

# Coverage under the Railroad Retirement System

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# WARNING

*Any views expressed herein are solely those of the presenter and 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. Railroad Retirement Board 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 a three-member Board, appointed by the 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 for Covered Employers under the Railroad Retirement Tax Act (RRTA)

2024

	Employee	Employer
Tier I	7.65%	7.65%
Tier II	4.9%	13.1%

- Tier I base same as SSA (\$168,600)
- Tier II base (\$125,100)
- Tier I includes Medicare tax of 1.45% with no maximum.
- Additional 0.9% Medicare tax for individuals earning in excess of \$200,000 and married couple filing jointly above \$250,000.

# Railroad Unemployment Insurance Act (RUIA) Contributions for Covered Employers

- Contributions for the Unemployment and Sickness program are “experienced rated.”
- Rates are based on an experience-rated formula, which includes the amounts paid in to the RUIA trust fund by the employer and amounts paid out to employees by the RRB on a yearly basis.
- The rates for 2024 are .65% to 12% on the first \$1,985 per month per employee.

# Employers under RRA, RUIA & RRTA

- Any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49.
- Any company which is directly or indirectly owned or controlled by, or under common control with, one or more carrier employers and which operates any equipment or facility or performs any service (except trucking service or casual service) in connection transportation of passengers or property by rail.
- Any receiver, trustee, or other individual or body, judicial or otherwise, when in possession of the property or operating all or any part of the business of any employer as defined in paragraph (1) or (2)....

# Employers under RRA, RUIA & RRTA (cont.)

- Certain railroad-related associations, bureaus, and agencies that are controlled and maintained wholly or principally by two or more employers as defined in the first three paragraphs of the definition of “employer” and which are engaged in the performance of services in connection with or incidental to railroad transportation.
- Any railway labor organization, national in scope, which has been or may be organized in accordance with the provisions of the Railway Labor Act and its State and National legislative committees, general committees, insurance departments, and local lodges and divisions, established pursuant to the constitution or bylaws of such organization.

# Covered Rail Carriers

- Covered if carrier subject to jurisdiction of STB.
  - Examples: Class I railroads and short-line railroads.
- Not covered if carrier is not subject to jurisdiction.
  - Examples: In-state operation, private (contract carrier), and excursion rail service.



# Coverage of Non-Carrier or Carrier Affiliate

- 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

- Control may be direct or indirect
- Common stockholders
- Common directors or officers
- Sole provider contracts
- We look at the facts: Who has the right or power to direct the policies and business of the company? Who is in fact exercising direction of the policies and business of the company?

# Direct Control by Covered Carrier

Shareholder control?  
Common Officers?  
Common Shareholders?



# Under Common Control



# Under Common Control or Indirectly Controlled?

Jane Smith  
President  
Rail Repair Shop

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graph TD; A["Jane Smith  
President  
Rail Repair Shop"] --- B["Jane Smith  
President  
ABC Railroad"]; A --- C["Jane Smith  
Individual"];
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Jane Smith  
President  
ABC Railroad

Jane Smith  
Individual

# Exceptions to under Common Control

- *Union Pacific Corp. v. U.S.* – Federal Circuit Court of Appeals interpreting identical language under the RRTA held that the term “under common control” does not usually apply to two companies in a parent-subsidary relationship and thus 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).
- *Indiana Boxcar Corporation*, 712 F. 3d 590 (D.C. Cir. 2013), and *American Railroad Group Transportation Services, LLC*, BCD 15-02 (applying same logic to privately-held companies).

# Lower Tier Holding Company



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

- Car repair
- Maintenance
- Train Operations
- Administrative, Financial and Management Services
- Warehousing and handling rail cars
- Lobbying
- And a bunch more...



