

Chicago 11, Illinois  
AUG 15 1952

The Director of Retirement Claims

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M-154

The Associate General Counsel

Eligibility of a Pensioner and his Survivors for Benefits  
Under the Social Security Act on the Basis of Less Than Ten  
Years Railroad Employment After 1936.

The Social Security Administration has informed me that it is doubtful whether in a case referred to it by the Board it could award benefits on the basis of the railroad service of less than ten years performed after 1936 by a railroad employee who has been granted a pension under section 6 of the Railroad Retirement Act. The only reason for the hesitation of the Social Security Administration in this respect, it appears, is my ruling of July 11, 1951, L-51-312, Question 7, holding that a pensioner, though he would not have any "years of service", could be "insured" under section 5(1)(7) even though the provision in terms required "ten years of service" for "insured" status. The Administration's view is that under this ruling, if it should assume jurisdiction in the case in question to pay benefits to the pensioner himself, it would not be able to retain the case for the purpose of paying his survivors, because these survivors would, by the employees having "insured" status under the Railroad Retirement Act, have entitlement under that Act (sections 5(a), (b), (c) and (d)), and thus under section 5(g)(1) of the Railroad Retirement Act the Social Security Administration would lose jurisdiction.

I do not believe, however, that the ruling in question need result in the consequence feared. The ruling was a general one intended to cover pensioners as a class and derived its validity not from the language of the provision but solely from the necessity of giving the provision some practical effect and to avoid the absurd consequence of depriving completely all pensioners' survivors from benefits when, obviously, the language otherwise shows that the Congressional intent was to provide such benefits. Such considerations would not be applicable, however, to the special situation of the pensioner with some "years of service", but less than ten, derived from service after 1936, since nothing otherwise would preclude eligibility for his survivors under the Social Security Act (see section 5(k)(1) as amended). In such circumstances the rule of construction permitting a deviation from the

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literal meaning of the statutory provision would not apply and to that extent the provision could, and I believe should, be understood as meaning that in cases such as that in question where the pensioner himself can not be awarded benefits under the Railroad Retirement Act on the basis of his railroad service after 1936 his survivors can not be awarded such benefits either. Thus, in such a case both the pensioner and survivors would take, if at all, under the Social Security Act as in the case of other employees with less than "ten years of service".

It must be considered, of course, that pursuant to General Counsel's Opinion L-47-449, approved by the Board, B. O. 49-389, a pensioner who has "ten years of service" because of railroad employment after 1936 can not be awarded an annuity on the basis of this service unless he elects to take an annuity instead of a pension. That same principle should apply, in my opinion, to the case of the pensioner with less than ten years of service. There is nothing to indicate that the transfer of credits to the social security system is to make any difference in this regard, and certainly the basis for the opinion in L-47-449 which derives from the position of the court in the Bates case that "it is clear that the spirit of the Act is that no person should receive two types of payments" is appropriate for use in this situation involving in form two separate systems but in substance just one since it is only railroad employment which provides the benefit under the system. Accordingly, in the case stated, the pensioner should be required to elect between taking benefits under the Social Security Act based on railroad employment, and retaining his pension under the Railroad Retirement Act. This loss of pension under the Retirement Act would, of course, be fully consistent with and have an effect exactly like that of the last paragraph of section 3(b) of the Act as amended which requires a reduction in the "pension of an individual" by the amount of the old-age insurance benefit to which the pensioner might be entitled even though the employment which made the pensioner eligible for the old-age benefit was not railroad employment.

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