

B.C.D. 16-20

August 23, 2016

**EMPLOYEE SERVICE DETERMINATION
DLW**

This is the decision of the Railroad Retirement Board regarding the status of DLW as an employee of a covered railroad employer under the Railroad Retirement and Railroad Unemployment Insurance Acts (RRA and RUIA). The status of this individual as an employee has not previously been considered by the Board. For the reasons set forth below, the Board finds service performed by Mr. W for the C&NC Railroad Corporation (B.A. 2374) (C&NC), Maumee & Western Railroad Corporation (B.A. 2375) (Maumee), and Wabash Central Railroad Corporation (B.A. 2376) (Wabash) to be service as an employee of those railroads for purposes of benefit entitlement under the RRA for the period January 1, 2004 through December 31, 2007.

Review of the files indicate that during audits of C&NC, Maumee and Wabash done around 2000, information was provided to the agency regarding RMW Ventures, L.L.C. (RMW), TransMark Associates, Inc. (TransMark), and American Maintenance & Training, Inc.(AM&T). Investigation of these companies indicated that TransMark was incorporated September 18, 1997. TransMark provides consulting services to state and municipal governments, manufacturing entities, machinery brokers, recycling concerns, agri-business concerns, small railroads and other transportation concerns, and individuals. Services provided include help in development of start-up business plans, assistance with planning for specific transportation, accounting services, and brokerage of engineering services. TransMark provides services to C & NC, Maumee, and Wabash. At the time of the agency's investigation, the average percentage of TransMark's gross revenues generated by business with these companies was 15.8, 19.8, and 8.2, respectively. TransMark is owned by Spencer Wendelin.

AM&T was incorporated September 9, 1997, and provides services to federal, state, and local government entities, industrial and agri-business firms, and railroads. These services provided include maintenance and repair of large machinery; training of individuals and groups in the operation of various types of large equipment and in equipment safety training; construction work and consulting assistance, including the specialized movement of large items such as machinery and fixed structures, such as bridges; and the disassembly of large machinery. AM&T provides services to C & NC, Maumee, and Wabash. At the

time of the agency's investigation, the average percentage of gross revenues generated by business with these companies was 10.8, 24.6, and 10.2, respectively. AM&T is owned by Wurmwood Trust, Charles Hambley, Jr., and William Hambley, co-trustees.

RMW was formed April 28, 1997, and leases real estate and other assets to short line railroads and other companies. RMW leases real estate to C & NC, Maumee, and Wabash. At the time of the agency's investigation, the percent of business time spent doing business with rail carriers was under 10 percent. Approximately 75 percent of RMW's revenue is received from property leases, a portion of which is attributable to railroad lessees. RMW is owned by 12 different parties, including individuals, joint holders, and others. RMW has no employees, but has a Manager, Mr. Spencer Wendelin. RMW owns the assets of C&NC, Maumee and Wabash. When the rail lines were purchased, a separate limited liability corporation was formed to take title to each line; C&NC, L.L.C., Maumee & Western, L.L.C., and Wabash Central, L.L.C. These limited liability corporations were "pass through" entities, had no employees, performed no operational functions, and were intended solely to permit the acquisition of the rail lines by RMW under the terms dictated by Norfolk Southern Corporation. After the acquisition was closed, the three limited liability corporations were merged in RMW, with RMW the surviving entity. Rail service was provided on the lines by a separate operating company with an operating agreement with RMW. The operating companies were C&CN Corporation, Wabash Central Railroad Corporation, and Maumee and Western Corporation, all employers covered by the Acts¹.

Subsequent to this investigation, in B.C.D. 01-86, issued December 4, 2001, we found:

Trans-Mark, American Maintenance, and RMW all provide services to carriers covered under the Acts. However, there is no evidence in the record which contradicts the information submitted that these companies are not affiliated with any carriers. Accordingly, the Board finds that TransMark, American Maintenance, and RMW are not employers under

¹ In Board Coverage Decision (B.C.D.) 13-30, issued September 20, 2013, we found that effective December 28, 2012, Maumee ceased to be a covered employer under the Acts. Similarly, in B.C.D. 14-25 we have found that effective October 8, 2013, C&NC is no longer an employer covered under the Acts.

the Railroad Retirement and Railroad Unemployment Insurance Acts.