# Exceptions to Coverage

- Casual service
- Segregation
- Trucking
- Value-added service

# Casual Service

- Service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.
- Measure railroad-related service, and do not include railroad service to unrelated entities.
- *VMV Enterprises*, BCD 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

- Trucking services are generally in the nature of over-the-road trucking services with company-owned trucks or independent contractors working under the company's own certificate of authority.
- *CSX Intermodal*, BCD 96-82: Trucking and freight services over multiple carriers.
- *Triple Crown*, BCD 97-53: Trucking services independent of NS carrier services.
- *Commercial Transload of Minnesota*, BCD 12-05: Trucking exception applied because intent of companies was to coordinate all trucking operations in CTM, separate and apart from the rail carrier.

# Examples of Value-Added Services

- Related entity provides a service beyond what railroads generally provide.
- *Pabtex*, BCD 95-12: Blending fuel products.
- *CSX TDSI*, BCD 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 authority of the employer to supervise and direct the manner in which an individual performs service; or
- (B) Rendering professional or technical services and is integrated into the staff of the employer; or
- (C) Rendering personal services on the employer's property, which are integrated into the employer's operations

AND

- The individual 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:
- The Board will not apply (B) and (C) to employees of independent contractors performing service for the railroad where such contractors are engaged in an independent trade or business. *See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Co.*, 206 F. 2d 831 (8th Cir. 1953).<sup>1</sup>

<sup>1</sup> (B) Rendering professional or technical services and is integrated into the staff of the employer; or (C) Rendering personal services on the employer's property, which are integrated into the employer's operations.



# Types of Independent Contractors

- Sole Proprietors – self employed individuals
  - Section (A), (B), or (C) can apply in these situations<sup>2</sup>
- Multi-person or corporate entities engaging in independent business
  - Mostly concerned with section (A)<sup>2</sup>

<sup>2</sup> (A) Subject to the continuing authority of the employer to supervise and direct the manner in which an individual performs service; or (B) Rendering professional or technical services and is integrated into the staff of the employer; or (C) Rendering personal services on the employer's property, which are integrated into the employer's operations.

# Types of Independent Contractors (cont.)

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

# Types of Services

- Administrative, management, HR, marketing
- Rail car repair, terminal operations, engineering
- Technology
- Training
- Lobbying
- Environmental
- Claims
- Health care
- Maintenance

# Determining Independent Contractors

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

# What to Avoid

- Train operations
- Officers or top management
- Dispatchers – *Rail Term*, BCD 11-14 and *Herzog Transit Services*, 624 F. 3d 467 (7th Cir. 2010)

# Temporary Workers (non-operating positions)

- Is company established in business of providing temporary workers?
- Does company have more clients than just your railroad?
- How much supervision required for the temporary workers?
- Sliding scale based on length of service.
  - See *Adecco Employment Services*, BCD 01-25, and *ETC Office Systems Services*, BCD 00-13.

# Former Employees

- Former railroad employees can work as independent contractors, but:
  - Work truly must be independent; it helps if they offer services to multiple entities/companies
  - Do not simply place in prior position
  - Former employee should not serve as a supervisor or require daily supervision

# Risks

- Contractor or contractor's employees will be found to be your employee for RRB reporting.
- 4 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 from RRB (self-employment determination from Office of General Counsel).**



# How does an employer get reviewed by the RRB?

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

# Resources

- RRB website provides link to Board Coverage Decisions <https://www.govinfo.gov/collection/railroad-retirement-board-publications>
- Questions? Contact the RRB:
  - Management Member's Office
    - Rob Perbohner, Counsel to the Management Member, 312-636-4737, [Robert.Perbohner@rrb.gov](mailto:Robert.Perbohner@rrb.gov)
    - Erin Brandenburg, Attorney-Advisor to Management Member, 708-391-7451, [Erin.Brandenburg@rrb.gov](mailto:Erin.Brandenburg@rrb.gov)
  - RRB's Office of General Counsel
    - Annie Mentkowski, Assistant General Counsel, 312-751-4948, [law@rrb.gov](mailto:law@rrb.gov)