

UNITED STATES GOVERNMENT

Memorandum

RAILROAD RETIREMENT BOARD

JUL 01 1986

L-86-92

TO : Director of Compensation and Certification

FROM : Deputy General Counsel

SUBJECT: Rail Management Services, Inc.
Employer Status

This is in response to your request for a determination as to the current status of Rail Management Services, Inc., as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. I previously determined Rail Management Services (RMS) not to be an employer under the Acts in Legal Opinion L-81-21, and accordingly the Employer Status List, at item 5528.5, records that service to this company is not creditable.

Legal Opinion L-81-21, dated February 18, 1981, was based largely upon information supplied by Mr. [REDACTED], President of RMS. At that time, Mr. [REDACTED] was also President of the Ontario Central Railroad Company and the Ontario Midland Railroad Corporation, and according to his letter of November 3, 1980, some individuals connected with RMS "fill[ed] certain officer positions" with those companies. However, RMS owned no stock in either company, and four of the seven members of the Board of Directors of each company were unconnected with RMS.

Mr. [REDACTED] stated that at that time RMS engaged in two fields of endeavor. The company primarily acted as a consultant to local government units and groups of shippers considering the establishment of short line railroads to preserve rail service on branch lines abandoned by major rail carriers. In this capacity, RMS prepared feasibility studies and assisted clients in setting up and commencing short line operations. RMS also arranged storage space for temporarily inactive freight cars for the Ontario Midland Railroad Corporation and for National Railway Utilization Corporation, a car leasing company. Mr. [REDACTED] said that he expected that RMS would discontinue this aspect of its business in the near future. Mr. [REDACTED] also noted that while RMS might undertake management of a railroad in the future, it had not done so at that time. Mr. [REDACTED] further stated that RMS subcontracted projects undertaken by it to individuals, and itself had no employees.

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Based on this information, I concluded that RMS was not an employer under the Railroad Retirement or Railroad Unemployment Insurance Acts by reason of either being itself a carrier by rail subject to part I of the Interstate Commerce Act or operating the line of another such carrier in interstate commerce. I also concluded that RMS was not under common control with any of its client railroads, but expressed no opinion regarding the nature of the services RMS performed for the client carriers. Finally, I stated that RMS should notify the Board of any material change in its business.

In connection with a determination of the status of the Jersey Southern Railway, Mr. [REDACTED], Assistant Treasurer and Controller of that Railway, wrote in a letter to my office dated April 24, 1984 that the Jersey Southern had "no employees", and that:

"The administrative work is performed by our general office staff * * * in Sodus, New York. They are employees of RMS and provide general administrative services for several different Railroads. The Railroad is billed for time and fringe benefit on and [sic] actual time worked basis."

On February 10, 1986, Mr. [REDACTED] wrote to your office in response to your inquiry that RMS now provides "management services, accounting services, mechanical services, operational guidance, track and right of way inspections and engineering" to the Ontario Midland Railroad, the Ontario Central Railroad, the Ontario Eastern Railroad, the Allegheny Southern Railway, and the Jersey Southern Railway. Mr. [REDACTED] also wrote that RMS provides a complete array of administrative services to these railroads, including "General Accounting, billing, interline settlements, payroll, disbursements, [and] car hire accounting." RMS' "business is 100% associated with" these railroads. Salaries and expenses incurred by RMS "are allocated to each of the railroads based on the volume of traffic each line has * * * on a strict pass through basis, and there is no markup * * *." Although Mr. [REDACTED] stated that RMS has four employees, he stated that five individuals held positions with each company. Together with information listed for Jersey Southern in The Pocket List of Railroad Officials, Vol. 91, no. 3, pages 601 & 603, and the file on the Allegheny Southern Railway, the following summary of officers and directors may be set forth:

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1. [REDACTED]: Chairman of the Board — Ontario Midland Railroad
Ontario Central Railroad
Ontario Eastern Railroad
Jersey Southern Railway
President — Rail Management Services, Inc.
Allegheny Southern Railway
2. [REDACTED]: Secretary/Counsel — Ontario Midland Railroad
Ontario Central Railroad
Ontario Eastern Railroad
Jersey Southern Railway
Rail Management Services, Inc.
3. [REDACTED]: Vice Chairman — Ontario Eastern Railroad
Vice President Rail Management Services, Inc.
4. [REDACTED]: Chief Engineer — Ontario Midland Railroad
Ontario Central Railroad
Ontario Eastern Railroad
Jersey Southern Railway
Member of Board — Rail Management Services, Inc.
5. [REDACTED]: President/Gen'l MGR — Ontario Midland Railroad
Ontario Central Railroad
Ontario Eastern Railroad
Jersey Southern Railway
Vice-President/ — Rail Management Services, Inc.
Treasurer
Asst. Treasurer/ Allegheny Southern Railway
Controller

In addition, it may be noted that The Pocket List of Railroad Officials shows the general office of all four railroads to be [REDACTED] which also appears as the address of RMS. The Allegheny Southern Railway is shown as having suspended operations. Ibid., p. 293.

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Section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. § 351) provides in pertinent part that:

"For purposes of this Act, * * *

"(a) The term 'employer' means any carrier (as defined in subsection (b) of this section) * * *.

"(b) The term 'carrier' means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act."

Section 1(a)(1)(i) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)(i)) contains a substantially identical provision. Moreover, this office has long held that where a company operates a railroad in interstate commerce under lease or other arrangement with a rail carrier subject to part I of the Interstate Commerce Act, both companies are employers under the Railroad Unemployment Insurance and the Railroad Retirement Acts. See Legal Opinions L-42-393, L-83-134, and L-85-39.

Section 1(d)(i) of the Railroad Unemployment Insurance Act defines the term "employee" as any individual who is or has been in the service of one or more employers for compensation. Section 1(e) of that Act provides that an individual is "in the service of an employer" if:

"(i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation * * *."

Substantially the same definitions are found in section 1(b) and 1(d)(1) of the Railroad Retirement Act, and in sections 3231(b) and (d) of the Railroad Retirement Tax Act. In considering these provisions, courts have construed them interchangeably.

It has been held that, under certain circumstances, the employees of a third party which contracts to perform a service for a railroad employer may be considered to be in the service of the

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railroad employer within the meaning of these sections. A prime consideration in determining whether an individual is subject to the continuing authority of a railroad in the performance of his services is whether or not the services performed are of a nature which the railroad could delegate and place beyond its control and still claim to operate its railroad and carrier activities. Wabash R.R. Co. v. Finnegan, 67 F. Supp. 94, 99 (E.D. Mo., 1946). The Board has in the past been required to identify and cover as employees under the Acts individuals performing accounting, purchasing and stenographic services. Adams v. Railroad Retirement Board, 214 F. 2d 534 (C.A. 9, 1954). The fact that such individuals may be nominally on the payroll of another company may be disregarded. Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358, 362 (C.A. 10, 1942).

It is clear that the business activities of RMS have changed significantly since February 1981. Where RMS earlier limited its service to its clients to the period during which the client considered whether or not a short line railroad would be feasible and then assembled documents and material necessary to begin operation, RMS now provides numerous continuous services without which no railroad could operate. Adams, supra, at 542. It should be noted that all five of RMS' clients have been held to be employers under the Acts as carriers by rail subject to Part I of the Interstate Commerce Act. Moreover, it appears RMS' services are completely oriented toward these five railroads. Because the same individuals hold several managerial positions at the railroads and at RMS, the services provided by RMS are effectively subject to the supervision and direction of the management of those railroads. That the services performed by RMS do not include actual operation and repair of trains and right of way is not material; they are essential to the operation of the railroads in question. RMS acts as a conduit for compensation paid to these individuals by the respective railroads by charging the salaries of employees providing these services directly to the railroads without any profit factor. Utah Copper, supra, and Legal Opinion L-38-650.

Based on the foregoing, it is my opinion that the individuals whose services are provided through Rail Management Services to the Ontario Midland Railroad, Ontario Central Railroad, Ontario Eastern Railroad, and Jersey Southern Railway are actually in the service of those railroads within the meaning of section 1(d) of the Railroad Unemployment Insurance Act and section 1(d)(i) of the Railroad Retirement Act. Further, it is my opinion that the


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salaries billed to those railroads by RMS constitute compensation paid by those railroads and should be reported as such. In view of the foregoing, I find it unnecessary to reconsider the status of Rail Management Services itself as an employer under the Acts.

Regulations of the Board provide that a decision of this office with respect to covered status under the Acts is final unless duly challenged within the appropriate time. Where facts and circumstances forming the basis for a final determination sufficiently change to warrant a contrary determination, the decision of this office on those facts and circumstances shall be an initial determination within the meaning of section 259.1 of the Board's regulations (20 CFR 259.1). See section 259.7 of the Board's regulations (20 CFR 259.7). Accordingly, the parties affected thereby may request reconsideration of this decision within one year of the date of this memorandum.



Steven A. Bartholow

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