The evidence regarding Mr. W shows that he was born in May 1946, and filed an application for an annuity under the Railroad Retirement Act on May 9, 2008. The remarks section of that application states in part:

Applicant stated he worked for TransMark Associates from February 15, 1999 to August 23, 2007. Applicant believes Trustmark (sic) Associates is operating as a railroad carrier. Applicant believes he should be given railroad credit for the period he worked for TransMark Associates.

Mr. W has made numerous telephone calls to the agency, and submitted many documents. According to one of the first contacts he had with the agency (March 10, 2008), Mr. W advised that from 1973 to 1999 he worked for a rail carrier unrelated to this matter, and that in 1999 he began working as a contractor, pursuant to a written agreement, with TransMark. In 2003 he was placed on TransMark's payroll as an employee². In a letter dated April 5, 2008, Mr. W stated that he believes he worked for three covered entities, C&NC, Maumee, and Wabash, for "4 separate, but consecutive periods of time * * * identified as:

1. From February 15, 1999 through June 5, 2000
2. From June 6, 2000 through May 31, 2004
3. From June 1, 2004 through July 31, 2007
4. From August 1, 2007 through August 23, 2007

To receive credit for benefit entitlement purposes under the Acts, an individual must be in service to an employer which the Board has determined to be an employer covered by the Acts. Mr. W claims he should be credited with railroad service for the period February 15, 1999 through August 23, 2007. Section 9 of the Railroad Retirement Act (RRA) requires railroad employers to file annual reports of compensation and service for each of their employees with the Railroad Retirement Board. Section 9 further provides that the Board's records of reported compensation and service become final unless the error in a report of compensation or the failure to report compensation is called to the

² Information subsequently provided by Mr. W indicates that he was placed on the payroll of TransMark in 2004.

attention of the Board within four years after the date on which the report of compensation was required to be made. Section 209.8 of the Board's regulations (20 CFR 209.8) provides that the annual report is due on or before the last day of February for the preceding calendar year. The record indicates that the first time Mr. W contacted the agency regarding his service for the years 1999 through 2007 was when he spoke with the agency's Office of General Counsel on March 10, 2008, regarding his concerns about the services he provided to TransMark, therefore the only years which can be considered are calendar years 2004 through 2007³.

However, for the entire period for which Mr. W claims he should be credited with railroad service (not just the period 2004 through 2007) Transmark was not a covered employer under the Acts, pursuant to our decision in B.C.D. 01-86. This is a final agency decision for which the time period to appeal has expired. Moreover, section 259.2(a) of the Board's regulations (20 CFR 259.2(a)) provides that an employee of a company is not a party to any coverage determination with respect to that company.

Each year those individuals with creditable railroad compensation in the previous year receive RRB Form BA-6, Certificate of Service Months and Compensation. While it is true that Mr. W would not have received a BA-6 form for the years he was not receiving railroad credit, he would have received one for each year he had creditable railroad service from 1973 through 1999. There is no evidence of record to indicate that Mr. W ever contacted the RRB regarding his claim that services provided to TransMark be found creditable in the period 1999 through 2007 before contacting the agency in March 2008.

