

**EMPLOYEE SERVICE DETERMINATION  
CSW**

This is the decision of the Railroad Retirement Board regarding whether the services performed by CSW for the Buckingham Branch Railroad Company (BB) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. BB is an employer (B.A. 2410) under the Acts administered by the Board.

In a Form AA-4, "Self-Employment and Substantial Service Questionnaire" submitted to the Richmond, Virginia district office on February 20, 2007, CSW stated that she began providing services for BB on a part-time basis on January 3, 2006<sup>1</sup>. Review of this Form and associated documentation indicates that CSW provided services as a sole proprietorship. The services are described as "administrative assistant to RM Bryant, RE Bryant, SC Powell". CSW's duties include ordering supplies, copying forms, copying manuals, making up new files, answering the telephone, taking messages, working with the safety program, filing, making up medical files, typing up labels for year end files, preparing mailings, as well as clerical support to the BB accounting staff, agent and management staff. CSW previously was a part-time employee of BB (until June 28, 2002), and her duties as an employee were different from her duties now. Previously, CSW's duties were in "high responsibility areas that involved waybilling, working closely with customers, coordinating with class I connections, computer use, EDI, and other activities critical to the daily operations of the rr".

These services were (by the nature of the type of services) performed on the property of BB. CSW determined her own working hours (she had no set hours or days – she worked only when needed and she was available); she did not supervise anyone, but she was partially supervised by whoever assigned her a project to work on; she did not participate in any fringe benefit program; she paid self-employment taxes on the income she received from BB; she performed his services pursuant to a written contract; and she would submit an invoice twice a month and receive payment twice a month.

On September 20, 2007, CSW provided additional information through the employee questionnaire which had been sent to her. According to information provided on that form, CSW worked briefly in 2003, none in 2004, part-time in 2005 and 2006, and has not worked since December 2006. CSW confirmed that she worked only if she was available and BB needed her services; that she did not work more than three days per week (usually two days per week), she worked pursuant to a written contract, and that she invoiced BB for her services and was paid based on the invoice.

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<sup>1</sup> According to the Form AA-4, CSW ceased providing services January 1, 2007, until she received a decision from the Board regarding her services.

Information was also submitted by Mr. R. Mark Bryant, Executive Vice-President of BB. Mr. Bryant explained that CSW had been contracted for a temporary basis because the railroad was going through a rapid expansion and was short staffed in administration. The BB wanted someone who was knowledgeable about railroads (specifically the BB) to help with basic administrative duties on a short-term, part-time basis. Mr. Bryant stated that CSW worked about three weeks total in 2003, did not provide any services in 2004, and provided services from January 11, 2005, through December 2006, and her hours varied, anywhere from 8-20 hours per week; she invoiced BB for her services based on an hourly rate twice a month, and her invoices were reviewed and approved by BB management<sup>2</sup>. Mr. Bryant also stated that CSW's services were, by necessity, a part of BB's normal office operations, and she did work with other BB employees because she was assisting them. By necessity, CSW received general direction and guidelines from BB management and non-management with respect to the particular project she was working on, but CSW determined the order, sequence and priority of the work with respect to other tasks she had assigned to her. Mr. Bryant confirmed that BB provided CSW with the limited use of facilities and support services – she did not have an assigned desk or office, and she was not provided with storage space, use of company vehicles, furniture, or other services that were provided to BB employees. BB did not provide any training for CSW, and could terminate the agreement at any time. CSW was not required to furnish proof of insurance because BB does not require that of small contractors (their liability insurance covers small contractors). Mr. Bryant stated that CSW did not receive medical insurance, vacation, sick time, or holidays. Finally, Mr. Bryant noted that CSW's work did not replace a regular BB employee, nor has CSW been replaced since she stopped working for BB.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) 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) 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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<sup>2</sup> Mr. Bryant explained that, as a policy, BB management reviews and approves all contractor and consultant invoices.

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)).

A determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

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 tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could 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. The Board has in recent years not applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business, relying on the decision of the United States Court of Appeals for the 8<sup>th</sup> Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). The Kelm decision distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10<sup>th</sup> Cir., 1996), at 891(holding with respect to an attorney's agreement to perform professional services for the railroad as an independent contractor that " \* \* \* merely to state that such a relationship exists does not necessarily make it so \* \* \* .") An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may

substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

Applying these criteria to CSW's case, the Board finds that the Kelm decision does not prevent consideration under paragraphs (B) and (C) because despite calling her business a sole proprietorship, CSW did not operate as independent business enterprise. CSW worked only for BB and had no employees herself. CSW supplied no equipment, and had no investment in a business. Moreover, BB merely stating CSW is an independent contractor is not itself determinative when weighed with other evidence. Gatewood, supra, and Holt v. Winpisinger, 811 F. 2d 1532, 1538 (D.C. Cir., 1987)(employment relationship established under ERISA).

Both CSW's and Mr. Bryant's descriptions of the services performed by CSW shows that they are clearly technical services. CSW provides services to the BB, and those services are directly integrated into the management and operation of the railroad employer. Therefore, the Board finds that CSW is integrated into the employer's staff or operations, as is specified in paragraphs (B) and (C).

Accordingly, in view of all the evidence in the record, it is the determination of the Board that service performed by CSW for the Buckingham Branch Railroad Company in 2003, 2005 and 2006 is covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. The employer is directed to submit such returns of service and compensation with respect to CSW's service for the years 2003, 2005 and 2006 as Board staff may require.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever