

## **DETERMINATION OF EMPLOYER AND EMPLOYEE STATUS**

### **Rail Systems, Incorporated**

This is the determination of the Railroad Retirement Board concerning the status of Rail Systems, Incorporated (RSI) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). Because the Board finds that RSI is not an employer under the Acts for the reasons explained below, this determination will also address the question of whether employees of RSI should be considered to be employees under the Acts.

Information was obtained through correspondence with CP Rail System, d/b/a Soo Line Railroad (BA No. 1606) and RSI. In addition, several CP Rail System employees who wish to remain anonymous submitted information concerning work performed by RSI.

RSI indicated that it is a privately held company that was incorporated in December 1986. RSI is involved in recycling of metals, supplying landscape materials, and shredding railroad ties. None of the information obtained indicated that RSI is either owned by or under common control with a rail carrier employer. RSI does not operate a railroad. It therefore does not fall within the definition of "employer" under the RRA and RUIA. Since, however, employees of RSI work on railroad property to dispose of scrap railroad ties, the question has arisen as to whether those employees should be considered to be covered employees of the carrier for which those services are performed.

RSI stated that about twenty percent of its employees work in positions related to business connected with rail carriers. RSI is under contract to dispose of scrap tie for CP Rail System. RSI indicated that it performs work along track right-of-way, picking up scrap ties. The scrap ties are disposed of in LaCrosse, Wisconsin and are picked up for disposal at various sites around LaCrosse. RSI employees are under the supervision of railroad employees only when they are picking up scrap ties along the mainline. RSI also stated that its hours coincide with the railroad's hours only when using a flagman while picking up ties along the mainline. RSI stated that it submits weekly invoices for the ties disposed of. Roadmasters inform RSI of the scrap tie locations. The railroad does not have the right to change RSI's methods of work or to replace a particular RSI employee. Nor are RSI employees trained by the railroad. All equipment used belongs to RSI.

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Consistent with the responses provided by RSI, CP Rail stated that it cannot dictate who RSI may employ as long as the employees follow the terms of the contract and follow all applicable laws and rail safety requirements. Nor does CP Rail have any control over what task any individual performs for RSI. CP Rail does have the right to approve or reject any or all subcontractors. RSI is required to provide CP Rail with proof of liability insurance and, in some cases, with a performance bond or letter of credit.

The contract between RSI and CP Rail is dated December 31, 1992 and states in pertinent part that it will continue for a period of five years. Paragraph 4 of that agreement provides that:

The Contractor [RSI] will complete the tie disposal services with its own employees and equipment in accordance with its own procedures, subject to approval of the Wisconsin Department of Natural Resources or other pertinent agency, as applicable. Contractor will also provide adequate supervision to assure compliance with all applicable laws, including environmental rules and regulations, and the safety of all Contractor and Company [CP Rail] employees involved in the services. The Company will have no rights or responsibilities for supervision, inspection or control except as necessary to allow it to determine whether the work performed complies with the requirements of this Agreement.

An earlier contract, dated July 25, 1990, required RSI to salvage and remove ties from the right-of-way of Soo Line Railroad. That earlier contract required the work to be completed within 360 working days from the date of the Agreement. CP Rail indicated in its response that the pickup and disposal of scrap ties has been done by various contractors over the years, although that work is now under contract to be done by RSI.

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' operations, personal services the rendition of

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which is integrated into the employer's operations." [45 U.S.C. §231(d)(1)(i)].

Section 1(e) of the RUIA contains essentially the same definition.

In the view of a majority of the Board, the evidence obtained from RSI and CP Rail is consistent in indicating that RSI, and not CP Rail, has the right to direct the manner in which RSI employees do their work for CP Rail. In fact, the contract between the two companies expressly reserves that right for RSI. A majority of the Board finds, therefore, that the definition of "employee service" in section 1(d)(1)(i)(A) of the RRA does not apply to employees of RSI.

In considering whether the definitions in sections 1(d)(1)(i)(B) and (C) apply, the Board has long applied the holding in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953). Under Kelm, employees of independent contractors who perform services for a railroad are not considered to be employees of the railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts. RSI was established in 1986, some time before it began to remove scrap ties for CP Rail. Moreover, only a portion of RSI's business consists of its service for the railroad. The record indicates that only 20% of RSI's employees work in positions related to business connected with railroad carriers. Despite the assertion in the record in this case by an anonymous employee of CP Rail who stated that the work now done by RSI has been performed historically and exclusively by Brotherhood of Maintenance of Way employees, there is no evidence that RSI was established to avoid coverage under the RRA and the RUIA. Rather, the evidence indicates that RSI is an independent business. A majority of the Board finds that Kelm applies and that RSI employees are not covered employees under the RRA and the RUIA.

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Glen L. Bower

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V. M. Speakman, Jr. (Dissenting)

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