As explained above, the time period for considering half of the years contained in Mr. W's request for railroad service has passed. Section 211.16 of the Board's regulations (20 CFR 211.16) provides that as a general rule the Board's record of compensation and service may not be corrected after four years in the absence of fraud. Mr. W alleges that he (and potentially other, although no

³ The report for calendar year 1999 was due by the last day of February 2000; a protest needed to be filed by February 2004. The report for calendar year 2000 was due by the last day of February 2001; a protest needed to be filed by February 2005. The report for calendar year 2001 was due by the last day of February 2002; a protest needed to be filed by February 2006. The report for calendar year 2002 was due by the last day of February 2003; a protest needed to be filed by February 2007. The report for calendar year 2003 was due by the last day of February 2004; a protest needed to be filed by February 2008. Mr. W's first contact with the agency was, as stated above, March 10, 2008.

other employees have come forward) were actually employees of the three railroads, but were treated as employees of TransMark, in an attempt by TransMark to avoid coverage. We have reviewed Mr. W's allegations, and for the reasons outlined below, find the actions of TransMark do not rise to the level of fraud.

Exactly what circumstances constitute fraud on the part of the employer must be inferred by the Board, as fraud is neither defined in the RRB's statutes nor in its regulations. Furthermore, there is no case law explicitly defining fraud as used in the RRB regulations. Therefore, the Board looks to similarly situated statutes to assist in its interpretation.

Due to the similarity between the RRB's taxing authority under the Railroad Retirement Tax Act (RRTA) and the Internal Revenue Service's (IRS) taxing authority, the Board turns to Internal Revenue Code (IRC) section 6663 to assist in its interpretation of fraud. *See*, 26 U.S.C. § 3201 *et seq.* IRS section 6663 authorizes the IRS to impose a monetary penalty if underpayment of tax is due to fraud. Neither IRC section 6663 nor its regulations define fraud. However, according to case law interpreting IRC § 6663, fraud "is to be construed as ordinarily understood." White v. United States, 20 F. Supp. 623, 625 (W.D. Ky, 1937). Fraud is the "deliberate suppression of vital facts in the [tax] return, which is misleading, it is a fraud, and the misrepresentation will support fraud penalties if made recklessly without knowledge, or if carelessly done as to lead a trier of facts to believe that the person on whom the duty rests to disclose has knowingly or intentionally failed to do what the law requires." White, 20 F. Supp. at 625. In other words, fraud is the intention "to evade the taxes [the taxpayer] knew were owing by conduct intended to prevent their collection." Hayward v. Commissioner, 746 F.2d 1369 (8th Cir. 1984).

Fraud must be proved by "clear and convincing evidence, but intent can be inferred from strong circumstantial evidence." Bradford v. Commissioner, 796 F.2d 303, 307 (9th Cir. 1986) (citations omitted). Indicia of fraud include: (1) understatement of income; (2) inadequate records; (3) failure to file tax returns; (4) implausible or inconsistent explanations of behavior; (5) concealing assets; and (6) failure to cooperate with tax authorities. Bradford, 796 F.2d at 307-308 (citations omitted).

In defining fraud, it is also helpful to look at the language in Weyerhaeuser Co. v. Railroad Retirement Bd., 503 F.3d 596 (7th Cir. 2007). Although the court in Weyerhaeuser stated that it did not need to decide the definition of fraud, the court noted that the RRB had previously used the definition of an employer's "knowing failure to report compensation and service as required under the Railroad Retirement Act . . ." Weyerhaeuser, 503 F.3d at 602. The court's language in Weyerhaeuser is consistent with the fraud definitions found in the cases interpreting the IRC.

The Board has reviewed whether TransMark's actions would rise to the level of fraud, thus tolling Mr. W's period of time for filing protests of compensation. 20 C.F.R. § 211.16(b)(1). In 2001 the Board found that TransMark was not an employer covered by the RRA and the RUIA. B.C.D. 01-86. Therefore, TransMark was bound to pay FICA taxes to the IRS instead of taxes to the Board under the RRTA. The Board's 2001 coverage decision regarding TransMark is final as it was not appealed within one year following the date on which the initial determination was issued. 20 C.F.R. §259.3. Thus, the 2001 coverage decision is not before the Board for review and can no longer be reopened.

