Legal Opinion L-2003-06
June 20, 2003

U.S. Railroad Retirement Board
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TO : Martin J. Dickman
Inspector General

FROM : Steven A. Bartholow
General Counsel

SUBJECT : **Training and Consulting Connection, LLC - B.C.D. 2003-1**
Employer Status and Contract Employee Status

This is in reply to your memorandum of June 13, 2003, suggesting that the Board reopen and revise Board Coverage Decision 03-1, which determined that Training and Consulting Connection, LLC was not an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts, and that it's employees were not statutory employees of any client railroad of that firm for purposes of the Acts. You also suggest addition of a requirement in future coverage decision notice letters that the subject company notify the agency if the character of the business changes or differs materially from the description contained in the coverage decision. As discussed below, I agree that future notice letters may be revised as you suggest. I do not agree that B.C.D. 03-1 need be reopened.

As you know, the Secretary to the Board provides a cover letter addressed to the subject company for all coverage decisions by the Board. The letter which accompanies an initial decision advises the recipient of the right to request that the Board reconsider the decision within one year. The letter which accompanies any such later decision by the Board on reconsideration does not provide similar directions regarding making further appeal to the Courts of Appeal. Neither letter provides further information beyond the statement that the Internal Revenue Service shall be notified of the decision as well. These letters are sent to all subject companies, regardless of whether the decision finds the company is or is not a covered employer under the Acts. As a coverage decision by the Board is often based upon representations by the subject company, I agree that it is appropriate to include language that the subject company must notify the Board of changed circumstances or inaccuracies.[1]

Before I address your suggestion that the Board reopen B.C.D. 03-1, I believe a summary of law regarding the relationship between railroad contractors and coverage of their employees under the Acts administered by the Board may be in order. As you know, section 1(b) of the Railroad Retirement Act of 1974 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

[1] Because the Board's regulations impose the duty to furnish information or record upon "any employer or employee", the argument has been raised in connection with coverage investigations that an entity which is not an "employer" does not have a duty to comply. See 20 CFR 209.2, 209.5. However, the power of the Board to issue administrative subpoenas "relative to the determination of any right to benefits" provides adequate authority to compel non-employers to provide at least threshold evidence regarding an entity's status as an employer under the Acts. Cf. Legal Opinion L-2000-23, advising the Chief of Audit and Compliance that where a case had been referred after a five-year fraud investigation of the employer by the Office of Inspector General was closed without prosecution, he retained authority to audit years otherwise now outside the four year limitation of section 9 of the Act.

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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 RRTA (26 U.S.C. §§ 3231(b) and (d)).

As initially enacted, the RRA, RUIA and RRTA defined employee only as one who "is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation". See section 1(c) of the Railroad Retirement Act of 1937, Public No. 162, 75th Congress, (50 Stat. 307 at 308); section 1(d) of the Carriers Taxing Act of 1937, Public No. 174, 75th Congress, (50 Stat. 435, 436); and section 1(d) of the Railroad Unemployment Insurance Act of 1938, Public No. 722, 75th Congress, (52 Stat. 1094, 1095). The language which now appears as paragraphs (B) and (C) above was added to the 1937 RRA, the RUIA and the RRTA by the 1946 amendments. See section 1, Public Law 79-572, (60 Stat. 722). Although supervision and direction of an individual's rendition of service is the classic test for status as an employee (27 AM JUR 2d Employment Relationship § 2), the Board's General Counsel at the time nevertheless characterized the 1946 amendments as a "clarification" of prior law rather than the introduction of additional alternatives, on ground that prior "rulings of the Board show that the Board had considered functional and economic criteria in determining whether an individual was an employee under the un-amended law." See Legal Opinion L-46-692, (Analysis of the Clarified Employee Definition) at 4.

