

Employee Status Determination**MLC****M& B Contracting and Consulting, LLC**

This is the decision of the Railroad Retirement Board on reconsideration of the Board's determination in Board Coverage Decision (B.C.D.) 06-14, which found MLC's service as a freight car inspector to be performed as an employee of a covered railroad employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (RRA and RUIA). For the reasons set forth below, a majority of the Board finds again on reconsideration that MLC's service is performed as a covered employee under the Acts.

The Board's records show that MLC filed an application under the Railroad Retirement Act on January 7, 2003, for a full annuity at age 60 with 30 years of railroad service. He was awarded an annuity under the Act with a beginning date of February 1, 2003.

On March 6, 2005, the manager of the Roanoke, Virginia, office of the Board received an undated letter from MLC. The letter stated that MLC and his wife had formed M & B Contracting and Consulting, LLC. MLC stated he had begun inspecting freight cars for his former railroad employer, Norfolk Southern Corporation. He stated that the railroad paid M& B Contracting for his services, and that M&B Contracting in turn paid him a salary. MLC's salary was to be limited to less than the annual exempt amount of earnings which would trigger a deduction in the tier I component of his annuity pursuant to section 2(g)(2) of the RRA, "with the remainder going to my spouse." The letter also stated that Norfolk Southern reimbursed M&B Contracting for MLC's work-related expenses, such as meals and lodging and car rentals, and questioned whether these reimbursements would be included as earnings for purposes of determining whether he exceeded the annual earnings limitation.

The Roanoke office furnished MLC a "Self-employment and Substantial Service Questionnaire" (Board Form AA-4) which MLC returned March 29, 2005. MLC stated that before retirement, he had worked for Norfolk Southern as a supervisor in the building and inspection of freight rail cars. Beginning on November 8, 2004, he now performed freight car inspections on the premises of Norfolk Southern under contract, but was unsupervised and did not supervise others. He stated that he performed car inspections only for Norfolk Southern, and did not advertise his services to others. He set his own hours and paid his own self-employment tax. He submitted an invoice to Norfolk Southern and received payment in 3-4 weeks. He

did not participate in any employee benefit programs such as health insurance or employer pensions. He described the value of his business and the amount of earnings from the business based on capital investment as "\$0."

With the completed Questionnaire, MLC also submitted a copy of his 2004 Federal income tax return, which claimed net profits of \$3,250 from his business as a sole proprietorship. MLC also submitted a document entitled M&B Contracting and Consulting, L.L.C. Operating Agreement. The Agreement states that MLC and his wife agree to form a limited liability company under the Virginia Limited Liability Company Act (Code of Virginia 1950, Chapter 12 §§ 13.1-1000 et seq.) MLC's wife is named managing member, and is to receive a salary determined at the company's annual meeting. MLC is to receive a salary not exceeding \$12,000 per year. Both members are to receive a 50 percent share of the profits and distributions, and to share equally in losses and expenditures.

On April 5, 2005, the district office received a copy of a contract between Norfolk Southern and MLC dated December 3, 2004. The contract recites that Norfolk Southern desires to engage MLC as "Contractor * * *as needed to provide freight car inspection services at Client's [Norfolk Southern's] facility in various locations". MLC is to be paid \$250 per day plus expenses, to be invoiced on a weekly basis, without withholding for "taxes or Social Security payments". He is not eligible to participate in the company retirement plan, thrift plan, or any other benefit plan offered to employees. He is to indemnify Norfolk Southern for liability resulting from loss of life or personal injury "to Contractor" or the "loss of or damage to Contractor's property" but excludes losses "caused solely by negligence" of Norfolk Southern. The contract does not state the length of time it is to remain in effect, but does provide that Norfolk Southern may terminate the contract at any time "with or without cause" without penalty. No provision is made for termination by MLC. The contract further states that MLC's

relationship is that of an independent contractor for the Client [Norfolk Southern] and shall not be considered an employee or agent of the Client for any purpose. Client reserves no control over Contractor as to how the services should be performed, and Contractor is responsible for accomplishing the results undertaken by him under this Agreement. The manner and methods used by Contractor in achieving those results are to be determined by Contractor.

