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# Legal Opinion L-2006-24
# December 6, 2006

**TO** : Ronald Russo
Director of Policy and Systems
Office of Programs

**FROM** : Steven A. Bartholow
General Counsel

**SUBJECT** : Transportation Security Agency
Tier II—Indexed Average Monthly Compensation
Current Connection

This is to provide you with clarification, in response to a request made directly to my Office by the subject employee, of my opinion as to whether employment for the Transportation Security Agency is employment for "a United States department or agency named in section 1(o)" of the Railroad Retirement Act, for purposes of the indexed average monthly compensation calculation provided by section 3(b)(2) of the Act. As discussed below, in my opinion the Transportation Security Agency (TSA) must be considered to be among the agencies named in section 1(o) for all purposes, including the tier II computation specified by section 3(b)(2). A copy of this memorandum has also been sent directly to the employee.

Records of the Board show that the subject employee was born January 1944 and is currently 62 years old. He worked in the railroad industry from October 1964 through January 1978, and has been credited with a total of 125 months of railroad service for annuity entitlement purposes. Information from the Social Security Administration shows that the employee has been credited in the records of that agency with wages for the period 1990 through 2005. No earnings were reported under either system for the period February 1978 through December 1989.

In his letter to this Office, the employee explained that after he left the railroad industry, he worked from 1978 through 1991 for the Federal Railroad Administration of the United States Department of Transportation. He then worked for the state government of California from 1991 through 2005. On May 1, 2005, he returned to work for the Federal Government when he began work for the Transportation Security Agency of the United States Department of Homeland Security, where he remains currently employed. His work concerns security on mass transit, freight and commuter rail. The employee asks whether his TSA employment may render him eligible at retirement for an indexed average monthly compensation calculation.

As you know, section 3(b)(2) of the RRA (45 U.S.C. § 231b(b)(2)), as amended by section 1118 of Public Law 97-35 (95 Stat. 357, 630), provides a formula to "index" (i.e., put in proportion to the earnings level of all workers) the railroad earnings used in the average monthly compensation calculation of the tier II benefit component. The "indexed" average monthly compensation tier II formula is available only to an employee:

> * * * who has not engaged in employment for an employer in the 60-month period preceding the month in which such individual's annuity began to accrue, and whose major employment during such 60-month period was for a United States department or agency named in section 1(o) of this Act * * * .

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Section 1(o) of the RRA (45 U.S.C. § 231(o)) in general states that an employee retains his or her "current connection" with the railroad industry for benefit entitlement purposes if he or she has not engaged in regular non-railroad employment after leaving the railroad industry. Section 1(o) defines regular employment to exclude:

> (o) * * * an employer [in the railroad industry] or employment with the Department of Transportation, the Interstate Commerce Commission, the Surface Transportation Board, the National Mediation Board, the National Transportation Safety Board, the State-owned railroad (as defined in the Alaska Railroad Transfer Act of 1982), so long as it is an instrumentality of the State of Alaska, or the Railroad Retirement Board * * * .

This Office has most recently considered the status of TSA as an agency within the meaning of section 1(o) in Legal Opinion L-2005-14, issued May 25, 2005. That opinion noted that section 1517 of the Homeland Security Act of 2002 (Public Law 107-296) (codified at 6 U.S.C. § 557) stated in pertinent part:

> With respect to any function transferred by or under this Act * * * reference in any other Federal law to any department * * * the functions of which are so transferred shall be deemed to refer to the Secretary, or other official, or component of the Department to which such function is so transferred. (emphasis added).

RRA section 1(o), quoted above, refers to the Department of Transportation, a "department the functions [of a component] of which" (i.e., TSA) were transferred by P.L. 107-296 to the Department of Homeland Security effective March 1, 2003. Accordingly, L-2005-14 concluded that section 1517 of the Homeland Security Act required that section 1(o) of the Railroad Retirement Act "shall be deemed to refer to the * * * component to which such function is so transferred." Legal Opinion L-2005-14 specifically stated that this meant RRA section 1(o) "must be read as if it explicitly lists the Transportation Security Administration among those Federal entities for which employment is disregarded when determining the existence of a current connection." This statement superseded the earlier advice provided by L-2003-03, issued on January 31, 2003 before TSA had been transferred from Transportation to Homeland Security.

The employee in the current case began employment with TSA in May 2005, after the agency became a component of the Department of Homeland Security in March 2003. Although his question relates to the tier II computation rather than a current connection determination, the employee's question does once again present the issue as to whether the Homeland Security Act in effect amended RRA section 1(o) to add TSA to the listed entities which are disregarded for current connection determinations, even for those employees who first begin work for TSA after the March 2003 transfer from the Department of Transportation.

Consistent with the reasoning of L-2005-14, I believe that RRA section 1(o) must be read for all purposes as if it expressly refers to the Transportation Security Agency. This means first, that no employment with TSA by a former railroad employee, whether begun before or after March 1, 2003, should be considered when determining a current connection, and second, that an individual whose "major employment" (as defined by section 3(b)(2) of the RRA) is with the TSA is eligible for the indexed tier II average monthly compensation calculation. In the subject case, although it appears that the approximately 14 years of employment with the state of California after leaving the railroad in 1990 broke his current connection, in my opinion the subject employee would therefore be eligible for the indexed calculation if TSA is his major employment at the time he retires.

I suggest that instructions issued to examiners be corrected to reflect this memorandum.