

Signed

OCT 3 1977

Secretary of the Board

L 77 - 450.1

H - 64

General Counsel

Consolidated Rail Corporation - Erie-Lackawanna
Railway Company Unfunded Pension Plan

This is in reply to the question you raised on September 14, 1977, concerning my decision on the Erie-Lackawanna Railway Company Unfunded Pension Plan. You asked for a reconciliation of my opinion that the plan is a supplemental pension plan for purposes of the Railroad Retirement Act with certain questions raised by the Chairman.

In General Counsel's opinion L-76-604 I stated that a determination as to whether a pension plan is a supplemental pension plan within the meaning of the Railroad Retirement Act is made on a case by case basis. This means that a number of factors are considered, but that no single factor is necessarily determinative. I noted that a plan must clearly set forth eligibility and vesting conditions, as well as a formula to determine the amount of benefits payable under the plan, and that in the case by case analysis of plans which are submitted for approval, these are the most significant factors. Not listed in L-76-604 as a factor to be considered, but certainly a consideration which must be kept in mind in determining whether a plan is a supplemental pension plan within the meaning of the Railroad Retirement Act, is the underlying purpose of the supplemental annuity reduction and tax credit device contained in the law, which is to prevent a duplication of costs to employers who are making pension payments notwithstanding the supplemental annuity program.

The Erie-Lackawanna unfunded plan is available to nonagreement employees who retire at the convenience of management between ages 60 and 65 with a "significant number of years of service." Certainly the phrase "significant number of years of service" is vague, but the July 1, 1971, memorandum of the Erie-Lackawanna Railway Company, which describes the plan, clearly implies a relationship between the plan and the funded Erie-Lackawanna plan. The funded plan is a supplemental plan

Secretary of the Board

for purposes of the Railroad Retirement Act. The Consolidated Rail Corporation, which now administers both plans, confirmed that the unfunded plan exists for the purpose of paying benefits to individuals who do not qualify, as a result of early retirement, for pensions under the funded plan, and that the unfunded plan follows the "parameters" of the funded plan. Thus, 20 years of service, which is specified in the funded plan, is the minimum number of years of service which is, by definition "significant." Pensions are, according to a Consolidated Rail Corporation spokesman, available as a matter of "well established policy" to nonagreement employees who retire at the convenience of management between ages 60 and 65 with 20 or more years of service.

In this regard it might be noted that the only language in the July 1, 1971, memorandum which tends to create an impression that the plan may be somewhat discretionary is cast in terms of a negative which is not applicable to most individuals who would be covered by the plan: "Generally, the benefit is not to be made available to employees who are younger than age 60 or who do not have a significant number of years of service." This language suggests that pensions under the plan may occasionally be awarded on a discretionary basis, but that individuals who are age 60 and are asked to retire before age 65 have an undeniable right to a pension if they have 20 or more years of service. It is my opinion that a plan is not to be ruled discretionary, and therefore not a supplemental pension plan for purposes of the Railroad Retirement Act, simply because there may be a small number of individuals drawing pensions under the plan on a discretionary basis, if such plan clearly relates to an identifiable category of individuals who automatically receive pensions under the plan as a matter of policy upon satisfying specific eligibility requirements. The information given the Board by the Consolidated Rail Corporation indicates that there is such a category of individuals who get pensions as a matter of policy under the unfunded pension plan. The intention to have a plan flexible enough to be used to grant an occasional pension on a discretionary basis will, however, explain why "significant" rather than "20" is used to describe the number of years of service which is required to establish eligibility.

Finally, it must be emphasized that the unfunded Erie Lackawanna plan contains very detailed provisions for the computation of the pension amounts to be provided to qualified

Secretary of the Board

individuals, and this amount is coordinated to benefits paid under the Railroad Retirement Act. While this is not determinative of the question presented, it certainly creates a presumption that the plan is not administered on a discretionary basis. There would appear to be little reason to make eligibility discretionary but the amount of benefits so exact. The exactitude of the computation provision would appear to be for the purposes of obligating the company to pay no more and of guarantying an individual will receive no less than the exact amount of the entitlement. Entitlement, however, seems to be implied.

Given the foregoing considerations, it is my opinion that the unfunded Erie Lackawanna pension plan is a supplemental pension plan for purposes of the Railroad Retirement Act. The Consolidated Rail Corporation which now administers the plan should receive the applicable tax credits in cases where pensions are paid to individuals under that plan.

Dale G. Zimmerman

DDL:das