

August 15, 1997
L-97-29

TO : Thomas M. McCarthy
Chief, Debt Recovery Division
Through: Peter A. Larson
Chief Financial Officer

FROM: Steven A. Bartholow
Deputy General Counsel
Through: Catherine C. Cook
General Counsel

SUBJECT: Debt Collection Improvement Act of 1996
Sections 2(f) and 12(o) of the Railroad Unemployment Insurance Act

This is in reply to your memorandum of June 24, 1997, wherein you requested advice concerning the requirements of the Debt Collection Improvement Act of 1996, Public Law 104-134 (DCIA), as applied to debts due the Railroad Retirement Board (RRB) under sections 2(f) and 12(o) of the Railroad Unemployment Insurance Act (RUIA). Your questions are set out below followed by a response.

QUESTION #1: Please advise whether debts due under sections 12(o) and 2(f) of the RUIA are subject to the requirements of the DCIA.

CONCLUSION: Debts under sections 12(o) and 2(f) of the RUIA are subject to the requirements of the DCIA.

RATIONALE: Section 2(f) of the RUIA provides that remuneration due to a railroad employee for periods when RUIA benefits were paid to that employee shall be held in trust for the RRB. Section 12(o) provides that the Board has the right to be reimbursed where a third party is liable for damages due to the infirmity for which the RRB paid sickness benefits.

The DCIA requires that agencies transfer all "nontax" debts delinquent more than 180 days to the Department of Treasury for administrative offset and cross-servicing. "Nontax" is defined to mean "any debt or claim other than a debt or claim under the Internal Revenue Code of 1986" [31 U.S.C. '3701(a)(8)]. Under that definition, section 12(o) debts are nontax debts subject to the requirements of the DCIA. As you will recall, we recently amended Part 367 of our regulations to include in the definition of a past-due legally enforceable debt one:

(a) Which arose under any statute administered by the Board or under any

contract; and with respect to debts referred to the Department of Treasury, is a nontax debt. (20 CFR 367.2(a), 62 F.R. 19220, April 21, 1997).

Historically, section 2(f) debts have been treated as tax debts. The basis for that treatment is found in section 2(f), which gives to the Board the same authority to collect a debt which arises under section 2(f) as is provided in section 8 of the RUIA. Section 8, in turn, gives the Board the same authority to make collection as is conferred by the Railroad Retirement Tax Act. It is my opinion, however, that despite the historic treatment of 2(f) debts as tax debts, a debt which arises under section 2(f) should not be treated as a tax debt for purposes of the DCIA for the following reasons.

First, section 2(f) debts are not taxes. As stated in Legal Opinion L-89-147:

. . . It seems evident that in extending the collection mechanism of section 8(h) to the collection of benefit reimbursements under section 2(f), Congress merely intended to enhance, not restrict, the Board's authority and ability to collect such reimbursements. Since section 2(f) debts are not taxes, it would not have made sense to apply a limitation on their collection which was essentially applicable to the collection of taxes.

* * * * *

. . . I am of the opinion . . . that the incorporation of Internal Revenue Code provisions with respect to the collection of section 2(f) receivables does not transform such debts into tax claims arising under the Internal Revenue Code, nor does it result in the Internal Revenue Code provisions as being the exclusive means by which the Board may collect such receivables . . . Congress clearly did not intend that the Board have no other method for effecting collection.

The same reasoning applies in responding to your inquiry. The DCIA was enacted as a tool for collecting debts owed to the Federal Government. I do not believe that we should read the incorporation of tax collection authority in section 2(f) as a restriction which would exclude section 2(f) debts from DCIA collection tools. It is therefore my opinion that for purposes of the DCIA, a debt which arises under section 2(f) of the RUIA is a nontax debt.

