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The Acting Director of Personnel

The Associate General Counsel

Your memorandum of August 12, 1955, on the "Effect of H.R. 4744, 84th Congress, on Employment of Personnel".

This is in reply to your memorandum of August 12, 1955, concerning the effect of sections 5 and 6 of H.R. 4744, 84th Congress, 1st Session, (approved August 12, 1955), "on the employment and status of certain personnel in the Railroad Retirement Board".

Before discussing the several questions raised in your memorandum, I deem it appropriate to quote the pertinent provisions of the Railroad Retirement Act and the Railroad Unemployment Insurance Act. Section 10(b)4 of the Railroad Retirement Act reads in pertinent part as follows:

"The Board shall * * * employ such individuals and provide for their compensation and expenses as may be necessary for the proper discharge of its functions. All positions to which such individuals are appointed, except one Administrative Assistant to each member of the Board, shall be in and under the competitive civil-service and shall not be removed or excepted therefrom.

Section 15(c) of the Railroad Retirement Act reads in pertinent part as follows:

"The Board is hereby authorized and directed to select two actuaries, one from recommendations made by representatives of employees and the other from recommendations made by representatives of carriers. These actuaries, along with a third who shall be designated by the Secretary of the Treasury, shall be known as the Actuarial Advisory Committee with respect to the Railroad Retirement Account.

Section 12(h) of the Railroad Unemployment Insurance Act reads as follows:

"The Board may enter into agreements or arrangements with employers, organizations of employers, and railway-labor organizations which are duly organized in accordance with the

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provisions of the Railway Labor Act, for securing the performance of services or the use of facilities in connection with the administration of this Act, and may compensate any such employer or organization therefor upon such reasonable basis as the Board shall prescribe, but not to exceed the additional expense incurred by such employer or organization by reason of the performance of such services or making available the use of such facilities pursuant to such agreements or arrangements. Such employers and organizations, and persons employed by either of them, shall not be subject to the Act of Congress approved March 3, 1917 (39 Stat. 1106, ch. 163, sec. 1)."

Section 12(1) of the Railroad Unemployment Insurance Act reads in pertinent part as follows:

"The Board may employ such persons and provide for their remuneration and expenses, as may be necessary for the proper administration of this Act. * * * Provided, That all positions to which such persons are appointed, except one Administrative Assistant to each member of the Board, shall be in and under the competitive civil service and shall not be removed or excepted therefrom: * * * And provided further, That, for the purpose of registering unemployed employees who reside in areas in which no employer facilities are located, or in which no employer will make facilities available for the registration of such employees, the Board may, without regard to civil-service laws and the Classification Act of 1923, appoint persons to accept, in such areas, registration of such employees and perform services incidental thereto and may compensate such persons on a piece-rate basis to be determined by the Board."

It is my opinion that the above-quoted section 15(c) of the Railroad Retirement Act, section 12(b) of the Railroad Unemployment Insurance Act, and the last proviso in the excerpt, quoted above, from section 12(1) of the latter Act (and not any exception from the competitive service such as Schedules A, B or C.) are the legal basis for the present status, and future employment, in the Board of members of the Actuarial Advisory Committee, National Reporting Officers, and Special Claims Agents, respectively. The language of such sections clearly so provides and the amendments made by sections 5 and 6 of H.R. 4744, supra, made no change in such language. On the contrary, to the extent that any doubt as to the application of such sections was indicated by the use of Schedule A for the employment and tenure of persons in the above-enumerated positions, the appropriate Congressional committees have clearly removed any such doubt by expressly affirming the authority of such sections for the

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purposes stated, and by pointing out specifically that the enactment of H.R. 4744 would have no effect whatever on the continued application of these sections. Thus the House Committee on Interstate and Foreign Commerce, in its report of this bill H.R. 4744, supra, stated in pertinent part as follows:

"It should be noted that the following positions will not be affected by the enactment of the bill: Positions of members of the Actuarial Advisory Committee, who are appointed under the provisions of section 15(c) of the Railroad Retirement Act; positions of national reporting officers who are selected by the standard railway labor organizations to serve without remuneration, and who are paid only their expenses under sections 12(h) of the Railroad Unemployment Insurance Act and 10 (b) 4 of the Railroad Retirement Act; and positions of special claims agents who are appointed under the provisions of section 12(1) of the Railroad Unemployment Insurance Act. The provisions in the present law under which these persons serve are not amended by the reported bill." House Report No. 1046, to accompany H.R. 4744, 84th Congress, First Session, page 8.

