U.S. Railroad Retirement Board
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Legal Opinion L-2003-13
September 16, 2003

TO : V.M. Speakman, Jr.
Labor Member

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Engineer Reserve Pool Payments to Canadian Residents
Compensated Service/Last Non-railroad Employment/
Deduction for Employment Outside the United States

This is in reply to your request that I review the effect on annuities under the Railroad Retirement Act of payments made to Canadian employees of CSX Transportation (CSX) under the "Engineer Reserve Pool Agreement" between CSX and the Brotherhood of Locomotive Engineers dated January 12, 1994. As detailed below, in my opinion (1) these payments are railroad compensation, but only to the extent attributable to displacement from service in the United States; (2) where not attributable to service in the United States, these reserve pool payments do not constitute earnings from the annuitant's last non-railroad employer; and (3) the reserve pool payments do not in any case constitute "non-covered remunerative activity outside the United States" for purposes of assessing any deduction imposed against the tier I and dual benefit annuity components.

Under the January 1994 Agreement, CSX allocates a number of "engineer reserve pool" positions to each terminal. Engineers may apply to CSX to be listed in the reserve pool at their home terminal. CSX enrolls applicants on the list up to the number of available reserve pool positions at a given location. Competing applicants are assigned to the reserve pool in order of seniority. Engineers in the pool receive 70 percent of a basic yard engineer's pay, and continue coverage of CSX health and welfare benefits. They must provide CSX a current address and telephone number, must maintain their operating rule and physical qualifications, and must be available for recall with seven days notice. An engineer who fails to report after the seven day notice period is removed from the reserve pool. Engineers in the reserve pool may request placement on a

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preferential list to be recalled if CSX cannot obtain an engineer from the engineer's pool or the engineer's extra board. After 28 days in the reserve pool, an engineer in the pool may be displaced by another with greater seniority; a reserve pool engineer after 28 days may also voluntarily exercise seniority to an engineer position. No other time limitations are imposed for continuation in the pool, and engineers in the reserve pool may work in outside employment which is "not in conflict of interest" without reduction of the payments.

As you know, section 1(h)(1) of the Railroad Retirement Act (RRA) defines compensation for benefit entitlement purposes under that Act in part as:

> * * * any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad] 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 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(h)(2) of the RRA further provides that:

> 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, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. * * *

The Railroad Unemployment Insurance Act at section 1(i)(1) provides essentially the same definition with respect to compensation creditable for benefit entitlement purposes under that Act as well. In addition, regulations of the Board (20 CFR 211.3(a)(2)) further define pay for time lost to include:

> (a)(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

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> 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. * * *

Section 210.5(d) of the regulations (20 CFR 210.5(d)) provides in part that for purposes of annuity calculation and entitlement under the Act, "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."

While under the terms of the January 1994 Agreement an employee voluntarily removes himself or herself from active service, the Agreement does not provide for ending the employment relationship with the railroad. Rather, the reverse is true: while receiving payments, the employee remains indefinitely subject to recall with a seven day notice, and must remain qualified as a locomotive engineer. By granting the employee's application to be placed in the reserve pool, the railroad in effect is placing the engineer into a "less remunerative position" similar to an employee afforded protection under the Washington Agreement of May 1936 or the Job Stabilization Agreement of February 1965. Displacement allowances and wage guarantees under these agreements are considered creditable pay for time lost and railroad service under section 1(h)(1) and 1(h)(2) of the Act. See Legal Opinions 76-50 (monthly allowance under the Washington Agreement is creditable compensation) and L-84-162 (wage guaranty payments under the February 1965 Agreement). Accordingly, the payments under the January 1994 Engineer Reserve Board agreement are railroad compensation within the meaning of section 1(h)(2) of the Railroad Retirement Act for benefit entitlement purposes. An employee may be credited with a month of railroad service for "Any month or any part of a month during which an employee performed no active service but received" payment under the January 1994 Agreement. See regulations of the Board at 20 CFR 210.5(d) and 211.3(a)(2).

Section 2(e)(1) of the Railroad Retirement Act requires an employee to cease compensated service to a railroad employer in order to establish entitlement to an annuity; section 2(e)(3) states that no monthly annuity may be paid for any month in which the annuitant is credited with a month of railroad service. Board regulations at 20 CFR 218.30(c) provide that "compensated service" to a railroad employer for purposes of section 2(e) includes a month in which an employee is credited with

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railroad employer service by reason of a displacement wage guaranty. This means that no monthly annuity may be paid for any month in which railroad compensation is credited due to a reserve pool payment made under the January 1994 Agreement.

However, those CSX engineers who elect placement in the reserve pool and who are Canadian residents present a special case due to the decision of the Railroad Retirement Board in Board Order 86-59. In that decision, a majority of the Board determined that pursuant to section 1(d)(3) of the Railroad Retirement Act (which excludes railroad service performed outside the United States under certain circumstances), service performed in Canada to United States railroad employers by Canadian residents ("Canadian service") would no longer be considered creditable for benefit purposes under the Act. This decision was affirmed by the Court of Appeals in Railway Labor Executives' Association v. United States Railroad Retirement Board, 842 F. 2d 466, (D.C. Cir. 1988).

A series of opinions by this Office has advised how Board Order 86-59 should be implemented in various situations. In Legal Opinion L-92-40, the General Counsel addressed whether holiday, vacation and wage guaranty payments to Canadian residents may be credited as railroad compensation. She advised that where a payment to a Canadian resident is not directly attributable to a trip in the United States which would constitute covered railroad employer service, the payment would be considered Canadian service, and therefore not creditable as railroad employer compensation. Where the employee received a wage guaranty payment attributable to a specific train run which would lie in whole or in part within the United States, the guaranty payment is creditable compensation only in proportion to the mileage within the U.S.

The particular Canadian resident submitted in connection with your request began to receive an annuity under the Act at age 60 in 1997. Although there is no specific evidence regarding when he was placed on the engineer reserve pool, the record of returns of service and compensation reported by the railroad for this employee show no railroad service has been credited after 1989. Records of employer reports of railroad service and compensation for years 1998 and earlier are now final and conclusive evidence of the service and earnings of that individual pursuant to section 9 of the Act and regulations promulgated

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thereunder.[1] Accordingly, consistent with Legal Opinion L-92-40, the fact that the Board's records show none of the wage guaranty payments received by the employee in question has been credited means no part of the wage guaranty is attributable to service within the United States, and that the entire amount of payments he has received is "Canadian service".

Legal Opinions L-92-5 and L-93-38 have advised that a Canadian resident who continues in railroad employment which is no longer creditable pursuant to B.O. 86-59, is not in railroad employment which prevents payment of the entire railroad retirement annuity for the month such service is performed pursuant to section 2(e) as noted above. Those opinions further advised that Canadian service nevertheless is earnings from employment for purposes of annuity reductions imposed by two provisions of section 2(f) of the Railroad Retirement Act.[2] The question is whether payment to Canadian residents for time lost, such as the guaranty payment to engineers in the reserve pool, may also be considered earnings for purposes of the 2(f) annuity reductions.

The first provision, section 2(f)(1), subjects the employee's tier I and dual benefit annuity components to "deductions on account of work pursuant to the provisions of section 203 of the Social Security Act." For most annuitants, the 2(f)(1) deduction means the "retirement test" established by sections 203(b) and 203(f), requiring a benefit deduction for earnings above an annual limit.[3] However, work outside the United States in

[1] Section 9 of the Railroad Retirement Act provides that in the absence of fraud, a return filed with the Board by a railroad employer of service and compensation paid to employees is final if not contested within 4 years of the date the annual return is required to be filed. Regulations of the Board at 20 CFR 209.8 require an annual return of service and compensation for a year be filed by the last day of February of the following year. Thus, the 1998 return was required to be filed February 1999, and became final in 2003. See section 211.16 of the regulations (20 CFR 211.16), governing finality of compensation records.

[2] I note that Legal Opinion L-93-38 further advised that since the United States railroad employer remained a covered employer under the Act, the continued service to a railroad by a Canadian employee, even though no longer creditable for benefit purposes, would not break the employee's "current connection" with the industry as defined by section 1(o) of the Act. A current connection is an eligibility requirement for a disability annuity based on inability to perform the last railroad occupation, for a supplemental annuity for career railroad employees, and for payment of annuities to the employee's survivors.

