Legal Opinion L-2002-12
October 7, 2002

U.S. Railroad Retirement Board
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TO : John Bogner, Director
Disability, Sickness and Unemployment Benefits Division
Office of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Wisconsin Central System 2000 Workforce Restructuring
Management Employee Severance Pay Plan

This is in response to an inquiry by the Wisconsin Central division of the Canadian National Railway[1], through the Milwaukee office of the Board, requesting my opinion as to whether payments under the Wisconsin Central System 2000 Workforce Restructuring Management Employee Severance Pay Plan (WCS 2000 Plan) constitute a separation allowance which disqualifies the recipient from receiving unemployment insurance benefits pursuant to section 4(a-1)(iii) of the Railroad Unemployment Insurance Act (RUIA). For the reasons set forth below, in my opinion a recipient of payment under the WCS 2000 Plan is disqualified from receiving unemployment benefits for the period calculated under section 4(a-1)(iii). However, no compensation may be credited for benefit entitlement purposes, and the employee may not be considered in service to an employer, for months after the month the employee has returned his or her election under the Plan. As this opinion may affect other claimants, I am directing my response to you, with a copy to the Milwaukee office.

The employer has provided a copy of the summary plan description of the WSC 2000 Plan. The plan is described as an unfunded severance pay plan administered by the Vice President, Human Resources, Wisconsin Central Ltd. The costs of the plan are borne entirely by the employer. Payments under the plan may be offered at the employer's discretion to individuals who have been full-time employees of the Wisconsin Central, the Fox Valley & Western, Ltd., or the Sault Ste. Marie Bridge Company for at least six months, who are not subject to a collective bargaining agreement, and who work in a position which is to be eliminated as part of the "2000 Workforce Restructuring".

The WCS 2000 Plan offers the employee two payment options. Under option A, the employee receives twice-monthly payments, equal to the employee's base salary "less applicable withholdings", for either three or six months (depending upon the employee's occupation) or until other employment is secured. The employee continues to be covered for health, dental and group life insurance at the employer's expense during this period. Under option B, the employee receives a lump sum equal to three month's salary "less applicable withholdings." The employer does not continue to pay insurance coverage under option B, but the employee may continue health insurance coverage for eighteen months at his or her own expense as required by Federal law (COBRA coverage). Under either option, the employee is also eligible for "professional outplacement services" from an outside contractor.

To receive payments under the WCS 2000 Plan, the employee must execute a "release form". An executed copy of this form for option A, entitled "Release of Claims (A)" has been provided. The document states that in consideration for provision by Wisconsin Central of the foregoing benefits, the employee agrees:

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[1] The former Wisconsin Central Railroad became a division of the Canadian National Railway as a result of a merger approved by the Surface Transportation Board in September 2001. See: Canadian National Railway Company, et al. ---Control—Wisconsin Central Transportation Corporation, et al., Finance Docket No. 34000, 2001 STB LEXIS 711, (September 7, 2001).

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1. * * * to release and forever hold WCL harmless from any and all claims, causes of action, liabilities, obligations, demands and damages of any nature whatsoever * * * arising out of or related to your employment with WCL, or the termination of that employment, up to and including the date of execution of this document * * * .

The document further recites that:

3. * * * as of the date of your separation from WCL, YOU (sic) are eligible to continue your present medical/health coverage, pursuant to COBRA * * *. As set forth above, however, WCL will pay that premium rate for a period of up to 3 months from your separation. * * *

Finally, the document states that:

10. YOU acknowledge that the separation benefits accepted by YOU constitutes the consideration for this Release of Claims because the allowance is something to which YOU would not otherwise be entitled.
* * *

A copy of a letter dated September 20, 2000, from the Vice President, General Manager of Wisconsin Central, and marked as hand delivered to a named employee, has also been provided. The first paragraph of the letter states:

> This letter confirms our discussion of today regarding your transition to employment outside of Wisconsin Central Ltd. (WCL). As we discussed, WCL has determined that your position is among those being eliminated in conjunction with our restructuring. Accordingly, I regret to inform you that your employment with WCL is terminated.

A copy of a letter dated November 27, 2000 from WCL to the employee following the employer's receipt of the "Release" form states:

> Per your severance agreement, you have elected salary and benefit continuation for three (3) months. Under this arrangement, you must complete the attached COBRA Continuation Enrollment Form and mail (sic), as specified, to the firm we use to administer COBRA. We have notified them that your coverage has been paid through February 1, 2000, which is 3 months after the date you signed your severance agreement.
>
> * * * If you wish to continue your coverage beyond that point, you will need to send in the payments * * * to * * * our COBRA administrator.

Section 4(a-1)(iii) of the Railroad Unemployment Insurance Act provides in part as follows:

> Sec. 4 (a-1) There shall not be considered as a day of unemployment or as a day of sickness, with respect to any employee—
>
> * * * * *
>
> (iii) if he is paid a separation allowance, any of the days in the period beginning with the day following his separation from service and continuing for that number of consecutive fourteen-day periods which is equal, or most nearly equal, to the amount of the separation allowance divided (i) by ten times his last daily rate of compensation prior to his separation if he normally works five days a week * * * ;

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Compensation from railroad employment is defined by section 1(i)(1) of the RUIA in pertinent part as follows:

> (i)(1) IN GENERAL.—The term "compensation" means any form of money remuneration, including pay for time lost * * * paid for services rendered as an employee to one or more 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. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer * * *.

The definition of the term "compensation" in the RUIA is substantially the same as that found in section 1(h)(1) of the Railroad Retirement Act (RRA) (45 U.S.C. 231(h)(1)), and section 3231(e) of the Railroad Retirement Tax Act (RRTA)
(26 U.S.C. 3231(e)). Section 302.7(a) of the Board's regulations (20 CFR 302.7(a)) therefore provides that subject to the annual compensation limitations specific to the RUIA, a railroad employer's report of compensation made under the Railroad Retirement Act will be used to determine railroad compensation for benefit eligibility purposes under the RUIA. With regard to separation and severance payments, I note that regulations of the Board promulgated under the Railroad Retirement Act provide:

> 211.10 Separation allowance or severance pay.
>
> Separation or severance payments are creditable compensation except that no part of such payment shall be considered creditable compensation to any period after the employee has severed his or her employer-employee relationship except as provided for in 211.11 of this part [relating to compensation used only in calculating a tier I annuity component].

Based on the foregoing, in my opinion payments under the WCS 2000 Plan cannot be considered exempt compensation pursuant to section 1(h)(6)(v) of the Railroad Retirement Act (sometimes known as a "wage continuation plan") because they are not made on account of sickness or accident. See Legal Opinion L-91-90 (applying standards under section 209(b) of the Social Security Act to find payments under a long term disability plan not to be creditable compensation under the Railroad Retirement Act).

Further, it is my opinion that no compensation may be credited for benefit entitlement purposes, and the employee may not be considered in service to an employer, for months after the month the employee has returned to WCL his or her election to either option A or B. An employee who elects to receive a lump sum payment under option B of the WCS 2000 Plan has clearly broken the employee-employer relationship with WCL. He or she receives no further payments after the initial lump sum, and has no insurance coverage maintained by the employer. Moreover, the employee may immediately obtain other employment without losing the right to retain the full amount of the lump sum payment. Although the status of an employee who elects to receive installment payments under option A of the WCS 2000 Plan is less clear, the notice given to the employee states that the employee's "employment with WCL is terminated", indicating an accomplished fact, rather than an event taking place at a future point in time. Moreover, although WCS 2000 Plan applies by its terms only to employees in positions not subject to collective bargaining who therefore lack a claim to a position on the basis of seniority, the broad language of paragraph 1 of the "Release" form quoted above may be considered a relinquishment of any rights to the employee's former position. The evidence supports a conclusion that the employee severs the employment relationship when electing option A as well. Compare: Legal Opinion L-89-80 (bi-weekly payments over a termination period following execution of a voluntary "termination agreement" constitute compensation, where the employee retains health benefits with the employer); see also, Reed v. Railroad Retirement Board, 145 F. 3d 373 (D.C. Cir., 1998).

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In view of the foregoing, it is also my opinion that payment under WCS 2000 Plan constitutes a separation payment which disqualifies the employee pursuant to section 4(a-1)(iii) of the RUIA from receiving unemployment or sickness insurance benefits for a period equivalent to the length of time he or she would have worked to receive the amount of the payments under the Plan. Finally, although authority to determine a payment to be made pursuant to an non-governmental plan for sickness or unemployment benefits is vested in the Director of Operations (see 20 CFR 323.5), I note that the WSC 2000 Plan lacks the statement of purpose and benefit coordination provisions required by the Board for such plans. See 20 CFR 323.4. The WSC 2000 Plan would therefore evidently not qualify as a plan pursuant to regulations of the Board.