B.C.D. 04-4

Employer Status Determination

FEB 05 2004

Columbia National Group Inc.
Columbia Iron and Metal Company
CR Construction Company

This is the decision of the Railroad Retirement Board regarding the status of Columbia National Group Inc. (National Group), Columbia Iron and Metal Company (Iron and Metal), and CR Construction Company (CR Construction) as employers under the Railroad Retirement and Railroad Unemployment Insurance Acts. The status of these companies has not previously been considered.

The evidence is that Iron and Metal and CR Construction are wholly owned subsidiaries of National Group. Iron and Metal purchases steel products from International Steel Group, an unrelated company which is successor to LTV Steel. CR Construction performs track maintenance and rail car repair. CR Construction began operations July 23, 1993, and employs between 30 and 70 individuals during the year. CR Construction has provided its services to large class I railroads such as Norfolk Southern (BA 9408) and CSX Transportation (BA 1524), and to short lines such as Midland Terminal (BA 4266) and Ohio Central Railroad (BA 3362). Currently, approximately 70 percent of CR Construction's business activity and revenues derive from one contract with the ISG Cleveland Works Railway, a covered rail carrier employer (BA 4276), which is owned by International Steel Group. CR Construction owns a variety of general construction equipment such as pick-up trucks, "bobcat" tractors, and hydraulic jacks and jackhammers. It also owns specialized rail equipment such as hi-rail trucks, ballast regulators, spike pullers and drivers, and re-railers. National Group provides CR Construction with a repair facility and office and yard space. Cleveland Works Railway also provides office shop and repair space for work done for that company.

CR Construction repairs track and rail cars for Cleveland Works Railway as a subcontractor to Iron and Metal, which has the primary contract with the Railway. According to the General Manager of Iron and Metal, this arrangement would allow Iron and Metal, in the event of financial difficulties encountered by International Steel Group, to net payments due for its purchases of steel products against receivables owing for its track and rail car repairs. A copy of both the primary contract between Iron and Metal and the Railway, and of the subcontract between Iron and Metal and CR Construction are in evidence. The general contract, dated June 3, 2002, states at appendix A that Iron and Metal agrees to "provide all labor, tools, supplies, and supervision necessary to construct, maintain and repair tracks, right of way and freight cars including ancillary services such as signal maintenance, welding, weed spray, rail defect detection, etc." Article I of the contract states that all work is to be performed "at the I[nternational] S[teel] G[roup] job site located in Cleveland, Ohio." Article VIII of the contract requires that the work must meet "OSHA, FRA, and AAR standards", and that the contractor indemnify the Railway from damages and claims arising from the work. The final numbered paragraph 4 of the general

contract appendix states that the contractor's labor rates are billed directly, without mark-up, to Railway. The subcontract between CR Construction and Iron and Metal summarizes CR Construction's duties as "All of the work and fulfill all of the responsibilities of the contract on behalf of the contractor." Neither National Group, nor Iron and Metal nor CR Construction is affiliated through equity ownership or through common directors or corporate officers with any rail carrier.

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;
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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.

National Group, Iron and Metal, and CR Construction are clearly not carriers by rail. Further, there is no evidence that any of the three companies is under common ownership with any rail carrier or controlled by officers or directors who control a railroad. National Group, Iron and Metal, and CR Construction are therefore not covered under the Acts as rail carrier affiliate employers. They meet no other definition of a covered employer under the Acts. The majority of the Board finds that National Group, Iron and Metal, and CR Construction are not covered employers.

This conclusion leaves open, however, the question whether the persons who perform rail maintenance and rail car repair work for CR Construction as the subcontractor of Iron and Metal with Cleveland Works Railway should be considered to be employees of the railroad rather than of CR Construction. 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

Columbia National Group Inc.
Columbia Iron and Metal Company
CR Construction Company

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.

As noted above, Iron and Metal and CR Construction contract with Cleveland Works Railway. The general contract which CR Construction has agreed to fulfill provides that CR Construction will furnish labor, materials, cranes, trucks, machines and tools necessary to repair track and rail cars. CR Construction further agrees to carry liability insurance and to name Railway as an additional insured. The individuals performing the agreed services are supervised by CR Construction employees. Railway compensates CR Construction, not its employees, for the contract services.

