



UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

OFFICE OF GENERAL COUNSEL

L-2010-04

June 23, 2010

Mr. xxxxxxxxxxx.
Assistant Vice President
General Claims Department
BNSF Railway Company
P.O. Box 961039
Fort Worth, Texas 76161

Dear Mr. xxxxxxx:

This is in response to your letter dated March 17, 2010, requesting my opinion regarding the crediting of compensation pursuant to a judgment against the BNSF Railway for personal injury under the Federal Employer's Liability Act (FELA). Your letter also requests advice regarding the appropriate treatment of the payment to the employee under the Railroad Retirement Tax Act, and any liability the employer may have to reimburse any payments for medical expenses of the employee which have been paid under Medicare.

In the particular case you have furnished, the employee brought suit in state court under the FELA for damages due to an on-the-job injury which occurred on January 25, 2005. After trial the jury filed a special verdict on May 15, 2009, finding the injured employee to have suffered "past loss, including lost earnings, [of] \$283,035", and "future loss, including lost earnings, lost earning capacity, medical expenses, pension loss, [and] ability to provide household services [of] \$723,563". Further, pursuant to section 3 of the FELA (45 U.S.C § 53) the jury found that the injured employee's negligence contributed by 30 percent to the cause of the injury. Accordingly, by Judgment dated May 18, 2009, the Court awarded the employee damages of \$198,124.50 for past loss including loss of earnings, and \$506,494.10 for future loss, including lost earnings. Your letter also states that the employee has not relinquished his right to employment, and he will be maintained as "disabled" on the BNSF "active seniority list".

As you know, section 1(h)(1) of the Railroad Retirement Act (RRA) defines compensation for benefit entitlement purposes under that Act 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. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. * * *

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 * * *. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

The Railroad Unemployment Insurance Act at section 1(i)(1) provides essentially the same definition with respect to compensation creditable for benefit entitlement purposes under that Act as well. In addition, regulations of the Board (20 CFR 211.3(a)(1)) further define pay for time lost:

- (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 as an employee includes
 - (1) Pay received for a certain period of time due to personal injury * * *

The regulations of the Board allow parties to agree that the employer file a return of compensation allocating pay to the months in which the time was actually lost. A reasonable relationship to the employee's normal monthly pay is ordinarily no less than 10 times the employee's daily pay rate. See 20 CFR 211.3(b). Section 204.6 of the Board's regulations (20 CFR 204.6) further states that compensation may be credited pursuant to section 211.3 only to months in which the employee retains an employment relationship to the covered employer. Prior opinions of this Office have held that in absence of language to the contrary, an injured

employee will not be presumed to retain an employment relation after the date of a judgment or settlement of the injury suit resulting in the pay for time lost.

Finally, I note that section 210.5(d) of the regulations (20 CFR 210.5(d)) provides in part that for purposes of annuity calculation and entitlement under the Act, "Any month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service."

The evidence in the current case is that \$198,124.50 is payable to the employee in May 2009 based on factors including pay for time lost in the past, that is from date of injury (January 2005) through date of judgment (May 2009). No compensation is allocated to specific months, and no amount of damages is allocated only to pay for time lost as distinguished from other "past damages". Accordingly, pursuant to section 1(h)(2) of the RRA it is my opinion that the full amount of \$198,124.50 must be allocated to the months January 2005 through May 2009, subject to the annual maximum creditable amounts for those years, and less any compensation already credited under the Railroad Retirement Act during that period. Any remaining amount of the past loss damages after this allocation is complete is to be disregarded. The employer must file RRB Forms BA-4 Report of Creditable Compensation Adjustment for these years.

I note that section 8 of the Railroad Unemployment Insurance Act (45 U.S.C. § 358) requires that the employer pay contributions to the Board upon compensation paid to its employees. See also section 345.115 and 345.116 of the Board's regulations (20 CFR 345.115, 345.116). Section 345.118(c) of the regulations further provides that when an employer must file an adjustment of compensation, the employer must account for the compensation adjustment in the calendar quarter in which the BA-4 is filed. Accordingly, the total additional compensation reported for past compensation in this case must be reported and paid with Board Form DC-1 Employer's Quarterly Report of Contributions.

The evidence in the case submitted is also that that \$506,494.10 is payable for months following May 2009, based on factors including pay for time lost. Again, no compensation is allocated to specific months into the future, and no amount of damages is allocated only to pay for time lost as distinguished from medical expenses, pension loss, or other reasons. Moreover, because you state that the employee has not relinquished his employment rights, the presumption that his employment ended with the date of judgment is rebutted. Accordingly, based on the evidence available, in my opinion the full amount of \$506,494.10 for future loss must be allocated as pay for time lost into future months. The amount is to be allocated to each month at 1/12 of the annual maximum creditable compensation for the year to which the compensation is allocated. The compensation is to be reported to the Board by the employer when filing Board Form BA-3 Annual Report of Compensation. See regulations of the Board at 20 CFR 209.8.

With respect to any employment taxes due under the Railroad Retirement Tax Act (26 U.S.C §§ 3231-3241), I must advise that the Tax Act is administered by the Internal Revenue Service of the Department of Treasury. Consequently, I have no authority to provide advice concerning taxpayer obligations arising under that Act. I may note, however, that regulations of the Internal Revenue Service at 26 CFR 31.3231(e)-1(a)(3) define taxable compensation as including pay for time lost.

Similarly, financing of Medicare benefits is administered by the Centers for Medicare & Medicaid Services (CMS). Advice must be sought from that agency regarding any liability for payment of medical expenses covered by Medicare. In this connection, I may note that Medicare benefits are precluded for a medical expense for which payment has been made, or can reasonably be expected to be made under a liability insurance policy or a self-insured plan. See section 1862(b)(2)(A)(ii) of the Social Security Act (42 U.S.C. § 1395y(b)(2)).

I trust that the foregoing discussion will be of assistance to you.

Sincerely,

Steven A. Bartholow
General Counsel