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Digest

UNITED STATES GOVERNMENT

Memorandum

RAILROAD RETIREMENT BOARD

AUG 27 1982

L 82-217

TO : Director of Data Processing and Accounts

FROM : General Counsel

SUBJECT: Southeastern Pennsylvania Transportation Authority
Fox Chase Rapid Transit Line
Employer Status

This is in response to your inquiry of October 19, 1981, regarding the status of the Southeastern Pennsylvania Transportation Authority (SEPTA) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The Authority has not previously been held to be an employer under those Acts.

SEPTA is a corporation organized under the Pennsylvania Urban Mass Transportation Law, 55 P.S. § 600.101 et seq., to "exercise the public powers of the commonwealth as an agency and instrumentality thereof." 55 P.S. § 600.303(d). SEPTA and its predecessors have furnished passenger service by street and elevated railways, subway trains, and buses, and SEPTA currently carries about 300,000 passengers daily. In addition, SEPTA has subsidized rail commuter service furnished by ConRail under contract with SEPTA. In late 1980, SEPTA determined that the cost of the diesel-powered commuter service provided by ConRail was too high. Under a new agreement, ConRail continued to operate electric-powered commuter trains, while diesel-powered service was terminated.

The Fox Chase line was one of the diesel-powered commuter lines on which ConRail discontinued service. Prior to its termination, this service consisted of six daily round trips from Newtown, Pennsylvania, to Reading Terminal at 12th and Market Streets in Philadelphia. On some inbound trips, the diesel train ran directly from Newtown to Reading Terminal; on others, inbound passengers transferred at Fox Chase to an electric-powered train. After diesel-powered service was discontinued, ConRail, pursuant to its agreement with SEPTA, continued to operate electric-powered commuter trains running between Fox Chase and Philadelphia. In May 1981, when ConRail last ran diesel trains, the Fox Chase line had a daily average of 117 passengers.

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After ConRail's diesel-powered service was terminated, SEPTA spent $648,000 renovating track and stations on the Fox Chase line. It then established the "Fox Chase Rapid Transit Department and Division," and took voluntary transfer applications for employment thereon from its subway train operators. Ten applicants were taught how to run, inspect, and maintain diesel locomotives by a former ConRail train supervisor.

On Monday, October 5, 1981, SEPTA's Fox Chase Rapid Transit Department commenced operations over a 15.2 mile stretch of SEPTA-owned track between Fox Chase station in Philadelphia and Newtown, Pennsylvania. Passengers traveling outbound from Reading Terminal board electric-powered commuter trains manned by ConRail crews, and transfer to SEPTA's Fox Chase Diesel Line at the Fox Chase station. SEPTA currently has six employees operating and maintaining service on the Fox Chase line. The diesel-powered train is manned by two two-man crews. The remainder of the ten applicants chosen have been returned to their duties as subway train operators, but apparently remain available to fill vacancies on the Fox Chase line as necessary.

Section 1(a) of the Railroad Retirement Act provides in pertinent part as follows:

> "Section 1. For the purposes of this Act--
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> "(a)(1) The term 'employer' shall include--
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> "(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;
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> * * * * *
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> "(2) Notwithstanding the provisions of subdivision (1) of this subsection, the term 'employer' shall not include--
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> * * * * *
>
> "(ii) any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general diesel-railroad system of transportation * * *."

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It is well established that municipalities and other public bodies may be employers under the Acts, as defined by section 1(d)(i) of the Railroad Retirement Act. See, e.g., Legal Opinion L-43-163, concerning a municipal department which operated dock terminals; see also 268 ICC 333 (1947). Moreover, in Legal Opinion L-81-160, the Illinois Regional Commuter Railroad Corporation was held to be an employer because it had assumed the commuter operations of the Chicago, Rock Island and Pacific Railroad Company, and hence had become a carrier by railroad itself.