On April 5 the district office also received a copy of "Change Order No. 1" which modified the December 2004 contract. The amendment states "Contractor changing name from MLC to M&B Contracting and Consulting, LLC" but that "Terms will remain as in original agreement". The amendment, which was effective March 18, 2005, was signed by MLC and a railroad official.

On June 29, 2005, the Board's Assistant General Counsel wrote to the Norfolk Southern, requesting a description of the work MLC performed under his contract. Mr. Michael J. Adamczyk, Manager Car Maintenance, Norfolk Southern, supplied the following description of MLC's work:

MLC has been employed on a consulting basis to inspect Bad Order freight cars verifying or updating information in our Bad Order database. At the direction of another retired NS employee who is also on contract, he traveled to many locations on Norfolk Southern property where BO cars were stored. Upon arrival he consulted with local NS mechanical supervisors about cars and their physical location in the yard. He located those cars and inspected them, estimating the cost to repair and recording that data on an NS supplied form. He may have been accompanied by a local supervisor during the inspections as a courtesy for assistance in locating the cars, transportation within the train yard, as well as for information sharing and safety concerns.

Based on the foregoing evidence, on April 10, 2006, the majority of the Board determined that MLC's activity under the contract constituted service as an employee of a covered railroad employer under the RRA. See B.C.D. 06-14 MLC.

By letter dated April 20, 2006, counsel for MLC requested that the Board reconsider the initial decision pursuant to section 259.3 of the regulations (20 CFR 259.3). MLC submits no new evidence with his request. However, he points out that his duties as a rail car inspector differed from those as a supervisor for Norfolk Southern; that after the March 2005 amendment to the contract, the service agreement was between the railroad and M&B Contracting and Consulting rather than between the railroad and MLC; that he paid employer and employee share of the taxes assessed under the Federal Insurance Contributions Act; and that he received no employee benefits from Norfolk Southern while working under the contract.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, the individual must fall within

the definition of that term provided by the Acts. 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 Railroad Retirement Tax Act (RTA) (26 U.S.C. § 3231(b) and (d)).

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

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 could 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. The Board has in recent years not applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where

such contractors are engaged in an independent trade or business, relying on the decision of the United States Court of Appeals for the 8th Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). However, the Court in Kelm distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10th Cir., 1996), at 891 (holding with respect to an attorney's agreement to perform professional services for the railroad as an independent contractor that " * * * merely to state that such a relationship exists does not necessarily make it so * * * .")

Based on the evidence of record, a majority of the Board finds on reconsideration that MLC's work in his personal capacity for Norfolk Southern in 2004 before formation of M&B Contracting and Consulting, LLC constitutes service as an employee within the meaning of section 1(d)(1)(B) and (C) of the RRA and the analogous provision of section 1(e) of the RUIA. MLC worked only for Norfolk Southern, and only on Norfolk Southern property. His sole proprietorship had no capitalization, and the only source of revenue was MLC's technical advice to the railroad regarding freight rail cars which were in need of repair. As the Norfolk Southern is required by the Federal Railroad Administration (FRA) to identify defective freight cars, inspection of freight cars is integral to Norfolk Southern's freight rail operation. See FRA regulations at 49 CFR 215.9—215.15. By performing the required inspection of rail cars which were designated by Norfolk Southern supervisors, MLC's performance of this technical service was integrated into Norfolk Southern staff within the meaning of RRA section 1(d)(1)(B). Alternatively, by making an in-person inspection of freight rail cars as directed by Norfolk Southern employees on the property used in the employer's operations, MLC's services were integrated into Norfolk Southern's operations within the meaning of RRA section 1(d)(1)(C). See: Railway Express Agency v. Railroad Retirement Board, 250 F. 2d 832 (7th Cir., 1958).

