



UNITED STATES GOVERNMENT

# MEMORANDUM

FORM G-115f (1-92)

RAILROAD RETIREMENT BOARD

*For Board Approval*

September 9, 2013

L-2013-22

**TO :** The Board

**FROM :** Karl T. Blank *K T Blank*  
General Counsel

**SUBJECT :** Hide Power & Equipment Co. (B.A. No. 9022)  
Contributions under the Railroad Unemployment Insurance  
Act - Non-retroactive Assessment

This is to advise the Board regarding the request by Hide Power & Equipment Co. (Hide Power), for a ruling by the Board limiting the retroactivity of liability of that company for contributions due under section 8 of the Railroad Unemployment Insurance Act for the period 2007 through 2011. For the reasons set forth below, I recommend that the Board allow the employer's request through April 7, 2011, the date of the Board's coverage decision concerning Hide Power. A draft Board Order is attached.

In a decision issued April 7, 2011, the Board held that Hide Power (BA No. 9022) was an employer under the Railroad Retirement Act (RRA) (45 U.S.C. §231 et seq.) and the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. §351 et seq.) beginning January 1, 2000.

In a letter dated October 15, 2012, Mr. Dan Herholdt, Treasurer of Hide Power, requested that the Board forego collection of contributions under the RUIA for the period 2007 through 2011. In support of this request, the letter notes that Hide Power operated in the State of Delaware and has paid unemployment insurance taxes under the law of that State during this period. It also appears that Hide Power was acting in good faith in believing that it was not covered under the RRA and RUIA, as evidenced by two letters submitted by Mr. Herholdt dated June 8, 2012 from Ms. Catherine Rauso, Tax Operations Manager for the State of

Delaware's Division of Unemployment Insurance, and July 29, 2011 from Mr. Matthew Martin, Unemployment Insurance Assessments Supervisor for the State of Delaware Department of Labor. In her letter, Ms. Rauso stated that Hide Power has submitted quarterly reports and applicable payments in a timely manner since 2004, the account was closed effective March 31, 2011, and the account was tax compliant. In his letter, Mr. Martin stated that Hide Power is in compliance with the Delaware Department of Labor's Employer Tax Assessments and does not owe assessments or quarterly reports.

The Board's records show that one employee of Hide Power filed for and was paid \$1,782.00 in unemployment benefits in the fourth quarter of 2011. Accordingly, no employee of Hide Power has filed for unemployment or sickness insurance benefits for days prior to April 1, 2007, the date of the Board's coverage decision concerning Hide Power.

Section 8(a)(1)(A) of the RUIA requires employers covered by the Act to pay a contribution equal to a percentage of compensation paid to each employee, limited by a maximum monthly compensation base determined each year. Unlike taxes funding the Railroad Retirement Act, which are collected by the Internal Revenue Service under the Railroad Retirement Tax Act (26 U.S.C. §§ 3201-3241), employers pay these contributions to fund the RUIA directly to the Railroad Retirement Board. See RUIA section 8(i). The Board's authority with respect to contributions is set forth by section 8(k) of the RUIA as follows:

(k) All provisions of law, including penalties, applicable with respect to any tax imposed by the provisions of the Railroad Retirement Tax Act, insofar as applicable and not inconsistent with the provisions of this Act, shall be applicable with respect to the contributions required by this Act: Provided, That all authority and functions conferred by or pursuant to such provisions upon any officer or employee of the United States, except authority to institute criminal proceedings, shall, with respect to such contributions, be vested in and exercised by the Board or such officers and employees of the Board as it may designate therefor. \* \* \*

With regard to retroactivity of rulings under the Internal Revenue Code of 1986 (the Code) by the Secretary of the Treasury or the Commissioner of Internal

Revenue, section 7805(b)(8) of the Code, as amended in 1996, states:

(b)(8) The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

Published revenue procedure under the Code states that a ruling applies retroactively unless it includes a specific statement indicating under the authority of section 7805(b) the extent to which it is to be applied without retroactive effect. See Rev. Proc. 89-14, 1989 -1 Cum. Bul. 814, 815.

The Railroad Retirement Board has determined in a series of decisions dating to the early years of administration of the RUIA that under the authority of Code section 7805(b)(8) and its predecessor provisions, the Board may in appropriate circumstances limit retroactivity of liability for contributions under the RUIA. See, e.g., Board Order 42-177, *Ogden Union Stockyards Company and Idaho Stockyards Company*, approving the recommendation of the General Counsel in Legal Opinion L-42-219 to apply former section 3791(b) of the Internal Revenue Code of 1926; and Board Order 59-119, *Richmond Union Stockyards Company*, applying section 7805(b) of the Internal Revenue Code of 1954. The 1996 amendment to 7805, though adding paragraphs (b)(1) through (b)(7) regarding retroactivity of regulations, did not alter the authority granted to the Secretary with respect to administrative determinations not made by regulation. See P.L. 104-168 § 1101(a), 110 Stat. 1468. See, Board Order 06-30, *American Orient Express Railway*, adopting Legal Opinion L-2006-13, and Board Order 09-59, *Trans-Serv, Inc.* Accordingly, the rationale adopted by the Board in prior determinations to limit retroactive effect of coverage under the RUIA continues to provide a useful framework for analysis of the request by Hide Power.

Rulings on non-retroactive coverage under the RUIA have been granted by the Board in cases where: 1) the evidence suggests that the employer paid taxes under the Federal/State employment compensation system believing in good faith that the employer was covered by that system; 2) no benefits have been paid to the employer's employees under the RUIA; and 3) where retroactive coverage would impose undue burden on the Board, the employer, and the state system for no apparent gain.



Although Mr. Herholdt has requested the Board waive collection of contributions for the period 2007 through 2011, we see no basis for extending waiver to a period later than the Board's decision. In view of the foregoing, it is my opinion that Board Coverage Decision 11-49, *Hide Power and Equipment Co.*, should be applied without retroactive effect to the extent of relieving Hide Power from payment of contributions which are due with respect to compensation paid to employees prior to April 7, 2011, the date of the Board's coverage decision.

An appropriate draft Board Order is attached.

Attachment

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<b>SUBMIT 5 COPIES OF THIS FORM TO THE APPROVING OFFICER</b>	Form No. G-20a (9-91)  United States of America Railroad Retirement Board  <b>BOARD RECOMMENDATION</b>	PAGE 1 OF _____ PAGES	
		DATE OF ACTION	
		ACTION TAKEN	
		BECOMES BOARD ORDER NO.	INITIALS OF SECRETARY
EFFECTIVE DATE			
APPROVED BY			
HEAD OF OFFICE, BUREAU, OR REGION	DATE	APPROVING OFFICIAL	DATE

**ORDER APPLYING RULING AS TO CREDITABILITY OF SERVICE PERFORMED FOR HIDE POWER & EQUIPMENT CO. WITHOUT RETROACTIVE EFFECT WITH RESPECT TO CONTRIBUTIONS ACCRUED PRIOR TO APRIL 7, 2011.**

The opinion and recommendation of the General Counsel contained in his memorandum of September 9, 2013, (Legal Opinion L-2013- 22) relative to relief of Hide Power Equipment Co. from payment of contributions under the Railroad Unemployment Insurance Act is approved and adopted.

Pursuant to the recommendation therein, it is hereby ordered that the ruling of B.C.D. 11-49, holding Hide Power & Equipment Co. to be an employer covered under the Railroad Unemployment Insurance Act shall be applied without retroactive effect to the extent of relieving the company from payment of contributions under the Act which had accrued prior to April 7, 2011.