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Legal Opinion L-2006-18
August 31, 2006

TO : Dorothy Isherwood
Director of Programs

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Pension Protection Act of 2006 (H.R.4), Public Law 109-280

On August 17, 2006, President Bush signed into law H.R. 4, the Pension Protection Act of 2006, hereinafter "Act." Title X of the Act contains provisions relevant to the railroad retirement system essentially identical to those found in the National Employee Savings and Trust Equity Guarantee Act of 2005, and the Pension Protection and Expansion Act of 2003, which were reviewed for the Board in memos sent on September 13, 2005 and February 10, 2003, respectively, which impact payments made by the Board to the former spouses of railroad employees. The provisions take effect August 17, 2007, which is one year from the enactment date. Provided below is an analysis of the legislation.

I. Divorced Spouse Annuity Provisions

Section 1002 of the Pension Protection Act of 2006 amends the eligibility requirements for a divorced spouse annuity found in section 2(c) of the Railroad Retirement Act (RRA). Currently, a former spouse of a railroad employee is not eligible for a divorced spouse annuity unless the employee is entitled to an annuity. Section 1002 of the Pension Protection Act of 2006 amends section 2(c) of the RRA, by eliminating the requirement that an employee be entitled to an annuity.[1] The above change parallels the eligibility requirements for a divorced spouse benefit payable under the Social Security Act, with one notable exception. Under the Social Security Act, a divorced spouse must have been divorced from the insured individual for a period of not less than two years in order to be entitled to benefits where the insured individual is not entitled to benefits. See 42 U.S.C. § 402(b)(4)(B)(ii). Congress did not include such provision in the Act. However, such provision is incorporated by reference in subparagraph (iii) of section 2(c)(4) of the RRA. See 45 U.S.C. § 231a(c)(4)(iii)). Therefore, a divorced spouse must have been divorced from the employee for a period of not less than two years in order to be entitled to an annuity under the RRA where the employee is not yet entitled to an annuity.

Since the provisions do not take effect until August 17, 2007, the earliest annuity beginning date, which may be established for a divorced spouse annuity, where the employee is not entitled to an annuity is August 17, 2007. However, in order to be eligible for an August 17, 2007 annuity beginning date, the former spouse must file the appropriate application timely, and August 17, 2007 must not be earlier than the dates specified in section 5(a) below:

> (iii) in the case of an applicant otherwise entitled to an annuity under section * * * 2(c) * * * not earlier than the latest of (A) the first day of the sixth month in which the application therefore was filed, (B) the first day of the month in which the application therefore was filed if the effect of beginning such an annuity in an earlier month would result in a greater age reduction in the annuity, * * * , (C) in the case of an applicant otherwise entitled to an annuity under section * * * 2(c), the date following the last day of compensated service of the applicant, or (D) in the case of an applicant otherwise entitled to an annuity under section * * * 2(c), the first day of the first month throughout which the applicant meets the age requirement for the annuity applied for.

[1] Although employee annuity entitlement is no longer a requirement, the employee must be at least age 62 and fully insured under the Social Security Act using his combined earnings.

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Having addressed entitlement issues, we now turn to issues regarding the computation of the benefit payable to a divorced spouse, where the employee is not entitled to an annuity. Section 4 of the RRA provides that the annuity of a divorced wife under section 2(c) shall be "equal to the amount (before any reduction on account of age and before any deductions on account of work) of the wife's insurance benefit * * * to which such * * * divorced wife would have been entitled under the Social Security Act if such individual's service as an employee after December 31, 1936, had been included in the term "employment" as defined in that Act." The Social Security Act provides that the benefit payable to such divorced spouses should be determined "in the manner otherwise provided for wife's insurance benefits under this subsection, as if such insured individual had become entitled to old–age insurance benefits on the date on which the divorced wife first meets the criteria for entitlement." See 42 U.S.C. § 402(b)(4)(A). Therefore, the divorced spouse annuity should be computed as if the employee was also entitled to an annuity on the divorced spouse's annuity beginning date. Subsequent adjustments to the divorced spouse's annuity rate should be made the same as they would be made if the employee had become entitled to benefits on the divorced spouse's annuity beginning date.

The Pension Protection Act of 2006 also amends section 2(e) of the RRA. Under current law, if an employee annuitant's monthly annuity is not payable for a work–related reason (i.e., the employee annuitant has performed work in the railroad industry or the disabled employee annuitant has earned in excess of the amount allowed by the statute), then any spouse annuity or divorced spouse annuity paid by the Board based on that employee's earnings is also not payable for that month. Section 1002 of the Act amends section 2(e) of the RRA so that the annuity paid to the divorced spouse may continue despite the employee's work activity. Effective August 17, 2007, this change will apply to all divorced spouse annuitants, not only those who receive an annuity prior to the employee's annuity entitlement.

