No. 17-1042

In the Supreme Court of the United States

BNSF RAILWAY COMPANY, PETITIONER

v.

MICHAEL D. LOOS

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an employer's payment of back pay to an employee for working time lost due to an on-the-job injury is taxable "compensation" under the Railroad Retirement Tax Act, 26 U.S.C. 3231(e).

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INTEREST OF THE UNITED STATES

The question presented is whether an employer's payment of back pay to an employee for time during which the employee was unable to work due to an on-the-job injury constitutes taxable "compensation" under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. 3201 *et seq.* Because taxes collected under the RRTA fund the retirement benefits paid to railroad workers under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. 231 *et seq.*, the United States has a substantial interest in the resolution of this question. The Treasury Department has issued a regulation that addresses the question presented, and the United States filed a brief supporting petitioner in the court of appeals.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutes and regulations are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

A. Statutory Background

Two federal statutes operate together to provide retirement benefits for workers in the railroad industry. They substitute for Social Security, from which railroad workers are exempt, and provide additional benefits comparable to those of a private pension plan. See 26 U.S.C. 3121(b)(9).

First, to fund the retirement benefits, the RRTA imposes a tax on railroad workers' "compensation." 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).

Second, the RRA governs the payment of benefits to railroad retirees. As in the Social Security system, the amount of benefits that a particular retiree receives depends in part on the amount and allocation of the retiree's past "compensation." See 20 C.F.R. 225.2-.3, 226.60; see also 45 U.S.C. 231a-c; 45 U.S.C. 231(*o*). The RRA defines "compensation" as:

> any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.

45 U.S.C. 231(h)(1).

The Treasury Department, which is charged with prescribing rules and regulations to implement the RRTA, 26 U.S.C. 7805, has construed the RRTA's definition of taxable "compensation" as "not confined to amounts paid for active service," and instead as encompassing "amounts paid for an identifiable period during which the employee is absent from the active service of the employer," including "pay for time lost." 26 C.F.R. 31.3231(e)-1(a)(3)-(4); see Reg. 100, Art. 5 (1937) (substantially identical construction, adopted in the year of the statute's enactment).

B. The Enactment Of The RRTA And RRA

Congress began work on a federal railroad retirement system in the early 1930s, when private pension plans in the railroad industry spiraled into "a state of crisis." Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008). Because the Social Security system was expected to operate only prospectively and would not begin paying benefits for several years, Congress created a separate railroad retirement system, supported by a tax on railroad workers' pay. See *Wisconsin Central Ltd.* v. *United States*, 138 S. Ct. 2067 (2018).

A 1935 statute taxing railroad workers' compensation to fund retirement benefits limited taxable "compensation" to "any form of money remuneration *for active service*, received by an employee from a carrier." Act of Aug. 29, 1935 (1935 Act), ch. 813, § 1(d), 49 Stat. 974 (emphasis added). The companion benefits statute also calculated benefits based on "active" service. See Railroad Retirement Act of 1935, ch. 812, 49 Stat. 967. But the 1935 version of the RRTA was invalidated by a federal court. See *Alton R.R.* v. *Railroad Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936).

Congress then enacted a revised package of railroad-pension legislation that forms the basis for today's railroad retirement system. As amended and renamed, the Carriers Taxing Act of 1937 (1937 RRTA), ch. 405, 50 Stat. 435, is today's RRTA, and an accompanying benefits statute, the Railroad Retirement Act of 1937, ch. 382, 50 Stat. 307, is the precursor to today's RRA.

The 1937 RRTA rendered an employee's compensation taxable when that compensation was *earned*, rather than when it was *paid*. § 1(e), 50 Stat. 436. Both the RRTA and RRA defined "compensation" identically—and without the 1935 statutes' limitation to "active" service—as

> any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.

Ibid.; RRA § 1(h), 50 Stat. 309.

In regulations issued shortly after the RRTA's enactment, the Treasury Department construed the RRTA's definition of "compensation" as reaching remuneration both for periods of active service and for periods in which the employee was not actually performing work for the employer. The regulations provided that compensation 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." Reg. 100, Art. 5 (1937). As examples of the second type of com-

pensation, the rules referred to "[s]ick pay, vacation allowances, or back pay upon reinstatement after wrongful discharge." *Id.* Art. 6(b).

C. Development Of The RRTA

Congress has revised the RRTA provision defining compensation more than 40 times since the statute's enactment, including to shift from an as-earned to an as-paid taxation model and to carve out particular forms of compensation.

1946 Amendments. The RRTA provisions treating employees' compensation as taxable when *earned*, regardless of when the compensation was *paid*, imposed "heavy administrative burdens both on the [Railroad Retirement] Board and on the employers to make thousands of corrections in reports previously filed." Supp. S. Rep. No. 1710, 79th Cong., 2d Sess. Pt. 2, at 7 (1946). Congress therefore replaced language requiring each railroad employee to pay taxes on "compensation * * * earned by" the employee with language requiring the employee to pay taxes on compensation "paid to" the employee. Act of July 31, 1946 (1946 Act), ch. 709, § 2, 60 Stat. 722.

Congress also amended the RRTA and RRA definitions of "compensation" by adding a second paragraph, which established a "presum[ption]" that compensation was earned in the period in which it was paid. 1946 Act § 2, 60 Stat. 722. The paragraph also provided additional guidance concerning when employers' payments should be deemed to be for "time lost," by specifying that "[a]n employee shall be deemed to be paid, 'for time lost' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury." *Ibid.*

1975 Revenue Ruling and Statutory Amendments. The 1946 amendments left in place some statutory references to when payments were "earned." Even after those amendments were enacted, the IRS continued to take the position that certain back payments should be taxed at the rate that applied when the payments were earned, and the agency expressed that view in a 1975 Revenue Ruling. See Rev. Rul. 75-266, 1975-2 C.B. 408; see also *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 628 F. Supp. 1431, 1435 (D. Kan. 1986) (stating that, "[a]fter the 1946 amendments, it was unclear whether compensation was to be taxed on an 'as earned' or an 'as paid' basis," and noting the railroad's contention "that the IRS routinely taxed on an 'as earned' basis").

Several months after the 1975 revenue ruling, Congress amended the statute again to eliminate provisions that appeared to make relevant when payments were "earned." Act of Aug. 9, 1975 (1975 Act), Tit. II, §§ 201-207, 89 Stat. 466-467. Those provisions included the portion of the RRTA's definition of "compensation" that addressed pay for time lost. Congress modified the definition as shown below, with the new language shown in boldface, the eliminated language stricken through, and the language in roman type left unchanged:

> (e) COMPENSATION.—
>
> For purposes of this chapter-
>
> (1) The term 'compensation' means any form of money remuneration ~~earned by~~ **paid to** an individual for services rendered as an employee to one or more employers, ~~or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.~~

> (2) **An employee shall be deemed to be paid compensation in the period during which such compensation is earned only upon a written request by such employee, made within six months following the payment, and a showing that such compensation was earned during a period other than the period in which it was paid**. ~~A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made.~~ An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

See §§ 204-206, 89 Stat. 466; 26 U.S.C. 3231(e) (1970 & Supp. V 1975).

1977 Exemption For A Particular Class of Time Not Spent In Active Service. The next year, Congress amended the RRTA's definition of "compensation" (26 U.S.C. 3231(e)(1) (1976)) to carve out certain sickness and disability payments—a particular category of

payments for time not spent in active service to the employer. Act of Oct. 18, 1976, § 4(b), 90 Stat. 2526. The 1977 law provided that "compensation" under the RRTA "does not include (i) the amount of any 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 * * * on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability." *Ibid.*

1981 Narrowing of the Sickness and Disability Exception. Congress pared back that exemption four years later. First, it directed that the only payments under a sickness or disability plan that should be categorically excluded from the RRTA's definition of taxable "compensation" were "payments which are received under a worker's compensation law" and RRA benefits. Act of Dec. 29, 1981 (1981 Act), § 3(b)(1), 95 Stat. 1662; see 26 U.S.C. 3231(e)(4)(A). Second, it specified that certain other payments under sickness and disability plans would be excludable only after the employee had been separated from the employer for six months. 1981 Act § 3(c), 95 Stat. 1662; see 26 U.S.C. 3231(e)(4)(C). Third, it provided that an employer's payments "for days of sickness" under the Railroad Unemployment Insurance Act would also be excludable only after the employee had been separated for six months, unless those payments were "the result of on-the-job injury." 1981 Act § 3(c), 95 Stat. 1662; see 26 U.S.C. 3231(e)(4)(B) and (C).

1983 Technical Amendments. The Railroad Retirement Solvency Act of 1983 (1983 Act), 97 Stat. 411, made "[t]echnical" changes to the definition of "compensation"—including changes that eliminated discussion of

when payments were "deemed" to be for "time lost." See 26 U.S.C. 3231(e)(2) (1982). The 1983 Act principally increased tax rates and annualized the wage base, in order to improve the railroad retirement system's solvency. In its final section, entitled "[t]echnical [a]mendments," 1983 Act § 225, 97 Stat. 424, the statute struck the existing Subsection (e)(2)—which had addressed when an employee would be "deemed to be paid compensation," and when an employee was "deemed to be paid 'for time lost,'" 26 U.S.C. 3231(e)(2) (1982)—and inserted in its place rules pertaining to the annual wage base. 1983 Act § 225, 97 Stat. 424; see 26 U.S.C. 3231(e)(2). The House Report described the change as implementing "technical and conforming amendments * * * in light of the fact that the current monthly wage bases for railroad retirement taxes [we]re changed to annual amounts" under other provisions of the bill. H.R. Rep. No. 30, 98th Cong., 1st Sess. Pt. 2, at 29 (1983) (1983 House Report).

D. Current RRTA Regulations

Treasury Department regulations continue to provide that RRTA "*compensation*" includes an employer's remuneration of an employee for time not spent in active service, including payments for "time lost." 26 C.F.R. 31.3231(e)-1(a)(3)-(4). They state at the outset that taxable "*compensation*" under the RRTA typically carries the same meaning as taxable "*wages*" under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.* "except as specifically limited by the Railroad Retirement Tax Act * * * or regulation." 26 C.F.R. 31.3231(e)-1(a)(1). They further provide that "[t]he term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent

from the active service of the employer." 26 C.F.R. 31.3231(e)-1(a)(3). The regulations specify that "[c]ompensation includes * * * pay for time lost." 26 C.F.R. 31.3231(e)-1(a)(4).

When the Treasury Department revised its regulations concerning RRTA "compensation" in 1993, the Department utilized notice-and-comment rulemaking and rejected a commenter's suggestion that, because amendments to the RRTA had removed express references to "time lost," such payments had become nontaxable under the statute. 59 Fed. Reg. 66,149, 66,188-66,201 (Dec. 23, 1994). The agency concluded that although Congress had removed the prior discussion of "time lost" in the course of changing the RRTA's taxation structure "to a 'paid basis' from an 'earned basis,'" payment for time lost was still taxable compensation. *Id.* at 66,188.

E. Proceedings In This Case

1. Respondent, who worked for petitioner as a conductor, brakeman, and switchman, missed numerous days of work after he "twisted his knee when he fell into a snow-covered drainage grate in the train yard." Pet. App. 4a; see *id.* at 3a-6a.

Respondent filed suit, alleging (as relevant here) that petitioner was liable under the Federal Employers Liability Act (Railroads), 45 U.S.C. 51 *et seq.*, for negligently causing the knee injury. Pet. App. 7a. A jury agreed that petitioner had been negligent and awarded respondent damages, including $30,000 for lost wages for the periods when respondent had been unable to work for petitioner. *Ibid.* Petitioner concluded that its payment of lost wages to respondent constituted taxable compensation under the RRTA, and that it was

therefore required to withhold a portion of the lost-wages award for RRTA taxes. *Ibid.*

2. The district court held that such withholding was improper, concluding that payments for "time lost" were not taxable under the RRTA. Pet. App. 29a-30a. The court did not dispute that payments for time lost fell within the RRTA's definition of taxable "compensation." It concluded, however, that those payments were excluded from RRTA taxation because the Internal Revenue Code excludes from income tax "the amount of any damages (other than punitive damages) received * * * on account of physical injuries." *Id.* at 30a (citation omitted).

3. The court of appeals affirmed on a different rationale. Pet. App. 1a-24a. It acknowledged that the Treasury Department's interpretations of the RRTA are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that "damages for lost wages fit well within the definition of 'compensation'" adopted by the agency. Pet. App. 19a. The court concluded, however, that the Treasury Department had acted unreasonably in construing the statute to reach "amounts paid for an identifiable period during which the employee is absent from the active service of the employer . . . as well as pay for time lost." *Ibid.* (quoting 26 C.F.R. 31.3231(e)-1(a)(3)-(4)).

The court of appeals acknowledged that, under FICA—the statute that funds Social Security retirement benefits for non-railroad employees—payments for periods in which an employee is not performing active service can constitute taxable wages. Pet. App. 19a-20a. The court found this Court's FICA precedents inapposite, however, on the ground that FICA taxes

payments for "employment" rather than payments for "services." *Id.* at 20a. The court concluded that a payment for lost wages cannot constitute remuneration "'for services rendered'" because such a payment is for "a period of time during which the employee did not actually render any services." *Ibid.*

The court of appeals declined to interpret the RRTA's definition of "compensation" *in pari materia* with the definition of "compensation" contained in the RRA. Pet. App. 21a. It acknowledged that the two statutes "accomplish a unified purpose: the RRA provides benefits, while the RRTA funds them." *Ibid.* It concluded, however, that the *in pari materia* canon is inapplicable here because the RRA's definition of compensation expressly includes "pay for time lost," while the RRTA's does not. *Ibid.* The court viewed the statutory history as "confirm[ing]" this analysis because the RRTA previously included express references to payment for time lost, but those references had been removed. *Id.* at 21a-23a. Finding the RRTA "unambiguous" in excluding payments for lost wages from taxable "compensation," the court affirmed the district court's judgment. *Id.* at 24a.

SUMMARY OF ARGUMENT

A. Under the plain meaning of the RRTA, money remuneration that an employer pays to an employee as part of the employer-employee relationship constitutes taxable "compensation," even when it covers periods in which the employee was not in active service.

1. Payments of money remuneration as part of the employer-employee relationship are payments "for services rendered as an employee to one or more employers," 26 U.S.C. 3231(e)(1), even when they cover periods in which the employee is not in active service. This

Court has adopted that approach in construing materially identical language in the Social Security Act, 42 U.S.C. 301 *et seq.*, and FICA.

In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), the Court held that the Social Security Act's definition of "wages" as remuneration for "any service . . . performed . . . by an employee for his employer" reached not only payments for "work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Id.* at 365-366. In *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395 (2014), the Court adopted the same construction of the same language in FICA. The RRTA's substantially similar definition of "compensation" should likewise be construed to encompass money remuneration arising from "the entire employer-employee relationship," including payments for time lost due to workplace injury, not simply payments for "work actually done." *Nierotko*, 327 U.S. at 366.

2. Surrounding statutory provisions confirm this understanding of the RRTA's definition of "compensation." Exceptions to that definition for limited types of payment "on account of sickness or accident disability," 26 U.S.C. 3231(e)(1) and (4), reflect the understanding that "compensation" ordinarily extends beyond payments for hours spent in active service. If the RRTA's definition of "compensation" reached only payments for periods of active service, no carve-out would be needed to exclude classes of sickness and disability pay.

The RRA further supports petitioner's view that RRTA "compensation" includes payments for time lost due to on-the-job injury. The RRA is the RRTA's "companion statute," *Wisconsin Central Ltd.* v. *United*

States, 138 S. Ct. 2067, 2073 (2018), and governs the calculation of benefits funded through RRTA taxes. The RRA defines compensation as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, *including remuneration paid for time lost as an employee*." 45 U.S.C. 231(h)(1) (emphasis added). The italicized language indicates that, for purposes of the RRA, Congress viewed "remuneration paid for time lost" as a "form of money remuneration paid to an individual for services rendered." Particularly given the close relationship between the two statutes, the RRTA's identical basic definition of "compensation" should be construed to reflect the same understanding.

3. In the year that the RRTA was enacted, the Treasury Department construed the term "compensation" to encompass "amounts earned or paid for periods during which the employee or employee representative is absent from active service," including "[s]ick pay, vacation allowances, or back pay upon restatement." Reg. 100, Art. 5 and 6(b) (1937). Congress has not overridden that agency construction, and the narrow exclusions from taxable "compensation" that Congress has enacted would be superfluous under the court of appeals' understanding of that term.

The court of appeals' interpretation was based in part on mistaken inferences from the statutory history. As originally enacted, the RRTA stated that its general definition of compensation "includ[es] remuneration paid for time lost as an employee," before setting out a special timing rule for identifying when such "time lost" payments should be "deemed earned." 1937 RRTA § 1(e), 50 Stat. 436. Although Congress in 1975 deleted

the discussion of "time lost" in the definition of "compensation," it did so in the course of shifting RRTA taxation from an as-earned to an as-paid basis, and it left in place other references to "time lost" in the next subsection of the statute. Neither that 1975 amendment, nor the deletion in 1983 of the RRTA's remaining references to time lost—as part of what Congress described as technical amendments—can appropriately be read to create a statutory exclusion for "time lost" payments.

The district court concluded that the payments at issue here were excluded from RRTA taxation because the Tax Code excludes from "gross income" payments "on account of personal physical injuries." 26 U.S.C. 104(a)(2). That analysis conflates the distinct concepts of "gross income," the tax base on which income tax is collected, and "compensation," the separately defined category of payments that are taxable under the RRTA.

B. At minimum, the Treasury Department's longstanding construction of RRTA "compensation" is reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Principles of *Chevron* deference "apply with full force in the tax context." *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 55-56 (2011). The Treasury Department's interpretation tracks this Court's interpretation of similar language, reasonably treats a tax statute as *in pari materia* with its benefits counterpart, and reflects a permissible understanding of the statutory history.

ARGUMENT

TAXABLE "COMPENSATION" UNDER THE RRTA INCLUDES MONEY REMUNERATION PAID AS PART OF THE EMPLOYER-EMPLOYEE RELATIONSHIP, NOT SIMPLY PAYMENTS FOR ACTIVE SERVICE

The RRTA's definition of taxable "compensation" is not limited to remuneration for time spent in active service, as the court of appeals believed, but rather encompasses such items as severance pay, vacation pay, and payments for time lost due to workplace injury. At minimum, the Treasury Department's longstanding construction to that effect, which matches this Court's interpretations of virtually identical language in other federal statutes, is reasonable and warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. RRTA "Compensation" Includes Money Remuneration Paid As Part Of The Employer-Employee Relationship

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). So long as a monetary payment from an employer to its employee arises out of the employment relationship, it is covered by that definition, even if it is not paid for hours of active service.

1. Under this Court's decisions, remuneration "paid to an employee for services rendered to one or more employers" includes remuneration for time not spent in active service

a. In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), this Court construed statutory language materially indistinguishable from the RRTA language

here. *Nierotko* presented the question whether the Social Security Act's definition of "wages" as remuneration for "any service . . . performed . . . by an employee for his employer" encompassed back pay awarded under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, for a period during which an employee had been wrongfully discharged based on union activity. 327 U.S. at 364. The government argued that the payments were not covered by the statute because they were not "for work done" and the employee "did not perform any service" to earn them. *Id.* at 365. In the present case, the court of appeals adopted substantially the same construction of the RRTA's similar language. See Pet. App. 20a (concluding that an employer's payments to an employee for time lost due to injury were not payments for "'services rendered'" because they were "for a period of time during which the employee did not actually render any services").

This Court unanimously rejected the government's argument in *Nierotko*, holding that payments for "any service * * * performed" include not only payments for "work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." 327 U.S. at 365-366. The Court stated that "[t]he very words 'any service . . . performed . . . for his employer,' with the purpose of the Social Security Act in mind, import breadth of coverage," and "admonish us against holding that 'service' can be only productive activity." *Id.* at 365. The Court found support for its construction in the practice of treating vacation pay, sick pay, and pay for time spent in jury service as covered "wages," even though an employee is not actively serving his employer during those periods. *Id.* at 366 n.17. Justice Frankfurter concurred

to emphasize that this view comported with longstanding interpretations of "service" in the context of employment. *Id.* at 370-371.

b. Four years ago, the Court unanimously reaffirmed this interpretation in *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395 (2014). The Court there considered whether severance payments were subject to FICA tax as payments for "any service, of whatever nature, performed . . . by an employee for the person employing him." *Id.* at 1399 (citation omitted). Applying *Nierotko*, the Court held that such payments were taxable because "the term 'service,' used with respect to Social Security, 'means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.'" *Id.* at 1400 (citation omitted).

c. The lost-wages award in this case falls within the understanding of payment for "service" that *Nierotko* and *Quality Stores* reflect. Petitioner's payment for days of work that respondent missed due to an injury caused by employer negligence was clearly made as part of "the entire employer-employee relationship." *Nierotko*, 327 U.S. at 366; see *id.* at 365-368 (finding that back pay for time in which an employee was not working due to unlawful discharge constituted payment arising from "the entire employer-employee relationship"). And there is no meaningful textual difference between the two statutory provisions that would warrant divergent results. Compare 26 U.S.C. 3231(e)(1) (RRTA's definition of "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers") with *Nierotko*, 327 U.S. at 364 (Social Security Act's

definition of "wages" as "all remuneration" for "any service . . . performed . . . by an employee for his employer"); *Quality Stores*, 134 S. Ct. at 1399 (same definition in FICA).

In discounting the significance of *Nierotko* and *Quality Stores*, the court of appeals overlooked an important aspect of the relevant statutory language. The court stated that "the FICA definition cannot be imported into the RRTA because instead of taxing payment for 'services,' the FICA taxes payment for 'employment.'" Pet. App. 20a (some internal quotation marks omitted). But while FICA defines "wages" as "all remuneration for employment," 26 U.S.C. 3121(a), it defines "employment" as "any service, of whatever nature, performed * * * by * * * an employee for the person employing him," 26 U.S.C. 3121(b). In both *Nierotko* and *Quality Stores*, the Court therefore focused on the same interpretive question that is presented here—whether an employer payment that is based on the employer-employee relationship, but covers a period in which the employee is not performing active work, constitutes payment for employee "service." See *Quality Stores*, 134 S. Ct. at 1399; *Nierotko*, 327 U.S. at 366.

2. The statutory context confirms that the RRTA's definition of "compensation" extends beyond payments for active service and encompasses pay for time lost

The larger statutory context reinforces the conclusion that the RRTA's definition of "compensation" encompasses items like vacation pay, severance pay, and pay for time lost, which are not linked to specific hours of active service but which arise out of the employer-employee relationship.

a. The express statutory exceptions to the RRTA's definition of "compensation" reflect the understanding that "compensation" reaches all payments arising out of the employer-employee relationship. Payments that an employer makes "on account of sickness or accident disability" are exempted from RRTA taxation if they are made under worker's compensation laws or under the RRA. 26 U.S.C. 3231(e)(1) and (4)(A). And payments "on account of sickness or accident disability" made through any other type of employer-provided plan, as well as payments "for days of sickness" under the Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*, are excluded from compensation only after the employee has been separated from employment for six months. 26 U.S.C. 3231(e)(1) and (4)(B)-(C). Those exceptions reflect Congress's understanding—consistent with *Nierotko*, *Quality Stores*, and agency interpretation dating back to the year of the RRTA's enactment—that payments arising out of the employment relationship are generally "compensation" even if they are not made for specific hours spent in active service. If the RRTA's general definition of "compensation" covered only payments for active service, as the court of appeals believed, an exclusion for specific sickness and disability payments would be unnecessary.

b. The RRTA's companion benefits statute reinforces that understanding. Under the interpretive canon that related statutory provisions should be construed *in pari materia*, ambiguities in a term may be resolved by considering how the term is used in related statutes. *Branch* v. *Smith*, 538 U.S. 254, 281 (2003) (plurality opinion) ("[I]f divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them.") (citation omitted); *United*

States v. *Stewart*, 311 U.S. 60, 64 (1940) ("[A]ll acts *in pari materia* are to be taken together as if they were one law.") (citation omitted); see *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). In analyzing whether stock could constitute "money remuneration" under the RRTA, the Court looked to the use of the term "money" in the Internal Revenue Code of 1939, ch. 2, 53 Stat. 15, which was "part of the same title as" the RRTA and was "adopted just two years later." *Wisconsin Central Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018). The Court explained that several provisions of that Code "treated 'money' and 'stock' as different things," and it viewed that disparity as evidence that "money remuneration" under the RRTA did not include stock. *Ibid.*

The RRTA and RRA are "companion statute[s]," *Wisconsin Central*, 138 S. Ct. at 2073—the "interrelated parts of an overall plan designed to benefit railroad employees," *Atlantic Land & Improvement Co.* v. *United States*, 790 F.2d 853, 856 (11th Cir. 1986); see *Universal Carloading & Distrib. Co.* v. *Pedrick*, 184 F.2d 64, 66 (2d Cir.), cert. denied, 340 U.S. 905 (1950). As the court below put it, "the RRA provides benefits, while the RRTA funds them." Pet. App. 21a. Absent a clear textual indication of a contrary legislative intent, construing the RRTA to tax the same employer payments that are used to calculate RRA benefits promotes the effective administration of the overall statutory scheme.

Like the RRTA (see 26 U.S.C. 3231(e)(1)), the RRA defines "compensation" to mean "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative." 45 U.S.C. 231(h)(1). Unlike the

RRTA, however, the RRA contains the additional language "including remuneration paid for time lost as an employee." *Ibid.* The term "including" indicates that remuneration paid for time lost is "an illustrative application" of the general definition. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (discussing "includes"); see *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) ("includes" used to identify "examples" that are "illustrative"); see also *Groman* v. *Commissioner*, 302 U.S. 82, 88 (1937) ("includes" builds upon "the ordinary connotation of the [underlying] term"). The RRA definition thus indicates not only that payments for time lost are part of RRA "compensation," but also that Congress viewed such payments as a "form of money remuneration * * * for services rendered as an employee."

Given the complementary nature of the two statutes, the RRTA phrase "any form of money remuneration paid to an individual for services rendered as an employee" is likewise naturally construed to "includ[e] remuneration paid for time lost as an employee." To be sure, the "including" proviso contained in the RRA does not appear in the current RRTA. But the canon that related statutes should be construed *in pari materia* is useful precisely because it enables courts to construe an ambiguous term in one statutory provision using insights from a more detailed provision that contains the same term. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 & n.11 (1985) (treating a particular Clean Water Act provision's reference to "waters" "including wetlands adjacent thereto" as evidence that "the term 'waters' elsewhere in the [Clean Water] Act" includes wetlands) (citation omitted); *Reiche* v. *Smythe*, 80 U.S. (13 Wall.) 162, 162,

164 (1872) (holding that birds should not be classified as "'other live animals'" in a tariff statute because an earlier-enacted tariff statute expressly addressed "birds" and "'water fowls'" and treated them as distinct from "animals of all kinds") (citations omitted).

3. The RRTA's history bolsters the most natural interpretation of the statutory text.

a. The original 1935 railroad workers' taxation statute defined taxable "compensation" as "any form of money remuneration *for active service*, received by an employee from a carrier." 1935 Act, ch. 813, § 1(d), 49 Stat. 974 (emphasis added). When Congress enacted the RRTA two years later, after the 1935 statute had been declared invalid, it omitted the word "active" and defined "compensation" to include "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). That sequence suggests that the RRTA reaches not only payments for "work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." *Nierotko*, 327 U.S. at 365-366.

Subsequent statutory changes reinforce that inference. Later in the year that the RRTA was enacted, the Treasury Department construed the statute's definition of "compensation" as "not confined to amounts earned or paid for active service." Reg. 100, Art. 5 (1937). Instead, the regulations stated, compensation "includes amounts earned or paid for periods during which the employee or employee representative is absent from active service," *ibid.*, including "[s]ick pay, vacation allowances, or back pay upon reinstatement after wrongful discharge." *Id.* Art. 6(b). Since that time, Congress has

repeatedly amended the RRTA's definition of "compensation" against the backdrop of that interpretation and of this Court's 1946 decision in *Nierotko*. But Congress has not altered the overarching definition of "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), nor has it enacted any general exclusion covering payments for time not spent in active service to an employer.

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (quoting *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991)); see *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (citation and internal quotation marks omitted). The inference of congressional ratification is particularly strong here because of the exemptions that Congress did enact. See 26 U.S.C. 3231(e)(1) and (4) (carve-outs for payments as a result of sickness or disability under only certain circumstances). Those exclusions would be superfluous if the RRTA's definition of "compensation" was limited to payments made for specific periods of active service. See *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (find-

ing inference of congressional ratification to be particularly strong when statutory amendments "presupposed" a point embodied in the earlier interpretations).

b. In rejecting the agency's longstanding approach, the court of appeals relied heavily on amendments that removed express references to "time lost" from the RRTA's definition of compensation. Pet. App. 21a-23a. The court misunderstood those changes.

When assessing whether a deletion of statutory text has actually narrowed the statute's scope, this Court has considered both the remaining text and the historical context. See, *e.g.*, *Kellogg Brown & Root Servs., Inc.* v. *Carter*, 135 S. Ct. 1970, 1975, 1977 (2015) (holding that limitations provision that had applied to "'offenses involving the defrauding or attempt[ing] to defraud the United States * * * now indictable under any existing statutes'" remained limited to criminal offenses even after deletion of the limiting phrase "'now indictable under any existing statutes,'" because the primary operative term "'offenses'" was unchanged and "suggest[ed] that no fundamental alteration was intended") (citation omitted); *Taylor* v. *United States*, 495 U.S. 575, 582, 590 (1990) (rejecting argument that the deletion of a definition of burglary "indicate[d] Congress's intent to reject that definition," when the "general purpose and approach" of the statute continued to support the application of the deleted definition and legislative history did not counsel otherwise). Here, the amendments that removed the RRTA's express references to "time lost" were part of a series of changes to shift RRTA taxation from a when-earned to a when-paid basis, and they are not reasonably read as creating an exclusion for time-lost payments in the statute.

i. The RRTA initially defined "compensation" as "any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost*." 1937 RRTA § 1(e), 50 Stat. 436 (emphasis added). It thus identified "time lost" as a "form of money remuneration * * * for services rendered," and it specified when such payments should be "deemed earned." The latter feature was important because the RRTA then taxed compensation when it was earned, not when it was paid.

Congress removed that discussion in a series of changes that shifted the obligation to pay RRTA taxes to the time at which the relevant compensation was paid. In 1946, Congress replaced language requiring each employee to pay taxes on "compensation * * * earned by" him with language requiring the employee to pay taxes on compensation "paid to" him. 1946 Act § 2, 60 Stat. 722. The same provision established a "presum[ption]" that compensation was earned in the period in which it was paid. *Ibid.* But the IRS continued to hold the view, ultimately reflected in a 1975 Revenue Ruling, that certain back pay should be taxed at the rate applicable when the back pay was earned, not at the rate that applied when it was paid. See Rev. Rul. 75-266, 1975-2 C.B. 408.

Shortly after that 1975 Revenue Ruling, Congress enacted the first of the changes on which the court below relied. The 1975 law foreclosed any time-of-earnings inquiry unless one was sought by the employee, by specifying that "[a]n employee shall be deemed to be

paid compensation in the period during which such compensation is earned only upon a written request by such employee." 1975 Act § 206, 89 Stat. 466. And, as relevant here, the law revised the definition of "compensation" to ensure that the obligation to pay tax would arise when the relevant compensation was paid. It accomplished that result by changing the basic definition of "compensation" from "any form of money remuneration earned by" an employee, 26 U.S.C. 3231(e)(1) (1970), to "any form of money remuneration paid to" an employee. 1975 Act §§ 204-205, 89 Stat. 466. And it removed the definition's references to "time lost," including the language stating that "remuneration paid for time lost shall be deemed earned in the month in which such time is lost." 26 U.S.C. 3231(e)(1) (1970); see 1975 Act § 204, 89 Stat. 466.

By the time of the 1975 amendment, *Nierotko* and the Treasury regulations confirmed that the RRTA's overarching definition of "compensation"—as "any form of money remuneration, earned by an employee for services rendered as an employee to one or more employer"—reached payments for periods not devoted to active service, such as payments for time lost. The pre-1975 version of the RRTA, moreover, which contained the same "including" language that still appears in the RRA, made clear that Congress viewed "remuneration paid for time lost as an employee" as a "form of money remuneration * * * for services rendered as an employee." See p. 4, *supra*. If Congress had intended to exclude such payments from taxable RRTA "compensation," the deletion of express references to "time lost," while leaving intact the basic definition that had long been understood to "includ[e]" such payments, would have been a very oblique way of accomplishing

that result. That is a particularly implausible inference given the 1975 amendment's primary purpose of confirming the applicability of a when-paid approach to RRTA taxation. If the 1975 Congress had actually sought to achieve the result that the court below attributed to it, Congress presumably would have enacted an express exclusion, as it later did for a subset of payments that are not for active service (certain payments based on sickness and disability).

The 1975 amendment, moreover, left in place other RRTA references to time lost. Although Congress removed the reference to "time lost" in the definition of "compensation" at 26 U.S.C. 3231(e)(1), it retained in the next subsection a provision dealing with identification of time-lost pay. That provision set out a rule for identifying when injury-related payments should be considered payment for time lost, rather than non-taxable payments for other costs (*e.g.*, medical expenses) associated with an injury. It specified that, "[i]f a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost." 26 U.S.C. 3231(e)(2) (1976). Congress's retention of that provision would have served no evident purpose if Congress had intended to exclude payments for time lost from the RRTA's definition of "compensation."

ii. Congress also did not exempt payments for time lost from RRTA taxation when "[t]echnical [a]mendments" enacted in 1983 deleted guidance concerning when payments "shall be deemed" to be for time lost. See 1983 Act § 225, 97 Stat. 424 ("Technical Amendments"). The Railroad Retirement Solvency Act of 1983

increased the RRTA's tax rates and annualized the wage base, in an effort to shore up the railroad retirement system's finances. §§ 211-226, 97 Stat. 419-426. The Railroad Retirement Board (Board) estimated that, absent the legislation, the Board would have needed to cut Tier 2 benefits by 40% in 1983 and 80% in 1984. Soc. Sec. Admin., *Recent Changes to the Railroad Retirement Act* (1983), https://www.ssa.gov/policy/docs/ssb/v46n12/v46n12p14.pdf. A final section of the 1983 statute, entitled "Technical Amendments" and subtitled "Amendments Relating to Application of Contribution Base on an Annual Basis," replaced the entirety of Subsection (e)(2)—which had included the statute's guidance on identifying payments for "time lost," 26 U.S.C. 3231(e)(2) (1982)—with a new subsection. 1983 Act § 225, 97 Stat. 424. The new subsection, entitled "Application of Contribution Bases," set out technical rules for determining the wage base. *Ibid.*; 26 U.S.C. 3231(e)(2).

These changes are not appropriately read to have excised "time lost" from the scope of taxable "compensation." They left the RRTA's definition of "compensation" unaltered, and simply eliminated guidance on when an employee "shall be deemed" to have been paid for time lost, 26 U.S.C. 3231(e)(2) (1982). 1983 Act § 225, 97 Stat. 424. The 1983 statute's labeling of the relevant provision as a technical amendment makes it especially unlikely that Congress intended the changes to add an implicit, substantive exemption to the RRTA's definition of compensation. See, *e.g.*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016); *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316 (2001). Reading the 1983 amendments to create a *sub silentio*

tax exemption for time-lost payments would also conflict with the statute's overall purpose of shoring up the Board's finances. See 1983 House Report 25 (explaining that the bill increased tax rates and annualized the statute's wage bases "[i]n light of the need of the retirement system for additional revenues"). And the most relevant legislative report did not suggest any such purpose, but instead mirrored the language of the statute, describing the changes to Subsection (e)(2) as "technical and conforming amendments" implementing the shift from a monthly wage base to an annual wage base. *Id.* at 29.

The sequence of RRTA amendments that removed the prior express references to "time lost" thus were designed to shift RRTA taxation from an as-earned to as-paid basis, and to make certain technical changes. Those amendments are not reasonably read to exclude time-lost payments from the statute's definition of "compensation."

4. The income-tax exclusion for "payments on account of personal physical injuries" does not apply to RRTA taxation.

The district court concluded that the payments here are exempted from RRTA taxation because payments "on account of personal physical injuries" are excluded from the definition of "gross income" used in the federal income-tax provisions. See Pet. App. 29a-30a (discussing 26 U.S.C. 104(a)(2)). That reasoning conflates distinct statutory provisions.

RRTA taxes and income taxes are levied on different tax bases. Federal income taxes are imposed on "taxable income," see 26 U.S.C. 1, 11, which is defined as "gross income" minus certain deductions. 26 U.S.C. 61

and 26 U.S.C. 63 (2012 & Supp. IV 2016). "Gross income," in turn, "means all income from whatever source derived," subject to certain exclusions. See 26 U.S.C. Subt. A, Ch. 1, Subch. B., Pt. III ("Items Specifically Excluded from Gross Income"). One exclusion provides that "gross income does not include * * * the amount of any damages * * * received * * * on account of personal physical injuries or physical sickness." 26 U.S.C. 104.

The RRTA taxes "compensation"—a distinct term with a defined meaning. The RRTA's definition of "compensation" does not incorporate or cross-reference the categories of "taxable income" or "gross income." And the RRTA's definition of "compensation" does not contain a parallel exception for damages received "on account of personal physical injuries or sickness." 26 U.S.C. 104. The statutory carve-outs from "gross income" under the income-tax laws therefore are irrelevant under the RRTA.

When Congress has created exclusions from income taxation, it has sometimes—but not always—added parallel exclusions to the RRTA. See Pet. Br. 41 (describing parallel exclusions for employee achievement awards, certain payments for student-loan forgiveness, certain fringe benefits, employer-provided educational assistance, certain employer-provided meals and lodging, medical savings account contributions, and employer contributions to health savings accounts). Congress's selective enactment of parallel exclusions refutes the district court's suggestion that exclusion of a particular category of payment from the definition of taxable income *automatically implies* a parallel exclusion from RRTA "compensation."

