

List of Subjects in 16 CFR Part 423

Care labeling of textile wearing apparel and certain piece goods; Trade Practices.

By direction of the Commission.

Donald S. Clark,

Secretary.

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RAILROAD RETIREMENT BOARD
20 CFR Part 255
RIN 3220-AA44
Recovery of Overpayments
AGENCY: Railroad Retirement Board.

ACTION: Proposed rule.

SUMMARY: The Railroad Retirement Board (Board) revises part 255 of its regulations, currently entitled "Recovery of Erroneous Payments", to clarify and update its regulations with respect to recovery of overpayments. The revisions more clearly identify the individuals from whom recovery may be sought and under what circumstances recovery of an overpayment of benefits will be made. The revisions also cover the circumstances under which such recovery may be waived, and the circumstances under which such recovery may be terminated or suspended under the Board's authority concerning administrative relief from recovery.

DATES: Comments must be received by January 29, 1996.

ADDRESSES: Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: Thomas W. Sadler, Assistant General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751-4513, TDD (312) 751-4701.

SUPPLEMENTARY INFORMATION: Part 255 of the Board's regulations has not been revised since 1967. Although section 10 of the Railroad Retirement Act of 1974 (45 U.S.C. 231i) includes provisions for recovery and waiver of overpayments of benefits which are substantially the same provisions included in the Railroad Retirement Act of 1937 (45 U.S.C. 228i, superseded), internal procedures dealing with overpayments of benefits have been developed which should properly be included in the regulations of the Board. In addition, in the Board's view, waiver should not be available with respect to certain types of overpayments and this proposed rule reflects those proposals. Because the

proposed rule would make extensive changes in the existing regulation, a section-by-section analysis is provided below.

The title of part 255 is proposed to be revised to "Recovery of Overpayments". The current title, "Recovery of Erroneous Payments", mistakenly implied that all such payments were caused by "fault". Overpayments can and do occur through no fault of the recipients of such payments. The purpose of part 255 is to set out regulations to govern those instances where more than the correct amount of benefits has been paid, regardless of whether or not "fault" exists.

Section 255.1 would replace the present § 255.1, which sets out statutory provisions, with an introductory statement to summarize what is included in part 255.

Section 255.2 defines "overpayment" using essentially the same language that is used in the current § 255.2 to define "erroneous payments".

Section 255.3 states the general rule that overpayments shall be recovered in all cases except where recovery is waived under § 255.10 or administrative relief from recovery is granted under § 255.17 or where collection is suspended or terminated under these regulations or the Federal Claims Collection Standards.

Section 255.4 would replace the current § 255.4, which simply states in a summary manner the methods by which erroneous payments may be recovered, with a detailed description of those individuals from whom overpayments may be recovered.

Section 255.5-255.8 set out the methods by which an overpayment of benefits may be recovered. These methods include recovery by cash payment (§ 255.5), recovery by setoff from any subsequent payment determined to be payable on the basis of the same record of compensation (§ 255.6), recovery by deduction in the computation of a residual lump-sum death benefit payable under the Railroad Retirement Act (§ 255.7), and recovery by actuarial adjustment of an annuity (§ 255.8). These sections are substantially similar to the current §§ 255.5-255.8. However, § 255.8, unlike the current section, provides that an actuarial adjustment is not effective until the overpaid annuitant negotiates the first check which reflects the actuarially adjusted rate.

Section 255.9 provides that where recovery of an overpayment is by setoff which can be effected within 5 months and the individual from whom recovery is sought is an enrollee under Medicare Part B, the individual's monthly

Medicare premium will be paid and the balance of the annuity amount will be applied toward recovery of the overpayment. This section is new and is intended both to save the agency the administrative costs of billing an annuitant for his or her Part B Medicare premium where his or her annuity would be offset in its entirety to recover an overpayment and also to avoid lapse of Medicare coverage.

Section 255.10 sets out the general requirements for waiver of recovery of an overpayment as set forth in the Railroad Retirement Act and replaces the present §§ 255.10 and 255.11.

Section 255.11, as currently in effect, would be removed because it is redundant. The new section 255.11 would define "fault" and gives examples of when an individual is or is not at fault based upon past agency decisions. Section 255.12 defines when recovery is contrary to the purpose of the Railroad Retirement Act, based upon past agency decisions. Section 255.13 defines when recovery is against equity or good conscience. Each of these sections is new and together they expand on the present § 255.12.

