U.S. Railroad Retirement Board
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Legal Opinion L-2005-16
June 14, 2005

TO: John Baer
Director of Retirement Benefits
Office of Programs

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Substitute Teacher
Last Person Service Employment

This is to advise you, in response to a request made directly to my Office by the subject spouse annuitant, of my opinion as to whether any or all of the spouse's employment as a substitute teacher for three California school districts constitutes her last non-railroad employer for benefit entitlement purposes under the Railroad Retirement Act. As discussed below, in my opinion she may return to any of these former employers without incurring the deduction for last non-railroad employment. A copy of this memorandum has also been sent directly to the spouse annuitant.

The evidence provided by the spouse is that she last worked for the Arcadia Unified School District on January 19, 2005; for the Garvey School District on April 15, 2005; and for the Temple City Unified School District on April 25, 2005. On April 27, 2005, she filed an application for a spouse annuity under section 2(c)(1)(ii)(C) of the Railroad Retirement Act (45 U.S.C. § 231a(c)(1)(C)) on the basis of a minor child in her care. Her annuity was awarded with a beginning date of May 1, 2005. She has provided a letter from each district stating that she worked on a day-to-day basis as needed, and unlike the full time teaching staff, had no contractual or collective bargaining rights. Temple City has now offered new employment.

As you know, a spouse annuity is subject to a deduction for earnings as an employee of the last non-railroad employer or employers "* * * by whom such spouse was employed before the date on which the annuity of such spouse * * * began to accrue." See section 2(f)(6)(A)(ii) of the Railroad Retirement Act (45 U.S.C. § 231a(f)(6)(A)(ii)). The amount of the deduction in this case is limited to 50 percent of the spouse tier II annuity component. Regulations of the Board at 20 CFR 216.22(b) define last non-railroad employment to include (1) any non-railroad employment from which the annuitant last resigned in point of time in order to receive the annuity, and (2) any additional non-railroad employment which the annuitant resigned in order to have an annuity become payable. For purposes of the second definition, that regulation states in part:

> Employment which an individual stops within 6 months of the date on which the individual files for an annuity will be presumed in absence of evidence to the contrary to be service from which the individual resigned in order to receive an annuity. 20 CFR 216.22(b)(2).

As the spouse left all three school districts within 6 months of the date her annuity began to accrue, the question is whether she has presented sufficient evidence to rebut the presumption that she resigned these positions in order to receive her annuity. In this regard, although the amount of deduction applied to an annuity has changed from the entire annuity to only half of the tier II component, the definition of last non-railroad employer has remained unchanged over time. See section 2(d) of the Railroad Retirement Act of 1937, Public No. 162, 75th Cong., 1st Sess., (50 Stat. 307, 310); and section 2(e)(3) of the Railroad Retirement Act of 1974, Public Law 93-445 (88 Stat. 1305, 1316). Accordingly, it is well settled that the analysis of evidence applied to questions of last non-railroad employment under the prior law may be

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applied to evidence under the current provision. See Legal Opinions L-93-21, L-2002-10.

Two earlier opinions of the General Counsel considered the status of temporary or substitute teachers under the 1937 Act provisions. Legal Opinion L-57-235 concerned a railroad employee whose part-time non-railroad employment for a city department of education ended in May, and whose annuity then began in August. The General Counsel found that he could continue to teach night school welding classes without loss of his annuity. The two hour classes occurred two or three nights per week during the normal September to May school year, but were abandoned if an insufficient number of students enrolled in a given year. Though the employee had engaged in this work every year from 1931 to 1957, the city department of education confirmed that the employee was appointed to the position at the beginning of each school year; that his employment ended with the earlier of the month the class was abandoned or the normal end of the school year in May; and that he had no right to return the following September. The General Counsel found this pattern similar to the seasonal employment by a baseball scout found not to be in last non-railroad employment by earlier Legal Opinion L-55-171. He therefore concluded that because the employment ended at the expiration of the appointment for each school year, the employee had not resigned to in order to receive an annuity, and could accept a new appointment without penalty.

However, in Legal Opinion L-70-18, the Chairman of the Railroad Retirement Board advised a spouse who worked as a substitute teacher that the General Counsel agreed with the determination that her former school district was her last non-railroad employer. The spouse worked for the district during the second calendar quarter of 1965, and then began to receive her annuity in October. She returned to work as a substitute teacher in December 1965, and in January and June 1966. Unlike the welding instructor in the 1957 opinion, there was no evidence that the spouse did not have a continuing right to be considered for substitute positions.

Because it must be renewed each school year, the employment by the spouse in the current case is similar to that of the welding instructor in L-57-235, and is dissimilar to that of the substitute teacher in L-70-18. Moreover, as noted by the 1957 opinion, the spouse's employment with each school district for each school year has aspects of seasonal work since it recurs for the same period of time each year. In Legal Opinion L-97-37, the General Counsel stated that seasonal employment:

> * * * will not be considered last person service employment where the following conditions are met: (1) the employee possesses no re-employment rights and must reapply each year for the position; (2) the employment relationship is terminated at the end of each period of employment; and (3) such employment has terminated prior to the annuity beginning date for some reason not related to the application for an annuity under the Railroad Retirement Act.

According to the information provided by the Arcadia, Garvey and Temple City school districts, the spouse's employment meets all three of foregoing criteria. Consistent with the reasoning of L-57-235, it is therefore my opinion that none of these three districts is her last non-railroad employer within the meaning of section 2(f)(6)(A) of the Railroad Retirement Act and section 216.22(b) of the Board's regulations.

A copy of this opinion should be filed in the record of the spouse's claim.