U.S. Railroad Retirement Board
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Legal Opinion L-2001-16.1
December 3, 2001

TO : Robert E. Bergeron
Assistant to the Labor Member

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Credibility of Military Service
Reserve Volunteers Called to Active Duty

This is in reply to your further inquiry regarding the term "war service period" as used to determine the creditability of active service in the United States armed forces as railroad service for benefit entitlement purposes under the Railroad Retirement Act. For the reasons set forth below, I agree with your interpretation that an individual's military service may be considered to be in a "war service period" without regard to when the service was performed, if that individual's service was involuntary by reason of being called to active duty pursuant to call by the President or by an Act of Congress or a regulation, order or proclamation pursuant thereto.

My previous memorandum to you, issued as Legal Opinion L-2001-16, concerned creditability under the Act of military service by an individual who enlisted as a reservist but who was later called to active duty. In advising you that the call to active duty constituted "involuntary service", I stated that the individual's period of active duty could be considered creditable for annuity computation purposes "providing that the period of time fell within a 'war service period' and met the additional requirement for preceding railroad employer service" as specified by section 3(i)(2) of the Railroad Retirement Act. This advice is consistent with regulations of the Board, which provide in pertinent part as follows:

212.4 Periods of creditable military service.

In order for military service to be considered creditable under the Railroad Retirement Act, it must have been performed during one of the following periods:

* * * * *

[(a) through (d) dates of the Spanish American War, Philippine Insurrection, Mexican Border Disturbances, and World War I]

* * * * *

(e) September 8, 1939 through June 14, 1948—National Emergency and World War II * * *.

(f) June 15, 1948, through December 15, 1950. This service is creditable if:

(1) Entered into involuntarily; or
(2) Entered into voluntarily, but only if * * * [certain conditions specific to this period are met]

(g) December 16, 1950, through September 14, 1978—National Emergency. (Emphasis supplied).

Following the most recent amendment to section 212.4 of the regulations in May 1990, Legal Opinion L-91-32.1 determined that a new military service period began with the President's declaration of the current national emergency on August 2, 1990.

Under section 212.4 of the regulations quoted above, as augmented by Legal Opinion L-91-32.1, all active duty in the United States armed forces within one of the specified periods is potentially creditable for benefit entitlement purposes, whether voluntary or involuntary. Section 212.4 would appear to further require that an individual's term of military service must fall within a listed war service period. In particular, this would mean involuntary active duty

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during the period between the national emergency ending September 14, 1978 and the most recent national emergency which began August 2, 1990, could not be creditable because it does not fall within a "war service period". However, as you point out in your memorandum, the term "war service period" is defined by section 1(g)(2) of the Act in part as follows:

> For purposes of section 3(i)(2) of this Act, a "war service period" shall mean (A) any war period, or (B) with respect to any particular individual, any period during which such individual (i) * * *, or (ii) was required by call of the President, or by any Act of Congress or regulation, order, or proclamation pursuant thereto, to enter and continue in military service, or (C) any period after September 7, 1939, with respect to which a state of national emergency was duly declared to exist which requires a strengthening of the national defense.
> (emphasis supplied).

Paragraphs (A) and (C) of section 1(g)(2) are framed as discrete time periods. Thus, a "war period" for purposes of paragraph (A) is defined by section 1(g)(3) in terms of actual conduct of military action by the United States armed forces. See Legal Opinion L-72-234, which characterized a war period as "declared war involving the United States, an invasion of the United States, or in effect, a civil war within the United States"; and Legal Opinion L-41-568, finding military action by armed forces of the United States in defense of U.S. territory in the Philippine Islands constituted a war period during the time hostilities were conducted. Paragraph (C) of section 1(g)(2) is delineated by a period within a declared national emergency. See Legal Opinion L-91-32.1, noted earlier. The time-period specific language of section 212.4 of the regulations is therefore consistent with section 1(g)(2) of the Act in this respect.

Paragraph (B) of section 1(g)(2), however, is stated in terms of compulsory service in the armed forces by the individual employee, without reference to an external time period. Legal Opinion L-50-229, to which you refer in your memorandum, considered employees who entered the armed forces after the end of the World War II emergency period June 14, 1948. The Associate General Counsel concluded in that opinion that section 4(c) of the 1937 Act required that military service by an individual which was begun involuntarily due to the Selective Service Act of 1948 during that time period could be creditable, but that voluntary service could not.

The 1978-1990 period was similar to the 1948-1950 period in that no declared national emergency or war period was in effect. Consistent with the reasoning of L-50-229, voluntary active service in the United States armed forces begun during the 1978-1990 period is clearly not creditable for benefit entitlement purposes under the Act because it meets neither alternative (A), (B) or (C) of section 1(g)(2). Unlike the 1948-1950 period, the absence of conscription during the 1978-90 period meant an employee could not be drafted from his railroad position into the armed forces. However, the Associate General Counsel concluded in Legal Opinion L-53-378 that military service by a volunteer Marine reservist who was ordered to active duty before December 15, 1950 would be creditable under the 1937 Act from the date ordered to active duty on the basis that the reservist entered active duty involuntarily, without regard to the fact that his reserve term began voluntarily. Given my advice to you in Legal Opinion L-2001-16 to the same effect (military service by an voluntary armed forces reservist who is called to active duty is involuntary service within the meaning of the 1974 Act), it follows that active military service by a reservist in the United States armed forces between September 14, 1978 and August 2, 1990 as a result of a call to active duty nevertheless constitutes service during a "war service period" with respect to that individual within the meaning of section 1(g)(2)(B) of the Act. Such service may be creditable for benefit entitlement purposes under section 3(i)(2) the Act if it is preceded by the required service for a covered railroad employer.

I trust that the foregoing discussion provides the information you require.

cc: Director of Policy and Systems

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1 Section 4 of the Railroad Retirement Act of 1937 contained essentially identical language.

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2 Voluntary service in the armed forces during the period beginning June 15, 1948 and ending December 15, 1950 was later rendered creditable by section 7304 of the 1988 amendments to the Railroad Retirement Act (Public Law 100-647). See Legal Opinion L-89-62. Because the amendment only relates to the 1948-1950 period, it does not undercut the analogy between "war service period" as applied to the 1949-1950 period prior to the amendment and the 1978 – 1990 period.