



Legal Opinion L-2003-12
August 29, 2003

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 : Robert E. Bergeron
Office of the Labor Member

FROM : Steven A. Bartholow
General Counsel

SUBJECT : CSX 1999 Voluntary Early Retirement and Separation Program
Compensation – Separation Allowance

This is in reply to your request for my opinion as to whether the payments received by the former railroad employee, xxxxxxxxxxxxxxxxxxxxxxxx, pursuant to his election under the CSX 1999 Voluntary Early Retirement and Separation Program, constitute compensation creditable for benefit entitlement purposes under the Railroad Retirement Act. As explained below, in my opinion the payments which the employee has received do not constitute railroad compensation under the Act, and do not allow the crediting of any additional railroad service months.

The records of the Board show that the employee, who was born in 1947 and is currently age 56, has been credited with a total of 408 months of railroad service through January 2000. To support a claim for additional service months and compensation, the employee has furnished copies of various documents, including an October 1999 summary of the CSX 1999 program, the "Employment Separation and Release Form" which he signed November 21, 1999, correspondence between CSX and himself at the time of his separation, and a copy of his August 2003 "Earnings Statement".

The introduction to the program summary distinguishes between two distinct types of payments which CSX offered to its employees under the 1999 program: the "Voluntary Separation Program," and the "Voluntary Early Retirement '3 PLUS 3'" program. The Voluntary Separation Program also offered two payment alternatives: a lump sum or monthly installments. The lump sum recipient terminated all aspects of employment at time of payment, while an employee who elected the monthly installments remained covered by medical and life insurance during the payment period (subject to payment of required premiums); the time period of the installment payments also counted as continued company service in determining the vesting service requirement under the company pension plan. Employment taxes were withheld up to the annual limit, whether the employee elected the lump sum or installment payment method. Voluntary Separation Program payments were made from general company funds.

The Voluntary Early Retirement 3 PLUS 3 option was evidently offered to those CSX employees who were within three years of certain age requirements or who were within three years of certain minimum CSX service requirements under the company pension plan. Employees electing this option were considered, for purposes of meeting the age and service requirements of the CSX pension plan, to be three years older and have three years additional employment with the company. In effect, these employees retired on the company pension three years earlier. The summary document states that pension payments are made from a qualified trust, and no Railroad Retirement employment taxes are withheld.

The subject employee in the case you submitted executed an "Election to Resign Pursuant to the CSX 1999 Voluntary Early Retirement and Voluntary Separation Program" form, which states in part that "After careful review, I am willing to resign pursuant to the Program and agree to sign the Release at the time and place specified by the Company. Further, I elect to receive the Early Retirement Window * * *." The



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Agreement and Release furnished by the employee states in pertinent part that in consideration of the agreement by CSX Transportation to pay the benefit described, the signatory employee agrees that:

Effective upon the date of this Agreement, I hereby relinquish forever any seniority rights I may have under any labor agreement with the Company, and I agree that until my employment relationship with the Company ceases, my compensation and other employment terms, conditions and benefits will be as set forth [elsewhere in the release document] * * *.

As you know, section 1(h)(1) of the Railroad Retirement Act (RRA) defines compensation for benefit entitlement purposes under that Act in part as:

* * * any form of money remuneration paid to an individual for services rendered as an employee to one or more [railroad] employers * * * including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. 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. * * *

Section 1(h)(2) of the RRA further provides that:

An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. * * *

The Railroad Unemployment Insurance Act at section 1(i)(1) provides essentially the same definition with respect to compensation creditable for benefit entitlement purposes under that Act as well. In addition, regulations of the Board (20 CFR 211.9, 211.10) provide:

§211.9 Dismissal allowance.

Dismissal allowances paid to an employee under a protective labor agreement that covers the amounts paid for specific periods of time are creditable as compensation under the Railroad Retirement Act, provided the employee has not severed his or her employee-employer relationship.

§211.10 Separation allowance or severance pay.

Separation or severance payments are creditable compensation except that no part of such payment shall be considered creditable compensation to any period after the employee has severed his or her employer-employee relationship except as provided for in §211.11 of this part [which allows a payment taxable only for tier I purposes under the Railroad Retirement Tax Act to be credited for purposes of calculating the tier I annuity component under the RRA pursuant to section 1(h)(8) of that Act].

Section 210.5(d) of the regulations (20 CFR 210.5(d)) provides in part that for purposes of annuity calculation and entitlement under the Act, "Any month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service."

This Office previously determined that the lump sum payment under the CSX 1999 Voluntary Separation program constituted compensation as a separation allowance. See Legal Opinion L-99-18. Because the



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employment relation terminated at the time of the election to receive the lump sum payment, however, compensation could not be credited and service months allocated after the month of election to receive the lump sum payment. That opinion did not address whether any additional compensation or service months may be credited where the employee chose, as in the case you submitted, the "Voluntary Early Retirement 3 Plus 3" option.

It is evident that CSX made the 1999 Voluntary Early Retirement and the Voluntary Separation Programs available to certain employees for the same purpose: to reduce the number of CSX employees. The liberalized eligibility afforded under the Voluntary Early Retirement program for the company pension, as an inducement to terminate employment, might appear to be separation payments in exchange for the employee's relinquishment of any right to further employment. Cf. Legal Opinions L-96-9, L-96-10 (holding payments from a "supplemental pension trust fund" which were in return for resignation, were separation payments for purposes of the disqualification period imposed on unemployment and sickness insurance benefits under section 4(a-1)(iii) of the Railroad Unemployment Insurance Act). It is noteworthy, however, that the Voluntary Early Retirement program required, as did the lump sum payment alternative of the Voluntary Separation program, that the employee terminate his employment relationship with the employer at the time of election. Consequently, even if the payments were otherwise considered compensation, no additional compensation could be credited, or service months allocated, under the Railroad Retirement Act after the date of the employee's election. Compare, e.g., Legal Opinion L-2003-10 (separation payments made by installments are creditable as service and compensation through period of payment, where employment relationship continues until last payment is made).

There are additional significant differences between the Voluntary Early Retirement and the Voluntary Separation programs. Because the payments elected under the Voluntary Early Retirement option are 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 section 1(h)(1) of the Act. In addition, because the payments are predicated on retirement from service, they are not made "with respect to an identifiable period of absence from the active service of the employer" within the meaning of section 1(h)(2) of the Act, and section 211.9 of the regulations. This Office has therefore declined in the past to find that pension payments made under an offer of liberalized eligibility requirements as an inducement to separate from railroad employment, are in fact separation payments creditable as compensation under the Act. See Legal Opinion L-2001-04 (CSX Special Enhanced Benefits Program, 2 Plus 2 Option).

The offer to increase the employee's age and company service by 3 years each under the 1999 program is essentially indistinguishable from the offer to increase the employee's age and company service considered by Legal Opinion L-2001-04. Consistent with the reasoning of that opinion, I conclude that the employee's railroad compensation and service in the Board's records correctly reflects that the payments which he receives pursuant to his election of the "3 PLUS 3" early retirement option of the CSX 1999 Voluntary Early Retirement and Separation Program are not creditable as compensation under the Acts.

cc: Policy and Systems, Office of Programs