B.C.D. 03-74

SEP 19 2003

Employer Status Determination
DOT Rail Service, Inc.

This is the decision of the Railroad Retirement Board regarding the status of DOT Rail Service, Inc. as an employer under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA). The following information was provided by Mr. Thomas F. McFarland, attorney for DOT.

DOT was incorporated May 26, 1983, and engages in the provision of track maintenance, repair and rehabilitation work of track, intraplant railcar switching, and other work such as tree cutting, clean-up of various job sites, snow removal, and excavation. DOT has approximately 42 employees, of whom 57 percent perform track maintenance and repair and rehabilitation of track. The vast majority of their time is spent working for private industries and an estimated 8 percent of their time is spent working for a rail carrier. DOT spends an estimated 8 percent of its business time providing services for the Burlington Northern Sante Fe Railroad Company and 6.6 percent of its business time providing services for Union Pacific Railroad Company.

DOT owns equipment such as "backhoes, tampers, ballast regulators, spikers, speed swing machines, engines, trucks, trailers, etc." DOT is a privately held corporation owned by Paula J. Mudge-Gibson and Don L. Gibson, who also own Central Illinois Railroad Company, Inc., a covered employer under the Acts (B.A. No. 4785), and Chicago Heights Switching Company, which was held by the Board on reconsideration not to be an employer under the Acts (B.C.D. Number 03-63).

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 (RRTA) (26 U.S.C. § 3231).

DOT clearly is not a carrier by rail. Further, although it is under common control with Central Illinois, there is no evidence that it provides any services to its affiliate.

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Therefore, the Board, Labor Member dissenting, finds that DOT is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for DOT under its arrangements with rail carriers should be considered to be employees of those railroads rather than of DOT. 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
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> (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 showing that DOT's work is performed under the direction or control of the employees of any of its customers; 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 DOT 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

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States, 389 F. 2d 337 (6th Cir. 1968) at 341. It is apparent that DOT is in the business of providing services to many customers, only a relatively small percentage of which are connected to the rail industry. The evidence of record indicates that DOT is engaged in the recognized trade or business of repairing and maintaining track. DOT has a substantial investment in track repair equipment. Accordingly, it is the opinion of the Board that DOT is an independent business.

Because DOT engages in an independent business, Kelm would prevent applying paragraphs (B) and (C) of the definition of covered employee service to this case. Accordingly, it is the determination of the Board that service performed by employees of DOT is not covered employee service under the Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr. (dissenting in part)

Jerome F. Kever