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The Director of Employment and Claims

The Associate General Counsel

Payments by Erie Railroad Company to
Employees Undergoing Hernia Operations

My opinion has been requested as to whether individuals who receive certain payments from the Erie Railroad Company are eligible for benefits under the Railroad Unemployment Insurance Act for unemployment due to sickness. These payments are made to employees undergoing hernia operations, and consist of a basic amount of \$150, plus \$2.50 for each of the employee's years of service after the fifth.

It appears that the Railroad allows employees with hernias, not connected with any other infirmity, the privilege of an operation by the Railroad's surgeons without charge, and in addition makes the payments in question to them. This is done without regard to whether or not the hernia is service-connected, and without regard to any possible liability on the part of the Railroad; we have been informed that it has been done even in cases in which the statute of limitations would clearly bar a suit against the Railroad. The payments are also made without regard to whether an employee suffers a loss of earnings because of the operation. Thus, they are made even to salaried employees who suffer no loss of wages when they are off work because of illness. They are also made to employees who have been on furlough.

The payments are made by voucher. The voucher contains no reference to any day or days, such as the date of the operation or the beginning and ending dates of the period of convalescence. As indicated above, the amount of the payment an employee receives does not in any way depend on the length of time he may be absent from work as a result of the operation. However, each employee receiving a payment is required to sign a release.

The Railroad Company contends that the payments are gratuities. According to the information we have received, the Company adopted the policy of making these payments because of its desire to keep its employees physically fit, to preserve friendly employer-employee relations, and to avoid the necessity of distinguishing between cases in which the hernia is service-connected and those in which it is not. It appears that there is no written agreement, letter or exchange of any kind obligating the Railroad to make the payments.

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Whether receipt of the payments in question would prevent an employee from receiving sickness benefits under the Railroad Unemployment Insurance Act depends in part on whether the payments are "remuneration" within the meaning of the Act. Under the provisions of Section 1(k), a day cannot be a day of sickness if remuneration is payable or accrues to the employee with respect to that day. "Remuneration" is defined in Section 1(j) as meaning pay for services for hire, including pay for time lost; it does not, however, include payments received pursuant to a nongovernmental plan for sickness insurance.

There is a presumption that payments made to an employee by a corporation are not gratuities, since officers and directors are usually not authorized to make a gift of corporate funds. The mere absence of a legal consideration, or the fact that an employer is not under a duty to pay, does not necessarily make a payment a gift or gratuity. Cf. Opinion L-47-236. Payments made by a railroad to its employees are usually based to some extent on past services or on the expectation of future services, and are therefore not gratuities. This is particularly apparent in cases in which the amount of the payment is related to the employee's number of years of service, as it is in the case of the hernia payments made by the Erie Railroad.

Upon a consideration of all the facts, it is evident that the payments here under discussion are essentially payments made by the Railroad Company to promote the health, good will and contentment of its employees, and that they are made in consideration of past or future services. While it is true that the Company has been influenced to some extent by its desire to avoid the necessity of distinguishing between service-connected and other hernias, the policy which it has adopted provides for payment without regard to the cause of the infirmity. Consequently, and notwithstanding the fact that an employee receiving such payments signs a release, rather than merely a receipt, it is apparent that the payments do not have the character of payments on account of liability, but rather of payments for services. Since the payments are not made under an insurance policy, trust fund, or any other such arrangement, and hence may not be regarded as made pursuant to a nongovernmental plan for sickness insurance, they must be held to be "remuneration" as defined in Section 1(j).

While the payments in question are remuneration, they are made entirely without reference to any time factors, such as the length of time which might be required for an operation or for convalescence. They are not related in any way, either by the voucher or otherwise, to any period of time. The payments cannot, therefore, be regarded as payable or accruing to the employee with respect to any particular day or days, within the meaning of Section 1(k) of the Act. Accordingly, it is my opinion that the receipt of such payments does not prevent an

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individual from being eligible for benefits under the Act, for unemployment due to sickness.1/

David B. Schreiber
Associate General Counsel

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do not present

1/ Since, as pointed out above, the payments are not made on account of liability, they are not within the purview of Section 12(o) of the Act.