B.C.D. 04-18

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EMPLOYEE SERVICE DETERMINATION
Employees of Transportation Certification Services

On October 30, 2002, the Office of Inspector General of the Railroad Retirement Board (OIG) referred to the Retirement Benefits Division, for the assessment of overpayments, the cases of 31 retirees who were receiving annuities while performing work under contract with Transportation Certification Services (TCS). Transportation Certification Services was previously found not to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts in B.C.D. 95-40.

The information provided by the annuitants was in many cases inconsistent with the information provided by the OIG. The information contained in the files provided by the OIG is not original information from employers covered under the Acts, but was compiled from information provided by TCS. The General Counsel requested the Audit and Compliance Division to seek additional information from the affected annuitants so that the Board could make employee coverage determinations prior to assessment of any overpayments.

The referral of the 31 cases is, in effect, a request to re-open both the decision in B.C.D. 95-40 and the compensation and service record of each of the 31 annuitants. B.C.D. 95-40 was issued on March 20, 1995, and became a final agency decision when the period for requesting reconsideration passed one year later. See 20 CFR 259.3. With respect to the service and compensation records of the 31 annuitants, the years involved range from 1994 through 1998. The reports of service and compensation for most of these years were also final at the time of the referral to the Retirement Benefits Division. See 45 U.S.C. §231h and 20 CFR 211.16. One employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts did submit amended reports to provide compensation and service credits for annuitants who had worked in train and engine service on that employer's property.

The Board is thus presented with the dual question of whether to re-open its decision in B.C.D. No. 95-40 and whether to re-open the service and compensation records of the 31 annuitants. In reviewing the prior coverage determination concerning TCS, the Board held that training service provided by TCS to carriers would not be covered service. However, the OIG discovered that some of the individuals under contract with TCS were also providing locomotive engineering services for TCS's clients. The Board has previously held that an individual that is operating a train as an engineer or conductor will be held to be an employee of the carrier. Therefore, any service in this regard would be covered service even if the individual claimed to be an

independent contractor. B.C.D. No. 95-40 is modified to conclude that any work performed through TCS as a locomotive engineer or as a conductor for a covered rail carrier employer is employee service for the rail carrier employer.

However, the greater difficulty the Board faces in this case concerns the individual records of service and compensation involved. Specifically, the evidence as to the types and amount of service provided by the annuitants in this matter is inconsistent and meager. Certainly, the passage of time has not made the Board's job any easier in resolving these issues. Additionally, the Board must consider the effects of its prior decision concerning TCS and the misinformation that has been provided to the annuitants regarding their status under the Acts. For these reasons, except in the limited circumstances described below, the Board will not re-open the compensation and service records of the 31 annuitants. See 20 CFR 261.11.

The Board finds that any service that has been reported by an employer under the Acts for a contractor of TCS as of the date of this decision shall be credited to the individual as employee service pursuant to the Board's regulations and, if applicable, shall cause an adjustment in the annuity of that employee. If the crediting of such service shall cause an overpayment in annuities under the Railroad Retirement Act, an overpayment shall be assessed, but the conditions for waiver set out in section 10 (c) of the Railroad Retirement Act shall be deemed to be satisfied as explained below.

First, it shall generally be considered that the employee was without fault in causing the overpayment due to the confusion and misinformation concerning the employee's status as an employee while under the contract with TCS. Further, the Board finds that recovery of the overpayment would be against equity or good conscience, since the employee accepted the annuity payment(s) in question in the belief based on B.C.D. No. 95-40 that the service being provided through TCS was not covered rail service that would interrupt the employee's annuity entitlement. In view of the length of time that has elapsed since the service was rendered, as well as the misinformation and confusion mentioned earlier, and the advanced age of the annuitants at the present time, the Board finds that equity demands that recovery of the overpayments be waived.

In summary, the Board reopens and modifies its decision in B.C.D. No. 95-40 to conclude that work performed through TCS as a locomotive engineer or as a conductor for a covered rail carrier employer is employee service for the rail

carrier employer. The Board will reopen the service and compensation records only for those annuitants for whom service performed under contract with TCS was reported by a covered employer on or before the date of this decision. The Board in all other cases will not reopen its record of service and compensation and holds that any service of any individual under contract with TCS, which has not been reported prior to the date of this decision by an employer under the Acts, shall not be considered creditable service by virtue of section 9 of the Railroad Retirement Act.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever