" to mean "any individual employed by an employer." Unlike section 1 of the RRA, which contains a similar definition, ERISA did not contain further guidance regarding the meaning of "employee." The Supreme Court thus adopted the general common law of agency for determining who qualifies as an employee under ERISA:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired

> party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. 117 L. Ed. 2d at 589-590.

The test for employee status under paragraph (A) of the RRA is clearly analogous to that applied by the Court in Nationwide Mutual Insurance Company. Considering the evidence in this case in light of the factors set out by the Supreme Court in that case, a majority of the Board finds that the control test in paragraph (A) is not met.

The tests set forth in paragraphs (B) and (C) of section 1(d)(1)(i) of the RRA go beyond the test contained in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the operations of a covered employer 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 covered employer where such contractors are engaged in an independent trade or business and where the arrangement has not been made in order to avoid coverage under the RRA and RUIA. Kelm v. Chicago, St. Paul, Minneapolis, & Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). Industrial Temps is independently incorporated, and is in the business of supplying temporary employees to companies needing such service. A majority of the Board therefore finds that Industrial Temps is an independent contractor within the meaning of the Kelm decision and that its employees are not performing covered employee service for purposes of the Railroad Retirement and Railroad Unemployment Insurance Acts.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting)

Jerome F. Kever

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