No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,
v.

MICHAEL D. LOOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the satisfaction of a judgment under the Federal Employers' Liability Act that includes an award of lost wages is subject to taxation under the Railroad Retirement Tax Act.

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1918 Revenue Act	Revenue Act of 1918, ch. 18, 40 Stat. 1057 (1919)
1934 RRA	Railroad Retirement Act, ch. 868, 48 Stat. 1283 (1934)
1935 Act	Act of Aug. 29, 1935, ch. 813, 49 Stat. 974
1937 Act	Carriers Taxing Act of 1937, ch. 405, 50 Stat. 435
1946 Act	Act of July 31, 1946, ch. 709, 60 Stat. 722
AAR	American Association of Railroads
AAR Statement	Statement of Sidney S. Alderman, General Solicitor, Southern Railway, on Behalf of the Association of American Railroads, *Railroad Retirement: Hearings on H.R. 1362 Before the H. Comm. on Interstate and Foreign Commerce*, 79th Cong., pt. 2, at 563 (1945)
Board	Railroad Retirement Board
Code	Internal Revenue Code (26 U.S.C.)
FELA	Federal Employers' Liability Act
IRS	Internal Revenue Service
Latimer Statement	Statement of Murray W. Latimer, Chairman, Railroad Retirement Board, *Railroad Retirement: Hearings on H.R. 1362 Before the H. Comm. on Interstate and Foreign Commerce*, 79th Cong., pt. 1, at 31 (1945)

LHWCA	Longshore and Harbor Workers' Compensation Act
RRA	Railroad Retirement Act
RRTA	Railroad Retirement Tax Act
RUIA	Railroad Unemployment Insurance Act
Schreiber	David B. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* (1978)
SSA	Social Security Act
Washington Agreement	Washington Job Protection Agreement (1936) (reproduced at *Chesapeake & O. Ry. Co. v. United States*, 571 F.2d 1190, 1206-12 (D.C. Cir. 1977) (Appendix))

INTRODUCTION

Under the plain language of the Railroad Retirement Tax Act ("RRTA"), satisfaction of a judgment under the Federal Employers' Liability Act ("FELA") is not taxable for the plaintiff. Tort damages do not fall within the RRTA's definition of taxable compensation – they are not remuneration "for services rendered." Damages are paid for breach of a legal duty, not for services rendered. In satisfying a FELA judgment, a railroad pays an injured worker damages for its negligence, not remuneration for services the worker rendered. The Eighth Circuit properly construed the RRTA in concluding that petitioner's satisfaction of respondent's FELA judgment is not taxable under that statute.

Petitioner's argument (at 18) that the RRTA's text is "not so plain" is unavailing. Petitioner and the government seek to define "compensation" in the RRTA by resorting to a range of other statutes and cases, when the most direct path to understanding Congress's intent is in the RRTA's plain language.

Another basis to affirm the Eighth Circuit's judgment is the district court's correct determination that the Internal Revenue Code's general exemption for personal-injury damages awards from "income" also applies to this case. Since 1919, such awards generally have been exempt from income tax, and there is no indication Congress impliedly repealed that general rule for the RRTA's tax "imposed on income." In the thousands of FELA cases that have gone to judgment in the past century, petitioner and its *amici* point to no situation in which the Internal Revenue Service ("IRS") imposed RRTA taxes on a FELA damages judgment. Decades of experience confirm the result Congress intended.

STATEMENT

A. Statutory Background

This case involves the interrelationship of multiple statutory schemes: the RRTA imposes taxes to help fund retirement benefits for *railroad* workers; the Railroad Retirement Act ("RRA") governs those benefits; the Federal Insurance Contributions Act ("FICA") funds Social Security benefits for *non-railroad* workers; Internal Revenue Code § 104(a)(2) generally excludes personal-injury recoveries from income taxation; and FELA enables railroad workers to recover for injuries caused by their employers' negligence.

RRTA. As early as 1875, railroads developed private pension schemes, and by 1927 those plans covered as many as three-fourths of all railroad workers. *See* David B. Schreiber, *The Legislative History of the Railroad Retirement and Railroad Unemployment Insurance Systems* 1 (1978) ("Schreiber"). Those private pensions, however, were "generally inadequate, liable to capricious termination, and of little assistance to disabled employees"; and the Great Depression soon pushed them into "a state of crisis," prompting Congress to design a federal pension system for retired and disabled railroad workers. Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. No. 2, at 41 (2008).

After the Railroad Retirement Act, ch. 868, 48 Stat. 1283 (1934) ("1934 RRA"), was declared unconstitutional in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), Congress enacted separate taxing and benefits statutes.[1] Although a federal district court enjoined enforcement of the tax statute,

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[1] Act of Aug. 29, 1935, ch. 813, 49 Stat. 974 ("1935 Act"); Railroad Retirement Act of 1935, ch. 812, 49 Stat. 967.

see Alton R.R. Co. v. Railroad Ret. Bd., 16 F. Supp. 955 (D.D.C. 1936), the Railroad Retirement Board ("Board") began awarding annuities under the benefits statute. *See* Schreiber at 16-17. In 1936, the railroads and unions signed the Washington Job Protection Agreement ("Washington Agreement"), which provided protections for workers adversely affected by consolidation in the industry, including payments to workers deprived of employment or displaced to lower-paying positions. *See Chesapeake & O. Ry. Co. v. United States*, 571 F.2d 1190, 1206-12 (D.C. Cir. 1977) (reproducing agreement).

In 1937, pending appeal of the 1936 *Alton* decision, railroad management and unions reached a compromise agreement on the pension system, which became the basis for a revised version of the taxing and benefits statutes. The taxing bill was known as the Carriers Taxing Act of 1937, ch. 405, 50 Stat. 435 ("1937 Act"). In 1939, Congress incorporated that Act into the Internal Revenue Code and, in 1946, renamed it the RRTA.

The basic structure of the RRTA as enacted in 1937 remains in place today. Employers and employees each pay RRTA taxes. Employers pay "an excise tax" based on "compensation paid during any calendar year by such employer for services rendered to such employer." 26 U.S.C. § 3221(a). The employee's tax is "imposed on the income of each employee." *Id.* § 3201(a).

An "employee" under the RRTA is an "individual in the service of" an employer for "compensation." *Id.* § 3231(b). An employee is in the "service" of an employer when he is "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" and "he renders such service for compensation." *Id.* § 3231(d)(1)-(2).

In the RRTA, Congress used the term "compensation" to define the tax base – what is subject to taxation. Specifically, the RRTA provides in pertinent part that "there is hereby imposed on the income of each employee a tax equal to [a specified] percentage of the compensation received during any calendar year by such employee for services rendered by such employee." *Id.* § 3201(a)-(b). 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." *Id.* § 3231(e).

RRA. The RRA provides a pension system to railroad employees, 45 U.S.C. §§ 231-231v, which the Board administers, *id.* § 231f. Benefits are provided in two tiers. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75 (1979). Tier 1 benefits are equivalent to Social Security benefits. 45 U.S.C. § 231b(a). Tier 2 benefits are "like a private pension" and "tied to earnings and career service." *Hisquierdo*, 439 U.S. at 574. The amount of Tier 2 benefits an employee receives is based on "years of service" and the average of the employee's highest 60 months of creditable "compensation." 45 U.S.C. § 231b(b). "[Y]ears of service" means in pertinent part "the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost." *Id.* § 231(f)(1). Under the RRA, "compensation" means "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers . . . including remuneration paid for time lost as an employee." *Id.* § 231(h)(1).

FICA. "The same Congress that enacted the [RRTA] enacted a companion statute, [FICA], to fund social security pensions for employees in other

industries." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018). FICA and the RRTA share the same basic structure, but with different tax bases. Under FICA, employers also pay "an excise tax." 26 U.S.C. § 3111(a). For employees, FICA taxes are "imposed on the income of every individual." *Id.* § 3101(a).

The amount of the FICA tax on employee income is based on a percentage of "the wages (as defined in section 3121(a)) received by the individual with respect to employment." *Id.* Congress defined the tax base for FICA ("wages") differently from the tax base for the RRTA ("compensation"). FICA "wages" are defined in pertinent part as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *Id.* § 3121(a).

In 1992, legislation proposing to synchronize RRTA "compensation" with FICA "wages" was introduced. *See* 138 Cong. Rec. 2101-02 (1992). Congress did not adopt that proposal and has kept the respective tax-base definitions separate and distinct. *See* 26 U.S.C. § 3231(e)(2)(C) (incorporating FICA provision relating to successor employers into RRTA but substituting RRTA definitional terms).

§ 104(a)(2). Internal Revenue Code § 104(a)(2) excludes from gross income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2). A version of that provision has remained in effect since the Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1057, 1066 (1919) ("1918 Revenue Act"). The § 104(a)(2) exclusion is not limited to damages

for medical expenses or pain and suffering: "It also excludes from taxation those damages that substitute . . . for lost wages, which would have been taxed had the victim earned them." *O'Gilvie v. United States*, 519 U.S. 79, 86 (1996). Juries are instructed not to consider federal or state income taxes in awarding damages. *See Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 496 (1980).

FELA. Enacted in 1908, FELA makes a railroad liable for negligently causing an employee's injuries. 45 U.S.C. §§ 51-60; *see CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688 (2011). Congress sought to give railroads a compelling financial reason to provide a safe workplace. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) ("FELA was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations"). Congress passed FELA before the widespread adoption of workers' compensation schemes, and many States continue to exclude railroad employees from workers' compensation coverage "on the assumption that FELA provides adequate protection." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Because of the dangers of railroad work, railroads have faced many thousands of FELA cases. Pet. 22. During the 80-year coexistence of FELA and the RRTA, neither petitioner nor *amici* point to any instance in which the IRS has imposed RRTA taxes on payment in satisfaction of a FELA judgment.

No Treasury regulation expressly states that satisfaction of FELA judgments are subject to RRTA taxation. Instead, the IRS "has consistently held that compensatory damages, including lost wages, received on account of a personal physical injury are excludable

from gross income with the exception of punitive damages" and that "[t]here is general agreement that to the extent damages are excludable from gross income, they are not subject to employment taxes." Lawsuits, Awards, and Settlements Audit Techniques Guide 8, 14 (May 2011);[2] *see also* IRS, Memorandum from the Office of Chief Counsel at 8 (Oct. 22, 2008) ("Amounts excludable from gross income under § 104(a)(2) . . . are not wages for FICA and income tax withholding purposes.");[3] IRS P.L.R. 200303003, at 4 (Jan. 17, 2003) ("There is general agreement that to the extent damages are excludable from gross income under section 104(a)(2), they are not subject to employment taxes.").[4]

B. "Compensation" Under The RRTA

The RRTA consistently has taxed employee "income," with the tax base being a specified "percentage" of the defined term "compensation." 26 U.S.C. § 3201(a). The RRTA's definition of "compensation" has changed over the years, however.

The RRTA's earliest predecessor statute from 1934 used "compensation" without defining the term. *See* 1934 RRA § 1, 48 Stat. 1283-84. The 1935 taxing statute defined compensation as "any form of money remuneration for active service, received by an employee from a carrier." 1935 Act § 1(d), 49 Stat. 974.

1937 Taxing Statute. In the revised Carriers Taxing Act of 1937, Congress defined "compensation" as

> any form of money remuneration earned by an individual for services rendered as an employee

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[2] https://www.irs.gov/pub/irs-utl/lawsuitesawardssettlements.pdf.

[3] http://www.irs.gov/pub/lanoa/pmta2009-035.pdf.

[4] https://www.irs.gov/pub/irs-wd/0303003.pdf.

> 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.

§ 1(e), 50 Stat. 436.

The 1937 Act intended to "make[] it clear that what is significant is that compensation has been earned by the employee, not that it has been actually received by him," and "that compensation received by an employee in respect of months during which he was ill or on vacation is to be included in the compensation of the employee's tax liability." S. Rep. No. 75-818, at 4 (1937); *accord* H.R. Rep. No. 75-1071, at 5-6 (1937) (same).

