

**Employer Status Determination
Corbin Railway Service Company**

This is the decision of the Railroad Retirement Board regarding the status of Corbin Railway Service Company (Corbin) 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 Corbin was incorporated as a privately held Florida corporation on November 17, 1986, and began operations the same day. Corbin conducts operations through five divisions: American Wheel & Hydraulics Division in Jackson, South Carolina; Corbin Division in Corbin, Kentucky; DeCoursey Division in Covington, Kentucky; Erwin Division in Erwin, Tennessee¹; and Kustom Karr Division in Green Cove Springs, Florida². Corbin's business centers around rail freight cars: it sells and installs rail freight car truck parts, couplers, doors, and new or reconditioned wheels; it cleans and paints freight cars; and offers locomotive and freight car repair at various plants about the country. Approximately 80 percent of Corbin's business is derived from class I railroads, but Corbin is not 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 express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;

(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 (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

¹The Erwin facility is leased from CSX Transportation.

²The Green Cove Springs facility was purchased in August 1990 from Kustom Karr Corporation, a Missouri firm incorporated July 9, 1985. Prior to August 1990, Kustom Karr conducted a car repair business only at the Green Cove Springs location. Kustom Karr, formally renamed KK Associates, Incorporated, on September 6, 1990, is an independent, privately held company unrelated to Corbin, which has not actively conducted operations since the time it sold its Florida facility to Corbin.

Section 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).

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

This conclusion leaves open, however, the question whether the persons who perform freight car cleaning and repair work for Corbin under its arrangements with rail carriers should be considered to be employees of those railroads rather than of Corbin. Section 1(b) of the RRA and section 1(d)(1) 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 and 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.

Corbin has provided copies of contracts with CSX Transportation. A contract concluded March 8, 1988, provides that Corbin will furnish labor, materials, cranes, trucks, machines and tools necessary to make specified freight car repairs, and to clean cars to the satisfaction of CSXT, at the Corbin, Kentucky facility. A contract dated June 13, 1988, provides that Corbin will perform the same services at Green Cove Springs, Florida. Corbin further

agrees in both contracts to carry liability insurance and to name CSX Transportation as an additional insured. CSX Transportation agrees to compensate Corbin for repairs and cleaning at rates specified in schedules attached to the contracts which have been updated periodically. Corbin states that the individuals performing the agreed services are supervised by Corbin employees, not by employees of CSX.

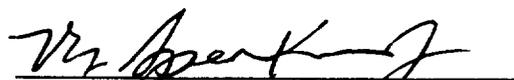
The foregoing evidence shows that Corbin's employees work under the directions of Corbin staff on Corbin premises; accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual a covered 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).

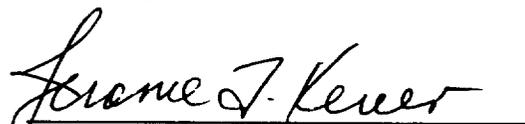
Thus, under Kelm, the question remaining to be answered is whether Corbin is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 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). Corbin's numerous facilities clearly constitute a sizable investment in plant and equipment. Moreover, the terms of the contracts provided indicate that Corbin may suffer a loss if expenses under its contracts exceed the agreed payment. Finally, Corbin 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 99, Number 1, at 48, 307 (February 1993). Corbin consequently meets the test for independent contractor status, and individuals performing service under its contracts are employees of Corbin rather than employees of the rail carriers for which Corbin provides its services. Kelm, supra.

Accordingly, it is the determination of the Board that Corbin Railway Service Company is not a covered employer and service performed by employees of Corbin Railway Service Company is not covered employee service under the Railroad Retirement and Railroad

Unemployment Insurance Acts.


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