



# LEGAL TRACKS

A publication of the American Short Line and  
Regional Railroad Association's General Counsel Committee

## Meeting Dates

**Railroad Day on  
Capitol Hill**  
March 8, 2012  
Renaissance Hotel  
Washington, DC

**ASLRRRA 2012:  
CONNECTIONS**  
April 21-25, 2012  
JW Marriott  
Indianapolis, Indiana

**NEXT GENERAL  
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April 22, 2012  
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## Many Happy Returns: Ensuring You Are Meeting Your RRB Tax Obligations

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Enforcement of certain Railroad Retirement Board ("RRB") regulations have created a new conundrum for rail employers large and small. The regulations in question involve proper allocation of lost wages at the conclusion of a FELA case. The RRB considers a settlement or verdict awarded to a FELA plaintiff to be compensation for time lost, and is wholly subject to RRB taxes as "lost wages." Also, at issue is whether a FELA plaintiff who is receiving disability annuity benefits from the RRB must reimburse the RRB and how a rail employer can leverage that during negotiations.

### Background

Created in 1935, the RRB is an independent federal agency with a three-member board, with one member each appointed by the President of the United States, rail membership, and rail labor, respectively. Rail employers are subject to a separate and distinct system of employment taxes. The RRB administers benefits to rail employees under this program. Railroad employment taxes fund retirement and sickness benefits.

The RRA (45 U.S.C. § 231 *et seq.*) and RUIA (45 U.S.C. § 351 *et seq.*) authorize benefits for rail employees and their families. A rail employee must have at least 10 years of covered rail service, or five years performed after 1995, to receive benefits. The RRA, RUIA, and RRTA (Railroad Retirement Tax Act) define "employer" as a railroad carrier or company, directly owned and/or controlled by a carrier or under common control with a carrier that operates any equipment or facility or performs any service, direct or indirect, in connection with the transport of passengers or property by railroad.

RRB benefits are structured in two "tiers" to coordinate with Social Security.<sup>1</sup> Tier I is equivalent to social security, and for withholding and reporting purposes it is divided into 6.20 percent for retirement and 1.45 percent for Medicare. Tier II benefits, based solely on railroad

<sup>1</sup> Tier I and Tier II rates are set forth in the current version of Tax Rates and Maximum Taxable Earnings Under Social Security, Railroad Retirement and Railroad Unemployment Insurance Programs available from the RRB.



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service, are taxed at 3.9 percent for employees and 12.1 percent for employers for 2012. Rail employers, but not employees, also pay unemployment insurance taxes.

### Creditable Compensation

For rail employers to properly meet their RRB tax liabilities, it is critical to know when and how to designate payments for settlements or verdicts as “lost wages” versus payment for other damages. Under RRB regulations, the intent of an award for lost wages is to treat the employee as if he or she had actually performed compensated service during a designated period of time. Accordingly, for tax purposes, any payments under a settlement agreement or verdict are treated and taxed as compensation/lost wages, unless the payment is specifically designated “other than lost wages”.<sup>2</sup>

Pay for “time lost” is creditable based on when the payment is allocated, not made.<sup>3</sup> Rail employers must report a jury award to the RRB when a judgment is satisfied, and must allocate the award to those months for which the employee received compensation. The employee’s portion of RRB tax is withheld by the rail employer from the gross amount of any award, and forwarded to the RRB. Importantly, an employment relationship must exist in the months to be credited with pay for time lost. In prior RRB opinions, the RRB has held that an injured employee is not presumed to retain an employment relationship after the date of a judgment or settlement that resulted in pay for time lost.<sup>4</sup>

To properly credit “time lost”, payments must be for an actual period of absence from service. Additionally, the amount paid for time lost must reasonably relate to the employee’s normal monthly pay. A monthly allocation of at least ten times the employee’s daily pay rate in effect on the date of injury is considered “a reasonable relationship” to actual lost wages.<sup>5</sup>

### Employer Issues

Addressing a few key issues in the early stages of litigation will help ensure that a rail employer protects its rights and meets its statutory responsibilities under the RRB regarding payment of taxes for lost wages. Employers should ensure that their designated counsel raise the RRB tax issue before the court via appropriate affirmative defenses at the pleadings stage. This can also be addressed during the discovery process. Trial briefs on RRB tax liabilities, as well as motions filed prior to trial outlining the issue for the court, can also be useful. Special interrogatories in the verdict slip may also help allocate RRB taxable lost wages, or designate that no part of a settlement is for lost wages. In addition to the traditional verdict interrogatories for the various elements of liability and/or causation, lost wage-specific interrogatories are recommended. As previously noted, RRB taxes are withheld from any gross verdict amount.

Proper designation of amounts paid under a settlement agreement is also crucial, and the release executed in conjunction with the settlement must clearly state what portion, if any, of the settlement amount, is for past and/or future lost wages. If the amount is **zero**, the employer follows normal practice for tax payments on settlement amounts. Including language in the release to properly allocate the lost wages compensation subject to RRB taxes, or designate that no part of the settlement is for lost wages, is imperative.

<sup>2</sup> See, 45 U.S.C.A. § 231.

<sup>3</sup> See, 20 C.F.R. § 211.3(a)(1).

<sup>4</sup> See, RRB Legal Opinion L-2010-4.

<sup>5</sup> See, 20 C.F.R. 211.3(b).

## Additional Considerations

Frequently in the course of FELA litigation, we encounter plaintiffs in receipt of RRB disability annuity payments for the same time period that they are suing a rail employer for lost wages due to alleged injuries. A rail employee who has relinquished his or her rights with the rail employer cannot receive pay for time lost and disability annuity payments covering the same time period for the same injuries.<sup>6</sup> In this situation, the RRB will seek repayment of past annuity payments to a plaintiff, and absent compelling circumstances, will suspend future payments.

Understanding the tax and annuity implications of a verdict, including the potential recovery of disability payments by the RRB, should encourage more reasonable settlements by plaintiffs. The following example illustrates how a potential verdict stacks up against a guaranteed settlement, especially for plaintiffs receiving a disability annuity.

For a plaintiff expecting a prospective judgment of \$500,000.00, with lost wages designated at \$350,000.00, after deducting fees, taxes, repayment of annuity to the RRB, and loss of future annuity benefits, the net amount to the plaintiff is \$107,350.40. The calculations are as follows:

Verdict	\$ 500,000.00
Attorney Fees	- 125,000.00
Litigation Expenses	- 15,000.00
RRB Tier I Tax (4.2%) on \$106,800	- 4,485.60
Medicare Tax (1.45%) on \$350,000	- 5,075.00
Repayment of Past Annuity	- 120,000.00
Loss of Future Annuity	<u>- 120,000.00</u>
<b>Net:</b>	<b>\$ 107,350.40</b>

If the plaintiff entered into a properly structured settlement agreement, however, the plaintiff would be better off from a strictly financial perspective. For a settlement of \$350,000.00, after deducting fees and case expenses, the plaintiff stands to net \$247,500.00. Also noteworthy for rail employers in a settlement context is the fact that RRB taxes are not required to be paid on settlements that include pay for time lost, and allocation for RRB purposes is not required, if the settlement agreement provides, as outlined previously, that the settlement proceeds are allocated to factors "other than time lost," pursuant to RRB statutes and regulations.

Proposed Settlement	\$ 350,000.00
Attorney Fees	- 87,500.00
Case Expenses	<u>- 15,000.00</u>
<b>Net:</b>	<b>\$ 247,500.00</b>

## Conclusion

As a rail employer, familiarity with the concepts of payment for time lost, creditable compensation, and the tax implications of litigation versus settlement is essential to compliance with the employer's statutory duties set forth by the RRB, RRA, RUIA, and RRTA, including proper reporting and payment of taxes. It is equally essential to understand how to

<sup>6</sup> See, RRB Legal Opinion L-84-22.

comply with all applicable regulations in a manner that minimizes an employer's financial obligations. It is our hope that the information provided above provides a framework for moving forward in a manner that puts all rail employers in a better position to do both.

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**Information about our authors:**

**T.H. Lyda** and **Amanda Sargent** are with the lawfirm of Burns White LLC. A litigator with more than 18 years of experience, T.H. Lyda concentrates his practice in occupational disease, toxic tort and products liability litigation. As Co-Chair of the firm's Transportation Practice Group, T.H. represents Class I and short line railroads in a variety of business and legal matters across the country. He serves as National Coordinating Counsel for two Class I railroads with respect to their occupational illness dockets and is also a member of the ASLRRRA's General Counsel Committee. Amanda Sargent is an Associate with the law firm of Burns White. Experienced in a diverse range of legal matters, Ms. Sargent has represented a wide range of clients, including individuals, businesses and non-profit organizations from a variety of industries, in the areas of transportation law, business law and general litigation.

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