The Fox Chase line was previously operated by ConRail, an employer under the Acts, as part of a general diesel railroad system of transportation. Passengers of the diesel line as now operated by SEPTA must continue to transfer to a ConRail-run electric train if they wish to travel to Reading Terminal. Based on the reasoning of L-81-160, SEPTA's operation of the Fox Chase line amounts to an assumption by SEPTA of ConRail's common carrier obligations. However, while the Illinois Regional Commuter Railroad Corporation was established solely to run commuter rail operations, SEPTA's principal business, in addition to bus service, is the operation of electric street, interurban or suburban railways which are specifically exempt from the Railroad Retirement Act's definition of "employer" by section 1(a)(2)(ii) thereof, quoted above. In this regard, regulations of the Board provide that where a company or person principally engages in business other than carrier business, but does engage in some carrier business, the Board may determine that some identifiable and separable enterprise conducted by the company or person may be considered to be the railroad employer. 20 CFR 202.3(d). As noted above, SEPTA has constituted the Fox Chase operation as a separate division within SEPTA, whose employees receive special training and are detailed only to that division. Therefore, it is my opinion that the Fox Chase division of SEPTA has been an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since its operation of diesel-powered service commenced on October 5, 1981. An appropriate G-341 reflecting this conclusion is attached.

On August 13, 1981, Congress enacted the Northeast Rail Service Act (NERSA), Public Law 97-35 (95 Stat. 643). Section 1136 of that Act (45 U.S.C. § 744a) provides that ConRail shall be relieved of any legal obligation to operate commuter service on January 1, 1983. If the Fox Chase line proves successful, SEPTA has indicated its intention to begin direct operation in 1983 of some 800 daily electric-powered commuter trains on the 13 commuter

lines serving the Philadelphia region. Service over these lines is currently provided by ConRail under contract with SEPTA. From 1,600 to 1,700 ConRail employees currently are engaged in this commuter service.

The individuals who currently operate the electric-powered commuter lines now run by ConRail are covered under the Railroad Retirement and Railroad Unemployment Insurance Acts as employees of a railway operated "as a part of a general diesel-railroad system of transportation." If this service is operated directly by SEPTA, the status of the employees operating the electric commuter lines must then be considered in light of the electric railway exclusion of section 1(a)(2)(ii) of the Railroad Retirement Act, quoted above.

The issue as to when an electric-powered rail line is subject to Federal legislation actually predates the Railroad Retirement Act of 1974 and its predecessor Acts of 1937, 1935, and 1934, and arose in connection with jurisdictional questions under the Interstate Commerce Act. See United States v. Hubbard, 266 U.S. 389 (1924). With the enactment of the Railway Labor and Railroad Retirement Acts, the Interstate Commerce Commission was empowered to determine whether any line operated by electric power fell within the definition of an employer under those Acts. See 45 U.S.C. § 228a(a), now 45 U.S.C. § 231(a)(2)(ii). The cases decided under this provision hold that an electric railway is not covered under the Act if it is predominantly a local passenger carrier, but if it engages in the general business of freight transportation, it is more than a street or interurban electric railway, and becomes part of the general "steam" railroad system of transporation. See, e.g., North Coast Transportation Company, 286 I.C.C. 691 (1952), Subway Division, Rochester Transit Corporation, 255 I.C.C. 508 (1943).

Under the standard developed in these cases, there must be a significant movement of freight to overcome the exclusion of electric power. There is no evidence that any freight movement will occur over the commuter lines to be operated by SEPTA. Hence, it may appear that under the terms of the electric railway exclusion, SEPTA's contemplated operation of electric-powered commuter lines would fall outside the definition of "covered employer" under the Acts.

