



UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 NORTH RUSH STREET
CHICAGO, ILLINOIS 60611-2092

GENERAL COUNSEL

DEC 03 2009

Ms. Cathryn S. Frankenberg
Soo Line Railroad
AVP Labor Relations & Human Resources
501 Marquette Ave. S., Suite 1715
Minneapolis, MN 55402

Mr. Mark S. Wimmer
Brotherhood of Maintenance of
Way Employes Division - IBT
General Chairman
18921 York Street, N.W., Suite F
Elk River, MN 55330

Re: Joint Request for Interpretation
Creditable Service
RRB reference number: C.722-10

Dear Ms. Frankenberg and Mr. Wimmer:

This is in response to the November 23, 2009 joint inquiry I received, in which my opinion was sought concerning the credibility of vacation pay of railroad employees in furlough status who are subject to the terms of the agreement between the Brotherhood of Maintenance of Way Employes Division - International Brotherhood of Teamsters (BMWED) and the Soo Line Railroad Company (Soo).

The credibility of vacation payments to railroad employees on furlough was addressed previously in Legal Opinion L-59-321 by then General Counsel Myles F. Gibbons, who noted as follows: "Where the recipients of the vacation payments are on furlough, the treatment of the payments depends almost entirely on the intention of the parties. Thus, if a vacation is actually taken, that is, the payments are assigned to a particular period, payments for the vacation period are creditable, and the amounts paid are reported for that period; on the other hand, if payments are made as payments in lieu of vacation, they may be assigned to the last payroll period of the year if not

paid before then, to the payroll period with respect to which they are paid, or to the last day worked before the furlough began."

Consistent with the advice provided by General Counsel Gibbons, it is my opinion that it is permissible for employees on furlough to decline to take an actual vacation and instead, choose to take vacation pay in one-day increments in different months in order to obtain additional months of credited service.

You also question the relevance, if any, of the Employee Protective Agreement of February 7, 1965, particularly when it comes to seasonal employees, as seasonal layoffs have already started to take place and many of the seasonal employees have expressed a desire to use vacation in one-day increments to obtain additional months of credited service. The 1965 Agreement is relevant to guaranty payments made pursuant to that Agreement. As I understand your inquiry, the payments at issue are vacation payments pursuant to the terms of the BMWED/Soo agreement, not the 1965 Agreement. Accordingly, the status of a furloughed seasonal employee as covered, or not covered, by the 1965 Agreement is not relevant to the question presented.

As noted in section 211.4 of the Board's regulations, "Payments made to an employee with respect to vacation or holidays shall be considered creditable compensation whether or not the employee takes the vacation or holiday." (20 C.F.R. § 211.4). Employees to which this provision applies include employees in furlough status, seasonal and non-seasonal alike. It should be noted that an employee in furlough status cannot collect benefits under the Railroad Unemployment Insurance Act for the day to which vacation pay is allocated. This is so, regardless of whether the vacation is actually taken, or the employee opts to use vacation in one-day increments to obtain additional months of credited service.

I hope the above information addresses your concerns. If you have any additional questions, please do not hesitate to contact me.

Sincerely,



Steven A. Bartholow
General Counsel

bcc: Wayne J. Scharnak
Chief, Employer Service/Training Center