The same House report in the "SECTION-BY-SECTION EXPLANATION OF THE COMMITTEE BILL", states in pertinent part as follows:

"The amendments made by these two sections of the bill would have no effect on the specific direction given, and authority granted, to the Board and to the Secretary of the Treasury in section 15 (c) of the Railroad Retirement Act to select and provide for the compensation of members of an actuarial advisory committee. Nor would these amendments have any effect on the continuance of the provisions of section 12(1) of the Railroad Unemployment Insurance Act, authorizing the Board expressly to appoint persons, without regard to the civil-service laws, to accept unemployment insurance registrations and to perform incidental services in certain special areas where registration facilities are not otherwise available, and to provide for their compensation on a piece-rate basis. Similarly, the amendments would in no way deprive the Board of its present authority under section 10 (b) 4 of the Railroad Retirement Act and section 12(h) of the Railroad Unemployment Insurance Act to engage or employ officers of railway labor organizations to perform certain functions for the Board, and to pay the additional expenses incurred in such performance, although

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otherwise without remuneration. In all other respects, however, the civil-service laws would be applicable to employees of the Board as indicated, and in the employment of employees for such positions as attorneys for which the Civil Service Commission might not otherwise provide competitive examinations, the Commission would have authority to provide such examinations." House Report, supra, pages 15 and 16. 1/

Also, the Senate Committee on Labor and Public Welfare, in its report on the same bill, stated in pertinent part as follows:

"The provisions of the bill, which would amend only the general provisions of section 10 (b) (4) and section 12 (1) with regard to employment by the Railroad Retirement Board, would not affect in any way the employment of members of the Actuarial Advisory Committee for whose appointment special provision is made in section 15 (c) of the Railroad Retirement Act; positions of national reporting officers who are selected by the respective national railway labor organizations to serve without pay, and who under sections 12 (h) of the Railroad Unemployment Insurance Act and 10 (b) (4) of the Railroad Retirement Act are paid for expenses only; and the positions of special claims agents who are appointed pursuant to special authority contained in section 12 (1) of the Railroad Unemployment Insurance Act." Senate Report No. 1040, to accompany H.R. 4744, 84th Congress, First session, page 6.

And the same Senate Report, in the "SECTIONAL EXPLANATION OF THE COMMITTEE BILL", states in pertinent part as follows:

"The amendments made by sections 5 and 6 of the bill would, of course, have no effect on the direction specifically

1/ The references in the Committee Report to section 10(b)(4) of the Railroad Retirement Act (in addition to section 12(h) of the Railroad Unemployment Insurance Act) as authority for the payment of expenses to National Reporting Officers (see first sentence of section 10(b)(4) of the Railroad Retirement Act) whose services, in some cases at least, are for the benefit of both Acts, show a Congressional understanding that the grant of authority for the Board to pay the expenses of persons employed in the administration of the Railroad Retirement Act was general, and that the restriction added by section 5 of H.R. 4744 to the employment of compensated individuals was not necessarily a restriction on the employment of persons in this special category performing functions under the Railroad Retirement Act for no compensation whatever. (See House Hearings on H.R. 4744, page 44.)

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given and the authority expressly granted to the Board and to the Secretary of the Treasury in section 15 (c) of the Railroad Retirement Act to select and provide for the compensation of members of the Actuarial Advisory Committee. The amendments would not have any effect either on the provisions of section 12 (1) of the Railroad Unemployment Insurance Act, which authorized the Board expressly to appoint persons, without regard to the civil-service laws, to accept unemployment insurance registrations and to perform incidental services in certain special areas where registration facilities are not otherwise available and to provide for their compensation on a piece-rate basis. Nor would the amendments in any way deprive the Board of the authority now granted it by section 12 (h) of the Railroad Unemployment Insurance Act and section 10 (b) (4) of the Railroad Retirement Act to engage or employ officers of railway labor organizations to perform certain functions for the Board, and to pay the additional expenses incurred for such performance, although otherwise without remuneration. In every other respect, however, the civil-service laws would be applicable to employees of the Board as indicated, and when employing persons for such positions as attorneys for which the Civil Service Commission might not otherwise provide competitive examinations, the Commission would have authority to provide such examinations." Senate Report, supra, pages 10 and 11. 2/

I am of the opinion, therefore, that the official personnel action for the three categories of employees named above be amended to reflect the appointment authority contained in section 15(c) of the Railroad Retirement Act and sections 12(h) 3/ and 12(1) of the Railroad Unemployment Insurance Act, respectively; and that all future appointments in those three categories be formally indicated as being under the authority of the indicated sections.

