

SEP 8 - 1952

F 52 534

Mr. R. J. Leibenderfer, Secretary
United States Freight Company
345 Hudson Street
New York 14, New York

Dear Sir:

I have your letter of July 31, 1952, advising that the status of the Western Carloading Co., Inc. and the Merchant Shippers Association under the Railroad Retirement Tax Act has been ruled upon by the Bureau of Internal Revenue and inquiring whether the coverage dates specified in our letter to you of February 5, 1951, L-52-52, may now be regarded as final. A reply to your letter was delayed pending receipt of the Bureau determination.

In its opinion dated July 28, 1952, the Bureau found that by virtue of certain agreements executed at the time of the acquisition of the stock of the two companies, effective control by United States Freight Company of the Western Carloading Co., Inc. and the Merchant Shippers Association did not exist until September 1, 1950, and October 30, 1950, respectively. The facts with respect to the control of the Western Carloading Co., Inc. are described in the Bureau's opinion as follows:

"The information which you have furnished relative to this issue discloses, among other things, that all of the stock of Western Carloading Co., Inc., was acquired by the United States Freight Company on August 1, 1944. However, it is your contention that control of Western remained in Mr. M. F. Leveson, from whom the stock was purchased, at least until September 1, 1950, by virtue of certain powers vested in him pursuant to the agreement of August 1, 1944, made and entered into by and between Western Carloading Co., a co-partnership consisting of M. F. Leveson and Eleanor Wahn and Western Carloading Co., Inc., a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, and having its principal office at Los Angeles, California.

"Such agreement expressly provided that, during the six-year period covered by the agreement and ending July 31, 1950, Mr. Leveson should be a member of the board of directors of Western Carloading Co., Inc., and that all action taken by such board should be by the unanimous vote of all of its members except as may be specifically provided in its by-laws; and that in addition thereto Mr. Leveson should have the right to approve or disapprove any by-law prior to its adoption. No specific exception to such requirement of unanimous action was provided for in the by-laws. Instead, a by-law was adopted recognizing the requirement of unanimous action by the members of the board.

"It also was expressly provided that Mr. Leveson should serve as General Manager of Western for a period of four years from August 1, 1944, and for an additional period of two years if he so elected. It was further provided that the corporation would procure its board of directors to elect Mr. Leveson as its president for the period of six years from August 1, 1944.

"In the agreement of August 1, 1944, by and between Mr. Leveson and the United States Freight Company, it was promised and agreed that the United States Freight Company would guarantee the faithful performance and fulfillment of all the terms and conditions of the agreement between Mr. Leveson and Miss Hahn comprising the prior existing partnership and Western also dated August 1, 1944.

"In order to implement and effectuate such guarantee, it was further provided in such agreement that the shares of Western stock owned by the United States Freight Company should be endorsed in blank and delivered to an escrow agent to be held as security for the prompt performance of the terms and obligations of Western as set out in its agreement with the prior existing partnership, and that in the event of a default by Western in the performance of any such obligations, such partners would be entitled at their option and upon thirty days written notice to the United States Freight Company, to take over and become absolute owners of the stock so deposited unless the United States Freight Company should cure such default before the expiration of such thirty-day period.

"On January 10, 1950, Western and Mr. Leveson, in anticipation of the expiration on July 31, 1950, of their

agreement executed on August 1, 1944, entered into a new agreement containing substantially the same terms as the then existing agreement except that a provision was added that such new agreement, in so far as it related to the retention of Mr. Leveson as President and Director with absolute veto powers might be cancelled or terminated by either party upon thirty days written notice.

"It is the opinion of this office, upon analyzing the provisions of the agreements entered into by the parties in interest, that Mr. Leveson was in complete and absolute control of Western's operations and policies for all periods prior to September 1, 1950."

In connection with the Merchant Shippers Association the opinion of the Bureau found as follows:

"With respect to the status of the Merchant Shippers Association, the available information discloses that the United States Freight Company acquired a majority interest in the outstanding capital stock of Merchant Shippers on May 6, 1948, but, by virtue of certain powers vested in Mr. T. H. Sorensen pursuant to contracts similar in scope to the agreements in the case of Western Carloading Co., Inc., supra, the United States Freight Company did not have the right to exercise the requisite domination and control of the affairs of the Merchant Shippers Association to constitute it a controlled company within the meaning of Section 1532(a) of the Railroad Retirement Tax Act until the date of the death of Mr. Sorensen on October 30, 1950."

On the basis of the information set forth above as to the control of the Western Carloading Co., Inc. and the Merchant Shippers Association by United States Freight Company, and in view of the ruling of the Bureau under the related Railroad Retirement Tax Act, it is my opinion the Western Carloading Co., Inc. and the Merchant Shippers Association were not until September 1, 1950 and October 30, 1950, respectively, employers within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts..

In view of my conclusion as to the status of the Western Carloading Co., Inc. prior to September 1, 1950, it follows that the Pioneer Carloading Company was not an employer within the meaning of the Railroad Retirement and Railroad Unemployment Insurance Acts during the period from February 1, 1945, to May 30, 1947, when its

stock was held by the Western Carloading Co., Inc. This failure to qualify as an employer during such period, however, does not affect our original ruling that it has been an employer from October 1, 1942, to February 1, 1945, and since May 30, 1947.

Very truly yours,

Nyles F. Gibbons
General Counsel

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CC: Director of Fiscal Accounts