Several appellate courts have held that FICA's definition of "wages" implicitly incorporates an exclusion for payments made on account of personal injury—though some of those courts have concluded that any "back pay" component of such payments would be taxable. See *Gerbec* v. *United States*, 164 F.3d 1015, 1026 (6th Cir. 1999) (back pay taxable); *Dotson* v. *United States*, 87 F.3d 682, 689 (5th Cir. 1996) (same); *Redfield* v. *Insurance Co. of N. Am.*, 940 F.2d 542, 548 n.4 (9th Cir. 1991) (back pay not taxable), overruled on other grounds by *Commissioner* v. *Schleier*, 515 U.S. 323 (1995). And some government filings, including the government's court of appeals brief in this case, have described FICA as incorporating a personal-injury exclusion. See Gov't C.A. Br. 12-16.[*]

The government believes those characterizations of FICA erroneously conflate distinct concepts of "gross income" under the income-tax provisions and "wages" under FICA. But regardless of how FICA is understood, it would be improper to exempt payments for time lost due to personal injury from RRTA taxation, based on a gross-income exclusion that has not been incorporated into the RRTA. While neither FICA nor the Social Security Act contains an express reference to payments for "time lost," such payments are expressly included in the RRA's definition of "compensation,"

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[*] In a Technical Advice Memorandum to a taxpayer, the IRS stated that it agreed with the *Dotson* court that payments on account of personal injury are not taxable under FICA. Internal Revenue Service, *Technical Advice Memorandum 115068-09*, at 36 (2010). It is not clear that this statement was meant to encompass back pay, because *Dotson* treated back pay due to personal injury as taxable. In any event, guidance in such memoranda "applies only to the taxpayer for whom the advice was required." *Internal Revenue Manual* 33.2.1.9.1 (2004).

45 U.S.C. 231(h)(2), 231b, and those payments can therefore increase employees' retirement and disability benefits. It therefore would be inappropriate to interpret the parallel RRTA and RRA definitions differently —and to introduce asymmetry between the tax and benefit provisions that apply to railroad workers—in order to align the RRTA's definition of "compensation" with the distinct concept of "gross income."

B. The Treasury Department's Longstanding Construction Of RRTA "Compensation" Is Reasonable And Warrants Deference

For the reasons explained above, under the RRTA's plain meaning, RRTA "compensation" extends to all payments arising out of the employer-employee relationship, and is not limited to payments for periods of active service. Even if there were ambiguity in the RRTA's definition of compensation, however, the Treasury Department's interpretation would warrant deference under the principles of *Chevron*. *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 55 (2011) (applying *Chevron* "in the tax context").

At minimum, the Treasury Department acted reasonably in concluding that "[t]he term compensation [in the RRTA] is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer," 26 C.F.R. 31.3231(e)-1(a)(3) (emphasis omitted), and therefore includes "pay for time lost," 26 C.F.R. 31.3231(e)-1(a)(4). That interpretation is supported by this Court's longstanding interpretation of virtually identical language in FICA. See pp. 16-19, *supra*. It is reinforced by the express ex-

clusions from RRTA taxation of a narrow subset of payments for time not spent on active service, see 26 U.S.C. 3231(e)(1) and (4)(A), and by the companion benefits statute's directive that an identically worded basic definition of "compensation" "includ[es] remuneration paid for time lost as an employee," 45 U.S.C. 231(h)(1). The Treasury Department adopted its definition of "compensation" in 1937, the year the RRTA was enacted. Since that time, Congress has added narrow exemptions to the statute, but it has never altered the overarching definition of "compensation" or added an exclusion for "time lost."

In finding the Treasury Department's interpretation to be unreasonable, the court of appeals relied in substantial measure on Congress's removal from the RRTA of prior language specifying that the basic statutory definition of "compensation" —*i.e.*, "money remuneration * * * for services rendered as an employee"— "includ[es] remuneration paid for time lost as an employee." See Pet. App. 21a-22a (citation omitted). As explained above, however, that revision is not reasonably understood to create an RRTA exclusion for "time lost" payments, but was instead part of a set of revisions designed to serve other purposes. See pp. 23-30, *supra*. And even if the court of appeals' inference reflected *one* reasonable explanation for Congress's deletion of the prior language, the RRTA's current definition of "compensation" does not *unambiguously* exclude payments for time lost. The Treasury Department thus acted reasonably when it declined to construe revisions eliminating any statutory discussion of "time lost" as creating an implicit exclusion not set out in the statute's text.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 26 U.S.C. 3231 provides in pertinent part:

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.

* * * * *

(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.

* * * * *

2. 45 U.S.C. 231(h)(1) provides:

Definitions

(h)(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 or as an employee representative, including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost. A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or if the employee establishes, subject to the provisions of section 231h of this title, the period during which such compensation will have been earned.

3. 26 C.F.R. 31.3231(e)-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).

(2) A payment made by an employer to an individual through the employer's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered as an employee of the employer. Likewise, a payment made by an employee organization to an employee representative through the organization's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered by the employee representative as such. For rules regarding the treatment of deductions by an employer from remuneration of an employee, see § 31.3123-1.

(3) The term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.

(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a

less remunerative position or occupation as well as pay for time lost.

(5) For rules regarding the treatment of reimbursement and other expense allowance amounts, see § 31.3121(a)-3. For rules regarding the inclusion of fringe benefits in compensation, see § 31.3121(a)-1T.

(6) *Split-dollar life insurance arrangements.* See §§ 1.61-22 and 1.7872-15 of this chapter for rules relating to the treatment of split-dollar life insurance arrangements.

(b) *Special Rules.* (1) If the amount of compensation earned in any calendar month by an individual as an employee in the service of a local lodge or division of a railway-labor-organization employer is less than $25, the amount is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221.

(2) Compensation for service as a delegate to a national or international convention of a railway-labor-organization employer is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221 if the individual rendering the service has not previously rendered service, other than as a delegate, which may be included in the individual's years of service for purposes of the Railroad Retirement Act.

(3) For special provisions relating to the compensation of certain general chairs or assistant general chairs of a general committee of a railway-labor-organization employer, see paragraph (c)(3) of § 31.3231(b)-1.