With reference to persons in "excepted" positions, such as "Part-time and intermittent employees employed under the authority of section 6.101(g) of the Civil Service Regulations" and "Attorneys with excepted appointments", a literal reading of sections 5 and 6 of H.R. 4744, supra, would warrant the conclusion that such persons should not only not be separated from service upon the enactment of the amendments but should acquire competitive civil service status solely by reason of such enactment. The interpretation placed upon such sections by both Congressional Committees indicates, however, that, while separation from the service was not to be countenanced because of the enactment of the provisions, such persons would

2/ See footnote 1.

3/ See footnote 1.

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be required to pass non-competitive civil service examinations before obtaining classified civil service status. Thus the House Committee Report states in pertinent part as follows:

"It is contemplated that persons not holding classified (competitive) positions in the Railroad Retirement Board on the date of enactment of this legislation shall not be separated from their positions by reason of the amendments made by sections 5 and 6 of the reported bill. It is the intent of the committee that such individuals shall be afforded a reasonable opportunity to acquire a classified (competitive) civil-service status through suitable noncompetitive examinations." House Report, supra, pages 7 and 8.

The same House Report, in the "SECTION-BY-SECTION EXPLANATION OF THE COMMITTEE BILL", states as follows:

"It is contemplated that persons not holding classified (competitive) positions in the Railroad Retirement Board on the date of enactment of this legislation shall not be separated from their respective positions by reason of the amendments made by sections 5 and 6 of the reported bill. It is the intent of the committee that such individuals shall be afforded a reasonable opportunity to acquire a classified (competitive) civil-service status through suitable noncompetitive examinations." House Report, supra, page 15.

And the Senate Committee Report states as follows:

"The bill, of course, would not separate from the Board's employ anyone now employed by the Railroad Retirement Board who is now holding a schedule A, B, or C position under current rules of the Civil Service Commission, but the bill does contemplate that all such persons who are now without competitive status shall have a reasonable opportunity to acquire such a status through a suitable noncompetitive examination." Senate Report, supra, page 4.

The same Senate Report, in the "SECTIONAL EXPLANATION OF THE COMMITTEE BILL", states as follows:

"It is contemplated that persons not holding classified (competitive) positions in the Railroad Retirement Board when the amendments are enacted shall not be separated from their positions by reason of the amendments made in sections 5 and 6 of the bill. It is the intent of this committee that these individuals be afforded a reasonable opportunity to acquire a classified (competitive) civil-service status through suitable noncompetitive examinations." Senate Report, supra, page 11.

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I am of the opinion, therefore, that persons now in "excepted" positions are under no circumstances to be separated from service by reason of the amendments made by sections 5 and 6 of H.R. 4744, supra, and that such persons must be given a reasonable opportunity to acquire a classified (competitive) civil service status through suitable non-competitive examinations prescribed and administered by the United States Civil Service Commission. 4/

I am also of the opinion that if (as seems to be the case from the statements in your memorandum) the part-time and intermittent employees you described are, in fact, employed on a temporary rather than permanent basis, they would come within the permissive provisions of section 2.302 of the Civil Service Regulations, and would not at all be affected by sections 5 and 6 of H.R. 4744, supra. With respect to "temporary" employees coming within section 2.302 of such Regulations, the Senate Committee Report stated as follows:

"The enactment of sections 5 and 6 of the bill would not in any way restrict the authority of the Board to make temporary appointments pending the establishment of civil-service registers. The Civil Service Commission has authorized the Railroad Retirement Board, with other Federal agencies, to fill 'competitive positions' through agency recruitment 'when no civil-service registers have been established for individual positions or when civil-service registers are inadequate to fill the jobs.' This authority extends even to 'a position which will continue for more than one year' (Federal Personnel Manual, p. X-1-3; Civil Service Rule, sec. 2.302)." Senate Report, supra, pages 4 and 5.

4/ The "intent", expressed in the reports of the two Committees, not to separate such persons from service in the Board and to afford them a reasonable opportunity to pass noncompetitive civil service examinations, may reasonably be construed, in my opinion, as Congressional interpretation of the language in sections 5 and 6, which is certainly susceptible to such an understanding, so that the "blanketing in" mentioned in your memorandum, is effected by "specific provision of law". Note particularly that this interpretation was on a bill introduced in the House by the Chairman and several other members of the House Committee on Interstate and Foreign Commerce, and in the Senate by the Chairman and several other members of the Senate Committee on Labor and Public Welfare, and even more particularly that this interpretation was discussed in the "SUPPLEMENTAL VIEWS" of the Senate Report (See page 17 of Senate Report No. 1040 on the bill H.R. 4744), and again during the debates in the Senate (see pages 10161, 10164, 10165 and 10175 of the Congressional Record for July 28, 1955) and that such interpretation was finally approved by a vote of 91 to 0 in the Senate and thereafter was unanimously approved by the House.

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With reference to the payment of the expenses of the Civil Service Commission incurred in conducting competitive examinations to fill attorney positions in the Board, it is my opinion that we need not rely on the Board's authority contained in section 11(c) of the Railroad Unemployment Insurance Act. If, in spite of the positive requirement that civil service examinations be given, the Commission believes that it is bound by an appropriate restriction applicable generally, the Board could, obviously, pay such expenses out of administrative funds just as it does for the expenses of other recruitment activities. On this question the House Committee Report stated as follows:

"Your committee is cognizant of the fact that, following the enactment of the reported bill, civil-service examinations would be required for candidates to fill vacancies for attorneys for the Board. At the present time, attorneys' positions are excepted from the competitive civil service and are included in schedule A. The committee is confident that suitable arrangements can, and will, be made by the United States Civil Service Commission and the Railroad Retirement Board for methods of examining and selecting candidates to fill attorney positions in the Board. The Congress may make specific appropriations to the Commission for this purpose. If necessary, the Board may pay for the expenses of conducting such examinations out of its administrative funds." House Report, supra, page 8.

And the Senate Committee Report stated, in this connection as follows:

"While the enactment of the bill would require that persons to be appointed to such positions as those of attorneys (for which the Civil Service Commission does not now provide competitive examinations) pass competitive civil-service examinations, such examinations could very well be provided for through suitable arrangements between the Civil Service Commission and the Railroad Retirement Board. The Board could pay the expense of conducting such examinations out of administrative funds, or special appropriations could be provided by the Congress." Senate Report, supra, page 6.

With reference to the Administrative Assistants to the Members of the Board, the enactment of the amendments does not, in my opinion, affect the employment or status of the present three Administrative Assistants to the respective Board Members. The amendment specifically dealing with the Administrative Assistants is in the form of a limitation on the amendment requiring that "all positions" to which persons needed by the Board "shall be in and under the competitive civil service and shall not be removed or excepted therefrom". This limitation, in terms, modifies the designation

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"all positions" by the addition of the words "except one Administrative Assistant to each member of the Board". Literally, then, the positions of Administrative Assistants are positions not required to be in the competitive civil service from which there can be no removal or exception. In other words the amendment does not say unqualifiedly that the positions shall not be in the competitive civil service but, in my opinion, should be understood as saying no more than that the removal of these positions from the competitive civil service is permitted.

A review of the debates in the Senate on the subject supports this position, I believe. The sponsor of the provision in question, Senator Potter, introduced it on the floor of the Senate after passage by the House of the bill H.R. 4744, and passage by the Senate Committee, without this amendment (so that otherwise there is no specific legislative history on the question), saying this " * * * I was greatly concerned over the fact that sections 5 and 6 were too inclusive. It has been my feeling - and the debate has shown that certainly most Members of the Senate agree about this - that a member of the Board should be entitled to select as his own Administrative Assistant, his own confidential assistant, whomever he may deem to select; and should not be restricted by the language of sections 5 and 6, as they pertain to the civil service". (Congressional Record, July 28, 1955, p. 10176) That statement was made, and the amendment introduced, following a protracted discussion on the merits of sections 5 and 6 of H.R. 4744, insofar as those provisions would have the effect of prohibiting the applications of Schedules A, B and C to Board employment and to permit persons with permanent appointments now in such categories to obtain Civil Service status by non-competitive examinations, (e.g. statements of Senators Purtell and Allott, Congressional Record, July 28, 1955, pages 10173-10174.) Nothing in the discussion suggests that the situation of the three Administrative Assistants was to be any different from what it would be if sections 5 and 6 were not to be enacted at all, and since that is exactly the form which the amendment concerning these positions took, I see no reason for treating them any differently from what they would have been without the passage of sections 5 and 6. In other words, it is my opinion, the positions of the three Administrative Assistants and the statuses of the three incumbents are in exactly the same situation as regards the Civil Service Commission and its rules and regulations as if H.R. 4744, supra, had not been enacted. Whatever applied to these positions and to their incumbents before still applies; there is no change.

While the provision excepting the positions of Administrative Assistants to Board members from the provisions added by sections 5 and 6 of the enacted bill might be construed as automatically removing such positions (but not the incumbents) from the classified civil service, I believe that the interpretation discussed above is the more reasonable one.

DBS:j1

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CC: Board Members
Secretary of the Board
Chief Executive Officer