

**EMPLOYER STATUS DETERMINATION****Kelly-Hill Company**

This is the decision of the Railroad Retirement Board regarding the status of Kelly Hill Company (KHC) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Neal Houser, President and one of the owners of KHC.

Investigation into the status of KHC began subsequent to an inquiry from Mr. Lloyd Matney. Mr. Matney, who provided services to railroad employers through KHC, had inquired about the creditability of those services under the Railroad Retirement Act and Railroad Unemployment Insurance Act<sup>1</sup>.

According to the website for KHC, it is "a full service railroad contractor", which specializes in new railroad track construction, continuous welded rail track construction, railroad track maintenance, production tie and railroad projects, track surfacing, bridge deck replacement, and turnkey railroad track design and construction. Projects listed on KHC's website include building track for the Kansas City Terminal Railway, Kansas City Southern and Gateway Western Railroad. KHC has also built a new coal loop for Kansas City Power & Light's Hawthorne Station, and reconstructed four miles of track for the Northeast Kansas & Missouri Railroad. "Numerous industries" have used KHC to construct their spur line for new facilities, and KHC also provides production tie and rail gangs for shortline customers.

According to information supplied by Mr. Houser, KHC was incorporated January 31, 1955, and is a privately held corporation. The owners of KHC are Mr. Houser, his wife Alice (who is the Chief Executive Officer), and Greg and Kathy Wright (Mr. Wright is Vice President). Mr. Houser stated that KHC's employees perform services on the property owned by the railroad; the services are described as "routine maintenance, surfacing, tie replacement, new track construction". Mr. Houser stated that 80% of KHC's employees work in positions related to business connected with rail carriers, 50% of KHC's total business time is spent doing business with rail carriers, and 50% of KHC's revenue is from rail carriers. Those rail carriers include "UP, KCS, KCT, Watco, and Iowa Interstate", and services are provided pursuant to a written agreement, a copy of which was provided.

According to the "Contract for Work or Services", work is performed at times and locations authorized by the railroad client, and work is done in accordance with the conditions, requirements, and stipulations contained in the particular proposal and bid form/schedule of billable service items. KHC furnishes all superintendence, labor, tools, equipment, materials, and supplies, and all other things requisite and necessary to perform the work under the agreement. KHC is

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<sup>1</sup> A determination regarding Mr. Matney's employee services has been done under separate cover.

paid within thirty days of presenting an invoice to the railroad client; KHC procures and maintains commercial general liability insurance, business automobile insurance, workers compensation and employers liability insurance; KHC and the employees of KHC are not considered employees of the railroad; KHC pays the wages and salaries of KHC employees performing the services; KHC provides safety training for its employees; KHC requires its employees to wear personal protective equipment as required by regulations (hardhats are affixed with KHC's logo); and KHC maintains payroll records for its employees. These records include time and day of week when employee's workweek begins, hours worked each day, total hours worked each workweek, basis of compensation (hourly, weekly, piecework), regular hourly pay rate, total overtime; total wages paid; client for whom work is performed; job location; and Forms W4, W-2, 1099. The agreement also states that KHC is required to maintain daily employee timesheets for both hourly and salaried employees. The agreement further states that the railroad client has "no control over the employment, discharge, compensation of and service rendered by" KHC's employees.

No railroad has a financial interest in KHC, either through direct or indirect stock ownership, no individual owns a controlling interest in KHC and a rail carrier, and no individual is an officer or director of KHC and an officer or director of a rail carrier. KHC owns railroad construction and maintenance equipment, and is not a lessee or lessor of railroad track or equipment. The Federal Railroad Administration has not required CDL to pay user fees, there has been no ruling by the Surface Transportation Board (STB) regarding the status of KHC, nor has the Internal Revenue Service (IRS) ruled on the applicability of the Railroad Retirement Tax Act to KHC<sup>2</sup>.

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;
- (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

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<sup>2</sup> In a letter dated October 15, 2007, Mr. Matney stated he would like to "start paying into my railroad retirement account again" that KHC has agreed to "pay into this account". It is noted that the Board has received no indication from KHC that it is seeking to be found to be an employer covered by the Acts.

- (iii) equipment or facilities) in connection with the transportation of passengers or property by railroad  
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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 (26 U.S.C. § 3231).

KHC is clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. Therefore, KHC is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for KHC's clients should be considered to be employees of the individual railroad rather than of KHC. 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

- (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)).

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.

In Reynolds v. Northern Pacific Railway, 168 F. 2d 934 (8th Cir. 1948), the Eighth Circuit stated that for purposes of liability for taxes under the analogous provision of the Railroad Retirement Tax Act, persons performing services for a railroad may be regarded as railroad employees, even though they are not directly employed or directly paid by the railroad. Id. at 942. The Court further stated that the intent of parties to the contract to avoid coverage, the historical practice of the railroad industry, and factors deciding the employment relationship under other Federal laws should all be considered. Id. at 940-941. Under other federal laws numerous factors are involved in determining whether an individual is engaged in employee service, and in the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act, these factors may be useful in application of those provisions. A few of these factors are relevant in the present case. An individual may not be self-employed where the employer furnishes without charge the supplies and premises for the work. See Henry v. United States, 452 F. Supp. 253, 255 (E.D. Tenn., 1978). Payment on an hourly basis rather than at a specified amount per job also indicates that the individual is an employee. See Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D. Va., 1962). An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

It is the opinion of a majority of the Board (Labor Member dissenting) that the foregoing criteria indicate that the KHC employees have been performing services as employees of KHC, rather than as employees of KHC's railroad clients. While the nature of the work requires these individuals work on the premises of the particular railroad, they do not use that railroad's supplies or equipment, but the supplies and equipment of KHC. They are trained by KHC, and paid by KHC. The railroad client, according to the written agreement, has no control over the services rendered by KHC employees.

Accordingly, it is the decision of a majority of the Board that the services performed by KHC employees are performed as employees of Kelly-Hill Company. As Kelly-Hill Company has been found not to be an employer under the Acts, these services are not creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

Michael S. Schwartz

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

Jerome F. Kever

**Dissenting Opinion of  
V. M. Speakman, Jr.  
Employer Status Determination  
Kelly-Hill Company**

KHC employees perform track construction and maintenance on railroad property. About 80% of KHC employees perform such services. A plain reading of section 1(d)(1)(i)(C) of the Railroad Retirement Act would dictate that these employees, while working on carrier property, should be covered under that statute. The deemed employee provisions of section 1(d)(l)(i)(B) and (C) were enacted to directly address the contracting out of traditional railroad work. See my dissent in Board Coverage Decision 06-21, June 5, 2006. *Employee Status Determination – J A d/b/a The “A” Team.*<sup>3</sup>

Original signed by:

V. M. Speakman, Jr.  
Labor Member

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<sup>3</sup> Available at [www.rrb.gov](http://www.rrb.gov)