

EMPLOYEE STATUS DETERMINATION

Compuware Corporation Employees Performing Work for Grand Trunk Western Railroad, Inc.

This is the determination of the Railroad Retirement Board to address the question of whether employees of Compuware Corporation (Compuware) who perform services for Grand Trunk Western Railroad, Inc. (BA No. 1208) (GTWR) should be considered to be covered 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).

Information was obtained by the Audit and Compliance Division of the Board's Bureau of Fiscal Operations during an audit of GTWR to determine the accuracy of creditable compensation and service reporting under the RRA and RUIA. In a letter dated July 19, 1996, Mr. Thomas Costello, Jr., General Counsel for Compuware, responded to a questionnaire inquiring about the services of that company.

Compuware is an international computer software products and professional services company incorporated in March 1973. Compuware began providing services to GTWR in approximately January 1981. Evidence obtained by Audit and Compliance indicates that in 1995, pursuant to agreement with GTWR (discussed in more detail below), Compuware hired selected GTWR employees who continued to provide service to GTWR after becoming Compuware employees.

Mr. Costello stated that Compuware's Professional Services employees work across a broad spectrum of technologies, including mainframe, mid-range and client-server platforms. Compuware works with many of the nation's leading companies in developing and implementing goal-oriented information technology solutions. The majority of Compuware's professionals are engaged in large scale applications systems development efforts which include assisting with accelerated requirements definitions through development of general and detail designs, proto-typing, construction, implementation, training, quality assurance and maintenance support.

Compuware employs over 2,800 professional staff technicians in the United States, 28 of whom work for the railroad industry. Those 28 employees account for approximately 1% of professional services employees working on a full-time basis for Compuware. Currently eight of those technicians perform services on a full-time basis for GTWR. Approximately 98.8% of Compuware employees' work is with non-railroad clients on a full-time basis.

In addition to working for GTWR, Compuware provides computer programming services for two other railroads, Amtrak (BA No. 8301) and Railinc (BA No. 9341). Compuware provides programming, design analysis and systems support for Railinc, and provides analysis and programming support for Amtrak.

Compuware Corporation Employees Performing Work for Grand Trunk Western Railroad, Inc.

For fiscal year 1996 approximately 2% of Compuware's professional services revenue is derived from GTWR and approximately 1% is derived from other railroads. For that same period, approximately 97% of Compuware's Professional Services revenue is derived from non-railroad clients. Mr. Costello also noted that the Professional Service Division portion of Compuware's total 1996 revenue is approximately 35%.

The evidence indicates that in 1995, when GTWR downsized its administrative operations in Detroit, Michigan and outsourced to Compuware work previously done by its own employees, Compuware was required to make offers of employment to certain prior GTWR employees based upon a list provided by GTWR management to Compuware. The salaries of the former GTWR employees who were hired by Compuware remained the same. In addition, in order to encourage employees to complete their transition assignments for GTWR, Compuware agreed to pay to each former GTWR employee the gross amount (less legally required withholding) equivalent to 12 weeks of salary at the 6-month anniversary date of their August 1, 1995 start date for Compuware. GTWR agreed to accept charges in Compuware's monthly billing equal to these payments. Individuals who, through mutual consent of GTWR and Compuware, completed their transition assignments prior to the stated 6 months duration, were also eligible to receive the afore-mentioned payment.

Employees of Compuware who work for GTWR work on GTWR property and may work in the same offices/locations as they did when they were employees of GTWR. Compuware employees work at the same site as GTWR employees, and they can see or call each other each day. Compuware employees follow the policies, practices, and procedures of Compuware Corporation. However, while performing services on the work site, they are required to abide by specific GTWR policy, practice or procedures. If there is a discrepancy between the policies, practices and procedures, Compuware controls.

The day-to-day work of Compuware employees who provide services for GTWR is assigned and supervised by GTWR managers; however, the long-term career growth, pay, and time reporting is handled by Compuware. Each Compuware employee assigned to GTWR works under the supervision and control of a Compuware Account Manager and Technical Resource Manager.

GTWR employees or managers meet with Compuware Account Managers and Technical Resource Managers on a regular basis to discuss the project status and/or employee performance. Also, at least monthly, Compuware management will meet with Compuware employees.

Compuware Corporation Employees Performing Work for Grand Trunk Western Railroad, Inc.

In response to a request to describe the fee or rate structure associated with the GTWR contract, Compuware stated that it charged GTWR a two-tiered rate structure depending on an individual's salary for both the data processors professional fees and the accounting professional fees. For both groups, the hourly rate for individuals with salaries below \$51,000 would be calculated as follows: SALARY/1,000 (e.g., \$47,664 salary = \$47.66 hourly rate). The hourly rate for individuals with salaries of \$51,000 or over would be calculated as follows: SALARY/1,000 times .975 (e.g., \$54,458 salary = \$53.10 hourly rate). Rates would adjust accordingly as individuals received salary reviews.

Compuware stated that all expenses incurred as a result of travel and support (e.g., beepers, cellular phones) are billed at cost to GTWR. Expense reports are presented for signature approval on all approved expenses. Prior approval needs to be obtained before any expenses are incurred.

GTWR employees or managers meet with Compuware Account Managers and Technical Resource Managers on a regular basis to discuss the project status and/or employee performance. Also, at least monthly, Compuware management will meet with Compuware employees. Compuware employees work at the same site as GTWR employees, and daily communication occurs between GTWR and Compuware employees. GTWR management has the final approval for all technical work and also has the option to contact Compuware management concerning employees' work.

In response to a request to describe the type of reports employees of Compuware are required to prepare and submit to GTWR, Compuware replied that status reports are presented to GTWR "as required" and time sheets are submitted once a month. In addition, Compuware expects a time report and a status report from each Compuware employee monthly. The "as required" status reports were previously prepared by the individuals when they were GTWR employees. The monthly Compuware status and time reports were not previously used.

All telephone, desk, office supplies, etc., are provided by the GTWR. All counseling, education, career advice, etc. is provided by Compuware. In order to perform their assigned tasks, many Compuware employees have direct access into GTWR files and have security clearance for that access. Compuware indicated that "normal checks and balances exist for GTWR systems."

Section 1(b)(1) of the RRA provides in pertinent part that the term "employee" means any individual in the service of one or more employers for compensation. Section

**Compuware Corporation Employees Performing Work for
Grand Trunk Western Railroad, Inc.**

1(d)(1) of the RRA provides in pertinent part 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; and

(ii) he renders such service for compensation . . . [45 U.S.C. §231(d)(1)].

Sections 1(d) and (e) of the RUIA contain essentially the same definition of "employee service." [45 U.S.C. §351(d) and (e)].

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work, but also with respect to the way he performs such work. The facts in this case indicate that although GTWR does have some degree of control over Compuware employees who provide services for GTWR, Compuware retains ultimate authority to direct the manner in which its employees perform services for GTWR. For example, Compuware employees who provide services for GTWR do so on GTWR property and may, in fact, work in the same locations they previously worked in as GTWR employees. Those Compuware employees who work for GTWR must abide by the policies, practices, and procedures of GTWR. However, they must also follow the policies, practices, and procedures of Compuware; and, in the event of a conflict between the policies, practices, and procedures of the two companies, must follow those of Compuware. Although the day-to-day work of Compuware employees who provide services for GTWR is assigned and supervised by GTWR managers, the long-term career growth, pay, and time reporting is handled by Compuware. Each Compuware employee must file a time report and a status report with Compuware each month. In addition, each Compuware employee who is assigned to GTWR works under the supervision and control of a Compuware Account Manager and Technical Resource Manager. At least monthly, Compuware management meets with Compuware employees. Compuware Account Managers and Technical Resource Managers also meet with GTWR employees or managers on a regular basis to discuss the status of a project or employee performance. A majority of the Board finds that Compuware retains the ultimate responsibility and right to direct the manner in which its employees

**Compuware Corporation Employees Performing Work for
Grand Trunk Western Railroad, Inc.**

perform services for GTWR and therefore concludes that the control test in section 1(d)(1)(i)(A) of the RRA does not apply.

The tests set forth under paragraphs (B) and (C) of the employee service definition go beyond the test in paragraph (A) and would hold an individual to be a covered employee if he is integrated into the railroad's operations even though the control test in (A) is not met. However, under an Eighth Circuit decision consistently followed by a majority of the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953).

Compuware has been in business since 1973 and did not begin providing service to GTWR until some eight years later. Only approximately 2% of Compuware's Professional Services revenue for fiscal year 1996 is derived from its work for GTWR; while approximately 97% is derived from non-railroad clients. The Professional Service Division portion of Compuware's total 1996 revenue is approximately 35%. The evidence does not indicate that GTWR required Compuware to hire former GTWR employees in order to escape coverage under the RRA and RUIA. Rather, the evidence indicates that GTWR was decreasing its staff and outsourcing to Compuware work that had previously been done by GTWR employees. Apparently as a condition of giving that additional work to Compuware, GTWR required Compuware to hire GTWR employees who otherwise would have become unemployed as a result of the outsourcing of their work. The eight Compuware employees who currently provide service to GTWR represent less than 1% of Compuware's over 2800 professional staff technicians. A majority of the Board finds that under Kelm, the Compuware employees who perform work for GTWR are not employees under section 1(d)(1)(i)(B) or (C) of the RRA.

Glen L. Bower

V. M. Speakman, Jr. (Dissenting)

Jerome F. Keever