UNITED STATES GOVERNMENT

MEMORANDUM

FORM G-115f (1-92)
RAILROAD RETIREMENT BOARD

March 11, 2013
L-2013-08

TO : Letty Benjamin-Jay
Chief of RRA Applications and Calculations
Through: Ronald Russo
Director of Policy and Systems

FROM : Karl T. Blank
General Counsel

SUBJECT: "Regular Occupation" Determination in a Disability Claim

This is in response to your request of November 16, 2012 for a legal opinion. In that request, you ask three questions regarding a "regular occupation" for an employee applying for an occupational disability annuity whose most recent work is for an employer enumerated in section 1(o) of the Railroad Retirement Act (RRA) and section 216.16 of the Board's regulations. It is my opinion that work for such an employer should be treated in the same manner as other non-railroad employer work for the purposes of an occupational disability annuity.

The questions posed in your memo stem from two employees who applied for occupational disability annuities and who most recently worked for two of the employers listed in section 1(o) (Federal Railroad Administration and Alaska Railroad). These are non-covered employers, work for which would normally break a current connection but for the exception provided for in section 1(o). The question then becomes, in light of the fact that a current connection is not broken by working for these employers, how is such work treated in determining the employee's regular occupation under section 2(a)(2).

At issue is the intersection of two provisions of the RRA—the definitions of "regular occupation" and of "current connection". In order to qualify for an occupational disability, the individual must, "have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty

years of service or (B) have attained the age of sixty". 45 USC 231a (a)(1)(iv). For the purposes of this provision, an employee's "regular occupation":

> "shall be deemed to be the occupation in which he will have been engaged in more calendar months than the calendar months in which he will have been engaged in any other occupation during the last preceding five calendar years, whether or not consecutive, in each of which years he will have earned wages or salary, except that, if an employee establishes that during the last fifteen consecutive calendar years he will have been engaged in another occupation in one-half or more of all the months in which he will have earned wages or salary, he may claim such other occupation as his regular occupation." 45 USC 231a (a)(2).

This definition of regular occupation is mirrored in section 220.11 of the Board regulations.[1]

As seen in the statute cited above, an individual must also have a current connection to the railroad industry in order to receive an occupational disability annuity. A current connection is defined as follows:

> (o) An individual shall be deemed to have "a current connection with the railroad industry" at the time an annuity begins to accrue to him and at death if, in any thirty consecutive calendar months before the month in which an annuity under this subchapter begins to accrue to him, or the month in which he dies if that first occurs, he will have been in service as an employee in not less than twelve calendar months and, if such thirty calendar months do not immediately precede such month, he will not have been engaged in any regular employment other than employment for an employer 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 [45 U.S.C. 1201 et seq.]), so long as it is an instrumentality of the State of Alaska, or the Railroad Retirement Board in the period

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[1] As you note, the regulations switch from the term "regular occupation" to "regular railroad occupation". These are interchangeable for the purposes of this discussion.

before such month and after the end of such thirty months. 45 USC 231(o).

Again, sections 216.11 through 216.17 of the Board's regulations mirror the statute.

There is no evidence in the text of the statute or in the legislative history that leads to the conclusion that work for these employers should be treated differently than work for other non-covered employers when determining an employee's regular occupation. Looking at the plain meaning of the statute, it appears that the exclusion of employment for the employers listed in section 1(o) is strictly for current connection purposes. The legislative history supports this. The history explains the purpose behind providing that work for these employers would not break a current connection:

> "Under the new Act, as well as under the 1937 Act, an employee must have had a "current connection with the railroad industry" in order to be eligible for an occupational disability annuity or a supplemental annuity and in order for his survivors to be eligible for survivor annuities. The current connection definition, which is contained in section 1(o) of the new Act, is amended to provide that an individual will not lose his current connection if his only employment after leaving railroad employment is with certain governmental agencies (the Department of Transportation, the Interstate Commerce Commission, the National Mediation Board, and the Railroad Retirement Board) which perform functions involving the railroad industry. The major purpose of this amendment is to provide benefits under the Railroad Retirement Act, rather than under the Social Security Act, for the survivors of individuals who leave the railroad industry to engage in employment with the agencies specified" S. Rep. No. 93-1163, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4093, 5727.

The history shows that the purpose of carving out this exception was to preserve survivor benefits for the families of these individuals. There is no indication that it was intended to affect the determination of a regular occupation for an occupational disability.

In addition, section 2(a)(2) of the RRA states, "For the purposes of paragraph (iv) of subdivision (1), the Board, with the cooperation of employers and employees,

shall secure the establishment of standards determining the physical and mental conditions which permanently disqualify employees for work in the several occupations in the railroad industry". In this provision, "employers" refers to employers covered by the act as defined by section 1(a)(1). Since covered employers are engaged in establishing the definitions of and standards for "occupations in the railroad industry", it follows that "railroad occupation" refers to an employee's occupation when working for hire for a covered employer.