1946 Omnibus Amendments. In 1946, Congress substantially revised the RRTA, the RRA, and the Railroad Unemployment Insurance Act ("RUIA"). *See* Act of July 31, 1946, ch. 709, 60 Stat. 722 ("1946 Act").[5] Congress amended the RRTA's definition of taxable compensation to add the following:

> 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.

§ 3(f), 60 Stat. 725. Congress made the same change to the RRA, thus giving employees a boost toward

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[5] The RUIA provides unemployment and sickness benefits to qualified railroad workers. 45 U.S.C. §§ 351-369.

achieving their months of creditable compensation for an RRA annuity. § 2, 60 Stat. 722.

Those RRTA and RRA amendments expanded the scope of the term "time lost" in two ways. First, they applied "time lost" to include not just payments to workers deprived of employment as a result of railroad mergers,[6] but also payments for displacement to a less remunerative position under the 1936 Washington Agreement. *See Chesapeake*, 571 F.2d at 1208-09 (Appendix). The new definition of compensation clarified that "remuneration paid for time lost as an employee" also included a "displacement allowance" under the Washington Agreement – that is, "the amount he is paid by the employer for loss of earnings resulting from his *displacement to a less remunerative position or occupation*." 1946 Act §§ 2, 3(f), 60 Stat. 722, 725 (emphasis added).

Second, the amendments expanded "time lost" payments to include payments for "absence on account of personal injury." *Id.* That language "provide[d] for crediting pay for time lost on account of personal injuries even though the pay is included in a general *settlement*." S. Rep. No. 79-1710, pt. 2, at 7-8 (1946) (emphasis added). The change "was necessary because the railroads were unwilling to make such payments subject to the provisions of the taxing act." Schreiber

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[6] The Board and railroads agreed that such "coordination allowances" were "payment[s] for time lost." *Railroad Retirement: Hearings on H.R. 1362 Before the H. Comm. on Interstate and Foreign Commerce*, 79th Cong., pt. 1, at 46 (1945) (Statement of Murray W. Latimer, Chairman, Railroad Retirement Board) ("Latimer Statement"); *see also id.*, pt. 2, at 574 (Statement of Sidney S. Alderman, General Solicitor, Southern Railway, on Behalf of the Association of American Railroads) (pay for time lost "definitely refers to . . . a payment under the so-called Washington agreement") ("AAR Statement").

at 53. Indeed, the American Association of Railroads ("AAR") vociferously opposed the change, arguing that personal-injury *settlements* did not fall within either "remuneration for services rendered" or the concept of "pay for time lost." *See* AAR Statement at 574-75 ("But when I pay an injured employee for a lost arm, I am settling a legal liability for his injury. I am paying him for his lost arm, not for his lost time. It is not remuneration for either services or for lost time, but it is compensation for injury and loss of the member and for loss of earning capacity. It clearly is not creditable or taxable compensation under these acts.").

The amendments also created a default presumption to allocate an entire settlement payment to time lost, thereby increasing an employee's creditable compensation. *See* 1946 Act §§ 2, 3(f), 60 Stat. 722, 725. The railroads objected to that provision as well, arguing that "[i]t deliberately seeks to convert a personal-injury settlement into a lost-time settlement, when lost time is only one of the many elements or factors entering into the estimation of such settlements." AAR Statement at 576.

The legislative history to the 1946 amendments repeatedly stated that "pay for time lost" in the personal-injury context refers to *settlements* of personal-injury claims.[7] Our research found no reference in that legislative history to taxes being paid or owed on the satisfaction of FELA judgments.

1975 and 1983 Amendments. After further amendments, by 1970, the RRTA's definition of compensation mirrored the RRA's definition and read as follows:

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[7] *See*, *e.g.*, S. Rep. No. 79-1710, pt. 2, at 7-8; Latimer Statement at 46, 162; AAR Statement at 576.

> (1) The term "compensation" means 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. . . .
>
> (2) 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.

26 U.S.C. § 3231(e)(1)-(2) (1970) (emphases added).

In 1975, Congress removed the "pay for time lost" language from the definition of "compensation" in § 3231(e)(1) "by striking out the first sentence and inserting in lieu thereof: 'The term "compensation"

means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.'" Act of Aug. 9, 1975, Pub. L. No. 94-93, § 204, 89 Stat. 466, 466. Congress retained the reference to "pay for time lost" in § 3231(e)(2). Although Congress amended the RRA at the same time, it did not alter the RRA's definition of compensation. *See* Act of Aug. 9, 1975, Pub. L. No. 94-92, § 201, 89 Stat. 461, 464-65.

In 1983, Congress substantially revised § 3231(e)(2), removing all language referring to payments by employers for time lost or personal injury. *See* Railroad Retirement Revenue Act of 1983, Pub. L. No. 98-76, tit. II, § 225(a)(1), 97 Stat. 411, 419, 424-25. As with the 1946 amendments, Congress simultaneously amended the RRA's definition of compensation: Congress expanded the definition of creditable compensation to encompass certain separation, subsistence, and termination allowances but did not amend the applicable provisions for time lost or personal injury. *Id.* § 403, 97 Stat. 434. The current RRTA contains no reference to pay for time lost or personal injury.

C. The Proceedings Below

Respondent Michael Loos incurred injuries when he fell through snow that covered an unmarked drain in petitioner's railyard. Before Loos filed this FELA suit, petitioner terminated his employment. App. 4a, 7a. The case was submitted to a jury, which, at petitioner's request, was instructed that "[t]he plaintiff will not be required to pay any federal or state income taxes on an amount that you award." ECF#74, at 38 (request); JA91a (final instruction). The jury verdict found petitioner liable for negligence and awarded Loos total damages of $126,212.78, which included $85,000 for past pain, disability, and emotional

distress, $11,212.78 for past medical expenses, and $30,000 for past wage loss. JA92a-95a.

Petitioner moved to offset the verdict by $3,765, the amount it claimed was due for RRTA withholdings on the wage-loss portion of the damages award. App. 28a-29a; JA11a-12a. The district court denied the offset, concluding that, because the damages were on account of personal physical injuries, § 104(a)(2) excluded them from taxation under the RRTA. App. 29a-30a.

The Eighth Circuit affirmed the judgment. App. 17a-24a. It held that the RRTA's definition of taxable compensation does not cover the damages for past wage loss awarded to respondent because, "[u]nder the RRTA's plain text, damages for lost wages are not remuneration 'for services rendered.'" App. 20a. Rather, the court explained, damages for lost wages are "remuneration for a period of time during which the employee did not actually render any services." *Id.* Therefore, "damages for lost wages do not fit within the plain meaning of the RRTA." *Id.*

The Eighth Circuit also rejected petitioner's argument that the court should "read the RRA definition of 'compensation'" – which includes "pay for time lost" – "into the RRTA." App. 21a. Noting that Congress had expressly removed "pay for time lost" from the RRTA's definition of compensation, the court rejected petitioner's invitation to import "the very language Congress eliminated." App. 23a. Having resolved the appeal based on the RRTA's definition of "compensation," the court declined to address whether § 104(a)(2) provided an additional ground for excluding respondent's damages award from taxation. App. 24a.

SUMMARY OF ARGUMENT

The RRTA does not tax satisfaction of a FELA judgment for two independent reasons.

I. The Eighth Circuit correctly concluded that damages for personal physical injuries do not fall within the statutory definition of "compensation" because they are not "remuneration for services rendered." When a railroad satisfies a FELA judgment, it pays for failing to uphold the standard of due care owed to an employee. The railroad pays for a tort, not for services rendered. Such a payment is therefore not "compensation" under the RRTA.

Petitioner tries (at 18) to avoid this outcome by arguing that the text is "not so plain." Its case in chief is that, to define RRTA compensation, the Court must look to *other* statutes. That approach is unpersuasive.

Petitioner and the government argue that "pay for time lost" is an "illustrative example" in the definition of compensation in the RRA – a separate benefits statute – and so encompassed within the RRTA's shorter definition of compensation for taxation. In the RRA, however, "pay for time lost" is not an example of remuneration "for services rendered," but rather an *additional* term that expands the RRA's definition of compensation. Pay "for time lost" is no longer in the RRTA's definition of compensation; when Congress deleted those words from the taxing statute in 1975 and 1983, its actions had meaning. Like FICA and the Social Security Act ("SSA"), the RRTA and the RRA are not *in pari materia*, and there is no basis for reading into the RRTA the RRA's reference to "pay for time lost."

Even if "pay for time lost" could be impliedly read back into the RRTA, that term does not cover FELA judgments. It is a term of art originally understood to

cover coordination allowances under the Washington Agreement and, later, personal-injury *settlement* payments. At most, taxable "pay for time lost" encompassed voluntary payments from the employer to the employee, not compliance with court orders to satisfy FELA judgments from a tortfeasor to a victim.

Retreating further, petitioner looks to the SSA and FICA to define RRTA taxes. But, as the Eighth Circuit recognized, the cases on which petitioner relies are inapposite, and this Court has instructed that the textual differences between the RRTA and FICA control. *See Wisconsin Cent.*, 138 S. Ct. at 2070.

II. The district court also correctly ruled that the Internal Revenue Code's general exclusion of personal-injury awards from "income" in § 104(a)(2) applies to RRTA taxes, which also are "imposed on income." When Congress enacted the RRTA in 1937, it acted against the backdrop of § 104(a)(2)'s predecessor personal-injury exclusion. When Congress later incorporated certain other gross income exclusions into the RRTA's definition of taxable compensation, Congress intended to recognize exemptions for *both* employees and employers because both taxes are based on a specified percentage of "compensation." Through § 104(a)(2), however, Congress has always excluded personal-injury damages from employee income, including the RRTA's tax on that income. Petitioner's proposed rule would create the anomaly that railroad worker personal-injury awards are taxable under the RRTA even though the Code exempts all other such awards from the definition of "income."

III. Petitioner's and the government's appeal to *Chevron* deference is misplaced. The current regulations do not address the question presented, and the government's recent litigating positions are not

persuasive. In the more than 80 years that FELA and the RRTA have coexisted, petitioner and its *amici* cannot cite a single instance in which the IRS has imposed RRTA taxes on satisfaction of a FELA judgment.

ARGUMENT

I. A FELA JUDGMENT IS NOT TAXABLE COMPENSATION UNDER THE RRTA

A. The RRTA's Text Does Not Cover FELA Damages Judgments

1. The RRTA taxes remuneration "for services rendered"

a. The RRTA's text taxes remuneration for services rendered, not remuneration for other purposes. Statutory interpretation begins with the text; when Congress includes an explicit statutory definition, courts are obliged to follow that definition. *See Wisconsin Cent.*, 138 S. Ct. at 2070; *see also Burgess v. United States*, 553 U.S. 124, 130 (2008). Congress defined taxable compensation under the RRTA as remuneration "for services rendered." That phrase therefore "limits the kinds of remuneration that will qualify for taxation." *Wisconsin Cent.*, 138 S. Ct. at 2071.

The services-rendered limitation appears in multiple places in the RRTA. The provision defining the tax rate imposed on employee income states: "**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." 26 U.S.C. § 3201(a) (emphasis added). The Tier 2 tax likewise "impose[s]" a tax on employee "income" as a percentage

of "compensation . . . *for services rendered*." *Id.* § 3201(b) (emphasis added).

Congress reinforced the services-rendered limitation in defining "compensation," the term that constitutes the tax base for determining Tier 1 and 2 taxes. RRTA "compensation" means "any form of money remuneration paid to an individual *for services rendered* as an employee to one or more employers." *Id.* § 3231(e)(1) (emphasis added). Thus, both the tax-imposing provision and the provision defining the tax base specify that employee taxes under the RRTA apply only to payments "for services rendered."

