U.S. Railroad Retirement Board
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Legal Opinion L-2006-19
September 12, 2006

TO: Labor Member Speakman

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Moving and Real Estate Sales Commission Benefits as Compensation

This is in response to your request for my opinion as to whether the benefits offered by the Transportation Communications Union (TCU) to retiring Grand Lodge officers and staff constitute earnings which will increase the amount of annuity, or which will reduce or prevent payment of an annuity due to earnings restrictions imposed by the Railroad Retirement Act. As discussed below, in my opinion these benefits are compensation which may be credited for tier II annuity component purposes through the employee's last date of employment, and may be credited for tier I annuity component purposes in the year of payment. It is also my opinion, however, that these payments are not earnings for purposes of the restriction on work for a covered railroad employer, or for purposes of assessing deductions against the tier I annuity component. A copy of this memorandum has also been sent directly to the TCU.

The TCU advises that it offers two relocation benefits to retiring Grand Lodge officers and staff. The moving allowance benefit offers a retiree who is relocating his or her household the choice between a moving allowance equal to two months salary, or reimbursement of actual moving costs incurred within one year of leaving the TCU. The real estate sales commission benefit offers to pay the commission charged to the retiree by a bona fide real estate brokerage within one year of leaving the TCU. The TCU advises that any of these benefits may be paid after the employee has ended his employment relationship with TCU, and consequently that payment may occur in the calendar year following the year in which the employee retires from TCU.

I. PAYMENTS ARE CREDITABLE AS TIER II RAILROAD COMPENSATION

The TCU is a railway labor organization covered as an employer under the RRA. Compensation paid by a covered employer is credited in accordance with section 1(h) of the RRA. Section 1(h)(1) defines compensation for benefit entitlement purposes under that Act in general as:

> * * * any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad or railway labor organization] employers * * *. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. * * *

Section 1(f)(1) of the RRA provides that a month for which a covered employer reports compensation paid to an employee is counted as a month of service for purposes of the tier II annuity component years of service computation as specified by section 3(i) of Act. Section 3(i)(4) further provides that compensation reported as earned for a calendar year may be allocated to any month in which the employee retains an employment relation to the employer but has been credited with less than 1/12 of the annual maximum creditable compensation ceiling for that year. See also, regulations of the Board at 20 CFR 210.3. No compensation may be allocated to any month after the month the employee ends his employment relationship with the covered employer. See section 204.5 of the regulations (20 CFR 204.5).

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Compensation allocated to a month is used to calculate the tier II average monthly compensation as specified by section 3(j). See sections 226.60—226.63 of the Board's regulations (20 CFR 226.60—226.63).

As a payment by a covered employer to an employee, the moving allowance and the real estate sales commission benefit are both presumed to be compensation within the terms of RRA section 1(h)(1) above. Section 1(h)(6) of the RRA lists six exclusions from the general definition of compensation: tips; earnings by certain non-resident aliens; local union lodge compensation less than $25; compensation for certain union delegates; payments under employer sickness and disability plans; and employer reimbursements for bona fide employee expenses. See also, regulations of the Board at 20 CFR 211.2(c). None of these six exclusions listed in RRA section 1(h)(6) applies to the moving allowance and sales commission benefit paid by the TCU.

Accordingly, in my opinion the amount of moving allowance under the TCU plan, whether paid under the two month salary option or the reimbursement of actual expenses, and the real estate sales commission benefit, are compensation under section 1(h)(1) of the RRA. Because these benefits are earned by reason of the employee's employment with the TCU, the compensation is creditable to months in which the employee remained in an employment relationship. When the moving allowance or sales commission benefit is paid in the year subsequent to the last year of employment, the payment would consequently be creditable to months in the prior year for which the employee remained in an employment relationship. In either case, no portion of the additional compensation may be credited for tier II annuity component calculation purposes beyond the proportion of the annual maximum creditable compensation ceiling attributable to the number of months in the calendar year of the employee's last year of service in which he remained in an employment relation to the TCU.

II. PAYMENTS ARE CREDITABLE AS NON-RAILROAD TIER I COMPENSATION

The foregoing conclusion may result in compensation by reason of the moving or sales commission benefit which may not be credited because the employee has already reached the maximum compensation limit for the months employed in the last year of employment. In that case, I note that RRA section 1(h)(8) provides:

> (8) Notwithstanding any other provision of this Act, for the purposes of sections 3(a)(1), 4(a)(1), and 4(f)(1) [pertaining to calculation of the tier I annuity component], the term "compensation" includes any payment from any source to an employee or employee representative if such payment is subject to tax under section 3201 or 3211 of the Internal Revenue Code [imposing the tier I taxes upon railroad employees and employers] * * *

The general definition of compensation paralleling RRA sections 1(h)(1) and 1(h)(6) above is found at section 3231(e)(1) of the Railroad Retirement Tax Act (RRTA) (26 U.S.C. § 3231(e)(1)). Beginning with paragraph 3231(e)(4) the RRTA then lists exclusions from taxable compensation which are not listed by RRA section 1(h)(6). In particular, paragraph 3231(e)(5) of the RRTA provides:

> (5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

Among the Internal Revenue Code (IRC) provisions listed by RRTA section 3231(e)(5), IRC § 132

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excludes from gross income an employer fringe benefit which pays or reimburses qualified employee moving expenses. See IRC § 132(a)(6), (26 U.S.C. §132(a)(6)). Section 132(g) defines a qualified moving expense for purposes of 132(a) by reference to IRC section 217 as an expense for moving household goods to a new residence in connection with the commencement of work. See 26 U.S.C 132(g), citing 26 U.S.C. § 217.

According to the information furnished, the TCU moving allowance (whether paid as two months salary or as based on expenses incurred) and the real estate sales commission benefit are paid only to retiring staff. While a determination of taxability of a particular payment under the RRTA must be made by the Internal Revenue Service rather than by the Board, it appears that since neither benefit is paid "in connection with commencement of work", neither the moving allowance nor the sales commission benefit may be excluded from "compensation" subject to the RRTA by section 3231(e)(5). Moreover, no other exclusion from compensation under the RRTA appears to apply to these payments.

It is therefore my opinion that pursuant to section 1(h)(8) of the RRA, the TCU moving allowance and the real estate sales commission are creditable as compensation for tier I annuity component purposes up to the maximum benefit base for the year in which payment is made, without regard to whether the employee remained in an employment relation to the TCU for any month within that year.

III. PAYMENTS ARE NOT EARNINGS FOR WORK RESTRICTION PURPOSES

Section 2(e)(1) of the RRA requires that an employee must cease to render compensated service to a covered employer in order to receive an annuity under the Act. Section 2(e)(3) further requires that once an annuity is awarded, no annuity may be paid for any month in which the employee renders compensated service to an employer. Because the payments may be credited only to a month for which the employee is in an employment relation to the TCU, payment of these benefits after the month of retirement will not constitute a return to the compensated service of the TCU which would render the annuity not payable under sections 2(e)(1) and 2(e)(3) of the RRA.

As noted earlier, sections 3(a) and 4(a) of the RRA specify the calculation of the tier I annuity component of employee and spouse annuities. Those sections in turn provide that the tier I component shall be calculated as the amount of social security benefit the employee or spouse would have been entitled to receive if all railroad earnings were covered as wages under the Social Security Act. Consistent with the general principal that the tier I annuity component is calculated as if it were a social security benefit, sections 2(f)(1) and 2(f)(2) of the RRA further require that the tier I components "shall be subject to deductions on account of work pursuant to the provisions of section 203 of the Social Security Act in the same manner as if such portion of such annuity were a monthly insurance benefit under that Act". If payment of the moving allowance and the real estate sales commission result in compensation creditable as wages for use in the tier I component calculation, then the last question regarding the TCU moving and real estate commission benefits is therefore whether these wages subject the tier I component to deductions on account of work pursuant to section 2(f) of the RRA and section 203 of the Social Security Act.

I have previously recognized that income reported as earnings, but not received for services performed in a trade or business, will not constitute earnings when applying the earnings restriction provisions of the RRA. See Legal Opinions L-2000-35 (holding income from sale of inventory at close of business to be sale of assets rather than earnings), and L-2006-05 (holding income which is solely a return on investment without performing services does not incur a deduction in a disability annuity). Moreover, regulations of the Social Security Administration apply a similar rule when determining whether a beneficiary under the Social Security Act is subject to the earnings restriction imposed by section 203. See 20 CFR 404.429(d),

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establishing a presumption that wages reported as paid to an employee are for services rendered in the year of payment, subject to satisfactory evidence that payment is for services rendered in another taxable year.

The evidence provided by the TCU is that moving allowance and sales commission benefits are paid to retiring staff. These payments are clearly attributable to the services of the employee for TCU prior to retirement, even if paid in a subsequent calendar year. Accordingly, in my opinion a moving allowance or sales commission benefit received by a TCU employee after retirement is not earnings for purposes of the earnings restriction imposed on tier I annuity components by section 2(f) of the RRA.