

October 14, 1997
L-97-40

TO : Peter A. Larson
Chief Financial Officer

FROM : Catherine C. Cook
General Counsel

SUBJECT : Consolidated Rail Corporation - Voluntary Separation
and Retirement Programs

This is in response to your memorandum of September 8, 1997, concerning the above-referenced separation programs.

Under Conrail's Voluntary Separation or Retirement Program, an individual who resigns from employment with the carrier receives a payment based upon his or her years of service. The payment is made in the form of an annuity or in a lump-sum which may be rolled over into an Individual Retirement Account. In addition, both programs provide bridge and other incidental payments. The uniqueness of these plans is that benefits are paid from excess assets from the Conrail Supplemental Pension Trust, which is apparently a qualified trust under section 401(a) of the Internal Revenue Code. This would explain why such payments are purportedly eligible for roll over treatment. It is important to note that the payments are made in addition to, and not in lieu of, any pension benefits which the departing employee has accrued. Conrail has not treated payments from the trust as creditable compensation under the Railroad Retirement (RRA), Railroad Unemployment Insurance (RUIA), or the Railroad Retirement Tax (RRTA) Acts. You inquire as to whether Conrail's treatment of these payments is correct.

As you pointed out, in Legal Opinion L-96-9 we held that payments under the above programs would be separation payments for purposes of the unemployment benefit disqualification found in section 4(a-1)(iii). Thus, receipt of payments under these programs disqualified an employee from the receipt of unemployment benefits for the period of time it would have taken him or her to earn the amount of the distribution. ¹ Initially, therefore, it would seem that L-96-9 compels a finding that these payments are also compensation under the RRA and RUIA. Specifically, section 211.10 of the Board's regulations provides that severance payments are creditable

¹For an extended discussion of the application of L-96-9 to the Conrail Voluntary Separation Program see the hearings officer decision in Decision No. 97-1036.

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compensation. However, if we determine that these payments are creditable compensation under the RRA and RUIA, we are faced with the anomaly that Conrail has apparently taken the position that the payments from the trust are not subject to taxes under the RRTA, by virtue of the exemption from the definition of "wages" for payments made from a qualified trust. See section 3121(a)(5)(A) of the IRC incorporated into the RRTA by section 3231(e)(1)(iv). If Conrail is correct, then it would be inconsistent to find that the payments in question are creditable compensation under the RRA and RUIA.

The purpose of the separation allowance disqualification referred to above is to avoid paying unemployment benefits to individuals who lack an economic need for such benefits due to the fact that they received a monetary incentive from their employer to retire. The fact that an employee receives what is tantamount to a separation payment from a tax exempt trust rather than from the employer's payroll should not dictate whether the separation disqualification applies. When viewed from this standpoint, we see nothing inconsistent in determining that the payments in question were separation payments for purposes of the disqualification, but not creditable compensation under the RRA or RUIA.

As you indicate in your memorandum, only the Internal Revenue Service can give a definitive answer as to whether the payments under these programs are subject to RRTA taxes. Since the Board is not presently treating the payments in question as creditable compensation under the RRA or RUIA and since, to my knowledge, no employee has requested that they be treated as creditable compensation, I see no basis for seeking an opinion from the Internal Revenue Service at this time.