

3001 Provisions of the Act

3001.01 Section 2(f)

of the Act provides:

"If (i) benefits are paid to any employee with respect to unemployment or sickness in any registration period, and it is later determined that remuneration is payable to such employee with respect to any period which includes days in such registration period which had been determined to be days of unemployment or sickness, and (ii) the person or company from which such remuneration is payable has, before payment thereof, notice of the payment of benefits upon the basis of days of unemployment or sickness included in such period, the remuneration so payable shall not be reduced by reason of such benefits but the remuneration so payable, to the extent to which benefits were paid upon the basis of days which had been determined to be days of unemployment or sickness and which are included in the period for which such remuneration is payable, shall be held to be a special fund in trust for the Board..."

3001.02 Section 1(j) of the Act provides:

"The term `remuneration' means pay for services for hire, including pay for time lost, and tips, but pay for time lost shall be deemed earned on the day on which such time is lost. The term `remuneration' includes also earned income other than for services for hire if the accrual thereof in whole or in part is ascertainable with respect to a particular day or particular days. The term `remuneration' does not include (i) the voluntary payment by another, without deduction from the pay of an employee, of any tax or contribution now or hereafter imposed with respect to the remuneration of such employee, or (ii) any money payments received pursuant to any nongovernmental plan for unemployment insurance, maternity insurance, or sickness insurance."

3002 Analysis of Section 2(f)

3002.01 Provision for special fund

Section 2(f) provides for collection of a special fund from a person or company from which remuneration is payable with respect to a period including days of unemployment or sickness. Such a collection is to be made if:

- a. remuneration is determined to be payable after the payment of benefits; and
- b. the person or company has notice of the payment of benefits prior to the payment of remuneration.

3002.02 Amount to be collected

The amount to be collected is the lesser of the following:

- a. The amount of benefits paid for days which had been determined to be days of unemployment or sickness and which are included in any period with respect to which it is later determined that remuneration is payable. This is the amount which would not have been paid if days with respect to which remuneration is payable had not been considered days of unemployment or sickness. For example, if remuneration is payable for the first seven days of a registration period containing 14 days of unemployment, the amount due under section 2(f) is seven times the claimant's daily benefit rate.

OR

- b. The amount of remuneration payable with respect to the period which includes days which had been determined to be days of unemployment or sickness.

3002.03 Effect on available balance

When the entire amount of benefits paid for any day or days is represented in such a collection, the day or days are to be disregarded in computing the number of days for which benefits have been paid.

3003 Initial Determinations on Claims

Adjudication of a claim shall not be delayed, but days in a registration period may be considered as days of unemployment or sickness, even though it is known that the claimant is claiming and may later receive remuneration for such days. If the facts are not clear as to whether the claimant is receiving, or expects to receive remuneration in the future, an investigation should be made to determine the facts.

3004 Notice under Section 2(f)

3004.01 Notice to person or company

When there is information that a claimant is claiming or may receive at some later date, pay for time lost for a particular day or days with respect to which benefits have been determined to be payable, notice of the Railroad Retirement Board's (RRB) right to recovery under section 2(f) shall be sent to the person or company which may pay the remuneration. When there is information that a claimant is a protected employee under a job protection plan, notice under section 2(f) shall be sent to his employer.

3004.02 Notice in case of labor dispute

Notice under section 2(f) is to be sent to a covered employer whose employees are unemployed due to a stoppage of work caused by a labor dispute on the premises of the employer. Only one such letter is needed in connection with a particular work stoppage; separate letters respecting individual employees are not required.

3004.03 Notice to claimant

When information is received that a claimant is entitled to guaranteed wages, payable annually, he is to be notified of the RRB's right, under section 2(f) to recovery of benefits from any annual guarantee payment.

3005 Determining Amount to be Collected under Section 2(f)

3005.01 General

Determinations as to the amounts to be collected under section 2(f) are made in the Sickness and Unemployment Benefits Section (SUBS), in accordance with applicable instructions. The method to be used in a particular case depends upon provisions of the agreement or settlement under which remuneration is to be paid. The general principles for determining amounts to be collected under section 2(f) are given below, and are covered in more detail in Appendices A and B. Variations occur when an employee is in an occupation that does not have a standard eight-hour day, or when labor-management practices for implementing an agreement are not uniform.

3005.02 Remuneration payable for each day in the period covered

Pay for time lost under some agreements covers a period, e.g. a month, and remuneration is payable with respect to each day in the period. Payments of this type are made under agreements providing for monthly guarantees in the form of "coordination allowances" or "dismissal allowances". See Appendix A.

Settlements of pay for time lost claims (such as those filed by employees who were discharged or held out of service and are seeking reinstatement, etc.) may also indicate that the payment should be considered as compensation for each day in the period covered. The amount to be collected under section 2(f) from a payment of this type is the lesser of these amounts:

- a. the amount of benefits paid for days in the period for which the payment is to be made,

OR

- b. the amount of the payment for the period.

3005.03 Remuneration payable for time not worked in a particular month

Pay for time lost under some agreements covers time not worked within a period, e.g., a number of days within a month; and remuneration payable under such an agreement is attributable to less than the whole number of days in the period. Payments of this type are made under agreements similar to the National Job Stabilization Agreement of February 7, 1965. See Appendix B. The amount to be collected under section 2(f) in this type of case is the lesser of the following:

- a. the amount of unemployment benefits paid for time not worked covered by the protective payment,

OR

- b. the amount of the protective payment for time not worked.

3005.04 Remuneration payable under annual guarantee

When an employee is entitled to an annual guarantee of remuneration without reference to the number of hours or days per week, month or year for which he is protected, the amount to be collected under section 2(f) will be an amount equal to the benefits paid for a number of days equal to whichever is smaller of the following:

- a. the number of days obtained by dividing the amount of the guarantee payment by the daily rate of compensation of the employee's job in the guarantee period,

OR

- b. the number of days for which unemployment benefits were paid to the employee in the guarantee period.

Example: Employee works or gets vacation pay for 158 days in guarantee period, and is paid \$4,684.00. His average daily compensation was therefore \$29.65. His protective payment for the guarantee period was reported to be \$2,541.78. This figure divided by \$29.65 gives 86 days. The benefits paid for 86 days amount to \$877.20; this is the amount to be collected under section 2(f).

3005.05 Dining-car employees

These employees have a working standard different from the eight-hour day that is common in the non-operating railroad occupations. To determine the number of days to which protective payments are attributable under the National Job Stabilization Agreement in the case of a dining-car employee, the number of hours covered by the payment is generally divided by 8.3 instead of by 8. The 8.3 figure is obtained by dividing 180 hours (full-time in dining-car service) by 21.75 (the average number of working days in a month.)

3005.06 Guaranteed extra board

Under some extra board agreements employees are guaranteed a specific number of basic days' pay per period. In the case of such an agreement the amount to be collected under section 2(f) from a guarantee payment is (1) an amount equal to the benefits paid for the number of days represented by the guarantee payment or (2) an amount equal to the benefits paid for days in the guarantee period, whichever is less.

3006 Effecting Collection

3006.01 Request for payment

When information is received that remuneration payable to a claimant is being withheld in accordance with the provisions of section 2(f), and a determination under section 2(f) has been made as specified in AIM-3005, the person or company from which the remuneration is payable is to be requested to remit the amount to be collected or informed that no amount is to be remitted.

3006.02 Adjudication pending receipt of remittance

When an employer to whom section 2(f) notice was sent advises that remuneration is payable to a claimant for a period for which benefits have been paid, no action shall be taken to recover from the claimant an amount due under section 2(f), as the amount to be collected is provided for in the special fund created by the employer.

3006.03 Brief of case when remuneration not withheld

A brief of case is to be submitted to the Sickness and Unemployment Benefits Section (SUBS) when an employer or company, after having been put on notice under section 2(f), pays remuneration to a claimant for a period including days of unemployment or sickness and does not withhold the amount to which the RRB is entitled.

3006.04 Recovery from employee

An amount due under section 2(f) is to be collected from the claimant only if:

- a. The amount is not received from the employer,

and
- b. It is determined that the amount was paid erroneously to the claimant. (See instructions on "Reopening and Redetermination".)

3007 Settlements to Which Both Sections 2(f) and 12(o) May be Applicable

Terms of settlement of an employee's personal injury claim against a person or company may provide for payment of an amount allocated as pay for time lost. In such a case, consideration is first given to the applicability of section 2(f). If section 2(f) is applicable and the amount to be collected there under is determined, section 12(o) will be considered applicable to the amount by which the total settlement exceeds the amount of the pay for time lost. An amount reported by the employer as pay for time lost is, to the extent that it bears a reasonable relation to the individual's earnings, to be considered to be pay for time lost.

3008 Authority to Make Determinations

SUBS is authorized to make determinations under section 2(f). Cases in which there is a question as to the proper determination are to be submitted to Policy and Systems for advice.

3020 Provisions of the Act

Section 12(o) of the Act provides:

"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained there under, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

3021 Analysis of Section 12(o)

3021.01 Benefits payable regardless of liability to pay damages

Section 12(o) provides that benefits payable with respect to days of sickness are to be payable regardless of the liability of any person to pay damages for the employee's infirmity.

3021.02 RRB's right to reimbursement

The RRB is entitled to reimbursement under section 12(o) from any sum or damages paid or payable to the employee on account of any liability (except a liability under a health, sickness, accident, or similar insurance policy) based upon the infirmity. It is not necessary that a liability actually exist, but merely that it be asserted. No reimbursement is to be requested in connection with sickness benefits payable on the basis of any infirmity other than the infirmity for which a sum or damages were paid or payable. The RRB should not assert any right to reimbursement from amounts paid to, or in behalf of, the employee for his or her expenses in connection with an infirmity.

3021.03 Medical, hospital and legal expenses

The RRB's right of reimbursement under section 12(o) applies only to the net amount of a settlement after deduction of the amount of an employee's expenses incurred in connection with the injury. The right of reimbursement does not extend to amounts of expenses incurred by an employee for medical, hospital, or legal services in connection with the infirmity. Legal expenses include the amount of the attorney's fee with the employee (usually one-third of the gross settlement amount).

The fact that an employee's medical or hospital expenses are covered by health, sickness or accident insurance does not prevent them from being considered as expenses incurred by the employee. The costs of medical or hospital services provided an employee because of his membership in a medical or hospital plan or association, or provided under Medicare, are also considered to be expenses incurred by the employee. Medical or hospital expenses paid directly by the liable party (eg. employer, etc.), however, are not to be deducted from the gross settlement.

Medical and hospital expenses are not deductible if they are paid under an insurance policy that indemnifies a railroad employer against liability under the Federal Employers' Liability Act (FELA). For example, under the Health and Welfare Agreement that was entered into by railroad management represented by the National Carriers' Conference Committee and railroad labor represented by the Brotherhood of Maintenance of Way Employees on October 22, 1975, employee medical expenses are paid to the providers directly by an insurance company. See Appendix I for the Legal Opinion concerning the Agreement and [click here](#) for a link to the list of railroad employers covered by the Agreement.

3021.04 Amount of reimbursement

The amount of reimbursement is the lesser of (a) the amount of benefits, or (b) the amount of the sum or damages (excluding amounts of certain expenses incurred by the claimant in connection with his infirmity as indicated in subsection 3021.03 above). In any case where Section 4(a-1)(ii) is also applicable, the

amount of reimbursement for purposes of section 12(o) is the amount of benefits paid after diminution or recovery under Section 4(a-1)(ii).

3021.05 Notice required

Notice is to be given to the person who is reported to be liable. Unless notice is given to a person who makes a payment of any sum or damages before he or she makes the payment, reimbursement is not to be requested of him or her.

3021.06 Recovery from claimant

The RRB may recover from the claimant if notice is not given to the person who pays a sum or damages before he makes the payment, or in some cases if notice has been given but not honored.

3021.07 Effect of 12(o) recovery on benefit balance

Any day for which the full amount of benefits is recovered or set off against a sum or damages is not to be counted in determining the number of days for which benefits have been paid in a benefit year.

3021.08 Workmen's compensation

Payments under workmen's compensation laws are not damage payments from which the RRB might be entitled to reimbursement. All payments under workmen's compensation laws are social insurance payments, but they affect a claimant's rights to benefits only if payable periodically to the claimant for total disability. (See AIM-17, "Determinations under Section 4(a-1)(ii)".)

3021.09 Formula when sickness benefits for registration period based on two infirmities

When the benefits payable for a registration period are based, in part, on days of sickness resulting from an infirmity for which damages are payable and, in part, on days of sickness resulting from some other infirmity, the amount of reimbursement to which the RRB is entitled is to be determined according to the following formula: Number of days of sickness in registration period based on infirmity for which damages are payable minus seven or four days (as the case may be), multiplied by daily benefit rate.

3021.10 "Advances"

Ordinarily, a cash payment (other than wages), made by an employer to an employee following an injury, is considered to be a sum paid on account of a liability; and it is considered that the RRB is entitled to reimbursement to the extent that it has paid or will pay benefits for days of sickness resulting from such injury. However, if an employer makes payments to an employee in advance of

settlement (generally referred to as "advances"), benefit payments may be continued until settlement is made or liability is otherwise established.

3021.11 "Coverage U"

Section 12(o) does not apply to a payment made to a claimant by his own insurance carrier under an endorsement to his policy (usually referred to as "Coverage U") providing that the insurance carrier will pay all sums, up to a specified maximum, which the claimant or his legal representative is legally entitled to recover as damages for bodily injury from the owner or operator of an uninsured automobile. Section 12(o) does apply to any payment which may be made by the tortfeasor, or anyone on his behalf, because of liability for causing the claimant's infirmity, whether the payment is made to the claimant or some other person, such as the claimant's insurance carrier under its subrogation rights.

3021.12 "No-fault automobile insurance statutes"

Section 12(o) applies to any payment made to our claimant under the "no-fault" insurance policy of another individual. A payment made under a no-fault insurance statute constitutes a sum paid because of the responsibility (liability) of the insured for our claimant's injury. The fact that a state's no-fault insurance statute requires payment without establishing fault for the injury does not remove the payment from the scope of section 12(o).

The RRB's right to reimbursement was clarified in the General Counsel's opinion L77-464, which stated that where liability to a claimant under the insurance policy of another individual occurs, even though no fault is established, and where payments are made pursuant to that liability, the payments are subject to the RRB's right to reimbursement under section 12(o) of the RUIA.

3022 Initial Determinations on Claims

Except as provided in Section 3026 benefits for days of sickness shall not be withheld because of information indicating that the claimant is claiming or may later receive a sum or damages on account of a liability based on the infirmity from which such days of sickness resulted.

3023 Notice of RRB's Right to Reimbursement

3023.01 Notice of lien

Notice of the RRB's right to reimbursement, Form Letter ID-30b, Notice of Lien, is to be sent in each case where a right or claim to damages may be asserted on the basis of an infirmity for which sickness benefits may be paid. The notice is to be sent (a) to each person or company who may be responsible for the infirmity, and (b) to each person or company against whom a claim may be made. In

addition, if any such person or company is insured, notice is to be sent to the insurance company. When notice is sent in any case where the employee was not injured at work, only the employee's name and social security account number and the date and place of injury shall be shown on the lien notice. If a reply to a Notice of Lien indicates that it was misunderstood, new notice must be delivered with appropriate explanation, by contact representative, if necessary.

3023.02 Notice to claimant

When notice of the RRB's right to reimbursement under section 12(o) is given to a person or company other than a covered employer, the claimant is to be notified of his liability to reimburse the RRB in case of a settlement.

3023.03 Notice to tortfeasor in "Coverage U" case

Upon receipt of information that a claimant has been paid by his insurer on account of an uninsured driver's legal liability for the claimant's injuries, the tortfeasor is to be notified of the RRB's right to reimbursement from any sum paid or payable to the claimant's insurer under its subrogation rights. A copy of such notice is to be sent to the claimant's insurer under its subrogation rights. A copy of such notice is to be sent to the claimant's insurer.

3024 Request for Information as to Liable Party

If it appears that a claimant is claiming or may later receive a sum or damages on account of liability for the infirmity from which his days of sickness resulted but information available is not sufficient for sending a Notice of Lien, further information is to be requested from the claimant. Such further information would ordinarily appear to be needed when covered employer liability is not indicated, the questions as to liability on the application for sickness benefits are not adequately answered, and the infirmity is an injury such as commonly results from an accident, or is a hernia, or in the case of a shop worker, is contact dermatitis.

Further information would also appear to be needed when liability other than covered employer liability is indicated and the liable party's insurance company is not known.

When it appears that the claimant may claim damages but he cannot or will not name the person who may be liable and such information is not available from some other source, the claimant shall be notified that he must advise the RRB of any settlement.

3025 Releasing Information as to Amount Recoverable

3025.01 General

Information as to the amount recoverable under section 12(o) shall be furnished, upon request, to an employer or other person who may be liable for payment of damages, or to the claimant, or to an attorney representing any of those parties. Such information is to be furnished whether or not terms of a settlement have been agreed upon.

3025.02 Settlement made

If an inquiry as to amount recoverable discloses that settlement has been made, request for reimbursement shall be made as prescribed in Section 3028.

3025.03 Settlement not made

If an inquiry indicates that settlement has not been made, the adjudicating office shall advise the inquirer as to the amount of benefits paid to date on the basis of the injury for which settlement may be made. If the claimant is still claiming benefits on the basis of that infirmity, the inquirer shall be advised that the amount of benefits paid to date must not be considered as a final notice of benefits paid unless the RRB is notified within seven days that a settlement has been made.

3026 Ten-Day Suspension of Benefit Payments

When the employer, or other person who is to make a settlement, or the representative of any such party, has indicated that settlement is to be made within seven days in a case where the claimant is continuing to claim benefits on the basis of the injury for which settlement is being considered, benefits may be suspended for a period of ten days beginning with the day the information is furnished. The ten-day suspension will allow for mailing time for a communication sent by the employer or other person within the seven-day period. Benefits are not to be suspended unless the inquirer has indicated that settlement will be made within seven days.

3027 Determining Amount Recoverable

When a person or company notifies the RRB concerning the provisions of a settlement of a claim for damages, the adjudicating office shall determine the amount to which the RRB is entitled by way of reimbursement. The amount stated as the sum or damages, and the amounts, if any, stated as expenses paid to or in behalf of the employee in connection with his infirmity shall ordinarily be accepted as correct. Where no expenses are reported, it shall be assumed, in the absence of evidence to the contrary, that the sum or damages reported does not include any amount paid for expenses.

3028 Request for Reimbursement

3028.01 General

When the amount recoverable from a settlement has been determined, request for reimbursement should ordinarily be addressed to the person or company making the settlement. If that person or company did not have notice that the RRB was paying benefits, the request for reimbursement should be addressed to the claimant. In the latter case no sickness or unemployment benefits should be paid to the claimant while any amount remains recoverable under section 12(o).

3028.02 Lien not honored

When the liable party has been put on notice but apparently failed to withhold for the RRB the amount recoverable under section 12(o), demand for reimbursement should be made upon the liable party. Telephone contact may be advisable as a means of ascertaining the facts and the liable party's position as to reimbursing the RRB. If this effort to collect from the liable party is unsuccessful, request for reimbursement should then be addressed to the claimant. Special efforts to get in touch with the claimant by personal visit or telephone may be advisable if the settlement was recent. In such a case the adjudicating office may send the collection letter to the field office for personal delivery and explanation.

If recovery from the claimant is not affected within a reasonable time, further efforts to recover from the liable party or his insurer should be undertaken without delay. Appropriate court decisions may be cited in making efforts to collect from insurance companies or large corporations. Care should be taken in speaking and writing not to disavow the RRB's right to recovery from the claimant. If there is an opportunity to collect from the claimant by offsetting benefits due under the Railroad Unemployment Insurance Act or the Railroad Retirement Act, the case should be submitted to the division of adjudication for an opinion whether recovery should be made by offset or whether efforts should be continued to recover from the liable party.

3028.03 Lien payment received

Ordinarily, receipt of a remittance in full payment of the RRB's lien will not require any acknowledgement. The remittance (canceled check, etc.) would usually be adequate evidence of payment. If, however, the railroad, insurance company, attorney, or other person requests a written acknowledgement, discharge, or release of lien, a typed letter is to be sent to the person or company requesting such acknowledgement. If a formal release is not requested, a release as shown in Exhibit W is to be sent.

If the remittance received is for less than the amount of the RRB's lien, and some question is raised as to the RRB's right to full reimbursement, the check is to be

returned to the remitter with a letter explaining the RRB's position, and a new remittance for the complete amount due the RRB is to be requested.

If, because of an apparent clerical error, less than the correct amount was remitted, the remittance is to be retained without depositing it, and a letter is to be sent explaining the situation and requesting the additional amount due.

3029 Notice to Claimant Concerning Expenses

When it appears, in connection with a report of a settlement, that information as to the claimant's expenses might affect the amount recoverable under section 12(o), the claimant should be so advised. As a rule of thumb such advice should ordinarily be sent when all these conditions are present: (1) the settlement is reported to be for less than \$3,000, (2) the settlement was made by a party other than a covered employer, and (3) the amount due the RRB is being withheld from the settlement.

3030 Receipt of Information Concerning Expenses

Action shall be taken as follows when information about a claimant's expenses is received after the amount recoverable under section 12(o) has been determined:

- a. The amount to which the RRB is entitled by way of reimbursement is to be tentatively recomputed by deducting the reported expenses from the amount of settlement.
- b. If deduction of the expenses from the amount of settlement would result in a smaller amount recoverable but the claimant has not furnished receipts, bills or statements supporting the expenses which he reported, he is to be requested to furnish such evidence or a statement explaining why he cannot furnish such evidence. Only amounts for which supporting evidence is furnished, or with respect to which the lack of such evidence is explained, are to be considered for purposes of Section 3031 below.

3031 Excessive Recovery

In any case where a recovery exceeds the amount to which the RRB is entitled by way of reimbursement under section 12(o), the correct disposition of the excess amount must be determined. If it is apparent that the excessive recovery has been withheld from the amount of the settlement paid the employee, the excess amount is to be paid to the employee. In other cases, it may appear that the excess amount should be refunded to the person or company from whom it was collected.

3032 Set-Off under Section 12(o)

3032.01 Reimbursement for benefits payable but not paid

If the amount of the settlement for an injury exceeds the amount of benefits paid on the basis of the injury, any additional benefits payable on the basis of the same injury are to be offset against the amount of the settlement to the extent of the difference between the two amounts. This adjustment is to be completed before any benefits are offset against any amount recoverable from the claimant.

3032.02 Letter to claimant

When the amount of a settlement exceeds the amount of benefits paid, and it appears that the claimant might claim additional benefits on the basis of the injury for which settlement was made, the claimant should be advised concerning the set-off.

a. Settlement in excess of \$7,500

If the sum or damages is in excess of \$7,500, the letter should explain that the amount of the payment is in excess of the sickness benefits which may be payable as a result of his injury and that no sickness benefits are payable.

b. Settlement less than \$7,500

If the sum or damages is less than \$7,500, the earliest date with respect to which sickness benefits may be paid is to be determined, and the letter should explain that no sickness benefits resulting from the same injury may be paid before that date.

3032.03 Notice to employee when benefits may exceed payment for injury

When a sufficient time has elapsed so that sickness benefits may be paid and the claimant has informed the RRB that he wishes to begin or resume claiming benefits, a claim form for a series of registration periods for which no benefits may be paid is to be sent to the claimant, together with a letter of explanation.

3032.04 Supplemental medical evidence

If the information on the statement of sickness is sufficient for making a determination that the claimant is unable to work at the beginning of the period for which no benefits may be paid, no additional medical evidence is to be requested until a claim form is sent to the employee for a period for which benefits may be paid.

3033 "Nuisance" Settlements

In some cases of disputed liability, railroads pay small amounts largely for the purpose of obtaining a release. In such cases, the amount paid is the amount of the settlement and accordingly that is the amount recoverable under section 12(o).

3034 Attorney Fee Cases

3034.01 Attorney refuses to endorse check

Checks in payment of the RRB's claim under section 12(o) are often made payable jointly to the RRB, the injured person, and his attorney. If the attorney refuses to endorse and turn over the check unless the RRB pays part of his fee, an effort should be made to have the drawer of the check issue a new check payable to the RRB alone. If this effort fails, the case is to be briefed.

3034.02 Explaining the RRB's position

When explaining the RRB's position with respect to attorney's fees in section 12(o) cases, the adjudicating office may cite the court decisions given in Appendices F and G.

3035 Protecting Lien in Court Cases

3035.01 Introduction

It is the duty of the adjudicating office to make arrangements for protecting the RRB's lien in cases where personal injury suits are based on infirmities for which the RRB has paid benefits. The first consideration is to prevent the money from getting away. Legal intervention in the suit is to be avoided, if possible. However, if legal intervention is necessary, preparation must be made for it. The adjudicating office should do all it can to provide time so that requests for legal intervention may be routed through the Department of Justice. Since information about a suit may reach the RRB at any of the various stages in the proceedings, the things to be done will vary according to the situation at the time when the RRB gets the information.

Note: In this instruction, "legal intervention" does not denote a particular form of legal action, either in the pending case or an independent suit, which the Dept. of Justice or a U. S. Attorney may ultimately determine to be advisable.

3035.02 Notice

If there is an amount recoverable under section 12(o) and if no notice of the RRB's lien has been sent to the defendant in the suit, Form Letter ID-30b should be sent, or delivered by special messenger, immediately.

3035.03 Arrangements for protecting the RRB's lien

Arrangements to protect the RRB's lien should be undertaken as follows:

a. Protection of lien by defense attorney

The attorney for the defendant should be asked whether the RRB's lien will be protected. If he gives assurance that the lien will be protected, he should be advised of the amount of reimbursement to which the RRB may be entitled, unless he already has this information. The attorney's assurance that he will protect the lien may ordinarily be accepted.

b. Protection of lien by plaintiff's attorney

If the attorney for the defendant does not give assurance that the RRB's lien will be protected, an effort should be made to get the plaintiff's attorney to agree to protect the RRB's lien. It is preferable to have him or her agree that the defendant's attorney should deduct the amount due the RRB. Whatever agreement is made, there should be some written record of it. A letter from the plaintiff's attorney is preferred as a record. A letter from the RRB office, confirming the understanding of action to be taken by the attorney, may also serve as a record. Copies of this letter should be sent to the defense attorney, the clerk of the court, or the U.S. Attorney, or all, as appropriate. A written record may be dispensed with where experience with the attorney indicates that is not needed.

c. Attorneys refuse to protect lien

If arrangements cannot readily be made with the attorneys, the clerk of the court may be notified of the RRB's right to reimbursement under section 12(o). With the notice, he should also be furnished a copy of the Form Letter ID-30b which was sent to the defendant. If the clerk of the court gives assurance that the RRB's lien will be protected, further action will not ordinarily be necessary.

d. No arrangements for protection of lien

If no arrangements to protect the RRB's lien can be made, it will be necessary to make preparations for legal intervention.

e. Payment of funds to clerk of court

If there is information that funds on which the RRB has a lien under section 12(o) are to be, or have been, paid to the clerk of a court, the appropriate U.S. Attorney should be notified and the matter reported at once to the chief, division of adjudication, by telephone. If the

adjudicating office has already been given assurance that the RRB's lien will be protected, the U.S. Attorney should be so advised.

3035.04 Preparing for legal intervention

Following are steps to be taken, normally after consultation with the chief, division of adjudication, in preparation for legal intervention:

- a. Find out the status of the court proceedings, including the scheduled or probable date of the next action, such as pre-trial hearing, trial, appeal, hearing on appeal, decision by the court, or payment in satisfaction of judgment.
- b. Take steps to obtain sufficient delay in payment to the plaintiff to enable the RRB to take necessary action:
 1. Find out when payment may be made and whether it will be made to the clerk of the court or to the plaintiff or his representatives. If payment is to be made to the clerk of the court, follow instructions in 3035.03e above.
 2. If payment is to be made to the plaintiff or his representatives, ask the defendant's attorney for delay in payment, if necessary, so that the RRB may have at least seven days to institute proceedings. If delay is obtained in this way, notify the chief, division of adjudication, at once of the circumstances so that legal intervention can be undertaken. If delay cannot be obtained in this way, proceed as provided below.
- c. If payment is to be made by the defendant within seven days and cannot be deferred, and efforts to protect the lien have been unsuccessful, give a report of the facts in the case immediately to the U.S. Attorney. In addition, notify the chief, division of adjudication, at once. The U.S. Attorney should be advised that the headquarters office of the RRB or the Department of Justice will request that he intervene in the case to protect the RRB's lien, and will furnish material on the interpretation of the law which may be required. In some cases the U.S. Attorney may find it necessary to take immediate action before receiving a formal request to intervene.

3035.05 Information to Policy and Systems

In any case where legal intervention may be required or where difficulty is encountered in protecting the RRB's lien, Policy and Systems is to be kept informed of all developments by memorandum or telephone. If there is any question about the relation of the suit to an infirmity resulting in days of sickness, copies of any complaints, answers, judgment and settlement agreements are to

be obtained and furnished. The initial report should include as much of the following as is available, together with any other pertinent information:

- a. claimant's name and account number
- b. name and address of plaintiff's attorney
- c. name of the liable person or company (defendant)
- d. name and address of defendant's attorney
- e. date Notice of Lien was sent, and to whom it was sent
- f. amount of the RRB's lien
- g. name of the Court
- h. case number
- i. date of judgment, if rendered
- j. date payment is to be made, if determined, and to whom
- k. source of information about the judgment
- l. date notice of judgment was given to the regional office
- m. what are the attitudes of the claimant's attorney and the defendant's attorney with regard to recognizing the RRB's lien.

3036 Settlement to Which Section 12(o) and 2(f) May be Applicable

Terms of settlement of an employee's claim against a person or company may provide for payment of an amount allocated as pay for time lost. In such a case, consideration is to be given first to the applicability of section 2(f). If section 2(f) is applicable and the amount recoverable there under is determined, it is to be considered that section 12(o) is applicable to the amount by which the total settlement exceeds the amount of the pay for time lost.

3037 Authority to Make Determinations

SUBS is authorized to make determinations under section 12(o). Cases in which there is a question as to the proper determination are to be submitted to Policy and Systems for advice.

Appendices

Appendix A - Circular RE: Recovery From Protective Payments

Circular Letter No. Ui-C-110 - Recovery Of Benefits From Protective Payments

November 1966

To Unemployment Insurance Contact Officials

Benefits paid to an employee under the Railroad Unemployment Insurance Act may be recoverable under Section 2(f) of that Act if compensation is later found to be payable to him under a protective agreement. This circular explains how the amount recoverable from a protective payment is determined when provisions of the agreement under which the payment is made indicate that it should be considered as compensation for each day in the period covered.

The amount of benefits recoverable from a protective payment of the type described above is the lesser of these amounts:

- a. the amount of benefits paid for days in the period (almost always a month) for which the protective payment is to be made;
- b. the amount of the protective payment for the period.
- c. (Provisions of many protective agreements take into account time worked in a base period as a factor in the extent of protection. Thereby they indicate that the protective payments provided should be considered not as compensation for each day in the period covered but rather as compensation for a lesser time not worked in the period. Payments under the National Job Stabilization Agreement of February 7, 1965 are of this nature. The procedure applicable to those payments is covered in Circular Letter UI-C-106, issued in December 1965.)

Protective payments of the type to which this circular applies are payable under the Washington Job Protection Agreement of May, 1936, the national agreement of September 25, 1964 covering shop craft employees, and, generally, all existing agreements (other than the National Job Stabilization Agreement) that protect employees who are deprived of employment against loss of compensation. An example of such a protective payment--based on compensation earned in, without regard to time worked in, the base period--is the "coordination allowance" payable under the Washington Agreement. It is a monthly allowance equivalent to 60% of the employee's average monthly compensation in the last 12 months of his employment before he was deprived of employment.

The procedure by which recovery cases are identified and the amount of recovery determined is ordinarily as follows:

- a. When an employer finds that, under terms of a protective agreement, compensation is due an employee for a particular period, the employer notifies the Board immediately as to the amount of compensation payable and asks how much is recoverable.
- b. The Board determines the amount recoverable and notifies the employer. The amount recoverable is, as explained above, the amount of benefits for the period (usually a month), or the amount of the protective payment for the period, whichever is less.
- c. The employer withholds the amount recoverable from the protective payment and remits it to the Board.

Some employers have been following this procedure. However, many have been sending Board offices lists of employees and asking for monthly reports of the amounts of unemployment benefits paid to the employees. Thereafter the Board gave such employers monthly reports of the amount of unemployment benefits paid to each employee on the list for the preceding month. If a protective payment was due any employee who had received benefits, the employer sent the Board a remittance equal to the amount of the benefits or the amount of the protective payment, whichever was less.

The Board's experience shows that the vast majority of employees on these lists do not claim benefits under the Railroad Unemployment Insurance Act and, of those who do claim benefits, many do not receive protective payments. Moreover, Board experience shows that the amounts reported on these lists are subject to change and cannot be validly considered as the amounts recoverable under Section 2(f). Therefore, with this circular the Board establishes a procedure whereby the Board will indicate on a list only whether or not benefits have been paid under the Railroad Unemployment Insurance Act without stating any amount. When an employer finds that a protective payment is actually due, the employer will advise the Board as to the amount of such protective payment. The Board will then promptly determine the amount recoverable under Section 2(f) of the Railroad Unemployment Insurance Act and will notify the employer.

The bureau of unemployment and sickness insurance will be glad to answer any questions that employer officials may have about this circular.

s/ Samuel Chmell

Director of Unemployment
and Sickness Insurance

Appendix B - Circular RE: Nat'l Job Stabilization Agreement

Circular Letter No. UI-C-106 - Compensation Paid Under National Job Stabilization Agreement

December 1965

To Unemployment Insurance Contact Officials

I. Railroad Retirement Board's Right to Reimbursement

When a railroad determines that compensation is payable to an employee for time not worked in a period for which the Board has paid unemployment benefits, the benefits may be recoverable under Section 2(f) of the Railroad Unemployment Insurance Act. Railroads are now making many such payments of compensation under the national job stabilization agreement of February 7, 1965. This circular is issued to explain how Section 2(f) is applied in connections with such payments.

Section 2(f) provides, in general, for recovery of unemployment benefits paid to an employee if it is later determined that compensation is due him from his employer for a period covered by the benefit payments, provided the employer has been put on notice concerning the benefit payments. The amount recoverable is the amount of the unemployment benefits paid for the period for which compensation is found to be payable, or the amount of the compensation, whichever is less.

II Procedure for Effecting Reimbursement

This is the general procedure under Section 2(f) in cases involving protective payments made under the national job stabilization agreement:

1. When it appears that a claimant for unemployment benefits may be protected under the agreement, the Board will notify the claimant's employer that unemployment benefits are being paid.
2. If the employer finds that compensation is due the employee for time not worked in a particular month, the employer should check with the Board to see whether benefits are recoverable from the compensation.
3. The Board will advise the employer of the amount recoverable, if any.
4. The employer should remit to the Board the amount determined to be recoverable.

III Determining Amount Recoverable

When protective payments are made under the job stabilization agreement, the Board is entitled to reimbursement for:

The unemployment benefits paid for time not worked covered by the protective payment or the amount of the protective payment for time not worked, whichever is less.

The amount recoverable is derived as follows:

1. Compute the time not worked covered by the protective payment. This is the difference between (1) number of hours for which the employee is protected as established by the average monthly number of hours worked in the 12 month base period* and (2) the number of hours actually worked in the month for which he is to receive payment.
 - * With respect to protected employees other than seasonal employees and employees holding regularly assigned positions on October 1, 1964, Article IV, Section 2 of the agreement provides for a "base period comprised of the last twelve months in which they performed compensated service immediately preceding the date of this Agreement."
2. Compute the amount of the protective payment covering time not worked in the month. This is the total compensation payable to the employee for the month for which the payment is made less the compensation paid for work performed in the month.
3. The amount by which the Board is to be reimbursed is the amount of unemployment benefits paid for the number of protected hours (converted into days) not worked and for which a protective payment is made (as computed in accordance with item 1) or the amount of the protective payment for time not worked (as computed in accordance with item 2) whichever is less.

Example:

Consider an employee who is protected to the extent of 120 hours and \$300 per month on the basis of his service in the base period.

- A. In August he worked 80 hours (10 days) and earned \$200. He received unemployment benefits from the Board for 11 days of unemployment in August at the rate of \$10.20 per day, or \$112.20.

1. Period of time not worked

120 hours minus 80 hours equals 40 hours
 40 hours divided by 8 hours per day equals 5 days* 5 days

When the hours for the month are not evenly divisible by 8, the fractional remainder is treated as a full day. For example, if dividing by 8 produces a result of 3 days and 1 hour, consider that the answer is 4 days. A fraction of a day which is less than 1 hour is disregarded.

2. Amount of protective payment for time not worked \$300 minus \$200 equals \$100 \$100.00
3. Unemployment benefits paid at the rate of \$10.20 for 5 days of unemployment for which the employee receives a protective payment \$51.00
4. Since \$51.00 (item 3) is less than \$100 (item 2) the amount of reimbursement to which the Board is entitled is \$51.00
5. The Board originally paid the employee \$112.20 for 11 days; he retains unemployment benefits of \$61.20 for 6 days

B. In September the employee worked 128 hours and earned \$296.00.

1. Period of time not worked 120 hours minus 128 hours leaves a negative balance. Hence in September there is no period of time not worked for which a protective payment is to be made, and the Board is not entitled to reimbursement for any unemployment benefits. The protective payment of \$4 is made for the days on which the employee actually worked.

IV. Information to be Furnished by Railroads

When an employer is preparing to make a payment under the job stabilization agreement for one or more months the Board will determine the amount recoverable as illustrated in the above section.

The employer will report:

1. Period of time not worked for which a protective payment is payable, and

2. The amount of the protective payment covering the time not worked (shown in item 1 above).

s/ Samuel Chmell

Director of Unemployment
and Sickness Insurance

Appendix A Circular Letters RE: 12(o)

Circular Letter Of Instructions No. UI-C-35 - Questions And Answers On Sections 12(o) And 2(f) Of The Railroad Unemployment Insurance Act, And On Workmen's Compensation Payments

Railroad Retirement Board
Bureau of Employment and Claims

October 17, 1947

This circular is issued in order to answer questions which employers have raised concerning provisions of the Railroad Unemployment Insurance Act under which employers are required to withhold sums payable to employees and to reimburse the Railroad Retirement Board for benefits paid to such employees.

The applicable sections of the Act are Sections 2(f) and 12(o). (Circular Letter of Instructions No. UI-C-34, issued July 9, 1947, also dealt with these sections of the Act.)

Provisions of Section 12(o)

Section 12(o) provides that:

"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained there under, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

What payment by employers may be within the scope of Section 12(o)?

The "sum or damages paid or payable . . . on account of liability . . ." which is referred to in Section 12(o) includes what are ordinarily called payments for damages, settlements of personal injury claims, etc. Payments which are solely for time lost are not included. Workmen's Compensation payments are not included. (This statement may be considered as a correction of any earlier statements to the contrary. See the last three paragraphs of this circular letter.) Railroad relief association payments are not included.

When is an employer required to reimburse the Board under Section 12(o)?

An employer will be required to reimburse the Board in accordance with the provisions of Section 12(o) when all these conditions exist:

- (1) Sickness benefits have been paid to an employee by the Board.
- (2) A "sum or damages" is paid or payable to the employee by the employer on account of a liability based on the infirmity for which the sickness benefits were paid (liability under a health, sickness, accident, or similar insurance policy being excepted.)
- (3) The employer has notice from the Board, before making settlement, that reimbursement may be required.

If the employer has already paid the employee before receiving the letter of notification, or otherwise having actual notice of the Board's rights under Section 12(o), it will not be required to make any payment to the Board. The employer's only responsibility to the Board in such cases is to furnish such information as the Board may require.

When and how will an employer be notified that reimbursement may be required?

The Board will notify an employer that reimbursement may be required under Section 12(o) whenever an employee who has made application or claim for sickness benefits:

- (1) States that the employer has paid or may be responsible for payment of damages, or
- (2) States that his injury resulted from his work.

The notification will be by letter addressed to an appropriate official of the employer. Such letters will be addressed to any official whom the employer designates. In the absence of any designation, they will be addressed to the sickness insurance contact officer for the employer.

When action is required of an employer when he is notified that reimbursement may be required?

No action is required of an employer as a result of receipt of notice that reimbursement may be required until such time, if ever, as payment of a sum or damages is to be made to the employee.

In order to protect its interest, the employer should either (1) withhold payment of any sum, other than workmen's compensation, which has been awarded but has not been paid, until notified by the Board of the amount due the Board; or (2) before making settlement, obtain (by telephone or telegraph if desired) from the regional office information as to the amount of benefits paid to the employee. If the employer contacts the regional office before making settlement, the regional office will withhold payment of any additional benefits to the employee for seven days to give the employer an opportunity to complete the settlement. If, within seven days, the regional office does not receive notice that a settlement has been made, additional payments of benefits may be made to the claimant.

The employer is required to advise the Board of the amount of the settlement. (If the settlement exceeds \$2000, only "in excess of \$2000" need be reported.) The employer is to report also the amount, if any, allocated as pay for time lost, and the period to which pay for time lost is allocated. For the employer's convenience in furnishing this information, Form SI-5 will be sent with the notification. The Board will, in turn, notify the employer of the amount, if any, which is to be paid to the Board as reimbursement for benefits. The employer is then to send to the Board a check for this amount made payable to the Treasurer of the United States.

What will the amount of reimbursement be?

The amount to be paid to the Board as reimbursement will be whichever is the lesser of these:

- (1) The amount of benefits paid on the basis of the infirmity, or
- (2) The amount of the damages.

Provisions of Section 2(f)

Section 2(f) provides, in part, that:

"If (i) benefits are paid to any employee with respect to unemployment or sickness in any registration period, and it is later determined that remuneration is payable to such employee with respect to any period which includes days in such registration period which had been determined to be days of unemployment or sickness, and (ii) the person or company from which such remuneration is payable has, before payment thereof, notice of the payment of benefits upon the basis of days of unemployment or sickness included in such period, the

remuneration so payable shall not be reduced by reason of such benefits but the remuneration so payable to the extent to which benefits were paid upon the basis of days which had been determined to be days of unemployment or sickness and which are included in the period for which such remuneration is payable, shall be held to be a special fund in trust for the Board. The amount of such special fund shall be paid to the. . ."

When will payments by an employer to an employee be affected by provisions of Section 2(f)?

Payments by an employer to an employee may come under provisions of Section 2(f) only if the employer has notice to that effect from the Board. The notice will ordinarily be in the form of a letter from the Board. In the absence of any such notice, Section 2(f) has no effect.

When will an employer be notified that Section 2(f) may be applicable?

The Board will notify an employer that Section 2(f) may be applicable when there is information that an employee is claiming or may receive remuneration from the employer for days for which unemployment or sickness benefits have been found payable.

What is meant by "remuneration" in Section 2(f)?

Upon receipt of notice that Section 2(f) may be applicable, an employer is required to take action if and when remuneration is found to be payable. In such case, the employer is required to:

- (1) notify the Board of the amount of remuneration payable and the days for which it is payable; and
- (2) withhold payment of remuneration until further advice is received from the Board.

What happens after the Board has been advised that remuneration is payable?

When the Board is advised that remuneration is payable for a day or days for which benefits have been paid, the Board will determine the amount which is recoverable under Section 2(f) and will notify the employer accordingly. The employer will be required to deduct that amount from the amount payable to the employee and pay it to the Board (in the form of a check made payable to the Treasurer of the United States).

How does the Board compute the amount to be paid to it?

The amount determined by the Board to be payable to it under the provisions of Section 2(f) will be whichever is the lesser of these:

- (1) The amount of benefits paid for days for which remuneration is found payable.
- (2) The amount of remuneration found payable for days for which benefits were paid.

What is the relation between workman's compensation and benefits under the Act?

Certain workmen's compensation payments are considered social insurance payments. If workmen's compensation is paid to an employee for permanent total or temporary total disability, the payments are made "with respect to" definite period and are, consequently, within the scope of Section 4(a-1)(ii) of the Act. The effect of that section is that such an employee receives only the amount by which his benefits for a period under the Act exceed his workmen's compensation for the period.

What information is needed by the Board?

In order to determine the amount of benefits under the Act, which may be payable to an employee who is receiving workmen's compensation payments, it is necessary to have information as to whether such payments are for permanent total or temporary total disability, and, if so, the amount and duration of the payments. Employers can aid us materially if they will furnish such information promptly upon request.

Must the employer reimburse the Board from workmen's compensation payments?

No. If, after benefits under the Act have been paid to an employee, it is found that he has received workmen's compensation payments for days with respect to which the benefits were paid, recovery from the employee will be undertaken. Neither the employer, nor the insurance company concerned, who has made, or may be making, the workmen's compensation payments, will be requested to reimburse the Board in connection with such payments.

Action to be taken in judgment cases

If a judgment is paid by the employer into a court, it may become necessary for the Board to intervene and assert its lien. It is expected that cases of this kind will be few in number. Whenever such a payment is to be made immediate notice should be sent to the appropriate regional office.

Distribution of this circular

Two copies of this circular are being sent to each sickness contact officer. Additional copies will be furnished upon request.

Director of Employment and Claims

Approved:

Chief Executive Officer

Circular Letter To Sickness Contact Officials - Supplement to Circular Letter No. UI-C-35 - Information About Past Settlements

Railroad Retirement Board
Bureau of Employment and Claims

December 19, 1947

This circular outlines what the Board does when a claim is made for sickness benefits on the basis of an injury for which the claimant has received a settlement.

If an employer has made a settlement even before the effective date of the Act and thereafter receives notice that sickness benefits may be paid, the employer is not required to reimburse the Board; however in such case the Board needs information regarding the amount of settlement since it may pay only that portion of the benefits which exceed the amount of settlement.

At the time the application for sickness benefits is received, the Board generally does not have any information as to whether a settlement has or has not been made. In his application for sickness benefits, the applicant is required to state whether some person may be responsible for the payment of damages. When an applicant states that some person or company may be responsible, the Board sends appropriate notice to such person or company.

If a settlement has been made prior to the date the notice is received, the person or company is not required to pay any amount to the Board. However, the Board cannot pay any sickness benefits to the claimant until the sickness benefits payable for his claims exceed the amount paid in settlement for his personal injury. At such time, the Board may pay only that amount which exceeds the amount of the settlement.

Accordingly, the Board needs prompt information as to the amount of the settlements made in these cases in order to prevent payment of sickness benefits to which the claimants are not entitled. In any case where you are asked to furnish the amount of settlement, it will be satisfactory when such settlement is in excess of \$2,000 to report, "in excess of \$2,000".

/s/ H. L. Carter
Director of Employment and Claims

Approved:

/a/ Robert H. LaMotte
Chief Executive Officer

**Circular Letter No. UI-C-35 - Withholding For Board When All Or Part Of
Damage Settlement Is To Reimburse Employee For Expenses**

United States of America
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago 11, Illinois

Bureau of Employment and Claims

December 3, 1948

Supplement No. 2

To Sickness Insurance Contact Officials

This circular supplements information previously supplied regarding the provisions of Section 12(o) of the Railroad Unemployment Insurance Act.

It has recently been held that Section 12(o) applies only to the net amount of a settlement after deduction of the amount, if any, of expenses incurred by a claimant in connection with his injury. (Such expenses would include costs of hospital care, doctor's fees, and attorney's fees.)

For employers, the practical effects of this are as follows:

1. When the amount of a claimant's expenses is equal to or more than the amount of the settlement, no report to the Board of the settlement is required even though the employer may have been notified, in accordance with Section 12(o), that the claimant had applied for sickness benefits. In cases of this type, the Board will not be entitled to any reimbursement.

Example: Claimant's medical expenses - \$585. Settlement - \$500. No report to the Board required.

2. When the amount of a claimant's expenses is less than the amount of the settlement, Section 12(o) is applicable only to the amount of the difference. That is, it is applicable only to the amount of the settlement less the amount of the expenses. In cases of this type, the employer should inform the Board of (a) the amount of the claimant's expenses and (b) the net amount of the settlement after deduction of such expenses.

Example: Claimant's medical expenses- \$500. Settlement - \$2000. Sickness Benefits paid - \$650. Information to be furnished to the Board: (a) claimant's expenses - \$500; (b) net amount of settlement - \$1500. Amount to be withheld from the settlement for reimbursement to the Board - \$650.

Example: Claimant's medical expenses - \$1500. Settlement - \$2000. Sickness Benefits paid - \$650. Information to be furnished to the Board: (a) claimant's expenses - \$1500; (b) net amount of settlement - \$500. Amount to be withheld from the settlement for reimbursement to the Board - \$500.

3. When the net amount of a settlement is more than \$2000, the employer may report such net amount as being "in excess of \$2000", instead of reporting the exact amount.

Example: Claimant's medical expenses - \$450. Settlement - \$2600. Information to be furnished to the Board: (a) claimant's expenses - \$450; (b) net amount of settlement - "in excess of \$2000."

What has been said above relates only to expenses for which the claimant has made, or is to make, payment. It does not apply to expenses borne directly by an employer. Any amount which an employer pays directly to a third party (such as a doctor or hospital) for care of an employee is not to be reported to the Board and is not to be deducted from the total amount of the settlement.

Example: The employer directly paid claimant's doctor and hospital bills amounting to \$235. Settlement - \$1000. Amount of settlement to be reported to the Board - \$1000. No report of the \$235 paid directly to be made.

Additional copies of this circular will be furnished upon request.

/s/H.L.Carter
Bureau of Employment and Claims

Circular Letter No. UI-C-35 - Disclosure Of Information In Personal Injury Cases

United States of America
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago 11, Illinois

Bureau of Employment and Claims

December 3, 1949

Supplement No. 3

To Sickness Insurance Contact Officials

The Board sometimes receives requests for information from employers in personal injury cases which cannot be released because of prohibitions set by the Railroad Unemployment Insurance Act on the release of information.

Section 12(d) contains a general prohibition against disclosure of information but permits disclosure when it would be in the claimant's interest. Section 12(n) specifically prohibits the disclosure of information furnished by a doctor except that such information may be disclosed in a court proceeding relating to a claim for benefits under the Act by the employee.

In view of these provisions of the Act, the Board cannot release information in a personal injury case beyond what is needed to protect a lien in accordance with the provisions of Section 12(o) of the Act. Section 12(o) relates to reimbursement of the Board when a settlement is made with an employee to whom the Board has paid sickness benefits. The Board must, of course, advise the employer or other liable party of the amount of reimbursement due. In the ordinary case, the Board can disclose no more than this. In any event, the Board will not be able to disclose any of the medical information which may be in file.

Two copies of this circular are being sent to each sickness contact officer. Additional copies will be furnished upon request.

/s/ H. L. Carter

Director of Employment and Claims

Circular Letter No. UI-C-35 - Notifying Board When Personal Injury Case Goes To Court

United States of America
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago 11, Illinois

Bureau of Employment and Claims

October 24, 1950

Supplement No. 4

To Sickness Insurance Contact Officials and Claims Attorneys

This circular has to do with protecting the Board's lien under Section 12(o).

In a personal injury case where appeal is taken from a judgment or where efforts to satisfy a judgment are met with refusal by either the plaintiff or the court to recognize the Board's lien, the railroad's counsel should wire the Board's General

Counsel, Myles F. Gibbons, at 844 Rush Street, Chicago 11, Illinois or call him at Whitehall 4-5500.

The regional office from which the employer obtained the lien information should also be notified.

Additional copies of this circular should be requisitioned for claims attorneys and those who may represent the employer in personal injury suits.

/s/ H. L. Carter

Director of Employment and Claims

Circular Letter No. UI-C-35 - Letting Board Know Amount Of Damage

United States of America
RAILROAD RETIREMENT BOARD
844 Rush Street
Chicago 11, Illinois

Bureau of Unemployment and Sickness Insurance

Released to Employers 6-22-55

Supplement No. 5

SETTLEMENT

To Sickness Insurance Contact Officials

Circular Letter UI-C-35 and its Supplement No. 1 stated that it would be satisfactory to report a damage settlement amounting to more than \$2000 as "in excess of \$2000". This is no longer adequate as benefit rates under the recent amendments to the Railroad Unemployment Insurance Act will result in payment of more than \$2000 in benefits based on injuries in a number of cases.

Accordingly, the Board needs to know the exact amount of settlements up to \$3000. If a settlement is in excess of \$3000, it will be satisfactory to report it as "in excess of \$3000." Form SI-5 is being revised accordingly.

Additional copies of this circular will be furnished on request.

/a/ H. L. Carter

Director of Unemployment and Sickness Insurance

Appendix B - Court Decision: Lewis v. Railroad Retirement Board

Alabama Supreme Court Decision

(Lewis v. Railroad Retirement Board, 54 So. 2d 777 (Ala. 1951) cert. den. 343 U.S. 919 (1952))

Following is a copy of decision of the Alabama Supreme Court which affirms the decision of a lower court directing payment to the Railroad Retirement Board of an amount due under Section 12(o) of the Railroad Unemployment Insurance Act.

L-51-493

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT
 THE SUPREME COURT OF ALABAMA
 OCTOBER TERM, 1951-52
 6 Div. 234
 David D. Lewis etc., et al.,
 v.
 Railroad Retirement Board et al.,
 Appeal from Jefferson Circuit Court
 in Equity.
 STAKELY, JUSTICE

This is an interpleader suit in equity in which the lower court entered a final decree awarding the fund in controversy of \$1,213.25, which had been paid into the registry of the court, to the claimant, respondent Railroad Retirement Board, and denying in whole or in part to the claimant, complainant David D. Lewis and the intervening law firm of Jackson, Rives & Pettus, any right to such fund. The claimant, complainant David D. Lewis, and the intervenors Jackson, Rives & Pettus have appealed to this court from the decree. The Railroad Retirement Board is an independent agency in the executive branch of the Government of the United States. -- 45 U.S.C.A. S 228(j).

The complainant was injured on or about February 25, 1948. Complainant filed his application for sickness benefits under the Railroad Unemployment Insurance Act with the Regional Office of the Railroad Retirement Board on March 3, 1948. The Railroad Retirement Board began payments under the provisions of the act to the complainant on account of this injury on February 25, 1948, the day following the injury. These payments continued with a brief interruption provided by the act through September, 1949. On August 13, 1948 the Railroad Retirement Board sent notice, as provided by the act, to the Comptroller of the Louisville & Nashville Railroad Company. This notice was received on or about the 17th of August, 1948.

The firm of Jackson, Rives & Pettus, Intervenor, was first contacted by the complainant with reference to employment as his attorneys in his civil action against the Louisville & Nashville Railroad Company on January 20, 1949. Intervenor filed suit in behalf of complainant against the Louisville & Nashville Railroad Company on January 21, 1949, and the summons and complaint in the suit were served on January 27, 1949. This suit was for personal injuries and was brought under the Federal Employers' Liability Act. On October 3, 1949 a consent judgment in the aforesaid suit -- Case Number 18,372-X--in the sum of \$37,500.00 was entered in favor of the complainant and against the Louisville and Nashville Railroad Company in the circuit Court for the 10th Judicial Circuit of Alabama. On October 8, 1949 the Louisville & Nashville Railroad Company requested information from the Railroad Retirement Board concerning the amount of benefits paid by the Board to the complainant, referring to the Board's letter of August 13, 1948. On October 13, 1949 the Board advised the Louisville & Nashville Railroad Company that the correct amount paid was \$1,213.25. It is without dispute that this is the correct amount which was paid.

The Louisville & Nashville Railroad Company paid to the Clerk of the Circuit Court for the 10th Judicial Circuit of Alabama the sum of \$36,286.75 subsequent to the entry of the aforesaid judgment. The sum of \$1,213.25 was withheld because of the claim of the Railroad Retirement Board.

Subsequent thereto the intervenors distributed the amount received by them from the clerk of the court by deducting and paying to the firm \$611.67 for expenses, by withholding as a fee the sum of \$8,918.77 and paying over the balance of the proceeds to the complainant. This was done with knowledge that the Board claimed \$1,213.25 of the \$37,500.00 judgment.

- I. It is without dispute that the complainant employed intervenors on January 20, 1949 as his attorneys to represent him in prosecuting Liability Act against the L. & N. Railroad Company with the agreement that the attorneys' fee of intervenors would be a contingent fee in an amount equal to 24% of the amount of recovery after deduction of expenses of prosecuting the claim. This suit was filed as aforesaid and without dispute the intervenors prepared the case for trial and tried the case. While the case was in progress and shortly before submission of the case to the jury, the consent judgment in the amount of \$37,500.00 was entered by the court, as aforesaid. Without dispute the fee as agreed upon was conceded to be a reasonable fee and the services of the attorneys in bringing and prosecuting the suit were well and properly performed.

No attorneys' fee has been paid to the intervenors on the \$1,213.25, which was withheld from payment by the L. & N. R.R. Co. and which was later paid into the registry of the court in this interpleader suit. In addition to the claim of the intervenors for a fee from the fund of \$1,213.25, the intervenors also claim an additional fee for filing the bill of interpleader on behalf of complainant in the amount of \$100.00.

In the letter of August 13, 1948 from the respondent, the Railroad Retirement Board, to the Louisville & Nashville Railroad Company the statute under which the respondent claimed its lien is set out in a form attached to the letter. This statute is Section 12(o) of the Railroad Unemployment Insurance Act, 45 U.S.C.A., 362(o) and reads as follows:

"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for such days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

It is the position of the appellants that the lien of the respondent, the Railroad Retirement Board, if any, is subordinate to the lien of the intervenors for attorneys' fees for services performed in obtaining judgment in the suit brought by the complainant against the Louisville & Nashville Railroad Company. The lien of intervenors as attorneys arises pursuant to 64 (2), Title 46, Code of 1940, which reads as follows:

"2. Upon suits, judgments, and decrees for money, they shall have a lien superior to all liens but tax liens, and no person shall be at liberty to satisfy said suit, judgment or decree, until the lien or claim of the attorney for his fee is fully satisfied; and attorneys at law shall have the same right and power over said suits, judgments, and decrees, to enforce their liens, as their clients had or may have for the amount due thereon to them."

Subsection 4 of the aforesaid section of the code is as follows:

"4. The lien in the event of suit, provided in paragraphs two and three of this section, shall not attach until the service upon the defendant or respondent of summons, writ or other process * * * *."

It clearly appears from the statute that the lien of the intervenors as attorneys could not arise until summons and complaint were served. This service was made on January 27, 1949. The notice of the respondent Railroad Retirement Board to the Louisville & Nashville Railroad Company was given on August 13, 1948 and was received not later than the other. It is apparent that the lien of the Railroad Retirement Board antedates that of the intervenors by several months because the lien of the Railroad

Retirement Board under the statute arises "Upon notice to the person against whom such right or claim exists * * *." -- 45 U.S.C.A. 362(o). Since the lien of the Railroad Retirement Board antedates the lien of the intervenors, it is superior to it.

In Adams v. Alabama Lime and Stone Corp., 221 Ala. 10, 127 So. 544, this court said:

"- - it has been consistently and often declared that the attorneys' lien is subordinate to all set-offs held by the judgment debtor as the time of its rendition. * * *

"We do not think this settled rule, declaring in effect that the attorneys' lien on a judgment rises no higher than the judgment itself at the time of its rendition, has been changed by our statute, ***. It could hardly be supposed the attorney's lien on property is made to displace existing liens or equities therein. ***

"It is often said with force this view destroys, wipes out the judgment, the subject matter on which the lien is declared; that it is sound policy to protect the attorney whose professional labors have brought the judgment into being. Obviously our statutes aim to protect attorneys as to the effects of their clients involved in the litigation. There is likewise strong reason for saying the rights of the attorney shielded to those of his client."

In the case of Grace v. Solomon, 241 Ala. 452, 3 So. 2d 3 this court said:

"This lien here provided (attorney's lien) cannot be extended beyond the fair interment of the statute, the effect of which, in agreement with the common law, is to place the attorney in the position of an equitable assignee of the judgment obtained for his client."

From the foregoing authorities it is clear that the lien of the intervenors as attorneys is limited to the equity of their client in the judgment. It cannot under the statute extend to an equity in the judgment which is owned by another and which is superior to that of the complainant. Under the federal statute the Railroad Retirement Board clearly had a lien to the extent of the payments made by it superior to the rights of the lien of the intervenors, attorneys, must be considered as subordinate to the lien of the respondent Railroad Retirement Board.

It is contended that the notice relied upon the respondent Railroad Retirement Board in its letter of August 13, 1948 to the Louisville & Nashville Railroad Company fails to meet the requirements in claiming a lien because it fails to state any amount for which a lien is claimed and for which reimbursement should be made. There is no merit in this contention. The statute provides that the Board's right to reimbursement

is determined by the "extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity". The statute provides for notice to the persons against whom the claim of the injured person exists and does not require any notice of the amount. Benefits paid under this statute are not lump sum benefits but are paid every two weeks upon application of the person entitled thereto. In the present case complainant upon his application received benefits beginning February 26, 1948 and continued with a brief interruption until September 1949. A total of \$1,213.25 was paid. It would have been impossible at any time prior to the last payment for the respondent to have advised the Louisville & Nashville Railroad Company of the amount of its lien. To require it to wait would cause it to fail to assert its lien and would be to impose a condition not required by the act. We think the notice was in all respects sufficient to create a lien provided for in the statute and as pointed out, it contains in an attachment to the letter the provisions of the act relating to the Board's lien in verbatim. We think the notice served to advise the Louisville & Nashville Railroad Company might later owe to the complainant. The notice put the Louisville & Nashville Railroad Company on notice of the right of the Board and provided the railroad with the means of ascertaining the amount claimed upon to settle complainant's claim against it. The railroad was placed in the position where it had the duty to make inquiry and was charged with all that inquiry would reveal. -- Figh v. Taber, 203 Ala. 253, 82 So. 495; Morgan Plan Co. v. Accounts Supervision Co., 34 Ala. App. 457, 41 So. 2d 424, cert. den. 252 Ala. 473, 41 So. 2d 428.

- II. Citing Kimbrough v. Dickinson, 251 Ala. 677, 39 So. 2d 241, the position is taken by the appellant that the intervenors are entitled to be allowed a fee out of the fund paid into the registry of the court on the principle that the complainant has maintained a successful suit for the creation, preservation and protection of a common fund and has brought into court a fund in which another may share. The principle set forth in the foregoing authority is not applicable here. That case involved a trust fund of an estate. The interest of the person who had borne the burden and expense of litigation was not antagonistic to those who benefitted by the litigation, all being heirs and next of kin of a decedent. In the foregoing authority it was said:

"It will be observed that the co-complainants, in suits of this nature, all have a similar interest in the subject matter of litigation--a common, and not an antagonistic interest in the trust fund, which has been brought under the control of the court. The necessary expenses of the original complainant incurred in litigation may very well, under these circumstances, be made payable out of the common fund. * * *"

In the case of Lewis v. Wilkinson, 237 Ala. 197, 186 So. 150, the court said:

"Attorney's fees will be charged to the interest in truth of fact represented. The fact that the representation incidentally resulted in benefit to the other cestuis squee trustent did not authorize charging them with attorney's fees."

In Wilkinson v. McCall, 247 Ala. 225, 23 So. 2d 577, this court said:

"Services for the common benefit of the parties mean services that are of benefit to the common estate, or in other words services rendered in a matter in which the trust as a trust is interested and not serviced in behalf of the individual interests of the parties to the cause." See Bidwell v. Johnson, 191 Ala. 195, 67 So. 985; Coker v. Coker, 208 Ala. 239, 94 So. 308.

In the foregoing authorities the court was considering the right of the attorney in the administration of a trust and in most of these cases such right in the light of 63, Title 46, Code of 1940. See Penney et al. v. Pritchard & McCall, _____ Ala. _____, 49 So. 2d 782. But even though no trust be involved, the right to charge a fund with costs and expenses depends upon whether the costs and expenses were incurred in the promotion of the interest of those eventually found to be entitled to the fund. 14 Am. Jur. 48.

The suit brought by complainant against the Louisville & Nashville Railroad Company was not in any sense a class suit or brought for the benefit of others. The complainant sought only to establish his own rights. The incidental benefit resulting to the Railroad Retirement Board is not a basis for charging the Railroad Retirement Board with the creation of a fund for its benefit.

Furthermore the action in which the judgment was procured was an action in a law court and not in equity. It was not filed in aid of or in connection with an equity proceeding as for example a receivership. In an action at law attorney's fees are not ordinarily taxable as costs., -- 20 C.J.S. p. 457. The interpleader suit was instituted by complainant to protect himself against conflicting claims, 48 C.J.S. p. 38 and not to create or protect a common fund from waste or destruction. -- Strong v. Taylor, 82 Ala. 213, 2 So. 760; Penny v. Pritchard & McCall, *supra*.

The services rendered by the attorney in the suit in which the judgment against the railroad company was procured were services rendered in behalf of a client, the complainant in the cause, and his individual interest under a contract made only between complainant and intervenors. It was not a service rendered in behalf of the Railroad Retirement Board, although it resulted incidentally in benefit to the Railroad Retirement Board. As a result of the views which we have here expressed, the allowance of a fee cannot be sustained on a theory of services rendered for the common benefit of all the parties.

- III. As to the allowance of an attorney's fee to be paid to the attorneys for instituting the interpleader proceedings out of the fund deposited, this was a matter which rested in the discretion of the court. There is nothing to show that this discretion was abused in failing to make the allowance, especially since the complainant and the intervenor were adjudged to have no interest in the fund. -- Jennings v. Jennings, 250 Ala. 130, 33 So. 2d 251.

There was no error in directing payment of the fund deposited in court to the Railroad Retirement Board. The decree of the lower court must be affirmed.

Affirmed.

Livingston, C. J., Brown and Lawson, J. J., concur.

Appendix C - Court Decision: U.S. v. Luquire Funeral Chapel

Decision By The United States Court Of Appeals

FOR THE FIFTH CIRCUIT

(U.S. v. Luquire Funeral Chapel, 199 Fed. (2d) 429 (CA 5, 1952))

The following is a copy of a decision of the United States Court of Appeals for the Fifth Circuit. The Court held that a notice addressed to "Luquire Ambulance Company" when it should have been addressed to "Luquire Funeral Chapel, Inc." was a legal and sufficient notice under Section 12(o), in that it reached the party for whom it was intended and fulfilled every purpose of such a notice. The Court also held that the Board does not have to prove that a compromise or settlement was based upon actual legal liability for the employee's injuries.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13763

UNITED STATES OF AMERICA,
Appellant,
versus
LUQUIRE FUNERAL CHAPEL, AND
JOHNS FUNERAL CHAPEL, INC.,
Appellees.

(October 31, 1952)

Before BORAH, STRUM, and RIVES, Circuit Judges.

RIVES, Circuit Judge: The district court held that a notice addressed to "Luquire Ambulance Company" when it should have been addressed to "Luquire Funeral Chapel, Inc." was insufficient, and hence that no lien was created within the purview of Section 12(o) of the Railroad Unemployment Insurance Act, 45 U.S.C.A. 362(o), set out in the margin.^{1/} The appellee^{2/} insists that the judgment in its favor should be affirmed on account of the claimed insufficiency of the notice, and, if not, then because there was no proof "of any liability" on the part of the appellee for the sickness of the railroad employee.

The case was tried upon an agreed statement of facts. The railroad employee, George R. Sewell, was injured in a motorcycle accident. An ambulance of Luquire Funeral Chapel, Inc., while transporting him to a hospital, collided with an automobile. Luquire Funeral Chapel, have been sustained by Sewell as the result of said collision, but ultimately agreed to a settlement pursuant to which judgment by consent in the State Court was entered in favor of Sewell and against the Luquire Funeral Chapel, Inc. in the sum of \$5,000.00 and costs, which judgment has been paid and satisfied.

Meanwhile, Sewell had filed claims with the Railroad Retirement Board for sickness benefits stating that his injuries were sustained in a collision between an automobile and an ambulance of "Luquire Ambulance Company, Birmingham, Alabama." Over a period of months, the Railroad Retirement Board paid to him sickness benefits on said claims in the total amount of \$985.00. The Board mailed a letter addressed to right of reimbursement under the provisions of Section 12(o), *supra*. There was no Luquire Ambulance Company, but the correct corporate title was Luquire Funeral Chapel, Inc. The letter was received by appellee's President and turned over by him to its attorney, who placed it in the legal files concerning the suit which Sewell had brought against the appellee. Notwithstanding that letter, Sewell's claim against the appellee was subsequently compromised and settled without recognition of the Board's right or reimbursement.

Under Section 12(o), the lien arises "upon notice" to the party alleged to be responsible for the injury. Appellee insists that since the notice is a condition precedent to the creation of the lien, the Board had no rights until the giving of the notice in precisely the manner required. It appears to us that no particular form of notice is prescribed, and that actual notice is sufficient. Luquire Funeral Chapel, Inc. was not misled because the notice was wrongly addressed to Luquire Ambulance Company. It reached the appellee for whom it was intended and fulfilled very purpose of, and in effect was, a legal and sufficient notice.^{3/} We would not underestimate the help rendered by technical accuracy in notices and proceedings toward attaining the goal of justice under law, but it is seldom that a poor vehicle should compel abandonment of the journey.

In support of its further defense, appellee points out that the Board is entitled to reimbursement from any sum or damages paid "on account of any liability" based upon the infirmity for sickness resulting from which the benefits are paid, and that

there was no showing in this case of any such liability on the part of the appellee. The appellee denied liability and insists that "it bought its peace and procured a release by the entry of a consent judgment". Section 12(o), *supra*, explicitly provides that the Board's right of reimbursement extends to any sum or damages paid through "compromise" or "settlement". It refers several times in the alternative to the employee's "right or claim", and in one instance follows those words with the alternative expression "exists or is asserted". The Railroad Unemployment Insurance Act contains no express provision for the Board's enforcement of the employee's right or claim against an alleged tortfeasor in the event the employee himself elects not to pursue the same, and that is probably for the reason that, without the employee's cooperation, such a provision would usually prove to be impractical or unenforceable. It is true also, we think that the Board's right to reimbursement in cases of compromise or settlement would generally be unenforceable, if the Board had to prove that the compromise or settlement was based upon actual legal liability for the employee's injuries. An employee who asserts a colorable or false claim against an alleged tortfeasor cannot expect more favorable treatment from the Board than one whose right is based upon legal liability. In either case, the obstacle to a compromise or settlement is a necessary consequence of the employee's acceptance of benefits from the Board. The result contemplated by the Act is that the Board shall ultimately respond in benefits to the employee only to the extent that damages are not collected from the alleged tortfeasor.

The judgment is therefore reversed with instructions to enter judgment for the appellant, plaintiff below.

REVERSED.

A True Copy;
Teste

Clerk of the United States Court of Appeals for the Fifth Circuit

1/ "Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of amount to which the Board is entitled by way or reimbursement."

- 2/ Luquire Funeral Chapel, Inc. and Johns Funeral Chapel, Inc. had merged, and we therefore refer to the appellees as a single party.
- 3/ No case on this point has been decided under this Section, but diligent counsel have collected many cases as to the sufficiency of notice under other statutes. Closely analogous are cases of mistakes in the names of persons to whom writs of garnishment are addressed; e.g. Johnson, et al. vs. McDonald et al., 73 S.W. 2d 128; Arkansas Rice Growers' Cooperative Ass'n vs. Minneapolis-Moline Power Implement Co., 65 S.W. 2d 913; Aly et al. vs. Texas Publication House, 5 W.S. 2d 235; Bailie Furniture Co. vs. Hotel Richmond Inc., 57 Ga. App. 281; Eslinger vs. Herndon, 158 Ga. 823. The cases cited by the parties include, for the appellant; Internation M. & T. Co. vs. Kensington Heights Homes Co., 183 N.W. 793; Whiteselle vs. Texas Loan Agency, 27 S.W. 309; Coffee vs. United States, 157 F. 2d 968; United States vs. Perry, 115 F. 2d 724; The Maine, 28 F. Supp. 578, 580, 581, aff'd sub nom. Standard Wholesale P. & A. Works vs. Travelers Ins. Co., 107 F. 2d 373 (C.A. 4, 1939); and for the appellee; Fleisher Co. vs. United States, 311 U.S. 15; United States vs. Beaver Run Coal Co., 99 F 2d 610; Barton vs. City of Waterloo, 255 N.W. 700; in Re Lounsberry, 226 N.W. 140.

Appendix D - Court Decision: U.S. v. Hall

L-53-490

U.S. v. Hall,

116 F. Supp. 47 (W. D. Wis., 1953)

BOARD'S LIEN AGAINST PERSONAL INJURY AWARD

United States of America, Plaintiff v. Norman C. Hall and Wisconsin Telephone Company, a Wisconsin corporation, Defendants.

In the United States District Court for the Western District of Wisconsin. Civil No. 492, July 21, 1953.

Where notice of a lien against an award granted in a personal injury settlement was properly given under Section 12(o) of the Railroad Unemployment Insurance Act which provides for recovery of the amount of benefits paid for sickness or injury in such cases, the Board is entitled to reimbursement. The defendant company's attempt to nullify the provisions of the Act and the lien thereunder, by payment of the award before notice to the Board of such payment, was futile and it could not avoid its liability on the lien by such procedure.

Frank L. Nikolay, U.S. Attorney, Madison, Wisconsin, for the plaintiff.

Messrs. Crawford, Crawford, and Cirilli, Attorneys, Superior, Wisconsin for the defendant.