However, the question of coverage of affected employees under the Railroad Retirement and Railroad Unemployment Insurance Acts in this context must be harmonized with the Congressional purpose of

the Northeast Rail Service Act. Section 1137 of that Act adds a new Title V to the Rail Passenger Service Act (45 U.S.C. § 501 et seq.). Section 501 of Title V (45 U.S.C. § 581), provides in pertinent part that:

> "(a) There shall be established, no later than November 1, 1981, a wholly-owned subsidiary of the Corporation to be known as the Amtrak Commuter Services Corporation (hereafter in this Act referred to as 'Amtrak Commuter').
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> * * * * *
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> "(c)(1) Amtrak Commuter shall not be subject to the jurisdiction of the Commission under chapter 105 of title 49 United States Code, but it shall (treated as a separate rail carrier) be subject to the same laws and regulations with respect to safety and with respect to the representation of its employees for purposes of collective bargaining, the handling of disputes between carriers and their employees, employee retirement, annuity, and unemployment system, and other dealings with its employees as any rail carrier providing transportation subject to the jurisdiction of the Commission under such chapter 105."

Title V also provides that Amtrak Commuter is obliged, effective January 1, 1983, to assume commuter services which ConRail was under contract to provide on August 13, 1982, unless a local commuter authority operates the commuter service itself or contracts with an operator other than Amtrak Commuter (section 504, 45 U.S.C. § 584); and that not later than May 1, 1982, ConRail, local commuter authorities intending to operate commuter services, and representatives of ConRail employees "to be transferred to the commuter authorities" shall enter into negotiations regarding the transfer of Conrail employees to Amtrak Commuter or to the local commuter authorities (section 508, 45 U.S.C. § 588). In addition, section 1157 of the Act amends the Railway Labor Act to include disputes between a publicly funded and publicly operated carrier providing rail commuter service (including Amtrak Commuter) and its employees. 45 U.S.C. § 159A.

If SEPTA were held not to be an employer, at least insofar as it receives employees transferred from ConRail pursuant to section 508 of NERSA, the employees transferred would eventually lose

their "current connection" with the railroad industry, as defined by section 1(o) of the Railroad Retirement Act (45 U.S.C. § 231(o)). A "current connection" is a prerequisite to several benefit determinations under the Act; e.g., occupational disability annuity and survivor benefit payments under sections 2(a)(1)(iv) and 2(d)(1) of the Act (45 U.S.C. §§ 231a(a)(1)(iv), 231a(d)(1)). Thus, individuals transferred to Amtrak Commuter would retain coverage under the Railroad Retirement Act pursuant to section 501(c)(1) of NERSA, quoted above, while those transferred to local commuter authorities would not, with the resulting negative consequences for their potential benefit entitlement.

In Railway Labor Executives' Association v. Southeastern Pennsylvania Transportation Authority, 534 F. Supp. 832 (Regional Rail Reorg. Ct. 1982), the Court held that the transfer of employees negotiation requirement of section 508 applied to SEPTA as well as Amtrak Commuter, because the House and Senate "Conferees seem to have thought they had provided a complete solution to the transfer of labor and property from ConRail to commuter authorities and Amtrak Commuter." 534 F. Supp. 832 at 846. Similarly, it is inconsistent with a "complete solution" to provide that employees transferred from ConRail to Amtrak Commuter are to retain pursuant to section 501(c)(1) their covered status under the Railroad Unemployment and Railroad Retirement Acts, while employees engaged in the same activity but transferred to a local commuter service do not. This conclusion is supported by the extension of coverage of the Railway Labor Act to "publicly operated" carriers, including but not limited to Amtrak Commuter. As noted above, the definition of "carrier" under that Act and the definition of "employer" under the Railroad Retirement and Railroad Unemployment Insurance Acts are identical. See section 1 (First) of the Railway Labor Act, (45 U.S.C. § 151 (First)).

Therefore, it is my opinion that the Northeast Rail Service Act forms a basis for determining that portions of commuter services assumed by SEPTA after August 13, 1981, constitute employer operations, regardless of the motive power used. Any future submission concerning additional commuter operations assumed by SEPTA should reflect the relationship between SEPTA's prior operations and its rail commuter operations, and the ratio of passengers and fares of rail commuter operations to street and subway operations, as well

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as any identifiable unit within SEPTA conducting commuter rail service, to facilitate a determination regarding segregation of employer and non-employer activities.

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Attachment

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