B.C.D. 03-75

OCT 16 2003

EMPLOYER STATUS DETERMINATION
Trinity Railcar Repair, Inc.

This is the decision of the Railroad Retirement Board regarding the status of Trinity Railcar Repair, Inc. (Trinity Railcar) 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 Trinity Railcar, which was incorporated in October 2001, is part of Trinity Rail Group, one of five business groups[1] operated by Trinity Industries, Incorporated. In a letter dated May 6, 2003, the Assistant General Counsel of Trinity Railgroup advised that Trinity Railcar currently operates four car repair facilities, primarily for tank cars, at Waycross, Georgia; at Miles City, Montana; and at Saginaw and Vidor in Texas. Each of these facilities employs from 20 to 100 individuals. Trinity Railcar also performs light repair work at three CSX Transportation intermodal terminals, and on location at two smaller railroads. From 2 to 10 Trinity Railcar employees perform the light repairs at each site. As of the May 2003 letter, Trinity Railcar has 375 employees at all locations. In 2002, about 15.5 percent of Trinity Railcar's revenue, or about $6.5 million out of $42 million, derived from railroads or "railroad affiliates". There is no evidence that Trinity Railcar is affiliated through equity ownership or through common directors or corporate officers with any rail carrier. The other components of the Rail Group manufacture rail cars and rail car parts.

Section 1(a)(1) of the Railroad Retirement Act (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 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.

Trinity Railcar is clearly not a carrier by rail. Further, there is no evidence that Trinity Railcar is under common ownership with any rail carrier or controlled by officers or

[1]The four remaining groups are Trinity Railcar Leasing and Management Services, Trinity Inland Barge Group, Trinity Construction Products Group, and Trinity Industrial Products Group.

directors who control a railroad. Based on available evidence, the Board finds that Trinity Railcar therefore is not a covered rail carrier affiliate employer because it is not under common control with a rail carrier employer covered by the Acts. As Trinity Railcar meets no other definition of a covered employer under the Acts, the Board finds that Trinity Railcar is not a covered employer.

This conclusion leaves open, however, the question whether the individuals who perform light car repairs for Trinity Railcar away from Trinity Railgroup facilities under its arrangements with rail carriers should be considered to be employees of those railroads rather than of Trinity Railcar. 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 * * *.

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 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). 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

Trinity Railcar Repair, Inc.

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).

Trinity Railcar under its contracts with the rail carriers evidently performs the light car repairs on the rail carrier premises. Nevertheless, Trinity Railcar has a sizable investment in plant and equipment at the four independent facilities where it conducts major car repair. Moreover, Trinity Railcar provides its services to the rail industry as a whole, and advertises itself to the general public as a freight car repair company. See: The Pocket List of Railroad Officials, Volume 109, Number 3, at A-66, A-67 (3rd Quarter 2003). Trinity Railcar consequently meets the test for independent contractor status under paragraphs (B) and (C). There is no evidence that work by Trinity Railcar at the CSX intermodal terminal is performed under supervision of employees of CSX Transportation, and in fact others working at the intermodal terminal may not be rail carrier employees. See, e.g., Board Coverage Decision 96-82, CSX Intermodal Inc., (carrier affiliate trucking company which picks up and hauls intermodal containers from carrier terminal is not a covered employer); and Legal Opinion L-91-67, Budco Group, Inc., Parsec and Piggyback Services Divisions, (employees of independent contractor performing truck-flatcar ramping service at various railroad terminals are not statutory employees of the railroads). The Board finds that available evidence does not establish that the control test in paragraph (A) is met.

Accordingly, it is the determination of the Board that the service performed by employees of Trinity Railcar Repair, Inc. engaged in light repair of freight cars at intermodal terminals is not covered employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever