

Employer Status Determination BHP Copper Company

This is the decision of the Railroad Retirement Board regarding the status of BHP Copper Company(BHP) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

BHP is a copper production company which owns three railroad subsidiaries: San Manuel Arizona Railroad Company (BA. No. 2745), Magma Arizona Railroad Company (BA No. 2710), and BHP Nevada Railroad Company (BA No. 2779). BHP's locomotive shop provides services for the first two subsidiaries.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(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 (other than trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

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).

BHP is not a carrier by rail. Further, a decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the Railroad Retirement Tax Act held that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of § 3231 of that Act. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993).

The relevant facts of the Union Pacific case are indistinguishable from those presented by BHP. Accordingly, the Board determines that BHP is not an employer under the Acts as it is not under common control with its rail carrier subsidiaries. Therefore, BHP is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for BHP under its arrangements with rail carriers should be considered to be employees of those railroads rather than of BHP. 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)).

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 the way he performs such work.

The evidence submitted shows that there are 17 employees in the locomotive shop, which is part of BHP Copper Metals Maintenance Department, which in turn is a division of BHP. The audit report concludes that these individuals are supervised by employees of BHP, which is consistent with the statements of the individuals who work in the locomotive shop; accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would 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. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Because BHP clearly engages in an independent business, Kelm would prevent the application of paragraphs (B) and (C) of the definition of covered employee to this case. Accordingly, it is the determination of the Board that service performed by employees of BHP is not covered under the Acts.

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