

EMPLOYER STATUS DETERMINATION

Housatonic Transportation Company

This is a determination as to the employer status of Housatonic Transportation Company (Transportation) under the Railroad Retirement Act (RRA) (45 U.S.C. § 231 et seq.) and the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §351 et seq.). Transportation has not previously been held to be an employer under the Acts.

The evidence is that Transportation was incorporated in Delaware on January 2, 1991. Transportation owns Danbury Terminal Railroad Company (Danbury Terminal), and Housatonic Railroad Company (Housatonic Railroad). See: Housatonic Transportation Company; Continuance in Control Exemption; Danbury Terminal Railroad Co. and Housatonic Railroad Co., Inc., Finance Docket No. 32163, 58 Fed. Reg. 52325, (October 7, 1993). Both Danbury Terminal and Housatonic Railroad are covered rail carrier employers under the Acts. Housatonic Railroad Company, Notice No. 89-58; and Danbury Terminal Railroad Company, Board Coverage Decision 93-17. Transportation reports that it has no employees, and functions merely as a holding company. Transportation is not a subsidiary of any company.

Section 1 of the RRA defines "employer" to include:

(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49;

(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, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (45 U.S.C. § 231(a)(1)(i) and (ii)).

Section 1 of the RUIA (45 U.S.C. § 351) and section 3231 of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231) contain essentially the same definition.

A recent decision of the United States Court of Appeals for the Federal Circuit regarding a claim for refund of taxes under the RRTA held that the parent-subsidiary relationship between a parent

corporation and its rail carrier subsidiary by definition does not constitute "common control" within the meaning of § 3231 of the Internal Revenue Code. Union Pacific Corporation v. United States, 5 F. 3d 523, (Fed. Cir., 1993).

The facts in the Union Pacific case are indistinguishable from those presented by Transportation. Accordingly, a majority of the Board determines that Housatonic Transportation Company is not and has never been an employer covered by the RRA and the RUIA, because it is not under common control with its rail carrier subsidiaries.

Glen L. Bower

V. M. Speakman, Jr. (dissenting)

Jerome F. Kever

CCCook:SABartholow:TWSadler:KTBlank:cmw
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TO : The Board

FROM : General Counsel

SUBJECT : Housatonic Transportation Company
Employer Status

Attached is a draft determination that Housatonic Transportation Company is not a covered employer.

Transportation, as parent of its rail carrier subsidiaries, is in the same position as the Union Pacific Corporation with respect to the Union Pacific Railroad. The attached ruling follows Union Pacific Corporation v. United States in finding that Transportation is not under common control with its rail carrier subsidiary, and therefore is not a covered employer.

Catherine C. Cook

Attachment