



Legal Opinion L-2006-21
September 12, 2006

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
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Mr. Tim Hanely
Chairman and State
Legislative Representative
Ohio State Legislative Board
Brotherhood of Locomotive Engineers
and Trainmen
11 N. High Street, Suite 2-B
Canal Winchester, Ohio 43110

Dear Mr. Hanely:

This is in reply to your letter of July 15, 2006, regarding service and compensation which you claim on behalf of 41 members of the Brotherhood of Locomotive Engineers and Trainmen as a result of termination of rail service by CSX Transportation, Inc. (CSXT) over 61 miles of track between Walker and Wilsonburg in West Virginia. As explained below, your members must make individual claims for this compensation to the Chief of Compensation and Employer Services of the Railroad Retirement Board no later than February 28, 2007.

The documents you submitted with your letter show that the former Interstate Commerce Commission (ICC) imposed employee protection provisions upon the predecessor to CSXT as a condition of approval of the abandonment of the Walker-Wilsonburg line in a decision rendered November 17, 1986. Baltimore & Ohio R.R.—Exemption—Abandonment, No. AB-19 (Sub-No. 125X), 51 Fed. Reg. 43250 (December 1, 1986). The United Transportation Union (UTU) then claimed employee protective payments for its members under the order. The claims by the UTU were approved by the ICC in a decision issued January 5, 1995, after a lengthy administrative proceeding. Baltimore & Ohio R.R.—Exemption—Abandonment, Finance Docket No. 31566 (Sub-No. 1)(unpublished order). The ICC decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit in a decision rendered February 16, 1996. CSX Transportation, Inc. v. Surface Transportation Board, 75 F. 3d 696.

The BLE was not a party to any of the foregoing proceedings. However, by letter dated August 27, 2001, the Assistant Vice President, Labor Relations of CSXT notified the General Chairman of the BLE that:

This refers to our several conversations and correspondence concerning certain protection claims for engineers affected by the abandonment of the line between Walker and Wilsonburg, West Virginia.

During our last conference, we agreed that in full and final satisfaction of these claims and without prejudice to our position, CSXT would pay \$650,000.00. The payment would be made in two equal amounts; the first during the third quarter and the second during the fourth quarter of 2001. It would be left to representatives of the Brotherhood of Locomotive Engineers ("BLE") to determine how the money would be divided among the claimant employees. The BLE would advise CSXT of the amount of the payment to be made to each employee by name and ID number and the quarter in which the payment should be made.

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Though it is not contested that CSXT did pay \$650,000 as a result of the foregoing agreement, no adjustments to the service and compensation records of any BLE members were ever reported to the Board by CSXT.

On March 9, 2006, you wrote to the Board's Chief of Compensation and Employer Services claiming, on behalf of 41 listed BLE members, "compensation and service credits under the Railroad Retirement (RRA) for displacement and dismissal payments made under the Oregon Short Line Conditions (Oregon Conditions). Payments were made by CSXT in 2002 * * *." When the Chief of Compensation and Employer Services contacted CSXT, however, the employer responded "CSX settled this case directly with the BLET for a fixed amount to be distributed however the Organization wanted. It was merely a lump sum settlement and did not represent any specific dates or periods that would provide credits. Thus, no adjustments to any employee's service records are appropriate."

The Board has referred your letter to the General Counsel of the Board for consideration. The General Counsel advises that compensation is defined for benefit entitlement purposes by section 1(h)(1) of the RRA in part as:

* * * any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad] employers * * * including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. * * * Compensation * * * earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to section 9, the period during which such compensation will have been earned.

The General Counsel notes that section 1(h)(2) of the RRA further provides that:

An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. * * *

In addition, the General Counsel advises that regulations of the Board (20 CFR 211.3(a)) further define pay for time lost to include:

(a) A payment made to an employee for a period during which the employee was absent from the active service of the employer is considered to be pay for time lost and is, therefore, creditable compensation. Pay for time lost includes:

(1) * * *

(2) Pay received for loss of earnings for a certain period of time, resulting from the employee being placed in a position or occupation paying less money. In reporting compensation which represents pay for time lost, employers shall allocate the amount paid to the employee to the month(s) in which the time was actually lost. * * *

The General Counsel advises that in his opinion, the \$650,000 in payments made by CSXT pursuant to its agreement of August 2001 with the BLE may constitute compensation creditable for benefit purposes under section 1(h) of the RRA. He notes that the opening paragraph of the



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August 2001 letter states that the BLE members have made claims to CSXT based upon the employee protections imposed by the November 1986 ICC order. While not waiving its objections to payment, CSXT in the August 2001 letter states it is offering the \$650,000 payment "in satisfaction of these claims." The Board's General Counsel advises that as a matter of law, all preliminary discussions between parties are merged into a compromise agreement which settles all their claims. 15A Am Jur 2d Compromise and Settlement § 36. Although explicitly not an admission by CSXT of liability for protective payments, the August 2001 agreement between CSXT and BLE clearly intended to bar any claims by the BLE members for employee protective payments under the November 1986 ICC order. In the opinion of the Board's General Counsel, if the basis of the employees' claims against CSXT was employee protection imposed by the November 1986 ICC order, and if CSXT in the August 2001 agreement settled these claims with a payment, then it follows that the \$650,000 paid under the settlement represented a retroactive lump sum "employee protection" payment for purposes of RRA section 1(h) and section 211.3(a) of the Board's regulations.

The General Counsel further advises, though, that whether service and compensation may be credited pursuant to the November 1986 order and 2001 settlement cannot be resolved for all 41 employees as a group. The November 1986 order established employee protections afforded under the "Oregon Short Line Conditions". These employee protections were set forth by the ICC in Oregon Short Line Railroad and the Union Pacific Railroad Company—Abandonment—Portion Goshen Branch, 360 I.C.C. 91 (1979). That decision established allowances for both displaced employees who were placed in a worse position in respect to work rules and compensation, and dismissed employees who lost a railroad position as a result of the abandonment. 360 I.C.C. at 98-100. Regulations of the Board provide that while displacement allowances are creditable compensation under the Act (20 CFR 211.8), a dismissal allowance paid for a specific period of time is creditable only provided the employee has not severed the employment relationship (20 CFR 211.9). The information you provided regarding the 41 BLE members shows some are "active", but others have "retired," are "deceased", or "left company". Thus, it cannot be determined from the information you provided whether each employee received a displacement or a dismissal allowance, the period for which the employee was displaced, or the point in time the employee severed his employment relationship with CSXT.

For this reason, any employee wishing to claim compensation or service under the August 2001 agreement must individually contact the Board's Chief of Compensation and Employer Services. As CSXT has notified the Board that it believes that compensation should not be allowed on the basis of the 2001 agreement, the General Counsel advises that the employee's claim should include his check stub or other record of the amount of payment received. See regulations of the Board at 20 CFR 211.15(b). Consistent with RRA section 1(h)(1), in the absence of a report from CSXT, the employee must also establish the period during which such compensation was earned by evidence that he was displaced or furloughed due to the abandonment, and by evidence as to whether and when he severed his employment relation with CSXT.

Finally, the General Counsel advises that section 9 of the RRA and section 211.16(a) of the Board's regulations require that your members must submit any claim for additional service and compensation by reason of the August 2001 agreement within four years of the last day of February of the year following the year in which payments were made. As you stated in your March 9, 2006, letter that CSXT made the payments in 2002, this means the employees must file a protest to the Board's Chief of Compensation and Employer Services no later than February 28, 2007.

Sincerely,



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FOR THE BOARD
Beatrice Ezerski
Secretary to the Board