STONE, J. -- This case was considered by the Court on briefs submitted by the plaintiff and the defendant Wisconsin Telephone Company on their respective motions for summary judgment, the action having previously been dismissed as to the defendant Norman C. Hall. The Court hereby makes the following findings of fact and conclusions of Law:

Findings of Fact

1. The Railroad Retirement Board, hereinafter referred to as the Board, is an independent agency in the Executive Branch of the Government of the United States.
2. The defendant Norman C. Hall resides at 1212 North 57th Avenue West, Duluth, Minnesota.
3. The defendant Wisconsin Telephone Company, hereinafter referred to as the Telephone Company, was on August 17, 1948, and at all times subsequent thereto has been, a corporation duly organized and existing under the laws of the State of Wisconsin and engaged in the business of furnishing telephone service.
4. The Board is charged with the administration of the Railroad Unemployment Insurance Act (45 U.S.C., 1946 ed., ³ 351-367), hereinafter referred to as the Act.
5. Norman C. Hall was injured on August 17, 1948, through the alleged negligence of the Telephone Company, and on the basis of that injury benefits under the Act, in the total amount of \$650.00, were paid him by the Treasurer of the United States, upon certification by the Board, during the period from August 17, 1948, through February 28, 1949.
6. The said payments were made under the following provisions of Section 12(o) of the Act, 45 U.S.C., 1946 ed., ³ 362(o):

"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay day damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any

- judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way or reimbursement."
7. Notice of the Board's rights under the said provisions of Section 12(o) was sent the Telephone Company on August 27, 1948.
 8. At some time during May, 1949, the Telephone Company's attorneys agreed with Norman C. Hall's attorneys to pay Mr. Hall \$5,000.00 in settlement of his claim against the Telephone Company.
 9. At some time during May 1949, the Telephone Company's attorneys advised Mr. Hall's attorneys that "it will be necessary that we pay the sum of \$650.00 to the Railroad Retirement Board in order to extinguish the lien which is given to them under the Federal statutes."
 10. On May 25, 1949, the Telephone Company's attorneys requested the Board's Minneapolis regional office to furnish them a letter stating the amount due the Board by way of reimbursement, and asked to be advised to whom the check should be made payable.
 11. On May 26, 1949, the Telephone Company's attorneys were advised by the regional office that the amount due the Board was \$650.00 and that payment should be made to the Treasury of the United States.
 12. Mr. Hall's attorneys subsequently advised the Telephone Company's attorneys that he "would not accept the settlement unless the Railroad Retirement Board's claim of \$650.00 was paid in addition to the settlement already agreed on."
 13. The Telephone Company's attorneys thereupon, without notice to the Board, applied to the Superior Court of Douglas County, Wisconsin, for approval of a \$5,000.00 settlement between the Telephone Company and Norman C. Hall.
 14. Pursuant to the said application, judgment for \$5,000.00 was entered in Mr. Hall's favor on June 23, 1949, no provision being made for the protection of the Board's claim.
 15. The amount of the judgment was thereupon paid by the Telephone Company to the Clerk of the Court, by whom it was disbursed to Mr. Hall.
 16. Subsequently, on or about June 26 1949, the Telephone Company's attorneys advised the Board's Minneapolis regional office of the entry and payment of the judgment.

17. The Board had no prior notice of the proceedings in the Superior Court, and has never been reimbursed for any of the benefits paid Norman C. Hall as aforesaid.
18. The Telephone Company has rejected all demands that it reimburse the United States of America in the amount of the Board's claim.

Conclusions of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the Court concludes that:

1. The Court has jurisdiction of this proceeding under the provisions of 28 U.S.C., 1946 ed., Supp. V, ³ 1345.
2. The indebtedness of the defendant Wisconsin Telephone Company to Norman C. Hall was at all times after the notice to it on August 27, 1948, subject to the statutory lien of the Railroad Retirement Board under the provisions of Section 12(o) of the Railroad Unemployment Insurance Act (45 U.S.C., 1946 ed., ³ 362(o)).
3. The defendant Telephone Company's attempt to nullify the provisions of the Federal Act, and the Board's lien thereunder, by entry and payment of the judgment, without notice to the Board until after the amount of the judgment had been paid to Norman C. Hall, was futile and of no effect, and the Telephone Company could not by this procedure avoid its liability on the said lien.
4. The defendant Telephone Company is indebted to the plaintiff in the amount of \$650.00, with interest from June 23, 1949.
5. The plaintiff is entitled to summary judgment against the defendant Wisconsin Telephone Company for \$650.00, with interest from June 23, 1949, and costs, and the Telephone Company's motion for summary judgment must be denied.

Memorandum Opinion

The plaintiff has moved for summary judgment against the defendant Wisconsin Telephone Company, for the sum of Six Hundred Fifty Dollars (\$650.00), plus interest, which represents the benefit payments by the alleged negligence of the defendant. The action was dismissed against the defendant, Norman C. Hall. The Railroad Retirement Board is an independent agency in the Executive Branch of the Government of the United States and will be hereinafter referred to as the Board.

Admitted Facts

The allegations in the amended complaint are admitted by the defendant's answer, and read as follows:

"The Railroad Retirement Board is an independent agency in the Executive Branch of the government of the United States, established under the Railroad Retirement Acts, as amended.

"This Court has jurisdiction by reason of 28 USC 1345.

"The defendant, Norman C. Hall, is a resident of 1212 North 57th Avenue West, Duluth, Minnesota, whose occupation is unknown.

"That the Wisconsin Telephone Company is a corporation duly organized and existing under the laws of the State of Wisconsin and is engaged in the business of furnishing telephone service and was such a corporation and so engaged on August 17, 1948 and at all times subsequent thereto.

"Plaintiff claims of the defendants the sum of \$650.00 plus interest at the rate of 5% from August 27, 1948, and costs, said principle sum representing the payment by the Railroad Retirement Board during the period from August 17, 1948 through February 28, 1949, inclusive for sickness benefits to defendant, Norman C. Hall under the Railroad Unemployment Insurance Act, as amended.

"Plaintiff avers that on August 17, 1948, defendant Norman C. Hall was injured and that on June 23, 1949 judgment in favor of Norman C. Hall in the sum of \$5,000 was made against the defendant, Wisconsin Telephone Company, for personal injuries sustained in the accident of August 17, 1948, claimed to have resulted from negligence of defendant Wisconsin Telephone Company, which \$5,000.00 was subsequently paid to defendant Norman C. Hall by the Clerk of Court, Superior, Douglas County, Wisconsin.

"Plaintiff further avers that on August 27, 1948 the Railroad Retirement Board duly notified by letter the defendant, Wisconsin Telephone Company, a corporation, of the right of the Railroad Retirement Board under Section 12(o) of the Railroad Unemployment Insurance Act, as amended (45 U.S.C. 1946 ed. 362(o)), for the sickness benefits paid to and to be paid to defendant Norman C. Hall out of any sums or damages payable to said Norman C. Hall by defendant Wisconsin Telephone Company for injuries sustained by the said Norman C. Hall in the accident occurring August 17, 1948.

"That on May 25, 1949, Mr. R. A. Crawford, an attorney at law in Superior, Wisconsin and counsel for the defendant, Wisconsin Telephone Company, informed the Regional Adjudicator, Railroad Retirement Board, 123 East Grant Street, Minneapolis 3, Minnesota, to put the claim of the Railroad Retirement Board in letter form and advise as to whom the check should be made payable, and that the paid Railroad Retirement Board on May 26, 1949, forwarded such a

reply to the said R. A. Crawford, stating the amount due to be \$650.00 and that payment should be made to the Treasurer of the United States.

"Plaintiff further avers that neither defendant Norman C. Hall or defendant Wisconsin Telephone Company, a Wisconsin corporation, have reimbursed that said Railroad Retirement Board in accordance with Section 12(o) of the Railroad Unemployment Insurance Act, as amended, and demand having been made, the said defendants have refused to pay.

"WHEREFORE, Plaintiff demands judgment of the defendants in the sum of \$650.00 plus interest and costs."

Controlling Statute

The defendant Norman C. Hall was injured on August 17, 1948, through the alleged negligence of the defendant Wisconsin Telephone Company. He applied to the Railroad Retirement Board, an agency of the United States Government, for benefits under the Railroad Unemployment Insurance Act, 45 U.S.C. 1946 ed. ³ 351-367, based on that injury. Such benefits totalling \$650.00 were paid him during the period from August 17, 1948, through February 28, 1949. These payments were made under the following provisions of Section 12(o) of the Act, 45 U.S.C., 1946 ed. ³ 362(o):

"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay day damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way or reimbursement."

Notice of the Board's rights under this Section was sent the defendant Wisconsin Telephone Company on August 27, 1948.

Statement of Benefits Paid

On May 26, 1949, pursuant to defendant's request, the Board furnished it with a statement of the amount of benefit payments it had paid to Norman C. Hall from the date of injury, August 17, 1949, to February 28, 1949, and for which it claimed its statutory lien on any indebtedness defendant owed or may owe Norman C. Hall, arising of his injury.

On or about June 26, 1949, after the judgment in favor of Hall for \$5,000.00 and against the defendant had been entered in the Superior Court for Douglas County, Wisconsin, the defendant then thoughtfully notified the Board that judgment had been entered, but failed to apprise the Board that it paid the full amount of the judgment to Hall via the Clerk of the Superior Court for Douglas County, Wisconsin, almost immediately after its entry.

Defendant Liable on Lien

Defendant's indebtedness to Hall was at all times after notice to defendant on August 27, 1948, subject to plaintiff's statutory lien and defendant's attempt to invalidate the Federal Statute and plaintiff's lien by entry and payment of the judgment without notice to the Board until after the judgment was paid to Hall was futile and of no effect. It could not by this procedure avoid its liability to plaintiff on the said lien. It is now indebted to plaintiff for the amount claimed in plaintiff's complaint with interest.

Plaintiff may have judgment against defendant for said amount, with cost.

Plaintiff's counsel may submit proposed findings of fact, conclusions of law and judgment.

Appendix E - Legal Opinions Re: Deductible Expenses

Chronological Summary Of Legal Opinions Re Deductible Expenses In 12(o) Cases

L-48-643

(August 26, 1948)

In this opinion it was held that the provisions of Section 12(o) should be applied only to the net amount inuring to the benefit of the individual after the payment of medical, legal, and other expenses incurred in connection with the injury. The associate general counsel pointed out that to apply the provisions of Section 12(o) to amounts representing reimbursement for such expenses would tend to discourage benefit claimants from prosecuting their demands against those responsible for their injuries and that this would react unfavorably upon the railroad unemployment insurance account by reducing the amounts recovered under Section 12(o).

L-50-127

(March 1, 1950)

In this opinion it was held that, in determining the net amount available for reimbursement of the Board under Section 12(o), the claimant's hospital expenses should be deducted even though they were covered by his personal

hospitalization policy. The associate general counsel noted that there are provisions in the RUIA which show a definite concern by Congress that a claimant's private insurance should not in any way limit his rights under the Act. Thus, Section 12(o) specifically provides that no reimbursement shall be required from payments made "under a health, sickness, accident, or similar insurance policy". Similarly, it is provided in Section 1(j) that "money payments received pursuant to any nongovernmental plan for unemployment insurance, maternity insurance, or sickness insurance: shall not constitute "remuneration"; consequently, the receipt of such payments does not prevent an individual from receiving benefits under the Act. The associate general counsel also stated in L-50-127 that it was immaterial whether the claimant was a patient in a member hospital, which supplied the services, or in a non-member hospital which was reimbursed under the provisions of his hospitalization policy.

October 1, 1957

In a letter of this date to Peter A. McDermott, Esq. (case of Henry T. Bieker, Jr., S.S.A. No. 513-03-8753), the associate general counsel stated that the cost of hospital and medical services provided because of the claimant's membership in a hospital association should be deducted in computing the net amount of his settlement. In this connection he said: "The fact that because of his membership in, and contributions to, the Hospital Association, Mr. Bieker was not actually out-of-pocket for the amount of these expenses is not, in my opinion, controlling."

L-60-461

(November 4, 1960)

This case involved the off-duty injury of Luis Guerrero, S.S.A. No. 708-10-9886. In this opinion, the associate general counsel pointed out that the conclusion stated in the Bieker matter must also be reached in a case, such as that of Guerrero, in which the claimant's hospital association dues are paid by his employer pursuant to an agreement with the employee's labor organization. The Associates General Counsel pointed out that the provisions of Section 12(o) and 1(j) referred to in L-50-127 make no distinction on the basis of who pays for the insurance. Nor does there appear to be any reason for such a distinction in the matter of determining when hospital and medical expenses may be deducted in determining the net amount of a settlement. One of the considerations upon which earlier rulings permitting the deductions of such expenses were based was the fact that to apply Section 12(o) to these amounts would tend to discourage benefit claimants from prosecuting their personal-injury claims and that this would react unfavorably upon the unemployment insurance account. Refusal to permit the deduction of hospital and medical expenses would have as great a tendency to discourage the prosecution of a person-injury claim in the case of an employee, such as Mr. Guerrero, whose hospital association dues were paid by his employer pursuant to an agreement with his labor organization, as it would in the case of a claimant, such as Mr. Bieker, who had paid his own hospital

association dues. It was also noted, in L-60-461, that the payment of Mr. Guerrero's hospital association dues by his employer is not a gratuity, but rather something to which he became entitled under the terms of an agreement negotiated with the employer by his labor organization.

July 11, 1961

L-61-316

B.O. 61-115

This case involved the on-duty injuries of claimant Jones and Townsend (S.S.A. No. 431-16-7585 and 486-09-5437). These claimants were entitled to medical and hospital care by reason of their membership in the Union Pacific Railroad Employees Hospital Association. The employer contributes a fixed percentage of the entire cost of operating the Association to compensate the Association for caring for employees injured on duty.

In L-61-316, the associate general counsel pointed out that there is nothing in the Hospital Association's Regulations to indicate that a member of the Association is not entitled, as a member, to care for injuries sustained on duty. It was apparent that the Railroad Company's contribution to the Hospital Association is required under agreements resulting from negotiations between the Company and the labor organization. Under these circumstances, and in accordance with the views expressed in the Guerrero case, the associate general counsel believed that the cost of the claimant's medical and hospital care should be deducted in determining the net amounts available for reimbursement of the Board under Section 12(o). The associate general counsel noted that the situation here is unlike the ordinary case in which an alleged tort-feasor, in settling a personal injury claim, himself takes care of the medical and hospital expenses. Here, the Company's payment to the Hospital Association is required by its agreements with the labor organizations, and is made without reference to whether or not the Company is liable, or is alleged to be liable, for the injury involved.

Appendix F - Court Decision: Richter and Levy v. U.S.

L-61-15B

This decision denied a claim for counsel fees against the Railroad Retirement Board on that part of a personal injury recovery paid to the Board under Section 12(o) of the Railroad Unemployment Insurance Act. (For decision of U.S. District Court see Appendix G.)

Cite this case: 296 F. 2d 509; cert denied, 369 U.S. 828

UNITED STATES COURT OF APPEALS

For The Third Circuit

No. 13, 563

B. NATHANIEL RICHTER AND ELWOOD S. LEVY,
Appellants

v.

UNITED STATES OF AMERICA

Argued October 2, 1961

Before Goodrich, Staley and Smith, Circuit Judges.

OPINION OF THE COURT
(Filed November 16, 1961)

By Goodrich, Circuit Judge.

The plaintiffs effected a settlement with a railroad in a Federal Employers' Liability Act case and paid part of the recovery to the United States under statutory provision. They now claim counsel fees against the Government on that part of the settlement paid to it. Plaintiffs lost in the court below. 190 F. Supp. 159 (1960).

The facts are undisputed. The plaintiffs, as lawyers, secured on behalf an employee of the Pennsylvania Railroad the sum of \$16,800. The railroad, in satisfaction of a lien of the Railroad Retirement Board, fits previously paid by the United States to the employee as compensation for disability arising from the accident. The remainder of the settlement arrangement, retained \$4,639.41 and turned the remainder over to the injured employee. What the appellants now want from the United States is one-third of what was paid to the Government pursuant to the provisions of the Railroad Unemployment Insurance Act.

