**B.C.D. 05-38** **AUG 5 2005**

**Employee Status**
**DL**

This is the decision of the Railroad Retirement Board regarding whether the services performed by DL for Train Travel, Inc., and Coe Rail, Inc., constituted employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Train Travel and Coe Rail are covered employers under those Acts (B.A. Numbers 9249 and 3266, respectively)[1]. Train Travel was held to be an employer effective January 1, 1989, and Coe Rail effective August 23, 1984. DL also claims to have worked for Coe Sun, Inc., d/b/a as Tarantula Steam Train, not a covered employer.

In letters of August 15, 2004, and February 6, 2005, DL describes his work for these companies. He states that he was paid the following amounts each of which was reported on a form 1099: in 1997, from Coe Rail: $16,464; in 1998, from Coe Rail: $32,759[2]; in 1999, from Train Travel: $12,060[3]; in 2001, from Train Travel: $32,698[4]; and, in 2002, from Train Travel: $8,776[5]. It should be noted that DL was credited with 14 months of creditable service during this period.

DL states that, for Train Travel, he concentrated on developing and pursuing leads for the purchase or lease of tracks upon which Train Travel could place new dinner train operations. He would identify new markets, and then he would determine if there was a section of track in the area that could be purchased or leased. Then he would begin negotiations for such lease or purchase. He would also, on a daily basis, supplement the dinner train reservations staff for the Michigan Star Clipper Dinner Train: he would answer telephone calls, take reservations, take receipt of food deliveries, and check guests in as they arrived for the evening departures. He also often operated the train as either the locomotive engineer or the conductor.

DL states that, for Coe Rail, he was the Supervisor of Locomotive Engineers, training new and existing engineers and conductors in their duties and in their retraining requirements. He also created and maintained all hours of service records, books of rules, and dispatching records. He hired all mechanical, train, and engine service personnel. He taught the mechanical staff how to perform all of the preventative maintenance required by the Federal Railroad Administration and by good maintenance practices. He also operated the Coe Rail freight trains as locomotive engineer and conductor at least once per

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[1] Both Train Travel and Coe Rail are wholly owned by Laurence I. Coe.
[2] Plus $400 reported on a W-2.
[3] Plus $975 from Coe Rail reported on a W-2, and $26,240 from Coe Sun.
[4] Plus $450.00 from Coe Rail reported on a W-2, and $27,313 from Coe Sun in 2000.
[5] Plus $1,100 from Coe Rail reported on a W-2.

month. He was also responsible to insure that Coe Rail had contractors in place to perform inspections and repair services and to maintain the records of such inspections and repairs.

His work for Train Travel was performed as a contractor with the title, Director of Development for Train Travel, Inc.

DL states that he was paid monthly by Coe Rail and by Train Travel, and that he was told by the owner of the companies that the owner's accountant had been instructed to make the appropriate contributions to railroad retirement.

DL states that he was required to follow a certain work routine, which included arriving in the office in the morning and staying until the dinner train departed, covering any vacancies on Coe Rail train crews, covering vacancies on the dinner train, training the operating crews for both companies, and helping on-board the dinner train if the situation required, six days per week.

The Board sent to Coe Rail copies of the information submitted by DL for comment. In a letter dated April 1, 2005, counsel for Coe Rail declined to comment on DL's claim.

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)). While the regulations of the Board generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

From DL's description of the work he performed for Train Travel and Coe Rail, we conclude that he was "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" as specified in paragraph (A). We also find that he was "rendering, on the property used in the employer's operations, personal services" as is specified in paragraph (C), the rendition of which services were performed on the premises and under the supervision of Coe Rail and Train Travel.

Accordingly, it is the decision of the Board that DL's services for Coe Rail and Train Travel were performed as an employee of those companies and consequently that that service is creditable under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Section 211.16 of the Board's regulations provides in pertinent part as follows.

> Finality of records of compensation.
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> (a) Time limit for corrections to records of compensation. The Board's record of the compensation reported as paid to an employee for a given period shall be conclusive as to amount, or if no compensation was reported for such period, then as to the employee's having received no compensation for such period, unless the error in the amount of compensation or the failure to make return of the compensation is called to the attention of the Board within four years after the date on which the compensation was required to be reported to the Board as provided for in Sec. 209.6 of this chapter.
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> (b) Correction after 4 years. (1) The Board may correct a report of compensation after the time limit set forth in paragraph (a) of this section where the compensation was posted or not posted as the result of fraud on the part of the employer.
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> (c) Limitation on crediting service. (1) Except as provided in paragraph (b)(1) of this section, no employee may be credited with service months or tier II compensation beyond the four year period referred to in paragraph (a) of this section unless the employee establishes to the satisfaction of the Board that all employment taxes imposed by sections 3201, 3211, and 3221 of title 26 of the Internal Revenue Code have been paid with respect to the compensation and service.
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> * * * * *.

Section 9 of the RRA and section 211.16 of the Board's regulations are designed to preserve the integrity of the Board's records of earnings and service and place the burden on the employee to bring to the attention of the Board any problems with reported earnings and service within four years. Employees are notified annually of their reported earnings and given the right to contest those earnings records. In this case, DL, because of apparent statements made by the employers, was lead to believe that earnings and service were being reported for him. Because some reports were, in fact, made, BA-6 notices for the years 1998 (reporting 2 months of service), 1999 (reporting 4 months), 2001 (reporting 5 months), and 2002 (reporting 3 months) would have been issued to DL. He believed, according to the record, in good faith that earnings and service were being properly reported for him and based on this good faith belief, did not submit any protests to the RRB concerning his earnings and service record. The employer has failed to present any evidence that the alleged statements made by the employer to DL to the effect that earnings and service were being properly reported were not made. While there is insufficient evidence to support a finding that the employer willfully withheld information with the intention of perpetrating fraud against the government, the evidence is sufficient, and not rebutted, that the employee was lead to believe in good faith that his service and earnings were being properly reported to the RRB. Neither section 9 of the RRA nor section 211.16 of the RRB's regulations should be applied to bar DL from receiving full credit for his service and earnings, without retroactive restriction.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.
*(Separate concurring opinion attached)*

Jerome F. Kever

Concurring Opinion of V. M. Speakman, Jr
Employee Service Determination
DL

I concur with the result in this case, but would have found that DL's employers willfully failed to file the required reports of service and compensation covering DL's employment.

The General Counsel's office initially advised the Board that they had concluded from the evidence presented that DL's employers, Train Travel and Coe Rail, apparently had willfully failed to report all his service to the Railroad Retirement Board as required by section 9 of the Railroad Retirement Act. They based this conclusion on the fact the carriers were thoroughly familiar with the reporting requirements under the Railroad Retirement Act, and the fact that they declined to raise any defenses to their obvious failure to report all of DL's employment with them. I concur with this reading of the evidence. As I consequence, regardless of DL's expectations, section 211.16(b)(1) of our regulations should be applied to credit DL with service beyond the four-year limit set forth in section 9.

Original signed by:

V. M. Speakman, Jr.