

OCT 17 1975

L 75 - 452

M - 51

Director of Data Processing and Accounts

General Counsel

Creditability of holiday pay of an individual receiving sick wages (non-creditable)

This is in reply to your memorandum of September 10, 1975, in which you inquired whether or not "holiday pay," which the Long Island Railroad Company has paid to an employee under the terms of the agreement between the railroad and the labor organization representing the employee, and which relates to a period during which he received non-creditable sick pay, is creditable as compensation under the Railroad Retirement Act. You also ask whether, in the event that this holiday pay is determined to be creditable under the Act, it should be credited in the month in which it was paid or to the months during which the holidays occurred.

The employee last performed service for the above-named employer in September 1974, and thereafter became disabled. As a result of his absence from work, which was caused by this disability, he was paid "sick wages" under the provisions of the aforementioned agreement during the period from October 1974 through March 1975. In addition, according to the terms of the agreement, he was paid in March 1975 amounts attributable to pay for one holiday in each of the following months: October, November, and December 1974, and January, February, and March 1975.

Section 1(h)(1) of the Railroad Retirement Act of 1974 provides, in pertinent part, that:

"The term 'compensation' means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers, or as an employee representative, 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. * * *" (Emphasis added.)

Paragraph 2 of section 1(h) further provides, in pertinent part, 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 * * *."

It is my opinion that the holiday pay received by the employee in question, in accordance with the provisions of the aforementioned agreement, constitutes compensation as that term is defined in section 1(h)(1) and (2) of the Railroad Retirement Act of 1974. The amounts received as holiday pay in this case relate to an "identifiable period of absence from the active service of the employer," and consequently constitute "pay for time lost." Therefore, these amounts must be credited as compensation during the period in which such time was lost, that is, these payments must be credited in the respective months during which the holidays occurred. This conclusion assumes, of course, that the employee retained an employment relationship with the Long Island during the months in question.

The facts of this case are similar to those in General Counsel's opinion L-58-113. In that case an employer, in accordance with the agreement between it and the labor organization representing an employee, paid certain sums to the employee which related to specified holidays falling within the months of January, April, May, July, September, November, and December 1957. These payments, which were held to be "pay for time lost," and therefore "compensation" for purposes of the Railroad Retirement Act and Railroad Unemployment Insurance Act, giving the employee an additional seven months of creditable service, were shown to have been made with respect to an "identifiable period of absence from the active service of the employer." A similar fact situation was presented in General Counsel's opinion L-74-107, which concerned certain vacation payments which had been treated as pay for time lost. These payments were required to be "reported for the period of the vacation irrespective of when the payment is made."

It should be noted that under section 3231(e)(1) of the Railroad Retirement Tax Act (26 U.S.C. § 3231(e)(1)), as amended by Public Law 94-93, which became effective on August 9, 1975, pay for time lost is apparently no longer deemed for railroad retirement tax purposes to have been earned in the month in which such time was lost. Thus, it would appear that pay for time lost is taxable, if at all, only with respect to the month in which the payment is made, unless the employee submits a request to the Internal Revenue Service within six months that the payment be attributed to an earlier period.

However, employers are still required under the Railroad Retirement Act to report compensation paid for time lost on an earned rather than a paid basis, regardless of how the payment is reported to the Internal Revenue Service or taxed under the Railroad Retirement Tax Act.

In this regard, of course, it must be recognized that the Railroad Retirement Tax Act is administered by the Internal Revenue Service, which is also responsible for making regulations with respect to that Act. That agency, to my knowledge, has not yet issued regulations relating to the effect of Public Law 94-93. If the Long Island Railroad Company wishes to obtain a definitive ruling with regard to the treatment of pay for time lost under the Railroad Retirement Tax Act, I suggest that they be advised to submit such questions to the Internal Revenue Service.

Dale G. Zimmerman
General Counsel

RWG:ss