

EMPLOYEE STATUS DETERMINATION

XXX-XX-6553

WEB

Background

This case was initiated by the Office of the Inspector General (OIG) in October of 2008, based upon a hotline complaint dated October 14, 2008 (Evidence 1 of investigative file). The complaint identified WEB, as being an individual who was receiving an annuity through the U.S. Railroad Retirement Board (RRB) while still employed by the United Transportation Union (UTU), a covered employer, which would be in violation of the Railroad Retirement Act (45 USC 231 et seq). The subsequent OIG investigation revealed that no formal inquiry was ever made to the Office of General Counsel regarding a legal opinion nor was a decision issued by the three-member Board regarding Mr. B's employment status. The OIG investigation did reveal an advisory letter from the Office of the Labor Member that explained that based upon the information given to that office, Mr. B's employment appeared to be self-employment; however, the letter also gave general legal recommendations to Mr. B regarding steps to take to clarify his self-employment status. The record indicates that the suggested steps were not taken by Mr. B.

The OIG investigation was completed and forwarded June 29, 2011 for review by the Office of General Counsel.

Applicable Law and Regulations

Section 1(b) of the RRA (45 U.S.C. § 231(b)) defines the term "employee" to mean any individual in the service of one or more employers for compensation. Section 1(d)(1) of the RRA provides that an individual is in the service of an employer if:

(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. (45 U.S.C. § 231(d)(1)(i)).

Section 1(e) of the RUIA (45 U.S.C. § 351(e)) contains essentially the same definition.

Section 203.3(a) of the RRB's regulations provides that an individual is performing service for an employer if:

(1) He is subject to the right of an employer, directly or through another, to supervise and direct the manner in which his services are rendered; or

(2) In rendering professional or technical services he is integrated into the staff of the employer; or

(3) He is rendering personal services on the property used in the operations of the employer and the services are integrated into those operations.

Section 216.23(c) of the Board's regulations (20 CFR §216.23(c)) defines self-employment as "work performed in an individual's own business, trade or profession as an independent contractor, rather than as an employee." That section further states that an individual is not self-employed if the business for which he performs service is incorporated. Section 216.23(c) also explains that whether an individual performing services is an employee depends upon the degree to which the recipient of services controls the individual's work. Section 216.23(c) then sets out factors that will be considered in determining whether an individual performs services as an employee or as an independent contractor.

Some indicia pointing to the existence of an employer/employee relationship are the performance of work on the employer's premises, execution of a contract for continuing services over a long or indefinite period, devotion of substantially all of a person's working time to such service, the performance of duties similar in many respects to those previously performed as an employee, training a successor in the duties of the individual's former job, and periodic payment of regular remuneration rather than payment for a specific result or work product.

Indicia pointing to the existence of a self-employed, independent contractor status are the setting up of an office or the performance of the work in places not connected with the employer's premises, performance of similar services for persons other than the employer, freedom as to the amount of time to be expended in rendering a particular service, agreements or arrangements for the performance of specific services of limited duration on a particular project, and payments for a particular result to be accomplished rather than regular remuneration on the basis of time worked.

Discussion

A majority of the Board finds that Mr. B's case turns on a basic analysis of whether his current employment more heavily favors the indicia that indicate he is a contractor or whether his current employment more heavily favors the indicia that he is an employee of the employer. The record reflects that Mr. B set up a corporation named "Rail Consultants, Inc." to portray himself as an expert in the field of labor-management negotiations (Tab C pages a-1 and a-2). The corporation has an office separate from the employer's property (Tab A page A-8). Mr. B reports that he does not work a set schedule and does not keep regular hours, but only works when a negotiation is needed (see Tab C pages b-1 through b-4). A majority of the Board finds that these factors weigh in favor of Mr. B's employment being that of an independent contractor which would not violate the terms of receiving a benefit under the Railroad Retirement Act.

However, the record also reflects several factors that indicate the Mr. B is not an independent contractor and is actually still performing duties essentially as an employee of a covered railroad employer. To begin, Mr. B himself related that he only does negotiation work when John Nadalin, UTU Director of Strategic Planning, advises him to go to a location to attempt to negotiate a contract with a non-represented railroad or non-represented group of individuals (Tab C page b-4). Mr. B also explained in the record that he is paid a flat fee per month and does not receive an hourly fee for his negotiation services (Tab C page b-3). The record also indicates that the negotiations Mr. B conducts are essentially the same negotiations he performed while still employed with the UTU, the only difference is his authority to officially "sign-off" on a negotiated contract (Tab C page b-4). Mr. B is currently conducting his business with the UTU without a written contract and without specific terms as to the duration of the arrangement (Tab C pages b-1 through b-3). The record does not provide any indication that Mr. B advertises his services to the public at large and he admits that his work with the UTU is his corporation's sole source of business (Tab C page b-4). The record also indicates that Mr. B's consulting work is the sole source of revenue for the corporation he created. Finally, even when Mr. B is contacted by a group of non-represented employees at the volition of the employee group, Mr. B explained that before he can go out and begin a negotiation with the employee group, he must receive clearance from Mr. Nadalin (see Tab C page b-5).