A majority of the Board finds that the foregoing evidence shows that CR Construction employees work under the directions of CR Construction 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 CR Construction 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). CR Construction clearly has a sizable investment in equipment. In the view of a majority of the Board, the fact that CR Construction maintains track and rail cars on the premise of the railroad is not determinative, since the Board has in the past found other companies performing work of this nature to be independent of the railroad. See, e.g., B.C.D. 01-11, *Heavy Railroad Excavations, Inc.,* and B.C.D. 03-74, *DOT Rail Service, Inc.* (maintenance of way) and *Railcar Repair of the South*, B.C.D. 95-101 (car repair). Finally, CR Construction provides its services to the rail industry as a whole, as evidenced by its list of current and prior customers. A majority of the Board finds that CR Construction consequently meets the test for independent contractor status, and individuals performing service under its contract with Iron and Metal are employees of CR Construction rather than employees of Steel Works Railway. Kelm, supra.

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

Michael S. Schwartz

V. M. Speakman, Jr., (Dissenting opinion attached)

Jerome F. Kever

Dissent of V. M. Speakman, Jr.
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We would find that the employees of CR Construction Company (hereinafter CR) who perform track maintenance and car repair for the ISG Cleveland Works Railway (BA 3362) (hereinafter Railway) should be considered statutory employees of the Railway by virtue of section 1(d)(1)(i)(C) of the Railroad Retirement Act. Specifically, we would find that these employees render personal services on the property used in the carrier's operations which are integral to the carrier's operations. While not necessarily disagreeing with the above, the Majority finds that Section 1(d)(l)(i)(C) does not apply because CR is an independent contractor and cites the Kelm case in support of its decision

In our view Kelm, to the extent it is good law, should not apply in this case for the following reasons. First, it is a stretch to say the CR is independent. As stated in the Majority's decision, that although CR has other contracts, 70% of its revenue is derived from its contract from Railway. Furthermore, its contract with Railway is open-ended and ongoing. This should reasonably lead one to the conclusion that without its contract with Railway, CR would not continue as a going concern.

Furthermore, although not stated in the Majority's decision, are the facts that the services provided by CR for Railway are performed on a continual basis by the same employees, many of whom had been former employees of Railway. Thus, we have a contractor who is economically dependent on a carrier who, on an ongoing basis performs traditional railroad services for the carrier on carrier property, with employees who were formerly covered under the RRA. We can be forgiven if we are puzzled as to why these employees are not considered by the Majority to be "rendering, on the property used in the employer's operations, personal services, the rendition of which is integrated into the employer's operations".

The Board Coverage Decisions relied upon by the Majority are not, in my view, controlling. *Heavy Railroad Excavations*, B.C.D. 01-11, dealt with a company which bound and removed used railroad ties for a carrier. Such services are in the nature of scavenger services and one could reasonably conclude that, as such, they are not professional or technical services nor are they an integral part of the carrier's operations. Thus, sections 1(d)(1)(i)(B) and (C) would not arguably apply.

Rail Car Repair of the South, B.C.D. 95-101, involved three affiliated companies. *Rail Car Repair of the South*, as its name suggests, repaired and refurbished rolling stock. All work was done on carrier property. These employees were found common law employees of the carrier for whom they performed services since they were supervised by an employee of that carrier. Thus, the issue of whether Rail Car was an independent contractor did not have to be reached. A similar result was reached with respect to *Arkansas Motive Power Services*.

The third company involved in that decision was *Arkansas Railroad Contractors, Inc.*, which did repair, maintenance, and construction of tracks, beds, rights-of-way, bridges, and structures of commonly located upon railroad rights-of-way. However, employees of that company performed an estimated 70-80% of their work for non-railroads; thus, sections 1(d)(1)(i)(B) and (C) really do not come into play.

In conclusion, we would find that employees of CR who, on continual basis, perform car repair and track maintenance for Railway to be deemed employees of Railway.

V M Speakman, Jr.
V. M. Speakman, Jr.

1-29-04
Date