B.C.D. 01-65 JUL 03 2001

Employee Service Determination

DLY

This is the decision of the Railroad Retirement Board regarding whether the services performed by DLY for the Port Terminal Railroad Association, the New Orleans Public Belt Railroad, and the CMC Railroad Inc. constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. These companies are covered employers under the Acts (B.A. Numbers 4815, 4525, and 4866, respectively).

DLY is a consultant in the area of organization development. She describes her work as follows.

> Analyzes corporate and individual performance discrepancies and designs and develops training/information/policies/ processes/strategies that support the business objectives of the organization. Included in this process is leadership development, dissemination, and change management.

In connection with services performed for the Port Terminal Railroad Association, she states that she "designs and develops the tools to accomplish the immediate task of the first line supervisors' role;" "works with the management team to assess organization needs and designs, develops and implements programs/initiatives to build management/employee skills and capabilities to meet the needs;" "works with interested general chairmen and other employee leaders to interpret and carry management's and the customers' needs and expectations to the employees responsible for performing the work;" "use[s] management, employee and customer surveys to assess performance requirements;" "[performs a] day-to-day advising/ counseling role for all levels of management and interested general chairmen for the purpose of creating effective solutions to resolve

critical business issues in ways that build organizational relationships both within and across departments;" "monitor[s]/interpret[s] FRA guidelines;" "[performs as an] advisor on all training technology and adult learner issues;" "stays current on technological changes in this area to ensure PTRA employees are on the leading edge;" "coordinate[s] PTRA benchmarking program;" and "designs employee and management development programs."

DLY performs services for these companies under renewable contracts for fixed periods of time (year to year in the case of the Port Terminal Railroad Association, month to month in the case of the other companies). The CMC contract provides that DLY is to provide services as an independent contractor at an hourly rate of $80.00 per hour. She is to provide all equipment, materials, postage, and supplies. She is, however, reimbursed for airfare, meals, and lodging if travel is required. The contract with the New Orleans Public Belt Railroad is similar. The contract with the Port Terminal Railroad Association provides for a monthly retainer.

She advertises her services to the public. Twenty percent of her services are performed at her home; eighty percent are performed on the property of the companies. She is paid monthly. She pays self-employment taxes on the compensation she receives. She is not supervised and does not supervise anyone.

DLY states that she has 39 months of railroad service and that, since 1982, she has worked as a consultant. It is unclear as to what period she is claiming credit for. The contract with CMC Railroad she submitted is dated June 30, 1999. The one with the New Orleans

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Public Belt Railroad is dated December 1996. The contract with the Port Terminal Railroad Association is dated July 27, 1995 (and has been extended by subsequent agreements).

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) 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) of the Railroad Retirement Act 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 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
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> (ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. § 3231(b) and (d)). Paragraph (A) of the definition dates from the inception of the railroad retirement system. See Public Law No. 162, 75th Cong., Ch. 382, Part I, (50 Stat. 307).

In Reynolds v. Northern Pacific Railway, 168 F. 2d 934 (8th Cir. 1948), the Eighth Circuit stated that for purposes of liability for taxes under the analogous provision of the Railroad Retirement Tax Act, persons performing services for a railroad may be regarded as railroad

employees, even though they are not directly employed or directly paid by the railroad. Id. at 942. The Court further stated that the intent of parties to the contract to avoid coverage, the historical practice of the railroad industry, and factors deciding the employment relationship under other Federal laws should all be considered. Id at 940-941. Under other federal laws, numerous factors are involved in determining whether an individual is engaged in employee service. In the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act, these factors may be useful in determining application of those provisions. An individual may not be self-employed where the employer furnishes without charge the supplies and premises for the work. See Henry v. United States, 452 F. Supp. 253, 255 (E.D. Tenn., 1978). Payment on a hourly basis rather than at a specified amount per job also indicates that the individual is an employee. See Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D. Va., 1962). An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

While DLY's performance of services contain elements of performance both as an independent contractor and as an employee, the Board concludes that the foregoing criteria indicate that DLY is performing her services as an independent contractor. She works for three different companies under substantially identical contracts, and she holds herself out as available to work for other parties. She works at home and on the premises of the companies, providing her own supplies and equipment. She is not supervised, as specified in paragraph (A) of

the definition, by any of the companies, and it does not appear that she is integrated into the employer's staff or operations, as is specified in paragraphs (B) and (C).

Accordingly, it is the decision of the Board that DLY's services for the Port Terminal Railroad Association, the New Orleans Public Belt Railroad, and the CMC Railroad Inc., are performed as an independent contractor for those companies and are not performed as an employee of any of the companies. Consequently, the Board finds that that service is not creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Original signed by:

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