A majority of the Board finds that the factors indicating that Mr. B is essentially continuing his employment with his railroad employer are more numerous and more indicative of the type of employment relationship Mr. B has with the employer. The record is undisputed that Mr. B has no terms as to the duration of his contract with the employer and receives regular monthly remuneration instead of wages for hours worked. Mr. B clearly is under the direct supervision of Mr. Nadalin and only performs service or travels when instructed by Mr. Nadalin. Additionally, the "corporate veil" which Mr. B sought to set up for himself is easily pierced by the twin factors that Mr. B's sole source of revenue is his consulting work for the UTU and the fact that he does not advertise to the public at large nor hold himself out as available to consult for any other union other than the UTU.

Mr. B made many references to the fact that he contacted the Office of the Labor Member for approval of his work situation. A majority of the Board finds that although he did seek advice from the Office of the Labor Member, the Office of the Labor Member never issued any formal decision or opinion to Mr. B. The counsel to the Labor Member's Office did provide Mr. B with a letter (see Tab B Evidence 13) that accurately summarized his (Mr. B's) own description of his work and the letter provided further suggestions of what Mr. B could do to strengthen his argument that he is an independent contractor; however, a majority of the Board notes that Mr. B did not alter his relationship with the employer as suggested by the Office of the Labor Member. Further, the Office of the Labor Member never held itself out as giving a "blessing" for this type of employer-employee relationship. The record indicates that the Office of the Labor Member was providing information for Mr. B to review or advice for Mr. B to follow, neither of which rises to the level of an "approval" as claimed by Mr. B.

The investigative record reflects that, in reality, much of the advice was not followed.

In summary, a majority of the Board finds that Mr. B's employment situation more closely resembles that of an employee of the United Transportation Union. The record indicates that he is integrated into the functions of the employer and the employer directs the manner and location of his services. Further, he is receiving regular monthly remuneration for his services instead of a contracted wage per hour of work. Finally, his work is essentially the same as his work prior to retirement. These factors indicating an employee-employer relationship outweigh the factors that would otherwise indicate that Mr. B is an independent consultant.

Decision

Upon review, a majority of the Board finds that Mr. WEB is functioning as an employee of the United Transportation Union within the definitions of employee in sections 1(d)(1)(i)(A) and 1(d)(1)(i)(B) of the RRA from his official retirement in October of 2006 to the present. Furthermore, a majority of the Board finds that the services performed by Mr. B for the United Transportation Union are within the definitions of employee in sections 1(d)(1)(A) and 1(d)(1)(i)(B).

Original signed by:

Michael S. Schwartz

Walter A. Barrows
(Dissenting opinion attached)

Jerome F. Kever

Dissenting Opinion of Walter A. Barrows
Docket Item No. 11-CO-0051
WEB

Under the Railroad Retirement Act, no annuity may be paid for any month an annuitant is in compensated service as an employee for an employer covered under the Act. Thus, if a carrier or union wants to make use of the services of one of its retired employees, the services must be performed as an independent contractor. Often, however, the distinction between an employee and an independent contractor, particularly with respect to an individual performing consulting services through his own business, is not easily discernible. Often the result depends more on the form of the relationship than on the substance of the services.

My colleagues correctly cite section 1(b) of the Act as the framework under which to analyze Mr. B's situation. In order to meet the definition of employee under this section an individual must meet the common law test of an employee, that is, he must be subject to the supervision of the service-recipient with respect to the method and manner of his services or, failing that test, he must be performing personal services which are integrated into the service-recipient's staff and operations.

Clearly, Mr. B does not meet the common law test. He negotiates contracts with small carriers and employees represented by the UTU. He is not supervised with respect to the manner in which he does his work. It is the end result which is important. In this regard, he operates no differently than a retained lawyer or mediator. The fact that he does not choose his assignments is irrelevant. The service-recipient generally determines the task and retains the independent contractor to assist in completing the task.

Neither does Mr. B meet the statutory tests for employees found in the Act. Although he is rendering professional services to the UTU, he does not perform them on UTU property and such services are not integrated into the staff or operations of the UTU. He has not set hours; no permanent office space. He works on an assignment-only basis and presumably can decline an assignment. He neither directs nor supervises UTU employees. He does not take part in any employee benefit program offered by the UTU.

Finally, I note that there was nothing surreptitious about B's post-retirement relations with the UTU. There was no design or scheme here to evade the post-employment restrictions in the Act. Both Mr. B and the UTU made every effort to ensure they were complying with the law.

For the above reasons, I dissent.

Original signed by:

Walter A. Barrows