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-2004-09
December 5, 2006

TO : Ronald Russo
Director, Policy and Systems
Office of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : CSX 2003/2004 Enhanced Pension Benefits Program
Organizational Effectiveness Initiative
Eligibility for Unemployment Insurance Benefits and Current Connection

This memorandum is in reference to a request by CSX Transportation (CSXT) for my opinion as to the effect upon eligibility for benefits under the Railroad Retirement and Railroad Unemployment Insurance Acts of payments by CSXT under the CSX 2003/2004 Enhanced Pension Benefits Program (the 2003/2004 Program). I am providing my analysis of the program directly to you so you may notify agency employees regarding any necessary action in adjudication of benefit claims under either Act. A copy of this memorandum has also been sent directly to CSXT.

The employer has requested advice regarding whether employees eligible for these payments may receive unemployment insurance benefits under the Railroad Unemployment Insurance Act (RUIA), and whether employees whose employment terminates in connection with the 2003/2004 Program will retain a current connection with the railroad industry for purposes of annuity entitlement determinations under the Railroad Retirement Act (RRA). As explained below, in my opinion the payments under the 2003/2004 Program do not constitute railroad compensation under the Acts, and do not allow the crediting of any additional railroad service months. Payments under the Program also do not constitute a separation allowance which would disqualify a claimant for unemployment insurance benefits. Those employees who receive benefits under the Program may be considered eligible for unemployment insurance benefits subject to evidence of availability for work, while the group which does not receive benefits under the Program need not establish availability first. Certain categories of employees may be considered qualified for a deemed current connection, while the current connection of those who expressed a willingness to have employment terminated in exchange for benefits under the Program must be determined upon the circumstances under which each individual left employment.

I. Summary of the 2003/2004 Program.

CSXT explains that its parent company, CSX Corporation, determined to reduce management positions throughout its organization, including subsidiary corporations, by 800 to 1000 jobs, under a program entitled “Organizational Effectiveness Initiative” or OEI. CSXT complied with the parent company directive by redesigning each level of management, then deciding which current employees will be moved from the existing jobs to the newly created positions. Benefits under the 2003/2004 Program are offered to certain classes of individuals who lose employment as a result of the restructuring.

CSXT has described several categories of employees offered benefits under the 2003/2004 Program. The first two are (1) managers who are not offered a new position after restructuring; and (2) managers who notify the employer that they would agree to allow CSXT to terminate their employment as part of the restructuring in order to receive benefits under the 2003/2004

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Program. In both instances, CSXT determines whether to retain the employee based on information such as effectiveness ratings, but in the second category CSXT considers the expressed interest of the employee as well. If terminated, both categories receive the same form letter from a CSXT official which states that as a result of company restructuring, "your employment with [CSXT] is being terminated * * * your separation is effective [the date of the letter]."

CSXT describes another group of employees who are "suspensed". CSXT explains that as the reorganization proceeds one management classification level at a time, some employees who are not offered a job at their present management level are notified that they may elect benefits under the 2003/2004 Program or may consider a position at the next lower corporate level. If they wish to be considered for this employment, their employment status is "suspended" until the reordering of next lower level of management is concluded and those positions are filled, a period which I am informed would last about 60 days. At that time the "suspensed" employee is either told no position is available, or is offered a managerial position at the lower management level. If no position is available, then the employee is offered benefits under the 2003/2004 Program. Employees offered "suspensed" status receive a letter from CSXT which states that "as a result of * * * [the company restructuring] you no longer have a position with CSX Transportation" at the employee's current management level. "If you do not choose to be considered for a position at * * * [the next lower management classification], your employment will be terminated." If CSXT offers the suspended employee a lower echelon management position, but the employee declines, his or her status as a suspended employee ends. For purposes of this memorandum, employees who elect immediate benefits under the 2003/2004 Program rather than suspended status, and those who request suspended status but are then not offered a position will be classified together as category 3; those who elect suspend status but then decline an offered position will be classified as category 4. I note that no benefits under the 2003/2004 Program are available to this fourth category of employees.

CSXT has also provided a summary of benefits which may be paid under the 2003/2004 Program. As described by the summary, the Program offers two distinct types of payments. The "2+2 Option" allows employees to be considered, for purposes of meeting the age and service requirements of the CSX pension plan, to be two years older and have two years additional employment with the company. In effect, these employees may retire on the company pension two years earlier. The summary document states that pension payments are made from a qualified trust, and no Railroad Retirement employment taxes are withheld. The "Lump Sum Option" allows the employee to receive a special lump sum distribution from the Pension Plan equal to the product of the employee's monthly base salary multiplied by a "benefit factor" ranging from 3 to 12, derived from a table grouping length of company service.[1] The summary document warns the employee that a lump sum payment is subject to normal distribution rules of the CSX pension plan, and therefore is subject to a 10 percent Federal tax penalty if received before the employee is age 55.