The ordinary meaning of "render services" refers to the performance of services for consideration. To "render" is to "give" or "furnish for consideration." *Webster's New International Dictionary* 2109 (2d ed. 1937). To render "services" means to provide "labor for the benefit of another, or at another's command." *Id.* at 2288. The RRTA specifies that an employee is in "service" when "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" and "he renders such service for compensation." 26 U.S.C. § 3231(d)(1), (2).

b. Congress's explicit limitation to remuneration "for services rendered" is consistent with the ordinary meaning of "remuneration" at the time of enactment as "recompense for services." 2 *New Century Dictionary of the English Language* 1520 (1934); *see also id.* (to remunerate means "[t]o requite, recompense, or reward (a person) for services, work, trouble, etc."); 8 *Oxford English Dictionary* 439 (1st ed. 1933) (defining "[r]emunerate" as "[t]o repay, requite, make some return for (services, etc.)" and "to pay (one) for services rendered or work done"); *Black's Law Dictionary* 1528 (3d ed. 1933) ("'remuneration' means a *quid pro quo*,"

that is, "whatever consideration he gets for giving his services"); 3 Frederick Stroud, *Judicial Dictionary* 1708 (2d ed. 1903) (same).[8]

Congress could have chosen to tax other types of remuneration, such as for expenses or jury service. The RRA, for instance, makes military service count toward creditable compensation "in the same manner as though military service were service rendered as an employee." 45 U.S.C. § 231b(i)(2). No similar provision exists to expand the scope of RRTA taxable compensation.

Congress's choice among alternative definitions of "compensation" also demonstrates its intent to tax pay for services and not other types of payments. Contemporaneous dictionaries defined "compensation" as encompassing not only payment for services but also compensation for loss. For example, *Black's Law Dictionary* defined "compensation" as not only "[t]he remuneration or wages given to an employee," such as "[s]alary, pay, or emolument," but also "[i]ndemnification; payment of damages; making amends; . . . that which is necessary to restore an injured party to his former position." *Black's Law Dictionary* 377-78; *see also* C. Martin Alsager, *Dictionary of Business Terms* 67 (1932) ("compensation" means "[t]hat which is accepted as an equivalent for loss, privation, or services rendered; . . . indemnification; recompense; . . . restoration"); 2 *Oxford English Dictionary* 717-18 ("compensation" means "[t]hat which is given in

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[8] Congress's modifying preface of "money remuneration" with "any form" is irrelevant here. Whether a railroad pays its employees in "coins, paper currency, [or] checks," *Wisconsin Cent.*, 138 S. Ct. at 2071, such remuneration is taxable only if it is "for services rendered."

recompense . . . remuneration," as well as "[a]mends or recompense *for* loss or damage").

Among the ordinary meanings for "compensation" at the time, Congress could have chosen "an equivalent for loss [or] privation." Alsager, *Dictionary of Business Terms* 67. But "Congress did not adopt that ready alternative." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017). Instead, Congress specifically defined "compensation" under the RRTA as "remuneration for services rendered." "That drafting decision" deserves respect. *Id.*

c. Petitioner (at 21-22) and the government (at 13) erroneously argue that several statutory exemptions to the RRTA's definition of "compensation" imply a broader understanding of that term. In fact, the exemptions Congress created confirm what the general definition says: taxable compensation is limited to "remuneration for services rendered."

Congress exempted from the RRTA's definition of taxable "compensation" payments made to an employee "under a plan or system established by an employer . . . on account of sickness or accident disability." 26 U.S.C. § 3231(e)(1)(i). For Tier 1 taxes, Congress also exempted from compensation certain disability benefits under the RRA and sickness benefits resulting from on-the-job injury under the RUIA. *Id.* § 3231(e)(4)(A)-(B). Unlike damages for negligence, sickness and disability benefits are part of an employee's package of compensation for rendering services. Under the RRA, annuities are provided for employees who have "render[ed] compensated service," 45 U.S.C. § 231a(e)(1), and benefits "accrue[]" based on "years of service" and disability, *id.* § 231a(a)(1). Similarly, an employee must be paid a certain amount of compensation for services rendered before receiving

sickness benefits under the RUIA. *Id.* §§ 351(i), 352(a)(1)(B), 353. Those payments are "for services rendered" and thus otherwise would be taxable compensation if Congress had not exempted them.[9]

2. A FELA damages award is not remuneration for services rendered

In ordinary usage, "remuneration for services rendered" does not encompass a damages judgment for injuries caused by a tortfeasor's breach of duty. When an employer satisfies a FELA damages award, it pays for negligence, not "for services rendered." "In legal parlance, the term 'damages' refers to money awarded as reparation *for injury resulting from breach of legal duty*." *Bowen v. Massachusetts*, 487 U.S. 879, 913 (1988) (Scalia, J., dissenting) (emphasis added) (collecting sources). FELA damages compensate for an injury from employer negligence that the law says the employer should not have committed. *See Winfield*, 244 U.S. at 164 (Brandeis, J., dissenting) (FELA liability is "a penalty for wrongdoing" and a "remedy" that "mak[es] the wrongdoer indemnify him whom he has wronged").

Damages for past wage loss under FELA also are not remuneration for services rendered. As the Eighth

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[9] Congress also exempted from RRTA compensation payments "received under a workmen's compensation law." 26 U.S.C. § 3231(e)(4)(A)(i). This Court has held that FELA preempted the field of remedies for railroad employees injured in interstate commerce, leaving to the States only actions for injuries occurring in intrastate employment. *See New York Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 147-54 (1917). When applicable, § 3231(e)(4)(A)(i) is not superfluous because employees receive state workmen's compensation benefits for services rendered. *See*, *e.g.*, Minn. Stat. § 176.011(9) (defining "[e]mployee" as "any person who performs services for another for hire").

Circuit explained, "[d]amages for lost wages . . . compensate the employee for wages the employee should have earned had he been able to render services." App. 19a-20a.[10] In his separate opinion in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), Justice Scalia similarly explained that "damages awards compensating an employee for lost wages" are "not" FICA "'wages' within the normal meaning of that term." *Id.* at 221 (Scalia, J., concurring in the judgment) (emphasis omitted).[11] The same reasoning applies to "compensation," which plays the same role as FICA wages in the RRTA's parallel statutory scheme.

B. Petitioner's Invocations Of Different Statutes To Define The RRTA Lack Merit

Petitioner's principal submission (at 18) is that the RRTA's statutory language is "not so plain" and that compensation under that Act should be defined by resort to other statutes. That argument fails.

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[10] Contrary to petitioner's assertion (at 21), the Eighth Circuit did not "add words" to the statute when it explained that "[d]amages for lost wages are, by definition, remuneration for a period of time during which the employee did not actually render any services." App. 19a-20a. The court used the word "actually" as a point of emphasis, to underscore that the statute means what it says. *See Carcieri v. Salazar*, 555 U.S. 379, 392-93 (2009).

[11] *Cleveland Indians* concerned a grievance settlement agreement, and the parties "stipulated that the settlement payments awarded . . . qualif[ied] as 'wages' within the meaning of FICA." 532 U.S. at 205. The Court did not consider the question presented here: whether satisfaction of a FELA judgment for personal physical injuries counts as "compensation," the RRTA's equivalent of FICA "wages."

1. The inclusion of "pay for time lost" in the RRA does not support reading the RRTA to tax FELA damages awards for past wage loss

Petitioner (at 23-34) and the government (at 20-30) contend that the Court should insert back into the RRTA's definition of compensation a term – "pay for time lost" – that is not in the current version of that statute (and was completely deleted from § 3231(e)(1) & (2) by 1983). That argument lacks merit. First, the RRTA does not tax, and cannot be read impliedly to tax, "pay for time lost." Second, even if the RRTA were read to tax "pay for time lost," that term does not reach satisfaction of a FELA judgment.

a. The RRTA does not tax "pay for time lost"

The RRTA's definition of compensation does not contain "pay for time lost." Those words do not appear in the statute. *See Meese v. Keene*, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.").

Petitioner and the government nevertheless insist this Court must define the RRTA by looking to the RRA, which 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). Petitioner (at 23) and the government (at 22) unpersuasively argue that Congress's use of the word "including" in the RRA means pay for time lost is an illustrative example of "remuneration for services rendered" and thus part of the RRTA's definition even though Congress took out the "time lost" clause.

i. "Pay for time lost" is not a form of remuneration for services rendered

Other provisions of the RRA reinforce the conclusion that remuneration "for services rendered" does not include pay for "time lost" from work. For calculating creditable compensation toward an annuity, the RRA defines "years of service" as "the number of years an . . . employee shall have rendered service to one or more employers for compensation *or received remuneration for time lost*." 45 U.S.C. § 231(f)(1) (emphasis added); *see also id.* § 231b(i)(2) (using similar phrasing – "or lost time" – to define "years of service" for computation of annuities). The use of the disjunctive "or" demonstrates Congress understood "remuneration for time lost" to be different from "compensation" for having "rendered service."

That understanding was clear in 1946 when Congress amended the RRTA: In resisting expanding "pay for time lost" to encompass personal-injury settlements, the AAR, *amicus* here, argued settlement payments were "compensation for injury" and "not remuneration for either services *or for lost time*." AAR Statement at 575 (emphasis added). *See Wisconsin Cent.*, 138 S. Ct. at 2070 (courts must interpret statutory words "consistent with their ordinary meaning at the time Congress enacted the statute") (alteration omitted).

Petitioner misreads (at 28) the RRTA's history in arguing that Congress added "pay for time lost" as an example of remuneration for services rendered. The House and Senate Reports indicate the change from "active service" (in 1935) to "services rendered" (in 1937) was meant to make clear "that compensation received by an employee in respect of months during which he was ill or on vacation is to be included in the compensation of the employee's tax liability." S. Rep.

No. 75-818, at 4; *accord* H.R. Rep. No. 75-1071, at 5-6 (same). Meanwhile, pay for time lost was distinct; it was not for active service or for services rendered.[12] Pay "for time lost" was a term of art Congress added in 1937 to reflect the 1936 Washington Agreement, which ensured railroad workers would receive a "coordination allowance" when workers were "deprived of employment" from railroad consolidation. *See supra* p. 9. Although affected employees could not work, the coordination allowances counted as "remuneration paid for time lost" and thus gave workers credit toward an annuity. "Even the [AAR] seems to have understood all this back in [1946]." *Wisconsin Cent.*, 138 S. Ct. at 2072; *see* AAR Statement at 574 ("that is a definite concept; a payment for lost time").

ii. "Pay for time lost" expands the definition of compensation

In the RRA's definition of "compensation," the phrase "including remuneration paid for time lost as an employee," 45 U.S.C. § 231(h)(1), *adds* to the ordinary meaning of "remuneration for services rendered." Congress used the term "including" to signal the *addition* of a discrete item, not an illustration of an otherwise subordinate element. Dictionary definitions, statutory examples, and judicial interpretations all confirm that conclusion.

First, contemporaneous dictionary definitions confirm that "including" signals an addition. *See Black's Law Dictionary* 943 ("*Including* may, according to

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[12] Petitioner (at 21) and the government (at 23) argue that taxable compensation is not confined to amounts paid for active service, and so must include pay for time lost. That argument is a strawman. Remuneration "for services rendered" can cover pay a railroad worker receives for time not actively working, such as vacation pay or sick pay. *See infra* p. 37. But that term is not so broad as to encompass damages for negligence.

context, express an enlargement and have the meaning of *and* or *in addition to* . . . ."); 2 Stroud, *Judicial Dictionary* 945 ("'Include' is very generally used in Interp Clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also, those things which the interp clause declares that they shall include."); *see also* 1 *New Century Dictionary* 809 ("include" "*often* [means] to contain as a subordinate element," but also means to "involve as a factor" and "to place in an aggregate, class, category, or the like") (emphasis added).

Second, other statutory examples show Congress's use of "including" to expand a defined term beyond its ordinary meaning. For example, FELA defines "common carrier" to "include" entities "charged with the duty of the management and operation of the business of a common carrier." 45 U.S.C. § 57. The word "include" in that context *adds* entities to the definition beyond the natural meaning of "common carrier."

Another clear example is the so-called "situs" requirement in the Longshore and Harbor Workers' Compensation Act ("LHWCA"). That provision states:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area* customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4) (emphasis added). The items introduced by the word "including" (pier, wharf, etc.) are

not encompassed within the noun that precedes them ("navigable waters"); they add to the ordinary understanding of that term.[13] The U.S. Code – past and present – contains many other similar examples showing that Congress uses "including" to expand the dictionary definition of a term.[14]

Third, this Court long has recognized Congress's use of "including" in an expansive sense. More than a century ago, this Court noted that "including" "may have the sense of addition . . . and of 'also.'" *Montello Salt Co. v. Utah*, 221 U.S. 452, 464-65 (1911); *see also id.* at 462-63 ("'We think the word "including" was used as the equivalent of "also," a sense in which it is frequently used in tariff acts.'") (quoting *United States v. Pierce*, 147 F. 199, 201 (2d Cir. 1906) (per curiam)). Just last Term, this Court recognized that "use of the word 'include' is not literal – any more than when Congress says something like "'a State "includes"

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[13] In *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), which petitioner cites (at 24), the Court interpreted LHWCA's separate "status" requirement, which provides that "[t]he term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3). In that provision, the Court "underst[ood] the word 'including' to indicate that 'longshoring operations' are part of the larger group of activities that make up 'maritime employment.'" 444 U.S. at 77 n.7. In the context of the *situs* requirement – which the Court made clear is "distinct," *id.* at 78, and did not have occasion to interpret, *see id.* at 77 n.6 – an "adjoining pier" is not "one example" of navigable waters.

[14] *See*, *e.g.*, 42 U.S.C. § 6903(23) ("The term 'resource recovery system' means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues."); 2 U.S.C. § 1301(4) ("The term 'employee' includes an applicant for employment and a former employee.").

Puerto Rico and the District of Columbia.'" *Stapleton*, 137 S. Ct. at 1658 (quoting 29 U.S.C. § 1002(10)).[15]

In short, Congress's use of "including" does not support the assertion that "pay for time lost" is a "form of money remuneration for services rendered." U.S. Br. 26. Consequently, when Congress deleted "including remuneration paid for time lost" from the RRTA's definition of compensation, it removed a discrete element, not an illustrative example otherwise already encompassed within the meaning of "remuneration for services rendered."

iii. Congress amended the RRTA to remove "pay for time lost"

In 1975 and 1983, Congress removed all references to "pay for time lost" from the RRTA's definition of compensation. *See supra* pp. 11-12. "'When Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect.'" *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). Moreover, this Court presumes that Congress acts purposefully in its disparate inclusion or exclusion. *See Burlington N. & S.F. Ry. Co. v.*

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[15] *Groman v. Commissioner*, 302 U.S. 82 (1937), which the government cites (at 22), confirms that "includes" can "enlarge the connotation" of a defined term beyond "common usage." 302 U.S. at 86. Other cases merely explain that the word "includes" does not delimit a definition. *See Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (declining to read "including" as delimiting an exemption's scope); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) ("includes" does not "cabin a definition"). That proposition is uncontroversial and established by statute. *See* 26 U.S.C. § 7701(c). Those cases do not answer the interpretive question here – whether, in context, "including" means "among which are included" or "and also."

White, 548 U.S. 53, 63 (2006). That presumption is particularly apt here.[16]

As the government points out (at 5), Congress revised the RRTA's definition of compensation several dozen times and knew how to craft the term. In 1983, for example, at the same time Congress amended RRTA taxable compensation to delete pay for time lost, Congress expanded the definition of RRA creditable compensation to encompass certain separation, subsistence, and termination allowances. *See supra* p. 12. Petitioner's request that the Court read the pay-for-time-lost phrase into the RRTA, "when it is clear that Congress knew how to specify ['compensation'] when it wanted to, runs afoul of the usual rule that 'when the legislature uses certain language in one . . . statute and different language in another, the court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46.06, at 194 (6th rev. ed. 2000)).

Seeking to avoid this conclusion, petitioner (at 29-34) and the government (at 23-30) try hard to explain why Congress might not have intended to remove "pay for time lost" from the RRTA. Petitioner suggests that Congress intended merely to change when, not whether, time lost is taxed. But the plain text reflects

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[16] The cases the government cites (at 25) do not undermine the rule that when Congress deletes statutory text the Court must give those amendments effect. In *Kellogg Brown & Root Services v. United States*, 135 S. Ct. 1970 (2015), the Court rejected the argument that deletion of the phrase "now indictable under any statute" "had the effect of sweeping in civil claims" because the operative term "offense" remained unchanged and the deletion had the effect of making the statute prospective. *Id.* at 1977-78. Here, respondent does not argue that Congress's deletion has the counterintuitive effect of expanding taxable compensation – just the opposite.

both changes and therefore indicates Congress meant to shift from an "earned" to a "paid" basis *and* remove time-lost payments from taxable compensation. Because "pay for time lost" is not an example of "remuneration for services rendered," petitioner and the government cannot explain why Congress had to remove not only the language about timing but also the reference to time-lost payments. In 1975, Congress replaced the first sentence of the definition of taxable compensation, thus signaling an intent to go beyond simply deleting the timing clause that specified when time lost "shall be deemed earned." *See supra* pp. 11-12.

The government argues (at 14, 29-30) that the Eighth Circuit drew "mistaken inferences" from the statutory history and that Congress would not have exempted time-lost payments "*sub silentio*." But Congress need not explain its intent in the legislative history for its amendments to have real and substantive effect. Reversing the Eighth Circuit's judgment would require this Court to read back into the statute words that Congress deleted. That, however, "'is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, [petitioner and the government] presum[e] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'" *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.)).

iv. The RRA and the RRTA are not *in pari materia*

Petitioner's assertion (at 25) that the RRTA and the RRA are *in pari materia* is incorrect and provides no basis for reading back into the RRTA the RRA's reference to "pay for time lost."

The RRA has the same relationship to the RRTA as the SSA does to FICA. *See Wisconsin Cent.*, 138 S. Ct. at 2071 (referring to FICA as RRTA's "companion statute" for "other industries"). This Court has expressly declined to construe *in pari materia* the SSA (the RRA's counterpart for non-railroad employees) and FICA (the RRTA's counterpart). *See Cleveland Indians*, 532 U.S. at 212-13. The Court explained that the "taxation and benefits eligibility contexts" are "discrete" and reflect different concerns. *Id.* at 213. Just as FICA taxes have "no direct relation" with Social Security benefits, *id.* at 212, so too RRTA "taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled" under the RRA, *Hisquierdo*, 439 U.S. at 574-75.[17]

The "pay for time lost" language is a significant linguistic difference between the RRTA and the RRA that precludes reading those statutes *in pari materia*. In addition, retirement benefits are based on "years of service" and levels of compensation, not taxes collected. 45 U.S.C. §§ 231a-231b. The Eighth Circuit correctly concluded these linguistic differences show

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[17] Indeed, Tier 2 tax rates fluctuate annually based on the ratio of benefits paid to the total asset value of the Railroad Retirement Account and the National Railroad Retirement Investment Trust (which depends on contributions *and* investment gains), at the aggregate, not employee, level. 26 U.S.C. § 3241.

Petitioner (at 1) expresses an interest in the solvency of the railroad retirement system, but offers no reason to suggest that the status quo – no RRTA taxes on FELA judgments – threatens the retirement system. The Board's latest annual report to Congress states that "the railroad retirement system will experience no cash-flow problems during the next 29 years." U.S. Railroad Retirement Bd., *2018 Annual Report* 2, https://rrb.gov/sites/default/files/2018-08/2018_Annual_Report.pdf.

that "'Congress intended its different words to make a legal difference.'" App. 21a (quoting *White*, 548 U.S. at 62-63 (declining to read statutes *in pari materia*)).

Congress's choice not to harmonize the RRTA and the RRA reinforces that conclusion. During the 1946 amendments, Congress considered codifying the RRTA's predecessor statute, the Carriers Taxing Act, as a part of the RRA and making all the definitions from the RRA "automatically applicable to the Carriers Taxing Act." S. Rep. No. 79-1710, pt. 2, at 9. In 1992, Congress also considered conforming RRTA "compensation" to the definitions of compensation in the RRA and the RUIA. *See* 138 Cong. Rec. at 2102 (Sec. 4108).[18] Congress did not adopt those proposals, however, confirming that the differences between the RRA's and the RRTA's definitions of "compensation" "convey differences in meaning." *Wisconsin Cent.*, 138 S. Ct. at 2071.

The authorities cited by petitioner and the government establish that the *in pari materia* canon applies only to interpreting provisions within the same statute[19] or to resolving ambiguities among statutes that address the same subject.[20] Reading statutes *in pari*

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[18] Congress defined "compensation" in the RUIA in yet another way, confirming that the linguistic differences between the RRTA and the RRA are intentional. 45 U.S.C. § 351(i)(1).

[19] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138 & n.11 (1985) (reading "waters" within different provisions of the Clean Water Act *in pari materia*); *cf. Branch v. Smith*, 538 U.S. 254, 273-82 (2003) (plurality opinion interpreting provisions in Title 2 governing elections to the House of Representatives); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (interpreting provisions within the Bankruptcy Code).

[20] *See Reiche v. Smythe*, 80 U.S. (13 Wall.) 162, 164 (1872) (interpreting two duty acts *in pari materia*); *United States v.*

materia is inappropriate where, as here, the statutes are in different titles of the U.S. Code (Title 26 and Title 45), administered by different agencies (the Treasury Department and the Board) pursuant to different regulations, and address different subjects – "the discrete taxation and benefits eligibility contexts." *Cleveland Indians*, 532 U.S. at 213.

b. In any event, "pay for time lost" does not encompass satisfaction of a FELA judgment

The statutory history of the RRTA and the RRA reveals that the concept of "pay for time lost" does not reach satisfaction of a FELA judgment. The presence of that phrase in the RRA does not advance petitioner's argument for that reason as well.

In 1937, Congress included a reference to "pa[y] for time lost" in the RRTA's definition of compensation. § 1(e), 50 Stat. 436. In 1946, over the AAR's protests, Congress expanded "pa[y] for time lost" to include remuneration for "absence on account of personal injury." § 3(f), 60 Stat. 725. That broader definition encompassed payments for personal injuries in *settlement* of a FELA claim. *See supra* pp. 9-10 & n.7. There is no evidence, however, that Congress ever considered the satisfaction of a FELA *judgment* to be taxable under that broader (since eliminated) language.

Even the broadest definition of "pay for time lost" in effect from 1946 to 1975 would not have covered the damages judgment in this case because a settlement

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Stewart, 311 U.S. 60, 64 (1940) (construing Revenue Acts of 1916 and 1928 *in pari materia*); *cf. Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (rejecting *in pari materia* argument because, although 18 U.S.C. § 1952 and § 1953 were enacted simultaneously and address "broad, common goals," they "play different roles in achieving" them).

is fundamentally different from satisfaction of a FELA judgment. In settlements, the railroad ordinarily does not admit liability – it reaches a voluntary agreement with the employee in exchange for not accepting liability for negligence. By contrast, a *judgment* from a court following suit is an involuntary payment made as an order to redress negligence.

Contemporaneous enactments contain express references to judgments, which confirms that "pay for time lost" never encompassed satisfaction of a FELA judgment. In 1946, Congress simultaneously amended the RRTA, the RRA, and the RUIA. In the RUIA, Congress specified that the Board is entitled to reimbursement for "any sum or *damages* paid or payable to [an] employee . . . through *suit*, compromise, settlement, *judgment*, or otherwise on account of *any liability*." 1946 Act § 323, 60 Stat. 741 (emphases added).[21] Thus, the same Congress that amended the definitions of "compensation" in the RRTA and the RRA to have "pay for time lost" reach settlement payments for personal injuries simultaneously referred in the RUIA to "damages" and "judgment." Those linguistic differences reinforce the conclusion that pay for time lost does not reach satisfaction of FELA judgments. *See Kellogg Brown & Root Servs.*, 135 S. Ct. at 1977 (in determining that "offense" did not include "civil violation" in False Claims Act tolling provision, Court found it "revealing that Congress ha[d] used clearer and more specific language" to designate civil violations in contemporaneous antitrust tolling statute).

Congress could have chosen to tax FELA judgments but did not. If Congress had wanted to make FELA judgments subject to taxes, it could have defined

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[21] This language remains today at 45 U.S.C. § 362(*o*).

"compensation" as "remuneration for services rendered as an employee *and damages paid or payable to an employee through suit or judgment*." "That amendment would have accomplished exactly what [petitioner] argue[s] Congress intended[,] . . . [b]ut Congress did not adopt that ready alternative." *Stapleton*, 137 S. Ct. at 1659; *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014) (when legislators do not adopt "obvious alternative" language, "the natural implication is that they did not intend" the alternative). The wording Congress chose indicates its intent not to make satisfaction of FELA judgments taxable.

2. Decisions interpreting the Social Security Act and FICA likewise do not support reading the RRTA to tax FELA damages for past wage loss

"Reaching further afield," *Wisconsin Cent.*, 138 S. Ct. at 2073, petitioner relies on cases involving the SSA and FICA – *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), and *Quality Stores*. Those cases are inapposite and offer no reason to disregard the RRTA's plain language.

a. *Nierotko* represents a discredited analysis this Court subsequently limited. There, the Court addressed whether back pay awarded to a reinstated employee by the National Labor Relations Board counted as "wages" under the SSA. The SSA defined "wages" as "all remuneration for employment" and defined "employment" as "any service, of whatever nature, performed." 327 U.S. at 362-63. The government argued that, "[s]ince 'back pay' is not received for 'service performed,' it does not come within the statutory definition" of "wages." Social Security Bd. Br. at 4, No. 318 (U.S. filed Dec. 6, 1945), 1945 WL 48899. But the government also acknowledged that

the SSA's "humanitarian purpose" "would be advanced if workers [we]re not deprived of some of their old-age protection because they [we]re the victims of unlawful employer practices." *Id.* at 24.

Instead of following Congress's explicit statutory definition, the Court focused on the SSA's remedial purpose: the "very words 'any service . . . performed . . . for his employer,' *with the purpose of the Social Security Act in mind*[,] import breadth of coverage." 327 U.S. at 365 (emphasis added; ellipses in original). The Court held that back pay for the wrongful discharge period qualified as "wages" under the SSA. *Id.* at 369-70. Furthermore, despite statutory language specifying that "wages" were "to be 'paid' in certain 'quarters,'" the Court instead concluded it "ha[d] no doubt that [the back pay] should be allocated to the periods when the regular wages were not paid as usual." *Id.* at 370.

Fifty-six years later, *Cleveland Indians* limited *Nierotko* and undermined its reasoning. There, the issue was whether settlement payments should be taxed under FICA by reference to the year they were paid or the years in which they should have been paid. 532 U.S. at 205. The government argued that the plain language of the statute – "wages paid" – required taxes to be applied to the year the settlement payments were paid. *Id.* at 209. The company argued that, "[b]ecause *Nierotko* read the . . . 'wages paid' language for benefits eligibility purposes to accommodate an allocation-back rule for backpay, . . . the identical . . . 'wages paid' language for tax purposes must be read the same way." *Id.* at 212. The Court rejected that argument.

The *Cleveland Indians* Court recognized that *Nierotko* was not based on a literal construction of the

statutory text but "in all likelihood reflected concern that the benefits scheme created in 1939 would be disserved by allowing an employer's wrongdoing to reduce the quarters of coverage an employee would otherwise be entitled to claim toward eligibility" for benefits. *Id.* Thus, *Cleveland Indians* declined to follow *Nierotko* in interpreting *identical language* in FICA: "*Nierotko* dealt specifically and only with Social Security benefits eligibility, not with taxation." *Id.*[22]

Cleveland Indians makes clear that the *Nierotko* holding is an "exception" that does not apply here. *Id.* at 215-16. "[T]he concern that animate[d] *Nierotko's* treatment of backpay in the benefits context has no relevance to the tax side" of FICA, *id.* at 216, let alone any relevance to the tax implications under the RRTA of a plaintiff's FELA judgment – *Nierotko* says nothing about what counts as taxable "income" or "compensation" under the RRTA.

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[22] Despite *Nierotko*, the Court was "inclined to conclude, given *Nierotko's* lack of concern with taxation," that the statutory text itself required back pay to be taxed when "actually paid." 532 U.S. at 216. That reasoning further undermines *Nierotko*'s interpretive approach.

Although the *Cleveland Indians* Court ultimately deferred to the Treasury regulations, it did so for reasons that do not apply here. There, the Court noted that the tax provisions evidenced a "tension" between the "twin aims" of "efficiently administrable and fair" taxation. *Id.* at 218. Here, there is no such tension: holding that a FELA damages award is not subject to RRTA taxes is both administratively efficient and fair. Because it does not require ascertaining the amount of damages subject to tax, it is efficient. And because it ensures the jury's award is not subject to double taxation (*i.e.*, the taxes the jury deducted in calculating a net-of-taxes award, and the taxes petitioner would have this Court impose on respondent), it is fair.

Petitioner also relies (at 20) on *Quality Stores*, but that case is off point. There, the Court held that severance payments are taxable "wages" under FICA. As the Court explained, "[s]everance payments are made in consideration for employment – for a 'service . . . performed'" – and are thus FICA wages. 134 S. Ct. at 1400 (ellipsis in original); *see also id.* (severance packages are designed "to reward employees for a greater length of good service and loyalty"). Likewise, severance payments are remuneration "for services rendered" and so would be taxable under the RRTA. For similar reasons, vacation pay and sick pay are also remuneration "for services rendered" – those items of compensation accrue with service time. *See*, *e.g.*, *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 27-28 & n.3 (1967) ("vacation pay" "accrued" under collective-bargaining agreement). Those payments are not a mere gratuity, but rather part of a package of benefits to retain the employee in the employer's service. They are made in consideration for past or anticipated services and are thus "for services rendered." FELA damages, by contrast, are paid for the employer's breach of a legal duty that causes injury.

Quality Stores cited *Nierotko* only for the proposition that the term "wages" is interpreted broadly "in the Social Security statutory context." 134 S. Ct. at 1400; *see also id.* (emphasizing that *Nierotko*'s interpretation of "service" was "with respect to Social Security"). The Court did not cast any doubt on *Cleveland Indians* and did not reach the question presented here.

b. Petitioner (at 20 n.20) and the government (at 18-19) unpersuasively assert that "there is no meaningful textual difference" between FICA "wages" and RRTA "compensation."

Last Term, this Court in *Wisconsin Central* addressed some of the linguistic differences between FICA and the RRTA. Although those statutes share the same basic structure, with a tax imposed on income and a tax base defined as a subset of income, Congress used different language to "carefully distinguish" the respective tax bases. 138 S. Ct. at 2073. The Court noted and explained the difference between "*all* remuneration" in FICA and "*money* remuneration" in the RRTA. *Id.* at 2071.

The RRTA's focus on "services rendered" is another significant difference between the two statutes. FICA's tax on income applies to "all remuneration for employment," 26 U.S.C. § 3121(a), which Congress defined *broadly* as "any service, of whatever nature, performed . . . by an employee for the person employing him," *id.* § 3121(b). By contrast, the RRTA's tax on income applies to "money remuneration paid to an individual for services rendered as an employee," *id.* § 3231(e)(1), and includes a particularized definition of "service," *id.* § 3231(d). Under the RRTA, an individual "is in the service of an employer" when he "renders such service for compensation" and is: "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service"; "rendering professional or technical services and is integrated into the staff of the employer"; or "rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations." *Id.* § 3231(d)(1), (2).

FICA does not define "service" and includes no similar "focus on the authority and control that an employer exercises over an employee in determining whether the employee is performing a 'service.'" *Union Pac. R.R. Co. v. United States*, 865 F.3d 1045,

1053 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 2709 (2018). In applying the statutory text in *Union Pacific*, "the Eighth Circuit w[as] right." *Wisconsin Cent.*, 138 S. Ct. at 2074. *Union Pacific* informed the Eighth Circuit's decision here. App. 20a.

Congress's intent to establish different definitions in FICA and the RRTA is clear. Consider § 3231(e)(2)(C)(i), where Congress incorporated a provision of FICA into the RRTA but expressly substituted the RRTA's definition of "services" with "employment" "each place it appears." That provision shows, contrary to the government's contention (at 16-17), Congress's intent to draw a distinction between the language in FICA and the RRTA.

In arguing that *Nierotko* and *Quality Stores* control, petitioner functionally asks this Court to expand the phrase "services rendered" in the RRTA to match FICA's broader definition of "wages." But Congress's choice to make "compensation" a "narrower term" "requires respect, not disregard." *Wisconsin Cent.*, 138 S. Ct. at 2072.[23]

In any event, personal-injury damages are not FICA "wages" either. Justice Scalia reached that conclusion in *Cleveland Indians*, and this Court has never held to the contrary: *Nierotko* concerned Social Security benefits, and *Quality Stores* concerned severance payments. Petitioner's effort to define the RRTA taxable compensation via other statutes fails.

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[23] Honoring the difference in the RRTA's definition of taxable compensation is also consistent with respecting the differences Congress has drawn between railroad-specific statutes and statutes governing other industries. *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971).

C. The Court Of Appeals' Approach Advances Congress's Purposes

1. Congress has enacted several statutes reflecting special solicitude for railroad workers. FELA is a "humanitarian" statute that this Court has "liberally construed . . . to further Congress' remedial goal" to facilitate "recovery by injured workers." *Gottshall*, 512 U.S. at 542-43; *see also Winfield*, 244 U.S. at 162 (Brandeis, J., dissenting) (FELA was "emergency legislation" given the hazards railroad workers face). The RRA also is a remedial statute Congress designed to supplant private railroad retirement and disability pensions that proved unreliable. *See Wisconsin Cent.*, 138 S. Ct. at 2070. Subjecting FELA judgments to taxes is inconsistent with those statutes.

2. Imposing RRTA taxes on FELA damages awards also creates "incentives for strategic behavior that Congress did not intend." *Cleveland Indians*, 532 U.S. at 216-17. Petitioner and its *amicus*, the AAR, seek a result that would *increase* their tax liability: If petitioner prevails, it will owe employer excise taxes in this case, *see* 26 U.S.C. § 3221, and for all future FELA judgments.

The railroads are pursuing that counterintuitive objective because subjecting FELA judgments to RRTA taxes gives railroads additional bargaining leverage in settlement negotiations with injured workers. When the railroad satisfies a judgment, whatever amount the jury allocates to past wage loss would be subject (under petitioner's proffered rule) to taxation. If the parties enter into a (pre- or post-trial) settlement agreement, however, they can allocate less of the railroad's settlement payment to taxable past wage loss and more to other categories not subject to RRTA taxes. Therefore, the railroad can use the threat of tax

liability to coerce a worker to accept a settlement less than an actual or potential damages award.

3. Petitioner's proposed rule creates unnecessary conflict with well-established FELA jury instructions, which state that damages awards are not subject to federal and state income taxes. *See Liepelt*, 444 U.S. at 498. That instruction is necessary because juries otherwise might "assume that a plaintiff's recovery . . . will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Id.* at 496.[24] At petitioner's request, the district court gave the model Eighth Circuit jury instruction, JA91a, ensuring that the jury was not confused about taxation.

Under petitioner's proposed rule, the jury will be instructed that the verdict is subject to some taxes (RRTA) but not to others (state and federal income). That approach is unnecessarily confusing to jurors and undermines Congress's goals in FELA cases of compensating plaintiffs. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537 (1983) (citing *Liepelt* and noting that lost-wages awards "should be estimated in after-tax terms"). The Court should reject that inequitable result, which contravenes the RRTA's plain text and the jury's determination.

II. A FELA JUDGMENT IS NOT TAXABLE INCOME UNDER THE RRTA

The district court correctly ruled that a separate provision of the Code – § 104(a)(2) – excludes satisfaction of a FELA judgment from RRTA taxes. That

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[24] In its extended discussion of taxation on FELA judgments, the *Liepelt* Court never mentions RRTA taxes. 444 U.S. at 490-98. That omission indicates no such taxation existed at the time.

provision provides an independent basis for affirming the judgment.

A. Section 104(a)(2) Excludes Personal-Injury Damages From The RRTA's Tax On Employee Income

1. Section 104(a)(2) provides in pertinent part that "gross income does not include . . . the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2). The Internal Revenue Code defines "gross income" in pertinent part as "all income from whatever source derived." *Id.* § 61. The effect of those provisions taken together is that the category of "all income" does *not* include damages for personal physical injuries.

Section 104(a)(2)'s exclusion from income for personal-injury damages applies to the RRTA's tax on employee income. The RRTA tax at issue is expressly "imposed on the *income* of each employee." 26 U.S.C. § 3201 (emphasis added); *see Wisconsin Cent.*, 138 S. Ct. at 2070 ("Under the [RRTA's] terms, . . . employees pay a tax based on employees' incomes.").[25] Congress's

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[25] Congress's choice in § 3201 to structure the RRTA employee tax as a tax on income as measured by a percentage of compensation accords with its making compensation a subset of income. *See* 26 U.S.C. § 61(a)(1) (defining "gross income" to include "[c]ompensation for services"); *Rowan Cos. v. United States*, 452 U.S. 247, 254 (1981) (recognizing that the counterpart to RRTA "compensation" – FICA "wages" – is a subset of income).

By contrast, the RRTA's employer tax is an "excise tax." 26 U.S.C. § 3221. *See Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 617-19 (1895) (discussing traditional distinction between direct taxes (of which income taxes are a subtype) and "duties, imposts, and excises").

decision to impose the RRTA's employee tax on income triggers the application of § 104(a)(2), which specifies that personal-injury damages are not income for purposes of the Code.

2. The RRTA's statutory history reinforces the conclusion that § 104(a)(2)'s exclusion applies to RRTA employee taxes. The RRTA consistently has levied a tax on employee "income." The 1935 statute was entitled "An Act: To levy an excise tax upon carriers and *an income tax* upon their employees, and for other purposes." 49 Stat. 974 (emphasis added). The statute accordingly "levied, collected, and paid *upon the income* of every employee" a tax. *Id.* § 2, 49 Stat. 975 ("INCOME TAX ON EMPLOYEES") (emphasis added).

The 1937 Carriers Taxing Act, the predecessor to the current RRTA, was also titled "An Act: To levy an excise tax upon carriers and certain other employers and *an income tax* upon their employees, and for other purposes." 50 Stat. 435 (emphasis added). It likewise "levied, collected, and paid *upon the income* of every employee a tax." *Id.* § 2(a), 50 Stat. 437 ("INCOME TAX ON EMPLOYEES") (emphasis added). When Congress passed the 1937 Act, FELA had been on the books for nearly 30 years, and the U.S. tax code had exempted personal-injury damages awards from *income* tax since 1919. *See* 1918 Revenue Act § 213(b)(6), 40 Stat. 1066. If Congress had intended to tax FELA damages awards in the Carriers Taxing Act of 1937 – an act that "levied" a tax "upon . . . *income*" – it would have done so expressly. *See Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (implied repeals disfavored).

In 1946, when it amended the RRTA, Congress retained the tax on income: "In addition to other

taxes, there shall be levied, collected, and paid *upon the income* of every employee a tax . . . ." 1946 Act § 3(a), 60 Stat. 723 (emphasis added).

In 1954, although Congress modified the phraseology, the RRTA's employee tax remained an income tax: "Rate of Tax. In addition to other taxes, there is hereby *imposed on the income of every employee* a tax . . . ." Internal Revenue Code of 1954, ch. 736, § 3201, 68A Stat. 1, 431 (emphasis added). Since 1954, that phrasing has remained. This consistent statutory language confirms that the RRTA tax is imposed on income.[26] Because § 104(a)(2) excludes damages for personal physical injuries from income, it excludes those awards from taxable income under the RRTA.

B. Applying § 104(a)(2) To The RRTA's Employee Tax Comports With The Prevailing Approach Under FICA

1. FICA's structure parallels the RRTA's: the employee tax is also "imposed on the income" of individuals. 26 U.S.C. § 3101(a). In the FICA context, this Court has recognized that "wages" – the term that defines the FICA tax base – "is a narrower concept than 'income.'" *Rowan*, 452 U.S. at 254; *see also Central Illinois Pub. Serv. Co. v. United States*, 435 U.S. 21, 29 (1978) (explaining that "wages" subject to withholding is "much narrower than subjectability to income taxation").

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[26] In its reply below (Cross-Appellant C.A. Reply Br. 18), petitioner incorrectly suggested that Congress's reference to "income" merely signals the constitutional power under which Congress acted. "It was not the purpose or effect of [the Sixteenth] amendment to bring any new subject within the taxing power. Congress already had power to tax all incomes." *Bowers v. Kerbaugh-Empire Co.*, 271 U.S. 170, 174 (1926).

In *Rowan*, the Court addressed whether "wages" encompassed the value of meals and lodging, which under § 119 of the Code are (like personal-injury damages) excluded from gross income. *See* 452 U.S. at 248, 251 & n.8. This Court accepted the argument that "[b]ecause 'wages' is a narrower concept than 'income' . . . the value of the meals and lodging . . . – which the Government acknowledge[d] is not 'income' [under § 119] – therefore cannot be 'wages' under FICA." *Id.* at 254. Although there (as here) the government contended that FICA "compose[d] a distinct system of taxation to which the rules of income taxation, such as the exclusion . . . in § 119, do not apply," the Court was "not persuaded by this contention." *Id.* at 257. The Court indicated that principles from income taxation apply to employment taxes. *See id.* at 257-58 (Congress did not necessarily "intend[] to tax remuneration in kind without regard to principles developed under income taxation," such as the exclusion found in § 119). The Court therefore invalidated Treasury regulations that were "far from consistent" and would have required otherwise. *Id.* at 258-59, 263.

Following that reasoning, the courts of appeals consistently have held that § 104(a)(2) excludes damages awards from FICA taxes. *See Gerbec v. United States*, 164 F.3d 1015, 1025-27 (6th Cir. 1999); *Dotson v. United States*, 87 F.3d 682, 689-90 (5th Cir. 1996); *Redfield v. Insurance Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991); *Anderson v. United States*, 929 F.2d 648, 653-54 (Fed. Cir. 1991).[27] IRS pronouncements are to like effect. *See supra* pp. 6-7.

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[27] The government's attempt (at 32) to distinguish *Gerbec* and *Dotson* is unavailing. In those cases, remand was appropriate to determine what portion of the award was not "on account of personal physical injuries," and so not excludable from income or

2. The Solicitor General tries (at 32) to distance himself from authorities recognizing that § 104(a)(2) applies to FICA wages, as well as the brief he approved in the Eighth Circuit below, which argued that § 104(a)(2) applies to FICA wages but not RRTA compensation.[28] The government, however, offers no persuasive reason why this Court should disregard the settled logic of those authorities.

Petitioner (at 25-26) and the government (at 33) insist RRTA taxable compensation and RRA creditable compensation should be symmetrical. But that is not the scheme Congress established. For instance, military service can count toward a railroad employee's "years of service" for an RRA annuity. 45 U.S.C. § 231b(i)(2). Military service, however, is not taxed under the RRTA, and so the railroad does not pay the employer excise taxes that help to fund the more generous railroad retirement pensions. Congress is presumed to have made an intentional choice in defining creditable and taxable compensation. *See Hisquierdo*, 439 U.S. at 574-75 (no direct relationship

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from FICA wages under § 104(a)(2). Here, there is no question that Loos's past wage loss is "on account of personal physical injuries," and so § 104(a)(2) excludes the damages from both income and RRTA taxes. *See Commissioner v. Schleier*, 515 U.S. 323, 329 (1995).

[28] Below, the government argued that it would be "reasonable" and "sound policy" to withhold RRTA taxes from FELA judgments, but not FICA taxes from other personal-injury awards, because railroad employees receive credit for such payments toward an annuity whereas workers in other industries do not. U.S. C.A. Br. 13-16. Petitioner makes a similar argument (at 47). That argument ignores the special treatment Congress has given to railroad workers in an array of statutes, including the RRA, which provides "a pension often more generous than the social security system supplies employees in other industries." *Wisconsin Cent.*, 138 S. Ct. at 2070.

between taxes and benefits). And the Court may not "rewrite the statute that Congress has enacted." *Dodd v. United States*, 545 U.S. 353, 359 (2005).

C. Petitioner's Responses Lack Merit

Petitioner and the government do not mention that the RRTA tax is "imposed on income." That omission is dispositive, for courts "'are obliged to give effect, if possible, to every word Congress used.'" *Carcieri*, 555 U.S. at 391 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Instead of the text, petitioner and the government rest on erroneous structural arguments.

1. The textual relationship of the RRTA to § 104(a)(2), not their location in the Code, governs

Petitioner suggests (at 38) that because § 104(a)(2) appears in a different part of the Internal Revenue Code it does not apply to the RRTA. Congress, however, expressly has forbidden reading significance into the "location or grouping of any particular section or provision or portion" of the Internal Revenue Code. 26 U.S.C. § 7806. "Congress codified [the personal-injury-damages exclusion] in § [104(a)(2)] of the income-tax provisions of the Code . . . . But that does not mean that Congress implicitly foreclosed the applicability of the rule to other provisions of the Code." *Rowan*, 452 U.S. at 258 n.13. The statutory text is clear: the RRTA's employee tax is imposed on income, and so § 104(a)(2) applies.

2. Cross-references to fringe-benefit exclusions do not negate the general exclusion for personal-injury damages

Contrary to petitioner's suggestions (at 40-42), Congress's cross-references in the RRTA to certain other exclusions from gross income do not indicate

Congress meant to deprive railroad workers of the benefit of § 104(a)(2) in obtaining payment in satisfaction of FELA judgments. If anything, the text of those exclusions undermines petitioner's position: the provisions expressly refer to exclusions from "income," rather than "gross income," thus showing Congress understands gross income exclusions to apply to all income. *See* 26 U.S.C. § 3231(e)(5)-(6), (9)-(11). Those legislative choices negate petitioner's only textual theory for avoiding the application of § 104(a)(2) to the RRTA's employee tax.

a. When Congress expressly incorporated gross income exclusions into the RRTA's definition of "compensation," it made those exclusions applicable to both employee and employer taxes. For those taxes, Congress set the tax base as a specified "percentage" of "compensation." *See* 26 U.S.C. §§ 3201(a)-(b) (employee tax), 3221(a)-(b) (employer tax). By contrast, exclusions not expressly cross-referenced – like § 104(a)(2) – apply only to the *employee* tax because that tax is imposed on "income," *id.* § 3201(a)-(b), whereas the employer tax is "an excise tax," *id.* § 3221(a)-(b). If Congress had wanted § 104(a)(2) to exclude personal-injury damages from railroad *employer* taxes, it would have incorporated that exclusion into the RRTA's definition of taxable compensation. *See White*, 548 U.S. at 63 (disparate inclusion and exclusion presumed intentional).[29] Therefore,

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[29] Although at one time Congress made certain portions of FELA settlements taxable under the RRTA as "pay for time lost" to assist railroad workers in achieving annuities, Congress has since deleted that exception to the § 104(a)(2) exclusion. *See supra* p. 12.

petitioner and the government are mistaken in arguing that applying § 104(a)(2) to the RRTA renders the cross-references meaningless.

b. Closer consideration of the exemptions on which petitioner relies confirms that Congress did not mean to deny the operation of § 104(a)(2) to injured railroad workers. Each of the exclusions Congress cross-referenced in the RRTA concerns fringe benefits that an employer provides to an employee, such as stock options, provision of meals and lodging, employee achievement awards, and education assistance. *See* 26 U.S.C. § 3231(e)(5)-(6), (9)-(11). Those voluntary transfers from the employer enhance the employer-employee relationship – they are forms of money remuneration for services rendered. Without cross-references, these items ordinarily would fall within the RRTA's definition of taxable compensation as "any form of money remuneration paid to an individual for services rendered as an employee." *Id.* § 3231(e)(1). By contrast, a FELA damages award is not "for services rendered" – it is for loss, privation, and injury. Congress therefore had no need specifically to exclude what already falls outside the RRTA's definition of compensation. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (negative implication canon applies to terms "understood to go hand in hand").

