

EMPLOYER STATUS DETERMINATION**Brown's Machine Works and Construction, Inc.**

This is the determination of the Railroad Retirement Board concerning the status of Brown's Machine Works and Construction, Inc. (BMWC) 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). Information about BMWC was furnished by William E. Haynie, the chief executive officer of BMWC.

Mr. Haynie reported in the responses to the Audit and Compliance questionnaire that BMWC was incorporated in Texas on October 22, 1997. BMWC began operations on November 3, 1997. The owners of BMWC are Jerrie L. Brown and Robert G. Brown. BMWC is a privately held company that does not share any common ownership or financial interest with any rail carrier.

BMWC's business consists of replacing ties, spikes, plates, anchors, rail, angle bars, crossing materials and repair of turnouts under the supervision of Class I and Class II railroads. BMWC performs 100% of its total business with rail carriers. The chief rail carriers for whom BMWC does business are Kansas City Southern Railway, Union Pacific Railroad, Watco, and BNSF. BMWC receives 100% of its income from rail carriers. BMWC owns all the necessary rail tools to perform the services and maintenance to the rail carriers previously described, but BMWC does not jointly own any facilities with a rail carrier.

Mr. Haynie provided two sample contracts that BMWC typically utilizes with its rail carrier clients. As stated earlier, BMWC does not lease equipment from rail carriers to perform its duties. The STB has not made any rulings regarding BMWC's status and the IRS has not ruled on the applicability of the Railroad Retirement Tax Act (RRTA) to BMWC. Mr. Haynie further reports that 100% of revenue for BMWC is received from the rail carriers described previously. BMWC employs between 34 and 60 employees and first began compensating employees as of November 3, 1997.

Section 1(a)(1) of the RRA defines the term "employer" to include:

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

Section 1 of the RUIA contains essentially the same definitions, as does section 3231 of the Railroad Retirement Tax Act.

It is clear from the record in this case that BMWC is not a rail carrier employer under section 1(a)(1)(i) of the RRA and section 1 of the RUIA. Turning to the definition in subparagraph 1(a)(1)(ii), we find that BMWC is also not an affiliate employer under the Acts. Despite the rail-related services that BMWC performs in terms of track and railway maintenance, it is clear that BMWC is not under common control with any rail carrier. Further, the contracts provided clearly indicate that BMWC holds itself out as a contractor to any rail carrier and does not limit itself to services for only one entity. Because BMWC performs services for many carriers, no single carrier influences or controls the work performed by BMWC.

Based on the evidence of record, we find that BMWC lacks the common control requirement to be covered under section 1(a)(1)(ii) of the RRA and the corresponding section of the RUIA and clearly lacks the characteristics to be found to be covered under section 1(a)(1)(i) of the RRA and corresponding section of the RUIA.

In accordance with the above discussion we find that Brown's Machine Works and Construction, Inc., is not an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Finally, because we find that: (1) BMWC is an independent contractor within the holding of the United States Court of Appeals for the Eighth Circuit in its decision in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953); (2) the evidence supports a finding that the employees of BMWC are directed by BMWC supervisors and use materials, equipment and supplies provided by BMWC, and (3) no employee of BMWC has claimed that

his/her service should be covered under the RRA and the RUIA, there is no need to consider employee service issues in great detail in this decision.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever