U.S. Railroad Retirement Board
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Legal Opinion L-2006-20
September 22, 2006

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

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Deeming Service Months with Multiple Employers

This is in reply to your inquiry of July 25, 2006, requesting my opinion as to whether the combined total compensation paid to an employee for a calendar year in which the employee has more than one railroad employer may be allocated to any month in which the employee retained an employment relation to any employer, when the Board calculates the employee's years of service under section 3(i) of the Railroad Retirement Act (RRA). You state in your memorandum that the question arose in development of a new automated process for crediting compensation in the records of the Board. For the reasons set forth below, in my opinion any compensation earned from any employer in a calendar year may be allocated to any month in that year in which the employee has an employment relation with a covered employer under the Act, subject to the limit on maximum compensation which may be credited to a month in that year.

In the hypothetical example you provide to illustrate your question, the employee works for the first employer "A" in January, February and March, with employment for that employer ending March 31. The employee then works for second employer "B" in June, July, November and December. The employee remains in an employment relationship to employer B for the months of August, September and October, but performs no service. Employer A reports to the Board it paid the employee compensation of $8,000, while employer B reports compensation to the Board of $4,000. The maximum creditable compensation under the law for the hypothetical year is $12,000.

As you know, section 1(f)(1) of the RRA provides that a month for which a covered employer reports compensation paid to an employee is counted as a month of service for purposes of the tier II annuity component "years of service" computation as specified by section 3(i) of Act. Section 3(i)(1) provides in general that an employee's "years of service" shall include all railroad industry service reported to the Board for months subsequent to December 31, 1936. Section 3(i)(4) then further provides that:

> Where for any calendar year after 1984 an individual has performed service for compensation in less than twelve months of the calendar year but has received compensation in excess of an amount determined by multiplying the number of months in the year in which such individual performed service for compensation by an amount equal to one-twelfth of the current maximum annual taxable "wages" as defined in section 3121 of the Internal Revenue Code of 1986, the individual shall be deemed to have rendered service for compensation in that number of months in the calendar year, but not to exceed twelve, which is equal to the quotient of the amount of such individual's compensation for the calendar year divided by an amount equal to one-twelfth of the current maximum annual taxable "wages" as defined in section 3121 of the Internal Revenue Code of 1986, with any remainder produced by this computation increasing the quotient by one, but an individual shall not be deemed under this subdivision to have rendered service for compensation in any month in which such individual was neither in an employment relation to one or more employers nor an employee representative.

Compensation allocated to a month of service is used to calculate the tier II average monthly compensation as specified by section 3(j), which provides in pertinent part that:

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> * * * In computing the monthly compensation, no part of any month's compensation in excess of * * * an amount equal to one-twelfth of the current maximum annual taxable "wages" as defined in section 3121 of the Internal Revenue Code of 1986 * * * shall be recognized. If for any calendar year after 1984 an employee has received compensation of less than one-twelfth of the current maximum annual taxable "wages" as defined in section 3121 of the Internal Revenue Code of 1986 in one or more months of the calendar year, the total compensation paid to such employee in the calendar year (without regard to the limitation on the amount of compensation in the preceding sentence) shall be determined to have been paid in equal proportions with respect to all months in the year in which the employee will have been in the service of one or more employers for compensation or will have performed service for compensation as an employee representative, but this sentence shall not operate to increase the employee's compensation for any month above an amount equal to one-twelfth of the current maximum annual taxable "wages" as defined in section 3121 of the Internal Revenue Code of 1986. * * *

See also, sections 226.60—226.63 of the Board's regulations (20 CFR 226.60—226.63).

In your hypothetical example, one-twelfth of the annual maximum creditable compensation of $12,000 is $1,000. Since the employee earned $8,000 in the first three months while working for employer A, but only may be credited with $3,000 for those months, the employee earned $5,000 in compensation from employer A which cannot be allocated to the months in service to that employer. If this excess $5,000 in compensation may be allocated to the time the employee is in service to employer B, then pursuant to RRA section 3(i)(4) the employee may be credited with three additional "deemed" months of service in August, September and October, and pursuant to section 3(j) will be credited with an additional $3,000 in compensation attributable to those months. If the compensation from employer A cannot be allocated to the months during which the employee had an employment relation to employer B, then the employee's tier II annuity component calculation will not consider any of the $5,000 excess for January through March.

The last sentence of section 3(i)(4), which states an additional month of service for the employee "shall not be deemed * * * in any month in which such individual was * * * [not] in an employment relation to one or more employers" is a mandatory prescription for determining additional, deemed months of service: the Board cannot deem a month of service for an employee if the employee had no employment relation to an employer in that month. However, section 3(i)(4) has no parallel mandate that the Board must use compensation from a particular employer. Section 3(i)(4) itself therefore does not prohibit allocation of compensation earned from one employer to months in which the employee works for another employer.

While section 3(i)(4) does not prohibit such allocations by the Board, the phrase in section 3(j) stating that compensation "shall be determined to have been paid in equal proportions with respect to all months in the year in which the employee will have been in the service of one or more employers" may be read to permit it. It may be inferred that if compensation may be credited to any month during the calendar year in which it was paid if the employee was in the service of one or more employers in that month, then the compensation also need not have been paid by the individual's employer for that particular month. Section 3(j) therefore supports allocation under section 3(i)(4) of compensation to add an additional "deemed" month of service.

Moreover, this interpretation is consistent with Congress' purpose in enacting these sections. Section 3(i)(4) and the portion of 3(j) relating to compensation after 1984 were added by section 107 of the Railroad Retirement Solvency Act in 1983. See Public Law 98-76 § 107 (97 Stat. 411, 418-19). The Solvency Act consisted of a package of amendments to both the RRA and the Railroad Retirement Tax Act (RRTA), which were collectively intended to remedy an impending funding shortfall and return the railroad retirement system to a sound financial basis. See: H.R. Rep. No. 30, 98th Cong., 1st Sess. 14(1983) reprinted in 1983 U.S. Code, Cong. and Admin. News 729, 730. In particular, sections 221 and

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222 of the Solvency Act (97 Stat. at 420-421) amended the RRTA to remove the former limitation which exempted from taxation the amount of compensation paid to an employee in any month which exceeded 1/12 of the annual taxable limit under the RRTA, and replaced it with a single annual taxable limit. These RRTA amendments subjected all compensation paid to the employee in a year to taxation up to the maximum amount taxable for that year, without regard to the number of months in which the compensation was paid. To balance the impact of the increased taxes imposed by sections 221 and 222 of the Solvency Act, section 107 therefore also provided a mechanism to increase the amount of service months and compensation used to calculate the annuity under the RRA. Allowing compensation upon which Railroad Retirement Tax had been paid, to be credited regardless of which employer paid the compensation to any available month in that year under sections 3(i)(4) and 3(j) achieves the Solvency Act's goal of balancing the increased compensation tax base with an increased benefit compensation base.

Accordingly, in my opinion, you may establish an automated program rule which would allow a service month to be deemed during a period an employee is in an employment relation to one employer by allocating compensation paid to that employee in the same calendar year from a second employer, if that compensation exceeds the amount which may be credited to months the employee was in service to the first employer. In your example, this means compensation from employer A can be allocated to the months during which the employee had an employment relation to employer B.