There has been no evidence presented by Mr. W showing that TransMark knowingly failed to report compensation and service of its employees to the RRB. In fact, there was no requirement that TransMark report compensation and service of its employees to the RRB, as the Board had found TransMark not to be a covered employer. Neither has there been any evidence presented that TransMark understated its income, kept inadequate records, failed to file tax returns, gave implausible explanations for its actions, concealed assets or failed to cooperate with tax authorities. Therefore, the Board finds there is no evidence that TransMark fraudulently failed to report compensation and service as required under the RRA. As the Board finds no evidence of fraud to toll the time for filing, Mr. W's claim is limited to the period 2004 through 2007.

Mr. W argues that his services for TransMark should be considered services provided to C&NC, Maumee, and Wabash, as an employee of those railroads. It is this issue which we now address.

In his letter of April 5, 2008, Mr. W states that although his paycheck came from TransMark, "most, if not all" of the work he did during the time period in

question was for C&NC, Maumee and Wabash. Mr. W argues that for the period June 6, 2000 through May 31, 2004 he was labeled an independent contractor rather than as a railroad employee. He provided copies of Form 1099-Misc for this period (Exhibits B1-B5 attached to the letter of April 5, 2008), as well as copies of Form W-2, Wage and Tax Statements for 2004, 2005, 2006, and 2007, which show TransMark as Mr. W's employer (Exhibits B6 –B10 attached to letter of April 5, 2008). As the only time period properly before us is calendar years 2004 through 2007, arguments and exhibits (such as the Forms 1099-Misc) concerning the years prior to 2004 are not considered in this decision.

Mr. W describes his assigned duties as handling both real estate and railroad property taxes for the 3 railroads, as well as personally negotiating and then preparing various types of lease agreements for the three railroads, such as railroad track lease agreements, railroad side track agreements, railroad land lease agreements, and railroad license agreements. Mr. W also

managed hundreds of already existing railroad lease and license agreements. I inspected on-site these railroad track lease agreements, railroad sidetrack agreements, railroad land lease agreements, and railroad pipe and wire license agreements.

While representing Maumee, Mr. W also worked with the Ohio Department of Transportation on various highway projects, particularly the realignment and relocation of U.S. 24 in northwest Ohio, speaking with and meeting on-site with various highway contractors to insure that the progress of the highway construction did not interfere with or cause damage to the railroad's property and operations. Mr. W also worked with the Indiana Department of Transportation on a number of highway projects located in Indiana, including widening and/or resurfacing of highways near to or adjacent to railroad property and/or located at railroad-highway grade crossings. Mr. W also did railroad real estate property tax work for the three railroads, coordinating, preparing and submitting the annual Public Utility Tax Reports for the three railroads to the respective state public utility tax departments in Ohio and Indiana. Mr. W checked and reviewed all of the county and local property tax bills for payment by the three railroads.

Mr. W also supplies copies of various court filings, such as the *Plaintiff's Verified Motion for Temporary Restraining Order and Preliminary Injunction without Notice* (Filed January 23, 2004); the *Defendant's Brief in Opposition to Plaintiffs' Verified Motion For Temporary Restraining Order and Preliminary Injunction Without Notice* (filed February 4, 2004); and the *Findings of Fact and Conclusions of Law* (filed February 19, 2004) (In the Wells Superior Court, State of Indiana, Cause No. 90D01-0401-PL-001) which includes the Certification of the Attorney for the Wabash which states "David W is the Manager of Special Assets for Plaintiff Wabash Central Railroad Corporation".

In a letter dated January 8, 2013, Mr. W explained that he represented Maumee at public information meetings in Ohio held by the Ohio Department of Transportation, and he represented all three railroads at the American Railway Development Association's 96th Annual Meeting from May 1 to May 4, 2005.

Mr. W argues that he was never a contractor. I was always a railroad employee. I worked for the three railroads indicated above. * * * I was paid as a salaried, full-time employee of the 3 railroads listed above. (letter of September 24, 2008).

