



Legal Opinion L-2006-02
January 11, 2006

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

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

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Payment of Union Dues
Compensation—Expense Payments

This is in reply to your request for my opinion as to whether payment by the Brotherhood of Maintenance of Way Employees Division—International Brotherhood of Teamsters (BMWED) of membership dues owed to the union by a Secretary Treasurer of a BMWED Local Lodge would constitute creditable compensation to the Secretary Treasurer from a covered labor organization employer for purposes of the Railroad Retirement Act (RRA). For the reasons set forth below, in my opinion, these payments are not creditable compensation under the Act because they represent payment of an employee expense.

In a letter to your Office, the BMWED states that in the past, the organization's constitution waived the membership dues obligation of Secretaries of BMWED local lodges. As a result of the merger between the former Brotherhood of Maintenance of Way Employees and the Brotherhood of Teamsters, effective January 2006, the constitution of the merged organization will require membership dues to be paid as a condition of holding office in the organization. The BMWED proposes to now allow the local lodges to pay these membership dues on behalf of their Secretaries. The BMWED states that the payment is not connected with services performed, but would substantially exceed \$25 per month.

The BMWED evidently is concerned that if the membership dues payments are creditable as compensation from a covered rail labor employer, annuities under the RRA payable to those Secretaries who are retired will be suspended pursuant to section 2(e)(3) of the Act, which provides in part:

(e)(3) No annuity under subsection (a)(1) or supplemental annuity under subsection (b)(1) shall be paid with respect to any month in which an individual in receipt of an annuity or supplemental annuity thereunder shall render compensated service to an employer [covered by the RRA]. * * *

This provision has been a condition for the payment of railroad retirement benefits since enactment of the Railroad Retirement Act of 1937. Opinions of this Office issued under that Act as well as the current Railroad Retirement Act of 1974 have consistently held that where an individual performs service to an employer and receives only payment for expenses but no compensation in exchange for those services, he or she is not performing "compensated" service within the meaning of section 2(e)(3) and its predecessor provisions. See, e.g., the following opinions under the 1937 Act provision: L-39-1205 (expenses incurred in advertising souvenir booklets and acting as entertainment committee members); L-49-509, (expenses working for a local unit of a railway labor organization); L-54-642 (expenses incurred by financial secretary of Local Lodge); L-72-44 (reimbursement for expenses as Local Lodge secretary of the former Brotherhood of Maintenance of Way Employees); and L-76-287 under section 2(e) of the 1974 RRA (reimbursement or advance of funds for actual expenses as a lodge official). Consistent with these opinions, if the membership dues payments by the BMWED on behalf of the Secretary Treasurers are payments for expenses rather than compensation for service rendered to a railway labor organization employer, they will have no effect upon any annuity payable under the Act to these officials.



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Whether a payment is creditable as compensation paid by a covered employer is determined by section 1(h) of the RRA. Section 1(h)(1) defines compensation for benefit entitlement purposes under that Act in general as:

* * * any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad or railway labor organization] employers * * *. 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. * * *

However, section 1(h)(6) provides a series of exceptions to the general definition of compensation. In particular, paragraphs (iii) and (vi) state:

(6) Notwithstanding the provisions of the preceding subdivisions of this subsection, the term "compensation" shall not include—

* * * * *

(iii) remuneration earned in the service of a local lodge or division of a railway-labor-organization employer with respect to any calendar month in which the amount of such remuneration is less than \$25;

* * * * *

(vi) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expense incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment.

BMWED states that the membership dues payments will exceed \$25 per month. The payments may therefore be excluded from compensation only if they are a "bona fide and necessary expense * * * in the business of the employer" within the meaning of RRA section 1(h)(6)(vi).

The regulations of the Board do not define a qualifying expense beyond the terms used in the statute. See 20 CFR 211.2(c)(6). I note, though, that paragraph 1(h)(6)(vi) was added to the 1974 RRA in 1976 by section 4(a) of Public Law 94-547 (90 Stat. 2523, 2526). Section 4(b) of P.L. 94-547 added identical language to the definition of "compensation" at 3231(e)(1)(iii) of the Railroad Retirement Tax (RRTA)(26 U.S.C. § 3231(e)(1)(iii)). As identical amendments enacted simultaneously to parallel statutes, sections 4(a) and 4(b) are clearly in pari materia. Terms used in RRA section 1(h)(6)(vi) and RRTA section 3231(e)(1)(iii) consequently have the same meaning in both provisions. Sutherland Statutory Construction § 51.01 (6th ed. 2000). Regulations of the Internal Revenue Service (IRS) which define bona fide and necessary expense in the business of the employer under the RRTA may be used to define such an expense under section 1(h)(6)(vi) of the RRA as well.

Initially, the IRS regulations issued under the RRTA refer directly to comparable regulations governing the characterization of payment of employee expenses as wages subject to the Federal Insurance Contributions Act (FICA). See 26 CFR 31.3231(e)-1(a)(5). The FICA regulations state in part that an employer payment of employee expenses will not be considered wages for FICA purposes if the expense is deductible from gross income as a business expense.



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See 26 CFR 31.3121(a)-3(a). Insofar as relates to the question at hand, a qualified business expense is an expense allowable as a deduction by part VI of subchapter B, chapter 1, subtitle A of the Internal Revenue Code (26 U.S.C. §§ 161—199). See 26 CFR 1.62-2(d); and 1.62-2(h). Dues payable to a labor union are recognized as a deductible employee business expense under section 162 of part VI. See 26 CFR 1.162-15(c).

In the present case, the Secretary Treasurers are employees of the BMWED. Their dues payments to the union are recognized as an employee business expense as defined by the RRTA. In my opinion, the payment of the dues on behalf of these employees , if identified by the BMWED in accordance with section 1(h)(6)(vi) of the RRA, would be excluded from compensation, and would not require withholding of an annuity payment for any month pursuant to the earnings restriction imposed by section 2(e)(3) of the RRA. Finally, it must be noted that although the conclusion in this memorandum relies on IRS regulations, it is not, of course, a determination of the status of the payment under the Internal Revenue Code.