Legal Opinion L-2004-11
July 1, 2004

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

TO : Arthur A. Arfa
Director of Hearings and Appeals

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Donated Sick Leave
Remuneration Payable or Accruing to Day of Sickness

This is in reply to your request for my opinion regarding whether sickness insurance benefits are payable under the Railroad Unemployment Insurance Act (RUIA) to an appellant who has received "donations of personal leave days". For the reasons set forth below, in my opinion no benefits may be paid for any day to which such payments may be attributed.

As stated in your memorandum, the appellant has been incapacitated by illness from performing his railroad employment, and evidently is otherwise a qualified employee under section 3 of the RUIA. The railroad employer has in effect a plan whereby employees may "donate" to an eligible co-worker paid days of leave which would otherwise accrue to them. The employer then pays the incapacitated employee additional days of sick pay, beyond the number of days which have accrued to that employee. There is evidently no statement of purpose by the railroad with respect to this program, or any co-ordination of payments under the program with benefits under the RUIA.

In general, section 2(a)(1)(B) of the RUIA provides for payment of sickness insurance benefits for qualified employees who have over four days of sickness in a two week registration period. Section 1(k) of the Act defines a day of sickness as a day on which the employee is incapacitated by illness or injury, "with respect to which (i) no remuneration is payable or accrues to him," and (ii) the employee has filed a timely statement of sickness. Section 1(j) of the RUIA defines "remuneration" as follows:

> (j) The term "remuneration" means pay for services for hire, including pay for time lost, and tips, but pay for time lost shall be deemed earned on the day on which such time is lost. The term "remuneration" includes also earned income other than for services for hire if the accrual thereof in whole or in part is ascertainable with respect to a particular day or particular days. The term "remuneration" does not include any money payments received pursuant to any nongovernmental plan for unemployment insurance, maternity insurance, or sickness insurance.

Because the payments received by the appellant in your case may be viewed as a voluntary transfer from co-workers to the appellant of a benefit owed to the co-worker by the railroad, it may be argued that the payments are a charitable contribution from one individual to another, rather than remuneration from the employer within the meaning of section 1(j).

As an initial proposition, opinions of this Office clearly establish that sick leave pay from an employer is remuneration within the meaning of section 1(j).[1] In Legal Opinion L-48-509, issued shortly after the

[1] A review of the legislative history of section 1(j) shows that the first sentence was enacted as part of the original Railroad Unemployment Insurance Act. See Public No. 722, ch. 680, 75th Cong., 3d Sess., 52 Stat. 1094, 1095. The second sentence regarding other earned income attributable to particular days was added in 1940. See Public No. 833, ch. 842, 76th Cong., 3d Sess., at section 4, 54 Stat. 1094. The last sentence, which excludes payments under nongovernmental plans, also appeared in the original RUIA but referred only to nongovernmental plans for unemployment insurance. It was amended to include nongovernmental plans for sickness insurance when Congress added the sickness insurance benefit provisions to the Act in 1946. See Public No. 572, ch. 709, 79th Con. 2d Sess., at section 302, 60

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

sickness insurance benefit provision was added to the Act, the Associate General Counsel considered payments by the railroad pursuant to a collective bargaining agreement which were made to "regularly assigned employees absent from duty on account of bona fide personal illness". Employees with one to five years of service to the railroad were eligible for six days per year; those with five and over were eligible for twelve days. Payments were specified as one-half of the employee's regular rate of pay, not exceeding $5. The Associate General Counsel concluded that because the payments could be made only to individuals employed for a specified minimum time, because the payments were made for specific periods of absence for which no wages were paid, and because the payments were tied to the employee's rate of pay, they had the characteristics of pay for time lost. As they were not made under a plan for nongovernmental sickness insurance, they were therefore remuneration with respect to the days for which they were paid, and sickness insurance benefits were not payable. See also Legal Opinion L-67-59 (payments of the incapacitated employee's full daily rate of pay for ten, twenty or thirty days, depending on years of employment, constitutes remuneration as pay for time lost which prevents payment of sickness insurance benefits).

Arguments that payments by the railroad to employees on account of sickness are gratuities not paid for services for hire, or not otherwise earned income within the meaning of section 1(j) have been rejected. In Legal Opinion L-52-297, the Associate General Counsel considered a railroad's policy to make a lump sum payment to any employee undergoing corrective surgery for a hernia, regardless of whether the hernia resulted from a service-connected injury. The payment, calculated as a basic lump sum augmented by an additional amount for every year of service to the employer above five, was available to all employees, including those on monthly salary or on furlough who would not have lost wages. Noting that the amount of payment was related to the employee's years of service, the Associate General Counsel found the payments were based on past services or the expectation of future services, and thus were remuneration paid for services under section 1(j), rather than gratuities. While related to service to the employer, however, they were not related to a period of time. The Associate General Counsel therefore concluded the payments, though remuneration, did not accrue to any particular day within the meaning of section 1(k) of the RUIA, and hence did not prevent payment of benefits for any specific day of sickness.