As further evidence that he should be considered an employee of the three railroads, Mr. W states that he had three sets of business cards, one for C&NC, one for Maumee, and one for Wabash. All three sets had his name and title (Manager-Special Assets), the same address, telephone number, cell phone number, and fax number. Mr. W also states that "I received my paycheck from TransMark Associates, Inc., but I drove a white "company" 1995 Ford Taurus that had its title placed in the name: Wabash Central Railroad Corporation".

Mr. W also submitted several documents sent to him from TransMark. The first, dated July 28, 2005, concerns a request from Mr. W for financial assistance with moving and storage of his furniture. That letter, signed by Mr. Spencer Wendelin, President of TransMark, contains a summary of Mr. W's employment offer made June 6, 2000, regarding reimbursement of moving expenses, payment of temporary living expenses, and financial assistance in the purchase of a new house (Exhibit A attached to letter of April 5, 2008). Mr. W submitted a copy of an email from Mr. Wendelin dated August 1, 2007, which

was sent to Mr. W along with a draft of a contract between TransMark and Railway Land Resources (Mr. W's company) in which Mr. Wendelin advises that Mr. W needs to obtain a federal employer identification number for Railway Land Resources (Exhibit Q attached to letter of April 5, 2008). The draft consulting contract is dated August 1 2007, and is between TransMark and "Railway Land Resources (David W DBA)" (Exhibit O attached to letter of April 5, 2008). A letter from Mr. Wendelin to Mr. W dated August 24, 2007 (Exhibit U attached to letter of April 5, 2008) states that the parties have reached "a temporary impasse in our discussions" about the use of Railway Land Resources by TransMark, and that TransMark feels "it is in the best interest of both of our firms that Railway Land Resources temporarily discontinue providing the contemplated services". The draft consulting contract appears to be a contemplated plan by Mr. W and TransMark whereby Mr. W, doing business as Railway Land Resources, would provide consulting services to TransMark after his employment with TransMark ended in 2007. As the contract appears to never have been signed, and furthermore, it would be for the period after the time period under consideration, no weight is given to it as evidence.

In a letter dated January 5, 2010, Mr. W stated that every two weeks he would break up the time he spent on each of the three railroads for which he was providing services, and that 100% of his time was spent working for the three railroads. He further stated that Mr. Wendelin had told him to break down the percentage of time he worked for each of the railroads so that TransMark's Treasurer could take money from each of the three railroads based on the percentage of time Mr. W worked for that particular railroad and then "combine those amounts from each of the above 3 railroads into each paycheck I would receive". It should be noted that review of Mr. W's earnings as reported by the Social Security Administration indicates that for years 1996, 1997 and 1998 Mr. W's earnings were reported as wages; for years 1998 through 2004, Mr. W's earnings were reported as self-employment; and for years 2005 through 2007, his earnings were reported as wages.

Review of the file shows that after receiving Mr. W's letter of April 5, 2008, and its attachments, the General Counsel sent a memorandum dated May 20, 2008, to the Chief of Audit and Compliance Section (A&C), Office of Budget and Fiscal Operations (BFO), requesting that A&C contact Mr. W to obtain

additional information regarding his claim for railroad service. The General Counsel also stated

Mr. W alleges that the three non-carrier companies are organized to avoid reporting individuals performing service to the three rail carriers as employees covered by the RRA, RUIA and RRTA. He states that TransMark, American Maintenance, and RMW share common officers and possibly ownership with each other and with three rail carriers, C&NC Railroad Corp, Maumee & Western Railroad Corp., and Wabash Central Railroad Corp.

Please contact TransMark Associates to obtain that company's description of Mr. W's employment for the periods he claims covered railroad service. Also obtain information regarding joint ownership and corporate officers of the three non-covered companies and the three railroads. A response should also include a current description of the business of each company, and the percentage revenue earned from, and staff time spent by the non-carriers in, work related to the railroads.

