



**Brotherhood of Maintenance of Way Employees Division
of the International Brotherhood of Teamsters**

Freddie N. Simpson
President

June 17, 2014

Perry K. Geller, Sr.
Secretary/Treasurer
B.M.W.E.
RECEIVED
JUL 03 2014

*Office of the
General Chairman
Northeastern*

To: All Vice Presidents and General Chairpersons

Re: Railroad Retirement Board General Counsel's Opinion Regarding Creditable Service

On June 13, 2014, the General Counsel of the Railroad Retirement Board (RRB) issued the attached letter of opinion regarding creditable service. The question presented to him concerned an injured employee who requested and received payment for a vacation day in a month while off sick. The employee contended that payment of the vacation day should be considered creditable compensation under the Act and should, therefore, count as a qualifying month of railroad service for retirement. However, the Carrier's position was that payment of the vacation day was merely for timekeeping purposes and was not compensation for service rendered.

The General Counsel sustained the employee's position.

According to the General Counsel, vacation pay is defined by regulation as compensation for service rendered "whether or not the employee takes the vacation or holiday" (20 CFR §211.4). Therefore, the date on which vacation pay is received should be credited to that month. In this case, the payment of one day's vacation pay to an employee off injured would count as a day's compensated service in that month for retirement purposes.

Additionally, the General Counsel noted that even if the payment of the vacation day was "in lieu" of vacation actually taken, the result would not change.

According to the regulations, an employee is deemed to receive vacation pay "in lieu" of actually taking the vacation days, when the employee is required to not take an actual vacation days. The General Counsel noted that usually when employees are paid "in lieu" of actually taking vacation days, that payment is a lump sum at the end of the year and is credited to the last day of the vacation year.

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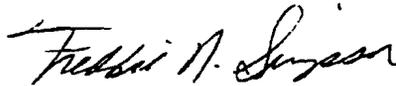


However, the General Counsel also observed that even if the Carrier argued that its payment of vacation for the sick employee was "in lieu" of actually taking a vacation day, the result would be the same.

The General Counsel stated, "if the employee does not take vacation but receives payment in lieu of vacation prior to end of the vacation year or prior to separation, such payment should be reported for the month containing the last day of the pay period with respect to which the payment is made to him."

If you have any questions regarding the General Counsel's opinion letter, please contact either Bill Bon or Don Griffin.

In solidarity,



Freddie N. Simpson
President

Attachment

cc: P. K. Geller, Sr.
W. A. Bon
D. F. Griffin
G. Hart
C. Kilcheski
P. Kennedy
C. Hogue
R. Inclima



UNITED STATES GOVERNMENT
MEMORANDUM

FORM G-115f (1-92)
RAILROAD RETIREMENT BOARD

June 13, 2014
L-2014-31

TO: Nathaniel Coleman
Chief of Compensation & Employer Services
Through: Ronald Russo
Director of Policy and Systems

FROM: Karl T. Blank
General Counsel

A handwritten signature in black ink, appearing to read "Karl T. Blank", written over the printed name.

SUBJECT: Crediting Service Months Due to Vacation Pay

This is in response to your request for my opinion as to whether an employer has the right to withhold reporting a creditable service month if an employee requests a vacation day while the employee is absent from work due to illness¹. In the example presented, the employer states that the floating vacation day is input "for timekeeping purposes", but would not count towards a qualifying month of railroad service for retirement. It is my opinion that if the employee is credited with a vacation day for timekeeping purposes, then payment for that day is considered to be vacation pay as defined by Board regulations and therefore, creditable as compensation for the day that it is taken.

In your request for a legal opinion, you state that requests from employees on medical leave to use a floating vacation day for a month's retirement qualification have been denied by an employer. The employer has indicated that the floating vacation day would be input for timekeeping purposes, but would not count towards a qualifying month of railroad service for retirement. According to the employer, it is up to the railroad's discretion to report vacation pay as either pay for compensated service or pay in lieu of vacation.

¹ For the purposes of this opinion, I am presuming that the employment relationship has not been terminated.

Section 1 of the Railroad Retirement Act states, "A payment made by an employer to an individual through an 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." 45 USC 231(h)(1). Board regulations further specify that creditable compensation includes vacation pay (20 CFR §211.2(b)(4)) and state, "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 CFR §211.4.

The distinction between crediting vacation as "vacation pay" versus "payment in lieu of vacation" has been discussed in Office of General Counsel legal opinions. In Legal Opinion L-42-601, the opinion discussed how to credit service months depending on how the pay was characterized.² The requirements for vacation pay included, "that the employee's employment relations with the employer has not terminated and that the vacation is actually taken." In addition, "payment for the period of such vacation does not become "earned" or "payable" until the vacation is actually taken and constitutes compensation for the period of vacation so taken, irrespective of when payment is actually made." This is distinguished from payment in lieu of vacation where, "instead of the requirement that the employee take his vacation there is the requirement that the employee do not take such vacation." The opinion goes on to explain:

"if an employee does not take his vacation but is to receive payment in lieu thereof, such payment becomes "earned" or "payable" on the last day of the vacation year, and is "compensation" for that day. *** If, however, an employee is paid an allowance in lieu of vacation prior to the end of the vacation year, such allowance will have become "earned" or "payable" on the last day of the pay period which respect to which the payment is made and will constitute "compensation" for such day."

An example of the latter scenario was given stating that if the payment in lieu of vacation is included in the employee's pay for a pay period ending October 3, the payment should be reported as compensation for the month of October. Later opinions of this office have consistently provided this advice. See, e.g. L-59-321, L-76-173. See also, *Florida East Coast Railway v. U.S.*, 470 F.2d 513, (Court of

² This opinion specifically dealt with vacation under the vacation agreement of December 17, 1941. It should be noted that the opinion goes on to state, "The foregoing principles may also be applied in the handling of vacation payments and payments in lieu of vacations under agreements other than the agreement of December 17, 1941 or payments not covered by any agreement."

Claims 1972), (Holding pay in lieu of vacation to be deemed paid the last month of the year for RRTA purposes).

In the case presented, the employer is crediting the employee with a vacation day for timekeeping purposes. Consequently, the employee is "taking" the vacation day on that day. As stated above, if the employee actually takes the vacation time, then it is considered vacation pay and creditable compensation for the month in which it was taken.

It should be noted that even if the employer is arguing that the payment to the employee is payment in lieu of vacation, it would still be considered creditable compensation. Generally, payment in lieu of vacation occurs at the end of a vacation year or at separation from employment. In both situations, the issue becomes when to credit that lump sum payment. But if the employee does not take vacation but receives payment in lieu of vacation prior to end of the vacation year or prior to separation, such payment should be reported for the month containing the last day of the pay period with respect to which the payment is made to him. See Legal Opinion L-42-601 attached.

Enclosure: Legal Opinion L-42-601