Legal Opinion L-2005-01
January 14, 2005

U.S. Railroad Retirement Board
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TO : Dorothy A. Isherwood
Director of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Partial Retroactivity of Automated Annuity Increases for Additional Railroad Service and Compensation Reopening Final Annuity Determinations under Part 261

This is in reference to Labor Member Speakman's memorandum to you dated December 21, 2004, requesting that you provide additional analysis of the proposed implementation of the automated program to adjust annuities for railroad service and compensation reported after the annuities were paid. In addition to his questions to you regarding background data, Mr. Speakman's memorandum to you raised two legal questions. I am providing my response to these questions to you for use in your reply. I have also furnished copies of this reply directly to Mr. Schwartz, Mr. Speakman and Mr. Kever.

The circumstances precipitating Mr. Speakman's memorandum may be briefly stated as follows. An employee and spouse or survivor annuity is calculated based upon the railroad service months and compensation in the Board's records at the time the annuity is initially awarded. On occasion, the railroad employer will subsequently file an amended report changing the number of months or amount of compensation or both. Heretofore, when the railroad filed an amended report, the employee's claim would have to be manually reviewed by a claims examiner to determine whether the report required that the annuity be recalculated. Many of these claims have never been reviewed.

The automated program which your Office has now developed will henceforth recalculate annuities as necessary to include future amendments to the Board's record of an employee's railroad service and compensation. The automated program may also increase annuities for which adjustment reports have been filed in earlier years, but the capacity to make this adjustment automatically for prior months is limited. You therefore propose to implement the new program by increasing annuity payments for affected annuitants only for months beginning no earlier than January 1, 2002, regardless of whether the annuity could increase for prior months. Any request by annuitants for recalculation of annuities for previous months would be denied on grounds that the determination of the annuity calculation prior to January 2002 is final.

Mr. Speakman's first question is: "With respect to the cases which you intend to reopen, what is the legal basis for not revising the initial decision (the initial annuity award) but merely revising the annuity rate at a later point in time?"

Response: The Board has authority under section 261.11 to order a final annuity award be partially reopened. The Office of Programs may therefore reopen a specific category of final annuity determination as directed by the Board.

The rules governing finality of decisions with respect to annuities under the Railroad Retirement Act are set forth by Part 261 of the Board's regulations (20 CFR 261). Section 261.1(a) of that Part states that after the expiration of the time limits for administrative review of an agency decision pursuant to Part 260 of the regulations (20 CFR 260), "* * * decisions of the agency may be reopened and revised under the conditions described in this part, by the bureau, office, or entity that made the earlier decision * * *". The conditions under which the appropriate office may reopen an earlier decision are specified by section 261.2 of the regulations. These conditions range from "any reason" within the first year (261.2(a)), to

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"new and material evidence" or "adjudicative error not consistent with the evidence of record" within the first four years (261.2(b)), and to reopening “at any time” if an earlier unfavorable decision resulted from a clerical error, or an error that appeared on the face of the evidence at the time of the unfavorable decision (261.2(c)(7)). When additional compensation and service of record was not overlooked at the time of the initial decision but is entered in the Board’s records more than four years after the determination of an annuitant’s service and compensation for annuity calculation purposes, section 261.10 allows the annuity rate to be corrected only from the date the evidence is received, leaving prior payments unadjusted.

As discussed in the response below to Mr. Speakman’s second question, the decision to reopen is discretionary; no regulation requires reopening of the cases under consideration. Section 261.2 defines the limited circumstances under which the Board has delegated authority to reopen final decisions to the subordinate divisions of the agency. Except as specified by section 261.10 for amendments to service records more than four years after the initial determination, these delegations do not include the authority to restrict the scope of reopening a case once the decision to reopen is made. However, section 261.11 of the regulations reserves to the Board discretion to interdict an outcome which would otherwise result under any other provision of 261, either by requiring reopening, or by requiring a decision not be reopened. In my opinion, the Board clearly has authority under this section to tailor a solution appropriate to specific circumstances. Accordingly, the Board may by order adopt your recommendation and direct that final determinations of annuity amounts in cases included in the automated payment be reopened only with respect to payments beginning from a specified date, such as January 2002.

Mr. Speakman’s second question is: "We would like an analysis from the General Counsel as to how administrative finality is supported in examples provided by the Board's reopening regulations under part 261 of our regulations. Specifically, it is our understanding that most of these cases involve adjustments to records of compensation made within the 4-year limit provided in section 9 of the Railroad Retirement Act (RRAct). It is also our understanding that the initial decision in these cases (the initial annuity award) was correct based on the service and compensation record at the time of the initial decision and because of the lack of any protest to the annuity rate * * * [and is] considered final. If these assumptions are correct, what is the legal basis for not applying the reopening regulations found in section 261.2 to these claim[s] where applicable?"

Response: Once a decision becomes final, reopening is discretionary. Though subordinate divisions of the agency are subject to limitations which the Board has imposed by section 261.2 and other sections of Part 261 regarding delegations of this discretion, the Board itself has ultimate authority under section 261.11 to restrict the scope of reopening of any final decision under the Railroad Retirement Act.

If handled by the Office of Programs without Board approval of the proposal, section 261.2 would apply to the cases included in the proposal as follows: First, section 261.2(a) will be applied in its customary fashion to reopen and pay with full retroactivity any case less than a year old at the time of the automated payment. Second, because the automated payment by definition would apply to cases where the employee’s railroad service record was amended after the initial determination, decisions more than four years old were correctly paid based on the record at the time of payment. These cases were thus not initially erroneous and would not be reopened under section 261.2(c)(7). The category of cases less than four years old falls directly within section 261.2(b): an employer report of amended service and compensation is clearly “new and material evidence”. As Mr. Speakman’s question suggests, once Office of Programs finds that an employee has been credited with additional railroad service and compensation within four years of the initial determination, that determination would be subject to completely retroactive reopening back to the effective date under 261.2(b). This would also be the result for any case less than a year old, reopened under 261.2(a), but which has an annuity beginning date prior to January 2002. Finally, if the employer report was received more than 4 years after the initial determination, Office of Programs could use section 261.10 to reopen annuity payments, but would be required make payment retroactive to the time the employer report was received. On the other hand, nothing in the regulations

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requires that the Office of Programs reopen the final determination of annuity rates in these cases at all. Under Part 261, the Office of Programs therefore could decide to only initiate the automated program for future compensation reports, and leave all prior decisions undisturbed. Nothing has been changed with respect to the finality of these cases merely by the development of the new automated program: the final determination of the annuity rate in each case remains final.

In sum, under section 261.2(a) of the regulations, the Office of Programs has clear authority to reopen cases initially paid in the year prior to the date of the automatic adjustment payments, and Programs could do so without further Board approval as long as the adjusted payments were fully retroactive. With Board approval pursuant to section 261.11, the Office of Programs may reopen other cases subject to limitations as the Board believes appropriate. The Board may, after consideration of the proposal by the Director of Programs, specify that retroactivity of any reopened decision is limited to annuities for months beginning January 2002. The Board would remain within bounds of its discretion under the law if the limitations imposed are not arbitrary or capricious. To the extent cases do not lie within the bounds authorized by the Board, the determination of annuity amounts in those cases and others for which no automated payment is issued, would remain final determinations, not subject to further appeal.