History of Washington State Railroad worker Income Tax dispute with Montana and Idaho

1981 - Montana received records from the BN railroad and started trying to tax Washington State railroad workers who travel into Montana.

1983 - State of Idaho sent letters to RR employees demanding 5 years state income tax.

1983 - Washington State RR workers filed class action suit against Idaho.

1984 - Washington State Congressional delegation introduces legislation to exempt train employees working in interstate commerce from paying state income taxes for passing though a state in which they do not live.

1986 - Railroad workers win lawsuit against Idaho regarding back taxes. Blangers et al v. Idaho

1987 - Washington State Legislation introduced regarding the tax problem.

SB 5956 - Special Tax on Idaho residents who work in WA. - passed legislature - vetoed by Governor Gardner.

SJM 8012 - Requesting that Congress change tax laws affecting employees of common carriers who cross state lines.

SJM 8013 -Requesting Idaho to exempt certain nonresident employees of common carriers from its State income tax.

House Floor Resolution No. 87-4659 - Requesting that tax be repealed. Passed and sent to Idaho, Director of the IRS, President of US Senate, the Speaker of the House and each member of Congress.

1988 - "Hands Across the Border" conference held in Idaho regarding this issue and other issues. Idaho passes law and stops trying to collect back taxes from our members.

1990 - Finally successful In Washington, DC - Public Law 101-322 Section 7 is passed. Railroad workers only have to pay state income tax in state in which they reside when working on interstate trains.

1992 - Montana begins attempts to try to collect pre 1990 taxes.

1994 - Congress passes "Swift High Speed Rail Act of 1994" Sec. 14 - Residence of Employees. The amendments made by section 7 of the Amtrak Reauthorization and Improvement Act of 1990 shall apply to all periods before and after the date of their enactment.

~~1995 - Agreement~~ proposed by Montana ~~Department of Revenue to~~ end dispute.

1997 - Montana garnishes wages of BNSF employees for pre 1990 earnings.

2004 - Possible BNSF operations move from Yardley in Washington to Hauser in Idaho and tax questions regarding UTU members.

SUMMARY OF THE SWIFT RAIL DEVELOPMENT ACT OF 1994[1]

1. The Authorization for Appropriations

Funds are authorized for 4 fiscal years (instead of 2 as has been the case since 1970).

2. Hours of Service Pilot Project

The railroads and all labor organizations representing any class or craft of directly affected covered service employees may jointly petition the Secretary for approval of a waiver of the Hours of Service Act requirements for the purpose of establishing one or more pilot projects to demonstrate alternatives to existing requirements, including maximum on-duty and minimum off-duty periods.

By January 1, 1997 FRA is required to report to Congress as to the effectiveness of the pilot projects and to recommend appropriate legislation for changes in the law.

3. Biennial Reporting

FRA's annual reporting requirements will be extended to a 2 year requirement.

4. Report on Bridge Displacement Detection

The Secretary is required to issue a report within 18 months concerning action that has been taken with regard to railroad bridge displacement detection systems.

5. Track Safety

In issuing track safety regulations, September 1, 1995 FRA is required to cover cold weather installation of continuous welded rail, and to consider whether or not to issue regulations that relate to the problem of track shelling in the detection of internal rail defects.

6. Residence of Amtrak Employees

In 1990 Congress prohibited an employee to be taxed by any state or local jurisdiction except where the employee resides. This change provides that the 1990 amendment applies to all periods of time before and after that enactment.

THIS SUMMARY IS FROM LARRY MANN - SAFETY LAWS - 2003

[1/] This statute is summarized only to show that the FRA still has not promulgated all of the regulations mandated by this law.

U.S. Code as of: 01/02/01 Section 11502. Withholding State and local income tax by rail carriers

(a) No part of the compensation paid by a rail carrier providing transportation subject to the jurisdiction of the Board under this part to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.

(b) A rail carrier withholding pay from an employee under subsection (a) of this section shall file income tax information returns and other reports only with the State and subdivision of residence of the employee.

"(b) Subsection (a) shall not be effective unless the Corporation or a railroad seeking coverage hereunder has entered into an operating agreement with a publicly funded commuter transportation authority established under Virginia law to provide access for revenue service to its property in connection with the operations of the publicly funded commuter transportation authority.".

SEC. 4. AUTHORIZATION TO USE FUNDS FOR SIMILAR PURPOSES.

Proceeds from the sale of all or part of the railroad line for which funds were provided, for acquisition and rehabilitation, under section 511 of the Rail Safety and Service Improvement Act of 1982 may be used for similar purposes with respect to any railroad line connecting with such line, for the purpose of continued rail service on such lines.

SEC. 5. COOPERATION WITH STUDY.

The National Railroad Passenger Corporation shall cooperate with the efforts of the Washington State Department of Transportation in designing and carrying out a study of the feasibility of reestablishing rail service between Seattle, Washington, and Vancouver, British Columbia.

SEC. 6. ROUTING FEASIBILITY STUDY.

The National Railroad Passenger Corporation shall conduct a study to evaluate the short-term and long-term revenue and cost implications of separating the existing California Zephyr-Desert Wind-Pioneer train into two service routes serving separate western destinations via a southern route and a central route through Iowa. The Corporation shall include in this evaluation the projected cost for required additional passenger equipment, any projected loss, and any revenue and ridership gains, associated with offering a second service route. A detailed report on the findings of the study shall be submitted by the Corporation to the Congress within 6 months after the date of enactment of this Act.

Reports.

State and local governments.
Taxes.

SEC. 7. RESIDENCE OF EMPLOYEES.

(a) Section 11504(a) of title 49, United States Code, is amended to read as follows:

"(a) No part of the compensation paid by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.".

(b) Section 11504(b) of title 49, United States Code, is amended to read as follows:

"(b)(1) No part of the compensation paid by a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a motor private carrier to an employee who performs regularly assigned duties in 2 or more States as such an employee with respect to a motor vehicle shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.

Income Tax;
Employees of Interstate Motor and Rail Carriers

I. Introduction

The purpose of this Technical Information Release (TIR) is to explain the Massachusetts income tax and withholding rules for employees of certain interstate motor and rail carriers. On July 6, 1990, the United States Congress enacted Public Law 101-322, the "Amtrak Reauthorization and Improvement Act of 1990" (the "Act"). This Act changed state taxation of certain interstate motor and rail carrier employees.

Because many states tax the compensation of nonresidents who are employed within their state, employees whose jobs require them to work in several states may face multiple state tax liabilities and filing requirements. Although each state only imposes a tax on the portion of the employee's compensation that is earned in that taxing state, the multiple filing requirements can be burdensome for the employee. The interstate transportation industry employs large numbers of employees who perform their duties in more than one state and, therefore, can be subject to numerous and varying state withholding and filing requirements. In order to reduce these burdens for certain interstate motor and rail carrier employers and their employees, Congress preempted certain state nonresident income tax provisions by limiting a state's power to tax the compensation of these employees.

II. Massachusetts General Rules

As a general rule, Massachusetts imposes a tax on all income, after deductions, exemptions and credits, of residents of the state. G.L. c. 62, § 2. Residents whose income is also taxed by another state may claim a credit against their Massachusetts tax for income taxes due to another state. G.L. c. 62, § 6(a). Massachusetts taxes the income of nonresidents only if the income is derived from sources within this state. G.L. c. 62, § 5A. Compensation from a nonresident's employment in Massachusetts is Massachusetts source income.

III. Preemption of State Law

Section 11504 of Title 49 of the United States Code, limits a state's ability to impose its income tax laws on certain employees of interstate motor and rail carriers. Generally, when a state law conflicts with a federal law, the federal law prevails under the Supremacy Clause of the United States Constitution.[1] Therefore, regardless of Massachusetts law to the contrary, § 11504 governs the ability of Massachusetts to impose its income tax laws on certain employees of interstate motor and rail carriers.

IV. Former Federal Limitations on State Taxation and Withholding

A. Taxation

Prior to July 6, 1990, 49 U.S.C. § 11504, as applied to employers and employees in Massachusetts, restricted Massachusetts wage withholding on nonresident interstate motor and rail carrier employees earning compensation in Massachusetts although it did not affect the Massachusetts income taxation of such compensation.

B. Withholding

Prior to July 6, 1990, 49 U.S.C. § 11504 limited a state's ability to require interstate motor and rail carriers to withhold state income tax and to file state income tax information returns. Interstate motor and rail carriers were required to withhold Massachusetts income tax only for Massachusetts residents who did not earn more than 50 percent of their compensation in another state and for nonresidents earning more than 50 percent of their compensation in Massachusetts. Revised Interstate Commerce Act, Pub. L. No. 95-473, § 11504, 92 Stat. 1446 (1978)(originally enacted as Income Taxation - Interstate Carriers and Employees, Pub. L. No. 91-569, §§ 1, 2(b), 3(a), 84 Stat. 1499 (1970)).

V. Current Federal Limitations on State Taxation and Withholding

A. Taxation

49 U.S.C. § 11504, as amended, provides that no part of the compensation paid on or after July 6, 1990 to an employee who performs regularly assigned duties in more than one state by a rail or motor carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission or by a motor private carrier, shall be subject to the income tax laws of any state or

subdivision of that state, other than the state or subdivision of the employee's residence. Under the Act, Massachusetts may impose its income tax only on interstate motor and rail carrier employees who are Massachusetts residents or who are Massachusetts nonresidents who perform all of their regularly assigned duties in Massachusetts.

B. Withholding

The July 6, 1990 Act amending 49 U.S.C. § 11504, as applied to employers and employees in Massachusetts, provides that interstate motor and rail carriers are required to withhold Massachusetts state income tax only from the compensation of Massachusetts residents and from the compensation of Massachusetts nonresidents who perform all of their regularly assigned duties in Massachusetts. In addition to withholding requirements, interstate motor and rail carrier employers are required to file other information returns for these employees, including wage and new hire reports under G.L. c. 62E and 830 CMR 62E.2.1.

C. Compensation and Employees Affected

These federal provisions apply only to interstate motor and rail carriers and their employees subject to the jurisdiction of the Interstate Commerce Commission and to motor private carriers ("interstate motor and rail carriers"). The restriction applies to compensation paid on or after July 6, 1990.

VI. Abatement

A nonresident employee of an interstate motor or rail carrier who has paid Massachusetts taxes on compensation earned in Massachusetts and paid on or after July 6, 1990, and who performed duties in a state other than Massachusetts, may be entitled to an abatement. Applications for abatement are made on Form CA-6. Contact Taxpayer Assistance for further information at 1-800-392-6089.

VII. Examples

Mr. Ron is an employee of a rail carrier that is under the jurisdiction of the Interstate Commerce Commission. Mr. Ron is a nonresident of Massachusetts and performs his regularly assigned railroad duties in Massachusetts, Maine, and Connecticut. Mr. Ron is not subject to income taxation in Massachusetts and his employer is not required to withhold Massachusetts income taxes.

Ms. Brown is an employee of a rail carrier that is under the jurisdiction of the Interstate Commerce Commission. Ms. Brown in a nonresident of Massachusetts and performs all her regularly assigned railroad duties in Massachusetts. Ms. Brown is subject to Massachusetts income taxation on her rail carrier compensation because she performs all her regularly assigned duties in Massachusetts. Ms. Brown's employer is required to withhold Massachusetts income taxes and to file any required Massachusetts income tax information returns.

Mr. Derek is an employee of a motor private carrier under the jurisdiction of the Interstate Commerce Commission. Mr. Derek is a resident of Massachusetts and performs his regularly assigned motor carrier duties in Massachusetts, New Hampshire, and Vermont. Mr. Derek is subject to Massachusetts income taxation on his motor carrier compensation because he is a resident of Massachusetts. Mr. Derek's employer is required to withhold Massachusetts income taxes and to file any required Massachusetts income tax information returns.

Mitchell Adams
Commissioner of Revenue
April 20, 1993

TSB-A-91(3.1)I
Income Tax
October 21, 1999
New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau
STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE
MODIFIED ADVISORY OPINIONS
PETITION NO. I910118A
PETITION NO. I930210A
PETITION NO. I930722A
PETITION NO. I960620A

Advisory Opinions were issued to Metro-North Commuter Railroad Company, 347 Madison Avenue, 19th Floor, New York, New York 10017, on March 18, 1991 with respect to Petition No. I9101118A, TSB-A-91(3)I; April 28, 1993 with respect to Petition No. I930210A, TSB-A-93(3)I; October 19, 1993 with respect to Petition No. I930722A, TSB-A-93(11)I; and December 17, 1996 with respect to Petition No. I960620A, TSB-A-96(5)I.

The issue raised by Petitioner, Metro-North Commuter Railroad Company, is how the application of the Amtrak Reauthorization and Improvement Act of 1990, PL 101-322 ("ARIA"), affects employees traveling to more than one state during the course of their employment. Specifically, the meaning of the term "regularly assigned" and the types of occupations and work schedules covered by ARIA are at issue.

After a current review of the application of the ARIA, such Advisory Opinions are modified to the extent discussed herein, for taxable years beginning on or after January 1, 2000.

Discussion

ARIA amended various provisions of **Title 49** of the United States Code relating to state and local taxation of compensation paid to employees of interstate rail carriers, interstate motor carriers and interstate motor private carriers and applies to compensation paid on or after July 6, 1990.

Section seven of ARIA amended **section 11504**(a) of **Title 49** of the United States Code (49 USC § **11504**(a)) with regard to a rail carrier providing transportation subject to the jurisdiction of

the Interstate Commerce Commission under Subchapter I of Chapter 105 of **Title 49**. The Interstate
Commerce Commission was abolished by Federal Public Law 104-88, the ICC Termination Act of
1995, effective January 1, 1996. The provisions of former **49** USC § **11504**(a) are now contained
in **section** 11502(a) of **Title 49** of the United States Code (**49** USC § 11502(a)). **49** USC § 11502(a)
states, in pertinent part, that:

No part of the compensation paid by a rail carrier ... to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.... (emphasis added)

Prior to ARIA, **49** USC § **11504**(a) provided a much more limited exemption for railroad ***employers***, from the duty to ***withhold*** income tax on the compensation of certain of their employees.
This provision was limited to employer relief from the multi-state burden; it ***did not*** exempt the
employees from the burden of multi-state income taxation.
While it is plain that ARIA greatly expanded the reach of the exemption, from employer withholding to employee taxation, it is not so clear whether or how the employee population covered
by the exemption was intended to change. The pre-ARIA exemption applied to an employee who-

(A) performs regularly assigned duties on a locomotive, car or other track-borne vehicle in at least 2 States ...; or
(B) is engaged principally in maintaining roadways, signals, communications, and structures or in operating motortrucks from railroad terminals in at least 2 States....

This exemption language was cast in 2 separate clauses. The (A) clause applied to employees who work on a locomotive or car, e.g. the engineers and conductors who ride the train.
The term *regularly assigned* in this clause has the meaning which relates to their kind of work,
where the normal tour of duty on the train will cross state lines. On the other hand, the (B) clause
applies to roadway maintenance workers. These workers are assigned to a specific roadway which
crosses state lines, but they will work in any given state on the roadway on an as-needed

basis.

The ARIA exemption is a single clause cast in terms of "an employee who performs regularly assigned duties as such an employee on a railroad in more than one State ...." It is the Department's position that this exemption telescopes the former (A) and (B) clauses into one. The ARIA exemption clause refers only to employees *regularly assigned*. In the ARIA clause, these employees must be regularly assigned *on a railroad*, which is interpreted to be shorthand for the pre-ARIA phrases of *on a locomotive, car, or other track-borne vehicle*, and *in maintaining roadways, signals, communications, and structures* of the railroad.

It is the Department's position that the correct reading of the ARIA exemption applies only to the pre-ARIA clause (A) employees, e.g., engineers and conductors, and the former (B) clause roadbed employees. However, the exemption does not apply to all the other kinds of employees of the railroad, for the following reasons:

As a matter of statutory construction, the relevant phrase in the ARIA exemption refers to an employee who performs regularly assigned duties *on a railroad*. The Department interprets this construction to mean *on the train*, and, *on the roadbed*, but not to cover the universe of employees of the railroad company. If Congress had intended an expansive meaning, the phrase *on a railroad* would not have been necessary.

There is nothing in either the legislative history nor in the statutory precursor to the ARIA exemption to suggest such an expansive reading to include the universe of employees.

Unlike conductors and engineers and the track maintenance employees, for whom crossing state lines would pose regular exposure to State taxation, there is nothing unique about other kinds of employment for a railroad that distinguishes it from employment in any other commercial endeavor. Accordingly, there is nothing that would invite the protection of a federal prohibition against state taxation.

Conclusion

With respect to Metro-North, the ARIA exemption phrase *an employee who performs regularly assigned duties as an employee on a railroad in more than one State*, is applied as follows:

Metro-North positions working on a locomotive, car or other track-borne vehicle, e.g., engineers and conductors, which we understand are categorized as "train and engine" positions, are positions that are regularly assigned duties on a railroad. Of these positions, only those positions on the New Haven line (the only line that traverses a state line) are positions that are regularly assigned in more than one state. Accordingly, only train and engine positions on the New Haven line are included in the ARIA exemption. Engineers and conductors assigned to other lines who travel the New Haven line only occasionally, such as for the "familiarization" trip described in the Advisory Opinions, are not included in the ARIA exemption.

The ARIA exemption applies to the position of an employee. For example, if an employee holds an engineer job posting for 11 months on the Hudson line and then switches to an engineer posting for 6 months on the New Haven line, only the New Haven posting is exempt.

Metro-North track positions described as "other than train and engine" and categorized as "Maintenance of Way", which comprise track maintenance employees, are also positions that are regularly assigned duties on a railroad. Of these positions, only those positions on the New Haven line are positions that are regularly assigned in more than one state. Accordingly, only "Maintenance of Way" positions on the New Haven line are included in the ARIA exemption. "Maintenance of Way" positions on the other Metro-North lines are not included in the ARIA exemption.

As to all other Metro-North positions, there is no ARIA exemption. These include all other positions described as "other than train and engine".

DATED: October 21, 1999

/s/

John W. Bartlett
Deputy Director
Technical Services Bureau

NOTE:

The opinions expressed in Advisory Opinions are limited to the facts set forth therein.

"§ 11502. Withholding State and local income tax by rail carriers

"(a) No part of the compensation paid by a rail carrier providing transportation subject to the jurisdiction of the Board under this part to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.

"(b) A rail carrier withholding pay from an employee under subsection (a) of this section shall file income tax information returns and other reports only with the State and subdivision of residence of the employee.

1"/7'

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I910118A

On January 18, 1991, a Petition for Advisory Opinion was received from Metro-North Commuter Railroad, 347 Madison Avenue, New York, New York 10017.

The issue raised by Petitioner, Metro-North Commuter Railroad, is how the application of the Amtrak Reauthorization and Improvement Act of 1990 (hereinafter the "Act") affects employees traveling to more than one state during the course of their employment, including the meaning of the term "regularly assigned" as applied to the provisions of the Act.

Petitioner operates commuter train service within New York State and Connecticut. Petitioner employs a number of employees who perform work in both states, some of whom perform this work on trains and some of whom perform this work in offices or along Petitioner's right-of-way. Many of Petitioner's employees are residents of Connecticut.

Federal Public Law 101-322, the Act, amended various provisions of Title 49 of the United States Code relating to state and local taxation of compensation paid to employees of interstate rail carriers, interstate motor carriers and interstate motor private carriers and applies to compensation paid on or after July 6, 1990.

Section seven of the Act amends section 11504 of Title 49 of the United States Code with regard to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under Subchapter I of Chapter 105 of such Title 49 and states, in pertinent part, that:

> No part of the compensation paid by a rail carrier. . .to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivisions of that State, other than the State or subdivision thereof of the employee's residence....(emphasis added)

Petitioner has four categories of employees for which it wants an opinion as to whether they are covered by section seven of the Act:

A. Employees who perform work on locomotives and who travel between states while performing such duties. For example, a railroad conductor or engineer who works on Metro-North's New Haven Line performing duties on a locomotive, who travels back and forth from New York to Connecticut during the performance of his or her duties.

B. Employees who perform all of their work in a state other than their residence returning to their resident state only when their duties are finished.

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C. Employees who perform duties, not on locomotives, in more than one state, who were previously covered by the section of the law which covered employees: "maintaining roadways, signals, communications and structures or in operating motor trucks from railroad terminals."

D. Employees, such as claims agents, railroad police, etc., who do not perform their duties on locomotives and are not employees "maintaining roadways, signals, communications and structures or in operating motor trucks from railroad terminals" but who do regularly perform their duties in more than one State.

The following is a partial list of occupations that may require an individual to perform work in more than one state for Petitioner.

nurse	mechanical supervisor
instructor	mechanical inspector
safety inspector	purchasing agent
material/storehouse supervisor	engineering supervisor
Vice President of Operations	construction supervisor
janitor	transportation supervisor
station supervisor	trial officer
custodial supervisor	traveling auditor
yardmaster	revenue accountant
Chief Mechanical Officer	revenue supervisor
	marketing manager

If an employee of Petitioner is not a resident of New York State for personal income tax purposes under section 605(b)(1) of the Tax Law, and such employee is paid compensation for regularly assigned duties performed in New York State and one or more other states, the compensation paid on or after July 6, 1990 does not constitute income derived from New York State sources and is not subject to New York State income tax, even though the employee performed services in New York State.

When applying the provisions of the Act for New York State income tax purposes, such an employee is considered to be performing "regularly assigned" duties in more than one state if such employee's job description requires the employee to perform services in at least two states on a systematic basis regardless of the percentage of time spent at each location. If an employee has no standard route and is assigned duties in more than one state on a random basis, that employee would not be considered to be performing "regularly assigned" duties in more than one state.

Accordingly, with respect to New York nonresident employees referred to in categories A, C and D above, the employees who are regularly assigned to perform duties both in New York State and Connecticut, the compensation paid on or after July 6, 1990 for the performance of such duties will not be subject to New York State income tax. Therefore, such compensation paid on or after July 6, 1990 is not subject to New York State withholding requirements.

With respect to New York nonresident employees referred to in categories A, C and D who are assigned duties on a random basis, even if duties are performed in New York State and Connecticut, such employees shall not meet the requirements of section seven of the Act exempting such employees from New York State income tax. The compensation paid to such an employee on and after July 6, 1990 for duties performed in New York State constitutes income from New York sources pursuant to section 631(b) of the Tax Law. Such compensation is subject to New York State income tax and New York State withholding requirements.

With respect to the New York nonresident employees referred to in category B who perform their duties exclusively in New York State, the compensation paid on or after July 6, 1990 for the performance of such duties constitutes income from New York State sources pursuant to section 631(b) of the Tax Law. Such compensation is subject to New York State income tax and New York State withholding requirements.

The determination of whether an employee is "regularly assigned" duties to be performed in New York State and one or more other states cannot be made from the occupation titles listed herein. Such question is a factual matter not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts". Tax Law, §171, subd twenty-fourth, 20 NYCRR 901.1(a).

It should be noted, that New York nonresident employees who receive compensation subject to New York State income tax are required to file Form IT-203, Nonresident and Part-Year Resident Income Tax Return, and report to New York any items on income derived from or connected with New York sources. If tax is not required to be withheld, estimated tax is required to be paid.

DATED: March 18, 1991

PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I930210A

On February 10, 1993, a Petition for Advisory Opinion was received from Metro-North Commuter Railroad Co., 347 Madison Avenue, New York, New York 10017.

The issue raised by Petitioner, Metro-North Commuter Railroad Co., is how the application of the Amtrak Reauthorization and Improvement Act of 1990 (hereinafter the "Act") affects employees traveling to more than one state during the course of their employment, specifically the meaning of the term "regularly assigned" and the types of occupations and work schedules covered by the Act.

Petitioner operates commuter train service within New York State and the State of Connecticut. Petitioner employs a number of employees who perform work in both states, some of whom perform ~~this work on trains~~ and some of whom perform this work in offices or along Petitioner's right-of-way.

Federal Public Law 101-322, the Act, amended various provisions of Title 49 of the United States Code relating to state and local taxation of compensation paid to employees of interstate rail carriers, interstate motor carriers and interstate motor private carriers and applies to compensation paid on or after July 6, 1990.

Section seven of the Act amends section 11504(a) of Title 49 of the United States Code with regard to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under Subchapter I of Chapter 105 of such Title 49 and states, in pertinent part, that:

> No part of the compensation paid by a rail carrier ... to an employee <u>who performs regularly assigned duties as such an employee on a railroad in more than one State</u> shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.... (emphasis added)

Petitioner requests an opinion as to whether the following four categories of employees are covered by section seven of the Act:

A. Jobs which involve duties which cover the entire Metro-North system (New York and Connecticut), which require the incumbent to perform duties in both states within a given week, although not on a fixed daily schedule. For example, a Crew Foreman position does not follow a fixed daily schedule of appearances at each crew base (i.e. every Tuesday in New Haven), but the incumbent regularly works at both Connecticut and New York locations from day to day during each week so that during a given week he/she will spend some time in both Connecticut and New York.

B. Jobs which report to a headquarter location in one state and are responsible for performing duties on a specified portion of the railroad line encompassing portions of both New York and Connecticut. Although such employees do no work in both states on a fixed daily schedule, they will spend time in both states during the year. For example, a track gang or signal maintainer position whose assigned portion of the railroad line is from a point in New York to a point in Connecticut.

C. Jobs which report to a headquarters in one state, but are responsible for specific duties throughout the entire Metro-North system in both states. For example, an auditor who, on an annual basis will perform audits and/or auditing oversight in both states, although when in that year those audits or oversight will be performed is not fixed.

D. Jobs which are responsible for performing duties for a territory encompassing areas in two states or the entire Metro-North system which travel within states on an as-needed basis. For example, a Police Detective responsible for investigations in two states whose presence in either state is determined by when the need for investigations arises.

If an employee of Petitioner is not a resident of New York State for personal income tax purposes under section 605(b)(1) of the Tax Law, and such employee is paid compensation for regularly assigned duties performed in New York State and one or more other states in accordance with the act, the compensation paid on or after July 6, 1990 does not constitute income derived from New York State sources and is not subject to New York State income tax, even though the employee performed services in New York State.

When applying the provisions of the Act for New York State income tax purposes, such an employee is considered to be performing "regularly assigned" duties in more than one state if such employee's job description requires the employee to perform services in at least two states on a systematic basis regardless of the percentage of time spent at each location. If an employee has no standard route and is assigned duties in more than one state on a random basis, that employee would not be considered to be performing "regularly assigned" duties in more than one state.

Accordingly, with respect to categories A and B above, the New York nonresident employees who are regularly assigned to perform duties in both New York State and Connecticut will meet the requirements of section seven of the Act exempting such employees from New York State income tax. Therefore, the compensation paid on or after July 6, 1990 for the performance of such duties by such New York nonresident employees will not be subject to New York State income tax. Further, such compensation paid on or after July 6, 1990 is not subject to New York State withholding requirements.

