

Employer Status Determination

Marietta Industrial Enterprises, Inc.
(doing business as Dock Side, Inc.)

This is the decision of the Railroad Retirement Board with respect to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of Marietta Industrial Enterprises, Inc. (doing business as Dock Side, Inc.) (MIE).

The following is based on information provided in letters dated November 13 and December 27, 1991, and March 20 and May 28, 1992, from Mr. Thomas L. Rose, Controller/Treasurer of MIE, and on information obtained by the Railroad Retirement Board in connection with its employer status determination as to Little Kanawha River Rail, Inc. (LKRR).

LKRR was held on July 25, 1990, to be a rail carrier employer covered under the Acts effective August 1, 1989, the date on which it began conducting rail operations. Although Mr. Rose has stated that "LKRR is owned by individuals who have less than 75% ownership of MIE", he now advises that MIE is owned in equal shares by W. Scott Elliott, Burt M. Elliott, R. Grant Elliott, and Cheryl L. Rose, while LKRR is owned in equal shares by W. Scott Elliott, Burt M. Elliott, and R. Grant Elliott. Accordingly, exactly 75 percent of the ownership of MIE owns 100 percent of LKRR. In his letter of December 27, 1991, Mr. Rose stated that the line in question serves "Ames Tools, AB Chance, Badger Lumber, Dock Side and CSX." In his letter of November 13, 1991, Mr. Rose stated that LKRR has no employees and the line is operated by MIE employees. Four to six such employees "may work on the railroad in any given pay period." The work "might require two hours/day or less." In addition there are many days "that the railroad does not operate." MIE and LKRR have the same address and telephone number.

In his most recent letter, Mr. Rose states that MIE has 125 employees and that its operations include:

- * Warehousing and JIT programs for local industry[.]
- * Metals Division which crushes, sizes, packages and quality controls Ferro Alloys, Bauxite, etc.
- * Trucking division which supports JIT programs, Metals Division, Plastics Division & Limestone.
- * Wholesale and Retail of Limestone and related aggregates.
- * Plastics Division which grinds, screens, packages and quality controls plastic and rubberized material for local industries.

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* Plastics Recycling Division which separates, grinds, cleans, extrudes, and quality controls recycled plastics.

* River Division which loads and unloads coal and coke materials along the Ohio, Kanawha & Little Kanawha Rivers for various industry. [This] Division also supports two harbor towboats.

* Construction division which does rip-rap work along the rivers for the railroad, industry, and private property owners. This division is also involved in boat ramp construction for various municipalities.

Mr. Rose also indicates as follows:

More than 80 percent of LKRR's operations take place on a private siding that has been constructed so that coke/coal can be unloaded from river barges directly into rail cars. The only services offered to any outside companies are the occa[s]ional switching of cars for A.B. Chance and O. Ames Company.

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," in pertinent part, as follows:

The term "employer" shall include--

(i) any express company, sleeping-car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *."

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons who control a rail carrier. From the information provided by Mr. Rose, it is clear that a controlling interest in MIE (three of four owners of MIE) owns 100 percent of

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LKRR. Accordingly, MIE is under common control with a railroad employer by reason of its commonality of ownership with LKRR.

The question then becomes whether MIE performs a service in connection with railroad transportation. Section 202.7 of the regulations (20 CFR 202.7) defines a service in as connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations. Since MIE's rail-related service is the actual operation of LKRR's train, it is clear that that service is reasonably directed related, functionally or economically, to the performance of rail carrier obligations.

Section 202.6 of the regulations of the Board, implementing the casual service exception contained in section 1(a)(1)(ii) of the Railroad Retirement Act, quoted above, provides that:

The service rendered or the operation of equipment of facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is 'casual' whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial. [20 CFR 202.6.]

While there is no direct information available as to the amount of income generated by services provided by MIE in connection with rail transportation, in view of LKRR's gross income being less than two percent of MIE's gross income (\$180,000.00 as compared with \$10,308.938.00) it must be inferred that the services rendered by MIE for LKRR clearly constitute an insubstantial portion of the operations of MIE. On this basis, the Board concludes that the services being performed by MIE for its rail carrier affiliate are casual, and accordingly, that MIE is not an employer under the Acts. Cf Rev. Rul. 84-91, 1984-1 C.B. 203, which held that the performance of services in connection with rail transportation was casual where the activities in question constituted less than 4% of the related company's activities.

II.

Another issue in this case is whether the employees of MIE performing services for LKRR should be regarded as employees of LKRR while performing the services in question. 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

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1(d)(1) of the Railroad Retirement Act 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 * * *.

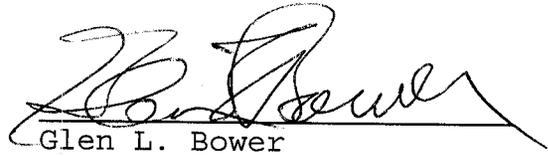
Section 1(e) of the Railroad Unemployment Insurance act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)).

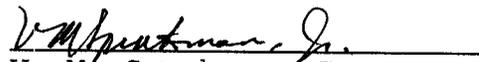
The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also in the way he performs such work.

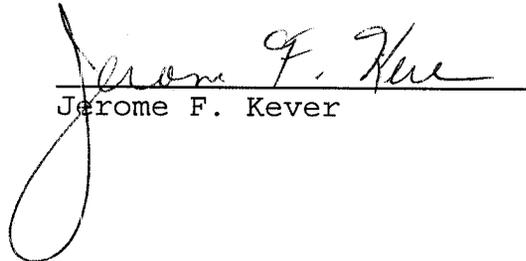
A rail carrier subject to the Interstate Commerce Act is under a duty to provide locomotives and cars to transport the public's property as part of its operation as a carrier. The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer. See Restatement (Second) of Agency § 214. The Board believes that operation of train service is a function so essential to the statutory duty of a rail carrier to provide rail transportation that the carrier must retain the power to direct and control the individuals who conduct the service. Cf. Annotation, What Employees are Engaged in Interstate Commerce within the Federal Employers' Liability Act, 10 A.L.R. 1184 (1921), at 1220-1226; and Annotation, Who is an Employee in Interstate Commerce within Federal Employers' Liability Act as Amended in 1939, 10 A.L.R. 2d 1279, 1296 (1950), (both discussing liability of the railroad for injuries to locomotive engineers, firemen, brakemen and conductors). Finally, regulations of the Board provide that where an individual is subject to the direction and control of an employer, the employee relationship is established "irrespective of whether the right to supervise and direct is exercised." See 20 CFR 203.3(b).

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The individuals provided to LKRR by MIE act as crew for the trains which LKRR must run in satisfaction of its rail carrier obligation. LKRR must retain ultimate control of the performance of its service as a common carrier. Accordingly, it is the determination of the Board that service performed by employees of MIE as crew for LKRR trains is creditable as service as employees of LKRR under the Railroad Retirement and Railroad Unemployment Insurance Acts.


Glen L. Bower


V. M. Speakman, Jr.


Jerome F. Kever