The plaintiffs base their claim on the Tucker Act, 28 U.S.C., sec. 1346(a)(2). This gives a district court jurisdiction in claims against the United States founded upon an act of Congress or upon either express or implied contract with the United States.^{1/} The argument for the appellants suggests that the district judge denied them relief on the basis that there was no implied contract with the United States within the meaning of the Tucker Act. They now say that this is not the theory of their case at all. In their words, "they depend upon the 'founded upon an Act of Congress' provision of the Tucker Act jurisdictional declarations."

The relevant portion of the Railroad Unemployment Insurance Act provides that the Board is entitled to reimbursement from any damages paid to an employee through suit on or settlement of any liability.^{2/}

The act itself makes no provision for counsel fees for those who affect the recovery for the injured workman. Nor does the act make any statement against

counsel fees. The section referred to obviously is to protect the interest of the United States.^{3/} The plaintiffs say, however, that, even though the act does not provide for an attorney's fee, they should be allowed to recover one either under Pennsylvania law or general federal equity principles. The theory is that the attorney who, by efforts, created the fund should be entitled to reimbursement from the Government on the principle of preventing unjust enrichment. RESTATEMENT, RESTITUTION, sec. 1, 105(2).

The minute this argument is made, however, it puts the claim outside the Tucker Act altogether. The claim is then based not upon a statute of the United States, but rather on general equitable principles. There is no basis in the Tucker Act at all for the assertion of these. In spite of the multitude of citations with which we have been deluged, the point seems to us perfectly clear.

Then it is suggested that, even though the act does not expressly provide for attorneys' fees in this case, the appellant should be entitled to a fee. The employee, it is said, is the only one who can retain an attorney to benefit both himself and the Board. Therefore, since the employee did so and did benefit both the Board and himself through the lawyer's efforts, the lawyer by proper implication from the act should be paid.

We find no basis for taking any such liberty with the statute. What we are in effect asked to do is to write in a provision which is not there. We think we are no more entitled to redraft the Railroad Unemployment Insurance Act than we are to tinker with a provision in the Internal Revenue Code. Cf. Evans v. Dudley, No. 13559, 3d Cir., Nov. 8, 1961. There is nothing in the legislative history to which we are cited that says anything for or against attorneys' fees in this situation. Congress when it desires to make provision for attorneys' fees knows perfectly well how to do so, as it has in the Federal Employees' Compensation Act^{4/} and an abundance of other situations.^{5/} It has not done so here and we do not think it a proper subject for court action.

The judgment of the district court will be affirmed.

A True Copy;

Teste

Clerk of the United States Court of Appeals
for the Third Circuit.

^{1/} The wording of the subsection is as follows:

"(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the

Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

2/ Railroad Unemployment Insurance Act section 12(o), 45 U.S.C.A., sec. 362(o):

"Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement."

3/ The extent of this interest is shown in figures cited to us by government counsel. The Government states that the Board, by virtue of ³12(o), has been able to recover almost ten percent of the sickness and maternity benefits paid out under the Railroad Unemployment Insurance Act. At the end of the fiscal year 1958-59, the cumulative benefits disbursed by the Board totalled \$500,000,000, while the total section 12(o) reimbursement was \$39,294,000.

4/ 5 U.S.C.A., sec. 777 provides that, if a compensable injury creates a legal liability in some person other than the United States and a beneficiary entitled to compensation under the act recovers damages therefore from that other person, the beneficiary "shall, after deducting costs of suit and a reasonable attorney's fee, refund the amount of the compensation received or to be received from the United States." (Emphasis added.)

5/ For example, Congress has made specific provision for the recovery of attorneys' fees in various types of private actions which might be said to be affected with a public interest. See 15 U.S.C.A. ³15 (suits by persons injured by violations of the antitrust laws); 15 U.S.C.A., sec. 77www (suits against persons filing false and misleading statements under the Trust Indenture Act); 49 U.S.C.A., sec. 16(2) (proceedings to enforce orders of the Interstate Commerce Commission).

Appendix G - Court Decision: Richter, Lord and Levy v. U.S.

This decision denied a claim for counsel fees against the Railroad Retirement Board on that part of a personal injury recovery paid to the Board under Section 12(o) of the Railroad Unemployment Insurance Act. (For decision of U.S. Court of Appeals see Appendix F.)

L-61-15-A

Cite this case: 190 F. Supp. 159 (E.D. Penn., 1960); affirmed 196 F. 2d 509; cert denied, 369 U.S. 828

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

B. NATHANIEL RICHTER,	:	CIVIL ACTION
JOSEPH S. LORD, III, and	:	
ELWOOD S. LEVY	:	
v.		
UNITED STATES OF AMERICA	:	NO. 27957
		OPINION AND ORDER
EGAN, J.		DECEMBER 29, 1960.

This suit was brought by a well known Philadelphia law firm against the United States to recover a one-third portion of the amount remitted by the Pennsylvania Railroad Company direct to the Government in pay of a lien filed with the railroad by the Railroad Retirement Board under ³12(o) of the Railroad Unemployment Insurance Act of June 25, 1938, c. 680, 52 Stat. 1107, as added by section 323 of the Act of July 31, 1946, c. 709, 60 Stat. 740, 45 U.S.C. section 362 (o).1/

Jurisdiction is founded on the Tucker Act, 28 U.S.C., section 1346.2/ The Government moves to dismiss for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted. The motion will be granted.

The instant case is a suit against the United States to recover a proportionate share of a legal fee for services allegedly rendered to the United States in connection with a suit under the Federal Employers' Liability Act.

The plaintiffs are B. Nathaniel Richter, Joseph S. Lord, III, and Elwood S. Levy. The complaint alleges that plaintiffs, as attorneys for Peter J. Urban during March of 1960, effectuated by settlement a gross recovery from the Pennsylvania Railroad Company of the sum of \$16,800, for injuries sustained in the course of his employment; that the railroad, in satisfaction of the lien of the Railroad Retirement Board, paid to the United States a portion of said recovery amounting to \$2,210, said amount representing the benefits previously paid by the said accident; that the railroad paid to the plaintiffs and the employee the sum of

\$14,590, being the difference between the agreed settlement of \$16,800 and the sum of \$2,210 paid by the railroad to the United States pursuant to the lien of the railroad Retirement Board; that plaintiffs were retained as counsel by the employee on a contingent fee basis; 3/ that the employee paid a contingent fee to the plaintiffs for their services of \$4,639.41 based on the net recovery after litigation expenses and the aforesaid lien of the Railroad Retirement Board had been deducted; that the payment to the United States was made possible by, and as a direct result of, the efforts and legal services of the plaintiffs who seek to be paid by the United States for these services; and that the reasonable and proper value of the services rendered by the plaintiffs for the benefit of the United States is \$736.67.

The plaintiffs aver that the payment to the United States was the direct result of their legal efforts and services and seek to be paid on any of several theories. Since there is no statutory authority, their recovery must be based on a quantum meruit basis or on principles of implied contract or of quasi-contract, or on the equitable principle of having created the fund.

It is quite clear from reading the complaint that if the plaintiffs have any claim against the United States, it is on the basis of a contract implied in law as opposed to a contract implied in fact, or on the equitable principle of having created the fund. The United States has not consented to be sued in this action and federal jurisdiction recognizes no such equitable right. Therefore the District Court has no jurisdiction over this action.

Under the Tucker Act, (supra, footnote 1) jurisdiction is conferred upon the District Courts concurrent with that of the Court of Claims of "any other civil action or claim against the United States," not exceeding \$10,000 in amount, founded either upon the Constitution, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. 28 U.S.C. section 1346(a)(2).

The Courts have uniformly construed the above provision of the Tucker Act to provide that the implied contract must be one implied in fact as opposed to one implied in law. Goodyear Tire & Rubber Co. v. United States, 276 U.S. 287 (1928); United States v. Minnesota Mutual Investment Co., 271 U.S. 212 (1926); Sutton v. United States, 192 F. 2d 438 (3 Cir. 1951).

As the Supreme Court stated in the case of United States v. Minnesota Mutual Investment Co., supra, at page 217:

"* * * An implied contract in order to give the court of claims or a district court under the Tucker Act jurisdiction to give judgment against the government must be one implied in fact and not one based merely on equitable considerations and implied in law."

This distinction between contracts implied in fact as opposed to contracts implied in law is well recognized and has been the subject of much comments by the Courts. The Third Circuit defined the distinction as follows in the case of American La France Fire Engine Co. v. Borough of Shenandoah, 115 F. 2d 866 (3 Cir. 1940), at page 867:

"* * * The distinction between express and implied contracts on the one hand and quasi-contracts on the other basic. It has been succinctly stated by Mr. Justice Stern in Cameron v. Eynon, 332 Pa.. 529, 532, 3 A.2d 423, 424, thus: "A quasi contract arises where the law imposes a duty upon a person, not because of any express or implied promise on his part to perform it, but even in spite of any intention he might have to the contrary. A quasi contract, which is a fictional contract, is not to be confused with a contract implied in fact, which is an actual contract, and which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in the light of the surrounding circumstances."

The distinction was also set forth at some length in the case of G.T. Fogle & Co. v. United States, 135 F. 2d 117 (4 Cir. 1943), at page 120:

"* * * The law, however, makes a distinction, absolutely vital here, between contracts implied in fact and contracts implied by law. This distinction is thus aptly stated in 17 C.J.S., Contracts, section 4, p. 320, 321: section Contract implied in law distinguished. A distinction exists between contracts implied in fact and those which are implied in law. Thus, a contract implied in fact is a true contract, the agreement of the parties being inferred from the circumstances, while a contract implied in law is but a duty imposed by law and treated as a contract for the purposes of a remedy only. Another distinction between such classes of implied contracts lies in the fact that, * * * in the case of contracts implied in fact, there must be an assent of the parties, as in express contracts, whereas, * * * in the case of contracts implied in law, or more properly quasi or constructive contracts, such element of assent is lacking. The distinction has also been stated that a contract implied in fact is an implied contract in which the intention is ascertained and enforced while a contract implied in law is a mere fiction, the intention being disregarded, and the quasi contractual obligation being imposed by law to bring about justice, without regard to the intention of the parties. Again, in the case of contracts implied in fact, the contract defines the duty, while in the case of constructive contracts, the duty defines the contract."

See also Martin v. Campanaro, 156 F. 2d 127 (2 Cir. 1946) and Lach v. Fleth, 361 Pa. 340 (1949).

In the instant case, there are no facts alleged in the complaint from which assent can be inferred. In fact, the complaint alleges no direct relationship whatsoever

between the plaintiffs and the United States or the Railroad Retirement Board. It is quite clear that the theory of the complaint is that by the Plaintiffs' services, a benefit has been conferred upon the United States, of which, in equity, the United States should bear its proportionate share of the cost of recovery. Thus, it is quite clear that recovery is sought on the basis of equitable principles rather than a contract implied in fact.

This case does not fall within the category of class actions^{4/} and certainly an attorney cannot seek to have a contract implied in fact as against the Government when he has been representing a private client under a separate bilateral agreement and was acting solely in his behalf. Any benefit which might be received by the Government is purely incidental. In Coleman v. United States, 152 U.S. 96 (1894), the Court refused to imply a contract in fact between an attorney and the United States when he had been previously engaged by another party and the attorney admitted that he had looked to that client for his recompense. The rule generally is that each litigant must pay his own counsel fees and that an attorney cannot make another party - who receives an indirect benefit - his debtor by voluntarily rendering services in his behalf without his express or implied assent. Nolte v. Hudson Navigation Co., 47 F. 2d 166 (2 Cir. 1931); Lamar v. Hall & Wimberly, 129 Fed. 79 (5 Cir. 1904); Weinberg v. Goldenberg's, 81 F. Supp. 353 (D.D.. 1948).

As the general rule is stated in 7 C.J.S., Attorney & Client, section 175:

"An attorney's claim for professional services against persons sui juris, or against the property of such persons, must rest on a contract of employment, express or implied, made with the person sought to be charged or with his agent. No one can legally claim compensation for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom the attorney may have been employed, or, as has been shown supra section 160, for services voluntarily rendered."

There is sound reason why a contract cannot be implied in fact in the instant case. Under the statutes of the United States only the Attorney General or the United States Attorney can represent the Government in an action in Court. 5 U.S.C. sections 306-310; Sutherland v. International Insurance Co. of New York, 43 F. 2d 969 (2 Cir. 1930). Section 306 of Title U.S.C. provides as follows:

"The officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments, and the heads of Bureaus and other officers in the Departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof,

as such officer, is a party or may be interested; and no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice, except in cases of services performed by attorneys appointed under section 503 of Title 28, for whom compensation is provided under section 508 of Title 28."

Further, Sections 314 and 315 provide:

"Section 314. Counsel fees restricted. No compensation shall be allowed to any person, besides the respective United States attorneys and assistant United States attorneys for services as an attorney or counselor to the United States, or to any branch or department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the district attorneys. * * *"

"Section 315. Appointment and oath of special attorneys or counsel. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law. Foreign counsel employed by the Attorney General in special cases shall not be required to take the oath required by this section."

In the case of Eastern Extension Tel. Co. v. United States, 251 U.S. 355 (1920), the Supreme Court stated, at pages 363-66:

"* * * It is obvious that no express contract by the United States to adopt and be bound by the third or any of the concessions can be made out from the findings of fact, and it is equally clear that such an implied contract, using the words in any strict sense, cannot be derived from the findings, for it is plain that there is nothing in them tending to show that any official with power, express or implied, to commit that government to such a contract, ever intended to so commit it.

"The contention of the claimant must be sustained, if at all, as a quasi contract, - as an obligation imposed by law independent of intention on the part of any officials to bind the government, - one which in equity and good conscience the government should discharge because of the conduct of its representatives in dealing with the subject-matter.

* * * *

"In the jurisdiction given to the court of claims Congress has consented that contracts, express or implied, may be judicially enforced against the government of the United States. But such a liability can be created only by some officer of the government lawfully invested with power to make such contracts or to perform acts from which they may be lawfully implied."

See also United States v. Willis, 164 F. 2d 453 (4 Cir. 1947)

Thus, it can be seen that only the Attorney General has the authority to make a contract for the special employment of an attorney. Furthermore, no attorney can receive counsel fees from the Government except on receipt of the certificate of the Attorney General that such services were actually rendered. There is no allegation in the complaint of the receipt of such a certificate. Under the circumstances, plaintiffs cannot qualify and no contract can be implied in fact.

It is clear, therefore, that the United States has not consented to be sued and that the complaint must be dismissed.

Notwithstanding this posture of the federal law, the plaintiffs in the instant action contend "that this is a misconstruction of the Act and that, absent a specific provision in the statute denying reasonable compensation to the attorneys who benefitted the Board by creating the fund from which the Board is to receive the payments, the courts must look to the laws of the several states to determine whether the attorney who so benefitted the Board is entitled to reasonable compensation out of the Board's share of the recovery" and further that the "issue of the case is whether the Act of Congress requires denial of compensation to those who created the fund for the Board or whether by reason of the failure of Congress to specifically deny the employee's attorneys' compensation the courts should look to applicable state law. The plaintiffs contend that where Congress is silent the courts should not ascribe to Congress an inequitable intent." (Plaintiffs' brief, p. 15).