Letters dated June 4, 2008, were sent to Mr. W, as well as Mr. Spencer Wendelin, President of TransMark. In a letter dated July 21, 2008, Mr. Wendelin stated that Mr. W "provided certain real estate related consulting services to a variety of our client companies and supplied certain real estate expertise for our firm's needs in that specialized area." Mr. Wendelin stated that "Mr. W became an employee of our company on June 1, 2004." And that "To our knowledge, Mr. W never performed any services as an employee for any of the three railroad companies named in this question". Mr. Wendelin further stated that

Mr. W did consulting work for our clientele, this often required him to be "in the field", where the real estate or rental property involved in whatever project he was assigned to an any given day, was located, or where the property records were kept (e.g. various county court houses). Such services would have been performed for clients from day to day, at various locations in Indiana, Ohio and Tennessee. When not in the field, Mr. W worked in office space at our corporate office in Corydon, Indiana and at a TransMark satellite office located in Connersville, Indiana.

Mr. Wendelin also stated that

At no time, during which Mr. W was our employee, did he report to any of our clients, nor to the management of any of our clients, including the three railroads you have mentioned. Mr. W was never a part of, nor treated as part of the staffs of any of our clients, including these three railroads clients. Mr. W was supervised exclusively by senior officers of TransMark Associates at all times and in all work tasks he performed. He was not compensated by any of our clients, nor was he provided any material support, office space, etc. by any of our clients. His services occasional (sic) required him to enter operating railroad property in order to perform part of his real estate consulting services, but in no manner was that entry related in any way to the railroad clients' operations any more than when a land surveyor enters on a property to do his work.

In answer to the question "Describe in detail the relationship between each listed company and TA (TransMark), Mr. Wendelin explained that TransMark

is a consulting firm. We provide a wide variety of consulting services to our clientele. These services include, but are not limited to real estate services, marketing and market development services, industrial and economic development services, accounting services, financing services, mechanical and civil engineering services, and use planning services; management services, invoice auditing and other specialized services, as the opportunity and requirements of the marketplace for consulting services may dictate from time to time.

The agency sent Mr. Wendelin a follow-up letter dated October 29, 2008, specifically stating "Our General Counsel has requested that you furnish the names and owners, the percentage of each railroad owned by each owner, and the offices of each of the following six railroads for which TAI provides services⁴: (1) Transmark, American Maintenance, (2) RMW (3) C&NC Railroad Corporation (4) Maumee & Western Railroad Corporation (5) Wabash Central Railroad Corporation, and (6) Transmark Associates."

⁴ We note that several of the entities listed as "railroads" have been found by the Board not to be railroad employers covered by the Acts and are, in fact, not railroads.

In a letter dated November 5, 2008, Mr. Wendelin responded to this request. In that letter he stated that TranMark's records indicate that Mr. W, through a company named Railway Land Resources, provided real estate contractor/consulting services to TransMark from July 3, 2000 through May 31, 2004, and Mr. W's employment with TransMark (which began June 1, 2004) ended August 31, 2008, with the elimination of the position Mr. W occupied in the company.

Mr. Wendelin further stated

Concerning your question #4 – TransMark Associates, Inc. is a contract consulting firm. Our records do not normally include ownership information about our clients. The information which is available from our records concerning the companies and railroads about which your letter inquires, is as follows.

Regarding "Transmark, American Maintenance", Mr. Wendelin stated "this entity is not known to our firm. It is not a TransMark Associates, Inc. client. We do not know if it is a railroad or not." Regarding "RMW", Mr. Wendelin stated, "TransMark Associates, Inc. does not provide services to any railroad client by this name. Our firm does provide services to a company by the name of RMW Ventures, LLC, which is not a railroad, but, is instead a real estate, development and equipment rental business." Regarding the three railroads, C&NC, Maumee and Wabash, Mr. Wendelin stated that TransMark "has provided contract consulting services to each of these railroads * * * on an intermittent and an 'as required' basis" He further stated that TransMark's "records on these clients do not include information on the ownership of these railroads". Finally, regarding "TransMark Associates", Mr. Wendelin stated that "this company is not a railroad. It is in the heavy machinery business. TransMark Associates, Inc. provides intermittent rented office space to this firm. That is the only relationship TransMark Associates, Inc. has with this company. TransMark Associates, Inc.'s records do not contain information on the ownership of this company".

