

EMPLOYER STATUS DETERMINATION**Encore Rail Systems LLC**

This is the decision of the Railroad Retirement Board regarding the status of Encore Rail Systems LLC¹ (Encore) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Doug Delmonico of Encore. Information was also obtained from the website for Encore and Steelhead Corporation, the parent company of Encore.

According to information provided by Mr. Delmonico, Encore is owned by the Steelhead Corporation², and Mr. Greg Winsor of Steelhead is the Chief Executive Officer of Encore. Encore, formerly R-Mac Sales and Leasing, began operations as Encore March 1, 2007. Encore has fifteen employees who, according to Mr. Delmonico, "provide equipment and training to railroads". According to Encore's website, Encore "is a single-source provider of the industry standard in railway tie plugging and rail seat abrasion prevention and repair". Encore provides on track training, track inspector training and certification, roadway worker certification, and track consulting. Mr. Delmonico explained that Encore does not own or operate a railroad, owns no track, and provides plugging equipment and technical training to railroad employees exclusively. With respect to its services, Mr. Delmonico stated that "90% of the railroad business is with the Union Pacific" and 10% is with other railroads and short lines.

No railroad has a financial interest in Encore, either through direct or indirect stock ownership, no individual owns a controlling interest in Encore

¹ It is noted that while Encore's website refers to "Encore Rail Systems Inc.", Mr. Delmonico refers to Encore Rail Systems LLC. As the date on the website is 2007, and the information in Mr. Delmonico's letter of March 17, 2008, was in response to the specific direction to provide the "correct corporate name", this decision will refer to the company as Encore Rail Systems LLC.

² Steelhead Corporation (Steelhead) is, according to its website, "a holding company and managing partner of a growing group of light manufacturing and distribution operations". Steelhead is a privately held corporation and serves customers throughout North America and Europe. Steelhead currently has four companies under management: Encore, RPS Inc. (a facility that specializes in railcar modification and retrofit programs), Ramptech, Inc. (an aftermarket supplier of Holden America's Grate/Lock Choke System, an automotive vehicle securement system used on approximately 40,000 bi-level railcars), and Metropolitan Air Technology, LLC (the manufacturer of speciality high-end damper products including the patented Roto-Twist line of cable operated damper systems).

and a rail carrier, and no individual is an officer or director of Encore and an officer or director of a rail carrier. Encore 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 Encore to pay user fees, there has been no ruling by the Surface Transportation Board (STB) regarding the status of Encore, nor has the Internal Revenue Service (IRS) ruled on the applicability of the Railroad Retirement Tax Act to Encore.

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 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).

Encore 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, Encore is not a covered employer under the Acts.

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

A majority of the Board, Labor Member dissenting, finds that the foregoing criteria indicate that the Encore employees have been performing services as employees of Encore, rather than as employees of Encore'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 Encore. The consulting services provided by Encore consist of on track training, track inspector training and certification, roadway worker training and track consulting. Other training programs and certification tests for track maintenance positions Encore provides include: safety certification training, maintenance of way rules training, maintenance of way roadway worker, maintenance of way flagman, maintenance of way machine operator, roadway maintenance machine safety, defensive driving, and lift truck training (forklift) certification. While such training may be provided on the grounds of the railroad client, it is the opinion of a majority of the Board, Labor Member dissenting, that the fact that Encore employees perform these services for a number of clients, these services are advertised to the public, and Encore receives payments for a particular result accomplished rather than regular remuneration on a time basis support a conclusion that Encore employees perform services as employees of Encore and not as employees of the railroads for which services are provided.

Accordingly, it is the decision of a majority of the Board, Labor Member dissenting, that the services performed by Encore employees are performed as employees of Encore Rail Systems LLC. As Encore Rail Systems LLC has been found not to be an employer under the Acts, a majority of the Board therefore finds that 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
ENCORE Rail SYSTEMS LLC

The employees of Encore provide roadway worker training, track maintenance consulting, and various other types of training programs related to railroad operations on railroad property. The deemed employee provisions of sections 1(d)(l)(i)(B) and (C) of the Railroad Retirement Act, and its companion sections in the RUIA and RRTA, were enacted to directly address the contracting out of traditional railroad work as performed by Encore. See my dissent in Board Coverage Decision 06-21, June 5, 2006. *Employee Status Determination – J A d/b/a The “A” Team.*³

One hundred per cent of Encore’s business is with carriers by rail. I would find the employees of Encore employees by attribution of the respective carriers for whom they are performing services.

Original signed by:

V. M. Speakman, Jr.
Labor Member

³ Available at www.rrb.gov under Legal Information/Board coverage Decisions