QUESTION #2: There are 3 notices generally issued on these debts. None of these notices provide reconsideration and/or waiver rights. Would the DCIA requirement to provide reconsideration and/or waiver rights apply to these debts? Is the response the same if the debt consists solely of interest and penalties accrued because of late payment? If we are required to provide reconsideration and/or waiver rights, at what point should they be provided?

CONCLUSION: Except when the agency seeks recovery from an employee, reconsideration and waiver rights need not be provided.

RATIONALE: The DCIA (31 U.S.C. '3716(a)(1)) requires that the head of an administrative agency may collect delinquent debt by administrative offset only after giving the debtor:

- (1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;
- (2) an opportunity to inspect and copy the records of the agency related to the claim;
- (3) an opportunity for a review within the agency of the decision of the agency related to the claim;
- (4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

While the above list includes a right to review, it does not include a right to reconsideration and waiver. A right to a review of the agency's decision is a more limited right than is a right to reconsideration. A review would entail a reexamination of a debt and provision of an explanation to the debtor. Reconsideration would include as part of a reexamination of the debt, a consideration of whether the decision regarding the debt should be changed. There is no independent right to reconsideration and waiver established in the DCIA.

However, section 340.10(e)(1) of the Board's regulations does address the question of waiver of 2(f) and 12(o) debts. That section provides that:

Where an amount is recoverable pursuant to section 2(f) of the Act from remuneration payable to an employee by a person or company, or where a lien for reimbursement of sickness benefits has arisen pursuant to section 12(o) of the Act, and in either case recovery is sought from a person other than the employee, no right to waiver of recovery exists. (20 CFR 340.10(e)(1)).

Thus, in the case of section 2(f) and 12(o) debts, no right to reconsideration and waiver exists except in the case where the agency seeks to recover the amount of the debt from the railroad employee. It is therefore my opinion that the agency does not need to provide reconsideration and waiver rights except when recovery is sought from a railroad employee.

The same conclusion would apply if the debt consists solely of interest and penalties, since the agency must certify that every nontax debt has been afforded a right to review within the agency prior to referral to Treasury for offset and/or cross-servicing.

QUESTION #3: These debts are generally considered delinquent if payment of the amount

claimed by the RRB is not received within 30 days of the settlement date. Should the 180-day delinquency period be measured from 30 days after the settlement date? If not, what date should the 180-day delinquency period be measured from?

CONCLUSION: The 180-day delinquency period should be measured from 30 days after the settlement date or date of final judgment entered by a court of competent jurisdiction.

RATIONALE: First of all, we have interpreted this question to refer to 12(o) lien debts, since 2(f) debts can arise other than through settlement or final judgment (e.g., through guarantee payment plans). The DCIA does not define a delinquent debt. However, the Federal Claims Collection Standards contain the following provision:

A debt is considered *delinquent* if it has not been paid by the date specified in the agency's initial written notification ('102.2 of this chapter) or applicable contractual agreement, unless other satisfactory payment arrangements have been made by that date, or if, at any time thereafter, the debtor fails to satisfy obligations under a payment agreement with the creditor agency.
[4 CFR 101.2(b)].

The Notice of Lien form, ID-30b (08-93), which the RRB uses to give notice of its 12(o) lien expressly advises that payment is due within 30 days of the settlement or judgment and that "Amounts that are not paid within 30 days are subject to interest charges from the date of settlement or judgment." This advice also reflects the Board's regulations on when payment of a 12(o) lien is due [20 CFR 341.6(b) and 200.7(a)(3)]. Since payment of a 12(o) lien is due within 30 days of settlement or final judgment and so long as the debtor is notified of that due date prior to the date of settlement or entry of final judgment, we agree that the 180-day delinquency period should begin to run from 30 days after the date of settlement or entry of final judgment.

QUESTION #4: We also refer these debts to the Department of Justice for civil action. Is there any need to provide reconsideration and/or waiver rights to these debtors prior to referral?

CONCLUSION: Only if we seek recovery from the railroad employee. See response to Question #2.