

# PAY FOR TIME LOST



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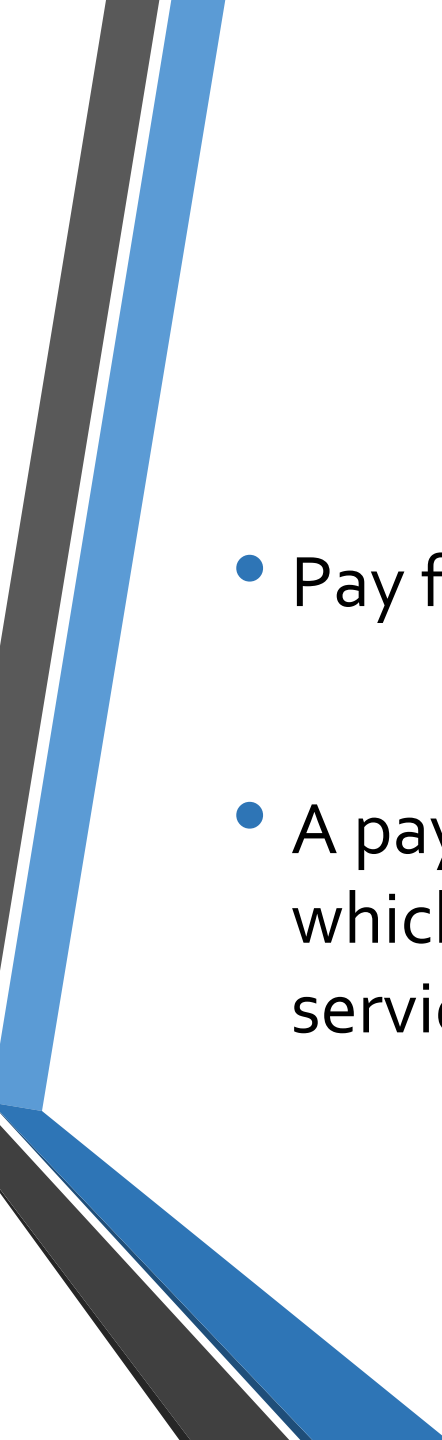
Office of General Counsel

United States Railroad Retirement Board

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- Pay for time lost is...
  - A payment to an employee for a period during which the employee was absent from the active service of the employer.

# What is included in pay for time lost?

- Includes:
  - Personal injury settlements/judgments/verdicts
  - Dismissal allowances
  - Guaranteed wages
  - Displacement allowances (paid for loss of earnings after employee given lower paying job)
  - Reinstatement awards including back pay
  - Settlements of employment discrimination cases





# Legal Authorities for Pay for Time Lost

## Statutory

- Railroad Retirement Act (RRA)
- Railroad Unemployment Insurance Act (RUIA)

## RRB Regulations

# Railroad Retirement Act statutory language

The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers, or as an employee representative, including **remuneration paid for time lost as an employee**, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made.

45 U.S.C. §231(h)(1); a substantially similar definition appears in the RUIA at 45 U.S.C. §351(i)(i).



# Regulations

- RRA regulation 20 C.F.R. §210.5(d)
- Any month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service...



# Effects of Pay for Time Lost

## Pros:

- Possible additional creditable compensation
- Possible additional service months
- Can provide enough service months to qualify employee for occupational disability or age and service annuity
- Can help employee maintain a “current connection” (needed for occupational disability but not age and service based annuity)

## Cons: ?



How does an employee receive pay for time lost?

A typical day...





Suddenly...







## Typical pay for time lost scenario:

- Injured employee
- Federal Employers Liability Act (FELA) lawsuit



# Settlement Agreement



# Structuring pay for time lost settlements for best overall outcome

- Payment must be made at least in part with respect to a claim for lost wages.
- Payment must relate to an **identifiable period** of absence from work.
- Payment must be made for a period of time when there was an **employment relationship**.
- *Note:* An employee off work due to a disability can still be considered employed, depending on age and circumstances.

## Settlements (cont.)

- To receive creditable service months from pay for time lost, lost months of service must directly relate to the claimed injury.
- Cannot add in unrelated lost months **prior** to injury.
- However, months need not be consecutive as long they relate to injury.

# Settlements (cont.)

- RRB presumes pay for time lost ends upon settlement date or date of verdict/judgment unless otherwise specified by the parties.
- Months may extend into the future (beyond the date of the judgment or settlement) depending on circumstances.
- Service credit cannot be received for **future** pay for time lost until that date has actually passed.

# How to allocate settlement amounts for best overall results

- If pay for time lost is allocated to the months in which time was actually lost, RRB will accept the parties' allocation if the monthly rate is at least 10 times the employee's daily rate according to RRB regulations.
- If employee does **not** want pay for time lost credit from settlement, the agreement should specifically say that.

## NEGOTIATING A SETTLEMENT?





# RRB IS HERE TO HELP!

- You can call the RRB in advance to review your draft settlement agreement!
- You can get help from RRB's Quality Reporting Service Center; Phone (312) 751-4992
- Fax: (312) 751-7123
- E-mail: [QRSC@RRB.GOV](mailto:QRSC@RRB.GOV)







# How is pay for time lost allocated when there is a court-ordered judgment/verdict?

If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost. 45 U.S.C. § 231(h)(2)

# Judgments/verdicts (cont.)

- Amount of compensation for each lost month depends on whether allocation was specifically made by court/jury.
- RRB will accept lower monthly compensation amount (below amount required by regulation) as creditable if court ordered.
- What if there is a lump sum general verdict?



# Pop Quiz!







[illegible]

# How to report pay for time lost

- Determine whether any portion of the amount should be allocated to eligible months in which no pay or service credit was received by the employee and determine how many months should be allocated.
- Ensure that at least 10 times the employee's daily pay rate in effect on the first day to which pay for time lost payments relate is allocated for each month.
- Can use Pay For Time Lost Worksheet (does not need to be submitted to RRB).
- [https://rrb.gov/index.php/RERI\\_Appendix\\_II\\_Pay\\_for\\_Time\\_Lost\\_Worksheet](https://rrb.gov/index.php/RERI_Appendix_II_Pay_for_Time_Lost_Worksheet)



**Rail Employer Reporting Instructions**  
**Appendix II: Pay for Time Lost Worksheet**

**Section 1: Identifying Information**

Employee's Name: \_\_\_\_\_ SSN: \_\_\_\_\_

**Section 2: Service Month Allocation**

*The allocation must relate to the actual period of absence from service due to the injury.*

A. Date of Injury: \_\_\_\_\_ B. Reported Service Months to Date: \_\_\_\_\_  
(Exclude Deemed Service Months in or after the year of Injury)

C. Service Months needed to attain: 120 \_\_\_\_\_ 240 \_\_\_\_\_ 360 \_\_\_\_\_

**D. Service Month Allocation:**

<u>Year</u>	<u>Allocated Months</u>	<u>Total</u>
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____

E. Total Allocated Service Months: \_\_\_\_\_

F. Service Months to Date: \_\_\_\_\_ + \_\_\_\_\_  
(2B)

G. Projected Total Service Months: = \_\_\_\_\_

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**Section 3: Minimum Creditable Compensation Calculation**

*The monthly compensation allocation must be at least ten times the employee's daily pay rate in effect on the first day to which Pay for Time Lost payments relate.*

A. Employee's Daily Pay Rate: \_\_\_\_\_

**B. Minimum Monthly Compensation:**

Employee Daily Pay Rate \_\_\_\_\_ x 10 = \_\_\_\_\_  
(3A)

**C. Total Allocated Compensation:**

Minimum Monthly Compensation \_\_\_\_\_ x Total Allocated Service Months \_\_\_\_\_ = \_\_\_\_\_  
(3B) (2E)

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**Section 4: Railroad Retirement Tax Act Calculation**

*Pay for Time Lost compensation is subject to the Tier I, Tier II and Medicare tax rates in effect when the payment is made. Annual maximum earnings bases apply to Tier I and Tier II taxes.*

**Employer Tax Calculation:**

Tier I Taxable Compensation \_\_\_\_\_ x \_\_\_\_\_ % = \_\_\_\_\_ Tier I Tax

Medicare Taxable Compensation \_\_\_\_\_ x \_\_\_\_\_ % = \_\_\_\_\_ Medicare Tax

Tier II Taxable Compensation \_\_\_\_\_ x \_\_\_\_\_ % = \_\_\_\_\_ Tier II Tax

Total Employer Tax \_\_\_\_\_

**Employee Tax Calculation:**

Tier I Taxable Compensation \_\_\_\_\_ x \_\_\_\_\_ % = \_\_\_\_\_ Tier I Tax

Medicare Taxable Compensation \_\_\_\_\_ x \_\_\_\_\_ % = \_\_\_\_\_ Medicare Tax

Tier II Taxable Compensation \_\_\_\_\_ x \_\_\_\_\_ % = \_\_\_\_\_ Tier II Tax

Total Employee Tax \_\_\_\_\_

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**Section 5: Railroad Unemployment Insurance Act Employer Contributions**

*RUIA contributions are calculated using the rates and monthly limits in effect during the months the Pay for Time Lost payments relate. RUIA creditable compensation is calculated by multiplying the service months allocated to the year by the lesser of the applicable RUIA monthly maximum or the employee's allocated monthly compensation.*

<u>Year</u>	<u>RUIA Creditable Compensation</u>	<u>Contribution Rate</u>	<u>RUIA Contribution</u>
_____	_____	x _____	= _____
_____	_____	x _____	= _____
_____	_____	x _____	= _____
_____	_____	x _____	= _____
_____	_____	x _____	= _____
_____	_____	x _____	= _____
Total Employer RUIA Contribution _____			

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# Made a mistake?



# Re-allocating service months

- RRB will allow amended compensation reports after settlement if both employer and employee agree.
- *NOTE:* RRB will accept a re-opened agreement with respect to pay for time lost only within the four-year time limitation imposed by Section 9 of the Railroad Retirement Act.





# Pay for time lost and railroad retirement payments

- Employee cannot receive retirement annuity, disability, unemployment insurance payments, or sickness benefits while receiving compensation.
- What happens if employee receives time lost payments for time period when s/he previously received unemployment or sickness benefits?



# Overpayments



# Overpayment Examples

Railroad secretary is terminated from the railroad with 27 years of service. She needs 30 years of service for full retirement age, otherwise she has to take a reduced age annuity. She files a discrimination lawsuit against the railroad. The employee files for an RRB annuity while lawsuit proceeds. The employee eventually settles with the railroad and obtains an additional 3 years of service months. The railroad reports the service credit to the RRB showing service for the 3 years after the settlement.

What happens?

# More Overpayment Examples

Railroad engineer with 35 years of service is injured on the job. He is awarded an RRB occupational disability in 2020 but does not relinquish his employment rights. He files a FELA lawsuit against the railroad and asks for back pay from 2020 to 2024 in his demands before the jury. The trial is in 2024. The engineer resigns from the railroad at the trial.

He receives a general verdict which include money for lost pay and money for general economic damages.

What happens?



# *BNSF Railway v. Loos*

- **Lower court,** *Loos v. BNSF Railway*, 2015 U.S. Dist. LEXIS 84663 (D. Minn. June 30, 2015) and *Loos v. BNSF Railway*, 2015 U.S. Dist. LEXIS 167603 (D. Minn. Dec. 15, 2015)
- **Court of Appeals:** *Loos v. BNSF Railway*, 865 F.3d 1106 (8<sup>th</sup> Cir. 2017)



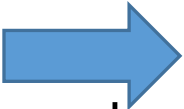


**Supreme Court:** *BNSF Railway v. Loos*, 139 S. Ct. 893 (2019)  
(Remanded) *Loos v. BNSF Railway*, 920 F.3d 1218 (8th Cir. 2019)

## *BNSF Railway v. Loos* (cont.)

- On March 4, 2019, the United States Supreme Court issued a ruling holding for BNSF and against Loos.
- Court held that pay for time lost in an employer-employee context is taxable compensation under the Railroad Retirement Tax Act.

# Pay for time lost and tax issues

- Ensure that proper RRTA payroll taxes (Tier I and Tier II) are withheld up to yearly maximum cap for calendar year in which payment is made.
- Important!!  Tier I and Tier II tax rates are calculated based on the calendar year the payment was made, **not** on the year the months of service were credited to the employee.
- *Note:* Employer is responsible for actually withholding and paying RRTA taxes even if employee is held responsible as part of settlement.

# Tax issues (cont.)

- Also...in the reverse:
- Employer must pay applicable RUIA contributions for each affected year to which pay for time lost payment relates (not calendar year of payment.)
  - Employer should contact RRB to find out applicable RUIA contribution rate for the proper year.
  - To confirm rate, check with RRB's Quality Reporting Service Center; QRSC phone (312) 751-4992.
  - Fax: (312) 751-7123
  - E-mail: QRSC@RRB.GOV





# Medicare taxes

- Medicare taxes must be withheld from a payment for time lost.
- When an employee's taxable earnings attain the Tier I maximum earnings base, Medicare taxes must continue to be deducted because there is no Medicare maximum amount.



# Questions?

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THANK YOU!