Legal Opinion L-2001-16
October 16, 2001

U.S. Railroad Retirement Board
844 North Rush Street
Chicago Illinois, 60611-2092

Phone: (312) 751-7139
TTY: (312) 751-4701
Web: http://www.rrb.gov

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 inquiry of October 10, 2001, requesting clarification of the circumstances under which active service in the United States armed forces by individuals who enlisted in the armed forces reserves may be credited as service for benefit entitlement purposes under the Railroad Retirement Act. Your inquiry was prompted by an apparent inconsistency in two recent opinions on this subject, Legal Opinions L-99-9 and L-98-24.

As you know, section 3(i)(2) of the Railroad Retirement Act provides that an employee's "years of service" in the railroad industry for annuity computation purposes includes "voluntary or involuntary military service * * * during any war service period" if preceded as specified by creditable railroad service. Section 1(g)(1) of the Act defines the time the employee is in "military service" as beginning when the employee is "commissioned or enrolled in the active service of the land or naval forces of the United States" and continuing "until resignation or discharge there from". That section further provides that "any individual in any reserve component of the land or naval forces of the United States" will be considered in active service "while serving in the land or naval forces of the United States for any period, even though less than 30 days". Section 1(g)(2) defines the term "war service period".

Your memorandum references two opinions issued by this office concerning active duty by reservists. Legal Opinion L-98-24 concerned an individual who voluntarily joined the armed forces in 1974, performed four periods of active duty while a member of the National Guard during the years 1974 through 1977, and served a fifth period of active duty in 1986 while in the armed forces reserves. The opinion concluded that the employee's periods of active duty during 1974 through 1977 were creditable under the Act, but that the active duty in 1986 was not. Legal Opinion L-99-9 revisited the issue in the context of active military service by a reservist who either initially volunteered for the reserves, or who volunteered for active uniformed service and later transferred to the reserves. The opinion concluded the reservist would be eligible for service credit under section 3(i) of the Act from the time "ordered to active duty or required by Call * * * to enter and continue in active duty", providing that the period of time fell within a "war service period" and met the additional requirement for preceding railroad employer service.

While both opinions reach consistent results (i.e. the reservist's active duty during a war service period is creditable under section 3(i)), a difficulty arises from the statement in L-98-24 that because the employee's enlistment was voluntary, "even though his subsequent active duty in the reserves was required, it follows that that subsequent active duty is considered voluntary since it grew out of his voluntary enlistment." This statement is incorrect.

The question of when a reservist's active service may be creditable under section 3(i) was directly addressed by Legal Opinion L-85-133. The employee under consideration had enlisted in the Marine Corps Reserve in March 1940 while still in high school. He found a job with a railroad in August but then was called to active duty in November 1940. The Legal Opinion reviewed the legislative history of section 1(g)(1), and noted that the predecessor section of the Railroad Retirement Act of 1937 explicitly provided a reservist would be allowed credit if "ordered to active duty". The opinion concludes "when a member of an inactive reserve component of the land or naval forces of the United States is called to active duty his service becomes creditable from that point in time * * *" presuming the member is called during a war service period and has the prerequisite railroad service prior to active duty.

As mentioned in Legal Opinion L-99-9, the erroneous comment in L-98-24 does not affect the outcome of the case considered, and is therefore only obiter dictum. However, it is explicitly disapproved as contrary to consistent interpretation of the terms of creditability of military service by activated armed forces reservists.

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cc: Director of Policy and Systems