B.C.D. 03-40

MAY 1 2 2003

Employee Service Determination
AM

This is the decision of the Railroad Retirement Board regarding whether the services performed by AM for the Columbia & Cowlitz Railway Company (C&C) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. The C&C is an employer (BA 3602) under the Acts administered by the Board. AM is an employee of Weyerhaeuser, a publicly traded integrated forest products company. Weyerhaeuser Corporation owns the C&C. According to an Employee Questionnaire regarding the activities of AM supplied by Mr. Kennedy Ketterman, Tax Audit Manager for Weyerhaeuser Corporation, AM is the General Manager of the C&C. He performs this work at the offices of Weyerhaeuser Corporation. AM started performing this service in August 1967. As part of his duties for the C&C, AM participates in meetings with employees of the railroad to discuss company policies, work procedures, etc. He also meets with the customers and suppliers of the railroad. He makes decisions as necessary to conduct railroad operations, to hire and discharge employees, conduct salary negotiations, disciplinary and arbitration hearings. He attends, as a representative of the railroad, national railway and shortline conferences and in general conducts any other business required to manage the C&C. AM spends approximately 15 hours of his 40-hour workweek (approximately 40%) on C&C business. Weyerhaeuser is reimbursed for the salary paid to AM by a direct charge on the C&C.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

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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
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> (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)). Paragraph (A) of the definition dates from the inception of the railroad retirement system. See Public Law No. 162, 75th Cong., Ch. 382, Part I, (50 Stat. 307).

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. In the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act, these factors may be useful in determining application of those provisions. 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).

AM is the general manager of the C&C. He performs numerous managerial services that are directly integrated into the management and operation of the railroad employer. He is paid indirectly by the C&C for these services on an ongoing basis. Therefore, the Board finds that AM is integrated into the employer's staff or operations, as is specified in paragraph (B).

Under section 211.16(a) of the Board's regulations (20 CFR 211.16(a)), the period of time within which compensation may be reported is limited to four years after the date on which such compensation is required to be reported to the Board. The four-year rule is subject to certain exceptions including the case "Where the earnings were

erroneously reported to the Social Security Administration in the good faith belief by the employer or employee that such earnings were not covered under the Railroad Retirement Act * * *" (section 211.16(b)(ii)). However, no employee may be credited with service months or tier II compensation beyond the four-year period unless the appropriate railroad retirement taxes have been paid (section 211.16(c)). Accordingly, it is the decision of the Board that AM's services for the Columbia & Cowlitz Railway Company is employee service. Consequently, such service is creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts insofar as is permitted by section 211.16.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever