



Legal Opinion L-2005-07
March 30, 2005

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

TO: Ronald Russo
Director of Policy and Systems

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Employer Request for Retroactive Effective Date
of Supplemental Sickness Benefit Plan
Willamette and Pacific Railroad, Inc.
Portland and Western Railroad, Inc.

This is in reply to your memorandum dated March 10, 2005, regarding the supplemental sickness plan for the Willamette and Pacific Railroad, Inc., and the Portland and Western Railroad, Inc., both subsidiaries of the Genesee and Wyoming Railroad, Inc.

You advise that your office approved the plan on February 1, 2005, stating that the effective date of the plan was January 1, 2005. A representative of the Genesee and Wyoming Railroad has requested that the effective date be January 1, 2000.

The plan was submitted to your office in January 2005. You advise that on February 22, 2002, an employee of the Willamette and Pacific Railroad applied for sickness benefits, stating on his application that he was receiving wage continuation pay. In a telephone conversation of March 14, 2002, the representative of the Genesee and Wyoming Railroad stated that that railroad had no formal supplemental plan approved by the Board, and inquired as to how to create a supplemental plan. During the period from October 2004 through January 2005, your office discussed with representatives of the Genesee and Wyoming Railroad the creation of a supplemental sickness benefit plan. On January 7, 2005, your office provided a template for a plan, and on January 20, 2005, a proposed plan was submitted.

Based on the foregoing information, it is apparent that the plan itself was not drafted and could not have been adopted by the railroads prior to January 2005, although certain benefits were paid to employees in 2002.

Section 323.3 of the Board's regulations (20 CFR 323.3) provides that:

An unemployment or sickness benefit plan qualifies as a nongovernmental plan if it conforms to the following standards:

- (a) The plan is in writing and has been published or otherwise communicated to covered employees prior to the inception of the plan;
- (b) Benefits under the plan are payable only to employees who are involuntarily laid off or separated from the service of the employer or who are absent from work on account of illness or injury;
- (c) Payment of benefits under the plan is conditioned upon a covered employee's meeting the eligibility conditions governing payment of



Legal Opinion L-2005-07 March 30, 2005

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

benefits under the Railroad Unemployment Insurance Act. However, a plan will not be disqualified merely because it:

(1) Provides benefits during any waiting period required under the Railroad Unemployment Insurance Act, or

(2) Provides benefits after an employee has exhausted rights to benefits under the Railroad Unemployment Insurance Act, or

(3) Provides benefits during a period when the employee is not a "qualified employee", within the meaning of part 302 of this chapter;

(d) Payment of benefits under the plan is coordinated with benefit payments to which the employee may be entitled under the Railroad Unemployment Insurance Act. In general, plan benefit payments will be considered coordinated with Railroad Unemployment Insurance Act benefit payments when computation of the plan benefits takes Railroad Unemployment Insurance Act benefit entitlement into consideration in such a way as to make it clear that the plan is supplementing Railroad Unemployment Insurance Act benefit payments for days of unemployment or days of sickness. For example, a plan that provides for payment of a specified daily benefit amount is considered coordinated with Railroad Unemployment Insurance Act benefit payments if the plan provides that the daily benefit amount otherwise payable to the employee is reduced by the amount of benefits that the employee received or could receive under the Railroad Unemployment Insurance Act for the same day if the employee had met all the eligibility criteria for such benefit. Similarly, there is acceptable coordination if the plan simply provides for payment of an amount as an "add-on" benefit to the amount of Railroad Unemployment Insurance Act benefits paid or payable. On the other hand, a plan that allows payment so as to compensate an employee for railroad or non-railroad earnings that are lower in amount than what the employee would get under the plan if he or she were not employed is not considered coordinated with benefit payments under the Railroad Unemployment Insurance Act because an employer payment made under such circumstances supplements earnings rather than benefit payments under the Railroad Unemployment Insurance Act. No Railroad Unemployment Insurance Act benefits are payable to an employee who is earning remuneration from railroad or non-railroad employment. Employer payments that make up for low earnings are pay for time lost and therefore are compensation and remuneration;

(e) The plan confers upon covered employees an enforceable right to the benefits under the plan. The plan may not commit to management discretion any decision as to whether such employee will actually be paid the benefits to which he is entitled under the plan or the amount to be paid;

(f) The plan may not provide benefits to a covered employee in an amount that, when added to his or her Railroad Unemployment Insurance Act benefits, is greater than the wages of salary that would have been paid if the employee were employed; and

(g) The plan incorporates the features set forth in Sec. 323.4 of this part and has been approved by the Board's Director of Unemployment and Sickness Insurance as a nongovernmental plan for unemployment or sickness insurance.



Legal Opinion L-2005-07
March 30, 2005

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

While it is not possible, based upon the available information, to determine whether the rules pursuant to which the payments prior to January 2005 were made met at least some of the criteria contained in section 323.3, above, it is clear that that the plan did not meet the criteria listed in subparagraph (a) prior to that date. The plan was not in writing and had not been published prior to that date. Accordingly, the RRB cannot approve the plan retroactive to January 1, 2000, as requested, or to any date earlier than January 1, 2005.