B.C.D. 05-42

Employer Status Determination
Decision on Reconsideration
DisAbility ReDesign, Inc.

AUG 3 1 2005

This is the decision on reconsideration 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.

In a decision dated November 19, 2003 (B.C.D. 03-82), a majority of the Board held that DRI was not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. A majority of the Board also held that service performed by Sheila G-P for the Union Pacific Railroad Company was not creditable under the Acts. On October 27, 2004, Ms. G-P requested reconsideration of the Board's decision regarding the coverage of DRI. She did not request reconsideration of that aspect of the decision finding that the service performed by Ms. G-P for the Union Pacific was not creditable.

In her request for reconsideration, Ms. G-P does not present new evidence, except for a statement, examined below, of her duties under the contract. Accordingly, the Board restates below the evidence contained in the record upon which the November 19, 2003 decision was based.

Background

The following information was submitted by Joseph D. Roach, Mackall, Crounse & Moore, PLC, counsel for DRI.

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[1] states that "Over the past 20 years[2] 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 Ms. G-P, Chief Executive Officer of DRI, states that she left the Burlington Northern in 1996 and formed DRI ("[formerly known as] SG-P, Inc.") at that time, and that for "the last sixteen months, DRI has provided vocational rehabilitation services exclusively to the Union Pacific Railroad."

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[1] As of October 3, 2002.
[2] 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 Ms. G-P and another DRI employee, Ms. C RW.

From 1990-1996, Ms. G-P 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, Ms. G-P left Burlington Northern and formed DRI f/k/a SG-P, Inc. The purpose of this new venture was to provide vocational rehabilitation facilitation services. DRI has two employees, Ms. G-P and Ms. 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, Ms. G-P 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 DRI's, and G-P'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.

Ms. G-P's statement of duties[3], mentioned above, is as follows.

> Direct and support the efforts of the [Return to Work] Coordinators on a regional basis.
>
> Handle those difficult situations that the [Return to Work] Coordinators are unable to successfully resolve.
>
> Work with the labor unions at a local and national level to promote return to work[.]
>
> Develop new job placement opportunities[.]
>
> Authorize temporary productive work (TPW) expenditures on a regional basis[.]
>
> Supervise the Stage 2 Review Nurses on a regional basis[.]
>
> Provide 1:1 case staffing support to the network vocational rehabilitation counselors[.]

[3] The source of the statement is unclear.

> Assist in the selection, orientation, training, and mentoring of network vocational rehabilitation counselors[.]
>
> Assist with the recruitment and training of new [Return to Work] Coordinators[.]
>
> Provide ongoing [Return to Work] program development support and quality assurance[.]

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[4], 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[5]. 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

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[4] The quoted material in these paragraphs, except for that described as from the statement of work, is entirely from that submitted by Ms. Girard.

[5] "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."

education, credentials, skills and expertise necessary to perform this type of service.

According to Ms. Girard, DRI's contract began June 1, 2001[6]. DRI is paid $4,500.00 per month plus travel expenses. Ms. Gniffke-Pribyl 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.

Pertinent provisions of the contract between DRI and UP are summarized in the following paragraphs. 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 [UP] Network VRCs who are providing services to disabled [UP] employees at [the Railroad's] Northern Region."

Section 1.A. of the contract specifies that the "work or services to be performed by the Contractor under this agreement is for vocational rehabilitation services including oversight and direction to the UP Network VRCs who are providing services to disabled UP employees in the Railroad's Northern Region." Section 1.C. provides that "The work will be performed at such times and locations authorized by the Railroad Representative [i.e., UP]. Such work shall be done in an expeditious, substantial and workmanlike manner to the satisfaction and acceptance of the Railroad Representative. * * *" Section 1.D. provides that the work is to be done to the satisfaction of the Railroad Representative. Section 1.E. provides that DRI is to furnish "all superintendence, labor, tools, equipment, materials, and supplies * * *."

Section 2.A. of the contract provides that total cost of the work, including travel, meal, and lodging expenses, may not exceed $108,000.00 per year. Section 3.A. provides that the term of the contract was for two years, subject to a 30-day written notice of termination by either party. UP could terminate the contract at any time for unsatisfactory performance. Section 6 of the contract provides that Information obtained by DRI in performance of the contract cannot be disclosed without the consent of UP, and DRI may not act as an expert witness in any litigation in which the UP is a defendant. These restrictions survive termination of the contract. Section 7 of the contract provides that the UP has the right of first refusal regarding any work product developed by DRI, and the right to any patents or copyrights.

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[6] As is stated in the copy of the contract provided to the Board.

Section 8 provides that DRI is considered to be an independent contractor. Under section 12.A. DRI is obligated to hold UP harmless for any damage suffered as a result of work under the contract. Section 14.A. provides that when working on railroad property, DRI is subject to the regulations of the Federal Railroad Administration. Section 16.B. provides that UP has a right to audit the books of DRI. Section 18 prohibits DRI from assigning or subcontracting work without the permission of UP. Section 21 obligates DRI to carry the insurance requirements set by 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).

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. DRI in effect contends that it is controlled by UP by reason of the contract between UP and DRI, and Ms. G-P presents additional argument in support of that contention.

Ms. G-P cites a memorandum dated February 5, 1979, from the then-General Counsel to the three-member Railroad Retirement Board (Legal Opinion L-79-41). This memorandum provided an analysis of Martin v. Federal Security Agency, 174 F. 2d 364 (3rd Cir. 1949). That case concerned an interpretation of the control requirement contained in the definition of "employer" contained in the Railroad Retirement and Railroad Unemployment Insurance Acts, and the

Railroad Retirement Tax Act, and held, essentially that "control" does not include control by contract ("defacto control"). The General Counsel advised, in effect, that the case did not resolve the question of whether control under the acts administered by the Board could include defacto control, and provided analysis in support of various interpretations of "control." The General Counsel provided a number of criteria to be considered in determining whether a company might be covered under the acts pursuant to an expansive definition of "control."

Ms. G-P contends that she meets those criteria in that DRI has performed work for only one railroad since April 2001; that it is economically dependent on Union Pacific; that since April 2001, DRI has performed only railroad work; that the contract provides for a flat rate payment; that the services performed by DRI are key to the carrier's operations; and that the work of rehabilitation practitioners can be performed either by employees or contractors. In regard to the carrier's control over the details of performance, Ms. G-P states merely that there is right of termination by either party with 30 days notice.

Ms. G-P also cites Southern Development Company v. Railroad Retirement Board, 243 F.2d 351 (8th Cir. 1957) which upheld the Board's determination that maintenance of an office building constituted services in connection with rail transportation. She cites a decision of the Board regarding Associated Safety & Accident Professionals, Inc., which held that company not to be performing services in connection with railroad transportation.

It is not disputed that DRI is performing services in connection with railroad transportation. Therefore Southern Development Company, which held that management of an office building constitutes services in connection with railroad transportation, does not assist in determining the coverage status of DRI. Ms. G-P cites Associated Safety & Accident Professionals, Inc., in order to distinguish that case from this one. More specifically, the company in that case had a number of clients; DRI currently has only one client, Union Pacific. Nevertheless, based on all of the evidence in this case, a majority of the Board finds that DRI is not controlled by Union Pacific. Particularly supportive of this conclusion are the following facts: Ms. G-P sets her own hours and schedule; does not conform to UP's work hours, routines, or schedules; and does not ordinarily perform her work on UP premises.

Moreover, a majority of the Board finds that DRI does not meet the criteria listed in Legal Opinion L-79-41 under the expansive definition of "control." Although DRI currently performs work only for UP, DRI is an independent enterprise that has had clients other than UP. Its website indicates that it advertises for such clients. UP does not have the right to control the details of the work performed by DRI. Nor does DRI's contract with UP provide that DRI may only perform services for

UP. Although DRI provides a valuable service for employees of UP, those services are not central to the main business of UP, which is the conduct of rail freight operations.

All elements of the contract, as described above, in this case indicate that that contract was entered into between two independent enterprises. Although most of the elements of that contract refer to obligations incurred by DRI, and rights provided to UP, that is because DRI is the company providing the service. Many provisions of the contract, such as the obligation of DRI to hold UP harmless for damage suffered by UP as a result of the work performed under the contract, are typical of a contract with an independent contractor. Although, as mentioned above, the contract provides that the work will be performed at such times and locations authorized by the UP and that it shall be done to the satisfaction and acceptance of the UP, these provisions do not indicate that the UP has authority to supervise the manner of performance (and it should be noted that Ms. G-P states that she does not conform to UP's work hours, routines, or schedules).

Accordingly, a majority of the Board finds that DRI is neither owned by nor under common control with a rail carrier employer. Thus, a majority of the Board concludes that DRI is not a covered employer under the Acts. The request for reconsideration is denied.

Michael S. Schwartz

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

Jerome F. Kever

DISSENT OF
V. M. SPEAKMAN, JR.
EMPLOYER STATUS DETERMINATION
EMPLOYEE SERVICE DETERMINATION
DISABILITY REDESIGN, INC.
SG-P

As I indicated in my dissent in B.C.D. 03-82, SG-P, the principal of DisAbility ReDesign, Inc. (DRI), should be considered an employee of the Union Pacific Railroad(UP) pursuant to section 1(d)(1)(i)(B) of the Railroad Retirement Act. However, upon reconsideration she seeks to have her company covered under that statute.