[3] Those sections provide that the monthly social security benefit shall be reduced by either one-third of annual earnings from employment which exceed an annual earnings

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employment not covered by the Social Security Act is subject to the alternative test established by section 203(c). That section provides that without regard to the amount of earnings, the full benefit is to be withheld for any month "in which such individual is under retirement age (as defined in section 216(l) of this Act and for more than forty-five hours of which such individual engaged in noncovered remunerative activity outside the United States" (42 U.S.C. § 403(c)(1)).

In considering whether a payment triggers a "work deduction" against the tier I and dual benefit annuity components under section 2(f)(1), the Board must weigh any interpretation of section 203 by the Social Security Administration (SSA) as the agency which administers that provision. See: Social Security Board v. Nierotko, 327 U.S. 358 (1945), at 366-367. While SSA does consider wage guaranty payments relating to covered employment to be earnings within the United States if the employee retains the employment relationship during the payment period (See SSA Program Operations Manual System (2003)§ RS 0205.045C Income That is not Wages for E[arnings]T[est] Purposes but May Be for Coverage), I can find no indication SSA has determined that such a payment constitutes earnings under the forty-five hour test applied to noncovered activity outside the United States.

Under the terms of the January 1994 Engineer Reserve Pool Agreement, the employee performs no services to the employer, and may even engage in other employment. In my opinion, mere receipt of the wage guaranty is not sufficient to show "forty-five hours of * * * remunerative activity" for purposes of section 203(c), as incorporated by section 2(f)(1) of the Railroad Retirement Act. Accordingly, it is my opinion that payments to Canadian residents under the January 1994 Engineer Reserve Pool Agreement do not require a deduction from the tier I and dual benefit component of an annuity under the Railroad Retirement Act.

The second section 2(f) deduction is imposed by section 2(f)(6). That section requires a deduction of $1 for every $2 of earnings against the employee's tier II annuity component and supplemental annuity in any month when the annuitant has earnings "from compensated service rendered in such month to the last person * * * by whom such individual was employed before the date on which the annuity of such individual

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limitation, in the case of beneficiaries who are retirement age or over; or by one-half of such excess earnings, if the beneficiary is less than retirement age.

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* * * began to accrue". The total employee annuity deduction is limited to one-half of the total tier II and supplemental annuity.

Congress added section 2(f)(6) to the Railroad Retirement Act as part of the 1988 amendments. See Public Law 100-647, Title VII, section 7302(e) (102 Stat. 3757, 3777). In Legal Opinion L-93-21, this Office reviewed the legislative history of the amended provision, and concluded that "Congress intended that the new deduction provision would apply to the same individuals and in the same fashion as the non-payment provision of former section 2(e) which it superseded."[4] That opinion noted that advice from the General Counsel over the preceding 20 years consistently concluded that "Where no service was rendered, the payment [from a last non-railroad employer] would not require nonpayment of the employee annuity under former section 2(e)."

As noted above, an employee receiving an engineer reserve pool wage guaranty must hold himself ready to perform service, but does not render active service to the railroad employer. The language of section 1(h) of the Act deems the employee to be in the service of the employer when the payment is made with respect to covered service, but no such deeming provision applies to payments with respect to Canadian service. Given that no service is actually performed, and no service may be deemed to have been performed, in my opinion the employee cannot be considered to be in the compensated service of his last non-railroad employer within the meaning of section 2(f)(6).

In sum, based on the foregoing reasoning, in my opinion the annuity of a Canadian resident who receives an engineer reserve pool wage guaranty pursuant to the January 1994 Agreement between CSX and the Brotherhood of Locomotive Engineers is not subject to deduction for non-covered employment outside the United States under section 2(f)(1), and is not subject to the deduction for last non-railroad employment under section 2(f)(6) of the Railroad Retirement Act.

I trust that the foregoing discussion will be of assistance to you.

[4] Prior to the 1988 amendment, section 2(e) required the full month's annuity be withheld for any month the annuitant worked for either a railroad, or for the annuitant's last non-railroad employer.