

**Employer Status Determination  
Employee Service Determination  
DisAbility ReDesign, Inc.  
SG**

This is the decision of the Railroad Retirement Board regarding the status of DisAbility ReDesign, Inc. (DRI) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts, and the creditability of service performed by SG.

### **Background**

Coverage of DRI was requested by Joseph D. Roach, Mackall, Crouse & Moore, PLC, counsel for DRI, who requested on behalf of DRI that the Board find that DRI is a covered employer under the Acts based on work performed by SG for Union Pacific Railroad Company (UP). The following information was submitted by Mr Roach.

DRI was incorporated and began operations April 2, 1999. Mr. Roach represented that its only client is and has been UP. However, DRI's website<sup>1</sup> states that "Over the past 20 years<sup>2</sup> we have provided services to more than 100 self-insurers or insured employers from transportation, health care, manufacturing, construction, insurance and the government." UP states that DRI had a corporate existence for five years before contracting with UP June 1, 2001. An affidavit dated March 5, 2002, of SG, Chief Executive Officer of DRI, states that she left the Burlington Northern in 1996 and formed DRI ("[formerly known as] SG, Inc.") at that time, and that for "the last sixteen months, DRI has provided vocational rehabilitation services exclusively to the Union Pacific Railroad."

From 1990-1996, SG worked as a Rehabilitation Manager for Burlington Northern Railroad Company. In 1996, the Burlington Northern merged to form the Burlington Northern and Santa Fe Railway Company and decided to obtain certain services from independent vendors. At that time, SG left Burlington Northern and formed DRI f/k/a SG, Inc. The purpose of this new venture was to provide vocational rehabilitation facilitation services. DRI has two employees, SG and CRW.

In his letter of October 22, 2002, Mr. Roach stated that for the last 16 months, DRI had provided vocational rehabilitation services exclusively to UP. Those services include "facilitating return-to-work plans by identifying appropriate referrals; assisting network counselors in placing [UP] employees as part of their rehabilitation; and partnering with [UP] management to redesign its disability management program." According to Mr. Roach, SG reports directly to [UP's] Director of Disability Management, who oversees and monitors her work and determines whether to renew DRI's contract. Mr. Roach stated that, "at all times [UP] determines and directs the scope and manner of

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<sup>1</sup> As of October 3, 2002.

<sup>2</sup> Other information obtained in connection with this case indicates that the 20-year period does not refer to the corporate existence of DRI, but to the work experience of SG and another DRI employee, CRW.

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DRI's, and SG's, responsibilities, duties and performance under the contract." We note that this last statement is not consistent with information provided by UP, which is examined below.

After obtaining information from Mr. Roach, the Board requested and obtained information from Mr. Jim Coulton, Senior Director – Federal Taxes, UP, and Candace Berg Girard, Director Disability Management, UP. According to Ms. Girard<sup>3</sup> UP has 65 Network Vocational Rehabilitation Counselors (NVRCs) in the Northern Region, who are independent contractors paid on a fee-for-service basis, and who provide services to disabled UP employees. The program is available to employees who have permanent physical limitations as a result of accident or illness that results in a loss of function which impedes the employee's ability to perform his or her job. The goal of the service is to assist disabled railroad workers in their return to work efforts. NVRCs are geographically disbursed throughout the UP system, a 23-state area. The NVRCs are private practitioners who are skilled experts in the area of vocational rehabilitation services. The rehabilitation program follows the traditional return to work hierarchy<sup>4</sup>. Due to the number of fee-for-service NVRCs, "UP contracts for 3 Vocational Rehabilitation Counselors to assist the 65 NVRCs in offering rehabilitation services to [UP injured or ill] employees." UP has contracted with the three regional vocational rehabilitation counselors of which DRI is one, to use them on an as-needed basis to assist the NVRCs with handling the vocational rehabilitation needs of UP employees.

Ms. Girard describes UP's arrangements with the counselors as follows. Examples of assistance from the regional counselor might be coordinating an on-site job analysis for the NVRC, assisting the NVRCs with preparation of reports, identifying appropriate job opportunities, or preparing for trial testimony. UP is limited in its ability to provide confidential information to a counselor without a specific contract for such services. Just as UP contracts outside defense counselors for litigation purposes, the Vocational Rehabilitation Program contracts three vocational rehabilitation counselors because these individuals have the education, credentials, skills and expertise necessary to perform this type of service.

The statement of work contained in an attachment to the UP-DRI contract, describes the work as: "vocational rehabilitation services including oversight and direction to the

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<sup>3</sup> The quoted material in these paragraphs, except for that described as from the statement of work, is entirely from that submitted by Ms. Girard.

<sup>4</sup> "1) Return to work at regular job, 2) Return to work at regular job with accommodation, 3) Return to work with constructive use of seniority, 4) Internal placement into a new position within [UP] without training, 5) Internal placement into a new position within UP with training, and 6) External placement into a new position without or with training."

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[UP] Network VRCs who are providing services to disabled [UP] employees at [the Railroad's] Northern Region.”

According to SG, DRI's contract began June 1, 2001<sup>5</sup>. DRI is paid \$4,500.00 per month plus travel expenses. SG sets her own hours and schedule, in order to conform to the schedule of the NVRCs. She does not conform to UP's work hours, routines, or schedules. The work is not ordinarily performed on UP premises but at DRI's office or in the field with the NVRCs and disabled employees. UP does not know how many hours DRI performs services for UP.

**Applicable Law**

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad \* \* \*.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Section 1(d)(1) of the RRA 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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<sup>5</sup> As is stated in the copy of the contract provided to the Board.

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(ii) he renders such service for compensation \* \* \*.

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ (b) and (d)).

**Findings and Conclusions**

DRI clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor is it controlled by officers or directors who control a railroad. Although DRI in effect contends that it is controlled by UP by reason of the contract between UP and DRI, the Board does not agree. The Board recognizes that UP may have legitimate business reasons to contract for certain services, and all elements of the contract in this case indicate that it was entered into between two independent enterprises. Further, DRI is an independent enterprise which has had clients other than UP. Its website indicates that it advertises for such clients. Accordingly, we conclude that DRI is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether SG should be considered to be an employee of UP rather than of DRI. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

The focus of the test under paragraph (A) of section 1(d)(1) of the RRA, quoted above, 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.

Although the evidence is conflicting in that Mr. Roach contends that SG is supervised by employees of UP, a majority of the Board finds that SG's work is performed independently and is not supervised. Her duties involve work with the NVRC, who are themselves independent contractors, not with UP employees. DRI's contract with UP does not provide for UP supervision of individual DRI employees, and UP does not have records of the number of hours worked by SG. As mentioned above, she mainly does not work on UP premises and does not conform to UP hours of work. Accordingly, a majority of the Board finds that the control test in paragraph (A) is not met. Moreover, under an Eighth Circuit decision consistently followed by the Board, the tests set forth under paragraphs (B) and (C) do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953). Thus, under Kelm the question remaining to be answered is whether DRI is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for

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purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl. 1977), at 1012; and whether the contractor engages in a recognized trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir. 1968) at 341. While these may be rather close questions in cases such as this one, where the contractor has only two employees and only one client, it is apparent that DRI has been in the business of providing services to many customers, not all of which were connected to the rail industry, and is engaged in the recognized trade or business of vocational rehabilitation. Accordingly, it is the opinion of a majority of the Board that DRI is an independent business.

Because DRI is an independent contractor, the services performed by DRI employees is not covered employee service within the meaning of paragraphs (B) and (C). Accordingly, it is the determination of a majority of the Board that service performed by SG of DRI is not covered under the Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr. (Dissenting,  
separate dissenting opinion attached)

Jerome F. Kever

**Dissent of  
V. M. Speakman, Jr.  
Employer Status Determination  
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SG

I must respectfully dissent from the majority's decision in this case. The majority's decision does not, in my view, give serious consideration to the facts raised by DisAbility ReDesign, Inc., (DRI) and incorrectly applies the law to the facts as stated in the decision.

At the outset, DRI, wants to be covered under our statutes. (Letter from Joseph D. Roach to Edmund T. Fleming, October 22, 2002). Granted that coverage is not a voluntary matter, but where an entity wants to be covered should not our policy be to cover it if there is any reasonable interpretation of the statute that would affect that result?

SG worked for many years as a Rehabilitation Manager for the Burlington Northern Railroad. In 1996 when the Burlington Northern merged with the Santa Fe her department was eliminated and the services she had performed were contracted out to non-covered employees. At that point she formed DRI in order to provide vocational rehabilitation services primarily on railroad-related matters. DRI consists of SG and another employee.

Although there is some evidence that DRI has had other clients, since June of 2001 it has worked exclusively for Union Pacific providing assistance to Union Pacific Network Vocational Rehabilitation Counselors. These individuals are independent contractors whose function is to assist disabled railroad workers in their return to work efforts. Mr. Jim Coulton, Senior Director – Federal Taxes- Union Pacific, indicated that DRI was retained because of SG's knowledge of the railroad work environment.

As the majority states, DRI is clearly not a carrier by rail. Thus, the next level of inquiry is whether it is controlled or under common control with a carrier by rail. Control is evidenced not merely by ownership, or voting control, but by the ability to influence the operations or direction of another business. *RRB v. Duquesne*

*Warehouse Co.*, 326 U.S. 446, 453 (1946). The legislative history of the definition of employer contained in the RRA provides that “ Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. De facto control may be exercised not only by direct ownership of stock, but by means of agreements, licenses and other devices which insure that the operation of the company is conducted in the interest of the carrier.” (S. Rep. No. 697, 75<sup>th</sup> Cong., 1<sup>st</sup> Session 7 (1937))

In Legal Opinion L-79-41 the General Counsel set forth certain factors which could be used to judge whether a carrier has de facto control by contract. These include whether the contractor performs work for one enterprise or several? To what extent is the contractor economically dependent on the carrier? Is the contractor performing railroad-related work only? To what extent does the carrier control the contractor’s method of performance? Does the contract provide for exclusivity? Does the contract provide for payment on a cost-plus or flat fee basis (the latter being more like a salary)? How central are the contractor’s services to the carrier’s operations? What is the usual practice in the industry?

Since June of 2001 the Union Pacific has been DRI’s primary, if not only client. DRI’s contract with the Union Pacific is DRI’s sole source of income, which is paid on a flat fee basis. DRI’s services are railroad related and DRI was retained because of its principal’s railroad-related experience. It ignores economic reality to suggest, as does the majority, that DRI’s contract with the Union Pacific is a deal between equals. The economic reality is that Union Pacific by virtue of its leverage has the ability to pretty much dictate how DRI does business or, more to the point, whether it stays in business, and thus indirectly has the potential for control of DRI.

DRI is clearly performing substantial services in connection with the transportation of property by rail. In this regard we do not merely look as to whether the services are essential to day-to-day operations of the carrier, but whether they are in any way supportive of the railroad’s common carrier obligation. *Despatch Shops v. RRB*, 153 F. 2d. 644 (D.C. Cir. 1946). As stated earlier, DRI assists the Union Pacific’s rehabilitation counselors in returning disabled railroad workers to work as well as assists the Union Pacific in the management of its rehabilitation program. These services are clearly related to Union Pacific’s common carrier obligations. Note that holding DRI to be an employer does not cost the Union Pacific one dime. The tax obligations and reporting requirements which would follow such a determination would fall on DRI.

Whether or not DRI is an employer under the Acts, it is clear SG's services for the Union Pacific are covered as a statutory employee under section 1(d)(1)(i)(B) of the RRA and its companion section 1(e) under the RUIA.

SG is clearly "rendering professional or technical services and is integrated into the staff of the employer" In fact she is performing services very similar to those performed when she was an employee of the Burlington Northern. She is now unfortunately one of the vast army of those who have lost decent jobs as the result of mergers and downsizing and now are so-called consultants.

The majority points to *Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 206 F.2d 831 (8<sup>th</sup> Cir. 1953) to support their finding that

SG's services are not covered under 1(d)(1)(i)(B). The majority states that (B) and its companion section (C) do not apply to contractors who are engaged in an independent trade or business. However, such an interpretation renders (B) and (C) pretty much superfluous. Any individual rendering technical or professional services is by nature of the services performed usually engaged in an independent trade or business. If you exclude such individuals from coverage when does (B) or (C) ever apply?

To the extent that the majority is correct that (B) and (C) do not apply to an independent trade or business, this interpretation should be limited to well-established enterprises which engage in numerous contracts with both railroad and non-railroad employers.

In my view this coverage determination presents exactly the situation which Congress intended (B) and (C) to address, that is, a nominal independent contractor performing personal services for an employer under the Acts and integrated in the operations of the carrier. It was their intent that such services be covered to the same extent as services of a common law employee were covered by virtue of section 1(d)(1)(i)(A). SG's relationship with the Union Pacific is very similar to that of Roth Gatewood's relationship to the Santa Fe. Gatewood, a nominal member of law firm (of counsel), performed legal services exclusively for the ATSF. In *Gatewood v. RRB*, 88 F.3d 886 (10<sup>th</sup> Cir. 1996), the court found such service covered under (B) and (C). It held that these sections were intended to cover work by self-employed individuals who were rendering service to a carrier under contract. *Gatewood, supra at 891.*

It is one thing to apply *Kelm* to employees of large corporations doing consulting work on the property of a carrier. It is another to apply it in a case such as this one where you are dealing with a single individual operating through a corporate shell. The majority concedes that this is a close case since we have an independent contractor with essentially one client. I would find that SG's services for the Union Pacific are covered under the Acts.

Original signed by:

V. M. Speakman, Jr.  
11-13-03