A majority of the Board also finds the evidence supports a conclusion that the contract's characterization of MLC as an independent contractor must be disregarded. MLC acknowledges that he worked only for Norfolk Southern, and took no steps to offer his services to the railroad industry at large. Devoting one's time solely to a single employer indicates an employment relationship. The

Board also notes that MLC was paid at a flat daily rate without regard to the work accomplished. Receiving payment measured by time worked rather than by steps toward completion of the contracted performance also indicates that an individual is an employee rather than an independent contractor. Further, the contract does not specify a definite period of performance, but allows the railroad to terminate the agreement for any reason without allowing MLC any measure of damages if the railroad suddenly determines to end MLC's services. An indefinite term of service which may terminate at will is a mark of an employee relationship, as compared to a contract to provide services for a specified period of time with penalties for nonperformance. The evidence of record is also that MLC performs his services to the railroad in person, and does not delegate performance to anyone else. When viewed in toto, a majority of the Board is satisfied that these facts establish MLC did not work as an independent contractor for the Norfolk Southern prior to substitution of M&B Contracting and Consulting, LLC effective March 18, 2005. See, Rev. Rul. 87-41, 1987-1 Cum. Bul. 296 (listing 20 factors for analysis of employee status under the Federal Insurance Contributions Act (FICA)).

A majority of the Board further finds that the substitution of M&B Contracting and Consulting, LLC for MLC as contracting party effective March 18, 2005 does not alter the result. In determining whether an individual meets the statutory definition of an employee under the RRA and RUIA, the Board may look beyond the formal legal arrangement to the substance of the individual's service. Martin v. Sullivan, 894 F. 2d 1520 (11th Cir. 1990) (the Social Security Administration may pierce the veil of fictitious family salary arrangements to determine whether the beneficiary had earnings as an employee), and Nu-Look Design, Inc. v. Commissioner of Internal Revenue, 356 F. 3d 290 (3rd Cir., 2004) (revenue of subchapter S corporation which was distributed to sole shareholder may be re-characterized as wages for services under FICA). MLC himself reported to the Board that the value of his business aside from the value of his own service was \$0. Before and after formation of the LLC, all revenue was generated through MLC's services. Although the LLC agreement names MLC's wife as manager of the LLC, MLC, not the manager, signed the new agreement with the railroad, indicating that the railroad in fact continued to deal directly with him rather than the business. Moreover, in his March 2005 letter to the district office MLC unabashedly described the salary arrangement between the LLC, himself and his wife as intended to allow him to receive from Norfolk Southern more than the exempt annual earnings amount applicable under section 203(f) of the Social Security Act (42 U.S.C. § 403(f)), and then to re-distribute those earnings between his wife and himself to avoid assessment of any deduction for non-railroad earnings under section 2(g)(2) of the RRA. A majority of the Board concludes

this evidence justifies disregarding the formation of the Limited Liability Company, and viewing all MLC's service to Norfolk Southern, before and after March 18, 2005, as covered railroad employee service.

A majority of the Board concludes on reconsideration that MLC's service as a freight car inspector is creditable service as an employee of Norfolk Southern Railroad. The employer is ordered to submit such returns of compensation and service reflecting MLC's service for years 2004 and 2005 as Board staff may require.¹

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever (Dissenting)

¹ The Board notes that as a result of its decision in B.C.D. 06-14, the Board's Director of Operations notified MLC that his annuity had been overpaid pursuant to section 2(e)(3) of the RRA, which prohibits payment of an annuity for any month in which the annuitant works for a covered railroad employer. MLC has requested administrative review of the Director's determination, which is currently pending. MLC's administrative remedies with respect to decisions regarding payment of benefits arise under regulations of the Board at 20 CFR Part 260, while decisions with respect to the status of an individual as a covered employee are made only by the members of the Railroad Retirement Board under regulations of the Board at 20 CFR 259. In rendering this coverage decision under Part 259, the Board declines to interfere with the administrative review under Part 260 of the amount of any erroneous payment in MLC's annuity as a result of his service to Norfolk Southern.