No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether income realized by railroad employees from the exercise of non-qualified stock options and from the vesting of restricted stock and restricted stock units is taxable compensation under the Railroad Retirement Tax Act, 26 U.S.C. 3201 *et seq.*

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 865 F.3d 1045. The order and opinion of the district court (App., *infra*, 17a-49a) is not published in the Federal Supplement but is available at 2016 U.S. Dist. LEXIS 86023.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2017. A petition for rehearing was denied on October 20, 2017 (App., *infra*, 50a-51a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 52a-60a.

STATEMENT

1. a. Under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3201 *et seq.*, railroad employees' "compensation" is subject to taxes that are used to fund a statutory program of retirement benefits. 26 U.S.C. 3201(a) and 26 U.S.C. 3201(b) (2012 & Supp. II 2014). In structure and purpose, the RRTA largely parallels the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.*, which funds Social Security. See 26 U.S.C. 3101-3128 (2012 & Supp. II 2014). Railroad employees are exempt from FICA. See 26 U.S.C. 3121(b)(9).

The RRTA defines "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. 3231(e)(1). Congress has enacted several exceptions to the RRTA's definition of taxable "compensation." These include an exception for income from the transfer or disposition of stock pursuant to "qualified" stock options (QSOs)—a type of stock option that generally enjoys favorable income- and employment-tax treatment under the Internal Revenue Code.[1] 26 U.S.C. 3231(e)(12) (exclusion of QSOs from RRTA definition of

[1] An "option" to buy a stock permits an employee to buy the stock at a fixed price—the strike price—at a specified time or when specified conditions are met. See *Black's Law Dictionary* 1268 (10th ed. 2014). If the price of the stock rises above the strike price, the option is valuable because it permits the option-holder to buy the stock at a below-market price.

"compensation"); see 26 U.S.C. 421, 422 (providing that, if statutory requirements are met, an employee does not recognize income on the grant or exercise of a QSO, but instead recognizes capital gains upon the stock's disposition); 26 U.S.C. 3121(a)(22) (excluding QSOs from FICA taxes).

b. In 1937, when the RRTA was enacted, the U.S. Department of Treasury (Treasury Department) promulgated a regulation construing the term "compensation" under the RRTA as "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. 410.5 (1938). The term "scrip" was understood at the time to encompass shares in a public company. See, *e.g.*, *Black's Law Dictionary* 1588 (3d ed. 1933).

In 1994, the Treasury Department issued a new regulation providing that, "except as specifically limited by the [RRTA] * * * or regulation," compensation under the RRTA "has the same meaning as the term *wages* in [FICA] section 3121(a)." 26 C.F.R. 31.3231(e)-1(a)(1). FICA defines "wages" as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. 3121(a) (2012 & Supp. II 2014).

2. a. Respondent operates railroads in the United States. Compensation of respondent's employees is accordingly subject to employment taxes under the RRTA rather than under FICA. App., *infra*, 3a.

Respondent has long compensated employees with stock in respondent's parent company, Union Pacific Corporation, which is publicly traded on the New York Stock Exchange. C.A. Separate App. 330-335; C.A. App. 13-14. To do so, respondent has awarded employees non-qualified stock options (NQSOs)—options that do

not meet the requirements for the favorable treatment given to QSOs. App., *infra*, 20a. In addition, respondent has compensated employees with grants of restricted stock, which are subject to restrictions on sale and forfeiture until the interest "vests" at a particular time or when other conditions are met, at which point the stock becomes unrestricted. *Ibid.* Finally, respondent has compensated employees with restricted stock units, under which the company agrees to transfer stock to the employee when the employee's interest vests. *Ibid.*

For many years, petitioner treated income that its employees realized from such stock-based compensation as a form of "money remuneration" subject to employment taxes under the RRTA, and it accordingly paid RRTA tax on such income. C.A. Separate App. 330-335. In 2014, however, respondent filed suit against the federal government seeking, as relevant here, $55 million in tax refunds for payments of RRTA taxes on income from its stock-based compensation. Respondent sought refunds of payments it had made on its own behalf and on behalf of its employees for the period then permitted under the statute of limitations, from 1991 to 2007.[2] App., *infra*, 3a; *id.* at 18a n.2; C.A. App. 10-13, 15.

b. The district court granted summary judgment to the government. App., *infra*, 17a-49a.

The district court concluded, as relevant here, that income from respondent's stock-based compensation of employees qualified as taxable "compensation" under

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[2] Respondent also sought refunds of approximately $19 million in RRTA taxes allegedly paid on lump-sum payments it had made to employees who were union members upon ratification of collective bargaining agreements. App., *infra*, 18a n.2. The court of appeals held that respondent was entitled to those refunds, *id.* at 14a-16a, and this petition does not ask the Court to review that determination.

the RRTA. App., *infra*, 40a-49a. The court found that conclusion to be supported by the RRTA's text, structure, and history. *Id.* at 40a-41a.

Starting with the text, the district court observed that "the term 'compensation' is modified by two antecedents: 'any form of' and 'money.'" Pet. App. 41a. The court noted that "any form of" "arguably broadens the definition of 'money remuneration,'" and "implies that the reference is to species of payments other than 'cash.'" *Ibid.* The court found that the modifier "money" can "have an expansive meaning connoting 'of or relating to capital or finance in general,' or can be regarded as simply a redundancy or archaic usage, similar to legalese such as 'money damages.'" *Id.* at 41a-42a. The court also concluded that the stock-based compensation at issue fell within common meanings of "'money,' [when] used as a noun," because that term refers not only to cash, but also to capital and assets easily convertible to cash. *Id.* at 42a-43a.

The district court found that the structure and history of the RRTA confirmed its analysis. App., *infra*, 44a. The court noted that the RRTA contains exclusions for various kinds of "non-cash benefits," and it reasoned that those exclusions would be unnecessary if the term "compensation" categorically excluded non-cash remuneration. *Ibid.* The district court further concluded that the RRTA's history indicated that RRTA "compensation" was intended to be generally commensurate with FICA "wages." *Id.* at 44a-47a.

Finally, the district court explained that, "if the statute could be said to be ambiguous," the court would give deference to the IRS's regulations, and would conclude on that basis that the stock-based compensation at issue

qualified as taxable compensation under the RRTA. App., *infra*, 46a-48a.

c. The court of appeals reversed. App., *infra*, 1a-16a. The court held that the RRTA's definition of taxable "compensation" unambiguously excluded stock. In construing the RRTA's definition of "compensation" as reaching "'any form of money remuneration,'" the court acknowledged the broad definitions of "'money'" that had been identified by the government and the district court. *Id.* at 4a (citation omitted). The court stated, however, that it was "not convinced" that those definitions "reflect[] the ordinary, common meaning of that term." *Id.* at 5a. The court instead found the most apt definition to be one referring to "any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value." *Ibid.*

The court of appeals found that narrower understanding to be supported by Congress's decision not to use in the RRTA the same broad definition of taxable "compensation" that it had used in FICA. App., *infra*, 7a. The court viewed Congress's choice not to "adopt [the] obvious alternative language" of FICA as evidence that Congress did not intend the RRTA to reach as broadly. *Ibid.*

The government argued that its broader interpretation of taxable "compensation" under the RRTA was supported by the statute's exemption of numerous forms of non-cash payment from the definition of "compensation." App., *infra*, 8a. The court of appeals rejected that argument, finding that these exemptions would have some effect even under its reading of the statute. *Ibid.* For example, the court opined that the RRTA's express exclusion of QSOs was not rendered

superfluous under the court's interpretation of the statute because "cash payments sometimes accompany the exercise of a stock option," *id.* at 9a; that the exclusion for employer-provided health care was not rendered superfluous because the exclusion also "covers cash payments made to an employee," *ibid.*; and that the exclusion for employer-provided meals and lodging was not superfluous because in certain circumstances the employee must pay a charge for meals, *id.* at 9a-10a. The court of appeals concluded that, "though the payments by mediums of exchange may not be frequent in the circumstances to which those exemptions apply compared to payments made in other property, the point is that no exemption is empty of meaning." *Id.* at 11a.

Finally, because the court of appeals "conclude[d] that the RRTA unambiguously does not require payment of RRTA taxes on remuneration in stock," the court held that it "owe[d] no deference to the IRS's regulation" indicating that stock was taxable "compensation" under the RRTA. App., *infra*, 13a.

ARGUMENT

The court below held that railroads are not required to pay RRTA taxes on payments of stock to employees, including payments through NQSOs, restricted stock, and restricted stock units. App., *infra*, 5a-14a. On January 12, 2018, this Court granted certiorari in *Wisconsin Central Ltd.* v. *United States*, No. 17-530, to decide whether railroads' payments of stock to employees, including through NQSOs, are taxable "compensation" under the RRTA. Accordingly, the Court should hold this petition pending its decision in *Wisconsin Central* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Wisconsin Central Ltd.* v. *United States*, No. 17-530, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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JANUARY 2018

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-3574

UNION PACIFIC RAILROAD COMPANY, IN ITS OWN CAPACITY AND IN ITS CAPACITY AS SUCCESSOR TO UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

ASSOCIATION OF AMERICAN RAILROADS,
AMICUS ON BEHALF OF APPELLANT(S)

Submitted: June 6, 2017
Filed: Aug. 1, 2017

OPINION

Appeal from the United States District Court
for the District of Nebraska-Omaha

Before: WOLLMAN, ARNOLD, and GRUENDER, Circuit Judges.

ARNOLD, Circuit Judge.

The Union Pacific Railroad Company seeks a refund of about $75 million in taxes that it paid the federal government from 1991 to 2007 under the Railroad Retirement Tax Act. UP maintains that the RRTA did not require it to pay taxes when it paid employees in stock or made what are called ratification payments to union-member employees. The district court rejected the refund requests and granted summary judgment to the government. We reverse and remand.

Anyone who has earned a paycheck in this country is probably familiar with the Federal Insurance Contributions Act, if not by name then by effect. The FICA requires employers to withhold a tax equal to a percentage of an employee's wages. 26 U.S.C. § 3102(a). In addition, an employer must pay a share of the tax. 26 U.S.C. § 3111(a). These taxes fund social-security and medicare benefits. *See United States v. Quality Stores, Inc.*, — U.S. —, 134 S. Ct. 1395, 1399, 188 L. Ed. 2d 413 (2014).

Rail carriers and their employees are not subject to FICA taxation; instead, they pay a somewhat different tax under the RRTA. *See* 26 U.S.C. §§ 3201, 3221(a)-(b). As its name suggests, RRTA taxes fund benefits under the Railroad Retirement Act. *See BNSF Ry. Co. v. United States*, 775 F.3d 743, 750 (5th Cir. 2015); 45 U.S.C. §§ 231-231v. Congress first enacted versions of the RRTA and the RRA in 1934 to stabilize the railroad industry's private pension plans during the Depression. Courts struck down that statute, *see R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362, 55 S. Ct. 758, 79 L. Ed.

1468 (1935), and its 1935 replacement, *see Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955, 958-59 (D.D.C. 1936), but Congress's 1937 version survived. Today, the RRA and RRTA resemble both a social welfare plan and a private pension program; one tier of benefits and taxes corresponds to what one would expect to receive from and to pay for social security and medicare, while the other tier ties benefits to earnings and career service. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979).

UP is a rail carrier that is obligated to pay RRTA taxes. During the time at issue, UP paid employees in company stock in addition to a monetary salary. UP paid RRTA taxes on the stock payments, but now it asks the government to refund the money because, it says, the RRTA did not require it to make those payments. The government disagrees, arguing that employers who pay employment taxes under the FICA are obligated to pay taxes on stock payments, and the Internal Revenue Service, by regulation, treats the FICA and the RRTA the same on this matter. *See* 26 C.F.R. § 31.3231(e)-1(a)(1). The district court agreed with the government's interpretation of the statutes and regulations at issue, so it granted summary judgment in the government's favor and denied UP's motion for summary judgment, which judgments we review de novo. *Dunham v. Portfolio Recovery Assocs., LLC*, 663 F.3d 997, 1000 (8th Cir. 2011).

Generally, when Congress authorizes an agency to issue regulations interpreting a statute that the agency enforces, we defer to the agency's interpretation of an ambiguous statute so long as the interpretation is reasonable. We must first determine whether the statute is ambiguous, and if not, we apply the statute as written;

if it is ambiguous, we must decide whether the agency's interpretation is reasonable. *Encino Motorcars, LLC v. Navarro*, — U.S. —, 136 S. Ct. 2117, 2124-25, 195 L. Ed. 2d 382 (2016).

Beginning, as we must, with the statutory text, *see Henson v. Santander Consumer USA Inc.*, — U.S. —, 137 S. Ct. 1718, 1721, 198 L. Ed. 2d 177 (2017), we see that the RRTA tax is based on an employee's "compensation," which is generally defined as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1). On the other hand, the FICA levies a tax on an employee's "wages," which are "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. § 3121(a). It seems to us that the FICA sweeps more broadly than the RRTA: The FICA expressly mentions the cash value of remuneration not paid in cash, such as payments in property, whereas the RRTA does not. And the determiner "all" qualifies "remuneration" in the FICA definition, appearing to make "remuneration" unlimited, whereas the word "money" qualifies "remuneration" in the RRTA.

But the parties dispute why the word "money" precedes "remuneration" in the RRTA. UP maintains that "money" takes on the ordinary meaning it had at the time the RRTA was enacted since the RRTA does not define it. Citing a handful of dictionaries, UP argues that "money" meant "a medium of exchange." UP notes that "money" can have a more restrictive meaning, such as referring only to cash or coins, but since the phrase "any form of" precedes the word "money," then it seems that Congress intended the RRTA to reach remuneration

paid in any medium of exchange, not just cash or coins. To the government and the district court, on the other hand, "money" does not do any work; it is a superfluity, akin to its impotence in phrases like "money judgment" or "money damages." Alternatively, they point out, citing their own handful of dictionaries, that "money" can have an expansive meaning relating to capital or finance in general, especially when "money" does the work of an adjective.

We think that UP has the better argument. First, we are not convinced that the expansive definition of "money" that the government advances reflects the ordinary, common meaning of that term. *See Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979). In fact, one of the dictionaries on which the government relies notes that in its "popular sense, 'money' means any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value." *See* Black's Law Dictionary 1200 (3d ed. 1933). A number of contemporary legal authorities agree. UP points to an instructive case decided near the time that the RRTA was enacted in which a testatrix left her "money" to one person and her personal property to another. *In re Boyle's Estate*, 2 Cal. App. 2d 234, 37 P.2d 841, 841 (1934). The trial court awarded stock that the decedent had owned to the legatee of the "money." The appeals court reversed, noting that "[t]here is no doubt that the word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks," and nothing indicated that "money" was used "in any sense other than its ordinary and accepted meaning." *Id.* at 842. The court explicitly considered broader definitions of money but did not apply them. Our court, moreover, explained during that same era

that "[t]he sole function of money is as a necessary medium of exchange in all commerce which has passed the barter stage," *Emery Bird Thayer Dry Goods Co. v. Williams*, 107 F.2d 965, 971 (8th Cir. 1939), which seems inconsistent with the notion that "money" in its ordinary context means any property whatsoever. More recently, the United States Tax Court said:

> A final problem we have with extending the definition of "money received" in section 1001(b) to encompass preferred stock is its great dissimilarity to money in any practical sense. Assuming without deciding that the term includes not only actual money, but "money equivalents" as well, it is difficult to see how stock of any sort could reasonably be viewed as such.

Nestle Holdings, Inc. v. C.I.R., 94 T.C. 803, 814-15 (T.C. 1990). In short, "[t]here are numerous ways to define 'moneys,' but dictionaries mostly agree that the term refers to a generally accepted medium of exchange." *In re Hokulani Square, Inc.*, 776 F.3d 1083, 1085-86 (9th Cir. 2015).

Second, a regulation adopted about four months after the passage of the RRTA explained: "The term *compensation* means all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example), which is earned by an individual for services performed as an employee." Employers' Tax, Employees' Tax, and Employee Representatives' Tax Under the Carriers Taxing Act of 1937, 2 Fed. Reg. 2198, 2202 (Oct. 15, 1937) (codified at 26 C.F.R. § 410.5 (1938)). If money meant either nothing or all property, as the government asserts, then there would be no reason to note that scrip or merchan-

dise orders also constituted "compensation." Those examples are illuminating only if "money" has a more restrictive meaning.

Third, consider the statutory context. Congress enacted the FICA's predecessor in 1935—the same year when Congress made its second attempt in passing the RRTA. In the 1934, 1935, and 1937 versions of the RRTA, Congress chose a different word—compensation—for the RRTA from the one it chose for the FICA—wages. These differences in the relevant terms call to mind the oft-cited principle that differences in statutory language convey differences in meaning. *Henson*, 137 S. Ct. at 1723. And when Congress does not adopt obvious alternative language, the natural implication is that it did not intend the alternative. *Advocate Health Care Network v. Stapleton*, — U.S. —, 137 S. Ct. 1652, 1659, 198 L. Ed. 2d 96 (2017). Congress has, moreover, preserved the distinction. In defining the term "successor employers," the RRTA adopts the FICA definition except that Congress substitutes "compensation" (as the RRTA defines it) where the FICA says "remuneration." *See* 26 U.S.C. § 3231(e)(2)(C)(ii)-(iii). We think that Congress did this because "compensation," which includes only money remuneration, is necessarily a subset of "remuneration," which Congress uses in defining FICA "wages." It would make no sense for Congress to swap these terms if "compensation" meant the same thing as "remuneration" and "wages" under the FICA. And finally, the government and the district court propose an interpretation that raises a red flag: When interpreting a statute, courts typically do not presume that Congress has used superfluous words in its enactments. *Stapleton*, 137 S. Ct. at 1659.

The government insists, however, that various non-cash exemptions from the general definition of "compensation" show that "money remuneration" means something broader than just mediums of exchange or else the exemptions would be superfluous. Why would Congress, the argument goes, create exemptions for non-cash payments if the general definition already excluded those payments? The Fifth Circuit relied on this argument to conclude that the statute is at least ambiguous. *See BNSF*, 775 F.3d at 754-55. The government emphasizes that the Supreme Court took a similar analytical tack when interpreting the term "wages" under the FICA, so we should do so here. *See Quality Stores*, 134 S. Ct. at 1400.

We have no quarrel in general with the approach that the government suggests, and we recognize that the Supreme Court has used it—but in a different context. We decline to give it any weight here because it rests on a false premise in the RRTA context. None of the exemptions that the government identifies will be rendered superfluous under our reading of the statute because each can include payments consistent with a medium-of-exchange interpretation of "money." Take, for example, the exemption for remuneration in "qualified stock options," 26 U.S.C. § 3231(e)(12), that the government relies on as illustrating its point. That exemption says that "compensation" does not include any remuneration on account of a transfer or disposition of a share of stock as the result of an exercise of certain qualified stock options. (The parties here, by the way, agree that the options in question are non-qualified stock options.) The government contends that if, as UP suggests, "money remuneration" includes only remunera-

tion paid in mediums of exchange like cash, then the exemption for qualified stock options adds nothing and is therefore superfluous. But what this argument omits is that cash payments sometimes accompany the exercise of a stock option, as, for instance, when the number of shares an employee can acquire at exercise is not a whole number, or if the remunerative program under which the option was transferred gives employees bonuses or additional compensation, in cash or other property, at the time of exercise. The IRS recognizes these possibilities. *See* 26 C.F.R. § 1.422-5(c). The government does not dispute UP's contention that money is sometimes received when a qualified stock option is exercised; instead, it questions why Congress would not also explicitly exempt non-qualified stock options. We think it is Congress's prerogative to give preferential tax treatment to certain kinds of options. The point is that the exemption for qualified stock options still has meaning even if we give "money" its ordinary meaning.

The government likewise calls our attention to the exemption for health and disability insurance, *see* 26 U.S.C. § 3231(e)(1)(i), but this exemption excludes from compensation "any payment . . . made to, or on behalf of, an employee . . . on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death." Since this exemption covers cash payments made to an employee, it would not be rendered superfluous by interpreting "money" to mean mediums of exchange.

Another provision of relevance exempts "the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable

to believe that the employee will be able to exclude such items from income under section 119." *See* 26 U.S.C. § 3231(e)(9). Section 119 is the income-tax section relating to meals and lodging. It contains a subsection relating to money payments that an employee must pay an employer for employer-provided meals even if the employee declines the meal. *See* 26 U.S.C. § 119(b)(3). Section 119(b)(3) treats those circumstances for tax purposes as if the employer had never paid the employee that money. Because it is excludable under § 119, the cash payment to the employee is also excludable under the RRTA, so this exemption would retain meaning.

We consider, finally, the fringe-benefit exemption in § 3231(e)(5), which exempts "any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefits from income under section 74(c), 108(f)(4), 117, or 132." But each of those sections includes a medium-of-exchange component. Section 74(c) excludes employee-achievement awards from income, but these awards can include some gift certificates, *see* 26 C.F.R. § 1.274-3(b)(2), which fall within the medium-of-exchange definition of money. Section 108(f)(4) is a loan-repayment program, which can include payments in mediums of exchange like cash. Section 117 deals with scholarships, which can involve cash payments. Finally, § 132 covers certain other fringe benefits, some of which involve cash payments, like moving-expense reimbursement and other cash reimbursements. In short, this exemption would still mean something under UP's definition of "money remuneration" because each of the cited sections includes a medium-of-exchange component. We are therefore not

convinced that UP's interpretation of "money" would mean that these exemptions would do no work.

The government points out that the FICA contains some of the same exemptions verbatim, presumably implying that the exemptions must have the same breadth in each of the tax schemes. We do not understand why this is necessarily so. The exemptions may apply to more transactions under the FICA, but that does not mean that they lack meaning under our interpretation of the RRTA. And though the payments by mediums of exchange may not be frequent in the circumstances to which those exemptions apply compared to payments made in other property, the point is that no exemption is empty of meaning.

Another reason that the exemptions do not do much to support the government's view is that they can be made to indicate that "money" is not as broad as the government suggests. The RRTA exempts cash tips under $20. 26 U.S.C. § 3231(e)(3). The FICA, on the other hand, exempts "tips paid in any medium other than cash" and cash tips under $20. 26 U.S.C. § 3121(a)(12). It is telling that Congress did not similarly exclude "tips paid in any medium other than cash" in the RRTA because this difference suggests that the general definition of "compensation" already excluded such tips.

Perhaps most important, Congress enacted the exemptions years after enacting the general definition of compensation. Under the government's theory, these later-adopted exemptions would impliedly repeal our reading of the original definition of "money remuneration." We do not favor a construction that later-enacted statutes impliedly repeal an earlier one unless the intention of Congress to repeal is clear and manifest.

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 662, 127 S. Ct. 2518, 168 L. Ed. 2d 467 (2007). The later statute must expressly contradict the earlier one, unless such a construction is absolutely necessary to give the words of the later statute any meaning. As just explained, the later-enacted exemptions have meaning, and Congress never announced an intention to alter the original scope of "money remuneration" to something beyond a medium of exchange. We keep in mind what Justice Cardozo said about implied repeals: "We cannot believe that in this process of amendment the word 'seamen' lost the broad meaning that it had in the law to be amended, and was narrowed by the exclusion of a particular species of seamen, i.e., seamen having command. The change is too sudden to be accepted as intended unless unmistakably declared." *Warner v. Goltra*, 293 U.S. 155, 159, 55 S. Ct. 46, 79 L. Ed. 254 (1934). In short, we disagree that the statutory exemptions to the definition of "compensation" reveal much, if anything, about the meaning of "money remuneration."

We recognize that one of our sister circuits recently held that payments in stock are a form of money remuneration because stock has become practically equivalent to cash: "just as today 100 dimes is the exact monetary equivalent of a $10 bill," the court asserted, "so is a stock certificate that can be sold for $10." *Wis. Cent. Ltd. v. United States*, 856 F.3d 490, 492 (7th Cir. 2017). We respectfully disagree. Even stocks with readily ascertainable share prices are not "money" because they are not mediums of exchange. One cannot pay for produce at the local grocery store with stock. Like any type of property, stock does have cash value and can be exchanged for money, but we do not think it is a medium of exchange. The Seventh Circuit expressly rejected

the idea that its holding rendered payments in any form of property taxable under the RRTA, noting that, for example, an employer would not have to pay RRTA taxes on a birthday cake. But as the dissent in that case recognized, *see id.* at 494 n.1, even a cake has market value and can be exchanged for money. We discern no limiting principle in the government's expansive interpretation that would prevent all property from being swept into the RRTA's text, so we decline to follow the Seventh Circuit's lead.

Finally, the government maintains that we should interpret the RRTA to reach as far as the FICA because the two statutes share a similar purpose. Vague notions about the statutes' purposes, however, cannot be used to override their actual texts. *See Henson*, 137 S. Ct. at 1725. We also decline to wade into the policy pros and cons of construing the statutes differently or for not taxing remuneration in stock under the RRTA. Even if we thought that the government had the better of the policy arguments, we cannot look past the RRTA's plain language. *See Sandoz Inc. v. Amgen Inc.*, — U.S. —, 137 S. Ct. 1664, 1678, 198 L. Ed. 2d 114 (2017). So we refuse the government's invitation to remove "money" from the books, either by erasing it entirely or by stretching it so wide that it encompasses everything, and suggest that the government is better off seeking an amendment of the statute from Congress.

Because we conclude that the RRTA unambiguously does not require payment of RRTA taxes on remuneration in stock, we owe no deference to the IRS's regulation defining the RRTA's "compensation" and the FICA's "wages" identically, and we reverse the district court's

grant of summary judgment to the government and denial of UP's motion for summary judgment on this issue.

We turn now to the other broad issue in the case and consider whether the RRTA required UP to pay taxes when it made so-called ratification payments to employees when their unions ratified collective bargaining agreements. These payments were intended to encourage unions to ratify collective bargaining agreements; they typically required the recipient to be employed with UP on a certain date, and the amount paid out was tied to the number of hours that the employee had worked the previous year.

Everyone agrees that the ratification payments are "money remuneration." UP argues, though, that no tax is due under the RRTA because these payments are not "for services rendered" by the employee. *See* 26 U.S.C. § 3221(a)-(b). The RRTA says that a person "is in the service of an employer" if that person "is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service," "is rendering professional or technical services and is integrated into the staff of the employer," or "is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations." 26 U.S.C. § 3231(d)(1). The district court rejected UP's argument without referring to this statute; it drew, instead, from *Quality Stores*, where the Supreme Court interpreted the FICA as applying to wages paid for "not only work actually done but the entire employer-employee relationship for which compensation is paid." 134 S. Ct. at 1400.

We disagree with the district court's approach because instead of taxing payment for "services," the

FICA taxes payment for "employment," which is defined broadly as "any service, of whatever nature, performed . . . by an employee for the person employing him." 26 U.S.C. § 3121(b). Transplanting the FICA's definition into the RRTA disregards the RRTA's focus on the authority and control that an employer exercises over an employee in determining whether the employee is performing a "service."

We conclude that the ratification payments were not made to employees for services rendered to UP because UP does not exercise control over whether a union ratifies a collective bargaining agreement. Indeed, ratification is a union activity that the Railway Labor Act protects from employer interference since that law is designed "to provide for the complete independence of carriers and of employees in the matter of self-organization." 45 U.S.C. § 151a(3).

The government also emphasizes that UP made the ratification payments from its payroll, which, it maintains, means they were "for services rendered." It is true that payroll payments are presumed to be compensation for services rendered. 26 C.F.R. § 31.3231(e)-(1)(a)(2). If the RRTA covered every payment that an employer made to an employee, then the payroll presumption would effectively be irrebuttable despite the regulation's admonition that it is not, and here UP has rebutted the presumption. First, because the unions' members were employed by several companies, UP simply used its payroll department to determine which union members actually worked at UP rather than for a different company. UP further explained that its payroll department, unlike its accounts-payable department, was

set up to withhold income taxes on the ratification payments.

The district court therefore erred in granting the government's motion for summary judgment and denying UP's motion for summary judgment because the RRTA did not require UP to pay taxes when it paid employees in stock or made ratification payments to them.

Reversed and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 8:14CV237

UNION PACIFIC RAILROAD COMPANY, IN ITS OWN CAPACITY AND IN ITS CAPACITY AS SUCCESSOR TO UNION PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: July 1, 2016

MEMORANDUM AND ORDER

This matter is before the court on the parties' cross-motions for summary judgment, Filing Nos. 50 and 51.[1] This is an action seeking a refund of employment taxes paid by the plaintiff, Union Pacific Railroad Company ("U.P.") under the Railroad Retirement Tax Act ("RRTA"), I.R.C. §§ 3201-3241. Filing No. 1, Complaint. U.P. seeks a refund of RRTA taxes with respect to 3 types of transactions: (1) exercises of certain nonqualified stock options ("NQSOs") granted to employees; (2) vesting of restricted stock and restricted

[1] Union Pacific moves for partial summary judgment only on the issue of liability because the parties agreed to resolve the principal legal issues in this case and then address the tax refund computations should the Court determine that Union Pacific is entitled to a refund. Filing No. 12, Rule 26 Report at 13-14.

stock units ("collectively, "restricted stock") granted to employees; and (3) certain payments to union members/ employees in connection with collective bargaining agreements.[2] *Id.* at 4-10. Jurisdiction is based on 28 U.S.C. § 1346(a)(1).[3]

Defendant United States of America ("the government" or "the IRS") contends that U.P. is not entitled to a refund because it is required to pay employment taxes under the RRTA on "compensation." The parties dispute whether the payments are "compensation" under the RRTA and whether the payees were "employees" engaged in "service," as those terms are used in the statute, at the time of the payments. The central dispute between the parties is whether "compensation" under the RRTA, defined as "money remuneration," equates to "wages" under the Social Security Act, defined as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash."

I. FACTS

The record shows the following relevant facts.[4] Union Pacific Railroad Company ("U.P."), is the surviving

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[2] U.P. seeks a refund for a claimed overpayment of more than $52 million for employment taxes on NQSOs; more than $3 million for restricted stock and RSUs; and a refund of nearly $19 million for alleged overpayments under collective bargaining agreements.

[3] The court overruled the government's challenge to jurisdiction with respect to payments for tax years 1995 and 1996. Filing No. 67, Memorandum and Order.

[4] The facts are gleaned from the parties' respective statements of undisputed facts and from the evidence submitted in connection with the motions. *See* Filing No. 56, Government Brief at 8-18; Filing No. 59, U.P. Brief at 2-21; Filing No. 60, Government Brief at 5-12;

corporation from the 1998 merger of Union Pacific Railroad Company and Southern Pacific Transportation Company. U.P. brings this action in its own capacity and as successor to the pre-merger Union Pacific Railroad Company. U.P. is a rail carrier and has its principal place of business in Omaha, Nebraska.

Stock options are contracts under which one party grants another party the right, but not the obligation, to buy or sell a set number of shares at a predetermined price within a specified period of time. The purchase price of the stock is determined on the date the stock option is granted. The predetermined price in the stock option contract is known as the "exercise price" or the "strike price." The stock option can be exercised by the option holder only after vesting. Vesting occurs after certain conditions are satisfied and set time periods have lapsed.

When an option holder exercises a stock option, the option holder pays the predetermined price of the stock to Union Pacific. Union Pacific delivers the shares of stock to the option holder. The option holder's decision as to whether and when to exercise a stock option is made by the option holder, as is the decision as to what to do with the stock. The transactions at issue involve option holders' exercises of NQSOs from 1991 to 2007.

Filing No. 62, U.P. Brief at 2-15; Filing No. 64, Government Reply Brief at 5-6; Filing No. 65, U.P. Reply Brief at 1-6; Filing Nos. 52-55, 57-58, 61, 63, and 66, Indices of Evidence.

A nonqualified stock option (NQSO) is a stock option that does not qualify as an "incentive stock option" under I.R.C. § 422.[5] Restricted stock is stock that cannot be transferred or sold until a set period of time passes or certain other conditions are met, at which time the stock vests and is no longer subject to forfeiture. Restricted-stock units (RSUs) are promises to transfer stock in the future, after a set period of time has passed or certain other conditions are met, at which time the RSU vests and is no longer subject to forfeiture.

For tax years 1981 through 1990, U.P. paid RRTA taxes with respect to NQSOs, restricted stock, RSUs, and ratification payments, without challenge. The record shows that both prior to and after 1991, U.P. granted NQSOs to some of its employees. The NQSOs provided the employees the right to buy stock in Union Pacific Corporation (UNP stock), U.P.'s parent company, which is publicly traded on the New York Stock Exchange.

U.P. granted these NQSOs to its employees under at least seven stock plans issued between 1982 and 2004. These stock plans were routinely amended and were generally administered by the Compensation and Benefits Committee. The stated general purpose of the stock plans under which the NQSOs were issued was "to promote and closely align the interests" of U.P.'s employees and shareholders "by providing stock based compensation and other performance-based compensation," and "to reward performance which enhances long

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[5] To qualify as an incentive stock option under that provision, the option award must meet certain requirements, including: a plan that is written, limited to employees, limited as to duration and exercise, and approved by directors and stockholders. *See* I.R.C. § 422.

term shareholder value; to increase employee stock ownership through performance-based compensation plans; and to strengthen [U.P.'s] ability to attract and retain an outstanding employee and executive team." The terms of the NQSO grants, which included the number of shares that could be purchased by each recipient, generally varied depending on whether the recipient was an executive or nonexecutive employee. U.P.'s stock plans provided for awards of incentive stock options ("ISOs"), as defined under I.R.C. § 422, as well as nonqualified stock options.

U.P.'s chief executive officer (CEO) and the compensation committee of the board of directors generally approved NQSO grants to U.P.'s executives, and made person-by-person determinations as to the terms of the grants. The CEO generally approved NQSO grants to U.P.'s nonexecutive employees based on department-head recommendations, and the terms of the grants were based on person-by-person determinations. For at least 2001 through 2007, the terms of NQSO grants to nonexecutive employees were also subject to discretionary guidelines issued by U.P.'s human resources department. The guidelines suggested different NQSO grants based on an employee's position and performance rating.

The NQSOs generally had to vest in order for U.P.'s employees to exercise them. Although the particular vesting requirements varied among the stock plans and grant agreements, the two general conditions for vesting were: 1) a minimum period for the employee to hold the option and 2) the employee's continued employment with U.P. In addition, some of the NQSOs had performance-based conditions for vesting, for example,

meeting specified financial targets or attaining goals related to employee safety.

Some NQSOs were also subject to potential "clawback" (i.e., revocation) even if they had vested. Employees receiving such NQSOs were required to sign noncompete agreements and to guard U.P.'s confidential information and trade secrets. Violations of those obligations would trigger clawback of the NQSOs.

To exercise NQSOs, employees purchased UNP stock from U.P. at the strike price. On the exercise of NQSOs by its employees, U.P. delivered the UNP stock to its employees' brokerage accounts. For federal income tax purposes, U.P.'s employees recognized ordinary income in the amount of the fair market value of the UNP stock at the time of exercise minus the amount the strike price for each share purchased.[6] of the NQSOs on its federal income tax returns for 1991 through 2007. U.P. and the employees' brokers computed the RRTA taxes due based on the difference between the fair market value of the UNP stock at the time of exercise minus the amount the employees paid for each share of the stock and U.P. collected the employee portion of the tax from the employee and remitted the employee and employer portions of the tax to the IRS.

U.P. granted restricted UNP stock (also called "retention stock") and RSUs to some of its employees that vested during the time period at issue. On vesting, those

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[6] In contrast to NQSOs, ISOs, sometimes referred to as statutory or qualified stock options, receive favorable tax treatment and the difference between the disposition price and strike price is taxed as capital gain. *BNSF Ry. Co., v. United States*, 775 F.3d at 747 n.5. Taxation of ISOs is not at issue.

employees received unrestricted or "vested" UNP stock from U.P. U.P. granted restricted stock and RSUs to its employees under three stock plans issued between 1993 and 2004. Those stock plans were also routinely amended and were generally administered by the compensation committee of Union Pacific Corporation's board of directors, or another similar committee. The general purpose of the stock plans under which the restricted stock and RSUs were issued was the same as the general purpose of the plans under which the NQSOs were issued. Generally, U.P. granted restricted stock to both executive and nonexecutive employees, but it only granted RSUs to its executives.

U.P.'s Chief Executive Officer ("CEO") and the Compensation Committee of the Board of Directors generally approved the restricted-stock and RSU grants to U.P.'s executives, and they made person-by-person determinations as to the number of shares or units granted. The CEO generally approved restricted-stock grants to U.P.'s nonexecutive employees based on department-head recommendations, and the number of shares granted were based on person-by-person determinations. For at least 2001 through 2007, the terms of restricted-stock grants to nonexecutive employees were also subject to discretionary guidelines issued by U.P.'s human resources department, which suggested different numbers of shares based on an employee's position and performance rating.

At the time of a restricted-stock grant, U.P. would transfer the restricted UNP stock to an employee's brokerage account. At the time that an RSU vested, U.P. would transfer the unrestricted UNP stock to an employee's brokerage account. Although the particular

vesting requirements for restricted stock and RSUs varied among the stock plans and grant agreements, the two general conditions for vesting were: 1) a minimum period for the employee to hold the restricted stock or RSU and 2) the employee's continued employment with the Railroad. In addition, some of the restricted stock and RSUs had performance-based conditions for vesting, such as U.P. attaining return-on-investment goals. Some restricted stock and RSU grants were also subject to potential clawback (i.e., revocation) even if they had vested. Employees receiving such grants were required to sign noncompete agreements and to guard U.P.'s confidential information and trade secrets. Violations of those obligations would trigger clawback of the stock.

On vesting of the restricted stock or RSUs, U.P.'s employees recognized ordinary income in the amount of the fair market value of the UNP stock at the time of vesting on their federal income tax returns. U.P. correspondingly deducted the collective amount of income recognized by its employees on its federal income tax returns for those years. U.P. computed the RRTA taxes due based on the fair market value of the UNP stock at the time of vesting and the Railroad collected the employee portion of the tax from the employee and remitted both the employee and employer portions of the tax to the IRS.

U.P. entered into several collective bargaining agreements ("CBAs") with various unions during the time-period at issue. Pursuant to the agreements, U.P. made one-time lump sum specialized payments to union member employees whose unions had ratified the CBAs ("ratification payments"). The CBAs set forth various

factors that the bargaining railroads would consider before making ratification payments, including whether the union member was employed on a certain date and his or her employment status. For example, under the 1996 CBAs, a person generally received a full lump-sum ratification payment from U.P. if the union ratified the agreement, the person was employed by U.P. on the date the ratification payment was made, and the employee had worked 2,000 hours in the prior year. If the employee had not worked enough hours to receive the full ratification payment, then the employee generally received a prorated payment based on the number of hours worked. U.P.'s payroll department processed the ratification payments by distributing the payments to U.P.'s employees in the form of cash or cash equivalents (e.g., checks or electronic funds transfers) net of tax withholdings. U.P. made the ratification payments to its employees separately from their standard semi-monthly wage payments. U.P.'s payroll department applied the RRTA tax rates and contribution-base limits to the taxable pay of each of U.P.'s employees who received a ratification payment to determine the RRTA tax withholding and deposited the amount for that person.

II. Law

A. Standard of Review/Burden of Proof

Summary judgment is appropriate when, viewing the facts and inferences in the light most favorable to the nonmoving party, the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "In ruling on a motion for summary judgment, a court must not weigh evidence or make

credibility determinations." *Kenney v. Swift Transp., Inc.*, 347 F.3d 1041, 1044 (8th Cir. 2003). "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Koehn v. Indian Hills Cmty. Coll.*, 371 F.3d 394, 396 (8th Cir. 2004).

A taxpayer seeking a refund of taxes erroneously or unlawfully assessed or collected may bring an action against the Government either in United States District Court or in the United States Court of Federal Claims" after first filing a claim for a refund with the IRS. *See United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 4 (2008). The taxpayer has the ultimate burden of proving its entitlement to a tax refund. *IA 80 Grp., Inc. v. United States*, 347 F.3d 1067, 1071 (8th Cir. 2003).

B. Background

The Railroad Retirement Act ("RRA") applies to railroad companies and their employees, and is administered by the Railroad Board. 45 U.S.C. § 231f. It was first passed in 1934 and "provides a system of retirement and disability benefits for persons who pursue careers in the railroad industry." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573 (1979). Retirement benefits paid through the RRA are funded through the RRTA. *Hance v. Norfolk So. Ry. Co.*, 571 F.3d 511, 522 (6th Cir. 2009). The Railroad Retirement Tax Act ("RRTA") is a subsection of the Internal Revenue Code ("I.R.C."). I.R.C. § 3201, *et seq.* The RRA and RRTA are separate and distinct bodies of statutory law—the RRA is a "benefit" statute, the RRTA is a "taxing" statute. *BNSF Ry. Co. v. United States*, 745 F.3d 774, 784 (5th Cir. 2014) ("Congress separated the taxing and benefit stat-

utes[.]"); *see United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212-14 (2001) (noting the difference in statutory goals between a benefits-eligibility statute and a tax statute).

The Railroad Retirement Act of 1937 was completely revised by the Railroad Retirement Act of 1974 ("the 1974 Act"). *See* An Act to Amend the Railroad Retirement Act of 1937 to Revise the Retirement System for Employees of Employers Covered Thereunder, and for Other Purposes, Pub. L. No. 93-445, 88 Stat. 1305 (1974); Prop. Treas. Reg. §§ 3201-3231, 58 Fed. Reg. 28366-01 (May 13, 1993). Prior to the 1974 Act, a railroad worker could be entitled to benefits under both the social security system and the railroad retirement system. Update of Railroad Retirement Tax Act Regulations ("RRTA Reg. Update"), 58 Fed. Reg. at 28367. A railroad worker covered under both systems received greater benefits than a worker covered under only one of the systems. *Id.* The 1974 Act phased out these dual Railroad Retirement and Social Security benefits and coordinated the benefit structures of the two systems. *Id.*

Under the RRTA, taxes are imposed on compensation earned by railroad employees. I.R.C. § 3201(a)-(b). Like the Federal Insurance Compensation Act ("FICA"), the RRTA imposes a tax on both employers and employees to fund the RRA's retirement and retirement benefits. *BNSF Ry. Co.*, 775 F.3d at 750. "The RRTA imposes a dual tax on railroad employers and employees that is used to fund annuities for retired railroad employees" and railroad employers are "responsible for withholding the employee's share and also required to pay over both [the employer's and employee's] portions to the IRS." *Hance*, 571 F.3d at 522; *Riley v. Sun Life*

and Health Ins. Co., 657 F.3d 739, 742 (8th Cir. 2011) (noting that the funding for Social Security Act and Railroad Retirement Act benefits derives from a tax on both the employee and employer).

Benefits under RRTA are divided into two tiers—"Tier I benefits take the place of Social Security, from which railway workers are exempt, and Tier II benefits are similar to those that workers would receive from a private multi-employer pension fund." *Hance*, 571 F.3d at 522; *see Hisquierdo*, 439 U.S. at 574-575 (stating that Tier I "corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act" and Tier II "like a private pension, is tied to earnings and career service"); *Duckworth v. Allianz Life Ins. Co. of North America*, 706 F.3d 1338, 1344 (11th Cir. 2013) (noting that "the RRA now offers benefits in two tiers, the first of which resembles Social Security benefits and the second of which resembles benefits paid under a private pension fund.") Tier II is "essentially an extension of the system of railroad pension plans that then existed when the RRA and RRTA were enacted in the 1930s." *BNSF Ry. Co*, 775 F.3d at 750.

The Railroad Retirement Solvency Act of 1983, together with amendments to the Social Security Act, subjected Railroad Retirement Tier I annuity portions to federal income taxes on the same basis as Social Security benefits and made Tier II benefits and vested dual benefit payments subject to federal income tax on the same basis as private pensions, beginning with tax year 1984. Railroad Retirement Board, Railroad Retirement Board Handbook, https://www.rrb.gov/general/handbook/chapter1.asp; *see* Pub. L. 98-76, 97 Stat. 411 (Aug. 12,

1983) *codified at* I.R.C. §§ 6050G, 3321, 3322; 45 U.S.C. § 231f-1.

C. The Statutes and Regulations at Issue

The Railroad Retirement Act provides a system of retirement, disability, spousal and survivor benefits for employees of railroads, similar to those provided to nonrailroad employees under the Social Security Act. 45 U.S.C. § 231. *et. seq.*; *Weyerhaeuser Co. v. United States R.R. Ret. Bd.*, 503 F.3d 596, 598 (7th Cir. 2007). The RRTA is the funding mechanism for those benefits, similar to the Federal Insurance Compensation Tax ("F.I.C.A.") for Social Security benefits. *BNSF Ry. Co.*, 775 F.3d at 750. The RRTA provides:

> (a) Tier 1 tax.—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3101 [Social Security and Medicare or FICA tax] for the calendar year.
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> (b) Tier 2 tax.—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the percentage determined under section 3241 for any calendar year of the compensation received during such calendar year by such employee for services rendered by such employee.[7]

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[7] IRC § 3241 provides for a determination of Tier 2 tax rate under a formula based on average account benefits ratio and contains a tax

I.R.C. § 3201. To be taxable under the RRTA, an employer must pay "compensation" to an "employee" for "service" rendered to the employer. I.R.C. §§ 3201 and 3221.

For purposes of the RRTA, Congress specially defined the following terms: "Employee" is defined as "any individual in the service of one or more employers for compensation." I.R.C. § 3231(b). An employee is in the "service" of an employer if he or she

> is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and he renders such service for compensation.

I.R.C. § 3231(d). "Compensation" is defined as "*any form of money remuneration* paid to an individual for services rendered as an employee to one or more employers." I.R.C. § 3231(e)(1) (emphasis added). The

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rate schedule (table) showing applicable percentage rates of up to 4.9%. *See* IRC § 3241(a) & (b). "The term 'account benefits ratio' means, with respect to any fiscal year, the amount determined by the Railroad Retirement Board by dividing the fair market value of the assets in the Railroad Retirement Account and of the National Railroad Retirement Investment Trust (and for years before 2002, the Social Security Equivalent Benefits Account) as of the close of such fiscal year by the total benefits and administrative expenses paid from the Railroad Retirement Account and the National Railroad Retirement Investment during such fiscal year." I.R.C § 3241(c)(2).

definition of "compensation" expressly excludes, however, four categories of payments from the definition: "the amount of any payment . . . on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death . . . ", certain tips, travel expenses, or any remuneration that would not be treated as wages under FICA, if FICA applied, as a qualified pension, profit-sharing, and stock bonus plan, employee annuity, individual retirement account, or deferred compensation plan. *See* I.R.C. § 3231(e)(1)(i)-(iv);[8] *see also* I.R.C. §§ 3121(a)(5)(A)-(I), 401(a), 403(a) & (b), 408(k)(1) & (p), 457(e)(11)(A)(ii). The definition of "compensation" under the RRTA also separately lists twelve specific exclusions—many of which are non-cash benefits—including meals and lodging, noncash employee achievement awards, Archer MSA contributions, health savings account contributions, and qualified or incentive (I.R.C. § 422) stock options. *See, e.g.*, I.R.C. § 3231(e)(1)-(12). The exclusions from the definition of compensation under the RRTA, with few exceptions, mirror the exclusions from the definition of wages under the FICA. Treas. Reg. § 31.3121(a)-1, 31.3231(e)-1, 31.3231(e)-2 (as amended by T.D. 8582), 1995-5 I.R.B. 38, 1994 WL 16000423 (F.R.), 59 Fed. Reg. 66188-01, 66188 (December 23, 1994).

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[8] A prior version of the Act specifically included pay for time lost due to personal injury in the definition, but "Congress deleted the . . . language from the RRTA in 1983 as part of an overhaul to both the RRA and the RRTA." *Phillips v. Chicago Cent. & Pac. Ry. Co.*, 853 N.W.2d 636, 641 (Iowa 2014); *see Marlin v. BNSF Ry. Co.*, 2016 WL 825146, at *2 (S.D. Iowa 2016).

FICA's definitional section provides: "[f]or purposes of this chapter, the term 'wages' means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," with certain limited exceptions. I.R.C. § 3121(a). Under FICA, "employment" is defined generally as "any service, of whatever nature, performed (A) by an employee for the person employing him." I.R.C. § 3121(b). The definition of wages in section 3121 of FICA encompasses a broad range of employer-furnished remuneration in order to accomplish the broad remedial purpose of the Social Security Act. *CSX Corp. v. United States*, 518 F.3d 1328, 1333 (Fed. Cir. 2008); *see United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1405 (U.S. 2014) (finding severance payments constitute taxable wages and recognizing that simplicity of administration and consistency of statutory interpretation instruct that the meaning of "wages" should be in general the same for income-tax withholding and for FICA calculations). The term "wages" encompasses more than the amount paid for particular services rendered; as long as the payment in question is remuneration for the overall employment relationship, it is properly encompassed within the term "wages" under section 3121(a) of FICA. *Id.*; *see Abrahamsen v. United States*, 228 F.3d 1360, 1364 (remuneration for employment includes compensation "not only work actually performed, but also the entire employer-employee relationship for which compensation is paid to the employee by the employer"). Similarly, with respect to income taxes, "gross income" is widely recognized as an incredibly broad term. *See, e.g.*, *Comm'r v. Kowalski*, 434 U.S. 77, 82 (1977); *Milsap v. Comm'r*, 387 F.2d 420, 423 (8th Cir. 1968).

Other sections of the Internal Revenue Code refer to tax treatment of qualified stock options, restricted stock, employee stock purchase plans, and other forms of deferred compensation. *See* I.R.C. §§ 421, 422, 423. Favorable tax treatment is afforded to qualified options. I.R.C. § 421; *see BNSF Ry. Co.*, 775 F.3d at 746 n.5. The legislative history explains that the policy basis for the difference in treatment of stock issued under qualified plans and stock issued under plans that do not qualify is to encourage long-term employee ownership of company stock. *Kolom v. C.I.R.*, 454 U.S. 1011, 1015 (1981). Tax on stock transferred under a qualified plan is deferred until the stock is sold, and any gain is then taxed at capital-gains rates provided certain other requirements are met. *Id.* at 1012; *BNSF Ry. Co.*, 775 F.3d at 746 n.5. There is a conforming exclusion of statutory stock options from employment taxes and income tax withholding, but not for nonqualified stock options. *See* H.R. REP. No. 108-548(I) at 145 (2004), *reprinted in* 2004 U.S.C.C.A.N. (118 Stat.) 1418, 2004 WL 1380512, *20-*21 (Leg. Hist.) (noting that statutory stock options are required to meet certain Internal Revenue Code requirements, intended to make exercise of incentive stock options or employee stock purchase plan options a tool of employee ownership rather than a form of compensation, that do not apply to nonqualified stock options); *see* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 261 (to be codified at I.R.C. §§ 421(b), 423(c), 3121(a), 3231, and 3306(b)).

In its regulations, the IRS defines compensation under the RRTA as having "the same meaning as the term wages in section 3121(a) [FICA], determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the

Internal Revenue Code) or regulation." Treas. Reg. § 31.3231(e)-1, Treas. Reg. § 31.3231(e)-1. The prior regulation had provided that "[t]he term 'compensation' means all remuneration in money, or in something which may be used in lieu of money (for example, scrip and merchandise orders), which is earned by an individual for services rendered as an employee to one or more employers or as an employee representative." 26 C.F.R. § 31.3231(e) (1990).[9] The agency explained the change—conforming the definition of "compensation" to that of "wages" under FICA—was made because of significant similarities between the FICA and the RRTA, noting that

> Legislation enacted since the adoption of the existing regulations has made the RRTA Tier 1 tax identical to the FICA tax as well as conforming the Tier 1 wage ceiling to the FICA wage ceiling. Along with conforming the structure of the RRTA to parallel that of the FICA, the exclusions from the definition of compensation under the RRTA, with few exceptions, mirror the exclusions from the definition of wages under the FICA. These exclusions from compensation include nonmonetary benefits such as fringe benefits, meals and lodging excludable under section 119 of the Internal Revenue Code, and employer-paid life insurance premiums for group term life insurance under $50,000. In amending RRTA, Congress often indicated the purpose was to provide conformity to

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[9] The earlier regulation would apply to U.P.'s claims for tax years 1991 and 1992 because the amended regulations apply for calendar years beginning after December 31, 1992. *See* Treas. Reg. §§ 31.3201-31.3231, 59 Fed. Reg. 66188-01. That fact is of no consequence under the court's analysis.

> FICA. Congress has added references to FICA provisions in the RRTA definition of successor employer (section 3231(e)(2)(C)) and the rules for nonqualified deferred compensation (section 3231(e)(8)). In addition, Tier 1 benefits are designed to be equivalent to social security benefits and are subject to federal income taxation in the same manner as social security benefits. Because the two statutes are not completely identical, the language of the regulation indicates that the term compensation has the same meaning as the term wages, except as specifically limited by the Railroad Retirement Tax Act.

Treas. Reg. 31.3231(e)-1, 31.3231(e)-2, 59 Fed. Reg. 66188-01, 66188.

In the context of holding that severance payments fall within the broad definition of "wages" under FICA, the Supreme Court recently reaffirmed the principle that the term "service" in the social-security context means "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Quality Stores, Inc.*, 134 S. Ct. at 1400 (quoting *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946)). The Eighth Circuit has held likewise with respect to FICA. *See Mayberry v. United States*, 151 F.3d 855, 860 (8th Cir. 1998); *accord CSX Corp.*, 518 F.3d at 1333. The IRS has also ruled that a lump-sum "signing bonus" on a contract or a "ratifying bonus" pursuant to a collective bargaining agreement constitute wages under FICA. Rev. Rul. 2004-109, 2004-2 C.B. 958, 2004 WL 2659666.

D. Statutory Interpretation

Courts interpreting a statute follow a familiar two-step framework. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). First, the court uses traditional tools of statutory construction to determine if Congress has unambiguously spoken to the question at issue. *Andrade-Zamora v. Lynch*, 814 F.3d 945, 951 (8th Cir. 2016); *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 940 (8th Cir. 2014). If the statute is unambiguous, the court simply applies the statute. *Id.*

In undertaking statutory construction, courts are required to "examine the text of the statute as a whole by considering its context, object, and policy." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011). Ultimately, the court's "objective in interpreting a federal statute is to give effect to the intent of Congress." *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999). The basic principle is that a statute must be construed "so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The court cannot interpret words in isolation, but "must interpret the statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). A court's duty "after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Graham Cnty. Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)). Interpretation of a word or phrase "'depends upon reading the whole statutory text, considering the purpose

and context of the statute, and consulting any precedents or authorities that inform the analysis.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1327 (2011) (quoting *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006)); *see also Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 222 (2008) (construction of a statutory term "must, to the extent possible, ensure that the statutory scheme is coherent and consistent"); *Deal v. United States*, 508 U.S. 129, 132 (1993) (stating it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

"[R]reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp., v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). "A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Id.* (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). "Thus, an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole, does not merit deference." *Id.* (quoting *University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013)); *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (stating that "[i]t is a well-established canon of statutory construction that a court

should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute").

Also, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. In general, under the *in pari materia* canon of statutory interpretation, statutes addressing the same subject matter should be read as if they were one law. *BNSF Ry. Co.*, 775 F.3d at 755; *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006). The statutory interpretation canon of *noscitur a sociis* recognizes that an ambiguous term may be given more precise context by the neighboring words with which it is associated. *BNSF Ry. Co.*, 775 F.3d at 755.

If the statute is ambiguous, the court proceeds to the second step of *Chevron* and applies the agency's interpretation if it "is based on a permissible construction of the statute." *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King v. Burwell*, 135 S. Ct. at 2488 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).

Chevron deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). The Treasury Department is explicitly authorized to "pre-

scribe all needful rules and regulations for the enforcement" of the Internal Revenue Code. *Mayo Found. for Med. Educ. and Research v. United States*, 562 U.S. 44, 57-58 (U.S. 2011); *see* I.R.C. § 7805(a). The Supreme Court "has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code." *Bob Jones Univ.*, 461 U.S. at 596 (characterizing I.R.C. § 7805(a) as "essential to efficient and fair administration of tax laws").

Pursuant to that authority, the Internal Revenue Service has promulgated regulations for the enforcement of the Internal Revenue Code. *See, e.g.*, 26 C.F.R. part 31, *et seq.* "[E]xpress congressional authorizations to engage in the process of rulemaking," like those granted to The Treasury Department under I.R.C. § 7805, are "a very good indicator of delegation meriting *Chevron* treatment." *Mayo Found.*, 562 U.S. at 58 (quoting *Mead*, 533 U.S. at 229). The IRS complied with notice and comment rulemaking procedures when implementing the amendments to the employment tax regulations under §§ 3201 through 3231 if the Internal Revenue Code. *See* Treas. Reg. §§ 31.3201-31.3231, 59 Fed. Reg. 66188-01 (Dec. 23, 1994); Prop. Treas. Reg. § 3201-3231, 58 Fed. Reg. 28366-01 (May 13, 1993) (notice of proposed rulemaking and notice of public hearing).

Chevron directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers, but, even under this deferential standard, "'agencies must operate within the bounds of reasonable interpretation." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015) (quoting *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442) (internal quotation marks omitted). An agency may not exercise its authority "in

a manner that is inconsistent with the administrative structure that Congress enacted into law." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125 (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

Thus, courts play a gatekeeping role under Chevron by "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority." *City of Arlington*, 133 S. Ct. at 1874.

III. DISCUSSION

The court first finds that it is a close question whether the statutory provision at issue—defining "compensation" as "any form of money remuneration" is ambiguous so as to require the court to undertake step two of the familiar *Chevron* analysis. In light of the text, structure, purpose and legislative history of the statute, applying the traditional tools of statutory interpretation to the phrase "any form of money remuneration" in the definitional provision of the RRTA, the court finds that the provision can be readily understood to encompass the transactions at issue without regard to the agency's definition of "compensation" to equate to "wages." The court can extrapolate a Congressional intent to tax all remuneration under the RRTA definition from the plain meaning of the words in the context of associated language, the scope of exceptions to the definition, and the overall purpose of the statute.

Starting with the text of the statute, the term "compensation" is modified by two antecedents: "any form of" and "money." One of these terms, money, modifies "remuneration" and is arguably a narrowing modifier. However, "money" is in turn modified by "any form of,"

which arguably broadens the definition of "money remuneration." The Railroad's focus on the meaning of the word "money," arguing it plainly means cash payment, ignores the fact that the use of "any form of" preceding the phrase implies that the reference is to species of payments other than "cash."

There is no dispute that the term "remuneration" is commonly understood to mean payment for services. "Money" is used not as a noun, but as an adjective, describing the form of remuneration. Used in that sense, "money" can either have an expansive meaning connoting "of or relating to capital or finance in general," or can be regarded as simply a redundancy or archaic usage, similar to legalese such as "money damages" and "money judgment." The court finds the words "remuneration," "wages," and "compensation" are generally interchangeable words in the context of employment and taxation whose meaning is not significantly altered by the addition of a descriptive or illustrative modifier such as "money." In view of the common use of the word "money" in legal parlance as an adjunct to words such as damages and judgment, the court finds the phrase "money remuneration" is commonly understood in the context of a tax statute to mean the same thing as wages. Any subtle distinctions between "wages" and "money remuneration" are meaningless in the context of the history of the RRTA and the interplay between the RRTA and other provisions of the Internal Revenue Code.

Both the FICA statute and the RRTA contain explicit exclusions from the respective definitions. The scope of the definition is measured with reference to its exceptions, the assumption being that the exclusions

would have fit within the scope of the definition had they not been excluded. Under both the RRTA and FICA, the exclusions are couched in terms of "payments," itself a broad term, and include non-cash items such as sickness or accident disability payments, payments for insurance, severance, pension plan payments and payments under deferred compensation plans. *See Quality Stores*, 134 S. Ct. at 1400 (noting the statutory exception for severance payments would be unnecessary were severance payments in general not within FICA's definition of wages").

Contrary to the Railroad's argument, the statute does not clearly present a definition that excludes non-cash benefits like those at issue herein. Dictionary definitions of "money" as a noun include "any circulating medium of exchange, including coins, paper money, and demand deposits," "a capital to be borrowed, loaned or invested," and "any article or substance used as a medium of exchange, measure of wealth, or means of payment." *See Money*, Dictionary.com Unabridged (2016), http://www.dictionary.com/browse/money (last accessed: June 16, 2016). "Money can also mean "a medium of exchange," that is, "anything generally accepted as payment in a transaction and recognized as a standard of value," or as an asset that can easily be converted to cash." Merriam-Webster's Collegiate Dictionary 750 (10th ed. 1994); Black's Law Dictionary 1072, 1096 (9th ed. 2009); *BNSF Ry. Co.*, 775 F.3d at 752. As an adjective, "money" means "of or relating to money to capital or finance. *Money*, Random House, Inc., *Dictionary.com Unabridged* (2016), http://www.dictionary.com/browse/money (last visited June 16, 2016). Synonyms for "money" include cash, capital, funds, payments, salary, wages, and property. *See Money*, *Thesaurus.com*, *Roget's 21st*

Century Thesaurus (3d ed. 2009), http://www.thesaurus.com/browse/money (last visited June 16, 2016). "Wages," defined under FICA as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash," has essentially the same commonly understood meaning as "money remuneration" as defined above.

The timing of the imposition of the taxes on the nonqualified options and restricted stock awards—at the time of exercise or when no longer forfeitable, rather than at the time of the award—also supports an understanding of the meaning of "money remuneration" as synonymous with wages, which are subject to tax when paid. The stock options when exercised and restricted stock when vested are examples of assets that, since they are traded on a national exchange, can readily be converted to cash. Further, the options at exercise and restricted stock at vesting are "a medium of exchange," that can be generally accepted as a payment in a transaction; the shares have a recognized value that can be traded, transferred, exchanged or borrowed against. Looking to the plain meaning of the statute, U.P. has not shown that the text of the statute reflects that Congress intended there to an incongruity between employment-tax treatment of "compensation" under the RRTA and that of "wages" under the FICA. To the contrary, all indications are that Congress intended similar treatment.

The structure of the statute provides further support for the notion that compensation (any form of money remuneration) under the RRTA and wages (all remuneration for employment) under FICA mean the same thing. The meaning of "money remuneration" is more pre-

cisely understood by looking at the four categorical exclusions from the definition and at the specific listed exclusions. Those include non-cash benefits, and also correspond to exclusions from "wages" under the Social Security Act, examples of deferred compensation given special treatment under the income tax and capital gains tax provisions of the Internal Revenue Code, as well as to benefits under other employee benefits statutes such as the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132.

Analysis of the purpose of the RRTA is perhaps the best indication that the court should read "compensation" in the RRTA as generally commensurate with the definition of "wages" in the FICA. The court disagrees with the Fifth Circuit Court of Appeals finding that the purpose of the statute "supports multiple interpretations," suggesting ambiguity. *See BNSF*, 775 F.3d at 755. It is well-established that RRTA and FICA are parallel statutes. FICA has been held to have a remedial purpose, mandating that compensation under the FICA be interpreted broadly. So too does the RRTA have a remedial purpose. The RRA was enacted to promote railroad careers and provide retirement security to railroad workers. It was enacted because the then-existing railroad employer-sponsored retirement plans were "rife with problems such as inadequate funding, capricious terminations, and limited benefits for disabled employees." *Id.* at 750. The Railroad Tax Act was later enacted to provide a funding source for the benefits provided by the RRA. The RRTA has been amended several times over the years, always with the stated goals of aligning the RRTA and FICA and ensuring the solvency of the railroads' benefits system. It

would be contrary to the purposes of both statues to interpret the provisions at issue to exclude a category of payments under one statute from taxation while requiring similar payments to be taxed under the other. The creation of the two-tiered system fulfills the purpose of alignment: aligning benefits under Tier I with social security benefits and aligning Tier II benefits with those under a private pension system. The important goal of maintaining solvency would not be advanced by constraining the funding source.

In this connection, examination of the tax treatment of private pension plans is illuminating. Statutory stock options, also known as "qualified" or "incentive" stock options," are specifically excluded from the definition of both compensation under RRTA and wages under FICA, but non-qualified stock options are not. Non-qualified options and restricted stock awards in the private sector are generally subject to employment taxes. The exclusion of qualified options under FICA dovetails with the tax treatment of qualified options for income tax and capital gains purposes. The stated purpose of the qualified or incentive stock option exclusion is to encourage investment in companies and provide a stake in capital. The rationale underlying the exclusion for benefits in the form of qualified stock options is that they are more akin to ownership than to remuneration. The matching exclusions signal congruity between the FICA and RRTA provisions and provide cohesiveness within the entire Tax Code. Accordingly, it appears from the overall structure of the Tax Code that nonqualified options and restricted stock are reasonably meant to be considered "compensation" under RRTA and "wages" under FICA for employment tax purposes.

The legislative history also supports the conclusion that, in the context of the overall statute, Congress has spoken clearly and "money remuneration" under the RRTA is equivalent to "wages" under FICA. The use of the phrase "any form of" suggests Congress meant to encompass non-cash payments. The statute was amended over the years with an eye toward financial security and solvency. The RRTA was overhauled in 1983 with the express goal of conforming the statute to FICA. The two-tier structure respects the historical railroad pension plan benefits system and aligns it with benefits found in the private sector. The railroad has not presented a cogent argument that the Railroads' retirement system was intended to be subject to a different employment tax scheme than other industries' retirement systems and pension plans.

Even if the statute could be said to be ambiguous, the IRS's regulation satisfies the reasonableness standard under *Chevron* step two. There is no dispute that the IRS possesses the authority to prescribe rules and regulations to enforce the Internal Revenue Code. The IRS's definition is a permissible construction of the statute. The challenged regulation provides that the term "compensation" as relevant to the RRTA has the same meaning as "wages" under FICA, except as specifically limited by the RRTA. The court does not view the essentially meaningless modifier "any form of money" to be any such specific limitation on the term "remuneration." Rather, the text and structure of the regulation, in the context of the statute as a whole, suggests that the specific limitations referred to are the listed exclusions under the RRTA that differ from the listed exclusions under FICA. Those differences, involving, for example years-of-service requirements, occupational disability

benefits, and spousal or survivor benefits, do not affect the taxability of the transactions at issue and do not affect the outcome of this case. The differences reflect the differences in the RRTA and FICA statutes. RRA benefits are broader than Social Security benefits in that RRA benefits include some items that social security does not, i.e., sick time, unemployment benefits, etc. The IRS regulation is qualified to reflect that fact.

The IRS regulation is a permissible construction of the statute that fulfills the statutes purpose and conforms to Congressional intent. To hold otherwise would be to undermine the purpose of the RRTA and to damage the solvency of the Railroad Retirement system. There has been no showing that Congress intended only to tax cash benefits when it federalized the Railroad Retirement system. Any suggestion that Congress, either initially or through numerous amendments to the RRTA over the years, intended to mimic the narrow cash-only benefits base of the underfunded, potentially insolvent private system it chose to replace defies logic and common sense. Because similar language in similar statutes should be interpreted similarly, the IRS's decision to interpret the FICA and RRTA together is not unreasonable. The Railroad attributes too much importance to what amounts to an inconsequential difference in phrasing the definition of a term that is clearly intended to mean the same thing that it means in a parallel statute so as to function as part of a cohesive, comprehensive statutory taxation and benefits system. U.P. has not sustained its burden to show that it is entitled to a refund of taxes paid on NQSOs or restricted stock.

With respect to the ratification payments, U.P. similarly has not shown it is entitled to a refund. Because U.P. made the ratification payments in cash or cash equivalents, there is no question that they are "money remuneration" under I.R.C. § 3231(e). The undisputed evidence also shows that U.P. made the payments to its employees for services rendered. Generally, individuals received ratification payments from U.P. in their capacities as current or former U.P. employees, not as union members. A union member who did not work for U.P. would not have received a payment from U.P. The amounts of the payments were, in some cases, prorated based on length of service or conditioned on the employee having achieved seniority status. U.P. concedes the payments were made through its payroll department, and has not rebutted the presumption under applicable Treasury Regulations that such payments are presumed to be compensation for services rendered. Moreover, it is clear that the payments were made pursuant to collective bargaining agreements that are essentially employment contracts as part of an employer-employee relationship. *See Quality Stores, Inc.*, *134 S. Ct. at 1400*; Rev. Rul. 2004-109, 2004-2 C.B. 958, 2004 WL 2659666. For the reasons stated above in connection with "wages" vis-a-vis "compensation," the court finds the ratification payments are compensation for services under *I.R.C. § 3231* and are subject to employment tax. Accordingly, U.P. has not shown it is entitled to a refund of employment taxes for ratification payments.

IT IS ORDERED that:

1. The Government's motion for summary judgment (Filing No. 50) is granted.

2. Union Pacific Railroad Company's motion for summary judgment (Filing No. 51) is denied.

3. A judgment of dismissal in conformity with the Memorandum and Order will issue this date.

Dated this 1st day of July, 2016.

BY THE COURT:

/s/ Joseph F. Bataillon
Senior United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-3574

UNION PACIFIC RAILROAD COMPANY, IN ITS OWN CAPACITY AND IN ITS CAPACITY AS SUCCESSOR TO UNION PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ASSOCIATION OF AMERICAN RAILROADS, AMICUS ON BEHALF OF APPELLANT(S)

Filed: Oct. 20, 2017

ORDER

Appeal from the U.S. District Court
for the District of Nebraska-Omaha
(8:14-cv-00237-JFB)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Oct. 20, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

APPENDIX D

1. 26 U.S.C. 3201(a) and (b) (2012 & Supp. II 2014) provides:

Rate of tax

(a) Tier 1 tax

In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3101 for the calendar year.

(b) Tier 2 tax

In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the percentage determined under section 3241 for any calendar year of the compensation received during such calendar year by such employee for services rendered by such employee.

2. 26 U.S.C. 3231(e) (2012 & Supp. II 2014) provides:

Definitions

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.

Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically —either as an advance, as reimbursement or allowance —for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as

amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such

individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act),

clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to

an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and, (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such

benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[(7) Repealed. Pub. L. 113-295, div. A, title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040.)

(8) Treatment of certain deferred compensation and salary reduction arrangements

(A) Certain employer contributions treated as compensation

Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation

The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging

The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options

The term "compensation" shall not include any remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

3. 26 C.F.R. 410.5 (1938) provides:

Definition of "compensation." The term "compensation" means all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example), which is earned by an individual for services performed as an employee for one or more employers, or as an employee representative. The term is

not confined to amounts earned or paid for active service but includes amounts earned or paid for periods during which the employee or employee representative is absent from active service. The term does not include tips, or the voluntary payment by an employer of the employee's tax, without the deduction of such tax from the remuneration of the employee. (As to when compensation is earned, see § 410.7.)[*†]

4. 26 C.F.R. 31.3231(e)-1(a)(1) provides:

Compensation.

(a) *Definition*—(1) The term *compensation* has the same meaning as the term *wages* in section 3121(a), determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

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[*] For statutory citation, see note to § 410.0.

[†] For source citation, see note to § 410.1.