New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-93 (11) I
Income Tax
October 19, 1993

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I930722A

On July 22, 1993, a Petition for Advisory Opinion was received from Metro-North Commuter Railroad Company, 347 Madison Avenue, New York, New York 10017.

The issue raised by Petitioner, Metro-North Commuter Railroad Company, is how the application of the Amtrak Reauthorization and Improvement Act of 1990 (hereinafter the "Act") affects employees traveling to more than one state during the course of their employment, specifically the meaning of the term "regularly assigned" and the types of occupations and work schedules covered by the Act.

Petitioner operates commuter train service within New York State and the State of Connecticut. Petitioner employs a number of employees who perform work in both states, some of whom perform this work on trains and some of whom perform this work in offices or along Petitioner's right-of-way.

Federal Public Law 101-322, the Act, amended various provisions of Title 49 of the United States Code relating to state and local taxation of compensation paid to employees of interstate rail carriers, interstate motor carriers and interstate motor private carriers and applies to compensation paid on or after July 6, 1990.

Section seven of the Act amends section 11504(a) of Title 49 of the United States Code with regard to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under Subchapter I of Chapter 105 of such Title 49 and states, in pertinent part, that:

> No part of the compensation paid by a rail carrier. . .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. . . (emphasis added)

Petitioner requests an opinion as to whether the following two categories of employees are covered by section seven of the Act:

1. Collective bargaining requires Petitioner in certain situations to compensate employees for traveling to and from their work locations. As an example: A conductor, whose crew base is located in Stanford, Connecticut, is instructed to perform flagging service (protection for train movements in the vicinity of a construction site) at New Rochelle, New York, at 8:00 a.m. on a continuing basis for the period of the construction. In such a case, the employee takes a train that leaves Stanford, Connecticut, at 7:00 a.m. and arrives in New Rochelle, New York at 7:45 a.m. He or she reports to the work

site at 8:00 a.m. and performs service until 4:00 p.m. Upon completion of the assignment, the conductor leaves New York at 4:30 p.m. by train back to Connecticut where he or she arrives at 5:30 p.m. The employee is compensated for a total of 10 hours and 30 minutes. Eight hours of that time period represents the work actually performed, and the balance of 2 hours and 30 minutes represents the travel time to and from the crew base and work location.

2. Certain positions at Metro-North require that individuals be "on call" and available to report for work if needed. In such instances the individuals will remain at home while "on-call" For instance, an individual who is a resident of Connecticut may work a specified number of days of the week in New York and spend a specified number of days of the week at home "on-call" He/she will be paid for both the days worked in New York and the days spent at home in Connecticut on call.

In accordance with the provisions of the Act, if an employee of Petitioner is not a resident of New York State for personal income tax purposes under section 605(b)(1) of the Tax Law, and such employee is paid compensation for regularly assigned duties performed in New York State and one or more other states, the compensation paid on or after July 6, 1990 does not constitute income derived from New York State sources and is not subject to New York State income tax, even though the employee performed services in New York State.

When applying the provisions of the Act for New York State income tax purposes, such an employee is considered to be performing "regularly assigned" duties in more than one state if such employee's job description requires the employee to perform services in at least two states on a systematic basis regardless of the percentage of time spent at each location. If an employee has no standard route and is assigned duties in more than one state on a random basis, that employee would not be considered to be performing "regularly assigned" duties in more than one state.

Herein, the employees in category "1" are not performing duties while traveling to and from their work locations. Therefore, an employee who performs all of his/her duties in one state but travels to/from another state to perform such duties is not performing duties in more than one state. Additionally, in the example, a conductor whose crew base is located in Connecticut but performs flagging service at a construction site in New York is not considered to be performing "regularly assigned" duties in more than one state because the duties are assigned on a random basis, depending on where the construction site is and the duration of such construction. The employees in category "2" are performing duties in more than one state when they perform services in New York State a specified number of days of the week and are "on-call" in Connecticut a specified number of days of the week and such employees are paid for both the days worked and the days on-call.

Accordingly, with respect to New York nonresident employees referred to in category "1" above, who (a) are regularly assigned to perform all of their duties in New York State but travel to/from Connecticut to perform such duties, or (b) are performing duties in both New York State and Connecticut but are assigned

such duties on a random basis do not meet the requirements of section seven of the Act exempting such employees from New York State income tax. The compensation paid to such employees on and after July 6, 1990 for duties performed in New York State constitutes income from New York sources pursuant to section 631(b) of the Tax Law. Such compensation is subject to New York State income tax and New York withholding requirements.

With respect to category "2" above, the New York nonresident employees who are regularly assigned to perform duties in both New York State and Connecticut will meet the requirements of section seven of the Act exempting such employees from New York State income tax. Therefore, the compensation paid on or after July 6, 1990 for the performance of such duties by such New York nonresident employees will not be subject to New York State income tax. Further, such compensation paid on or after July 6, 1990 is not subject to New York State withholding requirements.

The determination of whether an employee is "regularly assigned" duties to be performed in New York State and one or more other states is a factual matter not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to a "specified set of facts" Tax Law, §171. Twenty-fourth; 20 NYCRR 2376.1(a).

It should be noted, that New York nonresident employees who receive compensation subject to New York State income tax are required to file Form IT-203, Nonresident and Part-Year Resident Income Tax Return, and report to New York any items on income derived from or connected with New York sources. If tax is not required to be withheld, estimated tax is required to be paid.

DATED: October 19, 1993

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.