II. Partition Payments

In addition to modifying the provisions governing the eligibility to a divorced spouse annuity, the Act also adds a provision to the RRA relevant to the payments made in accordance with section 14(b) of the RRA. That section allows for the division of the non–tier I portions of an employee's annuity pursuant to a court order that characterizes such portions as property subject to distribution. Payments made pursuant to such court orders are commonly referred to as partition payments and currently terminate upon the death of either party, whichever occurs first. The recent legislation amends the RRA to allow for payments to former spouses pursuant to such court orders to continue beyond the employee's death. Specifically, section 1003 of the Act adds a paragraph to section 5 of the RRA, which allows the payment of the employee's tier II component awarded to a former spouse as part of a property distribution to continue after the employee's death. Section 1003 reads as follows:

> (a) In General – Section 5 of the Railroad Retirement Act of 1974 (45 U.S.C. § 231d) is amended by adding at the end the following:
>
> (d) Notwithstanding any other provision of law, the payment of any portion of an annuity computed under section 3(b) to a surviving former spouse in accordance with a court decree of divorce, annulment, or legal separation or the terms of any court–approved property settlement incident to any such court decree shall not be terminated upon the death of the individual who performed the service with respect to which such annuity is so computed unless such termination is otherwise required by the terms of such court decree.

Most court orders served on the agency involving property distributions do not include termination provisions. However, on occasion, a court order will include a provision requiring the termination of a partition payment upon the occurrence of a certain event. Examples of such terminating events are remarriage, attainment of a certain age, and entitlement to an annuity. Where such provisions are

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included in a court order, it has been the practice of the legal staff in the Office of General Counsel to bring such provision to the attention of Programs' staff, so that the appropriate call–up and/or notation may be made, since the occurrence of the event would not otherwise require termination of a partition payment. The recent legislation does not negate such provisions, and if the specified event occurs, payment of the partition award should be terminated.

Probably the most common terminating event recited in court orders is the death of one of the parties. In the past, the legal staff has not made any mention of such provisions in memoranda sent to Programs, since current law required the termination of payment upon the death of either party, whichever occurs first. Effective August 17, 2007, payment should only be terminated upon the death of the employee if the court order expressly provides for such. Therefore, if an employee annuitant dies on or after August 17, 2007, and a former spouse is receiving a partition award, the court order implementing that award must be reviewed to determine if it includes provisions requiring the termination of the payment of the partition award upon the death of the employee. If such provision is included, then payment of the partition award must be terminated. This is true regardless of the date the court order was entered. If such provision is not included in the court order, and the employee dies on or after August 17, 2007, then payment of the partition award to the former spouse will continue. However, as explained below, such payment may need to be adjusted upon the employee's death.

As previously noted, section 14(b) of the RRA allows for the division of the non–tier I portions of an employee's annuity. This means that a partition award may include portions of the employee's tier II component, vested dual benefit, supplemental annuity, and any increase payable under the overall minimum provisions. The recent legislation allows for the continued payment of the tier II component only. Therefore, even if the court order does not include a provision requiring the termination of the partition award upon the death of the employee, if the partition award is comprised of more than a tier II component, then the partition award must be adjusted upon the death of the employee to exclude the non–tier II portion. The adjusted rate is payable beginning with the payment due for the month in which the employee died. If a partition award payment, which is comprised of more than a tier II component, is erroneously paid to a former spouse after the employee's death, then the non–tier II portion of the payment shall be an erroneous payment to the former spouse within the meaning of section 10 of the RRA, consistent with section 295.7(e) of the RRB's regulations.

On occasion, a court order will be entered in a case where the parties are separated, but opt not to divorce. In those instances, it is our opinion that partition award payments should continue to terminate upon the death of either party, unless the court order provides for termination at an earlier date. Section 1003 is entitled "Extension of Tier II Railroad Retirement Benefits to Surviving Former Spouses Pursuant to Divorce Agreements" and the text of the legislation specifies that the payee at issue is the surviving former spouse. Use of the term "former spouse" in the caption and text suggests that Congress intended for tier II partition payments to continue after the employee's death only if the recipient of such payment was divorced from the employee annuitant. Such a limitation is consistent with section 4 of the RRA, which expressly provides that, where survivor benefits are payable under the RRA, only the non–divorced surviving spouse's annuity includes a tier II component. Therefore, even if a court order specifies that payments will continue after the employee annuitant's death, unless the parties have divorced since the order governing the property distribution was entered, such payments must be terminated upon the death of the employee annuitant.

It should also be noted that the legislation only covers when recurring partition payments terminate. It does not affect when they begin. If the employee never becomes entitled to an annuity, no partition payment is due the former spouse. Also, if the Board is first served with a valid court order after the employee dies, no partition payments are due the former spouse. Furthermore, if it is determined that accrued annuities due but unpaid at death are payable based on the employee's earnings, this legislation does not impact the distribution of such annuities. Annuities due but unpaid at death are payable under

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section 6 of the RRA, and in accordance with section 14 of the RRA, such annuities are exempt from legal process.

The question has been raised as to whether cost-of-living increases accrue to the partition awards after the death of the employee. As noted above, the Act allows for the continued payment of that portion of a partition award that represents the annuity computed under section 3(b) of the RRA. Tier II cost-of-living increases are found in section 3(g) of the RRA. Consequently, it is our opinion that cost-of-living increases do not accrue after the employee's death. The amount of the partition payment to the surviving former spouse should be fixed at the former spouse's share of the tier II payable to the employee in his last month of entitlement, including all cost-of-living increases through that month.

Finally, it should be noted that the employee's current connection with the railroad industry is not relevant to whether partition payments continue to the former spouse.