June 15, 2000
L-2000-23

TO : Edmund T. Fleming
Chief, Audit and Compliance Section
Through: Peter A. Larson
Director of Fiscal Operations

FROM : Steven A. Bartholow
General Counsel

SUBJECT: Auditing Employer Records for Years Outside the Limitation Periods of the Railroad Retirement and Railroad Unemployment Insurance Acts

This is in reply to your memorandum of March 29, 2000, requesting advice as to whether and under what conditions you may audit the records of an employer for compensation unreported under the Railroad Retirement Act, and for unreported compensation and unpaid contributions under the Railroad Unemployment Insurance Act. For the reasons set forth below I conclude that based upon the information available, years beginning with 1986 may be subject to audit.

The specific case you submitted concerns a public authority (Authority) which purchased an abandoned line of rail from a trunk carrier to retain freight rail service in the locality. The public authority then contracted a private firm (?A@)to operate its line. Based on these facts, in a decision dated March 7, 1985, the public authority was determined to be a covered rail carrier employer under the Acts administered by the Board effective with commencement of rail operations in June 1984. As all operations were conducted by the contract operator A, and as contract operator A had previously been determined to be a rail carrier employer under the Acts, the public authority was advised that it would be considered an employer without employees by letter of May 7, 1986 from the Director of the Board's former Bureau of Compensation and Certification. However, the Director further noted that he had been informed that A had ceased operations, and requested updated information. The public authority responded by letter of May 13, 1986, that the rail line was currently operated by contractor "B".

Although operator B continued to run trains over the line in the ensuing years, no compensation was reported under the RRA, and no contributions were paid and no compensation was reported under the RUIA in the ensuing years by either B or by Authority. The situation came to light as the result of a criminal investigation initiated in February 1995 by the Office of Inspector General of the Railroad Retirement Board (OIG). The OIG investigation also disclosed that in addition to the contract with B for train service, a municipality "C" within the rail line service area provided administrative services for Authority under an informal arrangement. In February 2000, OIG closed its file without prosecution and referred the matter to your office. Because the OIG investigation covered a period dating back to the initial effective date of Authority's status as a covered employer in 1984, your memorandum requests guidance in determining the extent to which this period is open to audit for compliance by your office.

Your question is presented in two parts: whether you have authority under the Acts to audit records of the Authority, contractor B, and municipality C for prior years without limitation; and if so, what level of evidence is necessary to justify a decision to conduct such an audit. With respect to the first question, general Board authority to obtain information from the public arises from section 7(b)(6) of the RRA (incorporated into the RUIA by RUIA section 12(l)), which states in part that "The Board shall have the power to require all employers and employees * * * to furnish such information and records as shall be necessary for the administration of this Act * * * ." More specifically, as entitlement to benefits under the Acts is determined by service and compensation in the railroad industry, section 9 of the RRA and section 6 of the RUIA require covered employers to file returns of service and compensation to be credited to the accounts of their employees. Because service and compensation of employees are necessary to administer the benefit entitlement provisions of the Acts, the Board therefore clearly has authority to inspect employer records to ensure these employer reports properly reflect the service and compensation of the employees. Burlington Northern v. Office of Inspector General, 983 F. 2d 631, (5th Cir., 1993) at 633-34, 643. See also, Legal Opinion L-84-115 to the same effect.

Section 9 of the RRA also provides that compensation reported to the Board by an employer for any year, or the absence of compensation reported by an employer for any year, becomes conclusive evidence of compensation for any employee for that year after the expiration of four years from the date the employer report was required to be filed with the Board. Section 6 of the RUIA imposes the same limitation 18

months after the date the reports are required to be filed under that Act. However, while section 9 of the RRA and section 6 of the RUIA restrict a claimant's right to challenge the Board's records of his or her service as reported or unreported by a railroad industry employer, the Board itself retains authority under the Acts to reopen records at any time. Gerend v. Railroad Retirement Board, 248 F. 2d 357, (9th Cir., 1957); Jacques v. Railroad Retirement Board, 736 F. 2d 34, (2nd Cir., 1984). The RRA and RUIA thus do not restrict agency authority to inspect employer records of service and compensation for any year.