Moreover, the timing and context of Congress's cross-references to these gross income exclusions in the RRTA further confirm that Congress did not mean to negate the application of § 104(a)(2) to the RRTA's tax on employee income. The following table shows when and where Congress added cross-references to gross income exclusions in the RRTA and FICA.

Subject

Exclusion from Income: Date Added	**RRTA Section: Date Added**	**FICA Section: Date Added**
Employee achievement awards		
§ 74(c): 1986	§ 3231(e)(5): 1986	§ 3121(a)(20): 1986
Amounts received under Federal or State student loan forgiveness		
§ 108(f)(4): 2004	§ 3231(e)(5): 2004	§ 3121(a)(20): 2004
Qualified scholarships		
§ 117: 1954	§ 3231(e)(5): 1984	§ 3121(a)(20): 1984
Fringe benefits		
§ 132: 1984	§ 3231(e)(5): 1984	§ 3121(a)(20): 1984
Employer-provided educational assistance		
§ 127: 1978	§ 3231(e)(6): 1984	§ 3121(a)(18): 1978
Value of meals and lodging furnished by employer		
§ 119: 1954	§ 3231(e)(9): 1989	§ 3121(a)(19): 1983
Medical savings account contributions		
§ 106(b): 1996	§ 3231(e)(10): 1996	not added
Employer contributions to health savings accounts		
§ 106(d): 2003	§ 3231(e)(11): 2003	not added
Qualified stock options		
§ 421(a), § 422(a)-(b), § 423(a)-(b): 1964	§ 3231(e)(12): 2004	§ 3121(a)(22): 2004

Congress cross-referenced each of these exclusions between 1978 and 2004 – some 40 to 70 years after the RRTA's enactment. In many of those provisions, Congress added cross-references to the RRTA or FICA at the same time that it *created* the gross income exclusion – *e.g.*, §§ 74(c), 106(b), 106(d), 108(f), 127, 132. That history shows that – in addition to applying the exclusion to the excise tax on employers – Congress was clarifying the tax on employee income, and not seeking indirectly to exclude exemptions not cross-referenced.[30]

If Congress had wanted § 104(a)(2) to apply only to taxes withheld under FICA but not the RRTA, it could have so designated. *Cf.*, *e.g.*, 26 U.S.C. § 3231(e)(3) (specifying that rule for cash tips applies "[s]olely for purposes of the taxes imposed by section 3201" of RRTA). Congress did not make that choice.

In the end, the purpose of exclusions is to reduce tax liability, not to increase it. By cross-referencing gross income exclusions in the RRTA, Congress made doubly sure that it *reduced* a railroad employee's potential tax burden. In adding the cross-references relating to fringe benefits, Congress evinced no intent indirectly to *increase* taxes on railroad employees who suffered physical injuries from employer negligence.

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[30] The statutes at issue in the cases petitioner cites (at 42) are fundamentally different – those statutes provided exemptions at the outset, not cross-references added later. *Elgin v. Department of Treasury*, 567 U.S. 1, 13 (2012), concerned 5 U.S.C. § 7703(b)(2), which, since the *inception* of the Civil Service Reform Act of 1978, has delimited the statutes under which an employee may seek judicial review outside the Federal Circuit. *United States v. Bess*, 357 U.S. 51, 57 (1958), did not involve cross-references added to an earlier-enacted statute, but rather the comparison of one statute with two other provisions enacted contemporaneously.

III. TREASURY HAS NOT ADDRESSED WHETHER A FELA JUDGMENT IS TAXABLE UNDER THE RRTA, AND ITS LITIGATING POSITIONS DO NOT WARRANT DEFERENCE

A. *Chevron* Deference Is Inappropriate In This Case

"[I]n light of all the textual and structural clues," there is "no ambiguity for the agency to fill." *Wisconsin Cent.*, 138 S. Ct. at 2074.[31] Even if the statute were ambiguous, the Treasury Department has not formally ruled on the precise question.

The current Treasury regulations state that "compensation" "has the same meaning as the term *wages* in section 3121(a)" of FICA, "except as specifically limited by the [RRTA]." 26 C.F.R. § 31.3231(e)-1(a)(1) (emphasis added). "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." *Id.* § 31.3231(e)-1(a)(4). The regulations do not speak to payments for personal injuries.

At one point, Treasury regulations specified that "compensation" included "a payment . . . made to an employee *with respect to a personal injury* [that] includes pay for an identifiable period of absence from active service." Republication of Regulations, 25 Fed.

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[31] The government incorrectly says (at 11) that the Eighth Circuit "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). In fact, the court of appeals concluded that "the RRTA is unambiguous" and that therefore the regulations "receive no deference under *Chevron*." App. 24a.

Reg. 13,032, 13,067 (Dec. 20, 1960) (§ 31.3231(e)-1(b)(3)) (emphasis added). But the Secretary deleted that language in 1979. *See* Definition of Compensation for Purposes of the Railroad Retirement Tax Act, 44 Fed. Reg. 15,484, 15,484-85 (Mar. 14, 1979) (deleting subparagraph (b)(3)). Thus, even assuming an award of lost wages in a FELA judgment counts as such a payment, the current RRTA regulations do not attempt to impose taxes on satisfaction of that judgment. The Treasury Department has not since issued regulations or guidance indicating that it considers satisfaction of FELA judgments to be "compensation" or "income" taxable under the RRTA.

That change in the regulations underscores that the government has not "followed [its interpretation] consistently since the inception of the statute." *Wisconsin Cent.*, 138 S. Ct. at 2075 (Breyer, J., dissenting). Treasury is entitled to no deference when the regulations say nothing about FELA damages awards. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (when regulation "does not address the issue," it receives no deference).

B. The Regulations' Inclusion Of "Pay For Time Lost" Does Not Support Petitioner's Position

Petitioner (at 34-36) and the government (at 33-34) claim significance from the current regulations still including "pay for time lost" within the definition of compensation. That phrase does not include satisfaction of a judgment. *See supra* pp. 32-34.

Even assuming that "pay for time lost" encompasses a FELA damages award, the Treasury's inclusion of that language in its regulations is an impermissible interpretation of the statute, because the agency cannot rewrite the law by keeping the language

Congress removed. *Chevron* "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).[32]

C. The Revenue Rulings Do Not Support Petitioner's Argument

Contrary to petitioner's suggestion (at 43-44), the Revenue Rulings do not answer the question presented. Those rulings pertain to settlements, not FELA judgments. "[B]ecause neither revenue ruling is directly on point," the Eighth Circuit rightly gave them "no consideration." App. 24a n.11. In any event, IRS "interpretive rulings do not have the force and effect of regulations," and "they may not be used to overturn the plain language of the statute." *Schleier*, 515 U.S. at 336 n.8. Tellingly, the government does not even cite them in its brief.[33]

D. History Supports The Court Of Appeals' Interpretation

The novelty of petitioner's arguments highlights why its interpretation is incorrect. For more than 80

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[32] Petitioner (at 36-37) and the government (at 24-25) greatly overstate in arguing that Congress has ratified or somehow acquiesced in the IRS's interpretation that the statute still includes "pay for time lost." "What [they] refer[] to as 'Congress' deliberate acquiescence' should more appropriately be called Congress's failure to express any opinion." *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality); *see also Rowan*, 452 U.S. at 258-62 (rejecting government's argument that Congress endorsed Treasury regulations where those regulations were "far from consistent" over time).

[33] Petitioner also cites (at 37) the Board's positions, but the Treasury Secretary, not the Board, is charged with administering the RRTA. 26 U.S.C. § 7805. So no deference is due to the Board. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018).

years, FELA and the RRTA have coexisted, yet no one – not petitioner, not the government, and not the AAR whose members employ 95% of all railroad employees – points to any instance in which the IRS has imposed RRTA taxes on satisfaction of a FELA judgment. The railroads have only recently raised this issue in litigation beginning in 2012.[34] The government has piggy-backed on these cases to advance its self-serving position that satisfaction of FELA judgments are taxable under the RRTA.

The government's position is inconsistent with the RRTA's plain text. It also conflicts with the settled treatment of § 104(a)(2) in the parallel FICA context. Although the government disavows those authorities, it provides no persuasive reason to do so. Affirming the Eighth Circuit ensures consistent outcomes across the RRTA and FICA and thus confirms that the statutory scheme operates to effectuate Congress's goal "to promote simplicity and ease of administration" in the tax code. *Rowan*, 452 U.S. at 257. The government's position on the precise question, advanced for the first time in recent litigation and contrary to many years of practical experience, therefore has no "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140

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[34] *See*, *e.g.*, *Nielsen v. BNSF Ry. Co.*, No. 0807-10580, 2012 WL 12526344 (Or. Cir. Ct., Multnomah Cty., Mar. 5, 2012); *see also* JA27a (Declaration of Michael P. McReynolds in Support of Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Collateral Source Offsets) ("I have been practicing law since 1977 in the FELA field, including my first 10 years working for Union Pacific Railroad and [petitioner]. In the hundreds of cases I have been involved with, [petitioner] and other railroads agreed that FELA verdicts and settlements, were not taxable under the Internal Revenue regulations and the [RRTA]. Only in the past few years has any suggestion been made that Railroad Retirement taxes should be deducted from FELA judgments.").

(1944); *see also Alaska v. Federal Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) ("We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation because 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'") (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 10, 2018

STATUTORY ADDENDUM

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1. Section 104(a) of the Internal Revenue Code, 26 U.S.C. § 104(a), provides:

§ 104. Compensation for injuries or sickness

(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

(3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980;

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a terroristic or military action (as defined in section 692(c)(2)); and

(6) amounts received pursuant to—

(A) section 1201 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796); or

(B) a program established under the laws of any State which provides monetary compensation for surviving dependents of a public safety officer who has died as the direct and proximate result of a personal injury sustained in the line of duty,

except that subparagraph (B) shall not apply to any amounts that would have been payable if death of the public safety officer had occurred other than as the direct and proximate result of a personal injury sustained in the line of duty.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee. For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.

2. Relevant provisions of the Federal Insurance Contributions Act, 26 U.S.C. § 3101 *et seq.*, provide as follows:

§ 3101. Rate of tax

(a) Old-age, survivors, and disability insurance.—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to 6.2 percent of the wages (as defined in section 3121(a)) received by the individual with respect to employment (as defined in section 3121(b)).

(b) Hospital insurance.—

(**1) In general.**—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to 1.45 percent of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)).

(2) Additional tax.—In addition to the tax imposed by paragraph (1) and the preceding subsection, there is hereby imposed on every taxpayer (other than a corporation, estate, or trust) a tax equal to 0.9 percent of wages which are received with respect to employment (as defined in section 3121(b)) during any taxable year beginning after December 31, 2012, and which are in excess of—

(A) in the case of a joint return, $250,000,

(B) in the case of a married taxpayer (as defined in section 7703) filing a separate return, ½ of the dollar amount determined under subparagraph (A), and

(C) in any other case, $200,000.

(c) Relief from taxes in cases covered by certain international agreements.—During any period in which there is in effect an agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the taxes imposed by this section to the extent that such wages are subject under such agreement exclusively to the laws applicable to the social security system of such foreign country.