Sections 255.14, 255.15, and 255.16 are new sections which describe special situations where waiver of recovery of an overpayment is not available. Specifically, § 255.14 provides that waiver is not available under certain circumstances when recovery can be made from an accrual of social security benefits. Section 255.15 provides that waiver is not available to the estate of an individual.

Section 255.16 would provide that recovery of a small overpayment of less than \$500 will never be considered contrary to the purpose of the Railroad Retirement Act or against equity or good conscience. Under this rule, waiver of recovery would not be applicable for debts under \$500. This proposed rule is similar to the rule contained in § 340.10(e)(2) of the Board's regulations with respect to recovery of overpayments under the Railroad Unemployment Insurance Act (20 CFR 340.10(e)(2)).

Section 255.17 sets out internal Board policy governing those situations where recovery of an overpayment may not be waived under section 10(c) of the Railroad Retirement Act, thus extinguishing the debt, but where recovery will not be sought for equitable reasons. The regulations do not currently contain such a provision.

Section 255.18 is new and explains how an overpayment is recovered when that overpayment was made to a representative payee under part 266 of this chapter.

Sections 255.19 and 255.20, which deal with compromise, suspension, or termination of the collection of overpayments are substantively identical to the current §§ 255.14 and 255.15 with the exception that references to the Federal Claims Collection Standards (4 CFR Chapter 2) have been added.

This rule was previously published as a proposed rule on September 19, 1991 (56 FR 47426). Because the Board has substantially revised the rule as originally published, it has been determined to republish the rule as a proposed rule and to seek further public comment.

The Labor Member of the Board dissented from the action of the majority of the Board in approving this proposed rule. The Labor Member's reasons from dissenting from this action are set out below.

Views of the Labor Member of the Board

The Labor Member finds it to be a document seriously lacking in fairness and in grant need of a balanced approach to sensible debt collection.

- Section 255.12 includes non-liquid assets in the list of resources to be considered when determining whether recovery of an overpayment will be contrary to the purpose of the Railroad Retirement Act. The Labor Member thinks it would be unconscionable to expect anyone to liquidate personal property, for the purpose of repaying an overpayment for which he or she was not at fault, and accordingly feels this has no place in any waiver consideration.

- Example (1) in this same section is meant to illustrate when recovery would not be contrary to the purpose of the Act, but, in fact, the Labor Member considers it to be a one-sided attempt to construct as narrow a definition of financial hardship as possible, with the intention to leave the individual with as little as possible in the recovery process. He takes issue with the majority's failure to consider imminent financial obligations when making financial hardship determinations, as well.

- Section 255.13(b) states that an individual's ability to repay an overpayment is relevant with respect to the credibility of the claim that the individual detrimentally relied on the incorrect payment, but the Labor Member believes that, consistent with the Social Security Administration's regulations, a person's financial circumstances are not material in this regard.

- Section 255.15 does not allow waiver when recovery is sought from the estate of an overpaid individual.

However, the Labor Member submits that a literal reading of section 10(c) of the Act directs waiver consideration for estates, as well as individuals, when qualifying criteria is met. He feels that if the Act limited waiver to situations where there was no fault, and recovery would be "contrary to the purpose of the Act," then this restrictive interpretation presented by the majority would possibly have merit. But, since the Act also allows for waiver when recovery would be "against equity or good conscience," it should also be granted to the estate in situations where it would have been granted while the individual was alive. He sees the proposed regulation as being at odds with the statute on this point.

- Proposed Section 255.16 states that where the amount of an overpayment is less than \$500 it may not be waived. The majority compares this proposal to the rule contained in section 340.10(e)(2) of the Board's regulations with respect to recovery of overpayments under the Railroad Unemployment Insurance Act (RUIA). The Labor Member does not see this as a valid comparison. He suggests that overpayments under the RUIA often involve working individuals whose income from employment is only temporarily halted, which is in direct contrast to the situations at hand involving elderly or disabled individuals on fixed incomes. Moreover, waiver requests for both RUIA and Railroad Retirement Act overpayments usually include a request to reconsider the amount of the overpayment. Small RUIA overpayments are usually less complex, thus less costly to recompute, providing more of an incentive to complete the recovery process. Conversely, Railroad Retirement Act overpayments can involve various issues and complexities adding to the cost of adjudication. He recommends as a more reasonable and fair approach the allowance of a blanket relief from recovery in these small overpayment situations. From a business standpoint, he believes that the cost to the agency in trying to collect small overpayments will outweigh the benefits. Furthermore, he argues that past experience has shown that overpayments under \$500 because of their complexities routinely result from computational errors by the Board where the beneficiary would have no knowledge than an incorrect payment was made. As a government agency with a responsibility to pay benefits accurately, we, not the beneficiary, should be held accountable when we fail to do so.

- The Labor Member also points out that, on the issue of "fault," if an

individual received an incorrect annuity rate for a period of more than 5 months after the Board has received information which should have caused it to reduce the benefits, it has been a long-standing agency policy to consider the individual not at fault for any payment after the fifth month. This is provided that the continued issuance of the payments at the incorrect rate led the beneficiary to believe in good faith the he or she was entitled to the amount represented by the payment. The majority has refused to include such a provision in this proposed rule. Rather, it believes that the fault determination should be decided on a case-by-case basis. The Labor Member, on the other hand, believes that given the advanced technology available to the Board, the five-month rule should be incorporated into the proposed rule and, in fact, be reduced even further. He notes that the Social Security Administration has a provision similar to the one that he favors.

- The Labor Member also takes exception to the majority's decision not to include a provision which would allow blanket relief from overpayment recovery clearly resulting from the fault of the agency, contending that the Board must accept full responsibility for its own errors.

- In conclusion, he finds the proposed rule to be insensitive in tone and content and completely slanted against the overpaid individual. He notes that the Social Security Administration takes a far more sensible approach to handling overpayments than is presented in the proposal. He is of the opinion that his colleagues view the Board more as a collection agency than one whose primary mission is the *payment* of benefits, and would like to see as much attention paid to preventing overpayments as there is to collecting them.

The agency has determined that this is not a significant regulatory action for purposes of Executive Order 12866; therefore, no regulatory impact analysis is required. There are no information collections associated with this rule.

List of Subjects in 20 CFR Part 255

Railroad employees, Railroad retirement.

1. For the reasons set out in the preamble, part 255 of title 20, chapter II of the Code of Federal Regulations is proposed to be revised to read as follows:

PART 255—RECOVERY OF OVERPAYMENTS

Sec.

- 255.1 Introduction.
- 255.2 Overpayments.
- 255.3 When overpayments are to be recovered.
- 255.4 Persons from whom overpayments may be recovered.
- 255.5 Recovery by cash payment.
- 255.6 Recovery by setoff.
- 255.7 Recovery by deduction in computation of death benefit.
- 255.8 Recovery by adjustment in connection with subsequent payments.
- 255.9 Individual enrolled under supplementary medical insurance plan.
- 255.10 Waiver of recovery.
- 255.11 Fault.
- 255.12 When recovery is contrary to the purpose of the Railroad Retirement Act.
- 255.13 When recovery is against equity or good conscience.
- 255.14 Waiver not available when recovery can be made from accrual of social security benefits.
- 255.15 Waiver not available to an estate.
- 255.16 Waiver not available for small overpayments.
- 255.17 Administrative relief from recovery.
- 255.18 Recovery of overpayments from a representative payee.
- 255.19 Compromise of overpayments.
- 255.20 Suspension or termination of the collection of overpayments.

Authority: 45 U.S.C. 231f(b)(5), 231i.

§ 255.1 Introduction.

Section 10 of the Railroad Retirement Act provides for the recovery of an overpayment of benefits to an individual. This part explains when an overpayment must be recovered, from whom an overpayment may be recovered, and when recovery of the overpayment may be waived for administrative relief from recovery granted, and circumstances under which the overpayment may be compromised, or circumstances under which recovery of the overpayment may be suspended or terminated.

§ 255.2 Overpayments.

An overpayment, within the meaning of this part, is made in any case in which an individual receives a payment under the Railroad Retirement Act, all or part of which payment he or she is not entitled to receive.

