

IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

DONALD W. TRUE,)
)
 Plaintiff,) TC-MD 030024F
)
 v.)
)
 DEPARTMENT OF REVENUE,)
 STATE OF OREGON,)
)
 Defendant.) **DECISION**

Plaintiff appeals Defendant's tax assessment for tax year 2000. A trial was held in Portland on July 30, 2003. Scott Kamin represented Plaintiff. Amy Stalnaker appeared for Defendant.

Plaintiff asserts that his income, although earned in Oregon, is exempt from state income tax under Public Law 101-322, the Amtrak Reauthorization and Improvement Act of 1990 (Amtrak Act).

I. STATEMENT OF FACTS

Plaintiff is a resident of Vancouver, Washington. For a number of years, including the year at issue, Plaintiff has been employed as a City Driver/Dock Worker (Combination) for Yellow Freight Corporation (Yellow Freight). Yellow Freight is a less than truckload intrastate and interstate carrier. (Ptf's Ex 2.) Plaintiff is based at the Portland distribution center. Yellow Freight's trucks will deliver any place within 50 miles of the Portland distribution center.

Plaintiff is one of 80 to 90 City Driver/Dock Workers (Combination) who is based at the Portland distribution center. Approximately 50 of those employees drive one of 35 routes or are overflow drivers. Five of the 35 routes travel to the state of Washington. The

30 to 40 remaining City Driver/Dock Workers (Combination) work primarily on the dock. The City Driver/Dock Workers (Combination) bid annually on whether they are primarily drivers or dock workers. The individual routes are bid on as well.

An employee who is employed as a City Driver/Dock Worker (Combination) must be qualified, ready, and able to perform the entire spectrum of duties at all times. The position summary for City Driver/Dock Worker (Combination) states that the employee must be able to “[l]oad, unload and move materials within or near terminal, yard or worksite, performing a combination of duties under general supervision. Drive truck to transport materials to and from specified destinations.” (Ptf’s Ex 5 at 3.) Plaintiff testified that even though he works primarily on the dock, he will not be permitted to work any particular day if he is not legally and physically able to perform **all** of the duties of a City Driver/Dock Worker (Combination) on that day. Thus, all City Driver/Dock Worker (Combination) employees must maintain a commercial driver’s license (CDL). On Plaintiff’s CDL, he has a hazardous materials endorsement as well as a double/triple endorsement.

Although Plaintiff holds a dock bid, and works primarily on the dock, he drives occasionally as well. When there is a backlog of freight to be delivered he is more likely to drive, such as the day after a holiday or when he is called in to work a sixth or seventh day in a week. He testified that of the employees who work primarily on the dock, some drive every day. He further testified that he sometimes drives two times in a week, while at other times he may not drive for two weeks. He drives in Washington in approximate proportion to the number of routes in Washington compared to the number of routes overall. Accordingly, he drives in Washington approximately one seventh

of the times that he drives.¹ Accepting Plaintiff's testimony that he typically drives three to four times a month means that he drives in Washington approximately five to seven times per year. Consistent with that expectation, Plaintiff drove in Washington seven times in the year 2000 and five times in the year 2002.² (See Ptf's Exs 3 and 4.)

II. ANALYSIS

The Amtrak Act exempts from state taxation, by any state other than the taxpayer's state of residence, the wages of employees who perform regularly assigned duties in two or more states, when their duties directly affect commercial motor vehicle safety in the course of their employment. See Amtrak Reauthorization and Improvement Act of 1990, Pub L No 101-322 (1990). The pertinent portion of the Amtrak Act, found in Title 49 of the United States Code, reads:

"(1) No part of the compensation paid by a motor carrier providing transportation * * * 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.

"(2) In this subsection, the term 'employee' has the meaning given such term in section 31132."

49 USC § 14503(a)³ (emphasis added).

The word "employee" is defined as follows:

"(2) 'employee' means an operator of a commercial motor vehicle (including an independent contractor when operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who—

“(A) directly affects commercial motor vehicle safety in the course of

¹ 5 Washington routes ÷ 35 total routes = 1/7.

² It is unknown how many times, if any, Plaintiff drove in Washington in 2001.

³ This statute was originally codified at 49 USC § 11504(b)(1).

employment; and

“(B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of the employment by the Government, a State, or a political subdivision of a State.”

49 USC § 31132.⁴

The Amtrak Act was passed so that "rail and transportation workers will only have to pay State taxes to their State of residence." 136 Cong Rec S8676 (June 25, 1990) (Testimony of Senator Slade Gorton). Prior to the Amtrak Act's passage "a truck driver or train engineer might pass through several states during a single day, technically earning income in each of the states. That could subject those employees to burdensome filing requirements and conflicting claims for tax credits." *Butler v. Dept. of Rev.*, 14 OTR 195, 197 (1997). The apparent goal of this part of the law "was to relieve those employees of unreasonable burdens by limiting their tax obligations." *Id.*

In order to be exempt from state income tax under the Amtrak Act, Plaintiff must meet certain elements. Plaintiff must be an employee as that word is defined by 49 USC § 31132, be a non-resident of Oregon, be paid by a motor carrier, have a direct affect on safety, and have regularly assigned duties in two or more states. The parties agree that Plaintiff is an employee, a non-resident of Oregon, paid by a motor carrier, and has a direct affect on safety. The parties disagree, however, on whether Plaintiff has regularly assigned duties in two or more states.

Plaintiff has two main arguments for his belief that he has regularly assigned duties in two or more states. First, the position description for City Driver/Dock Worker (Combination) and correspondingly Yellow Freight's company policy, require that Plaintiff be legally and physically able to perform all of the duties of City Driver/Dock Worker

⁴ This statute was originally codified at 49 USC § 2503.

(Combination) on any work day. Plaintiff also points out an example in Defendant's administrative rule that he argues buttresses his claim. See OAR 150-316.127-(E)(3) Example 3. In the example, a driver based in Washington does not have a regular route but drives in Oregon "at least once a month." *Id.* The example concludes that the driver has regularly assigned duties in two or more states "as long as all the routes (including interstate routes) are assigned indiscriminately among all drivers on a regular basis." *Id.* (parenthesis in original).

Plaintiff is incorrect in his arguments. Plaintiff's argument relating to the position description and its requirements is similar to an argument made in *Butler*. The taxpayer was a truck mechanic, also at Yellow Freight, who occasionally traveled to Washington to pick up parts needed to complete a repair. *Butler*, 14 OTR at 196. Akin to the present case, "[t]he company policy is that employees are to do whatever is necessary to get a truck quickly repaired and back on the road. *Id.* at 199. The court found, however, that "company policy is not an assigned duty. Under that policy, an employee might be required to do something that others would normally do." *Id.* at 199-200.

In the present case the position description and requirement of a CDL are not an assigned duty. They represent merely potential and availability, not regularly assigned duties. As in *Butler*, when Plaintiff drives he is being "required to do something that others would normally do." *Id.* at 200. Normally, employees who hold a driver bid would drive, rather than those who hold a dock bid, such as Plaintiff.

Assuming arguendo that OAR 150-316.127-(3) is valid,⁵ nor is Plaintiff's argument

⁵ The administrative rule states that it is implementing ORS 316.127. However, nowhere does the statute refer to the Amtrak Act, either by name or description of what is required for a nonresident to exclude his/her income pursuant to the Amtrak Act.

relating to Example 3 of the rule persuasive. See OAR 150-316.127-(E)(3) Example 3. Plaintiff claims that his situation is “substantially identical” to the situation in Example 3.⁶ (Ptf’s Trial Memo at 4.) The court disagrees. In the example, the employee is a full-time driver. In other words, he knew that he would be driving every day. In contrast, Plaintiff drives only when there are more deliveries to be made than there are employees with a driver bid available to make those deliveries. Notwithstanding that there are days when Plaintiff is more likely to drive, he does not know with certainty if he will be driving on any particular day. Further, the example states that an employee will have regularly assigned work in two or more states “as long as all the routes (including interstate routes) are assigned indiscriminately **among all drivers** on a regular basis.” OAR 150-316.127-(E)(3) Example 3 (parenthesis in original) (emphasis added). Even though Plaintiff's position is as a City Driver/Dock Worker (Combination) he holds a dock bid and does not drive unless there are more deliveries to be made than available drivers. Indeed, he drives only three or four times a month.

Plaintiff testified that approximately 50 of the City Driver/Dock Worker (Combination) employees drive one of 35 routes or take the "overflow." The employees holding a dock bid then are, in essence, overflow drivers for the overflow drivers. The definition of overflow includes "something that flows over: excess, surplus" and "so large as to exceed capacity and overflow." *Webster's Third New Int'l Dictionary*, 1607 (unabridged ed 1993). Plaintiff drives when there is an overabundance of work for the

⁶ It appears that Plaintiff is represented by a union. (See Ptf's Trial Memo at 4 ("Excluding, perhaps, the effect of any union rules which might be applicable").) Before the court could find Example 3 is "substantially identical" to Plaintiff's situation, it would need to determine if "all the routes (including interstate routes) are assigned indiscriminately among all drivers on a regular basis." OAR 150-316.127-(E)(3) Example 3 (parenthesis in original). There was no testimony or exhibits as to how Yellow Freight determines which employees holding a dock bid drive on any particular day.

employees with a driver bid. That is the quintessential example of driving on an as-needed basis.⁷ As noted earlier, although Plaintiff's position description requires that he be available to drive at any time, he holds a dock bid and does not regularly drive.

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III. CONCLUSION

Plaintiff did not have regularly assigned duties in two or more states within the meaning of 49 USC § 14503(a)(1). As such, his compensation is not exempt from Oregon income tax under the Amtrak Act except to the extent it was earned outside Oregon. Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied except to the extent his income was earned outside Oregon.

Dated this _____ day of October, 2003.

SALLY L. KIMSEY
MAGISTRATE

IF YOU WANT TO APPEAL THIS DECISION, FILE A COMPLAINT IN THE REGULAR DIVISION OF THE OREGON TAX COURT, BY MAILING TO: 1163 STATE STREET, SALEM, OR 97301-2563; OR BY HAND DELIVERY TO: FOURTH FLOOR, 1241 STATE STREET, SALEM, OR. YOUR COMPLAINT MUST BE SUBMITTED WITHIN 60 DAYS AFTER THE DATE OF THE DECISION OR THIS DECISION BECOMES FINAL AND CANNOT BE CHANGED.

THIS DOCUMENT WAS SIGNED BY MAGISTRATE SALLY L. KIMSEY ON OCTOBER 29, 2003. THE COURT FILED THIS DOCUMENT ON OCTOBER 29, 2003.

⁷ Plaintiff's argument would likely have been more analogous to Example 3 if he held a driver bid without an assigned route.