SEP 28 1977
L 77-575

Mr. Phillip Segrest
Attorney at Law
Post Office Box 7872
Waco, Texas 76710

Dear Mr. Segrest:

This is in response to your request to our district office in Fort Worth concerning the Board's position on the community property aspects of railroad retirement benefits. It is my understanding that you are appealing a decision rendered by a Texas divorce court which held that railroad retirement benefits are subject to Texas community property laws.

The district office has informed me that you are already aware of the Texas case of Allen v. Allen, 363 S.W. 2d 312 (Tex. Civ. App., 1962) which held that a divorce court had no power to divide the employee's anticipated railroad retirement benefits or to give the wife any interest therein. In addition, I am enclosing a copy of the decision of the Ninth Judicial District Court, Parish of Rapides, State of Louisiana, in the case of Rachal v. Rachal, Civil Suit No. 91,096 (August 28, 1975). The Court in Rachal held that taxes paid pursuant to the Railroad Retirement Tax Act and any expectancy or interest an individual may have in ultimate retirement benefits under the Railroad Retirement Act are not community property. In dicta, however, the Court further indicated that benefits under the Railroad Retirement Act and the Social Security Act must be characterized as separate property. Though Rachal obviously has little precedent value as far as a Texas Appellate Court may be concerned, the reasoning of the Court in Rachal, as expressed in its opinion, may be helpful to you in forming your arguments for your forthcoming appeal.

As you may know, the Board has consistently taken the position that there are no rights to benefits under the Railroad Retirement Act which constitute community property, since benefits under that Act are direct and independent rights granted by Federal law and are not contractual in nature. See Ruhl v. Railroad Retirement Board, 342 F. 2d 662, 666 (C.A. 7, 1965); Flemming v. Nestor, 363 U.S. 603, 608-611 (1960); see also Richardson v. Belcher, 404 U.S. 78, 80-81 (1971). Furthermore, no state court would have the authority to make a determination as to those who are entitled to such benefits. See Succession of White, 94 So. 2d 68 (1957); Succession of White, 96 So. 2d 355 (1957); In re Malo's Estate, 356 P. 2d 957 (1960). See also Wissner v. Wissner, 338 U.S. 655 (1950), reh. den., 339 U.S. 926 (1950).

The annuities provided by the Act are not of the same nature as payments under private pension plans. Any payments made by an employee for railroad retirement purposes differ from either private insurance premiums or contributions made to a retirement fund established by an employer for its employees in that the former are special income taxes which are levied on the incomes of all railroad employees by the Railroad Retirement Tax Act (26 U.S.C. § 3201, et seq.). Thus, the taxes paid by railroad employees under the Tax Act for railroad retirement purposes are of precisely the same nature as the taxes paid by nonrailroad employees under the Federal Insurance Contributions Act for social security purposes.

Therefore, an employee has no property interest in the amount of railroad retirement taxes which he has paid. The only right which an individual possesses under the Railroad Retirement Act consists of a potential interest in a Federal statutory grant in the form of an annuity when he accumulates at least 10 years of creditable railroad service, and this interest cannot, in our view, properly be considered as community property. In an imprecise sense, such potential right might be referred to as a "vested" interest where the individual has already been credited with the necessary 10 years of service; however, the fact still remains that such an individual cannot draw any annuity benefits until he meets the additional eligibility requirements set out in the Act, which he may never do. Furthermore, such right certainly is not a "vested" interest in the sense that it cannot be changed or withdrawn by the Congress at any time prior to the actual receipt of benefits, and even after an award of an annuity is made. See Bernstein v. Ribicoff, 299 F. 2d 248, 251-252 (C.A. 3, 1962); Price v. Flemming, 280 F. 2d 956, 959 (C.A. 3, 1960).

The railroad retirement and social security systems are closely coordinated both substantively and financially. In this regard, I am enclosing a copy of a letter to a California attorney which describes this coordination in some detail. Therefore, if a court were to hold that credits earned in employment covered by the Social Security Act create such a vested interest as would constitute community property, the same would be true of credits earned in employment covered by the Railroad Retirement Act. Conversely, if social security credits do not give rise to a community property interest, neither do railroad retirement credits. I can think of no legal basis for differentiating between the two systems for community property purposes, and, therefore, it would appear that any differences in treatment in this area would arise only as a result of a lack of understanding as to the nature of the railroad retirement system.

In addition, I would like to call your attention to section 14 of the Railroad Retirement Act (45 U.S.C. § 231m), which provides in part as follows:

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated * * * ."

The only exception to section 14 is section 459 of the Social Security Act (42 U.S.C. § 659), which provides for the garnishment of certain federal benefits to satisfy an obligation for alimony or child support. This section was amended this year by Public Law 95-30, and specifically provides that alimony "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."

Thus, section 14 prohibits a state court from compelling the Board to pay benefits to anyone other than an individual who has satisfied the statutory conditions of eligibility for

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benefits under the Railroad Retirement Act. Cf. Commonwealth v. Berfield, 160 Pa. Super. 438, 51 A. 2d 523 (1947), and Heuchan v. Heuchan, 38 Wash. 2d 207, 228 P. 2d 470 (1951). In view of the provisions of section 14, the Board could not give effect to a court order directed against it purporting to determine entitlement to railroad retirement benefits pursuant to a state's community property laws. In regard to section 14 you may also wish to look at the cases of Freedom Finance Co. v. Fleckenstein, 116 N.J. Super. 428, 282 A. 2d 458 (1971), and Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973).

Finally, you should also be aware of the recent decision of the California Supreme Court in In Re Marriage of Hisquierdo, 139 Cal. Rptr. 590, 565 P. 2d 224 (1977), which held that an employee's interest under the Railroad Retirement Act is subject to California's community property laws. In addition you should be aware of the case of In re the Marriage of McKinney, 14 Wash. App. 921, 546 P. 2d 456 (1976), which also holds that railroad retirement benefits are community property. McKinney, however, appears to be inconsistent with another Washington case, In re the Marriage of Clark, 13 Wash. App. 805, 538 P. 2d 145, 148 (1975), which indicated, but did not hold, that social security benefits are not community property.

I trust that the above information will be of assistance to you.

Very truly yours,

Dale G. Zimmerman
General Counsel

Enclosures

L-76-230
Decision in Rachal

cc: District Manager
Fort Worth, Texas

TWS:mco