§ 255.3 When overpayments are to be recovered.

Overpayments shall be recovered in all cases except those in which recovery is waived under § 255.10 or administrative relief from recovery is granted under § 255.17, or where the overpayment is compromised or recovery is terminated or suspended under §§ 255.19 or 255.20.

§ 255.4 Persons from whom overpayments may be recovered.

(a) *Overpaid individual.* The Board may recover an overpayment from the individual to whom the overpayment has been made by any method permitted by this part, or by the Federal Claims Collection Standards (4 CFR Chapter 2) (Example 1). If the overpaid individual dies before recovery is completed, then recovery may be effected by recovery from the estate or the heirs of such individual.

(b) *Other than overpaid individual.* The Board may recover an overpayment from a person other than the overpaid individual if such person is receiving benefits under a statute administered by the Board based upon the same record of compensation as the overpaid individual. In such a case, the Board will ordinarily recover the overpayment by setoff against such benefits as are provided for in § 255.6 (Example 2). However, the Board may ask for a cash refund of the overpayment.

(c) *Individual not in the same household.* Recovery under paragraph (b) of this section may be made from an individual who was not living in the same household, as defined in part 216 of this chapter, as the overpaid individual at the time of the overpayment, if the individual from whom recovery is to be made either was aware that benefits were paid incorrectly or benefited from the overpayment. (Example 3).

(d) *Examples.* This section may be illustrated by the following examples:

Example (1). An employee receiving a disability annuity returns to work without notifying the Board. The Board discovers that the employee is working and determines that the employee has recovered from his disability and has been overpaid. The Board requests that the employee repay the overpayment by cash refund either in one lump sum or in installment payments. If the employee refuses, the Board may refer the debt to a collection agency or the Department of Justice for civil suit or may collect the debt in any other manner permitted by law.

Example (2). The employee in Example 1 agrees to refund the overpayment by cash installment payments. However, the employee dies before repaying the total amount of the overpayment. At his death the employee's widow, who was living with the employee at the time the overpayment was incurred, becomes entitled to a widow's annuity. The Board may recover the remainder of the overpayment from any benefits due the widow.

Example (3). C, a child of a deceased employee by his first marriage, is receiving a disability annuity on the employee's record of compensation. W, the employee's second wife, is receiving a widow's annuity on the employee's record of compensation. C lives with his mother, the employee's first wife. C

marries without notifying the Board. Marriage terminates a child's annuity. W is not aware of C's marriage. Upon discovery of C's marriage, the Board demands that C refund the overpaid annuities; C refuses. Even though W is receiving an annuity based upon the same record of compensation as that of C, the Board will not recover the overpayment from W because she is not in the same household as C, was not aware of the incorrect benefits paid, and did not benefit from them.

§ 255.5 Recovery by cash payment.

The Board shall have the right to require that an overpayment to an individual be immediately and fully repaid in cash by that individual. However, if the Board determines that the individual is financially unable to pay the amount of the indebtedness in a lump sum, payment may be accepted in regular installments in accordance with the Federal Claims Collection Standards, found in 4 CFR chapter 2. These standards provide that whenever possible installment payments should be sufficient in amounts and frequency to liquidate the debt in not more than 3 years.

§ 255.6 Recovery by setoff.

An overpayment may be recovered by setoff from any subsequent payment determined to be payable under any statute administered by the Board to the individual who received the overpayment. An overpayment may be recovered from someone other than the overpaid individual by setoff from a subsequent payment determined to be payable to that other individual on the basis of the same record of compensation as that of the overpaid individual.

§ 255.7 Recovery by deduction in computation of death benefit.

In computing the residual lump sum provided for in part 234, subpart D, of this chapter, the Board shall include in the benefits to be deducted from the applicable percentages of the aggregate compensation provided for in that part all overpayments, whether waived under § 255.10 or otherwise not recovered, that were paid to the employee or to his or her spouse or to his or her survivors with respect to the employee's employment.

§ 255.8 Recovery by adjustment in connection with subsequent payments.

Recovery of an overpayment may be made by permanently reducing the amount of any annuity payable to the individual or individuals from whom recovery is sought. This method of recovery is called an actuarial adjustment of the annuity. The Board cannot require any individual to take an

actuarial adjustment in order to recover an overpayment not is an actuarial adjustment available as a matter of right. An actuarial adjustment does not become effective until the overpaid individual negotiates the first annuity check which reflects the annuity rate after actuarial adjustment

Example. An annuitant agrees to recovery of a \$5,000 overpayment by actuarial adjustment. However, the annuitant dies before negotiating the first annuity check reflecting the actuarially-reduced rate. The \$5,000 is not considered recovered. If the annuitant had negotiated the check before he died, the \$5000 would be considered fully recovered.

§ 255.9 Individual enrolled under supplementary medical insurance plan.

Where recovery of the overpayment is by setoff as provided for in § 255.6, and where recovery of the overpayment by such means will be accomplished within a period of 5 months, and the individual from whom recovery is sought is an enrollee under part B of title XVIII of the Social Security Act (Supplementary Medical Insurance Benefits for the Aged and Disabled), an amount of such individual's monthly benefit which is equal to his or her obligation for supplementary medical insurance premiums will be applied toward payment of such premiums, and the balance of the monthly benefit will be applied toward recovery of the overpayment.

§ 255.10 Waiver of recovery.

There shall be no recovery from any person in any case where more than the correct amount of annuities or other benefits has been paid to an individual or where payment has been made to an individual not entitled thereto if in the judgment of the Board:

(a) The overpaid individual is without fault; and

(b) Recovery would be contrary to the purpose of the Railroad Retirement Act or would be against equity or good conscience.

§ 255.11 Fault.

(a) Before recovery of an overpayment may be waived, it must be determined that the overpaid individual was without fault in causing the overpayment. If recovery is sought from other than the overpaid individual but the overpaid individual was not without fault, then waiver is not available. However, see § 255.17 for provisions as to when administrative relief from recovery may be granted in such circumstances.

(b) Fault means a defect of judgment or conduct arising from inattention or bad faith. Judgment or conduct is

defective when it deviates from a standard of reasonable care taken to comply with the entitlement provisions of this chapter. Conduct includes both action and inaction. Unlike fraud, fault does not require a deliberate intent to deceive.

(c) Whether an individual is at fault in causing an overpayment generally depends on all circumstances surrounding the overpayment. Among the factors the Board will consider are: the ability of the overpaid individual to understand the reporting requirements of the Railroad Retirement Act or to realize that he or she is being overpaid (e.g., age, education, comprehension, physical and mental condition); the particular cause of non-entitlement to benefits; and the number of instances in which the individual may have made erroneous statements.

(d)(1) Circumstances in which the Board will find an individual at fault include but are not limited to:

(i) Failure to furnish to the Railroad Retirement Board information which the individual knew or should have known to be material;

(ii) An incorrect statement made by the Individual which he or she knew or should have known was incorrect (including furnishing an opinion or conclusion when asked for facts); and

(iii) Failure to return a payment which the individual knew or should have known was incorrect.

(2) Where any of the circumstances listed in paragraph (d)(1) of this section are found to have occurred, the individual shall be presumed to be not without fault. This presumption may be rebutted, but the burden of presenting evidence to rebut the presumption is on the individual.

(3) For purposes of paragraph (d)(1)(i) of this section, furnishing information to the Social Security Administration or any other agency shall not be considered to constitute furnishing information to the Railroad Retirement Board.

(4) For purposes of this section, an error on the part of the agency shall not extinguish fault on the part of the individual.

(e) Circumstances in which the Board will find an individual not at fault include but are not limited to:

(1) the overpayment is the result of Board error of which the overpaid individual was not aware and could not reasonably have been expected to be aware (Example 1).

(2) The overpayment is the result of an adjustment to the overpaid individual's annuity because of entitlement of another individual to an annuity on the same record of

compensation as that of the overpaid individual (Example 2).

(f) The application of this section may be illustrated by the following examples:

Example (1). The Board makes a mathematical error in the computation of an employee's annuity, thus giving the employee a higher rate than he or she is entitled to but which is sufficiently close to the estimated rate given the employee at the time he or she applied for the annuity that the employee believed, in good faith, that the amount was correct. The employee is not at fault in causing the overpayment in this case. The overpayment may be waived if the requirements of § 255.12 or § 255.13 are met.

Example (2). The widow and four minor children of a railroad employee are receiving benefits from the Board under the family maximum. Another minor child not living in the same household as the above individuals is also determined to be the child of the deceased employee. The widow was not aware of the existence of this child. An award of benefits to this child causes a reduction in benefits to the other individuals under the family maximum benefit provision of the Social Security Act. Because of normal administrative delay this reduction does not take place for a period of 2 months after its effective date. The widow and her children are without fault with respect to this overpayment. The overpayment may be waived if the requirements of § 255.12 or § 255.13 are met.

§ 255.12 When recovery is contrary to the purpose of the Railroad Retirement Act.

(a) The purpose of the Railroad Retirement Act is to pay retirement and survivor annuities and other benefits to eligible beneficiaries. It is contrary to the purpose of the Act for an overpayment to be recovered from income and resources which the individual requires to meet ordinary and necessary living expenses. If either income or resources, or a combination thereof, are sufficient to meet such expenses, recovery of an overpayment is not contrary to the purpose of the Act.

(b) For purposes of this section, income includes any funds which may reasonably be considered available for the individual's use, regardless of source. Income to the individual's spouse or dependents is available to the individual if the spouse or dependent lived with the individual at the time waiver is considered. Types of income include but are not limited to:

- (1) Government benefits, such as Black Lung, Social Security, Workers' Compensation, and Unemployment Compensation benefits;
- (2) Wages and self-employment income;
- (3) Regular incoming payments, such as rent or pensions; and
- (4) Investment income.

(c) For purposes of this section, resources may include:

(1) Liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like;

(2) Non-liquid assets at their fair market value; and

(3) Accumulated, unpaid Federal benefits; and

(d) For purposes of paragraphs (c) (1) and (2) of this section, assets disposed of on and after the date of notification of the overpayment, other than cash expended to meet ordinary and necessary living expenses, shall be included.

(e) Whether an individual has sufficient income and resources to meet ordinary and necessary living expenses depends not only on the amount of his or her income and resources, but also on whether the expenses are ordinary and necessary. While the level of expenses which is ordinary and necessary may vary among individuals, it must be held at a level reasonable for an individual who is living on a fixed income. The Board will consider the discretionary nature of an expense in determining whether it is reasonable. Ordinary and necessary living expenses include:

(1) Fixed living expenses such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance), taxes, installment payments, etc.;

(2) Medical, hospital, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Miscellaneous expenses (e.g., newspapers, haircuts).

(f) Where recovery of the full amount of an overpayment would be made from income and resources required to meet ordinary and necessary living expenses, but recovery of a lesser amount would leave income or resources sufficient to meet such expenses, recovery of the lesser amount is not contrary to the purpose of the Act.

(g) This section may be illustrated by the following examples:

Example (1). A remarried widow, W, is overpaid \$6000 due to receipt of benefits on the wage records of both her late husbands. It has been determined that she is without fault. Her financial disclosure statement reveals monthly income greater than monthly expenses, and asset of \$12,000, \$10,000 of which is in cash. She claims to be saving these funds for future medical expenses, because she has a progressive disease. It is not contrary to the purposes of the Act to recover the overpayment. The desire, on the part of the beneficiary, to retain her assets to satisfy some potential future obligation, does not change the determination.

Example (2). A disability annuitant, D, is overpaid \$33,000 because of simultaneous

entitlement to workers' compensation payments. He is determined to be without fault. He claims he has assumed financial responsibility for his adult child and her children. A claimed expense for which the annuitant has no legal obligation to pay does not make recovery contrary to the purposes of the Act.

§ 255.13 When recovery is against equity or good conscience.

(a) Recovery is considered to be against equity or good conscience if a person, in reliance on payments made to him or her or on notice that payment would be made, relinquished a significant and valuable right (Example 1) or changed his or her position to his or her substantial detriment (Example 2).

(b) An individual's ability to repay an overpayment is not material to a finding that recovery would be against equity or good conscience but is relevant with respect to the credibility of a claim of detrimental reliance under paragraph (a) of this section.

(c) This section may be illustrated by the following examples:

Example (1). After being informed by the Board that he had been credited with sufficient years of railroad service to retire at age 60, and employee quit his railroad job and applied for benefits under the Railroad Retirement Act. He receives benefits for six months when it is discovered that he had insufficient railroad service to retire at age 60 and was not entitled to the benefits he received. His annuity was terminated. Because the employee gave up his seniority rights when he quit his railroad job, he cannot get his job back. It is determined that the employee was not at fault in causing the overpayments. In this situation recovery of the overpayments would be against equity or good conscience because the overpaid individual gave up a valuable right.

Example (2). A widow, having been awarded annuities for herself and her daughter, entered her daughter in a private school. The widow did not have substantial assets and her income, apart from the annuities she received in the amounts payable, would not have been sufficient for her to have undertaken the obligation to send her daughter to private school. In order to pay for the schooling she took out a loan and used the monthly annuities to pay interest and principal on the loan. After the widow and her daughter had received payments for almost a year, the deceased employee was found not to have been insured under the Railroad Retirement Act. Therefore, all payments to the widow and child were erroneous and the annuities were terminated. It is determined that the widow was not at fault in causing the overpayment. Having incurred a financial obligation (the school loan) toward which the benefits had been applied, the widow was in a worse position financially than if she and her daughter had never been entitled to benefits. In this

situation, the recovery of the overpayment would be against equity or good conscience.

§ 255.14 Waiver not available when recovery can be made from accrual of social security benefits.

Where the overpayment is the result of a reduction of benefits payable under the Railroad Retirement Act due to the overpaid individual's entitlement to social security benefits and recovery of such overpayment may be made by offset against an accrual of social security benefits, it shall not be considered to be against equity or good conscience or contrary to the purpose of the Railroad Retirement Act to recover the overpayment by offset against the accrual. Consequently, in such a case recovery of an overpayment is not subject to waiver consideration.

§ 255.15 Waiver not available to an estate.

There shall be no waiver when recovery is sought from the estate of an overpaid individual.

§ 255.16 Waiver not available for small overpayments.

Where the amount of the overpayment is less than \$500, it shall not be considered contrary to the purpose of the Railroad Retirement Act or against equity or good conscience to recover the overpayment. Consequently, recovery may not be waived.

§ 255.17 Administrative relief from recovery.

(a) Where the Board seeks to recover an overpayment from someone other than the overpaid individual, as provided for in § 255.4 of this part, and where waiver of recovery, as provided for in § 255.10 of this part, is not available because the overpaid individual was at fault as defined in § 255.11, the Board may forego recovery of the overpayment where the individual from whom recovery is sought was not at fault in causing the overpayment and where recovery is contrary to the purpose of the Railroad Retirement Act as defined in § 255.12.

(b) Application of administrative relief from recovery with respect to a given person from whom recovery may be made shall have no effect on the authority of the Board to recover the overpayment from anyone else from whom recovery may be sought.

(c) This section may be illustrated by the following examples:

Example (1): An employee, through his own fault, causes an overpayment in his annuity. The employee dies before the overpayment can be recovered from him and he leaves no estate. A widow's annuity is payable on the employee's compensation record. The widow was not at fault in

causing the overpayment. The Board may recover the remainder of the overpayment by setoff against the widow's annuity. However, it may forego recovery under this section if such recovery would be contrary to the purpose of the Railroad Retirement Act as defined in § 255.12. Since this is not a waiver of the overpayment, the Board is free to recover the overpayment from the widow at a later date, for example, if an accrual of benefits should become payable, or if it determines that such recovery would not be against the purpose of the Railroad Retirement Act.

Example (2): A representative payee for a retarded child, through her own fault, causes an overpayment in the child's annuity. The overpaid amounts were used for the benefit of the child. The representative payee dies before the overpayment can be recovered from her and she leaves no estate. The Board may not waive the remainder of the overpayment with respect to the child since for purposes of waiver the representative payee is considered the overpaid individual (see § 255.18) and the overpaid individual was at fault. However, if the child was not at fault in causing the overpayment and recovery would be contrary to the purpose of the Railroad Retirement Act as defined in § 255.12, then the Board may forego recovery of the overpayment from the child's annuity under this section.

§ 255.18 Recovery of overpayments from a representative payee.

