B.C.D. 04-23

APR 21 2004

Employer Status Determination
Rail Safety & Training Resources Inc.

This is the decision of the Railroad Retirement Board regarding the status of Rail Safety & Training Resources Inc. as an employer under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA). The following information was provided by Mr. James L. Hill, President of Rail Safety.

Rail Safety was incorporated March 24, 1998, and engages in the provision of training required for operating employees of railroads. Such training includes skills involving car mechanical operating rules, air brake and train handling rules, "locomotive and freight car mechanical," and hazardous material handling. Rail Safety has four employees. Rail Safety provides training to 23 companies, a majority of which are covered employers under the Acts. Over 78 percent of its revenue is derived from services provided to Canadian National Railways and Illinois Central Railway Company, both covered employers under the Acts (B.A. numbers 1103 and 1516, respectively).

Classes provided by Rail Safety last from one day to five weeks. Although all training is performed on customer property, there is no evidence that any Rail Safety employees are directed or supervised by employees of a railroad. Other services provided by Rail Safety include assisting in developing rule books, serving as expert witnesses in litigation, and development and maintenance of a database program created to satisfy Federal record keeping requirements. Rail Safety is a privately held corporation owned by three former railroad employees: James Hill, Timothy Cusack, and Tony Crabb. Rail Safety is not affiliated with a railroad.

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, 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).

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

This conclusion leaves open, however, the question whether the persons who perform work for Rail Safety under its arrangements with rail carriers should be considered to be employees of those railroads rather than of Rail Safety. 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 majority of the Board, Labor Member dissenting, finds there is no evidence showing that Rail Safety's work is performed under the direction or control of the employees of any of its customers; accordingly, the control test in paragraph (A) is not met. Moreover, under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) 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, in the opinion of the majority of the Board, the question remaining to be answered is whether Rail Safety 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. It is apparent that Rail Safety is in the business of providing services to many customers. The evidence of record indicates that Rail Safety is engaged in the recognized trade or business of training employees to meet Federal requirements. Accordingly, it is the opinion of the Board that Rail Safety is an independent business.

Because Rail Safety engages in an independent business, Kelm would prevent applying paragraphs (B) and (C) of the definition of covered employee to this case. Accordingly, it is the determination of a majority of the Board that service performed by employees of Rail Safety is not covered employee service under the Acts.

Original signed by:

Michael Schwartz

V. M. Speakman, Jr. (Dissenting opinion attached)

Jerome F. Kever

DISSENTING OPINION
OF V. M. SPEAKMAN, JR.

I would find that Rail Safety & Training Resources, Inc. is an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts as a company under common control with a railroad employer which performs a service in connection with the transportation of property by rail, effective January 1, 2001, the effective date of its current contract with Canadian National Railways.

As the Majority notes, Rail Safety is not affiliated through equity ownership with any rail carrier. Rail Safety's principal business is training railroad locomotive engineers, brakemen and conductors. Rail Safety also develops rule books, maintains a database program for Federal record keeping requirements, and provides expert witnesses in litigation. Almost 92 percent of Rail Safety's revenue derives from rail carriers and over 78 percent of its revenue is derived from just one contract with Canadian National Railways and Illinois Central Railway Company[1]. Rail Safety earns the remaining 8.1 percent revenues from non-carrier operations such as Nebraska Public Power, Marine Corps Civilian Human Resources, and In-Terminal Services.

Rail Safety itself has four employees. One employee, Director of Administration, handles the business' paperwork, while the remaining three employees are training instructors. Classes for clients last from one day to five weeks. Students are taught requirements of mechanical operating, air brake and train handling rules of the Federal Railway Administration, and hazardous material handling. All training is performed on customer property.

---

[1] Illinois Central Railway became a wholly owned subsidiary of Canadian National Railways in 1998. Mergent Transportation Manual, 2003 Ed., at 102. Both are covered employers under the Acts (B.A. numbers 1103 and 1516, respectively).

Rail Safety has provided copies of the current contract effective January 2001 with Canadian National and subsidiaries, as well as its prior contract with Illinois Central, effective April 1999. Paragraph 4 of the 2001 contract provides that Rail Safety is to invoice Canadian National for its services according to the fee schedule (not provided). Appendix A to the 2001 contract at section 6 also allows out of pocket expenses of Rail Safety employees, and guarantees Canadian National will use a minimum of $325,000 of services under the contract in 2001 and $350,000 in 2002. Section 2 of the Appendix specifies that Rail Safety shall provide Canadian National with:

"qualified professionals to train persons designated by CN for the purpose of providing those training services specified in Appendix A-1, * * * and to provide certain additional database or rulebook maintenance services, upon request * * * . CN shall be responsible for providing adequate classroom facilities throughout the term hereof."

Paragraph 9 requires that Rail Safety "shall have in its employ a sufficient number of capable employees" to provide the contract services promptly and at all times specified for performance. Paragraph 10 requires Rail Safety to comply with employment related laws concerning social security and unemployment insurance, immigrant status, and OSHA rules, including required filings and record retention. Paragraph 12 not only gives CN a proprietary right in any materials produced for CN during the agreement, but further requires Rail Safety to assign to CN the copyright for any materials prepared for CN which would not otherwise be CN property under the United States Copyright Act. Paragraph17 of the contract gives CN the right to terminate the agreement "for any reason whatsoever" with 60 days notice, while paragraph 14 allows Rail Safety to cancel only for non-compliance with contract terms.

Although coverage under the Acts administered by the Board is not elective, we note that in a letter dated August 11, 2003, containing information relating to its business, Rail Safety stated that "We feel that we should be

covered [under the Acts] because 100% of our business is railroad related and more than 90% of our business is for railroads covered under the Railroad Retirement Act."

Section 1(a)(1) of the RRA (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, 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 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).

Rail Safety owns or operates (directly or indirectly through agreement) no line of railroad; it does not hold itself out as a common carrier; and does not provide transportation using rails, rail cars, locomotives or other railroad instrumentalities. Rail Safety thus is clearly not a carrier by rail within the meaning of RRA section 1(a)(1)(i) quoted above.

To meet the second paragraph of section 1(a)(1), a company must both be under "common control" with a rail carrier, and must perform "service in connection with" railroad transportation. The language of section 1(a)(1)(ii) of the RRA of 1974 is essentially unchanged from that of the predecessor Railroad Retirement Act of 1937. Compare sections 1(a), 1(m) Public No.162, 75th Congress (50 Stat. 307, 309) and section 1(a)(1)(ii), Public Law 93-445, (88 Stat. 1305).

Courts have found the control requirement under the 1937 and 1974 Acts to be met where the stock of the controlled company is owned by a parent corporation, Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358 (10th Cir. 1942); Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir. 1983); Southern Development Co. v. Railroad Retirement Board, 243 F. 2d 351 (8th Cir. 1957); by an individual, Livingston Rebuild Center v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1992); and by a voting trust, Universal Carloading & Distributing Co. v. Railroad Retirement Board, 172 F. 2d 22 (D.C. Cir. 1948). Regulations of the Board at 20 CFR 202.4 further define control by a rail carrier as follows:

"A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person."

Regulations of the Internal Revenue Service promulgated under the RRTA contain a similar definition of control at 26 CFR 3231(a)-1.[2]

Section 202.4 of the Board's regulations has remained unchanged since promulgation under the Railroad Retirement Act of 1937, almost 65 years ago. See 4 Fed. Reg. 1477, 1478, (April 7, 1939). Contemporaneous administrative rulings show that at the time of promulgation, the Board intended that section 202.4 encompass not only control of a business

[2] That regulation provides that "* * * the term 'controlled' includes direct or indirect control, whether legally enforceable and however exercisable or exercised. The control may be by means of stock ownership, or by agreements, licenses, or any other devices which insure that the operation of the company is in the interest of one or more carriers. It is the reality of control, however, which is decisive, not its form nor the mode of its exercise."

through equity ownership, either as proprietor or stockholder, but also "de facto" control exercised by overweening power of the rail carrier through contractual provisions over the business decisions of the company. A case in point is found in the collective Board decisions concerning the Fred Harvey Company. See Legal Opinion L-36-134.25 (Fred Harvey an employer under the Railroad Retirement Act of 1935); and Board Order 39-513, *Fred Harvey* (adopting Legal Opinion L-39-502, determining coverage under the 1937 RRA).

As recounted in those decisions, the Fred Harvey company originated as an unincorporated business conducted by the company's founder, Fred Harvey. After Mr. Harvey's death, the business was incorporated as a closely held corporation owned by his family and associates. No evidence showed that these individuals also owned any rail carrier, but virtually the entire business of Fred Harvey consisted of running restaurants and dining car service for the Atchison, Topeka and Santa Fe Railway. The contract between Fred Harvey and Santa Fe prohibited Fred Harvey from engaging in any additional business, or conducting its business other than on Santa Fe property without the Railway's approval. Santa Fe prescribed Fred Harvey's accounting methods and could inspect its books at any time. Any Fred Harvey employee had to be fired at Santa Fe's request. Santa Fe could terminate the contract whenever dissatisfied, and then buy Fred Harvey's equipment. Santa Fe guaranteed any Fred Harvey operating loss, and essentially claimed a one-third share of any profit. Further, the president of Fred Harvey testified to the Interstate Commerce Commission that the contract made his company "completely subservient to" Santa Fe. See Atchison, Topeka and Santa Fe Railway Company et al., 127 I.C.C. 1 (1927), at 48. The General Counsel and the Board found on these facts that Santa Fe exercised de facto control over Fred Harvey to an extent that placed Fred Harvey under common control with the Santa Fe for purposes of section 202.4 of the regulations.

The de facto control of a business as a basis for determining that a company performing a service in connection with railroad transportation is under common control with a rail carrier has been applied sparingly by this agency in other instances, and has been considered by the courts only once. Martin v. Federal Security Agency, 174 F. 2d 364, (3rd Cir. 1949).

Martin indirectly concerned Legal Opinion L- 44-297, *Western Stevedoring Company*. Western operated grain elevators under contract with the Pennsylvania Railroad. The grain elevators were owned by Pennsylvania RR and located only in Pennsylvania terminals. Western also used only equipment provided by the railroad. Western engaged in no other business, and derived all its revenue from that single customer. In accord with Board Order 39-513, the General Counsel found under these facts that the Pennsylvania exercised de facto control over Western, rendering it controlled by the railroad. However, when Joseph Martin, a Western employee, died leaving his widow and children unable to receive monthly survivor benefits because the 1937 RRA did not provide such benefits at the time, his widow Hannah Martin applied for social security benefits. The then-Social Security Board denied her application because Western was a railroad employer, and she sought review in the United States District Court under the Social Security Act. The District Court found Western to be an employer under the Social Security Act, Martin v. Federal Security Agency, 73 F. Supp 482,(W.D. Penn. 1947) and the Third Circuit Court of Appeals (supra) affirmed.

The General Counsel reversed the determination that Western was a covered employer in 1953, after the Eighth Circuit Court of Appeals decision in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). See Legal Opinion L-53-554. However, in 1979, at the request of the Board, the General Counsel re-examined Martin, and advised in Legal Opinion L-79-41, that the Board was not bound to follow that decision. Aside from the obvious fact that the Board was not a party to the case, the General Counsel noted that the District Court decision analyzed the contracts in question and determined that these did not provide control. The District Court did not itself find as a matter of law that the term "control" did not encompass control through economic power. The General Counsel advised the Board that because the Court of Appeals first affirmed and adopted the finding of the District Court, and then offered its opinion of the meaning of "control" without applying the definition to the facts, the legal discussion of the Court of Appeals became obiter dictum rather than the holding of the case.

Consequently, the General Counsel advised the Board that whereas Martin had been previously been misread to prohibit the possibility of de facto control through contract, in fact it was limited to the circumstances peculiar to Western Stevedoring.

I am convinced, based on the General Counsel's analysis in Legal Opinion L-79-41, that Martin does not prevent a finding that a company may be subject to de facto control for purposes of section 202.4 of the regulations. Moreover, I would find that Rail Safety presents a suitable case for a determination that Rail Safety's business is de facto controlled by CN in accordance with the decision of the Board in *Fred Harvey*, supra. Rail Safety's employee staffing must be held to a level acceptable to CN. The contract provides almost four-fifths of Rail Safety's total revenues but may be unilaterally terminated without cause by CN. The copyrights for any material prepared by Rail Safety in connection with the CN contract must be assigned to CN even if a court later finds the material would not otherwise be CN property. I also would find Rail Safety performs a service in connection with transportation of property by rail, because it trains employees of the CN in elements fundamental to performance of their positions as locomotive engineers, brakemen and conductors.

Even if Rail Safety would not meet the requirements for an employer under the Acts, the employees of Rail Safety, when performing services for Canadian National under their contract, would be considered deemed employees of the carrier pursuant to section 1(d)(i)(B) and (C) of the RRA and its companion section under the RUIA. These individuals are rendering professional services on carrier property, and the nature of their services, training engineers, brakeman and conductors, clearly make their services an integral part of the carrier's operations. Kelm, cited by the Majority, to the extent that it was correctly decided at all, does not apply to merely nominal "independent contractors".

Original signed by:

V. M. Speakman, Jr.
4-15-04