

B.C.D. 13-11
EMPLOYEE SERVICE DETERMINATION
XXX-XX-1091 MLR

May 1, 2013

This is the decision of the Railroad Retirement Board (hereinafter the Board) regarding whether the services performed by MLR for Railroad Distribution Services (RDS) and the Pioneer Valley Railroad (PVR) (B.A. No. 3113) constituted employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. PVR is a covered employer under those Acts. RDS is a non-railroad subsidiary of Pinsley Railroad Company (PRC) (B.A. 7105).

In a facsimile letter faxed on May 5, 2012, Mr. R responded to the employee questionnaire provided to him by letter dated April 17, 2012. Mr. R advised that he has never worked for PRC, however he has been employed for two wholly owned subsidiary operations known as RDS and PVR. He stated that he is currently an employee of PVR providing services described by him as Operations Management, Sales and Marketing, Budgetary Control, Personnel Functions and Corporate Liaison. He currently serves as Vice President and General Manager of RDS and PVR. Mr. R stated that he is not under written contract for the services that he performs. He stated that he is a salaried employee who is paid bi-weekly by PVR. Mr. R stated that Internal Revenue Form W-2 received from RDS was used for reporting for the years 2003 through 2011. Mr. R reported that he works from an office in Westfield, Massachusetts and spends 20-30 percent of his time on the road visiting customers, industries and governmental agencies. He stated that he does not receive any instructions or training by PRC as to how his work is performed and he does not perform any work on the property of PRC, but rather works for RDS and PVR on property leased by RDS and on property owned by PVR. According to Mr. R, he provides 40 hours of service per week for RDS and PVR. Mr. R stated that his original employment in the railroad industry was between 1967 and 1970 as a train service employee during the summers while attending college working for New Haven Railroad and Penn Central. Mr. R stated that he returned to railroad service effective January 1, 2012 due to the retirement of the operations manager at PVR and the need for his services.

In February 2011, the Board's Office of Inspector General's (OIG) Office of Investigation (OI) initiated an investigation into Mr. R's work for PVR based upon a complaint to the OIG/OI Hotline which indicated that Mr. R was providing a compensated service to the PVR, but was not paying RRA/RUIA taxes. Accordingly, the OIG/OI issued an Inspector

General Subpoena to the PRC. Fletcher and Sippel, Attorneys at Law, responded to the subpoena on behalf of the PRC. In their response, PRC indicated as follows: 1) In 2003, Mr. R was hired by RDA, a non-carrier subsidiary of the PRC, and his responsibilities were the management of warehouse operations; 2) In 2007, Mr. R was promoted to Vice President and General Manager and was given limited responsibilities of the PVR; 3) Between 2008 and 2010, Mr. R performed varying tasks and varied amounts of time between the two companies, RDS and PVR; 4) Mr. R estimated that 35 percent of his time was devoted to railroad matters; 5) During these years, Mr. R's salary continued to be paid by RDS; and, finally 6) on January 1, 2012, the Operations Manager of the PVR retired and Mr. R's railroad work significantly increased and accordingly, Mr. R was "placed on the payroll of the PVR and was reported as a covered employee under railroad retirement, despite the fact that he continues to perform substantial non-rail services."

Based on the above OIG/OI investigation, the case was declined by the United States Attorney's Office for the District of Massachusetts; however they indicated that they would revisit this matter should the employer and/or employee fail to comply with any determination of the Board. Accordingly, the OIG/OI has closed its case.

Section 1(b) of the Railroad Retirement Act defines an "employee" to be any individual in the service of one or more (railroad) employers for compensation. Section 1(d) 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)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

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.

Effective January 1, 2012, Mr. R was put on the payroll of PVR and his compensation will be reported to the Board in accordance with section 9 of the Railroad Retirement Act. Thus, the issue for the Board to address is whether the evidence supports a conclusion that Mr. R was performing employee service prior to January 1, 2012. The evidence of record shows that between 2003 and 2011, Mr. R provided services for RDS and his compensation was reported on IRS Form W-2 for those years. Mr. R reported that he worked as a General Manager involved in warehouse management during that period. Mr. R stated that the change in work from RDS to PVR occurred when the operations manager for PVR retired and there was a need for him to become more directly involved in the railroads matters. Accordingly, beginning January 1, 2012, Mr. R became Vice President and General Manager of PVR and RDS.

Based on the facts as stated above, the Board finds that Mr. R's service for RDS, prior to beginning his service January 1, 2012 for PVR, did not constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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