

Employee Coverage Determination

DEC 18 1997

Environmental Contractors with CSX Transportation Company

This is the decision of the Railroad Retirement Board regarding the status of environmental contractors with CSX Transportation Company (CSXT) as employees under the Railroad Retirement and Railroad Unemployment Insurance Acts.

For the period 1991 through 1995, CSXT contracted with a total of twelve individuals to perform a variety of on-site environmental monitoring and testing functions to ensure compliance with Environmental Protection Agency and state rules for CSXT. None of the contractors is currently affiliated with CSXT in any capacity. They had responsibility for maintaining waste water treatment plants and their duties included monitoring daily flow and recording specific data regarding the operation of the environmental facility at which they worked, and the handling and disposal of hazardous and non-hazardous waste. These duties are now performed by Waste Water Engineering, Inc. The contractors were paid an hourly rate based on monthly or semi-weekly billing, and were reimbursed for expenses. The services were performed on the premises of CSXT. CSXT personnel met with the contractors weekly or monthly to insure contract performance and compliance with safety standards. The individuals provided CSXT with status reports on a daily, weekly, or as needed basis. They used CSXT office space. They did not perform similar duties for clients other than CSXT. CSXT did not provide the Board with copies of the contracts.

Section 1(b) of the Railroad Retirement Act (RRA) 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 the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

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

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also the way he performs such work. In view of the remainder of this decision, it is not necessary for the Board to decide whether the individuals qualify as employees under paragraph (A).

The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual to be 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).

CSXT contends that these individuals were engaged in an independent trade or business. In resolving this contention, it may be considered that 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. In this case, the individuals in question did not have any investment in facilities or opportunity for profit or loss; did not carry their own liability insurance; did not engage in a recognized trade; and did not provide similar services to other customers (although CSXT states that they were permitted to do so). It is therefore the decision of a majority of the Board that Kelm does not apply in this case.

The Board finds that the environmental monitoring and testing functions performed by the individuals in this case required specialized training as well as knowledge of applicable regulations and were therefore "technical services" within the meaning of section 1(d)(1)(i)(B) of the RRA. The Board finds further that the facts indicate that the individuals who performed those services were integrated into CSXT's staff. Specifically, the individuals concerned generally worked on CSXT premises during regular working hours. They worked exclusively for CSXT, used CSXT office space, and made required reports to CSXT. In addition, CSXT provided the individuals with supplies and reimbursed them for expenses. A majority of the Board thus finds that the individuals were employees of CSXT within the meaning of section 1(d)(1)(i)(B) of the RRA.

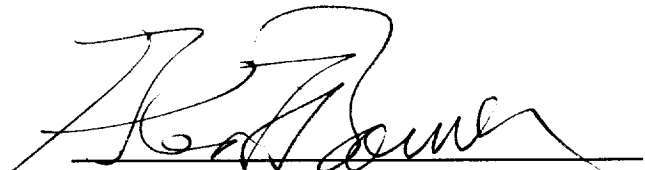
A majority of the Board finds further that the services were "personal" within the meaning of section 1(d)(1)(i)(C) of the RRA in that the individuals themselves, as opposed to a corporation or some other separate entity such as a partnership, were responsible for accomplishing the

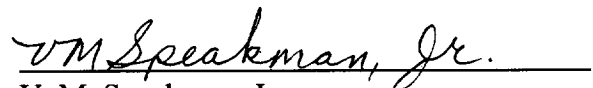
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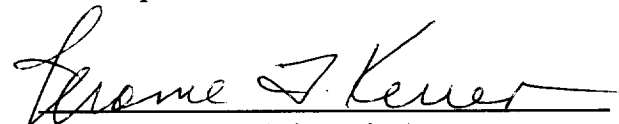
services. Since the Board has already found that the individuals were integrated into CSXT's staff, the Board finds that the individuals in this case were employees under section 1(d)(1)(i)(C) of the RRA.

However, pursuant to section 211.16 of the Board's regulations the period of time within which compensation may be reported is limited to four years after the date on which such compensation was required to be reported to the Board. Consequently, compensation paid for service performed in 1991 and 1992 may not now be credited under the Acts.

Accordingly, it is the determination of a majority of the Board, the Management Member dissenting, that service performed by the environmental contractors with CSXT is covered under the Acts for the periods 1993 through 1995.


Glen L. Bower


V. M. Speakman, Jr.


Jerome F. Kever (Dissenting)