We note that in his responses to the agency quoted above, Mr. Wendelin stated "(O)ur records do not normally include ownership information about our clients",

and with respect to the three railroads, C&NC, Maumee and Wabash, Mr. Wendelin stated that TransMark’s “records on these clients do not include information on the ownership of these railroads”. Review of agency records for C&NC, Maumee and Wabash indicate otherwise. Files for C&NC, Maumee and Wabash each contain letters addressed to Mr. Wendelin acknowledging payment for the assignment of reporting marks for each of the three railroads. Each file contains a letter from Mr. Wendelin, on the letterhead of the railroad in question, to the agency providing information about the railroad. In fact, each Board Coverage Decision indicates that Mr. Wendelin provided the information regarding the railroad to the agency for the Board’s use in making its coverage determination⁵. In a letter dated March 3, 2014, signed by Mr. Wendelin and on C&NC letterhead, Mr. Wendelin stated “C&NC Railroad Corporation stock is wholly owned by Mr. Spencer N. Wendelin”.

While the statements made by Mr. Wendelin in his letters of July 21, 2008, and November 5, 2008, appear to be contradictory in light of evidence contained in agency’s records, as stated previously, we find it does not rise to the level of fraud.

Furthermore, even if there is evidence that Mr. Wendelin owns TransMark as well as C&NC, the Board finds that established legal precedent and past Board coverage decisions prevent a finding of “common control”. To qualify as an employer under the Acts the two-prong test to find a railroad entity covered under the “common control” doctrine is that the railroad entity must (1) be either directly or indirectly owned or controlled by one or more such carriers or under common control with the carrier and (2) the railroad entity must perform service (other than trucking or casual service) in connection with the transportation of passengers or property by railroad. (*see, Union Pacific Corporation v. United States* 5 F. 3d 523, 1993.) The Court in Union Pacific further clarified “common control” by stating:

The term “under common control” does not usually apply to two companies in a parent-subsiary relationship. These words—“under

⁵ See, B.C.D. 98-7, “Information about MWRC (Maumee) was furnished by Spencer Wendelin, the agency’s contact official at Wabash Central Railroad Corporation...”; B.C.D. 98-9, “Information about WCRC (Wabash) was furnished by Spencer Wendelin, the agency’s contact official at WCRC...”; and B.C.D. 98-11, “Information about CNC (C&NC) was furnished by Spencer Wendelin, the agency’s contact official at Wabash Central Railroad Corporation...”.

common control” – convey a meaning of mutual subordination to a controlling principal. A company which controls another is not “under common control” with its subsidiary. Rather two companies most naturally fit within the term “under common control” when occupying parallel position as subsidiaries controlled by a common parent. (Union Pacific at 525 and 526.)

The Board applied this standard to determine “common control” in numerous coverage decisions since the holding in Union Pacific. Additionally, the Union Pacific definition of “common control” was found to hold true regardless of whether a railroad entity was a publicly held or privately held corporation in the recent United States Court of Appeals for the District of Columbia decision of Indiana Boxcar Corporation v. Railroad Retirement Board (712 F.3d 590, 2013). Indiana Boxcar applied the Union Pacific standard of “common control” to Indiana Boxcar Corporation and found it to not be under common control with its subsidiaries, even though Indiana Boxcar was a privately held corporation where the owner was also owner and president of each of Indiana Boxcar Corporation’s subsidiary railroads. The Court ruled that since the Board found other railroad entities with closely held, publicly traded corporations not to be under common control, the fact that Indiana Boxcar was a privately held corporation was not a material distinction and a privately held corporation should be subject to the same common control standard. The fact that Indiana Boxcar Corporation had employees performing management duties was not addressed since the Union Pacific common control standard was not met.