As you note, in Legal Opinion 79-62, this office found that since the employee's last railroad employment of any kind was more than 15 years from application, he could not be awarded an occupational disability annuity under the RRA on the grounds that he was unable to work in that occupation. In that case, it appears that in the time since the employee left the railroad industry, he worked for a government agency that did not break his current connection. Although not explicitly stated, I conclude this because the opinion went on to note that in view of the then recent modification of the current connection provision (legislative history of which is discussed above), it would be a novel question of law as to whether an occupational disability can be awarded to an individual who has retained his current connection with the railroad industry and become disabled in his government-related occupation. Legal Opinion L-79-62 leaves that issue unresolved as it appeared that the employee was not disabled in that government-related occupation. Nevertheless, the General Counsel did find that regardless of the fact that the government-related occupation did not break the current connection, it could not be disregarded in determining an employee's regular occupation.[2]

Legal Opinion 91-30 addressed a similar situation. In that case, the employee last worked in the railroad industry in February 1981. From March 1981 through December 1988, he claimed that he worked in self-employment. Since self-

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[2] This is different from another approach which would have essentially disregarded the employee's government employment. For example, there is an exception for an employee who works as an officer or employee of a railway labor organization. Section 220.11 allows that for these individuals "regular occupation" shall be the position to which the employee holds seniority rights or the position which he or she left to work for a railway labor organization. Legal Opinion 79-62 makes clear that such is not the case for employees whose last employment does not break a current connection. I also note that when the exception was created for officers of labor organizations through an agreement between railroad labor and management consistent with section 2(a)(2), the Board could have chosen to make a similar exception for employees of section 1(o) employers but it did not do so.

employment does not break a current connection, the question was whether he was eligible for an annuity since his railroad work did not fulfill the 5 or 15 year requirements of section 2(a)(2)[3]. At the time, section 208.9 of the Board's regulations was still in effect and a precursor to the current section 220.11 was being considered. That opinion stated:

> "There was no intention of changing the definition of 'regular occupation' in drafting proposed section 220.11(a). Indeed the wording of the proposed regulation would seem to require the inclusion of service for hire outside the railroad industry in testing for an individual's regular railroad occupation. The phrase 'engaged in service for hire in any other occupation' in paragraph (1) and the phrase 'engaged in service for hire during the last preceding 15 consecutive years' in paragraph (2) are not limited by their terms only to service for hire in the railroad industry."

Although self-employment does not break an employee's current connection, this office did not find that sufficient cause to discount it as service for hire outside the railroad industry in testing for an individual's regular railroad occupation.

It is therefore my opinion that the fact that work for an employer listed in section 1(o) does not break a current connection does not mean that it should be treated differently than work for other non-covered employers. Based on the statute and regulations, the legislative history, and prior legal opinions, it is my belief that work for employers listed in section 1(o) of the RRA should be treated as all other non-covered employers for the determination of an employee's regular employment in an occupational disability application.

Regarding the employees referenced in your memo, their work for the Federal Railroad Administration and the Alaska Railroad should be treated as you would other non-covered employment in determining their regular occupation. For the first employee who worked for the Federal Railroad Administration (FRA), you state that he applied for an occupational disability on October 20, 2008. He last

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[3] In that case we found that self-employment should not be considered "service by hire" under section 208.9 of the regulations or "wages or salary" under section 2(a)(2) of the Act. As a result, the time the employee engaged in self-employment was not considered and the Director of Disability and Medicare Operations was directed to refer to the most recent five years when the employee had earnings from employment. In this case, the employees at issue were not engaged in self-employment and appear to have been engaged in service by hire for their employers. As a result, the conclusion in L-91-30 is not applicable here.

worked for a railroad on July 30, 1988 as a locomotive engineer and then worked as a safety inspector for the FRA from March 1, 1990 through August 31, 2007. He was granted an occupational disability based on being disabled from performing his regular occupation as a locomotive engineer. There is no indication as to whether he is disabled from his work as safety inspector and it appears that his work for the FRA was essentially not taken into account. Therefore, this case is in direct conflict with Legal Opinion 79-62. In addition, under the guidelines articulated in this decision, the RRB should look back at the last 5 or 15 years from his application in 2008. Since he does not have any covered employment during that time, he does not have a regular occupation as defined by section 2(a)(2). That being said, there was a final agency decision made regarding this employee's eligibility on March 2, 2009 and regulations regarding reopening must be taken into account before any action is taken.

Regarding the second employee who worked for the Alaska Railroad, you ask if work performed in non-covered railroad employment which will not break a current connection is to be considered when determining the regular occupation an employee performed in the 5-year relevant period and 15 year relevant period in an occupational disability claim. The short answer is yes. It appears that this employee had covered railroad work in the 15 years prior to his application. Depending on how many months he worked in covered employment with BNSF as opposed to with non-covered employment, including the Alaska Railroad, he may have a regular railroad occupation.

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