With respect to New York nonresident employees referred to in categories C and D above, who are assigned duties on a random basis, even if duties are performed in both New York State and Connecticut, such employees do not meet the

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I930722A

On July 22, 1993, a Petition for Advisory Opinion was received from Metro-North Commuter Railroad Company, 347 Madison Avenue, New York, New York 10017.

The issue raised by Petitioner, Metro-North Commuter Railroad Company, is how the application of the Amtrak Reauthorization and Improvement Act of 1990 (hereinafter the "Act") affects employees traveling to more than one state during the course of their employment, specifically the meaning of the term "regularly assigned" and the types of occupations and work schedules covered by the Act.

Petitioner operates commuter train service within New York State and the State of Connecticut. ~~Petitioner employs~~ a number of employees who perform work in both states, some of whom perform this work on trains and some of whom perform this work in offices or along Petitioner's right-of-way.

Federal Public Law 101-322, the Act, amended various provisions of Title 49 of the United States Code relating to state and local taxation of compensation paid to employees of interstate rail carriers, interstate motor carriers and interstate motor private carriers and applies to compensation paid on or after July 6, 1990.

Section seven of the Act amends section 11504(a) of Title 49 of the United States Code with regard to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under Subchapter I of Chapter 105 of such Title 49 and states, in pertinent part, that:

> No part of the compensation paid by a rail carrier ... to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence.... (emphasis added)

Petitioner requests an opinion as to whether the following two categories of employees are covered by section seven of the Act:

1. Collective bargaining requires Petitioner in certain situations to compensate employees for traveling to and from their work locations. As an example: A conductor, whose crew base is located in Stanford, Connecticut, is instructed to perform flagging service (protection for train movements in the vicinity of a construction site) at New Rochelle, New York, at 8:00 a.m. on a continuing basis for the period of the construction. In such a case, the employee takes a train that leaves Stanford, Connecticut, at 7:00 a.m. and arrives in New Rochelle, New York at 7:45 a.m. He or she reports to the work

FRA - * employee is performing service

* employee is on extra list is Regular Assignment is on extra list in Stamford. This list covers work Regularly out of Stamford and is on duty for all
CSH1 at ~~Stamford~~.

site at 8:00 a.m. and performs service until 4:00 p.m. Upon completion of the assignment, the conductor leaves New York at 4:30 p.m. by train back to Connecticut where he or she arrives at 5:30 p.m. The employee is compensated for a total of 10 hours and 30 minutes. (Eight hours of that time period represents the work actually performed, and the balance of 2 hours and 30 minutes represents the travel time to and from the crew base and work location.)
He or she is working from the time they report in Stamford.

2. Certain positions at Metro-North require that individuals be "on call" and available to report for work if needed. In such instances the individuals will remain at home while "on-call". For instance, an individual who is a resident of Connecticut may work a specified number of days of the week in New York and spend a specified number of days of the week at home "on-call". He/she will be paid for both the days worked in New York and the days spent at home in Connecticut on call.

In accordance with the provisions of the Act, if an employee of Petitioner is not a resident of New York State for personal income tax purposes under section 605(b)(1) of the Tax Law, ~~and~~ such employee is paid compensation for regularly assigned duties performed in New York State and one or more other states, the compensation paid on or after July 6, 1990 does not constitute income derived from New York State sources and is not subject to New York State income tax, even though the employee performed services in New York State.

When applying the provisions of the Act for New York State income tax purposes, such an employee is considered to be performing "regularly assigned" duties in more than one state if such employee's job description requires the employee to perform services in at least two states on a systematic basis regardless of the percentage of time spent at each location. If an employee has no standard route and is assigned duties in more than one state on a random basis, that employee would not be considered to be performing "regularly assigned" duties in more than one state.

Herein, the employees in category "1" are not performing duties while traveling to and from their work locations. Therefore, an employee who performs all of his/her duties in one state but travels to/from another state to perform such duties is not performing duties in more than one state. Additionally, in the example, a conductor whose crew base is located in Connecticut but performs flagging service at a construction site in New York is not considered to be performing "regularly assigned" duties in more than one state because the duties are assigned on a random basis, depending on where the construction site is and the duration of such construction. The employees in category "2" are performing duties in more than one state when they perform services in New York State a specified number of days of the week and are "on-call" in Connecticut a specified number of days of the week and such employees are paid for both the days worked and the days on-call. If your on call you are considered to have performed service.

Accordingly, with respect to New York nonresident employees referred to in category "1" above, who (a) are regularly assigned to perform all of their duties in New York State but travel to/from Connecticut to perform such duties, or (b) are performing duties in both New York State and Connecticut but are assigned

347 Madison Avenue
New York, NY 10017-3739
212 340-3000

President

Metro-North Railroad

June 15, 1995

Mr. Anthony Bottalico
General Chairman
United Transportation Union
420 Lexington Avenue
New York, NY 10017

Re: Dual State Tax Amendment -- Amtrak Reauthorization and Improvement Act of 1990

Dear Mr. Bottalico:

This is a follow up to our discussion regarding Metro-North's practice of reporting earnings of non-resident employees performing work solely in New York State to the New York State Department of Taxation and Finance ("NYSDTF").

After our initial discussion, you faxed me a copy of a January 15, 1991 memorandum from the Washington, D.C. lawfirm of Highsaw, Mahoney & Clarke, P.C. ("Highsaw Mahoney") on the subject of the amendment enacted as part of the Amtrak Reauthorization and Improvement Act of 1990 and codified at 49 U.S.C. §11504. In discussing this statute, the Highsaw, Mahoney memo states, in the last paragraph on page 2, as follows:

> Consequently, even if an employee performs 100% of his work in one state but resides just across the border in a neighboring state, only his state of residence will receive income tax information from the employing railroad.

During the course of our discussion, we both mentioned the situation of a conductor who is a New Jersey resident and works 100% of his time on the Harlem line. You stated that in that situation even though all of the employee's work is performed within New York State, the federal statute would preclude Metro-North from both (1) withholding any New York State income tax from his salary, and (2) reporting the earnings to the NYSDTF.

such duties on a random basis do not meet the requirements of section seven of the Act exempting such employees from New York State income tax. The compensation paid to such employees on and after July 6, 1990 for duties performed in New York State constitutes income from New York sources pursuant to section 631(b) of the Tax Law. Such compensation is subject to New York State income tax and New York withholding requirements.

With respect to category "2" above, the New York nonresident employees who are regularly assigned to perform duties in both New York State and Connecticut will meet the requirements of section seven of the Act exempting such employees from New York State income tax. Therefore, the compensation paid on or after July 6, 1990 for the performance of such duties by such New York nonresident employees will not be subject to New York State income tax. Further, such compensation paid on or after July 6, 1990 is not subject to New York State withholding requirements.

The determination of whether an employee is "regularly assigned" duties to be performed in New York State and one or more other states is a factual matter not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts". Tax Law, §171, Twenty-fourth; 20 NYCRR 2376.1(a).

It should be noted, that New York nonresident employees who receive compensation subject to New York State income tax are required to file Form IT-203, Nonresident and Part-Year Resident Income Tax Return, and report to New York any items on income derived from or connected with New York sources. If tax is not required to be withheld, estimated tax is required to be paid.

DATED: October 19, 1993

PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.

We have reviewed the statute once again and I must tell you that we do not agree with the above-quoted conclusion in the Highsaw, Mahoney memorandum. Shortly after the law was enacted, we reviewed the legislative history and discussed problems of this nature with the staff of Congressman Lukens, the bill's sponsor in the House. We also requested several advisory opinions from the NYSDTF. Attached is a copy of their Advisory Opinion dated March 18, 1991, stating that non-resident employees who perform their work exclusively in New York State remain subject to New York State withholding and reporting. This situation is the Category B type of employee discussed in the Advisory Opinion.

The logical result of the interpretation suggested in the Highsaw, Mahoney memo would be that a non-resident employee performing duties only in one state would be obligated to pay income tax to that state but the employer would not be allowed to report the amount of earnings or make any withholding from them to the state to which the taxes are payable. Such an interpretation strains common sense. A more reasoned interpretation is that the language of §11504(d), relative to withholding and reporting, refers only to those employees who are included within the purview of Subsection (a), i.e., those performing regularly assigned duties in more than one state. Thus, the provision that information returns and other reports only be submitted to the state of residence does not apply to an employee who performs regularly assigned duties in a single state.

I am sorry that we are not able to give you the answer you are seeking. However, as you can see, we had carefully reviewed this matter at the time this statute was enacted and we now have revisited it once again. Under the law, our failure to properly withhold and report State income taxes could subject our company to penalties, interest and in some situations, payment of the tax itself.

As indicated, it is our view that Metro-North's present practice of reporting earnings information to the New York

State Tax Department for non-resident employees who perform all of their duties in New York State is in accordance with the provisions of both federal and New York law. I am glad that we have had the opportunity to explain our position to you.

Sincerely yours,

Walter E. Zullig, Jr.
Special Counsel
(212) 340-2027

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