From this circumstance, they argue that the Pennsylvania decisions, notably Furia v. Philadelphia, 180 Pa. Super. 50 (1955) (where plaintiff's attorney was permitted recovery on the theories of subrogation and the creation of a fund from which the City was reimbursed its workmen's compensation outlay), and Meehan v. Philadelphia, 184 Pa. Super. 659 (1957) (where it was stated that in Pennsylvania "subrogation is a matter of pure equity"), apply and that this permits a recovery by plaintiffs under the Rules of Decision Act, section 1652 of the Judicial Code of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. section 1652.

Unfortunately for plaintiffs, they overlook the fact that the equity jurisdiction of the Federal Courts differs from that of the State Courts. The general rule is stated at 19 Am. Jur., Equity §11 as follows:

"The equity jurisdiction of the Federal Courts is derived from the Constitution and laws of the United States; and throughout the different states of the Union the jurisdiction of these courts in equity is uniform and unaffected by state legislation."

See Mississippi Mills v. Cohn, 150 U.S. 202 (1893).

As a consequence the many authorities cited by plaintiffs in their well-prepared briefs have no application to the facts at hand.

Plaintiffs argue, contrary to the defendant, that Lewis v. Railroad Retirement Board, 256 Ala, 430 54 So. 2d 777 (1951), cert. denied, 343 U.S. 919 (1952), supports plaintiffs' theory of the instant case. They say that the Sate Court decided Lewis on the basis of whether the lien of the Board or the lien of the employee's attorney was superior, and applying Alabama law determined that the Board's lien, being first in time, was superior to that of the attorney. From this they argue that this Court, by applying Pennsylvania law, will reach a conclusion directly opposite to that reached by the Alabama court under the unique lien law of that State. We believe that the Alabama court reached the right conclusion, but for the wrong reason. No State law and no State decision can divest or downgrade a federal lien in the absence of the cent of Congress. This is clear from the authorities above cited.

Plaintiffs also argue that the cases cited by the defendant, decided under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. sections 901-50, have no value in helping the Court in solving the problems presented by the instant case. We disagree. We think those cases are most helpful because they make it clear that when Congress wants an attorney's fee paid out of money returned to the Government by way of a lien, it knows how to use language to accomplish the purpose. The cases referred to are Davis v. United States Lines Co., 253 F. 2d 262 (3 Cir. 1958); Oleszezuk v. Calmar Steamship Corp., 163 F. Supp. 370 (D. Md. 1958); Davis v. United States Lines Co., 153 F. Supp. 912 (1957) decided by my able colleague, Judge Van Dusen; Fontana v. Pennsylvania R.R., 106 F. Supp 461 (S.D. N.Y. 1952), aff'd sub nom. Fontana v. Grace Line, Inc., 205 F. 2d 151 (2 Cir.), cert. denied, 346 U.S. 886 (1953). See also Voris v. Gult-Tide Stevedores, Inc. 211 F. 2d 549 (5 Cir.), cert. denied, 348 U.S. 823 (1954).

For the foregoing reasons, we believe that defendant's motion to dismiss must be granted as this Court has no jurisdiction and plaintiffs have not stated a cause of action.

It is so ordered.

/s/ Thomas C. Egan

Thomas C. Egan
J.

- 1/ section 12(o) provides: "Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way or reimbursement."
- 2/ Jurisdiction is founded upon the Tucker Act as codified in §1346 of the Judicial Code (28 U.S.C. section 1346) which provides in part that, "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."
- 3/ A copy of the contingent fee contract is not in the record but it is immaterial to our disposition of the case.
- 4/ The cases of *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Doherty v. Bress*, 262 F. 2d 20 (D.C. Cir. 1958) cert. denied, 359 U.S. 934 (1959); *Voris v. Gulf-Tide Stevedores, Inc.*, 211 F. 2d 549 (5 Cir. 1954), and *Brown v. T. W. Phillips Gas & Oil Co.*, 105 F. Supp. 479 (W.D. Pa. 1952) are not controlling here. They were special situations and are controlled by their own facts.

Appendix H - Decision Of The Comptroller General Of The United States

I-72-230

On occasion, the Board's assertion of a section 12(o) lien against a recovery of damages under the Federal Tort Claims Act has been resisted by the Government agency concerned or by one of its contacts in the General Accounting Office on the strength of Comptroller General decisions holding that property damage claims between government agencies must be borne by the agency suffering the loss, since the appropriations of the other agency are not considered available for reimbursement. (Such opinions are found in 25 Comp. Gen. 49, 25 Comp. Gen. 322, 9 Comp. Gen. 263, 8 Comp. Gen. 600 and in other reports of such decisions.) In answering such an objection, the Board has

pointed out the differences between the decisions cited and the situation involving a Board claim against someone who is entitled to recover damages from the other agency rather than a claim against the other agency itself.

The distinction the Board has urged in such a case was made by the Comptroller General in the 1950 opinion quoted below. In handling a 12(o) claim asserted against damages recovered from another government agency under the Federal Tort Claims Act, the direct authority may be more readily accepted by the other agency and by reviewers in the General Accounting Office.

29 Comp. Gen. 470 [B-94488], May 17, 1950

"Personal Injuries--Damages--Availability of Post Office Department Appropriations to Reimburse Subrogee Under Railroad Unemployment Insurance Act

"The Railroad Retirement Board, as subrogee under the Railroad Unemployment Insurance Act of a railroad employee injured through the negligence of a postal employee, may be reimbursed from appropriations of the Post Office Department the sum withheld by the Department from an award made under the Federal Tort Claims Act, in the amount of sick benefits received by the employee from the Railroad Unemployment Insurance Account.

"Comptroller General Warren to the Postmaster General, May 17, 1950:

"Reference is made to your letter of April 10, 1950, requesting to be advised as to whether your Department properly may reimburse the Railroad Retirement Board for an amount paid as sick benefits to an employee of the Central Railroad Company of New Jersey, who was injured through the negligence of an employee of your Department while performing official duties.

It is explained that the injured employee of the Central Railroad Company of New Jersey filed a claim with your Department in the sum of \$335.56 pursuant to the Federal Tort Claims Act, approved August 2, 1946, 60 Stat. 842, 843, and that, upon consideration of the claim, it appeared that the claimant had been paid the sum of \$68 in sick benefits by the Railroad Retirement Board. Under such circumstances the claimant was awarded the sum of \$267.56 and the Railroad Retirement Board has now requested reimbursement from your Department in the amount paid by the Board as sick benefits to the claimant as the result of such injury.

"You point out that the right of an insurer or other subrogee to assert a claim under the Federal Tort Claims Act has been established in the case of United States v. Aetna Casualty & Surety Company, 338 U.S. 366. However, it is indicated that your doubt in the instant matter arises by reason of the fact that the subrogee, the Railroad Retirement Board, is an agency of the United States

Government, and as such comes within the principles of the decisions 25 Comp. Gen. 322; 10 id. 288; 8 id. 600; 5 id. 162.

"The decisions of the accounting officers just cited are to the effect that, where public property in the custody of one agency of the Government is loaned to another agency, the cost of repairs and replacement in the event of damage or loss of the property may not be paid from the appropriations of the borrowing agency. The reason for this rule is, generally, that the appropriations of the borrowing agency were not provided for the purpose of repairs or replacements of articles under the control of another agency, and that any payment therefor would result in an improper enhancement of the appropriations of the lending agency available for that purpose. However, the applicability of the rule of said decisions to the instant case is not apparent. Aside from the fact that there is not here involved the matter of repairs or replacement of damaged or lost public property, it is obvious that the appropriations of the Post Office Department are available for the payment requested by the Railroad Retirement Board, and that such payment would not result in any improper enhancement of appropriated funds of the Board. In that connection, it appears that the benefits in question were paid from the Railroad Unemployment Insurance Account established by 45 U.S. Code 360, which account is maintained by the contributions of employers and employee representatives covered by the Railroad Unemployment Insurance Act. See 45 U.S. Code 358.

"Further, particular attention is invited to section 12(o) of the Railroad Unemployment Insurance Act, 45 U.S. Code 362(o), which provides as follows:

'Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, and any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount of which the Board is entitled by way of reimbursement.'

Appendix I – Legal Opinion L-2011-06

July 22, 2011

L-2011-06

Mr. Richard G. Lifto
Assistant Vice President
General Claims Department
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76131

In reply refer to

C. 2011-3617

Dear Mr. Lifto:

This is in reply to your letter of June 24, 2011, wherein you asked the Railroad Retirement Board (RRB) to modify the factors it considers when determining whether to waive all or a portion of the RRB's lien under section 12(o) of the Railroad Unemployment Insurance Act (RUIA).

More specifically, you asked that the RRB not allow the 12(o) lien amount to be reduced by the amount of medical expenses that are paid on the employee's behalf pursuant to a Health and Welfare Agreement ("Agreement") entered into by rail management and rail labor on October 22, 1975. That Agreement provides in relevant part that:

In the case of an injury or a sickness for which an Employee who is eligible for Employee benefits and may have a right of recovery against the employing railroad, Benefits will be provided under the Policy Contract, subject to the provisions hereinafter set forth. The parties hereto do not intend that benefits provided under the Policy Contract will duplicate, in whole or in part, any amount recovered from the employing railroad for hospital, surgical, medical or related expenses of any kind specified in the Policy Contract, and they intend that benefits provided under the Policy Contract will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits

provided. Accordingly, benefits provided under the Policy Contract will be offset against any right of recovery the Employee may have against the employing railroad for hospital, surgical, medical or related expenses for any kind specified in the Policy Contract. (Art. III, Sec. A.).

Section 341.5(b) of the RRB's regulations specifies the expenses that may be subtracted from the amount of damages recovered in calculating a 12(o) lien:

“(1) The medical and hospital expenses that the employee incurred because of his or her injury. These expenses are deductible even if they are paid under an insurance policy covering the employee or are covered by his or her membership in a medical or hospital plan or association. But such expenses are not deductible if they are not covered by insurance or by membership in a medical or hospital plan or association and are consequently paid by a railroad or other person directly to the doctor, clinic or hospital that provided the medical care or services.

(2) The cost of litigation. This includes both the amount of the fee to which the attorney and the employee have agreed and the other expenses that the employee incurred in the conduct of the litigation itself.” [20 CFR 341.5(b)(1) and (2)].

You have explained that when an employee's medical expenses are paid for pursuant to the Agreement, the insurance company United Healthcare pays the medical service providers directly. The insurance is funded solely by BNSF. Thus, although BNSF does not pay the medical expenses directly to the providers of those services, it does pay the full cost of the insurance obtained to fund the railroad's liability for medical expenses resulting from the employee's injury or illness where the employee may have a right of recovery against the railroad.

The question then becomes whether payment of medical expenses by an insurance policy fully paid for by the railroad for the purpose of funding the railroad's liability for medical expenses resulting from employee injury or illness should be considered the equivalent of payment of medical expenses directly by the railroad.

A railroad's liability for an employee's injury would generally be determined under the provisions of the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) (FELA). That Act contains the following provision:

“Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the

provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.” 45 U.S.C. §55.

While section 55 in effect prohibits a railroad from exempting itself from liability under the FELA, it anticipates that a railroad may insure itself to cover liability under FELA and allows the railroad to set off amounts paid for such insurance from an amount paid to an employee who brought an action under FELA. The issue of whether benefits paid pursuant to such insurance should be set off from money due to the injured employee in an FELA action has been addressed by several courts. According to the U.S. Court of Appeals for the Ninth Circuit:

“In dealing with this issue both in the railroad and maritime cases, courts have been virtually unanimous in their refusal to make the source of the premiums the determinative factor in deciding whether the benefits should be regarded as emanating from the employer or from a ‘collateral source’. Rather, courts have tried to look to ‘the purpose and nature of the fund and of the payments’ and not merely at their source.” Folkestad v. Burlington Northern, Inc., 813 F.2d 1377, 1381 (9th Cir. 1987).

In the Folkestad decision, the Ninth Circuit discussed whether the insurance should be treated as a fringe benefit in part compensation for the employee’s work. The Court noted that if the insurance is viewed as the product of the employee’s labors, it is deemed to come from a source collateral to the employer rather than from the employer. Setoff in that instance would permit avoidance of FELA liability and such avoidance is prohibited by 45 U.S.C. § 55, 813 F.2d at 1381. The Court then noted that if the insurance is viewed as a contribution by the employer intended to fulfill FELA obligation, it would appear to fall within the proviso of 45 U.S.C. § 55 and setoff should be permitted. The Court considered the fact that the 1975 Health and Welfare Agreement between railroads represented by the National Carriers’ Conference Committee and railroad employees represented by the Brotherhood of Maintenance of Way Employees, which contained a provision almost identical to the Agreement provision quoted at the beginning of this letter, expressly provided for setoff. Because the agreement between the railroad and the union was clear, the Court held that the amount of the FELA judgment should be reduced by the amount of the insurance benefits paid pursuant to the collective bargaining agreement.

Two other Federal Circuit Courts of Appeals have reached the same conclusion with respect to setoff. See Clark v. Burlington Northern, Inc., 726 F.2d 448 (8th Cir. 1984), wherein the Court found that the railroad employer clearly intended to make a voluntary disability plan supplemental to sums recovered under the FELA and allowed setoff; and Burlington Northern Railroad Company v. Strong, 907 F. 2d 707 (7th Cir. 1990), wherein the Court found that benefits paid pursuant to a Supplemental Sickness Benefit Agreement, which provided that the Supplemental Sickness Benefits (SSB) received by employees would not

duplicate recovery of lost wages, could be set off from the amount of a FELA award. The Seventh Circuit Court wrote that, “We agree with our colleagues in the Eighth and Ninth Circuits that section 55 is not violated by an indemnity program agreed to between the union and the employer that allows the employer to deduct certain amounts from a FELA award. Section 55 was designed to prevent employers from receiving a windfall but not, as the Eighth Circuit points out, to ‘deter them from voluntarily paying monthly disability payments in lieu of wages to disabled workers’” 907 F.2d at 714, quoting Clark, 726 F.2d at 451.

It is my opinion, based on the discussion set out in this letter, that the RRB should not allow the amount of its 12(o) lien to be reduced by the amount of medical expenses that are paid on an injured employee’s behalf pursuant to the Health and Welfare Agreement (the Agreement) entered into by rail management and rail labor on October 22, 1975 because that Agreement is clear that rail management and rail labor have agreed that the amount of a FELA award should be reduced by the amount of the insurance benefits paid pursuant to the Agreement. I find further that this conclusion is consistent with the last sentence of section 341.5(b)(1) of the RRB’s regulations, as the “insurance” cited therein refers to a fringe benefit provided as part of an employee’s compensation paid by an employer and not to insurance purchased to indemnify a railroad employer against FELA liability.

A copy of this opinion is being released to the RRB’s Office of Programs so that appropriate procedures may be developed to apply the conclusion reached herein on a prospective basis. See 20 CFR 261.3.

Sincerely,

Steven A. Bartholow

General Counsel

