

April 24, 1997
L-97-17

TO : John L. Thoresdale
Director of Policy and Systems

FROM : Catherine C. Cook
General Counsel

SUBJECT : Miscellaneous Compensation, Compensation Allocation

This is in response to your memorandum of February 24, 1997, wherein you request clarification of the definition of Amiscellaneous compensation@ with respect to computation of Afinal average monthly compensation@ and with respect to how miscellaneous compensation is reported and credited.

The term miscellaneous compensation takes its roots in section 1(h)(8) of the Railroad Retirement Act (RRA) which provides as follows:

Notwithstanding any other provisions of this Act, for the purposes of sections 3(a)(1), 4(a)(1), and 4(f)(1), the term Acompensation@ includes any payment from any source to an employee or employee representative if such payment is subject to tax under section 3201 or 3211 of the Internal Revenue Code * * *.

This section was added to the RRA in 1983 by section 410(a) of Public Law 98-76 to permit the crediting of sick pay which was subject to railroad retirement taxes, but which was excluded from the definition of compensation by virtue of section 1(h)(6)(vi) - now 1(h)(6)(v) . In Legal Opinion L-88-108 we noted that section 1(h)(8) encompasses remuneration other than sick pay and includes compensation which may not be credited for purposes of the tier II computation due to the limitations of section 3(j) of the RRA, but which was subject to railroad retirement taxes. Thus, miscellaneous compensation came to be defined as set forth in section 211.11 of the Board's regulations as follows:

Any payment made to an employee by an employer which is excluded from compensation under the Railroad Retirement Act, but which is subject to taxes under the Railroad Retirement Tax Act, shall be considered compensation for purposes of this part but only for the limited purpose of

computing the portion of the annuity computed under sections 3(a), 4(a), or 4(f) of the Railroad Retirement Act (commonly called the tier I component).

In Legal Opinion L-94-16 we noted that in computing final average month compensation (FAMC), section 3(f)(1) of the RRA required that compensation as defined in section 1(h) be used in the computation. This would include so-called miscellaneous compensation under section 1(h)(8). The FAMC is an essential component in computing an annuitant's maximum annuity under section 3(f)(3) (RRA max). Failure to include miscellaneous compensation in the FAMC computation could lower an annuitant's RRA maximum. In the appeal of Norman H. Majette (Board Order 96-170), the Board reaffirmed the holding of L-94-16 with respect to computation of the FAMC.

In your memorandum you state that your understanding, in light of Majette, is that for the FAMC calculation, the compensation in any year is determined as follows:

Compensation equals tier I compensation plus miscellaneous compensation plus social security wages. In this equation, however, the total amount of the tier I compensation, miscellaneous compensation, and wages cannot exceed the tier II maximum amount for the year.

You initially inquire as to whether this is a correct understanding. It is correct.

You then inquire as to whether the FAMC calculation should change in light of Majette and, if so, with respect all claims or only new claims?

As noted earlier, the decision in Majette flows from our opinion L-94-16. The opinion L-94-16 constitutes a change of legal interpretation or administrative ruling within the meaning of Basic Board Order 75-5, ' 17C. Accordingly, final certifications made prior to L-94-16 in accordance with the pre-existing administrative interpretation would not be rendered erroneous by the change in interpretation.¹

Your second set of questions deal with reporting miscellaneous compensation. They may be summarized as follows:

¹The Board recently adopted a complete set of revised Basic Board Orders to replace the Consolidated Board Orders. However, section 17 of Consolidated Board Order 75-5 will remain effective until the Board has promulgated a regulation on reopening.

Must miscellaneous compensation be reported and accounted for separately?

No. We have previously analogized miscellaneous compensation to social security wages. See legal opinion L-88-108. The requirement that miscellaneous compensation be reported separately was based on the inability of our systems to incorporate this compensation into employee wage records other than through a separate report. From a theoretical standpoint, we discern no difference between miscellaneous compensation and tier I compensation or social security wages.

May Form BA-10 (Report of Miscellaneous Compensation) be eliminated and miscellaneous compensation be reported on the Annual Report of Compensation?

Yes.

Is there any objection to combining tier I compensation with miscellaneous compensation for purposes of annuity computation?

No. They may be combined, just as social security wages are combined in the computation of the tier I component.

Your final set of questions deal with the allocation of compensation reported when paid. Section 209.15 of the Board's regulations provides, in part, as follows:

In preparing a report required under this part, an employer may report compensation in the report required for the year in which the compensation was paid even though such compensation was earned by the employee in a previous year. If compensation is reported with respect to the year in which it was paid, it shall be credited by the Board to the employee in such year unless within the four year period provided in ' 211.15 of this chapter the employee requests that such compensation be credited to the year in which it was earned. * * *

In Legal Opinion L-93-52 we stated that under this regulation compensation reported when paid is creditable in the year reported unless it was actually earned in a previous year and the employee so requests that it be credited at that time. In that opinion our approval was sought for a procedure (actually a computer program) by which compensation reported after the annuity beginning date was automatically allocated back to the year last worked. We stated that this was permissible since one could reasonably presume that compensation reported after the annuity beginning date was earned in a prior period. This also had the advantage of giving the employee the maximum credit possible toward his tier II annuity component. For example, if in the year the employee last worked he did not earn maximum tier II compensation this procedure of allocating compensation paid after that year to that year he last worked would generally increase his tier II component.

You now ask us to express our disfavor with this procedure since, according to your findings it is causing incorrect annuity computations. For example, you state that allocating tier I

compensation back to a previous year can produce a tier I benefit which does not equal the equivalent social security benefit. In addition, you have found that employers have been reporting separation allowances paid in installments both as separation allowances on Form BA-9 and then again as regular compensation in the year paid. In such cases, you claim that the procedure for allocating back can give an employee credit for compensation for which he has received a refund of employment taxes under section 6(e) of the RRA. You, thus, ask whether it would be permissible to cease the above-described procedure. Rather, you propose that compensation reported after the annuity beginning date be credited in the year reported. Compensation reported after the annuity beginning date will be credited toward the tier I, but not toward the tier II, unless an employment relationship exists in which case the annuity beginning date will be adjusted. Only if the employee requests that the compensation reported be allocated to an earlier period when earned will the record of compensation be adjusted.

Your recommendation is consistent with section 209.15 of the Board's regulations, cited above. Accordingly, we would have no objection to the proposed change.