

JAN 07 2003

**Employer Status Determination
Employee Status Determination**

Training Consulting Connection

This is the decision of the Railroad Retirement Board regarding the status of the Training Consulting Connection (TCC) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

TCC was founded in 1991 and holds itself out as specialists in organization and staff development. It has a client list of approximately 80 companies, one of which is a railroad, Union Pacific Railroad Company. Under a contract with Union Pacific it supplies individuals, who it regards as independent contractors, to train Union Pacific employees in Remote Control Locomotive technology. This technology enables a railroad employee to operate a locomotive with a hand-held device. It is used in switching yards only, to break up and re-form trains, and generally not where there are crossings. Where there are crossings, the device must have a camera associated with it. There is no evidence that TCC is affiliated with a railroad.

There are nine individuals with whom TCC has contracted to provide this training to Union Pacific. All of them are former Union Pacific employees. The technology in which they are training Union Pacific employees is new to railroads in the United States (although apparently it has been in use in Canada for some time). Accordingly, the work these individuals performed for Union Pacific is generally different than that they are performing for TCC.

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;

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(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).

TCC clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Therefore, TCC is not a covered employer under the Acts.

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

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(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 with respect to the way he performs such work.

The evidence submitted shows that the work of the nine individuals is not performed under the direction of any Union Pacific employee or employees, but is performed under the terms of their contracts with TCC; accordingly, the control test in paragraph (A) is not met. Moreover under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) 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).


Thus, under Kelm the question remaining to be answered is whether TCC is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968) at 341. While these may be rather close questions in cases such as this one, where the contractor does not have permanent employees but rather hires individuals on a per job basis, it

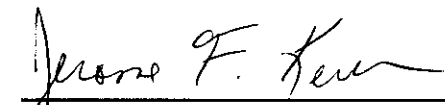
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is apparent that TCC is in the business of providing services to many customers, only a very small percentage of which are connected to the rail industry. The record indicates that TCC is engaged in a recognized trade or business. Accordingly, it is the opinion of the Board that TCC is an independent business.

Because TCC engages in an independent business, Kelm would prevent applying 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 the individuals who contract with TCC to provide services to Union Pacific are not employees of Union Pacific and that the services they provide to Union Pacific are not covered under the Acts.


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