B.C.D. 03-77

OCT 2 2 2003

Employer Status Determination
Quality Rail Services, LLC

This is the decision of the Railroad Retirement Board regarding the status of Quality Rail Services LLC (Rail Services) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of this company has not previously been considered.

The evidence of record is that Rail Services was formed in Colorado in 1995 as a Limited Liability Company, owned by Michael Gordon and Lawrence Moore. Rail Services conducts three lines of business: mechanical services, support services and fuel services. Mechanical services are described as cleaning and washing locomotives and rail cars at a facility operated in co-operation with Chem Station of the Rockies Inc., and performing running repairs, car inspections and wreck restoration at the customer's site. Support services are described by the company as lease of locomotive service trucks, service trailers, rail car repair trucks, and "red streak" rail cars for transporting disabled rail equipment.

In a letter dated May 29, 2003, Mr. David Miller of Rail Services described the principal focus of the company as the fueling and servicing of railroad locomotives. Mr. Miller stated that the company "does 100 percent of its business with the Burlington Northern Santa Fe Railway" (BNSF). However, a February 2003 print-out of the company's web site lists both BNSF and Amtrak as fueling services clients. The web site also showed Xcel Energy, Platte River Power Company, and Missouri Basin Electric Power Plant, as clients for mechanical services; and support service clients as the BNSF, Amtrak, EEX Power Systems, Terra Industries, Central Kansas Railway, and Yakima Steam Rail Museum.

The General Chairman of the National Conference of Firemen and Oilers of the Service Employees International Union has provided a copy of a decision of the National Mediation Board which recounts that on or about March 23, 2001, BNSF began substituting a Rail Services fuel truck and driver for two fuel tanker trucks previously operated by BNSF employees out of BNSF facilities at Alliance, Nebraska. A BNSF employee accompanied the Rail Services driver, and the BNSF employee performed the locomotive fueling. The decision found that while BNSF violated a notice requirement, its labor agreement with the Firemen and Oilers did not prevent use of a sub-contactor as described. See: National Conference of Firemen and Oilers, SEIU and Burlington Northern and Santa Fe Railway, Public Law Board No. 6456, Award No. 1, May 9, 2002.

Copies of Rail Services forms for Spill Report, Locomotive Problem Report, Emergency Refueling Report, and Contractor Site Inspection Checklist have been furnished. Each form contains detailed questions directed to the Rail Services employee, and each form directs that the report be made to Rail Services.

Quality Rail Services, LLC

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.

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

This conclusion leaves open, however, the question whether the persons who perform work for Rail Services under its arrangements with BNSF (and evidently Amtrak as well) should be considered to be employees of the railroad rather than of Rail Services. 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.

There is no evidence regarding the manner of performance of any services for Amtrak. The evidence with respect to the BNSF contract is that although the Rail Services employee may be accompanied by a railroad employee, the Rail Services employee must report to Rail Services. Accordingly, based on available evidence, 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. Under an Eighth Circuit decision consistently followed by the Board, however, 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 Rail Services 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). Rail Services clearly has a sizable investment in equipment. Moreover, although the evidence is conflicting, the information from the company's website indicates that it offers its services to the general public, both railroads and private rail industry as well. Consequently, a majority of the Board finds that Rail Services meets the test for independent contractor status, and individuals performing service under its contracts are employees of Rail Services rather than employees of a rail carrier for which Rail Services provides its services. Kelm, supra.

Quality Rail Services, LLC

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

Michael S. Schwartz

V. M.Speakman, Jr.
(Dissenting in part, separate dissenting opinion attached)

Jerome F. Kever

**Dissent of V. M. Speakman**
**Quality Rail Services, LLC**

The principal focus of Quality Rail Services, LLC involves the fueling and servicing of locomotives, according to the spokesman for the company. This individual stated that it does 100 percent of its business with the Burlington Northern Santa Fe Railway (BNSF) although that fact is in dispute.

As recounted by the National Mediation Board, in March 2001, the BNSF began substituting a Quality Rail Services fuel truck and driver for two fuel tanker trucks previously operated by BNSF employee. Now, the Quality Rail Services employee is accompanied by an employee of the railroad and avoids coverage, even though both are performing virtually the same services.

Accordingly, I would find the employees performing fueling and servicing of railroad locomotives, who effectively displaced previously covered railroad workers, to be covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

VM Speakman, Jr.
**V. M. Speakman, Jr.**

10-15-03
**Date**