

SEP 20 2004

**Employer Status Determination
Roadway Worker Training, Inc.**

This is the decision of the Railroad Retirement Board regarding the status of Roadway Worker Training, Inc.¹ (RWT), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Ms. Sally K. Kircher, counsel for RWT.

RWT is incorporated and began operations November 2, 2001. It has five employees, and has engaged the services of approximately 50 independent contractors. RWT believes that two of these individuals were previously employees of Union Pacific Railroad, which is a customer of RWT. Ms. Kircher advised that RWT provides services to the entire railroad industry:

* * * including Class One Railroads, Regionals and Shortlines, Transits, Consultants, Contractors and Suppliers. Some of the services offered by RWT include Training Program Development, Safety and Training Audits, Railroad New Hire Training, Dispatcher Training, Operating Rules Training, Conductor Training, Remote Control Locomotive Operator Training, Operations Assessments, On-Track Worker Training (49 CFR 214), Physical Plant Inspections, Data Base Review and Analysis, Contractor and Supplier Technical Safety & Compliance and Project Review and Analysis, Contractor and Supplier Technical Safety & Compliance and Project Review and Inspection.

RWT has had over 350 clients, some of which are covered employers under the Acts and others which are not. RWT subcontractors work both on client property and at other locations. RWT is a privately held corporation owned by James L. Cashwell and Patsy J. Crisafi, and is not affiliated with a railroad. RWT contractors are compensated by RWT, not by RWT clients, based on the provisions of their individual contracts with RWT. These contracts typically provide for compensation at a daily rate for services rendered to RWT clients.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(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;

(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 (except trucking service, casual service,

¹ Erroneously referred to as "Railroad Worker Training" in some material.

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and the casual operation of equipment or 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).

RWT clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Therefore, RWT is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for RWT under its arrangements with rail carriers should be considered to be employees of those railroads rather than of RWT. 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 the rendition of which is integrated into the employer's operations; and

(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 with respect to the way he performs such work.

The evidence in this case shows that RWT employees do not work with employees of Union Pacific or RWT's other clients, except to train them. The evidence also shows that RWT employees are not compensated by the clients and do not submit invoices and supporting documents such as timesheets to RWT's clients. RWT employees are not assigned to specific projects, and do not have work assigned or approved by clients. The evidence thus shows that work by the five RWT employees is not performed under the direction or control of the railroad employers with which RWT contracts. Accordingly,

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the control test in paragraph (A) is not met. 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 RWT 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. While these may be rather close questions in cases such as this one, where the contractor has only a small core of permanent employees and retains subcontractors to perform the actual training, it is apparent that RWT is in the business of providing services to many customers, and is engaged in the recognized trade or business of providing training. Accordingly, it is the opinion of the Board that RWT is an independent business.

Because RWT is an independent contractor, RWT employees are not covered employees within the meaning of paragraphs (B) and (C). Accordingly, it is the determination of the Board that service performed by employees of RWT² is not covered under the Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.
(Separate concurring opinion
attached)

Jerome F. Kever

² The Board does not decide the status of the contractors who provide services through RWT.

**Concurring Opinion Of
V. M. Speakman, Jr.
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I concur with the result in this case but for slightly different reasons. Roadway Worker Training, Inc. (RWT) is a consulting firm consisting of five employees. It has numerous clients both inside and outside the railroad industry. It performs its services through a number of subcontractors. There is no evidence that any employee of RWT is under the direction or control of any of RWT's clients. Furthermore, there is no indication that any employee of RWT is in any way integrated into the staff or operations of an employer under the Acts. Consequently, even absent the holding in Kelm, there would be no basis for deeming an employee of RWT an employee of one of its carrier clients.

Original signed by:

V. M. Speakman, Jr.