

FEB 18 1981

L 81 - 21

Director of Data Processing and Accounts

*See also:
L-86-92*

Acting General Counsel

Rail Management Services, Inc.
Employer Status

This is in reply to your inquiry dated August 15, 1980, requesting my opinion in regard to the employer status of Rail Management Services, Inc., hereafter referred to as RMS. This company has not previously been an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

In a letter dated August 6, 1980, Mr. David M. Beers, President of RMS, indicated that the corporation is engaged in providing consulting services to diverse clients regarding light density rail line problems. He further indicated that RMS provides no direct services to operating railroads or other employers covered by the Acts except while functioning temporarily as a broker for the placement of box cars for temporary storage. In response to a letter of inquiry by this Bureau, Mr. Beers indicated in a letter dated October 1, 1980, that RMS has assisted National Railway Utilization Corporation, an employer covered by the Acts, by contracting leased storage for railroad cars owned by that corporation. A copy of the storage contract currently in effect between RMS and the New York & Lake Erie Railroad Corporation was submitted to the Board for consideration. In a letter dated November 3, 1980, Mr. Beers indicated that the terms of the contract between the New York & Lake Erie and RMS are identical, except for a modest markup, to the contract between National Railway Utilization and RMS. In addition, Mr. Beers states that the car storage arrangement will probably not continue as a function of RMS for more than a few more months. The material terms of the contract between RMS and the New York & Lake Erie which was submitted for review appear to establish, under the general criteria which are used in deciding questions of this type, an independent contractor relationship between the parties. Therefore, any services rendered pursuant to the contract in question would not ordinarily be creditable under the Acts. See General Counsel's opinion L-80-202.

Director of Data Processing and Accounts

However, Mr. Beers, in addition to serving as President of RMS, at one time served as Chairman of Board of both the Maryland & Delaware Railroad Company and the Virginia and Maryland Railroad Company. He also currently serves without compensation as President of both the Ontario Central Railroad Company and the Ontario Midland Railroad Corporation. It should be noted that all four of these railroads are employers covered by the Acts.

Consequently, because some of the services performed by RMS are railroad-connected, there arises the question of whether RMS may be an employer within the meaning of the Acts by reason of being in common control with a carrier. As you know, a company is under common control with a carrier whenever the control of such company is in the same person, persons, or company as that by which the carrier is controlled. Common control exists if the carrier controls the company, if the company controls the carrier, or if both the company and the carrier are controlled either directly or indirectly by some other company or person.

According to Mr. Beers, RMS has no equity in any of the above-mentioned employers. Furthermore, Mr. Beers states he has resigned the two chairmanships he once held. In addition, of the two other employer entities, he states that four of the seven members of the respective boards of directors have not the remotest link with RMS.

On January 27, 1981, a representative of this office spoke with Mr. Beers regarding the relationship of RMS and its predecessor, Rail Services Associates, to the Bath & Hammondsport Railroad Company. According to Mr. Beers, Mr. J. A. Hannold, formerly with Rail Services Associates, was also then President of the Bath & Hammondsport Railroad Company. Neither Rail Services Associates nor RMS have had any association with the Bath & Hammondsport Railroad Company. In a letter dated January 27, 1981, Mr. William H. Stubbs, President of the Bath & Hammondsport Railroad Company, confirmed Mr. Beers' assertions in this regard. Mr. Beers further stated that Rail Services Associates and RMS grew out of an attempt to establish viable shortline railroad operations over low density lines of bankrupt railroads. The services performed are those of a consultant, reviewing proposed shortline plans and rendering an expert opinion thereon. RMS has 15 incorporators, some of whom are railroad officials, most of whom are not. RMS exercises no control or management functions in regard to any railroads, nor does the corporation own stock in any railroad. However, it may be noted that RMS has recently done some consulting work for the University of South Dakota regarding

Director of Data Processing and Accounts

a part of the Milwaukee Road system. In addition, Boise Cascade Corporation has employed the firm recently. In this regard, Mr. Beers indicated that management of a railroad by RMS was a possibility at some future date.

In view of all of the foregoing, it is my opinion that RMS is not an employer within the Railroad Retirement and Railroad Unemployment Insurance Acts so long as its contractual agreements with covered employers, such as here contemplated, do not vary materially from the terms of the agreement between RMS and the New York & Lake Erie Railroad Corporation. Furthermore, it appears that no "common control" exists between RMS and any covered employer which would subject RMS to coverage under the Acts. Accordingly, I conclude that employment with RMS is not creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts. However, Mr. Beers should be advised that should there be any material change in the facts as set forth above or should RMS commence operation of a railroad, RMS may itself then become an employer subject to the Acts.

An appropriate Form G-341 giving effect to the above conclusion is attached.

Steven A. Bartholow

Attachment

MIH:jrh
4208A/51A

9.7.58