

EMPLOYEE SERVICE DETERMINATION
CSX Transportation Company
Nurse Consultants

This is the determination of the Railroad Retirement Board concerning the status of nurse consultants who perform services for CSX Transportation Company (BA No.1524) (CSXT) as employees under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Background

During the period of November 1994 through October 1995, the Board's Division of Audit and Compliance conducted an audit of CSXT to determine the accuracy of the reporting of creditable compensation and service. The nurse consultants were identified through review of IRS Forms 1099 "Miscellaneous Income" and accounts payable invoices issued by CSXT to individuals treated as independent contractors. The audit found that many of these individuals have worked exclusively for CSXT for extended periods of time, are paid monthly, follow CSXT operating instructions and report directly to CSXT personnel.

The scope of the audit was limited to obtaining an understanding of the services performed by the nurse consultants, determining the number of individuals involved, the amount of compensation paid during calendar years 1991, 1992, and 1993, the period(s) of time services were provided, whether the consultants performed service for other clients, and other information necessary for the Board to make a coverage determination.

Information Gathered About Nurse Consultants

CSXT pays nurse consultants to provide medical services to injured employees of the railroad and to assist them with injury recovery and other rehabilitation services. Nurse consultants perform the following services:

- 1) Provide injury recovery management and rehabilitation counseling or consultation to railroad employees as directed by the CSXT Chief Medical Officer (CMO).
- 2) Make contact with and perform initial evaluation of injured CSXT employees and provide other injury recovery and rehabilitation services as directed by the CMO.

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- 3) Provide injury recovery rehabilitation orientation to an assigned District.
- 4) Provide, as directed, training and orientation for CSXT claims personnel.
- 5) Review and evaluate medical evaluation and rehabilitation facilities, pain clinics and other medical facilities as directed by the CMO.
- 6) Submit written monthly reports on all related activities as directed by the CMO, in addition to maintaining more frequent verbal contact as required.

Each of the enumerated services is listed in the standard contract that CSXT uses with its nurse consultants.

The Employee Coverage Investigation Report (Report) stated that the review of information obtained from the records of CSXT and through correspondence with the nurse consultants disclosed that the nurse consultants receive an annual fee, paid in twelve equal installments on the first day of each month. In addition, CSXT pays a monthly stipend to defray expenses such as postage, photocopies, telephone expenses, etc. CSXT also reimburses nurse consultants a daily fee, not to exceed \$500.00 per day, plus expenses, which includes travel, meals, and lodging, when expert testimony, either by deposition or trial testimony, is requested by CSXT counsel.

The Report stated that, except for two individuals who began providing services prior to that date, nurse consultants began providing services to CSXT in 1987 and continue to provide services to the company. In 1987, there were 14 nurse consultants located across the CSXT system. During calendar years 1991, 1992, and 1993, CSXT employed the services of 19 nurse consultants. Currently, there are 8 nurse consultants under contract to provide services to CSXT.

The Report stated that Forms 1099 "Miscellaneous Income" issued by CSXT for calendar years 1991, 1992, and 1993, and correspondence with individuals show that nurse consultants were paid a total in excess of \$777,000 in 1991, \$889,000

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in 1992, and \$577,000 in 1993. Wage and earnings information was not obtained from all nurse consultants.

Nurse consultants indicated that they provide services to CSXT employees from their homes or business office locations. On-site work evaluations are performed on CSXT property or at the home of the injured employee. Nurse consultants stated that they set their own work schedules. Generally, work schedules are set to meet the needs of the client, the medical provider and CSXT administration. One nurse consultant indicated that she was on 24-hour on-call availability for medical emergencies.

Nurse consultants must provide a full and complete report of each injury case to the railroad's Chief Medical Officer (CMO) promptly upon completion of counseling or consultation with an injured employee. Nurse consultants complete and maintain the reports and information listed below.

- 1) Nurse consultants gather reports from medical providers for the benefit of CSXT's medical department.
- 2) Nurse consultants approve medical payments beyond that covered by health insurance.
- 3) Nurse consultants provide timely information as required by the Director of Vocational Rehabilitation, Associate CMO, or CMO.
- 4) Nurse consultants input information directly into the CSXT Medical Management Computer System and the Injury Recovery Case Management System and also prepare narrative reports summarizing patient progress.

Nurse consultants indicated that they follow CSXT Medical Management Vocational Rehabilitation Program Manual instructions and other procedural directives when performing their work. Examples of procedures followed include:

- 1) Initiation of Medical Management within 24 hours of receiving notice from a CSXT claim department representative.

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- 2) Procedures which require closing medical management cases within prescribed CSXT time frames.
- 3) Procedures authorizing payment for services as long as medical treatment encourages recovery and return to work.
- 4) Guidelines for using and arranging work hardening procedures.
- 5) Cancellation of medical payment authorizations when injured employees fail to respond to initial contact.
- 6) Usage of introductory letters, vocational rehabilitation brochures and vocational questionnaires when opening medical cases.
- 7) Procedures relating to forwarding copies of reports, letters and other correspondence to CSXT claim department representatives.
- 8) Requirements relating to obtaining signed medical information release forms.
- 9) Procedures relating to when to notify insurance companies and employees that CSXT will no longer pay medical treatment costs.

Nurse consultants provide services in accordance with rules, regulations, and directives of CSXT, and are subject to quarterly programmatic reviews by CSXT's CMO. Nurse consultants receive instructions from Ms. Beverly Jackson, Director of the Vocational Rehabilitation Department, a CSXT employee. Ms. Jackson is responsible for assessing individual nurse consultant performance, negotiates contracts, and sets program standards. Nurse consultants participate in one or two annual medical management meetings held by CSXT.

Nurse consultants interact daily with injured CSXT employees and medical department staff on the status of employee medical conditions. Nurse consultants also interact with other CSXT claim and legal department employees handling settlement of employee injury claims and required court testimony.

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Five of the eight nurse consultants currently working for CSXT indicated that they do not provide services to other clients. Two other consultants spend 50% to 75% of their time handling CSXT employee injury cases.

CSXT provides or has paid for computer equipment, modems, and software used by nurse consultants to enter medical information into the CSXT Medical Management Computer System.

Nurse consultants became aware of their jobs through CSXT advertisements in national professional journals and newspapers or were informed of the job opening by friends working at CSXT. Seven of the nurse consultants surveyed indicated that their businesses are not incorporated. Five other consultants were incorporated. Only two of the nurse consultants surveyed advertise their services to the public in a nurse registry or trade publication.

In a letter dated May 13, 1996, David J. Stoyanoff, Tax Counsel for CSXT, responded to the coverage investigation report. Mr. Stoyanoff did not dispute any of the facts listed in the report, but instead objected to use of various facts as support for a finding that the nurse consultants were employees rather than independent contractors. Mr. Stoyanoff summarized his comments by stating that:

. . . none of the individual findings is indicative of employment status to any compelling degree, and many are neutral or actually indicative of independent contractor status.

Applicable Law and Regulations

Section 1(b) of the RRA [45 U.S.C. §231(b)] defines the term "employee" to mean any individual in the service of one or more employers for compensation. Section 1(d)(1) of the RRA provides that an individual is in the service of an employer if:

(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 technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property

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used in the employer's operations, personal services the rendition of which is integrated into the employer's operations. [45 U.S.C. §231(d)(1)(i)].

Section 1(e) of the RUIA [45 U.S.C. §351(e)] contains essentially the same definition.

Section 203.3(a) of the Board's regulations provides that an individual is performing service for an employer if:

(1) He is subject to the right of an employer, directly or through another, to supervise and direct the manner in which his services are rendered; or

(2) In rendering professional or technical services he is integrated into the staff of the employer; or

(3) He is rendering personal services on the property used in the operations of the employer and the services are integrated into those operations. [20 CFR 203.3(a)].

Discussion and Conclusion

The information summarized above indicates that the definition in either subsection (A) or (B) may be applicable to the nurse consultants. First, a majority of the Board finds that the definition in section 1(d)(1)(i)(A) applies to the nurse consultants because the evidence indicates that those consultants are subject to the continuing authority of CSXT to supervise and direct the manner in which they render their services. The standard contract that CSXT uses to engage the service of a nurse consultant provides in four of the six paragraphs enumerating the services to be performed by the nurse consultant that the nurse consultant will provide a particular service, such as injury recovery management and rehabilitation counseling or consultation to railroad employees, "as directed by RAILROAD's Chief Medical Officer." One of the two remaining paragraphs listing the services to be performed by the nurse consultant states that the nurse

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consultant will "provide, as directed, training and orientation for RAILROAD's claims personnel." The repeated use of a phrase which gives CSXT's Chief Medical Officer the right to tell the nurse consultant how to render a particular service is in and of itself clear evidence that CSXT has the right to supervise and direct the manner in which the nurse consultant renders services. Moreover, other information gathered through the audit investigation also supports the conclusion that CSXT controls how the nurse consultants perform their work.