II. Payments are not creditable compensation.

Because unemployment insurance benefits are not payable for any day for which the employee receives remuneration (RUIA section 1(k)), it must first be determined whether payments under the 2003/2004 Program constitute railroad compensation. As both the RRA and RUIA contain essentially the same definition of creditable compensation, the status of Program payments may

[1] For example, the table provides an employee with eight to nine years of service with a factor of 6, so the lump sum option distribution would equal a month's base salary multiplied by 6; while an employee with 14 to 15 years of company service would have a factor of 9 from the table, yielding a lump sum equal to monthly base salary multiplied by 9.

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be considered under both Acts together. See RUIA sections 1(i) and 1(j); RRA section 1(h). Both Acts thus define compensation for benefit entitlement purposes to include * * * any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad] employers * * *". Absent evidence to the contrary, both Acts also presume that "a payment made to an individual through the employer's payroll shall be compensation for service rendered". RUIA section 1(i)(1), RRA section 1(h)(1). Railroad compensation includes remuneration paid for time lost as an employee. Id. Pay for time lost itself includes the amount paid by the employer for loss of earnings resulting from displacement of the employee to a less remunerative position or occupation. (RUIA section 1(i)(1), RRA section 1(h)(2)). However, pay for time lost may not be credited as compensation after the employee's employment with the railroad terminates due to retirement or discharge. See regulations of the Board at 20 CFR 204.6 and 210.5(d) (RRA); and 20 CFR 322.6(b)(RUIA).

A benefit under either option of the 2003/2004 Program is paid from the trust fund established for the company pension. They are therefore not "A payment made by an employer to an individual through the employer's payroll" within the meaning of sections 1(h)(1) of the RRA or 1(i) of the RUIA. In addition, because the payments are predicated on termination of the employment relation and retirement from service, they are not made "with respect to an identifiable period of absence from the active service of the employer". This Office has declined in the past to find that pension payments made under an offer of liberalized eligibility requirements are separation payments creditable as compensation under the Act, even if evidently offered as inducements to retire. See Legal Opinion L-2001-04, (CSX Special Enhanced Benefits Program, 2 Plus 2 Option), and Legal Opinion L-2003-12 (CSX 1999 Voluntary Early Retirement and Separation Program, 3 Plus 3 Option).

The offer to increase the employee's age and company service by 2 years each under the 2003/2004 Program is essentially indistinguishable from the offer to increase the employee's age and company service considered by Legal Opinions L-2001-04 and L-2003-12. Consistent with the reasoning of those opinions, I conclude that payments under the 2003/2004 Program are also not creditable as compensation under the Acts.

III. Eligibility for Unemployment Insurance Benefits.

Given that payments under the 2003/2004 program are not creditable railroad compensation which would constitute a day of remuneration, the next question is whether the payments otherwise impact the employee's eligibility for unemployment insurance benefits. Section 4(a-1)(iii) of the RUIA disqualifies an employee paid a separation allowance from receiving unemployment insurance benefits for roughly the period of time equal to the number of weeks the employee would have worked at base salary to receive an equivalent amount of compensation. The payment need not be creditable as compensation to trigger the 4(a-1)(iii) disqualification. I note that the General Counsel has previously advised that both a monthly payment and a lump sum paid to employees age 55 and over who elect to voluntarily retire by a specified date constituted separation allowance payments for purposes of the 4(a-1)(iii) disqualification, even though paid from a "supplemental pension plan" which may not result in creditable compensation. See Legal Opinions L-96-9, L-96-10, reviewing the Conrail Voluntary Retirement Program.

The 2003/2004 Program differs significantly from the Conrail program. The Conrail program established a separate plan with eligibility limited only to certain individuals, who were guaranteed to receive immediate payment.

The 2003/2004 Program is an extension of the CSX pension plan. Eligibility for payment remains subject to the general disbursement rules under the plan, as augmented by the Program. This means, for example, that an employee may elect the 2+2 option, yet still not be eligible for

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immediate pension payments because he or she is under the requisite age, even with the additional 2 years age allowed under Program. In addition, while the Conrail plan was an inducement to voluntary separation, the 2003/2004 Program is offered only to individuals whose employment the company has decided to terminate as part of its restructuring, and is not limited by age. In my opinion these distinctions support a conclusion that, unlike the Conrail plan, payments received under the 2003/2004 Program are pension payments rather than a severance or separation allowance for purposes of the disqualification required by section 4(a-1)(iii).

To be eligible for unemployment insurance benefits, the RUIA also requires that a claimant must not leave employment voluntarily and without good cause, and must be available for work. See RUIA sections 4(a-2)(i); and 1(k)(1). Considering only the earlier description of various categories of employees would lead to the conclusion that the current employment of at least the employees in category (1) and those category (3) employees not offered a position at the end of the suspense period, has been involuntarily terminated, while those employees in category (2) may have volunteered to leave employment. However, CSXT also states that all employees must execute an "Employment Separation Agreement and Release Form" as a condition of eligibility to receive benefits under the 2003/2004 Program. An agreement to separate indicates the employee exercises volition in choosing to end employment. I note that agency policy generally considers an employee who leaves employment in exchange for a separation or severance payment has voluntarily left employment, but with good cause. See: Adjudication Instruction Manual (AIM) § 1505.05(h). The same policy applies to those who leave employment to receive a pension. AIM at §1505.05(j). Without further analysis, categories 1, 2 and 3 of the employees who leave employment as a result of the management restructuring described by CSXT, may at least be determined to have left employment with good cause for purposes of the unemployment insurance disqualification provision of section 4(a-2)(i). Based on the circumstances described, the fourth category of employees would not be disqualified pursuant to section 4(a-2)(i) because the employment offered but declined does not meet the definition of suitable work. See RUIA section 4(c).

The last question regarding eligibility for unemployment insurance benefits is whether the individual is available for work. In this regard, section 327.10(c) of the Board's regulations (20 CFR 327.10(c)) presumes an employee who voluntarily retires is not available for work, and therefore not eligible for unemployment benefits. Agency policy allows rebuttal of the presumption on evidence that the claimant is "doing what a reasonable person in similar circumstances would do to get substantial full-time employment." AIM § 804.04(b). I believe the ambiguity regarding the weight an expression of willingness to leave employment may have had in the employer's decision to terminate employment, and the fact that all employees who receive payments under the 2003/2004 Program must execute a release form, justifies requiring all employees, prior to receiving unemployment insurance benefits, to provide evidence of availability consistent with AIM § 804.04(b) in order to rebut the presumption that they left CSXT to receive pension payments. Availability evidence would not be required in the case of employees who are offered work only at a lower echelon of the organization, and then decline (category 4), because these individuals receive no payments under the 2003/2004 Program, and therefore cannot be said to have left in exchange for a pension.

IV. Current Connection under the Railroad Retirement Act.

The conclusion that payments under the 2003/2004 Program are not creditable railroad compensation means the employee receives no additional railroad service months, and may receive the pension payment under the 2+2 Option without effect upon the date an annuity under the RRA may begin. The last question is whether the employees leaving employment through the 2003/2004 Program due to the CSXT management restructuring retain a current connection for benefit entitlement purposes under the RRA.

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As you know, an occupational disability annuity under section 2(a)(1)(iv) of the RRA, a supplemental annuity under section 2(b) of the RRA, and survivor annuities under section 2(d) of the RRA Act, each require that the railroad employee have a current connection with the railroad industry as defined by section 1(o). An employee has a current connection for all purposes if he or she has worked for a railroad in 12 of the 30 months immediately preceding the month the employee annuity begins or the employee dies. See regulations of the Board at 20 CFR 216.13(a). An employee also retains a current connection if he or she has not had regular and substantial non-railroad employment between the end of the 30 month interval describe above, and the month the employee annuity begins, or the employee dies. See regulations of the Board at (20 CFR 216.13(b)). An employee who does not meet either of the foregoing may still have a current connection only for supplemental annuity and survivor benefit entitlement purposes if (1) the employee has completed at least 25 years of railroad service, (2) is involuntarily terminated from the railroad industry without fault, and (3) thereafter does not decline an offer of employment in the same class or craft as his most recent railroad employment. See 20 CFR 216.15(b) and .15(c). An employee who accepts a separation allowance and relinquishes his or her rights to employment has voluntarily terminated. 20 CFR 216.15(d). However, where loss of employment is imminent and certain, election to receive a separation payment is considered involuntary. See Legal Opinion L-90-106, (Management and Non-Contract Employees of Chicago and Northwestern Voluntary Separation Program) and the further opinions cited therein.

Based on the evidence provided, the CSXT employees in category (1), though required to sign the “Employment Separation Agreement and Release Form”, have been first notified that they no longer have a position. For these employees, loss of employment was certain. Similarly, employees in both categories (3) and (4) have been notified that their current position has ended. Regardless of whether or not they are later offered a position at a lower level, the loss of their current employment is also certain, and they are not offered an equivalent manager’s job. In my opinion, employees with 25 years of railroad service in categories (1),(3), and (4) meet the requirements for a current connection as set forth in 20 CFR 216.15(b).

There remains those employees in category (2) who notified CSXT that they would be willing to be terminated as part of the restructuring in order to receive benefits under the 2003/2004 Program. Because CSXT states willingness to leave employment was a factor, but not the sole factor, in the ultimate decision, in my opinion a decision cannot be made that the loss of the positions of all individuals falling in this category was imminent and certain without regard for this voluntary action. Whether each of these employees may meet the requirements for a current connection as set forth in 20 CFR 216.15(b) must be determined on the facts in each case.

cc: Director, Disability, Sickness & Unemployment Benefits Division
Chief, Compensation and Employer Services