U.S. Railroad Retirement Board
844 North Rush Street
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Legal Opinion L-2004-02
February 24, 2004

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In reply refer to:
R.R.B. No. xxxxxxxxxxxxxx
xxxxxxxxxxx

Dear xxxxxxxxxx:

This is in reference to your letter of January 19, 2004, which furnished additional information concerning the effect which your work arrangements with Kansas City Southern Railway, Transportation Consulting Connection (TCC), Union Pacific Railroad, and Next Gen Information Services, Inc. (Next Gen) may have on any future annuity which you and your family may receive under the Railroad Retirement Act. I have also received your February 16, 2004 telefacsimilie copy of a contract you propose enter into with Next Gen Services beginning this month. As explained in more detail below, in my opinion your work with Next Gen will not break your "current connection" with the railroad industry or trigger annuity deductions by reason of last non-railroad employment, but may require a deduction in your tier I annuity component.

Considering together all the information you have furnished to date, the evidence is that you last worked in April 2002 as a supervisor of the Union Pacific Railroad customer service center, evidently located in St. Louis, Missouri. In May 2002, you learned that KC Southern was contracting with TCC to train the railroad's employees in Baton Rouge, Louisiana, on a new computer system. You entered into a contract with TCC, received training on the system, and then trained the railroad staff. TCC paid you for hours spent on this project, which lasted from June 15 to August 5, 2002.

For personal reasons you did no work from September 2002 until August 2003. Effective August 20, 2003, you entered into an agreement with Next Gen as an information services consultant to Union Pacific. The 2003 Next Gen agreement provided that you were considered not to be the employee of Next Gen for Federal taxation or worker's compensation benefits. You were paid $25 per hour plus approved overtime in excess of 40 hours per week. Your statements were to be submitted monthly on the first day of the following month, and were payable by Next Gen in 45 days. The agreement further provided that you were "expected to work 8 hours per day", and that the written terms superceded any prior written or oral agreements. Although not further described by the agreement, you advise that the project concerned the Union Pacific's program to encourage shippers to switch from processing bills of lading via telefacsimilie copy or by telephone to making computerized entries directly on the Union Pacific web site, or to a telephone voice-recognition order system. Union Pacific furnished you a list of railroad customers, which you would contact and assist in converting to one of the replacement systems. The work was performed from your present home in Florida, without supervision by either the Union Pacific or Next Gen. You also state that despite the contract language, in practice you did not work 40 hour weeks, and set your own hours and pace.

You terminated your August 20 contract with Next Gen on November 30, 2003 to avoid any adverse impact on your current connection. You now wish to resume work on the Union Pacific/Next Gen project under a new contract to last for five months. The 2004 contract also differs from the 2003 contract by now specifically allowing you to determine the number of hours worked. You advise that you will be placing an advertisement soliciting information services consulting work from other sources in Railway Age or through an internet web site.

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As you know, annuities under the Railroad Retirement Act are the sum of independently calculated segments, or tiers. The tier I component is essentially the amount of social security benefit a railroad employee would receive if all railroad and non-railroad earnings were combined and credited under the Social Security Act. The tier II component is based on the employee's railroad service and earnings alone. Career employees may also receive an additional, supplemental annuity of up to $43 per month with 30 years of railroad service, if they retain a "current connection" with the railroad industry at retirement. Annuities may also be paid to survivors of an employee who retained a current connection at retirement or death. The existence of a current connection essentially depends on whether the former railroad employee performs regular and substantial work for a non-railroad employer after expiration of a period of no more than 18 months after he or she left railroad employment.

An individual's earnings as an employee may affect the amount of an age and service annuity under Railroad Retirement Act in several ways. First, no annuity may be paid for any month in which the annuitant works as an employee of a railroad employer. This restriction is absolute, without regard to the amount of earnings, hours worked, or whether the annuitant had worked for that particular employer before retirement. Second, where the annuitant works for his last non-railroad employer, the tier II, supplemental annuity and dual benefit annuity component, if any, are subject to a deduction of $1 for every $2 of earnings from that employment. An annuity subject to this deduction may not be reduced more than 50 percent of the total components subject to the withholding. This means that you cannot lose more than one-half of your tier II annuity component and supplemental annuity for any month in which the last non-railroad employer deduction is imposed. Third, the tier I annuity component is subject to the deduction for earnings over an annual limitation which is imposed by the Social Security Act. It should be noted that only the tier I social security earnings limitation applies to the annuity of an individual who is self-employed.

In each case where an applicant for an annuity is working, the Railroad Retirement Board must determine whether the applicant is self-employed, or is working as an employee. Generally speaking, if any arrangement entered into between an annuitant and a client is such that services are not performed subject to the supervision of the employer as to the manner in which they are performed and if the annuitant is not integrated into the staff or operations of that employer, then he or she will be considered to be an independent contractor and rendition of those services will not impair annuity payments. If, on the other hand, the annuitant performs work for a railroad employer subject to the continuing authority of that employer to supervise and direct the manner of its rendition, or if the annuitant is integrated into the staff or operations of that employer while performing such work, then he or she will be considered to be acting as an employee, and will not be entitled to annuity payments while rendering service as such.

Similar facts are considered when the applicant performs services for a non-railroad employer. Some indicia pointing to the existence of an employee status are the performance of work on the employer's premises, execution of a contract for continuing services over a long or indefinite period, devotion of substantially all of a person's working time to such service, the performance of duties similar in many respects to those previously performed as an employee and the periodic payment of regular remuneration rather than payment for a specific result or work product. Indicia pointing to the existence of an independent contractor status are pursuit of a recognizable trade or business in an independent office and performance of the work in places not connected with the employer's premises, performance of similar services for persons other than the employer, complete freedom as to the amount of time to be expended in rendering a particular service, agreements or arrangements for the performance of specific services of limited duration on a particular project, and payments for a particular result accomplished rather than regular remuneration on a time basis. Any one of the matters mentioned as indicia may not be

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controlling in a particular case, but, together with like matters which the case may involve, such indicia usually serve to form a basis for a firm conclusion with respect to an individual's status.

Based on the information you have now furnished, your work under the new contract with Next Gen is self employment rather than work as an employee of either Union Pacific or Next Gen. You will work independently without supervision from home in Florida at times of your choosing on a project of specified duration. Moreover, you will not be limited to serving a particular client, but will seek work from the railroad industry in general. Consequently, based on the information you furnished, it is my opinion that this work will have no effect on your current connection. Work pursuant to the 2004 Next Gen contract will also not subject the tier II of any annuity you may receive to the deduction for last non-railroad employer; however, as income from self employment, it may require a deduction in the tier I annuity component if your earnings exceed the annual limitation under the Social Security Act.

Regarding TCC, I note that the Members of the Railroad Retirement Board determined in Board Coverage Decision 03-01 that work for TCC is not railroad service creditable to any client railroad employer because TCC is engaged in an independent business. However, as the issue was not addressed by the Board, and as you have not furnished a copy of your contract with TCC, I express no opinion at this time as to whether work you have performed or may perform in the future for TCC may constitute work as an employee for a non-railroad employer for purposes of benefit entitlement under the Railroad Retirement Act.

I trust that the foregoing information will be of assistance to you. Any further correspondence regarding the contract with Next Gen should reference the Legal Opinion L-2004-04 shown above.

Sincerely,

Steven A. Bartholow
General Counsel