

EMPLOYEE STATUS DETERMINATION

Railroad Industries, Incorporated

This is the decision of the Railroad Retirement Board regarding whether the services performed by certain employees of Railroad Industries, Incorporated (RII) for Grenada Railway, LLC (Grenada) and Natchez Railway, LLC (Natchez) is creditable service under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.). The attorney for Grenada and Natchez has requested a determination regarding this issue.

In Board Coverage Decisions (B.C.D.) 09-69 and 09-70, Grenada and Natchez were respectively found to be employers covered under the Acts. Operations for both entities began on July 1, 2009. To assist in start-up operations, both entities utilized independent contractors provided by Railroad Industries, Inc. (RII), until they were able to hire their own employees. The employer status of RII was initially reviewed in 1994. At that time it was determined that as RII was not a rail carrier, was not under common control with a rail carrier, and was a consulting business, providing a number of services to a variety of clients, no further investigation was needed. Review of the current operations of RII indicated that nothing has changed – it is still a consulting business, providing various services to an extensive list of clients, both-rail related and non-rail related. It is the opinion of the Board's General Counsel that the available information concerning RII would not support a ruling that RII is an employer under the Acts, and by letter dated January 29, 2010, RII was advised that the agency would be closing its file on RII.

In a letter dated August 3, 2010, Attorney Richard G. Campbell, Jr. requested a formal ruling under 20 C.F.R. Part 259 of the Board's regulations as to whether certain individuals working on behalf of Natchez and Grenada are subject to the Acts. Mr. Campbell explained that RII has provided personnel to Natchez and Grenada "to perform day-to-day operations, including a general manager position, engineers and conductors". Mr. Campbell's letter specifically mentions seven individuals. Mr. Campbell further explained that both Grenada and Natchez have been reporting the railroad service and compensation of these individuals to the agency because it is the position of the railroads that these individuals should be considered employees of the railroads, rather than independent contractors provided by RII. According to Mr. Campbell, it is the position of RII that as RII is not considered an employer covered by the Acts, and the individuals provided by RII are independent contractors for RII, these seven individuals are not subject to the Acts. Accordingly, Mr. Campbell has requested a ruling regarding the status of these seven individuals because Grenada and Natchez, in addition to "making payments to the Railroad Retirement Board", have withheld these amounts from the invoices from RII, resulting in a "dispute as

to the legal obligation to make payments pursuant to the Railroad Retirement Act and Railroad Unemployment Insurance Act".

According to Mr. Campbell's letter, Natchez and Grenada "were purchased by new owners", who contracted with RII for "consulting and support services". We note that Mr. Campbell's letter refers to "A&K", apparently as the "new owners". Board Coverage Decisions (B.C.D.) 09-69 and 09-70 in which Grenada and Natchez were respectively found to be covered employers under the Acts, state that the two entities are owned by Mr. Kern Schumacher and Ms. Rhonda Nicoloff. Mr. Schumacher is the majority stockholder in A&K Railroad Materials, Inc., an entity found not to be covered under the Acts. Therefore, this determination is based on the premise that the owners of Grenada and Natchez are still Mr. Schumacher and Ms. Nicoloff.

Review of the file material indicates that Mr. Fritz Kahn, the previous attorney for Grenada and Natchez, was advised that, with respect to the question as to whether individuals provided by RII to Grenada and Natchez should be considered to be employees of those companies, past rulings of the Railroad Retirement Board have held that individuals who operate a train in interstate commerce are employees of the railroad, whether or not those individuals are on the payroll of the railroad. Thus, if the individuals provided by RII to Grenada and/or Natchez operate the trains for either or both of these carriers, those individuals would be considered to be employees of the railroad, and their service to the railroad(s) would have to be reported to the Railroad Retirement Board by the railroad. Mr. Kahn was advised that he could advise his clients Grenada and Natchez that they **must** treat as their own employees individuals furnished by RII where those individuals are operating either or both of these railroads. Review of agency records indicates that Grenada and Natchez have reported seven individuals as their employees¹. There is no record of a protest to this action being filed by Grenada, Natchez, or any of the seven individuals.

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

¹ Employees Milton Burges, Josh Greer, Richard Mitchell and Ron Newell have been reported as employees by Grenada (B.A. No. 5408); employees Charles Joffrion, Matthew Tiffany, and Jerald Clark have been reported as employees by Natchez (B.A. No. 5407).

(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 submitted shows that the work performed by the individuals provided by RII to Grenada and Natchez is that of the various functions involved in operating the trains (i.e., locomotive engineers, conductors and general manager), work which could only be performed under the control of the rail carriers involved and, therefore, in this case, performed at the direction of the rail clients of RII. Accordingly, it is the determination of the Board that the individuals provided by RII to provide services to Grenada and Natchez are employees of those rail employers for purposes of the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Keever