TransMark has a similar relationship with the three railroads in question as Indiana Boxcar Corporation has with its subsidiaries because TransMark and at least one of the three railroads in question are owned by the same person. As established by the Court’s holding in Indiana Boxcar, a corporate parent cannot be found to be under common control with its subsidiaries, regardless of any report of management services being provided by employees of the parent company because the common control analysis does not satisfy the first prong of common control under the Union Pacific standard. Accordingly, the Board must find that TransMark is not under common control with its affiliates and the Board, and continues to be an entity not covered as an employer under the Acts.

We now turn to the question of whether Mr. W's services for TransMark should be considered services provided as an employee of the three railroad employers. To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, Mr. W must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) 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 Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(b) and (d)).

A 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.

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 with respect to the way he performs such work. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and could 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. The Board has in recent years not applied paragraphs (B) and (C) to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business, relying on the decision of the United States Court of Appeals for the 8th Circuit in Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). The Kelm decision distinguished between services performed for the railroad by employees of a firm with a clearly independent existence, and services performed by an individual who primarily contracts to furnish only his own labor. 206 F. 2d at 835. Employees of a contracting firm must meet the direction and control requirements of paragraph (A), while single individuals contracting directly with the railroad may fall within the broader definitions of (B) or (C). In making a determination under these sections, the Board is not to be bound by the characterization of the relationship stated by the parties in a contract. Gatewood v. Railroad Retirement Board, 88 F. 3d 886 (10th Cir., 1996), at 891 (the Court holding that with respect to an attorney's agreement to perform professional services for the railroad as an independent contractor that “ * * * merely to state that such a relationship exists does not necessarily make it so * * * .”)

Applying these criteria to Mr. W's case, the Board finds that the Kelm decision does not prevent consideration under paragraphs (B) and (C) because Mr. W did not operate as independent business enterprise for the time period at issue. TransMark contracted directly with Mr. W individually for his service, rather than through a corporation, limited liability company, or other entity. Mr. W worked only for TransMark and had no employees himself. TransMark does not deny that Mr. W was considered to be an employee of TransMark.

Both TransMark's and Mr. W's descriptions of the services performed by Mr. W are clearly technical services. Mr. W handled both real estate and railroad property taxes for the railroads, as well as personally negotiated and then

prepared various types of lease agreements for the railroads, such as railroad track lease agreements, railroad side track agreements, railroad land lease agreements, and railroad license agreements. These services were performed entirely on property of the employers. Mr. W also represented the railroads in dealings with the Ohio Department of Transportation and before the respective state public utility tax departments in Ohio and Indiana, as well as representing the three railroads at public information meetings and at public meetings such as the American Railway Development Association's Annual Meeting. These services provided by Mr. W are directly integrated into the management and operation of the three railroad employers.⁶ Therefore, the Board finds that Mr. W is integrated into the railroads' staffs or operations, as is specified in paragraphs (B) and (C).

Accordingly, in view of all of the evidence, the Board finds that service performed by Mr. W for the C&NC Railroad Corporation (B.A. 2374), Maumee & Western Railroad Corporation (B.A. 2375), and Wabash Central Railroad Corporation (B.A. 2376) to be service as an employee of those railroads for purposes of benefit entitlement under the RRA for the period January 1, 2004 through December 31, 2007. The employers are directed to submit such returns of service and compensation with respect to Mr. W's service for 2004, 2005, 2006, and 2007 as Board staff may require.

Original signed by:

Walter A. Barrows

Steven J. Anthony

⁶ In a verified motion for temporary restraining order in a state court, the attorney for Wabash Central Railroad attested that David W is the "Manager of Special Assets for Plaintiff Wabash Central Railroad Corporation". This was attested to on January 22, 2004 during the same period TransMark indicated Mr. W was an independent contractor.