The Board has promulgated regulations 20 CFR 211.16 (b) and (c) which specify the conditions under which an employee's record of compensation as reported under section 9 of the Act may be reopened outside the four year period:

> (b) Correction after 4 years. (1) The Board may correct a report of compensation after the time limit set forth in paragraph (a) of this section where the compensation was posted or not posted as the result of fraud on the part of the employer.
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> (2) Subject to paragraph (c) of this section, the Board may correct a report of compensation after the [4 year] time limit set forth in paragraph (a) of this section for one of the following reasons:
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> (i) Where the compensation was posted for the wrong person or the wrong period;
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> (ii) 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 and there is a final decision of the Board under part 259 of this chapter that such employer or employee was covered under the Railroad Retirement Act during the period in which the earnings were paid;
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> (iii) Where a determination pertaining to the coverage under the Railroad Retirement Act of an individual, partnership, or company as an employer is retroactive; or
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> (iv) Where a record of compensation could not otherwise be corrected under this part and where in the judgment of the three-member Board that heads the Railroad Retirement Board failure to make a correction would be inequitable.

> (c) Limitation on crediting service. (1) Except as provided in paragraph (b)(1) of this section, no employee may be credited with service months or tier II compensation beyond the four year period referred to in paragraph (a) of this section unless the employee establishes to the satisfaction of the Board that all employment taxes imposed by sections 3201, 3211, and 3221 of title 26 of the Internal Revenue Code have been paid with respect to the compensation and service.
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The answer to the first part of your question is therefore that you may audit any year which falls outside the four year limitation only under circumstances which meet one of the exceptions imposed on reopening records by section 211.16(b) above.

The second part of your question relates to the weight of preliminary evidence necessary to support a decision to audit outside the four year limitation of section 211.16(b) of the regulations. Because the Board is empowered by section 7(b)(6) of the RRA and sections 12(a) and 12(l) of the RUIA to exercise its authority to obtain records by administrative subpoena enforceable in Federal District Court, the ultimate test of whether the Board may obtain records under the Acts is therefore whether the agency could enforce an administrative subpoena for employer records in court.

An administrative subpoena is enforceable if it seeks reasonably relevant information; is not too indefinite; and relates to an investigation conducted within the agency's authority. E.E.O.C. v. Quad/Graphics, Inc., 63 F. 3d 642 (7th Cir. 1995), at 645. With respect to the issue of fraud in particular, the United States Supreme Court has held that under a provision of the Internal Revenue Code which prohibits subjecting taxpayers to "unnecessary examination or investigations" does not require the IRS to show probable cause to suspect fraud for purposes of requiring the production for examination of records tax years outside the 3 year limitation period of the Internal Revenue Code. United States v. Powell, 379 U.S. 48, (1964)(construing 26 U.S.C 7605(b)). The Court in Powell found sufficient an affidavit filed with the District Court proceeding to enforce the administrative subpoena in which the IRS agent stated in part:

> * * * on the basis of information obtained * * * [in a current investigation of returns for years within the 3 year limitation period, the agent] has reason to suspect * * * [taxpayer] has filed false and fraudulent corporate income tax returns * * * with intent to evade its taxes and has attempted to evade and defeat the taxes due for these years by overstating the amount of * * * expenses so as to fraudulently understate the amount of taxable income * * * . (As quoted in Court of Appeals decision United States v. Powell, 325 F. 2d 914 at 915, rev'd, 379 U.S. 48).

The Powell decision has particular significance in that the Board stands in the same position in assessing contributions under section 8 of the RUIA as the Secretary of the Treasury does with respect to collection of taxes under the RRTA. See: Burlington Northern, supra, and L-84-115.

Applying the foregoing analysis to the situation at hand, it is my opinion that the fact that no reports were submitted during a period when train operations were conducted over a line of track owned by a covered rail carrier employer would on its face be sufficient to justify further investigation beyond the four year limitation of section 9 of the RRA. An initial determination that earlier years may be subject to audit would of course not foreclose a future conclusion that no fraud actually occurred, and that no other basis exists for crediting additional service or compensation under section 211.16(b) of the Board's regulations.

I understand that your remaining question regarding preparation of combined or individual audit reports has been answered informally.