However, the "functional and economic" test for the status of contractor employees as statutory employees of a covered rail carrier employer was contested in a number of cases under the Tax Act with negative results, whether the issue was analyzed under the law prior to or after the 1946 amendments. See: Pennsylvania R.R. Co. v. United States, 70 F. Supp 595, (Ct. Cl. 1947); Reynolds v. Northern Pacific Railroad Company, 168 F. 2d 934 (8th Cir., 1948); Reynolds v. Chicago, St. P. , M. & O. Ry, 168 F. 2d 943 (8th Cir., 1948); Reynolds v. Great Northern Ry Co., 168 F. 2d 944, (8th Cir. 1948); Nicholas v. Denver & R.G.W. R.R. Co., 195 F. 2d 428, (10th Cir., 1952); and Kelm v. Chicago, St. P., M. & O. Ry. Co., 206 F. 2d 831 (8th Cir., 1953). In 1953, the General Counsel, in his role as the initial adjudicator of coverage decisions under the regulations in effect at that time, issued a series of opinions accepting the outcome of the Tax Act litigation with respect to status of employee service under the RRA and RUIA. See Legal Opinions L-53-545; L-53-546, L-53-547, L-53-548, and L-53-549. Later, in a memorandum to Labor Member A. E. Lyon dated December 11, 1964, the General Counsel discussed the foregoing cases, and noted that in the previous eleven years, "we have not been aware that their success in court actions encouraged the railroads to engage in contracting-out their railroad work to any greater degree than they had regularly done in the past."

The policy set forth in the 1953 opinions has been followed by the Board to date.[2] Specifically, the Board has 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. Moreover, in acknowledgement of the standing of employees of independent contractors under the coverage provisions of the Acts, as interpreted by the Board, the matter has been reviewed as recently as 1990 by the Commission on Railroad Retirement Reform established by Public Law 100-203 (101 Stat. 1330 at

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[2] I note that the Board has reserved the authority to classify a contractor's employees as statutory employees in the limited circumstance of where the employee is performing a duty so integral to railroad operation that the railroad must control the performance of the duty, as in the case of engineer or brakeman. See, e.g., B.C.D. 95-20, Marietta Industrial Enterprises, Inc.; and 02-83, Boothill & Western Railway Co.

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1330-296). The Commission's report to President Bush noted that due to conflicting testimony it "was unable to reach a definite conclusion on the extent of the financial effects of contracting-out on the Railroad Retirement system * * *." Commission on Railroad Retirement Reform, Final Report, September 1990, at 125. Rather than bring contractors within coverage, the Commission recommended that if the extent of contracting out work by railroads did jeopardize the system, railroads be assessed an excise tax. Id. at 125-126. The Commission's proposal thus dealt with the loss of funding to the system without recommending coverage of the contractor's employees.

In accord with the foregoing, the Board in B.C.D. 03-1 applied the Kelm analysis to Training Consulting Connection LLC, and determined it to be an independent business. One of the criteria considered was whether TCC offered its services to the general public, as reflected by the number of its clients. The fact that TCC may have served more than one railroad client, rather than requiring reconsideration, therefore actually further supports the conclusion by showing that TCC offered its services to the public in general, rather than to a single employer. Once TCC is established to be an independent entity, under Kelm individuals in service to TCC cannot be considered employees of a contracting railroad in the absence of supervision. Because additional railroad industry clients would thus not affect the outcome of the decision, reopening appears to me to be unnecessary.[3]

In closing, I may note that the treatment of service by employees of one entity as employees of another for purposes of employee benefits is a difficult question, and case law reflects that it is certainly a matter over which reasonable minds may differ. See, e.g., United States v. Pacific Electric Ry. Co., 157 F. 2d 902, (9th Cir. 1946) (one half of compensation paid to employees working for unincorporated joint venture bus line was taxable under the RRTA to the railroad venture partner.); Gatewood v. Railroad Retirement Board, 88 F. 3d 886, (10th Cir. 1996) (legal service provided by attorney through law firm was creditable railroad service under RRA); and see generally, Central States v. Central Transport, Inc., 83 F. 3d 1282, (7th Cir. 1996) (multi-employer pension did not establish that employment firm which leased drivers to trucking firm was liable for pension contributions as an "alter ego" of trucking firm.) This Office will continue to be mindful, in providing advice to the Board in exercise of its statutory authority to determine coverage under the Acts, of the law and the balance of equities between the railroad industry, its employees, and administration of the railroad retirement system.

cc: The Board

[3] As the question of service to TCC arose as a result of employees concerned with the potential loss of a current connection for benefit entitlement purposes as a result of their work activity, the Office of Operations was aware of the Board's decision with respect to this matter through informal channels. In addition, the Office of Policy and Systems of the Office of Programs routinely receives from the Secretary to the Board a copy of all coverage decisions by the Board, and may notify the adjudication sections within Programs as deemed appropriate. It should also be noted that the Office of Assessment and Training receives a copy of any coverage decision that addresses the status of one or more named employees. However, I agree with your general point, and will take steps to ensure that a decision regarding an individual's status as a covered employee is brought to the attention of a section handling that individual's case for further action as appropriate.