U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

Legal Opinion L-2002-13
October 29, 2002

TO : Wayne J. Scharnak
Chief, Employer Service/Training Center

FROM : Steven A. Bartholow
General Counsel

SUBJECT : February 1965 Job Stabilization Agreement Allocating Service and Compensation for Wage Guaranty Payments for Seasonal Employees

This is to advise you regarding an inquiry from the Brotherhood of Maintenance of Way Employees (BMWE) concerning crediting wage guaranty payments made to railroad employees pursuant to a 1996 revision of the February 7, 1965 Job Stabilization Agreement. As detailed below, in my opinion the payments constitute pay for time lost creditable under section 1(h) of the Railroad Retirement Act.

The February 7, 1965 Job Stabilization Agreement arose from a dispute between a group of five railway labor organizations (including the BMWE) and a group of class I railroad employers which was mediated under the Railway Labor Act. Articles I and IV of the 1965 Agreement essentially provided that employees represented by the labor organizations who met a minimum service requirement as of October 1964 were protected from being placed in a worse position with respect to their compensation than the normal rate of compensation for their assigned position on October 1, 1964. Where the employee worked only seasonally, the Agreement required that he or she was to be offered employment at least equivalent to that performed in his or her seasonal employment in 1964 both as to period and as to compensation. [1]

On June 26, 1996, a Presidential Emergency Board established pursuant to the Railway Labor Act issued a report which recommended revisions to the February 1965 Agreement. The National Carriers' Conference and the BMWE adopted the report verbatim on September 26, 1996, thereby making certain amendments to the February 1965 Agreement. Article I, section 2, of the Agreement as amended now provides:

> Seasonal employees, who had compensated service during each of the years 1995, 1996 and 1997 who otherwise meet the definition of 'protected' employees under Section 1, will be offered employment in future years at least equivalent to what they performed in 1997 unless or until retired, discharged for cause, or otherwise removed by natural attrition.

The BMWE has advised that a seasonal employee makes a claim to his or her employer under Article I section 2 for a protective payment after the end of a calendar year: for example, a claim for compensation

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[1] Article I, section 2 of the 1965 Agreement stated "Seasonal employees, who had compensated service during each of the years 1962, 1963 and 1964, will be offered

Footnote 1 (cont'd)

employment in future years at least equivalent to what they performed in 1964 unless or until retired, discharged for cause, or otherwise removed by natural attrition."

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protection for 2001 is filed in 2002. The amount of the payment is determined by the employer and paid to the employee in the subsequent year. The BMWE suggests that since the payment actually relates to the prior year, the compensation should be credited to months in that prior year rather than to months in the year in which payment is issued. In this regard, section 1(h) of the Railroad Retirement Act defines compensation creditable for benefit entitlement purposes in part as follows:

> (h)(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers * * * 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 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. * * *
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> (2) 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 * * * and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. * * *

Regulations of the Board at 20 CFR 211.3(a) further provide as follows:

> (a) A payment made to an employee for a period during which the employee was absent from the active service of the employer is considered to be pay for time lost and is, therefore, creditable compensation. Pay for time lost as an employee includes:
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> (2) Pay received for loss of earnings for a certain period of time, resulting from the employee being placed in a position or occupation paying less money. In reporting compensation which represents pay for time lost, employers shall allocate the amount paid to the employee to the month(s) in which the time was actually lost. * * *

This definition of the term "compensation" is substantially the same as that found in section 1(i)(1) of the Railroad Unemployment Insurance Act (RUIA) (45 U.S.C. 351(i)(1)). See also, section 302.7(a) of the Board's regulations (20 CFR 302.7(a)).

In Legal Opinion L-84-162, this Office considered the status of payments under the February 1965 Agreement prior to the 1996 amendment, and concluded that such payments were compensation within the meaning of section 1(h) of the RRA and 1(i) of the RUIA, creditable to the months for which the payment is made. That opinion further advised that "the employees may request to have these payments so credited" pursuant to section 9 of the RRA (45 U.S.C. 231h) and former regulations of the Board at 20 CFR 250.3 (1984)(governing employer reports of compensation). Legal Opinion L-84-162 concluded that as the payments represented pay for time lost, "payment made pursuant to the Job Stabilization Agreement would entitle an employee to a month of service [even] where such payment is the only compensation received in a month."

The language of Article 1, Section 2 of the 1965 Agreement differs from that of the 1996 amendment. However, while the 1996 amendment updated the years of reference for the guaranty and inserted language explicitly specifying eligibility requirements, the 1996 revision does not alter the essential purpose of the section to establish compensation protection. The factual basis for the advice provided by Legal Opinion L-84-162 remains following the 1996 revision.

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Therefore, in my opinion payments made to employees pursuant to the 1996 revision remain compensation under the RRA and RUIA, creditable to months for which the payments are made in the prior year. Where the guaranty payment represents the only compensation paid to an employee in the year, the employee must be credited in the records of the Board with months of service in a fashion consonant with the protection of service afforded to the employee by Agreement. Finally, consistent with the advice provided by L-84-162, if the compensation is reported by the employer for the year in which the payment is made, the employee may request an amendment to his or her record of compensation, subject to the four year limitation specified by section 9 of the RRA and current regulations of the Board governing finality of returns of compensation and service at 20 CFR 211.16.