Section 1(a)(1)(ii) of the Railroad Retirement Act provides that a company which is controlled by a carrier by railroad is also covered if it is performing services in connection with railroad transportation. It is undisputed in this case that DRI is performing such services. The only issue is whether it is controlled by a carrier by railroad, specifically the UP.

Section 202.4 of the Board's regulations, which define control, provides that:

> "A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person." (20 CFR 202.4 (2005)

The relevant legislative history of the definition of employer contained in the Railroad Retirement Act states 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 owner-ship 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.
>
> "*** There are brought within the scope of the Act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States." (S. Rep. No. 697, 75th cong., 1st Sess. 7)

DRI is essentially one person, SG-P, who performed rehab services for employees of the Burlington Northern before her job was eliminated. She then formed DRI to perform the same type of work. DRI has had a number of clients, but since 2001 DRI has performed services exclusively for the UP. There should be little doubt who is calling

the tune in this relationship. DRI operates under a one-sided personal services contract with all the leverage on the side of the UP.

In General Counsel's Opinion 79-41 the General Counsel set forth criteria under which a company may be said to be controlled by an employer covered under our statutes by virtue of a contractual arrangement. Let us examine these criteria against the facts of this request for reconsideration.

1. Does the company perform work for one enterprise or several? *Although there is evidence that DRI has advertised for other clients there is no serious dispute that since June 2001, the Union Pacific has been its only significant client.*
2. To what extent is the company economically independent of its contracting carrier? *Again, there is really no dispute that without its contract with the Union Pacific, DRI would have little or no income.*
3. Is the company performing railroad-related work, only, or does it performs both railroad and non-railroad work? *Again, all of DRI's work since 2001 has been to assist in the rehabilitation of injured employees of the Union Pacific.*
4. To what extent is there control by the contracting carrier over the details of performance? *Section 1.C. of the contract between DRI and the UP provides that the work will be performed at such times and locations authorized by the Railroad (UP) Representative. Section 1.D. provides that all work is to be done to the satisfaction of the Railroad Representative. Section 15 of the contract provides that the UP may unilaterally reduce work (and thus the compensation) or add work for an additional amount as agreed upon. Under section 3.B. the UP may terminate the contract, if in its sole discretion it deems DRI's service unsatisfactory. DRI may terminate on 30 days notice only for cause. (Section 3.A.) The UP has the right to audit DRI's books (Section 16.B.). Upon completion of the contract, the UP has the right of ownership of any work product developed by DRI during the term of the contract. (Section 7.) DRI may not subcontract out the work under the contract without the permission of the UP. (Section 18).*
5. Does the contract provide for exclusivity of performance? *No.*
6. Does the contract provide for payment on a cost-plus or flat rate basis? *Section 2.A. of the contract provides that DRI shall be paid $4500 per month plus travel, subject to a 108,000 per year maximum. Under Section 2.B. amounts may be held back if there is insufficient progress on the work to be completed as determined by the UP.*
7. How central to the carrier's operations are the contracted-for service? *The services in this case involve assisting UP's network rehabilitation counsels in providing rehabilitative services to disabled employees of the UP. Such services are important, but would not appear central to UP's operations.*
8. What is the usual practice of the industry regarding provision of these services? *There is no evidence in the record on this issue.*

It is clear from the above that the contract between DRI and the UP is not one between equals, but insures that DRI operates only in the UP's interest. The UP has the right to dictate the times and locations of the work required under the contract. The UP can terminate the contract at will. It has the right to reduce work under the contract at will.

It has the right to audit DRI's books and the right to any proprietary product developed by DRI.

Early Board precedent supports DRI's request. In Board Order 39-513, adopting General Counsel Opinion 39-502, the Board found the Fred Harvey Company was controlled by the Atchison, Topeka and the Santa Fe Railway by virtue of their contractual arrangement under which Harvey ran restaurants and dining car services for the carrier. Like DRI, Harvey's entire business was with the Santa Fe, although Harvey's contract demanded exclusivity of performance. As with DRI, the carrier had the right to dictate where and when services were performed and could terminate the contract at will. Like DRI, Harvey's books were subject to inspection by the carrier at anytime.

Finally, although coverage is not elective under our statutes, what policy is served by not covering DRI? DRI is not resisting coverage. Indeed, it has requested coverage. As seen from the above analysis, it has made reasonable, if not compelling case, that it is controlled by the UP through its contractual arrangement with the carrier. It clearly performs an important service for the UP. It is difficult to see how the UP would be harmed by holding DRI to be a covered employer, and Board precedent would permit such a determination.

V. M. Speakman, Jr.

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