B.C.D. 02-49

Employer Status Determination
P & L Intermodal Corporation
d/b/a P& L Intermodal

JUL 02 2002

This is the decision of the Railroad Retirement Board regarding the status of P & L Intermodal Corporation d/b/a P& L Intermodal (PLI) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

The evidence is that PLI was incorporated as a privately held corporation in October 1998. The sole shareholders are Mr. Richard M. Grandish and Ms. Cheryl S. Grandish. Neither Mr. Grandish nor Ms. Grandish owns a controlling interest in any rail carrier, and no officers or directors of PLI are also officers or directors of any rail carrier.

In a letter dated September 13, 2001, Mr. Grandish stated as president of PLI that the company was formed to operate two intermodal freight terminals operated by the Burlington Northern Santa Fe until 1996. The Paducah and Louisville Railway[1] apparently acquired the terminals, and contracted with PLI to operate them under lease. Mr. Grandish states that PLI owns all improvements on the leased premises, including buildings, lighting, parking lots, track, and the freight-handling and office equipment. PLI began operations February 1, 1999. Virtually all of PLI's business is with the Paducah and Louisville, and PLI has exclusive right under contract to all the intermodal freight business of the Railway. Two PLI employees of a total of five work on the premises of the Railway in connection with their intermodal duties but are not supervised by Railway employees.

Section 1(a)(1) of the Railroad Retirement Act (RRA) (45 § 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;

1 The Paducah and Louisville Railway has been determined to be a covered rail carrier employer under the Acts, with service creditable from August 27, 1986. See Legal Opinion L-86-116.

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> (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 (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.

PLI is clearly not a carrier by rail. Further, there is no evidence that PLI is under common ownership with any rail carrier or controlled by officers or directors who control a railroad. PLI therefore is not a covered rail carrier affiliate employer. As PLI meets no other definition of a covered employer under the Acts, the Board finds that PLI is not a covered employer.

This conclusion leaves open, however, the question whether the persons who perform intermodal terminal work for PLI under its contract with the Paducah and Louisville Railway should be considered to be employees of that railroad rather than of PLI. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) 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 * * *.

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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 foregoing evidence shows that PLI's employees do not work under the directions of Railway staff; accordingly, 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 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. 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 PLI 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). PLI owns all buildings and equipment used in the intermodal terminal, which clearly constitutes a sizable investment. A majority of the Board finds that PLI consequently meets the test for independent contractor status, and individuals performing service under its contracts are employees of PLI rather than employees of the Paducah and Louisville Railway. Kelm, supra.

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Accordingly, it is the determination of a majority of the Board that service performed by employees of PLI is not covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Cherryl T. Thomas

V. M. Speakman, Jr. (Dissenting in part)

Jerome F. Kever