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The Director of Retirement Claims

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The Associate General Counsel

Application of Over-All SSA Minimum in Survivor Cases
Affected by the Repeal of the Last Sentence of Section 5(g)(2)

In answer to your request of August 2, 1955, it is my opinion that in a case in which a survivor is entitled to a survivor annuity under the Railroad Retirement Act, and would be entitled upon application to a benefit under the Social Security Act, whether or not the application is filed, the survivor annuity should be paid only pursuant to the railroad retirement formula even though the railroad employment would produce a higher survivor benefit under the social security formula. Of course, in a case where the annuity is lower than the amount which would be added by the inclusion of the railroad employment from which the annuity derived to the over-all total which would be payable under the Social Security Act, upon application, on the basis of the beneficiary's own or someone else's social security employment, the annuity should be increased to this greater amount.

The over-all "social security minimum" provision in section 3(e) is in terms of paying an annuity to an employee's survivor of not "less than the amount, or the additional amount, which would have been payable . . . for such month under the Social Security Act . . . if such employee's service as an employee . . . were included in the term 'employment' in that Act". The provision supposes a condition of payability of benefits under the Social Security Act if the employment from which the railroad retirement benefits derive were social security employment. In a case covered by your memorandum we have, of course, the fact of non-railroad employment which would provide, of itself and apart from the railroad employment of the employee, a benefit under the Social Security Act if applied for. If the railroad employment were social security employment, however, such a benefit, unless it would be larger than the survivor benefit which would derive from the railroad employment, or unless the other benefit would be payable earlier than the survivor benefit, might not ever be applied for, or even payable at all, in view of the eligibility and reduction conditions against dual benefits prescribed by sections 202(d), (e), (f), (h), and (k) of the Social Security Act. Thus, under these dual benefit restrictions of the Social Security Act, the railroad employment,

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were it covered by the Social Security Act, might provide, under the particular circumstances, all or almost all of the social security benefits payable to the employee's survivor.

Obviously, however, the over-all "social security minimum" provision was not intended to be taken so literally as to require the substitution of railroad employment for social security employment in providing benefits. Rather, even apart from legislative history, the very nature of the provision and its prescription that the amount payable under the provision be only the "additional" amount resulting from the treatment of railroad employment as social security employment, show plainly that the provision is to be understood as requiring payment for any month of only such additional amount as the railroad employment would provide under the Social Security Act assuming the beneficiary to have received for that month the full benefit otherwise payable on application under the Social Security Act on the basis of the social security employment of someone other than the employee without regard to the employee's railroad employment. See Associate General Counsel's Opinion L-55-284 which points out that the minimum provision "was intended to assure only that railroad employees and their survivors were not to lose benefits by reason of the exclusion of their railroad employment from coverage by the Social Security Act."

On such a basis the circumstance that a survivor had not applied for a social security benefit for which she or he was eligible, and thus could not receive, would not, in my opinion, justify increasing his or her railroad retirement survivor annuity to make up for this failure even though, had the employee's railroad employment been social security employment, this employment would have been the basis, under the restrictive dual benefit provisions of the Social Security Act, for all the social security benefits then payable. (Of course, where, after applying that principle, the employee's railroad employment would add an amount greater than the regular annuity to the total benefits the survivor could receive under the Social Security Act, if appropriate application were made, the survivor's annuity should be increased to that greater amount.)

David B. Schreiber
Associate General Counsel

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CC: Chief Executive Officer