IN THE OREGON TAX COURT
MAGISTRATE DIVISION
Income Tax

TIMOTHY P. TARABOCHIA,	)	
	)	
Plaintiff,	)	TC-MD 030039D
	)	
v.	)	
	)	
DEPARTMENT OF REVENUE, STATE OF OREGON,	)	
	)	
	)	
Defendant.	)	**DECISION**

Plaintiff appeals Defendant's determination that his income cannot be excluded from Oregon taxable income under the Amtrak Reauthorization Act of 1990 for tax year 2001. A trial was held in the Oregon Tax Court, Salem, Oregon on May 13, 2003. Timothy Tarabochia (Plaintiff) represented himself. Amy Stalnaker, Tax Auditor, appeared on behalf of Defendant.

I. STATEMENT OF FACTS

Plaintiff is employed by MCI Worldcom (Worldcom) as a Field Engineer/Telecom Tech, Outside Plant. (Ptf's Exs 3 and 23.) His position as a Field Engineer requires him "to perform all types of maintenance/protection responsibilities of the fiber [optic] lines" of Worldcom's Long Distance Backbone (Backbone) which are principally located in the railroad right-of-way owned by the Burlington Northern and Union Pacific Railroads (Railroads). (Ptf's Ex 23.) The Backbone carries a large volume of internet transmissions serving the Federal Aviation Administration, the Department of Defense and many 911 systems. (*Id*.) Plaintiff's duties include: use of test equipment for electronic monitoring of transmission systems, protection/inspection of the Backbone when various contractors are digging in the railroad right-of-way and patrolling the route. (*Id*.) He is required to take

annual railroad safety training from Union Pacific and Burlington Northern Railroads both for general safety and to meet Federal Railroad Administration requirements. (*Id*.)

During the tax year (2000) at issue, Plaintiff was a resident of Washington. He was headquartered in Kalama, Washington and routinely reported to his supervisor located in Hillsboro, Oregon. *(Id*. and Ptf's Ex 3.) Plaintiff estimated he spent 25-30 days per year working exclusively in Washington, with approximately two to three hours each day in Washington. (*Id*.) During the early part of 2000, he worked in Eastern Oregon and Idaho. (Ptf's Ex 23.) Defendant agreed with Plaintiff that he had regularly assigned duties in two or more states.

Plaintiff uses a company vehicle in his duties, fleet number 21579, a Ford F-250 4 x 4 Super Duty Club Cab[1] (Ford Truck), which is equipped with test and restoration equipment. (Ptf's Ex 23.) Plaintiff is responsible for maintaining his assigned vehicle. (Ptf's Ex 22 at 3; *see* Vehicle Equipment Inspection Checklist 2001, Ptf's Ex 42.) Defendant provided evidence that the Ford Truck had a gross vehicle weight rating of 8,800 pounds. (Def's Ex B.)

Defendant concluded that for tax year 2000 Plaintiff did not qualify to exclude his income from Oregon taxation under the Amtrak Reauthorization Act of 1990. Plaintiff appeals Defendant's determination.

ANALYSIS

Nonresidents earning taxable income in Oregon are subject to tax under

[1] According to Stalnaker, Ford does not make a F-250 4 x 4 Super Duty "Club" Cab, but does make one called a "Crew" Cab. (Def's Ex B.)

ORS 316.037(3).[2] The federal Amtrak Reauthorization and Improvement Act of 1990 (Amtrak Act) exempts certain nonresidents from Oregon income taxation. Pub L 101-322, § 11504, 104 Stat 295 (1990).

Under the Amtrak Act, state and local governments may not tax the compensation of nonresident employees who have regularly assigned duties in more than one state. The Amtrak Act was "passed so that 'rail and motor carrier transportation workers will only have to pay State taxes to their State of residence.' Testimony of Senator Slade Gorton, 136 Cong Rec S8676 (June 25, 1990)." *Buckel v. Dept. of Rev.*, (TC-MD 010911C, 011123C) 2002 WL 745637.

To qualify for the exemption, a number of requirements must be met.

First, the employee must work for one of three types of employers:[3] an interstate railroad, interstate motor carrier or a motor private carrier.[4] (Pub L 101-322, § 11504, 104 Stat 295 (1990); and Ptf's Ex 11.) Second, the employee must be a nonresident of Oregon and have regularly assigned duties in more than one state. (*Id*.)

In this case, the parties agree that Plaintiff is not a resident of Oregon and has regularly assigned duties in two or more states. Plaintiff concludes that he qualifies as an employee under two of the employer types: an interstate railroad employee because he works in the railroad right-of-way; and interstate motor carrier because he is an operator of a commercial motor vehicle.

A. Operator of a commercial motor vehicle

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[2] All references to the Oregon Revised Statutes (ORS) are to 1999.

[3] Federal, state or local governments are not qualifying employers.

[4] The exemption now covers waterway workers on interstate waterways.

A commercial motor vehicle is defined in the Amtrak Act as:

"a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle–

(A) has a **gross vehicle weight rating or gross vehicle weight** of at least 10,001 pounds, **whichever is greater**;"

49 USC § 31132 (emphasis added).

Defendant asserts that Plaintiff is not an operator of a commercial vehicle because the statutory requirements of a "commercial motor vehicle" are not met for two reasons: The specifications for the Ford Truck submitted by Defendant indicate that the gross vehicle weight rating (GVWR) for the Ford Truck is 8,800 pounds, and taxpayer does not transport property. Plaintiff did not provide any evidence to rebut Defendant's evidence that the GVWR of Plaintiff's Ford Truck is less than the statutory requirement of 10,001 pounds.

With respect to the gross vehicle weight (GVW), Plaintiff testified that his Ford Truck plus the trailer had a GVW of over 10,001 pounds. Plaintiff provided a certified weight receipt from Truck n' Travel in Eugene dated October 24, 2002,[5] for vehicle number 21579 stating a weight of 10,560 pounds. (Ptf's Ex 5.) Plaintiff testified that this is the weight of the Ford Truck **and** a trailer he typically uses. Plaintiff also provided a State of Washington Department of Licensing vehicle registration certificate issued May 5, 1993, for a 4000 pound trailer owned by MCI Telecommunication Corp. (Ptf's Ex 10.) He testified that this is a trailer he regularly uses. Defendant testified that Plaintiff's Ford Truck had a maximum payload rating of 2,390 pounds, indicating that it is capable of hauling an

[5] The court notes that while this date is after the tax year at issue, taxpayer continues to use similar, if not the same, vehicles and trailers in his current duties that he utilized at that time.

additional 2,390 pounds for a total possible GVW of 11,190 pounds. (Def's Ex B.)

Plaintiff concludes that the definition of GVW weight includes both the weight of the vehicle and the total weight of a towed unit. Unfortunately, he is incorrect. The statute defines the vehicle as self-propelled or towed, not a combination of self-propelled **and** towed.[6] GVW is defined as the maximum allowable weight in pounds or tons that a truck is designed to carry or, stated another way, it is the weight of the empty vehicle plus the maximum anticipated load weight. (American Trucking Association (Book of American Trends); Department of Energy (Transportation of Energy Databook).) GVW does not include the weight of a fully loaded vehicle and the weight of the towed unit with its load.

Plaintiff's evidence did not support his allegation that his commercial vehicle (Ford Truck, a self-propelled vehicle) has a GVWR or GVW of at least 10,001 pounds. Having failed to meet the weight requirement, the court finds that Plaintiff does not qualify for the Amtrak Act exemption because he did not operate a commercial motor vehicle.

B. *Railroad right-of-way worker*

At trial, Plaintiff advanced an argument that he qualifies for exemption as a railroad worker due to his work on the Backbone in the railroad right-of-way. Plaintiff provided numerous exhibits he wove together to support his argument that he is an "employee on a railroad" for the purposes of the Amtrak Act. (Ptf's Exs 15-22; 49 USCA § 11502.)

The Amtrak Act provides that to be exempt an individual must be an employee who performs regularly assigned duties on a railroad in more than one state:

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

[6] The combination of a self-propelled vehicle and towed unit is frequently referred to as gross combination vehicle weight (GCVW).

> "(a) No part of the compensation paid by a rail carrier providing transportation subject to the jurisdiction of the [Surface Transportation] 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."

49 USC § 11502.

In interpreting 49 USC § 11502, a federal statute, the court must look to federal principles of statutory construction. *See Butler v. Dept. of Rev.*, 14 OTR 195, 199 (1997). The "task is to identify and carry out the intent of Congress when it enacted" the statute. *Shaw v. PACC Health Plan, Inc*., 322 OR 392, 400, 908 P2d 308 (1995) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41, 45, 107 S Ct 1549, 95 L Ed 2d 39 (1987)). The court first looks at "language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'" *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 US 86, 94-95, 114 S Ct 517, 126 L Ed 2d 524 (1993) (alteration in original) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41 at 51).

Plaintiff concludes that because he performs his work in the railroad right-of-way, *i.e.*, road, he meets the statutory requirements. The Amtrak Act defines railroad to include "the road used by a rail carrier and owned by it." 49 USCA § 10102(6)(B). In addition to performing a specific kind of work, Plaintiff must be an "employee." 49 USC § 11502(a). Plaintiff alleges that he is an employee of railroads because he is subject to various rules and regulations, including the Railroad Workplace Safety

Regulations (49 CFR Ch 11, Part 214 (October 2001)). (Ptf's Ex 17.) Under 49 CFR Ch 11, Part 214.7, an employee is defined as "an individual who is engaged or compensated by a railroad or **by a contractor to a railroad** to perform any of the duties defined in this part." (*Id* at 144.) (emphasis added.) These regulations deal with railroad workplace safety, as required by the Federal Railroad Safety Act of 1970 (FRSA) and subject those who fall under it to the jurisdiction of the Surface Transportation Board. As a Worldcom employee working in the railroad right-of-way, Plantiff is an employee as defined by the regulation and is subject to the FRSA. Because he is subject to the FRSA, he is required to wear specified safety equipment, follow safety guidelines when working in the railroad traces and is subject to the Surface Transportation Board's jurisdiction, including any penalties for failure to act in accordance with the rules and regulations.

However, an individual is not an employee of a company just because the company imposes specific safety rules and regulations on that person. This is particularly true in this case where the Right Of Way Agreement Between MCI Telec[o]mmunications Corporation and Burlington Northern Railroad Company (Agreement) specifically stated that the "Railroad reserves no control whatsoever over the employment, discharge or compensation rendered by MCI [to its] employees or contractors." (Ptf's Ex 15 at 38-39.)[7] The Agreement further states:

> "It is the intention of the parties that MCI shall be and remain an independent contractor, and nothing therein shall be construed as inconsistent with the status or as creating or implying any partnership or joint venture between MCI and Railroad."

(*Id*. at 39.) During mandatory safety training sessions, the Agreement specified that MCI

[7] MCI after a merger with Worldcom uses the name Worldcom.

was to "bear all costs associated with its servants, employees * * * including (but not limited to) salaries and travel expenses." (*Id*. at 8.) The Agreement clearly indicates that Worldcom employees were not railroad employees.

The statute (49 USC § 11502) does not define the term employee on a railroad. In interpreting the phrase "compensation paid by a rail carrier * * * to an employee who performs regularly assigned duties as such an employee on a railroad," the court looks to the Internal Revenue Code (IRC), specifically IRC § 3401, for guidance. Wages are defined as "all remuneration * * * for services performed by an employee for his employer." IRC § 3401(a) (2000). Employer is defined as:

> "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that -
>
> "(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' * * * means the person having control of the payment of such wages."

IRC § 3401(d).

Under the terms and conditions of the Agreement, Plaintiff was the employee of Worldcom that was under contract to provide a service to the Railroads. The Agreement was carefully worded to emphasize that those working for Worldcom remained at all times employees, contractors or agents of Worldcom, not the Railroads. Further, Plaintiff's compensation was not paid by a rail carrier. Worldcom paid Plaintiff's compensation. Plaintiff does not meet the statutory requirement of an employee on a railroad.

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III. CONCLUSION

Now, therefore,

IT IS THE DECISION OF THIS COURT that Plaintiff's appeal is denied.

Dated this _____ day of August, 2003.

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JILL TANNER
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 JILL A. TANNER ON AUGUST 6, 2003. THE COURT FILED THIS DOCUMENT ON AUGUST 6, 2003.