



UNITED STATES GOVERNMENT
MEMORANDUM

FORM G-115f (1-92)
RAILROAD RETIREMENT BOARD
June 29, 2017
L-2017-52

TO: Randy Hayden
Chief of RRA Application and Calculation
Through: Kimberly Price-Butler
Director of Policy and Systems

FROM: Ana M. Kocur *Ana M. Kocur by MED*
General Counsel

SUBJECT: Union Pacific Long-Term Disability Plan
Impact on Benefits Under RRA and RUIA

This memorandum is in response to your inquiry of May 1, 2017, in which you requested an opinion regarding a private disability insurance plan for employees of Union Pacific Railroad Employee Health System (UPREHS) (BA# 9739). The employer requested a determination whether payments under the plan would affect eligibility for benefits or amount of benefits under the Railroad Retirement Act (RRA), particularly disability annuities under the RRA. It is my opinion that payments under the UPREHS plan are not compensation under the RRA, and payments under the plan will not affect eligibility or amount of benefits under the RRA. However, I must point out that the UPREHS plan provides for payments when an employee is disabled under the plan but still working, does not require the employee to meet eligibility requirements for payments under the Railroad Unemployment Insurance Act (RUIA) in order to receive payments under the plan, and does not appear to coordinate benefits with the RUIA. Therefore, it is unlikely to qualify as a nongovernmental plan for sickness insurance under that Act; as a result, payments under the plan would be considered to be remuneration under the RUIA, which would affect eligibility for benefits under the RUIA.

The proposed UPREHS plan will be administered by Unum Life Insurance Company of America and provides for a monthly benefit equal to 60 percent of monthly earnings, up to a maximum of \$5,000 per month, for qualifying employees who become disabled. To qualify, employees must work at least 30 hours per week prior to becoming disabled, and benefits are payable 90 days after the onset of disability. To be disabled under the plan, an employee must be limited from

performing the material and substantial duties of his or her regular occupation due to sickness or injury, and must have a loss of income equal to or greater than 20 percent of indexed monthly earnings due to the same sickness or injury. After 24 months of receiving benefits, an employee must be disabled for all gainful employment due to the same sickness or injury in order to continue receiving benefits. The plan explicitly permits benefits to be paid if an employee is still working, if the employee otherwise meets the requirements for disability under the plan. Benefits under the plan are reduced for the amount of disability or retirement payments under the Social Security Act (42 U.S.C. § 301 *et seq.*) or "any similar plan or act," as well as amounts received under state workers' compensation laws or governmental retirement systems, but may not be reduced below \$100 or 10 percent of the gross payment amount under the plan, whichever is greater.

Section 1(h)(1) of the RRA (45 U.S.C. § 231(h)(1)) defines creditable railroad compensation to include any form of money remuneration paid to an individual for services rendered as an employee of a covered railroad employer, including remuneration paid for time lost. Section 1(h)(2) of the RRA (45 U.S.C. § 231(h)(2)) specifies as follows, in relevant part:

(2) 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.

However, section 1(h)(6)(v) of the RRA (45 U.S.C. § 213(h)(6)(v)) excludes from compensation any payment made to an employee under a plan or system established by an employer for its employees or a class of employees on account of sickness or accident disability.

Legal Opinion L-1992-65, issued October 28, 1992, listed four requirements for an employer-established plan to qualify for the exclusion from compensation in section 1(h)(6)(v) of the RRA:

- 1) The plan must make provision for employees generally, and/or their dependents; or a class or classes of employees and/or their dependents; provides for payment to or on behalf of an employee or any of the employee's dependents, and assures employee awareness, i.e., the terms and conditions must be communicated directly or indirectly, via a bulletin board or similar method customarily used by the employer, to all employees or the class affected;

- 2) the plan must contain definite payment eligibility standards that may include length of service, salary, classification, or occupation, but may not be based solely on need, efficiency, or loyalty;
- 3) the plan must contain a formula for determining the minimum benefit amount for each eligible employee; and
- 4) the plan must specify the minimum period of payments, e.g. . payments will be made for the duration of the employee's illness, or for as long as the employment relationship continues.

It is my opinion that the UPREHS plan meets all of these criteria. Consequently, payments made under the plan are not compensation under the RRA, and payments under the plan would not prevent payment of an annuity under the RRA. Board regulations at 20 CFR §226.72(e) recognize that no deduction from an annuity will be made due to private disability benefits. However, payments made prior to the sixth month following the last month in which the employee worked for the employer would appear to be subject to Tier I taxation under section 3231(e)(4)(C) of the Railroad Retirement Tax Act (26 U.S.C. § 3231(e)(4)(C)) and creditable for tier I purposes under the RRA (*see* section 1(h)(8) of the RRA (45 U.S.C. § 231(h)(8))).

Although your request for a legal opinion did not address the treatment of the UPREHS plan under the RUIA, I believe it is important to distinguish the standard for a qualifying plan under section 1(h)(6)(v) of the RRA from the standard for a nongovernmental plan for sickness insurance under section 1(j) of the RUIA (45 U.S.C. § 351(j)). Board regulations at 20 CFR § 323.3 define the criteria for Board approval of a nongovernmental plan for sickness benefits, so that payments under such a plan may be excluded from remuneration under the RUIA. In particular, benefits under a plan must be payable only to employees who are absent from work on account of illness or injury, payment of benefits must be conditioned on an employee meeting the eligibility conditions governing payments under the RUIA, and payment of benefits must be coordinated with benefit payments under the RUIA. Benefits under a plan are generally considered coordinated with RUIA benefits when computation of plan benefits take RUIA benefit entitlement into consideration in such a way as to make clear the plan is supplementing RUIA benefits for days of unemployment or sickness. The UPREHS plan does not coordinate benefits with the RUIA in this way, and explicitly permits payments to be made when an employee is ineligible for RUIA payments, including when an employee is disabled from his or her regular occupation, but still working at a lower monthly income.

Legal Opinion L-1977-374 recognizes that a plan which qualifies as a nongovernmental plan under section 1(j) of the RUIA and Part 323 of the Board's regulations will normally also be a qualifying plan under section 1(h)(6)(v) of the RRA, but the reverse is not necessarily true. The UPREHS plan appears to fit this category. Board regulations at 20 CFR § 323.5 provide that the Director of Unemployment and Sickness Insurance shall determine whether a particular plan conforms to the requirements for Board approval. I understand that this function is currently performed by the Chief of RUIA, Internet and Support within the Office of Programs. UPREHS may submit the plan for a determination under the RUIA in accordance with 20 CFR § 323.5, if it has not already done so. In that eventuality, the Chief of RUIA, Internet and Support should inform UPREHS in what particular respect the plan does not qualify, pursuant to 20 CFR § 323.5.

cc: Chief of RUIA, Internet and Support