(a) *Joint liability.* In general, if an overpayment is made to an individual receiving benefits as a representative payee (see part 266 of this chapter) the Board may recover the overpayment from either the representative payee or the beneficiary, or both. If the beneficiary is currently receiving benefits, either in his or her own right or through a representative payee, the Board will generally propose to recover the overpayment by setoff against those benefits as provided for in § 255.6 of this part. If the beneficiary is not currently receiving benefits but the representative payee is receiving benefits, then the Board will generally propose to recover the overpayment by setoff against those benefits.

(b) *Waiver of overpayments.* For purposes of § 255.10 (Waiver of recovery), if it is determined that the representative payee was at fault in causing the overpayment there may be no waiver of the overpayment either as to the representative payee or the beneficiary. However, if the beneficiary was not at fault in causing the overpayment he or she may be eligible for administrative relief from recovery under § 255.17.

(c) This section may be illustrated by the following examples:

Example (1): M is receiving a child's annuity as a representative payee for her disabled son, S. With M's knowledge S

marries. Although both M and S know that marriage terminates the child's annuity, neither of them informs the Board of this event. Both M and S are liable for any overpayment caused. Wavier is not available since M would be considered at fault in causing the overpayment. Administrative relief from recovery is not available to S since he would also be considered at fault.

Example (2): R is a representative payee for B, who resides in a skilled-care facility. R is found to be at fault in causing an overpayment of benefits to B. The Board may recover the overpayment from either R or B. Waiver is not available because R was at fault in causing the overpayment. However, if B was not at fault in causing the overpayment he or she may be entitled to administrative relief from recovery under § 255.17.

§ 255.19 Compromise of overpayments.

(a) This section sets forth the principal standards which the Board applies in exercising its authority under 31 U.S.C. 3711 to compromise an overpayment. In addition, the Board may compromise an overpayment under the Federal Claims Collection Standards set forth in 4 CFR part 103.

(b) An overpayment may be compromised only if it is in the best interest of the agency. Circumstances and factors to be considered are:

(1) The overpayment cannot be collected because of the overpaid individual's inability to pay the full amount of the overpayment within a reasonable time;

(2) The overpaid individual refuses to pay the overpayment in full and it appears that enforced collection procedures will take an inordinate amount of time or that the cost of collecting does not justify the enforced collection of the full amount; or

(3) There is doubt that the Board could prove its case in court for the full amount claimed because of a bona fide dispute as to the facts or because of the legal issues involved.

§ 255.20 Suspension or termination of the collection of overpayments.

This section sets forth the principal standards which the Board applies in approving the suspension or termination of the collection of an overpayment. In addition the Board may suspend or terminate collection under the Federal Claims Collection Standards set forth in 4 CFR part 104.

(a) Collection action on a Board claim may be suspended temporarily when the debtor cannot be located and there is reason to believe future collection action may be productive or collection may be effected by offset in the near future.

(b) Collection action may be terminated when:

(1) The debtor is unable to make any substantial payment;

(2) The debtor cannot be located and offset is too remote to justify retention of the claim;

(3) The cost of collection action will exceed the amount recoverable; or

(4) The claim is legally without merit or cannot be substantiated by the evidence.

Dated: December 20, 1995.

By Authority of the Board.
For the Board.

Beatrice Ezerski,

Secretary of the Board.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 15

Federal Acquisition Regulation; Contracting by Negotiations; FAR Part 15 Rewrite

AGENCIES: Department of Defense, General Services Administration, and National Aeronautics and Space Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Comments are solicited from both government and industry personnel on how FAR Part 15 can be rewritten to better support contracting by negotiation. The Director of Defense Procurement, in concert with the Federal Acquisition Regulatory Council, is sponsoring an initiative to rewrite Federal Acquisition Regulation (FAR) Part 15, Contracting by Negotiation. The goal is to make Part 15 easier to understand and to eliminate policies, procedures, or requirements that impose unnecessary burdens on contractors or contracting officers. Regulatory requirements that are not required by statute, required to ensure adequately standardized government business practices, or required to protect the public interest will be considered for elimination. Innovative means of simplifying the procurement process and enhancing its efficiency will be considered for incorporation into the regulation.

Comments may be submitted in two formats: (1) By letter to the address below, or (2) by electronic response on the Acquisition Reform Network's FAR Part 15 Rewrite Forum located on the