B.C.D. 03-60

JUN 25 2003

Employer Status Determination

Rail Scale, Inc.
Southwest Signal Engineering Company

This is the decision of the Railroad Retirement Board regarding the status of Rail Scale, Inc., and Southwest Signal Engineering Company (SSEC) as employers under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Information regarding SSEC was provided by John H. Wilbur, Wilbur & Allen, counsel for SSEC. SSEC was incorporated and began operations December 6, 1988, and engages in railroad signal engineering services. At least 95 percent of its work is performed for a number of different railroads. SSEC is a privately held corporation which is not affiliated with a railroad. It has 144 employees. SSEC's work is performed on railroad property, and includes provision of technical assistance with projects, construction management services, and construction of crossing signals.

A copy of a contract which was provided, dated December 7, 1999, between SSEC and CSX Transportation (CSXT), obligates SSEC to "(1) test, certify and adjust * * * in-track scales owned by CSXT, (2) test and certify in-tract scales owned by third parties, located throughout CSXT's railroad system, and (3) perform other related scale services to be agreed upon by the parties * * *." Under the contract, SSEC agrees to utilize, and acquire if necessary, the following equipment: six trucks and trailers, three truck mounted knuckle boom cranes, and three test carts, and 216,000 pounds of weights. Under a Supplemental Agreement entered into January 31, 2000, SSEC agrees to lease six of CSXT's Scale Trucks and Scale Tools. Under the terms of a document dated January 1, 2002, labeled "Service Contract Form" entered into between SSEC and CSXT, SSEC agrees to perform signal engineering design and support services. Under the terms of a contract entered into between SSEC and Southern California Regional Rail Authority (the Despatching Department of which is covered under the Acts; B.A. No. 9749), SSEC is to perform signal and communications design services.

Information regarding Rail Scale also was provided by John H. Wilbur. Rail Scale was incorporated June 16, 1999, and began operations February 1, 2000. It engages in the servicing of scales, which work it performs for a number of rail carriers. It performs work for CSXT pursuant to an informal arrangement with SSEC which, as described above, has a formal agreement with CSXT.

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;

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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 (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).

SSEC and Rail Scale clearly are not carriers by rail. Further, the available evidence indicates that they are not under common ownership with any rail carrier nor are they controlled by officers or directors who control a railroad. Therefore, SSEC and Rail Scale are not covered employers under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for SSEC and Rail Scale under its arrangements with rail carriers should be considered to be employees of those railroads rather than of SSEC or Rail Scale. 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.

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The contracts submitted by SSEC show that SSEC itself is obligated to complete the operations described therein. There is no evidence that rail employees have any authority over SSEC's employees. Since the work performed by Rail Scale is performed under authority derivative of that of SSEC, it must be inferred that rail employees do not have any authority over Rail Scale's employees either. 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, the question remaining to be answered is whether SSEC and Rail Scales are independent contractors. 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. SSEC and Rail Scale are engaged in the recognized trade or business of signal and scale maintenance. They are clearly independent operations which contract with many carriers. Accordingly, it is the opinion of the Board that SSEC and Rail Scale are independent businesses.

Because SSEC and Rail Scale are independent contractors, their 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 SSEC and Rail Scale is not covered under the Acts.

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