Specifically, nurse consultants follow CSXT Medical Management Vocational Rehabilitation Program Manual instructions and other procedural directives, such as closing medical management cases within prescribed CSXT time frames and forwarding copies of reports, letters and other correspondence to CSXT claim department representatives, when performing their work. In addition, nurse consultants receive instructions from Ms. Beverly Jackson, the Director of the Vocational Rehabilitation Department and a CSXT employee. In a memorandum dated June 2, 1992, to all nurse consultants, Ms. Jackson stated in pertinent part that:

Following is a restatement of our medical management goals/protocol which must be followed. There must be no exceptions.

Ms. Jackson also assesses the performance of individual nurse consultants. Finally, nurse consultants participate in one or two annual medical management meetings held by CSXT.

While it is true, as Mr. Stoyanoff commented in his letter, that no one fact standing alone may support a finding of an employment relation between the nurse consultants and CSXT, in the opinion of the majority, the facts as a whole demonstrate that CSXT has the right to both supervise and direct the manner in which the nurse consultants perform their work. A majority of the Board therefore finds that the nurse consultants are employees of CSXT within the meaning of section 1(d)(1)(i)(A) of the RRA.

Turning to the second definition of "employee," the majority finds that the evidence shows that the nurse consultants also fall within the definition of employee in section 1(d)(1)(i)(B) of the RRA, despite the fact that they do not

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work on CSXT property. The services performed by the nurse consultants are professional services, since the nurse consultants had to have particularized education and training in order to perform those services. A CSXT program manual describes the nurse consultants as "the medical case manager for injured employees participating in the Medical Management and Vocational Rehabilitation Program." The nurse consultants interact daily with injured CSXT employees and medical department staff on the status of employee medical conditions. Nurse consultants also interact with other CSXT claims and legal department employees handling settlement of employee injury claims and required court testimony. The nurse consultants complete and maintain a number of reports and other information in connection with injured CSXT employees. For example, nurse consultants must provide a full and complete report of each injury case to the CSXT Chief Medical Officer promptly upon completion of counseling or consultation with an injured CSXT employee. Although the nurse consultants set their own work schedules, they generally set those schedules so as to meet the needs of the client (CSXT), the medical provider, and CSXT administration. The nurse consultants input information directly into the CSXT Medical Management Computer System and the Injury Recovery Case Management System and prepare narrative reports summarizing patient progress. Nurse consultants also gather reports from medical providers for the benefit of CSXT's medical department, approve medical payments beyond that covered by health insurance and provide timely information as required by the Director of Vocational Rehabilitation, the Associate Chief Medical Officer, or the Chief Medical Officer.

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A majority of the Board finds that the evidence overwhelmingly demonstrates that the nurse consultants function as an integral part of the medical department of CSXT and that they are integrated into the staff of CSXT. A majority of the Board therefore finds that the nurse consultants are employees of CSXT within the meaning of section 1(d)(1)(i)(B) of the RRA. Service is creditable subject to Basic Board Order 75-9.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever
(Dissenting)

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**EMPLOYEE STATUS DETERMINATION
CSX Transportation Company -- Nurse Consultants**

This is the decision of the Railroad Retirement Board concerning the status of nurse consultants who perform services for CSX Transportation Company (BA No. 1524)(CSXT) as employees under the Railroad Retirement Act (45 U.S.C. §231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.)(RUIA). In a decision dated August 30, 1996 (R. 2-13), a majority of the Board found that service performed by nurse consultants for CSXT may be credited, subject to Basic Board Order 75-9, as railroad service for the purpose of determining benefit entitlement under the Railroad Retirement and Railroad Unemployment Insurance Acts. CSXT filed a timely request for reconsideration of that initial decision (R. 14-20).

EVIDENCE ON APPEAL

The Board's initial decision in this case was based on information obtained through an audit conducted by the Board's Division of Audit and Compliance during the period November 1994 through October 1995, during which the agency obtained information from both CSXT and its individual nurse consultants. The audit was limited in scope to obtaining an understanding of the services performed by the nurse consultants, determining the number of individuals involved, the amount of compensation paid during calendar years 1991, 1992, and 1993, the period(s) of time services were provided, whether the consultants performed service for other clients, and other information necessary for the Board to make a coverage determination (R. 25-26). CSXT reviewed a report of the coverage investigation, to which Counsel for CSXT responded with general arguments challenging the Board's interpretation of the evidence. CSXT did not dispute the facts presented and did not furnish additional evidence (R. 21-23). On appeal, CSXT has submitted no new or additional evidence (R. 14-20).

Retention and Compensation of Nurse Consultants

The evidence on reconsideration is that CSXT enters into a contract with nurse consultants to provide rehabilitation and medical case management services (R. 35-38). The CSXT Medical Department Vocational Rehabilitation Program Manual ("Program Manual") states that the nurse consultant contract is funded and managed by the CSXT Medical Department, and that the nurse consultants are managed by the Director of the Vocational Rehabilitation Program (R. 51).

Nurse consultants are paid a fixed annual fee, allocated in monthly installments, as well as a monthly stipend to defray the expense of such items as postage, photocopies, and telephone expense (R. 37). Nurse consultants are also paid a fee, not to exceed \$500.00 per day, plus expenses, which include travel, meals, and lodging, when expert testimony, either by deposition or trial testimony, is requested by CSX counsel (R. 37, 50).

Except for two individuals who began providing services prior to that date, nurse consultants began providing services to CSXT in 1987 and continue to provide services to the company. Nurse consultants indicated they have worked for CSXT from a minimum of 2 years to a maximum of 12 years (R. 47-48). In 1987, there were 14 nurse consultants located across the CSXT system (R. 41). During calendar years 1991, 1992, and 1993, CSXT obtained the services of 19 nurse consultants. Currently, there are 8 nurse consultants under contract to provide services to CSXT (R. 41). Forms 1099 "miscellaneous Income" issued by CSXT for calendar years 1991, 1992, and 1993, and correspondence with individuals show that nurse consultants were paid a total in excess of \$777,000 in 1991, \$889,000 in 1992, and \$577,000 in 1993. Wage and earnings information was not obtained from all nurse consultants (p. 48).

The CSXT nurse consultant contract appears to constitute an agreement between CSXT, a third party identified as "REHAB," and the nurse consultants (R. 35). In practice, however, nurse consultants negotiate and enter into the agreement directly with CSXT or through their own incorporated business (R. 47-48). Nurse consultants became aware of their jobs through CSXT advertisements in national professional journals and newspapers or were informed of the job opening by friends working at CSXT (R. 29, 41). Five of the eight nurse consultants currently working for CSXT indicated that they do not provide services to other clients. Two other consultants spend 50% to 75% of their time handling CSXT injury cases. Seven of the nurse consultants surveyed indicated that their businesses were not incorporated. Five other consultants were incorporated (R. 47-48). Only two of the nurse consultants surveyed advertised their services to the public in a nurse registry or trade publication (R. 29).

Performance of Nurse Consultants

The nurse consultant contract states that either party may terminate the contract upon 60 days notice (R. 37). Nurse consultants receive quarterly programmatic reviews by CSXT's Chief Medical Officer (R. 37), and receive instructions about such matters as CSXT case management goals and Medical Department protocol from Ms. Beverly Jackson, Director of the Vocational Rehabilitation Department, a CSXT employee. Ms. Jackson assesses individual nurse consultant performance, negotiates contracts, and sets program standards (R.41). Nurse consultants are evaluated based on their efficiency and effectiveness of case management, quality and timeliness of case progress reporting, and adherence to program standards and protocol (R. 51). Nurse consultants perform the following medical management services:

- Provide injury recovery management and rehabilitation counseling to railroad employees as directed by the CSXT Chief Medical Officer (CMO)(R. 35-36).
- Make contact with, and perform initial evaluation of, injured CSXT employees; provide other injury recovery and rehabilitation services as directed by the CMO (R. 36).
- Provide injury recovery rehabilitation orientation to an assigned District (R. 36).
- Provide, as directed, training and orientation for CSXT claims personnel (R. 36).
- Review and evaluate medical evaluation and rehabilitation facilities, pain clinics, and other medical facilities as directed by the CMO (R. 36).
- Submit written monthly reports on all related activities as directed by the CMO; maintain more frequent verbal contact as required (R. 36).
- Gather reports from medical providers for the benefit of CSXT's medical department (R. 41)
- Approve medical payments beyond that covered by health insurance (R. 41).

- Provide timely information as required by the Director of Vocational Rehabilitation, Associate CMO, or the CMO (R. 41).
- Input information directly into the CSXT Medical Management Computer System and the Injury Recovery Case Management System; prepare narrative reports summarizing patient progress (R. 41, 49).

Nurse consultants follow task-specific instructions, procedures and protocol established by the CSXT Medical Department, including the following task-specific instructions issued by Ms. Beverly Jackson, Director of Vocational Rehabilitation:

- ***Initiation of Medical Management within 24 hours of receiving notice from a CSXT claims department representative.*** "Goal: Medical Management must be initiated without delay within 24 hours of receiving notice from the Claim Rep. * * * If you have a physician in your area that has provided questionable treatment in the past, don't 'wait to see what he says' about your patient. You know what he is going to say so get the second opinion immediately (R. 54)."
- ***Procedures which require closing medical management cases within prescribed CSXT time frames.*** "[F]ollowing is a restatement of our medical management goals/protocol which must be followed. There must be no exceptions. * * * You will not reopen your [case] without direction from the Medical Department (R. 55)."
- ***Procedures authorizing payment for services as long as medical treatment encourages recovery and return to work.*** "CSXT, directly and through the nurse consultant, will authorize full payment for services if the medical treatment is part of the CSXT medical management plan and encourages recovery and return to work. Treatment which does not meet this standard should not be authorized at 100%; the 20% paid from the supplemental must not be approved (R.55)."
- ***Guidelines for using and arranging work hardening procedures.*** "Work hardening is a useful treatment. It is also an expensive treatment which, through unrealistic expectations on our part, has been used inappropriately. The following are guidelines which must be followed in arranging work hardening. . . (R. 56)."

- ***Cancellation of medical payment authorizations when injured employees fail to respond to recovery and return to work.*** “From this date, when you close a medical management file without establishing contact with the employee * * * you must also cancel the authorization to pay charges not covered by the GA23000 policy. Please use these phrases on the form: ‘Reason: The Nurse Consultant is unable to contact the employee to obtain medical records. Without this medical information, neither the Medical Department, nor the Nurse Consultant at the Department’s direction, can authorize payment for services (R. 58, see also R. 62-63).’”
- ***Usage of introductory letters, vocational rehabilitation brochures, and vocational questionnaires when opening medical cases.*** “Please send the vocational rehab brochure at the start of any case that you open for services. If you do not want to send the folder, you may merely send the four inserts. * * * Do NOT send the voc. Questionnaire at the beginning of [a] case. Send it when it appears as if the employee will be unable to [return to] his job (R. 59).”
- ***Procedures relating to forwarding copies of reports, letters and other correspondence to CSXT claim department representatives.*** “Do not indicate cc: Claims on correspondence which you produce. This gives the appearance of being directed by claims, not merely that you wish to insure that claims is informed of important activities in the case. Continue to forward copies of reports, letters, etc., to claims by date stamp, hand written note, post it, etc. (R. 60)”
- ***Requirements relating to obtaining signed medical information release forms.*** “Remember, you cannot release medical records to an employee. If asked, advise the employee he must sign a release of medical information. The information may then be released to the treating physician (R. 60).”
- ***Procedures relating to when to notify insurance companies and employees that CSXT will no longer pay medical treatment costs.*** “Attached is the revised form which advises Travelers that CSXT will not be authorizing the 20% not covered by GA23000. The new form is signed by the Chief Medical Officer and Associate Chief Medical Officer and is, essentially, a fill-in-the-blank form which the Nurse Consultant initiates and distributes. If queried, you can say with assurance that the decision to take this action is based on Medical Department protocol (R. 62-63).”

Nurse consultants interact daily with injured CSXT employees and medical department staff on the status of employee medical conditions, as well as with CSXT claims and legal department employees handling settlement of employee injury claims and required court testimony (R. 29). Nurse consultants indicated that they provide services to CSXT employees from their homes or business office locations. On-site work evaluations are performed on CSXT property or at the home of the injured employee (R. 27). Nurse consultants enter case management information directly into the CSXT computer system on a regular basis. CSXT provides or has paid for computer equipment, modems, and software used by nurse consultants to enter information into the CSXT medical management computer system (R. 61).

Nurse consultants stated that they set their own work schedules. Generally, work schedules are set to meet the needs of the client, the medical provider and CSXT administration. One nurse consultant indicated that she was on 24-hour on-call availability for medical emergencies (R. 27). Nurse consultants also participate in semi-annual medical management meetings held by CSXT (R.41, 59).

APPLICABLE LAW AND REGULATIONS

Section 1(b) of the RRA [45 U.S.C. §231(b)] defines the term “employee” to mean any individual in the service of one or more employers for compensation. Section 1(d)(1) of the RRA provides that an individual is in the service of an employer if:

(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 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 [45 U.S.C. §231(d)(1)(i)].

Section 1(e) of the RUIA [45 U.S.C. §351(e)] contains essentially the same definition.

Section 203.3(a) of the Board's regulations provides that an individual is performing service for an employer if:

(1) He is subject to the right of an employer, directly or through another, to supervise and direct the manner in which his services are rendered; or

(2) In rendering professional or technical services he is integrated into the staff of the employer; or

(3) He is rendering personal services on the property used in the operations of the employer and the services are integrated into those operations [20 CFR 203.3(a)].

DISCUSSION

The issue before the Board is whether the nurse consultants retained by CSXT are covered employees under the RRA and RUIA in view of the criteria set forth in subsections 1(d)(1)(i)(A) and (B) of the RRA. In its initial decision of August 30, 1996, a majority of the Board found that the nurse consultants were employees of CSXT within the meaning of both subsections (R. 2-13). On appeal to the Board, CSXT argues: (1) that the level of supervision and control exercised by CSXT over the nurse consultants does not rise to the level indicative of an employment relationship; (2) that the nurse consultants are not integrated into the staff of CSXT; and (3) that CSXT is entitled to relief from collection of Railroad Retirement Tax Act and Railroad Unemployment Repayment Tax pursuant to §530 of the Revenue Act of 1978 (26 U.S.C. 3401, nt.), and that a decision by the Board to credit service performed by the nurse consultants would thus jeopardize the Railroad Retirement trust funds (R. 14-20).

Supervision and Control

On August 30, 1996, a majority of the Board found that the nurse consultants were subject to the right and continuing authority of CSXT to supervise and direct the manner of rendition of their services under the nurse consultant contract (R. 10). CSXT argues that the nurse consultants are independent

professionals and as such, the Chief Medical Officer does not supervise, control, or direct the manner of their performance. In particular, CSXT asserts it maintains only the right to tell nurse consultants “what to do,” rather than “how to do,” their jobs (R. 14-15).

A majority of the Board finds that, under section 1(b)(1)(i)(A) of the RRA, CSXT maintains and exercises a right to set the order of the nurse consultants’ services. It proscribes task-specific procedures and restrictions which have the effect of limiting the nurse consultant’s professional discretion. This finding is consistent with the employee/independent contractor status tests for nurses as set forth in Internal Revenue Service Revenue Rulings 61-196 and 75-101. CSXT has looked to Rev. Rul. 61-196 as support for its contention that the nurse consultants are independent contractors, as the ruling states in part that registered nurses are generally considered to be independent contractors in the performance of private duty nursing services, when such nurses hold themselves out to the public as exercising an independent calling requiring specialized skills.

The majority does not agree with CSXT that in the instant case, nurse consultants work in a “private duty” setting. Rather, the evidence establishes that they manage cases and provide services to directly support the institutional goals, standards, procedures and restrictions set by CSXT, consonant with its economic interest (R. 54-65). Further, a majority of the nurse consultants do not hold themselves out to the general public as practicing an independent calling, but rather, work exclusively for CSXT. Two nurse consultants work 50-75% of the time for CSXT (R. 47-48), and only two nurse consultants advertise their services to the public in a nurse registry or trade publication (R. 29).

Rev. Rul. 61-196 states that ordinarily, registered nurses have *full discretion* in administering their professional services, even though they may be subject to the supervision of the attending physician. In this case, although the nurse consultants are professional registered nurses requiring little supervision, CSXT nevertheless exercises control over “how” the nurse consultants perform their services by setting the order of their services and by setting mandatory task-specific goals, standards, procedures and restrictions (R. 54-65). CSXT monitors and evaluates nurse consultant performance as to such goals,

standards, procedures and restrictions (R. 51). It retains a right to discharge nurse consultants, apparently with or without cause (R. 37).

Moreover, Rev. Rul. 61-196 describes the circumstances under which registered nurses are considered to be employees, rather than independent professionals:

Hospitals, clinics, nursing homes, public health agencies, etc., engage registered nurses on a full-time basis as part of their regular staffs. Some physicians engage them as office attendants in connection with their private practice. The nurses work for a salary and follow prescribed routines during fixed hours. Although their duties are professional in nature, these nurses lose their individuality by integrating their services into the employer's business and by the employer's right to set the order of and supervise their services. These nurses are subject to the direction and control of the institution, agency physician, etc., and are employees in every sense of the word (Rev. Rul. 61-196, at 155).

Although the nurse consultants in this case do not work for a salary, they nevertheless work for a fixed annual amount allocated monthly, which includes reimbursement for expenses (R. 37, 50). Though they may or may not work during fixed hours, nurse consultants are required to follow prescribed routines as directed by the CSXT Medical Department and Ms. Beverly Jackson, at a task-specific level (R. 54-65). The nurse consultants' services are clearly integrated into CSXT's business, as will be discussed further below.

CSXT's reliance on Rev. Rul. 61-196 is further misplaced in light of Revenue Ruling 75-101, which applied the reasoning of Rev. Rul. 61-196 to an instance in which a licensed practical nurse, also ordinarily considered to be an independent contractor, was performing professional medical services under oral contract as a representative of a company. The nurse received instructions from the company and periodic review by a registered nurse employed by the company. She was paid on a regular basis and was subject to discharge. The Internal Revenue Service held that the company retained sufficient control to establish an employee-employer relationship:

[C]onsideration must be given to such factors as the continuity of the relationship, and whether or not the employee's services are an integral part of the business of the employer as distinguished from an independent trade or

business of the individual himself in which he assumes the risk of realizing a profit or suffering a loss. See U.S. v. Silk and Greyvan Lines, Inc., 331 U.S. 704 (1947), 1947-2 C.B. 167, and Bartels v. Birmingham, 332 U.S. 126 (1947), 1947-2 C.B. 174.

Revenue Ruling 61-196, 161-2 C.B. 155, states that whether a nurse is self-employed or an employee depends on the facts and circumstances of each case. Generally speaking, licensed practical nurses and registered nurses are considered to be self-employed. However, when such nurses are on the regular staff of a hospital, clinic, nursing home, or physician, work for a salary, follow prescribed routines during fixed hours, and are subject to the direction and control of those engaging them, they are employees. Rev. Rul. 61-196 also lists four factors to be considered in situations where a determination as to the existence of either an employer-employee or independent contractor relationship is required with respect to nurses. They are (a) the type and nature of the service performed, (b) the control exercised and by whom, (c) whether the individual is a licensed nurse, and (d) evidence establishing whether or not the services were performed in the conduct of an independent trade, business or profession.

In this case, the nurse performs professional nursing services as a licensed practical nurse for the clients of the company. The nurse represents the company, her services are periodically checked by the company, she is issued instructions, paid on a weekly basis, and her services may be terminated by the company. The nurse is not engaged in an independent enterprise in which she assumes the risk of profit and loss. Since she is a skilled worker, she does not require constant supervision. Accordingly, it is held that the company retains the right to exercise over the nurse the degree of control and direction necessary to establish the relationship of employer and employee (Rev. Rul. 75-101, at 318-319).

The facts of the case in Rev. Rul. 75-101 are strikingly similar to those in the present case. CSXT exercises a level of control comparable to that exercised by nursing homes and hospitals over the registered nurses they employ. Nurse consultants who perform services for CSXT have restricted professional discretion, since they are allowed to keep cases open and to authorize certain treatment or rehabilitation options only with the permission of the CSXT medical department (R. 54-56). Nurse consultants are directed to make decisions limiting services and payment for medical or vocational services (R. 55-56). They are then directed to explain such decisions through reference to CSXT protocol (R. 58, 62-63). The procedures and protocol established by CSXT are task-specific, as opposed to general statements of philosophy with

flexible decision-making parameters (R. 57, see 54-65, generally).

The registered nurses in this case do not function in an independent professional medical setting, but rather, function as representatives of the CSXT medical department when interacting with injured CSXT employees, claims representatives, insurance companies, and when testifying during litigation. Nurse consultants maintain a strong continuity of relationship with CSXT, performing their services exclusively or substantially for CSXT for periods of two to twelve years (R. 47-48). In such circumstances, consistent with Rev. Rul. 61-196(b), the nurse consultants have lost their "individuality," and consistent with Rev. Rul. 75-101, they simply are not engaging in an independent business or profession when they perform case management services for CSXT.

The facts of this case are further distinguishable from those in which Rev. Rul. 61-196 has been cited to support the independent contractor status of registered nurses. A common denominator in such cases has been that the nurses in question were retained by nurse registries, which registries acted as a broker of professional nursing services to hospital clients. Nurse registries typically do not establish nor require nurses to conform to task-specific instructions as to how to manage cases; nor do they evaluate nurse compliance with such procedures. Nurses retained by nurse registries tend to absorb the costs of equipment and expenses. See, Hospital Resource Personnel, Inc., v. U.S., 860 F. Supp. 1557 (S.D. Ga., 1994), aff'd in part, reversed in part on other grounds, 68 F.3d 421 (11th Cir. 1995). See also, Critical Care Register Nursing, Inc., v. United States, 776 F. Supp. 1025 (E.D. Pa. 1991); In Re: Pearl B. Serino, t/a Serino's Nurses Registry, 190 Bankr. 778 (M.D. Pa 1995). Here, CSXT retains and pays nurses directly, with stipends for expenses and loans or purchasing of computer equipment and software. Though they are professional registered nurses, nurse consultants perform services according to task-specific instructions issued by the CSXT medical department, and are subject to review for compliance with such instructions.

Accordingly, a majority of the Board finds that CSXT maintains and exercises a right to supervise and direct the manner in which the nurse consultants perform their services, pursuant to section 1(b)(1)(i)(A) of the RRA.

Integrated Performance

CSXT argues that the nurse consultants are not integrated into its staff. It contends that the activities of its nurse consultants are merely typical of registered nurses operating in a managed care environment (R. 15-16). CSXT contends that its nurse consultants are “in the business of providing medical care, and are not in the railroad business (R. 16).”

A majority of the Board disagrees with CSXT’s reasoning on this point. CSXT’s obligation to provide employee medical benefits in a managed care environment has simply made it more cost-effective to retain registered nurses on the staff of a railroad’s medical department than in previous decades, just as changes in financial and legal climates have made it more cost-efficient for railroads to directly employ professional personnel such as accountants, attorneys, and data processing engineers, though such professionals are not ordinarily considered to be “in the railroad business.” In this case, economic realities have simply made it cost-efficient for CSXT to retain an entire class of nurse consultants, whose services are an indispensable part of the whole constituted by the CSXT medical-vocational-rehabilitation department (R. 51-53).

A majority of the Board thus finds that the nurse consultants are integrated into the staff of CSXT’s medical department. Nurse consultants function as representatives of CSXT, administering medical care and rehabilitative treatment to injured CSXT employees, in light of task-specific procedures and protocol established by CSXT. Nurse consultants provide written reports to the medical department and claims departments, which reports are then used as the basis for claims, billing, or legal action (R. 36, 41, 49, 55, 58, 64). Nurse consultants testify in legal proceedings on behalf of CSXT and are paid a stipend for their testimony. Unlike independent professionals, nurse consultants are paid a monthly stipend to cover the cost of expenses including travel, postage, telephone costs, and other expenses as billed (R. 37, 41). CSXT provides nurse consultants with the computer and modem equipment needed to input information directly into the CSXT data processing system (R. 41, 61). Though CSXT argues that it would be unfair to require nurse consultants to purchase software needed to perform CSXT-specific operations, a hallmark of independent contractor status is the engaging in an independent business and ownership of tools and supplies at risk of profit or loss, and in this case, there

is no evidence to indicate that the nurse consultants bear a risk of profit or loss with respect to services rendered for CSXT.

CSXT argues that although nurse consultants set their work schedules to meet the needs of CSXT, this factor is not conclusive of independent contractor status. In context, however, this factor is probative of employee status. Most of the nurse consultants work exclusively or substantially for CSXT, and have done so for periods ranging from two to twelve years, certainly establishing a continuity of relationship as referenced in Rev. Rul. 61-169. Though the nurse consultants are not required to work exclusively for CSXT, the evidence establishes that most do, and that the circumstances of their employment are similar to those of a full-time, salaried, permanent employee, with a continuity of relationship ranging from two to twelve years (R. 47-48). Under such circumstances, even if nurse consultants work part-time for CSXT and part-time for other clients, their performance for CSXT rises to the level of an employer-employee relationship. The mere fact that some nurse consultants have incorporated their businesses, when they work exclusively or substantially for CSXT, does not obscure their function as representatives of CSXT. Nurse consultants in this case lack the "individuality" and full professional discretion normally expected in the performance of an independent trade or profession.

Accordingly, a majority of the Board finds that the nurse consultants are integrated into the staff of the CSXT medical department pursuant to section 1(b)(1)(i)(B) of the RRA.

§530 Relief


Finally, CSXT presumes that it will receive relief from payment of taxes under the Railroad Retirement Tax Act under section 530 of the Revenue Act of 1978 (26 U.S.C. 3401, nt.), and that a decision by the Board to credit service performed by the nurse consultants would thus jeopardize the Railroad Retirement Act trust funds.

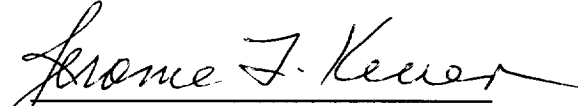
The Board finds that the issue of whether or not CSXT is entitled to section 530 relief is not within its jurisdiction, but rather is an administrative determination reserved exclusively for the Internal Revenue Service.

CONCLUSION

In the opinion of a majority of the Board, the evidence of record supports a finding that the nurse consultants of CSXT are covered employees under the tests set forth in sections 1(b)(1)(i)(A) and (B) of the Railroad Retirement Act.


Cherryl T. Thomas


V. M. Speakman, Jr.


Jerome F. Kever (Dissenting)