

**EMPLOYEE SERVICE DETERMINATION****JTC****S.S.A. No. XXX-XX-0005**

This is the decision of the Railroad Retirement Board regarding whether the services performed by JTC for Conrail, the Norfolk Southern (NS) and CSX Transportation (CSX) through Strategic Staffing Solutions (S3) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

JTC first contacted the Board in July, 2006, claiming service "for eighteen months from September 2001 through February 2003". In a letter dated December 1, 2006, JTC specifically requested that the last four months of 2001 be deemed as railroad retirement service, the fourteen months of 2002 and January and February 2003 when he was "working indirectly" for the Norfolk Southern (NS) and CSX Transportation (CSX) be deemed as railroad retirement service. In a letter dated January 18, 2007, Mr. Wayne Scharnak, the Board's Chief of Compensation and Employer Services, advised JTC that deemed service months are the product of a calculation, and the factors in that calculation are the number of reported service months, the reported Tier II compensation, and the maximum Tier II compensation for a given year. In addition, an employee/employer relationship must exist. Mr. Scharnak advised JTC that his reported Tier II compensation for 2001 was not sufficient to entitle him to be awarded any deemed service months. Further, since S3 is not an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts, JTC was not entitled to be awarded any deemed service months for 2002 and 2003<sup>1</sup>. Mr. Scharnak did advise JTC that he would be forwarding JTC's inquiries to the Board's Division of Audit and Compliance for a determination whether JTC's work for S3 might be considered employee service.

Section 9 of the RRA requires an employee contest errors in his record of service and compensation within four years after the day on which employer's return of the compensation was required to be made. Regulations of the Board in effect

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<sup>1</sup> According to its website, S3 is a "provider of information technology professional consultants for medium-to long-term engagements". S3 is an international company, with U.S. offices in Atlanta, Boston, Charlotte, Chicago, Columbus, Detroit, Fort Lauderdale, Houston, New Orleans, New York City, Orlando, Philadelphia, Richmond and Tampa, and European offices in Kaunas, Lithuania and London, England. It has over 1,000 employees, and its clients include "financial institutions, retail organizations, public utilities, health care and insurance entities, telecommunication industries, government, schools, and the service industry". There is no evidence that S3 is owned or controlled by any rail carrier, or is under common control with any rail carrier. Based on the evidence of file, it is clear that S3 is not an employer within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts.

during the entire time JTC allegedly performed service to Conrail, CSX and NS provided that annual employer returns of compensation and service under section 9 of the RRA must be filed no later than the last day of February of the following year for which service was reported. See 20 CFR 209.8. The employer's return of service and compensation for 2001 was therefore required to be filed by February 29, 2002. As noted above, JTC first raised the issue of creditability of his contract service July 5, 2006, five months after the four year limitation of section 9. While service for 2001 is outside the four year limitation of section 9, service performed in 2002 and 2003 is within the four year limitation of section 9.<sup>2</sup>

After receiving JTC's requests, Mr. William Wolfe, the Board's then-Chief of the Audit and Compliance Division, sent letters dated January 25, 2007, to JTC and S3 asking for detailed information about the services JTC performed. JTC responded on February 12, 2007; however, S3 did not respond to the initial letter, nor letters dated February 13, 2007, and April 23, 2007.

Inquiries were also sent by the agency's Division of Audit and Compliance to NS and CSX. Mr. Scott Wilkinson, Assistant General Tax Attorney for NS, responded in a letter dated September 19, 2007, stating that NS has no record of JTC providing services during the period January 2002 and February 2003, and further, NS has no record of S3 providing any services to NS. Sean Craig, Director-Audits & Appeals for CSX, responded to Mr. Wolfe in an e-mail dated January 7, 2008, stating that JTC has not worked for CSX or any of its affiliates since June 1999. Mr. Craig also stated that he had no knowledge of S3.

As no response had been received from S3, a subpoena was issued to S3 through the Board's Detroit, Michigan district office. In response to the subpoena issued, in a letter dated May 9, 2008, Mr. R. Jan Appel, General Counsel for S3, provided responses to the questions initially asked in the Board's letter dated February 13, 2007. According to the information provided by Mr. Appel, JTC provided information technology (IT) services at Conrail, beginning August 22, 2001, and "it is believed that JTC was compensated for

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<sup>2</sup> Section 211.16 of the Board's regulations (20 CFR 211.16) provides that as a general rule the Board's record of compensation and service may not be corrected after four years in the absence of fraud. "Fraud" may be defined as an intentional deception. A review of the Board's coverage file in this case does not reveal any evidence of fraud.

approximately 2977 hours"<sup>3</sup>. It is noted that JTC has submitted copies of W-2 Wage and Tax Statements for 2001, 2002 and 2003, indicating that he received wages from S3.

Review of the file indicates that there are conflicting statements regarding who JTC performed services for. In his initial request, JTC stated his request was to "1. Have the last four months of 2001 deemed as Railroad Retirement Service. 2. Have the fourteen months, of 2002 and Jan. & Feb. of 2003, working indirectly for the NS and CSX deemed as Railroad Retirement Service". In his letter of February 12, 2007, in answer to the question "Provide the name of the company you provided services for", JTC responded "Norfolk Southern, CSX and Shared Assets Areas (Conrail)". In response to the question "Did you perform work on Railroad's property?", JTC responded "Yes, Conrail, Philadelphia, PA, Mt. Laurel, NJ, Pittsburgh, PA; CSX, Jacksonville, FL, Baltimore, MD; NS, Atlanta, GA". Yet in response to the subpoena, Mr. Appel states that JTC only provided services to Conrail. This is supported by the statements provided by NS and CSX, that there is no record of S3 providing services, or JTC providing services for the period in question.

Following receipt of Mr. Appel's response, in a letter dated June 24, 2008, the agency contacted Norfolk Southern Corporation for information about services which JTC may have provided. A response from Ms. Kathy Summers of Payroll Accounting for Norfolk Southern Corporation stated that "JTC's employment with Conrail was terminated on August 22, 2001. He was not working as an employee during the period 2002-2003". A follow-up letter from the agency asked Ms. Summers for clarification whether JTC provided services to Conrail, through S3, for the period September 2001 through February 2003. A response from Ms. Summers dated October 13, 2008, states

Your recent request for additional information on JTC's employment with Strategic Staffing Solutions cannot be confirmed through our office. Payroll can only report information for employees of our company.

I contacted our Accounts Payable Department to see if I could obtain any additional information for you through vendor payments. I was informed by the manager, Kristen Yeatts, that no

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<sup>3</sup> Using a forty-hour workweek as a guideline, this amounts to roughly 74 and a half weeks, or approximately 18 months.

vendor payment information would be available for the time period you requested.

To be an employee of a covered railroad employer for purposes of benefit entitlement under the Acts administered by the Board, JTC must fall within the definition of that term provided by the Acts. Section 1(b) of the RRA and section 1(d)(i) of the RUIA both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) 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

(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 Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(b) and (d)).

The relevant evidence of record includes: the letter from Mr. Wilkinson, Assistant General Tax Attorney for NS, stating that NS has no record of JTC providing services during the period January 2002 and February 2003, and further, NS has no record of S3 providing any services to NS; the e-mail from Mr. Craig, Director-Audits & Appeals for CSX, stating that JTC has not worked for CSX or any of its affiliates since June 1999, and that he (Mr. Craig) had no knowledge of S3; and the letters from Ms. Summers stating that JTC's employment with S3 cannot be confirmed through the payroll office of Norfolk Southern Corporation.

In view of the evidence in the record, it is the determination of the Board that services performed by JTC in 2002 and 2003 were performed as an employee of S3, which is not an employer covered by the Acts. Accordingly, JTC does not

fall within the definition of "employee" as that term is provided by the Acts, and the services he performed and compensation he received are not creditable under the Acts.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever