



Legal Opinion L-2005-21
August 24, 2005

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TO : Wayne J. Scharnak
Chief, Compensation and Employer Services

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Burlington Northern and Santa Fe Voluntary Reserve Board
Program—Active Protected Clerical Employees, Fort Worth, Texas Zone

Compensation – Separation Allowance

This is to advise you, pursuant to the request of the Fort Worth District Office of the Board, regarding my opinion as to the effect under the Railroad Retirement and Railroad Unemployment Insurance Acts of payments under the provisions of Burlington Northern and Santa Fe Voluntary Reserve Board Program for Active Protected Clerical Employees in Seniority District 006 at Fort Worth, Texas, dated August 18, 2005 (the Program). As explained below, in my opinion, payments made under the Program are creditable as railroad compensation for benefit entitlement purposes under the Acts for months through the month in which the employee's resignation takes effect.

The General Director, Labor Relations, of the Burlington Northern and Santa Fe Railway Company (BNSF), has furnished the District Office a description of the Program, an "Application for Voluntary Reserve Board Program" and a "Resignation and Release Agreement". According to the description of the Program, an eligible employee may file an election to be placed on a "Voluntary Reserve Board". The employee will be paid \$2,500 per month for a period of three years, except that payments end before expiration of three years if the employee becomes eligible for a full annuity under the Railroad Retirement Act, or if the employee dies. During the period of payment, the employee retains health insurance coverage, the right to participate in the BNSF 401(k) plan, and the employee remains subject to recall. The BNSF will withhold health insurance premiums, union dues, and employment taxes under the Railroad Retirement Tax Act. The employee agrees to not reapply for any position at BNSF while on the Reserve Board, nor to perform service for BNSF in any capacity other than recall to service. The employee also agrees while on the Reserve Board to keep a current telephone number and address on file with the BNSF Labor Relations department. The employee's resignation becomes effective at conclusion of the payments.

A second alternative allows employees eligible for the Reserve Board to elect immediate resignation and payment of a lump sum equal to \$2,500 per month multiplied by the number of months in what would otherwise be the employee's maximum period of Reserve Board eligibility (i.e., the lesser of 36 months or the number of months through eligibility for full retirement) for a gross lump sum not to exceed \$90,000. The employer will deduct "federal, state and railroad retirement taxes, and union dues, etc." but employees electing the lump sum are not subject to recall, and are not eligible for continuing health and welfare benefits or for 401(k) contributions.

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



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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 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. * * *

Section 1(i)(1) of the Railroad Unemployment Insurance Act 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 employment 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."

In Legal Opinion L-2005-05, I reviewed a Voluntary Reserve Board program offered in March 2005 to clerical employees of the BNSF at Fort Worth. That program also offered employees the alternative to elect to be placed on a reserve board for up to 36 months, or to receive a lump sum payment immediately upon resignation. Based on previous analysis applied to reserve board programs set forth earlier in Legal Opinions L-2003-08 and L-94-8, I concluded that the payments to employees under the March 2005 reserve board program constituted creditable railroad compensation under the Acts during the time the employees remained on the reserve board. However, the lump sum paid to those who resigned immediately was creditable only through the date of resignation, except for tier I benefit purposes as provided by RRA section 1(h)(8) and section 211.11 of the Board's regulations.

The terms of both the reserve board payments, and the lump sum offered to the Fort Worth employees in the March 2005 Program do not differ in any significant respect from those offered to Fort Worth clerical employees under the August 2005 program described above. Accordingly, it is my opinion that payments made to employees electing placement on the voluntary reserve



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board under the Burlington Northern and Santa Fe Voluntary Reserve Board Program of August 18, 2005, for Active Protected Clerical Employees in Seniority District 006 at Fort Worth, Texas, are creditable as compensation for benefit entitlement purposes under the RRA and RUIA, including calculation of the tier II annuity component, during the period the employee remains on the reserve board. The lump sum payment made under the Program to those who elect immediate resignation is creditable only through the date of resignation, except with respect to the tier I annuity calculation.¹

I trust that the foregoing will be of assistance to you.

¹ I may note that although the lump sum payment is not creditable as compensation from railroad service after the employee's resignation, this payment nevertheless disqualifies the employee from eligibility for unemployment or sickness insurance benefits for the period of time calculated pursuant to section 4(a-1)(iii) of the RUIA.