By comparison, other opinions have found claimed gratuities were remuneration for specific days under RUIA section 1(k). Legal Opinion L-52-321 considered a salaried employee who received what the railroad termed a "special allowance" equal to his regular salary less the amount of sickness insurance benefits. Payments were made through the regular payroll, but the employee's eligibility was at the railroad's discretion. The Associate General Counsel noted that though the element of discretion meant they were not made pursuant to a nongovernmental plan for sickness insurance, because the payments were for an identifiable period, were in amounts having a definite relationship to regular salary, and were issued through payroll, they were pay for time lost and hence remuneration for purposes of RUIA section 1(j) and 1(k). The General Counsel reached the same conclusion in Legal Opinion L-54-575, where payments were made from a "gratuity roll" to management employees temporarily absent due to illness or injury. The payments were commensurate with the individual employee's monthly salary, and were made at the discretion of railroad management "in consideration of long and faithful service." The General Counsel noted that the fact that the payments were voluntary did not prevent their characterization as pay for time lost. See also L-63-203, finding "gratuities" paid to salaried employees absent from duty, in amounts equal to the employee's monthly wage less any benefits under the RUIA, were remuneration under RUIA sections 1(k) and 1(j).

Stat. 722, 736. The portions of section 1(j) relevant to this question therefore have not changed in almost 60 years, and interpretations of this provision during that time consequently remain useful for the present analysis.

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

Applying the analysis of prior opinions to the circumstances of your appellant leads to the conclusion that the payments received by reason of "donated personal days" were remuneration which prevents payment of sickness insurance benefits. First, the payment received by the appellant is remuneration. It is noteworthy that unlike an outright donation of cash, the personal days may be donated only between co-workers. The payments are through the company payroll, and evidently in the amount of the recipient's daily salary rather than the salary of the donor co-worker. Where the donor's pay rate is lower than the pay rate of the donee, the employer evidently nevertheless pays the higher rate. This indicates the payments are based on the value of past services or the expectation of future services to the employer by the recipient employee, rather than the value of such services by the donor employee at the donor's rate of pay. Second, unlike the hernia surgery payments discussed in L-52-297, the payment is made because the recipient employee has lost wages due to absence from work during a specific time. The payment of donated personal days therefore has the characteristics of pay for time lost delineated by prior opinions of this Office. The fact that the payment is initiated by voluntary action, even the voluntary action of another employee, does not detract from this characterization, nor does the fact noted earlier that the employer may actually contribute the difference when the donor's rate of pay is less than the donee's pay rate.

I also note that section 1(i)(1) of the RUIA defines railroad compensation for the purpose of determining a qualified employee pursuant to section 3 of the Act as follows:

> * * * any form of money remuneration, including pay for time lost but excluding tips, 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 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.

Creditable compensation under the RUIA thus by definition includes those payments which section 1(j) defines as remuneration, other than tips. Section 1(i)(1) is substantially the same as the definition of railroad compensation subject to taxation as defined by section 3231(e)(1) of the Railroad Retirement Tax Act (26 U.S.C. § 3231(e)(1)) and section 31.3231(e)-1(a) of the regulations of the Internal Revenue Service (26 CFR 31.3231(e)-1(a)). The Commissioner of Internal Revenue has ruled under section 3231(e)(1) that where an employer establishes a plan whereby co-workers may surrender to the employer leave time which may then be received by employees who suffer a "medical emergency", the amounts paid by the employer under the plan are compensation for services to the employer provided by the recipient which is taxable under the Railroad Retirement Tax Act. See: Rev. Rul. 90-29, 1990-1 Cum. Bul. 11. Given the essential identity of the definition of compensation under the Tax Act and the RUIA, the Commissioner's interpretation in Revenue Ruling 90-29 supports the conclusion that a payment by an employer pursuant to a plan allowing transfer of leave donated from co-workers is to be considered compensation under section 1(i)(1) of the RUIA as well. As compensation under section 1(i)(1), a payment under such a plan is by definition also remuneration under section 1(j) of the RUIA.

Accordingly, in view of prior opinions of this Office and the interpretation of the Railroad Retirement Tax Act by the Commissioner of Internal Revenue, it is my opinion that the payments for additional personal days received from the employer by the employee in your appeal are remuneration attributable to the days for which they are paid, and prevent payment of sickness insurance benefits for those days pursuant to section 1(k) of the RUIA.