§ 3111. Rate of tax

(a) Old-age, survivors, and disability insurance.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to 6.2 percent of the wages (as defined in section 3121(a)) paid by the employer with respect to employment (as defined in section 3121(b)).

(b) Hospital insurance.—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to 1.45 percent of the wages (as defined in section 3121(a)) paid by the employer with respect to employment (as defined in section 3121(b)).

(c) Relief from taxes in cases covered by certain international agreements.—During any period in which there is in effect an agreement entered into pursuant to section 233 of the Social Security Act with any foreign country, wages received by or paid to an individual shall be exempt from the taxes imposed by this section to the extent that such wages are subject under such agreement exclusively to the laws

applicable to the social security system of such foreign country.

[**(d)** Repealed. Pub. L. 115-141, div. U, title IV, § 401(b)(34), Mar. 23, 2018, 132 Stat. 1204]

(e) Credit for employment of qualified veterans.—

(1) In general.—If a qualified tax-exempt organization hires a qualified veteran with respect to whom a credit would be allowable under section 38 by reason of section 51 if the organization were not a qualified tax-exempt organization, then there shall be allowed as a credit against the tax imposed by subsection (a) on wages paid with respect to employment of all employees of the organization during the applicable period an amount equal to the credit determined under section 51 (after application of the modifications under paragraph (3)) with respect to wages paid to such qualified veteran during such period.

(2) Overall limitation.—The aggregate amount allowed as a credit under this subsection for all qualified veterans for any period with respect to which tax is imposed under subsection (a) shall not exceed the amount of the tax imposed by subsection (a) on wages paid with respect to employment of all employees of the organization during such period.

(3) Modifications.—For purposes of paragraph (1), section 51 shall be applied—

(A) by substituting "26 percent" for "40 percent" in subsection (a) thereof,

(B) by substituting "16.25 percent" for "25 percent" in subsection (i)(3)(A) thereof, and

(C) by only taking into account wages paid to a qualified veteran for services in furtherance of the activities related to the purpose or function constituting the basis of the organization's exemption under section 501.

(4) Applicable period.—The term "applicable period" means, with respect to any qualified veteran, the 1-year period beginning with the day such qualified veteran begins work for the organization.

(5) Definitions.—For purposes of this subsection—

(A) the term "qualified tax-exempt organization" means an employer that is an organization described in section 501(c) and exempt from taxation under section 501(a), and

(B) the term "qualified veteran" has the meaning given such term by section 51(d)(3).

(f) Credit for research expenditures of qualified small businesses.—

(1) In general.—In the case of a taxpayer who has made an election under section 41(h) for a taxable year, there shall be allowed as a credit against the tax imposed by subsection (a) for the first calendar quarter which begins after the date on which the taxpayer files the return specified in section 41(h)(4)(A)(ii) an amount equal to the payroll tax credit portion determined under section 41(h)(2).

(**2) Limitation.**—The credit allowed by paragraph (1) shall not exceed the tax imposed by subsection (a) for any calendar quarter on the wages paid with respect to the employment of all individuals in the employ of the employer.

(3) Carryover of unused credit.—If the amount of the credit under paragraph (1) exceeds the limitation of paragraph (2) for any calendar quarter, such excess shall be carried to the succeeding calendar quarter and allowed as a credit under paragraph (1) for such quarter.

(4) Deduction allowed for credited amounts.—The credit allowed under paragraph (1) shall not be taken into account for purposes of determining the amount of any deduction allowed under chapter 1 for taxes imposed under subsection (a).

§ 3121. Definitions

(a) Wages.—For 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; except that such term shall not include—

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a

trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) 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—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workman's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph 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;

[**(3)** Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason

of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)—

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law,

with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless—

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500,

except that clause (ii) shall not apply in determining whether remuneration paid to an employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

[**(9)** Repealed. Pub.L. 98-21, Title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)(A) tips paid in any medium other than cash;

(B) 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 $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid—

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents),

other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;

(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year

by the organization to the employee for such service is less than $100;

[**(17)** Repealed. Pub.L. 113-295, Div. A, Title II, § 221(a)(19)(B)(iv), Dec. 19, 2014, 128 Stat. 4040]

(18) 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, 129, 134(b)(4), or 134(b)(5);

(19) the value of any 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;

(20) 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;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) 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; or

(23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.

(b) Employment.—For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section

233 of the Social Security Act; except that such term shall not include—

* * * * *

(9) service performed by an individual as an employee or employee representative as defined in section 3231;

* * * * *

3. Relevant provisions of the Railroad Retirement Tax Act, 26 U.S.C. § 3201 *et seq.*, provide as follows:

§ 3201. 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.

(c) Cross reference.—

For application of different contribution bases with respect to the taxes imposed by subsections (a) and (b), see section 3231(e)(2).

§ 3221. Rate of tax

(a) Tier 1 tax.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the applicable percentage of compensation paid during any calendar year by such employer for services rendered to such employer. 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 3111 for the calendar year.

(b) Tier 2 tax.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the percentage determined under section 3241 for any calendar year of the compensation paid during such calendar year by such employer for services rendered to such employer.

(c) Cross Reference.—

For application of different contribution bases with respect to the taxes imposed by subsections (a) and (b), see section 3231(e)(2).

[**(d)** Redesignated (c)]

§ 3231. Definitions

* * * * *

(b) Employee.—For purposes of this chapter, the term "employee" means any individual in the service of one or more employers for compensation. The term "employee" includes an officer of an employer. The term "employee" shall not include any individual while such individual is engaged in the physical operations

consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

* * * * *

(d) Service.—For purposes of this chapter, an individual is in the service of an employer whether his service is rendered within or without the United States, if—

(1) he 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

(2) he renders such service for compensation;

except that an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States, only when he is rendering service to it in the United States; and an individual shall be deemed to be in the service of such a local lodge or division only if—

(3) all, or substantially all, the individuals constituting its membership are employees of an employer conducting the principal part of its business in the United States; or

(4) the headquarters of such local lodge or division is located in the United States;

and an individual shall be deemed to be in the service of such a general committee only if—

(5) he is representing a local lodge or division described in paragraph (3) or (4) immediately above; or

(6) all, or substantially all, the individuals represented by it are employees of an employer conducting the principal part of its business in the United States; or

(7) he acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer, but in such case if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only such proportion of the remuneration for such service shall be regarded as compensation as the proportion which the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case such other formula as the Railroad Retirement Board may have prescribed pursuant to section 1(c) of the Railroad Retirement Act of 1937 (45 U.S.C. 228a) shall be applicable, and if the application of such mileage formula, or such other formula as the Board may prescribe, would result in the compensation of the individual being less than 10 percent of his remuneration for such service, no part of such remuneration shall be regarded as compensation;

Provided however, That an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof; and the laws applicable on August 29, 1935, in the place where the service is rendered shall be deemed to have been applicable there at all times prior to that date.

(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.

* * * * *

§ 3241. Determination of tier 2 tax rate based on average account benefits ratio

(a) In general.—For purposes of sections 3201(b), 3211(b), and 3221(b), the applicable percentage for any calendar year is the percentage determined in accordance with the table in subsection (b).

(b) Tax rate schedule.—

"Average account benefits ratio		Applicable percentage for sections 3211(b) and 3221(b)	Applicable percentage for section 3201(b)
At least	But less than		
	2.5	22.1	4.9
2.5	3.0	18.1	4.9
3.0	3.5	15.1	4.9
3.5	4.0	14.1	4.9
4.0	6.1	13.1	4.9
6.1	6.5	12.6	4.4
6.5	7.0	12.1	3.9
7.0	7.5	11.6	3.4
7.5	8.0	11.1	2.9
8.0	8.5	10.1	1.9
8.5	9.0	9.1	0.9
9.0		8.2	0

(c) Definitions related to determination of rates of tax.—

(1) Average account benefits ratio.—For purposes of this section, the term "average account benefits ratio" means, with respect to any calendar year, the average determined by the Secretary of the account benefits ratios for the 10 most recent fiscal years ending before such calendar year. If the amount determined under the preceding sentence is not a multiple of 0.1, such amount shall be increased to the next highest multiple of 0.1.

(2) Account benefits ratio.—For purposes of this section, 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 Trust during such fiscal year.

(d) Notice.—No later than December 1 of each calendar year, the Secretary shall publish a notice in the Federal Register of the rates of tax determined under this section which are applicable for the following calendar year.

4. Relevant provisions of the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.*, provide as follows:

§ 231. Definitions

* * * * *

(f)(1) The term "years of service" shall mean the number of years an individual as an employee shall have rendered service to one or more employers for compensation or received remuneration for time lost, and shall be computed in accordance with the provisions of section 231b(i) of this title. Twelve calendar months, consecutive or otherwise, in each of which an employee has rendered such service or received such wages for time lost, shall constitute a year of service. Ultimate fractions shall be taken at their actual value.

(2) Where service prior to August 29, 1935, may be included in the computation of years of service as provided in subdivision (3) of section 231b(i) of this title, it may be included as to—

(i) service rendered to a person which was an employer on August 29, 1935, irrespective of whether such person was an employer at the time such service was rendered;

(ii) service rendered to any express company, sleeping-car company, or carrier by railroad which was a predecessor of a company which, on August 29, 1935, was an employer as defined in paragraph (i) of subsection (a)(1), irrespective of whether such predecessor was an employer at the time such service was rendered; and

(iii) service rendered to a person not an employer in the performance of operations involving the use

of standard railroad equipment if such operations were performed by an employer on August 29, 1935.

* * * * *

(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.

(2) An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting

from his displacement to a less remunerative position or occupation. 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.

(3) Solely for purposes of determining amounts to be included in the compensation of an employee, the term "compensation" shall also include 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) Tips included as compensation by reason of the provisions of subdivision (3) shall be deemed to be paid at the time a written statement including such tips is furnished to the employer pursuant to section 6053(a) of the Internal Revenue Code of 1986 [26 U.S.C. 6053(a)] or, if no statement including such tips is so furnished, at the time received. Tips so deemed to be paid in any month shall be deemed paid for services rendered in such month.

(5) In determining compensation, there shall be attributable as compensation paid to an employee in calendar months in which he is in military service creditable under section 231b(i)(2) of this title, in addition to any other compensation paid to him with respect to such months—

(i) for each such calendar month prior to 1968, $160;

(ii) for each such calendar month after 1967 and prior to 1975, $260; and

(iii) for each such calendar month after 1974, the amount which is creditable as such individual's "wages" under section 209(d) of the Social Security Act [42 U.S.C. 409(d)].

(6) Notwithstanding the provisions of the preceding subdivisions of this subsection, the term "compensation" shall not include—

(i) tips, except as is provided under subdivision (3) of this subsection;

(ii) remuneration for service which is performed by a non-resident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 1101(a)(15) of title 8, as amended, and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be;

(iii) remuneration earned in the service of a local lodge or division of a railway-labor-organization employer with respect to any calendar month in which the amount of such remuneration is less than $25;

(iv) remuneration for service as a delegate to a national or international convention of a railway-labor-organization employer 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;"

(v) 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; and

(vi) 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.

(7) The term "compensation" includes any separation allowance or subsistence allowance paid under any benefit schedule provided under section 701 of title VII of the Regional Rail Reorganization Act of 1973 [45 U.S.C. 797] and any termination allowance paid under section 702 of that Act [45 U.S.C. 797a], but does not include any other benefits payable under that title [45 U.S.C. 797 et seq.]. The total amount of any subsistence allowance paid under a benefit schedule provided pursuant to section 701 of the Regional Rail Reorganization Act of 1973 shall be considered as having been earned in the month in which the employee first timely filed a claim for such an allowance.

(8) Notwithstanding any other provision of this subchapter, for the purposes of sections 231b(a)(1),

231c(a)(1), and 231c(f)(1) of this title, the term "compensation" includes any payment from any source to an employee or employee representative if such payment is subject to tax under section 3201 or 3211 of the Internal Revenue Code of 1986 [26 U.S.C. 3201, 3211].

* * * * *