

Coverage under the Railroad Retirement System

By Robert M. Perbohner
Counsel to the Management Member

11th National Employer
Railroad Employer
Training Seminar

August 2021



WARNING

Any views expressed herein are solely those of the presenter, and as such, may not represent the views of the three-Member Board, the Management Member of the Board, or agency officials. Nothing herein may be construed as legal advice or as binding authority upon the U.S. R.R.B. and its agents. The Internal Revenue Service has sole authority to issue legal advice and opinions on matters pertaining to the Railroad Retirement Tax Act.

RRB Coverage Determination Process

Coverage determinations are made by the three member Board appointed by President and confirmed by the Senate:

Management Member – Thomas Jayne

Labor Member – John Bragg

Chairman – Erhard Chorlé

There must be at least two affirmative votes by individual Board members to render a coverage determination.

Payroll Taxes RRTA

2021

	employee	employer
Tier 1	7.65 %	7.65 %
Tier 2	4.9 %	13.1 %

Tier 1 Base same as SSA (\$142,800)

Tier 2 Base (\$106,200)

Tier 1 includes Medicare tax of 1.45% with no max.

Additional .9% Medicare tax for individuals earning in excess of \$200,000 and married couple filing jointing above \$250,000.

RUIA Contributions

Contributions for Unemployment/Sickness program are experienced rated. Rates for 2021 as follows:

2.5% surcharge = 3.15% to 12% on the first \$1,710 per month per employee.

Employers under RRA, RUIA & RRTA

- 1) Any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49;
- 2) Any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers...and which operates any equipment or facility or performs any service (except trucking...) in connection transportation of passengers or property by rail.

Coverage Rail Carriers

- Covered if: carrier subject to jurisdiction of STB.
- Not covered if: not subject to jurisdiction such as a private carrier or tourist line.

Coverage of Non-Carriers

- Directly or indirectly owned or controlled by, or under common control with a covered carrier; and
- Operates any equipment or facility or performs any service in connection with transportation of passengers or property by railroad.....

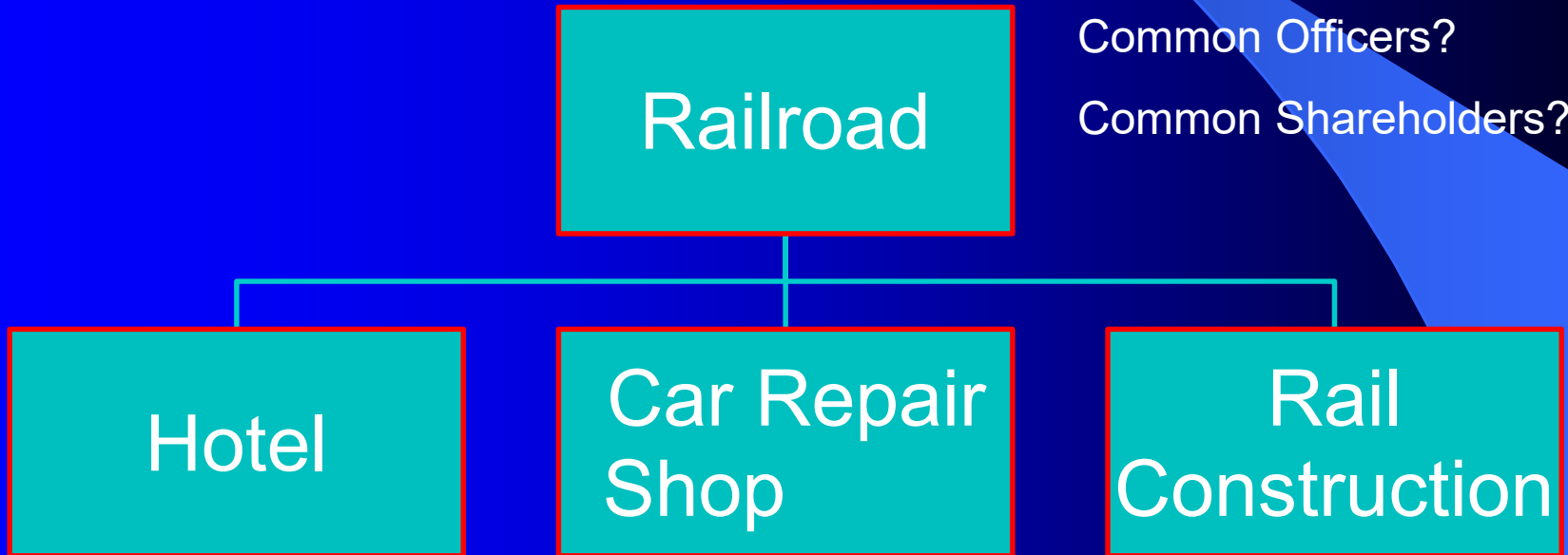
Control by Carrier

Direct or Indirect

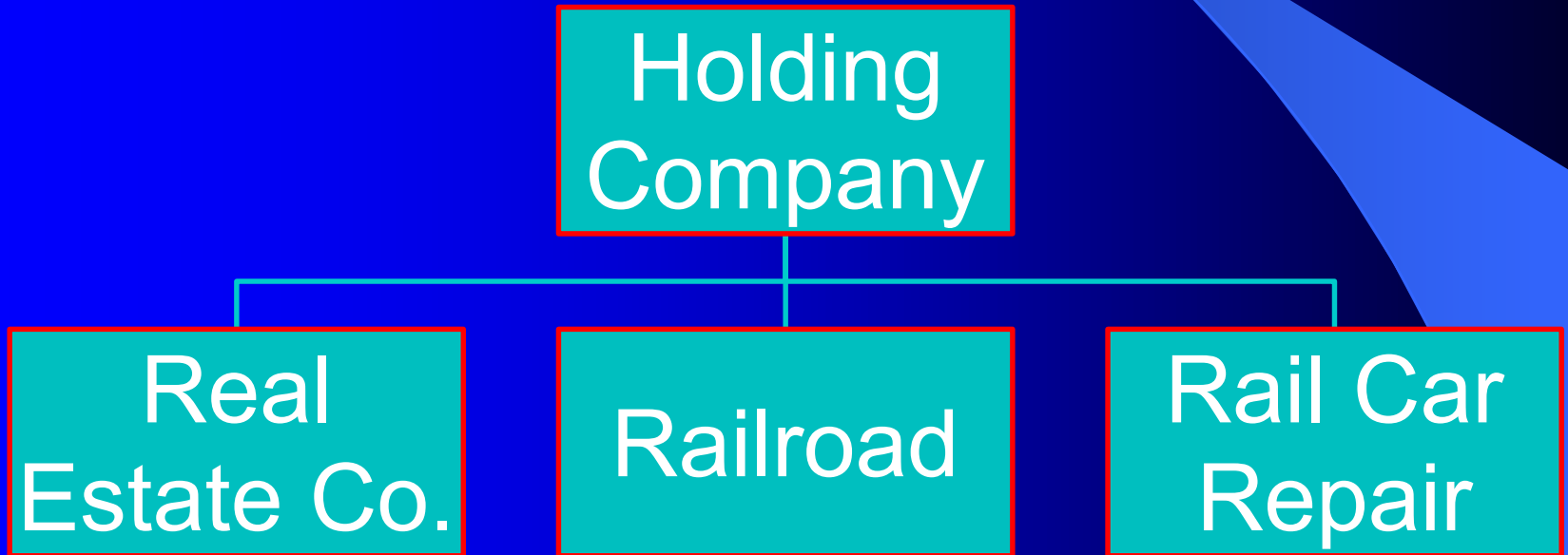
- Common stockholders
- Common directors or officers
- Sole provider contracts

Direct Control by Covered Carrier

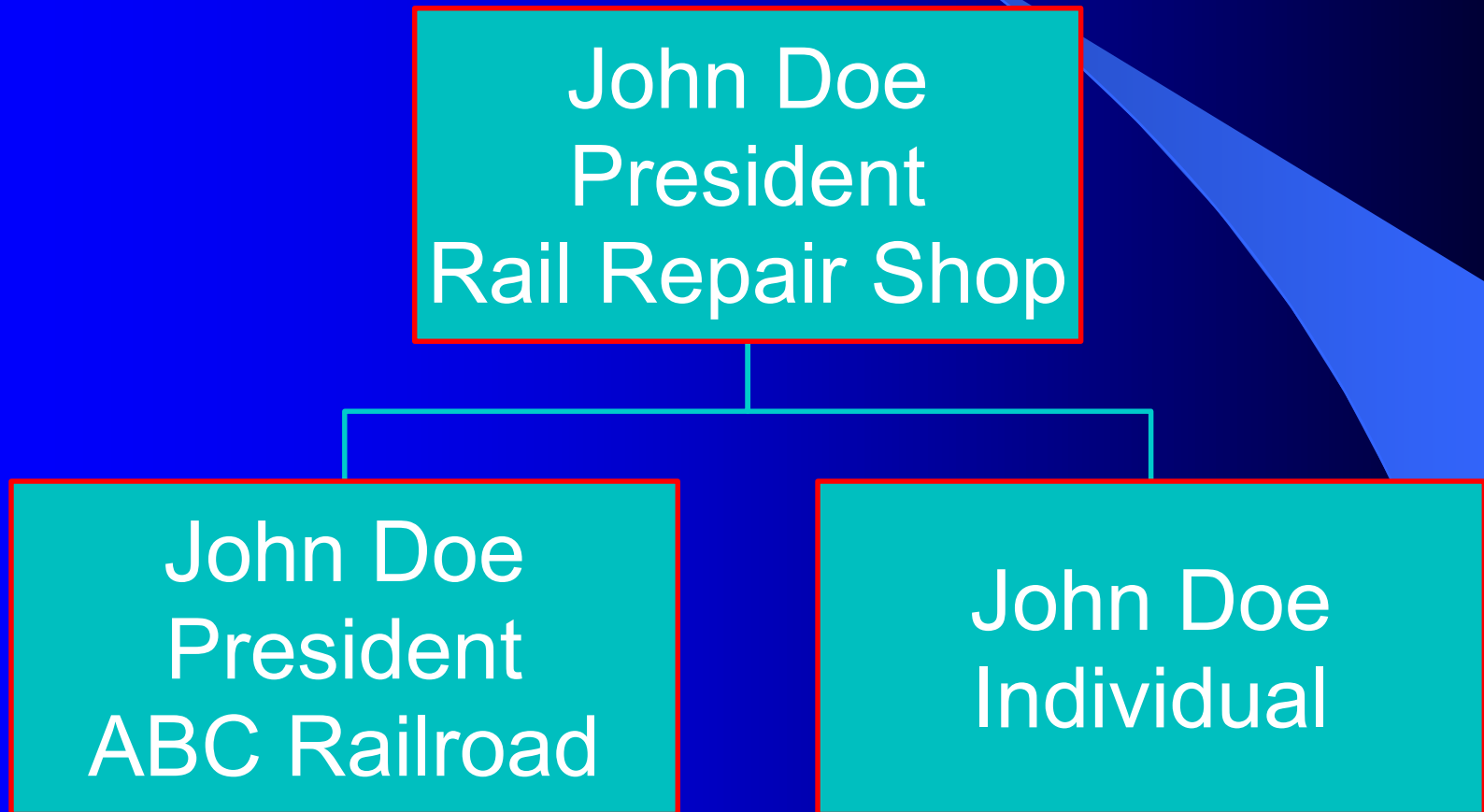
Shareholder control?
Common Officers?
Common Shareholders?



Under Common Control



Under Common Control or indirectly controlled?



Exception to under common control

Union Pacific Decision – U.S. Appellate Court interpreting identical language under the RRTA said a holding company is not considered to be under common control with a carrier subsidiary. 26 Cl. Ct. 739 (1992), *aff'd*, 5 F.3d 523 (Fed. Cir. 1993).

See also, privately held holding companies, *Indiana Boxcar Corporation*, 712 F. 3rd 590 (2013) and American Railroad Group Transportation Services, LLC B.C.D. 15-02.

Lower Tier Holding company



Examples of Operating Equipment or Facilities or Performing Service in Connection with Transportation

- Car repair
- Maintenance
- Train Operations
- Management Services
- Warehousing
- Lobbying
- And a bunch more.....

Exceptions to Coverage

- Casual Service
- Segregation
- Trucking
- Value –added service

Casual Service

- Measure railroad related service
- Do not include railroad service to unrelated entities
- See, VMV Enterprises B.C.D. 93-79

Segregation

- Can apply to both carriers and non-carrier employers
- Entity must be principally engaged in non-railroad business
- Distinct enterprise
- Must ask Board for an opinion

Trucking Exception Examples

- CSX Intermodal – Trucking and freight services over multiple carriers.
- Triple Crown – Trucking services independent of NS carrier services.

Value Added Services Examples

Related entity provides a service beyond what railroads generally provide.

- Pabtex – B.C.D. 95-12 – blending fuel products.
- CSX TDSI – B.C.D. 96-82 – auto storage & detailing.

Employee Coverage under the RRA, RUIA & RRTA

Any individual who is in the service of one or more employers or in an employment relation to one or more employers.

SERVICE TO AN EMPLOYER

- A) Subject to the continuing legal authority of the employer to supervise and direct the manner rendition of his or service; or
- B) Rendering professional or technical services and is integrated into the staff of the employer; or
- C) Rendering on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations: and

He or she renders such service for compensation.

An officer by definition is an employee.

Kelm Decision

- Is work being done under direction of independent contractor, if so then:
- Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Co. 206 F. 2d 831 (8th Cir. 1953) holds that part B and C to do not apply to employees of independent contractors performing service for the RR where such contractors are engaged in an independent trade or business.

Types of Independent Contractors

- Sole Proprietors – self employed individuals
(Section A B or C can apply in these situations.)
- Multi-person or corporate entities engaging in independent business (mostly concerned with Section A)

Types of Independent Contractors (cont.)

- Temporary Workers
- Limited services on specific jobs
- Contractors working on or for railroad on regular basis.

Types of Services

- Technology
 - Lobbying
 - Claims
 - Health care
 - Maintenance
 - Administrative
 - Management
- Training
Environmental
Engineering
Marketing
HR- Labor
Rail car repair
Terminal Operations

Determining Independent Contractors

- Courts and RRB have relied on various factors:
 - a) contractor investment in facilities or equipment,
 - b) contractor opportunity for profit or loss, and/or
 - c) contractor engages in recognized trade or business.
 - d) See RRB regulations 20 CFR §216.23
Aparacor, Inc. v. US, 556 F. 2d 1004 (Ct. Cl. 1977)
Lanigan Storage & Van Co. v. US, 389 F.2d 337 (6th Cir. 1968)
Also consider IRS Common Law Rules twenty factors

What to Avoid

- Train Operations
- Officers or Top Management
- Dispatchers – Rail Term B.C.D. 11-14
Also see, Herzog Transit Services, 624 F.3d 467 (7th Cir. 2010)

Temporary Workers (non-operating positions)

Factors to Consider

- Is company established in business of providing temporary workers ?
- Does Co. have more clients than just your RR?
- How much supervision required for the temporary workers?
- Sliding scale based on length of service

See, Adecco Employment Services B.C.D 01-25 and
ETC Office Systems Services B.C.D. 00-13

Former Employees

- Former railroad employees can work as independent contractors, but:
 - Work must truly be independent – helps for them to offer services to others
 - Do not simply place in old position and certainly does not provide daily supervision.

Risks

- Contractor or contractor's employees will be found to be your employee for RRB reporting.
- Four year statute of limitations for RRB except in cases of fraud.
- IRS may pursue for RRTA Withholdings
- Special risk for RRB annuitants working as contractors. Seek prior approval by RRB (self-employment determination from General Counsel's Office).

How does an employer get reviewed by the RRB?

- Audit & Compliance/Bureau of Law
- Employee coverage request
- Outside referral
- STB Determination

Resources

- Railroad Retirement Board website lists Board Coverage Decisions at <https://www.govinfo.gov/collection/railroad-retirement-board-publications>

Contacts at RRB for questions:

Management Member's Office

- Rob Perbohner, Counsel to the Management Member
312-751-7166 ----- Robert.Perbohner@rrb.gov
- RRB General Counsel's Office
Marguerite Dadabo, Assistant General Counsel
312-751-4945 ---- Marguerite.Dadabo@rrb.gov