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children of retired employees under the Railroad Retirement Act; or

(2) Crediting the military service under the Social Security Act would entitle employee to vested dual benefit payments.

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Subpart A—General

§216.1 Introduction.

This part explains when an individual is eligible for a monthly annuity under the Railroad Retirement Act. An individual eligible for an annuity as described in this part may become entitled to an annuity only in such amount as set forth in parts 225 through 229 of this chapter

(a) *Regular annuity.* A regular monthly annuity is provided for:

- (1) An employee who retires because of age or disability;
- (2) An employee's spouse or divorced spouse; or
- (3) The widow, widower, child, parent, remarried widow or widower, or surviving divorced spouse of an employee.

(b) *Supplemental annuity.* An employee who retires because of age or disability may also be entitled to a supplemental annuity.

§216.2 Definitions.

Except as otherwise expressly noted, as used in this part—

Age means an individual's age on the day preceding the anniversary date of his or her birth.

Annuity means a payment due an entitled individual for a calendar month and made to him or her on the first day of the following month.

Apply means to sign a form or statement that the Railroad Retirement Board accepts as an application for benefits under the rules set out in part 217 of this chapter.

Attainment of age means that an individual attains a given age on the first moment of the day preceding the anniversary date of his or her birth corresponding to such numerical age.

Board means the Railroad Retirement Board.

Claimant means an individual who files an annuity application or for whom an annuity application is filed.

Eligible means that an individual meets all the requirements for payment of an annuity but has not yet applied for one.

Employee means an individual who is or has been in the service of an employer as here defined.

Employer means a company, individual, or other entity determined to be a covered employer under the Railroad Retirement Act as provided by part 202 of this chapter.

Entitled means that an individual has applied for and has established his or her rights to benefits.

Railroad Retirement Act means the Railroad Retirement Act of 1974, as amended.

Re-entitled annuity means an annuity to which an individual becomes entitled after an earlier-awarded annuity has been terminated. A re-entitled annuity is usually awarded on the basis of different factors of eligibility from the initial annuity, and may be awarded without the filing of another application.

Retirement age means, with respect to an employee who attains age 62 before January 1, 2000 (age 60 in the case of a widow(er), remarried widow(er) or surviving divorced spouse) age 65. For an employee who attains age 62 (or age 60 in the case of a widow(er), remarried widow(er), or surviving divorced spouse) after December 31, 1999, retirement age means the age provided for in section 216(1) of the Social Security Act.

Social Security Act means the Social Security Act as amended.

Tier I benefit means the benefit component calculated using Social Security Act formulas and based upon earnings covered under both the Railroad Retirement Act and the Social Security Act.

Tier II benefit means the benefit component calculated under a formula found in the Railroad Retirement Act and based only upon earnings and service in the railroad industry.

Year of service means 12 calendar months, consecutive or otherwise, of service creditable to an employee as described in part 210 of this chapter.

§216.3 Other regulations related to this part.

This part is related to a number of other parts. Part 217 of this chapter describes how to apply for an annuity. Part 218 indicates when annuities begin and when they terminate. Part 219 sets out what evidence is necessary to prove

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eligibility. Where eligibility for an annuity is based upon a family relationship to an employee (for example, a widow's annuity), the definition of such family relationship may be found in part 222 of this chapter. Part 225 of this chapter describes the computation of the primary insurance amount.

Subpart B—Current Connection With the Railroad Industry

§216.11 General.

A current connection with the railroad industry is required to qualify for certain types of railroad retirement benefits. The existence of a current connection is clear in most cases where entitlement or death immediately follows continuous years of railroad employment. However, there are cases in which the employee did not work for a railroad employer for a period of time before entitlement or death. In these situations, special tests are applied to determine whether the employee can be considered to have a current connection with the railroad industry for the purpose of determining his or her eligibility for an annuity or other benefits.

§216.12 When current connection is required.

(a) A current connection is required to qualify an individual for the following types of railroad retirement benefits:

- (1) An employee occupational disability annuity as described in subpart D of this part;
- (2) A supplemental annuity as described in subpart E of this part;
- (3) An employee vested dual benefit in certain cases;
- (4) A survivor annuity as described in subparts G, H, and I of this part; and
- (5) A lump-sum death payment as described in part 234 of this chapter.

(b) A current connection which was established when an employee's annuity began is effective for:

- (1) Any annuity under this part for which the employee later becomes eligible; and
- (2) Any survivor annuity under this part or a lump-sum death payment under part 234 of this chapter.

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§216.13 Regular current connection test.

An employee has a current connection with the railroad industry if he or she meets one of the following requirements:

(a) The employee has creditable railroad service in at least 12 of the 30 consecutive months immediately preceding the earlier of:

- (1) The month his or her annuity begins; or
- (2) The month he or she dies.

(b) The employee has creditable railroad service in at least 12 months in a period of 30 consecutive months and does not work in any regular non-railroad employment in the interval between the month the 30-month period ends and the earlier of:

- (1) The month his or her annuity begins; or
- (2) The month he or she dies.

§216.14 Regular non-railroad employment that will not break a current connection.

Regular non-railroad employment will not break an employee's current connection if it is performed during the 30-month period described in §216.13(b), in or after the month the annuity begins, or in the month the employee dies.

§216.15 Special current connection test.

(a) *For survivor annuities.* An employee who does not have a current connection under the regular test has a current connection only to qualify an individual for a survivor annuity if:

(1) The employee would not be fully or currently insured under section 214 of the Social Security Act if his or her railroad compensation after 1936 were treated as social security earnings;

(2) The employee has no quarters of coverage as defined in section 213 of the Social Security Act; or

(3) The employee received a pension or a retirement annuity that began before 1948 based on at least 114 months of service.

(b) *For survivor and supplemental annuities.* An employee who does not have a current connection under the regular test has a current connection in order

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to pay a supplemental or survivor annuity if he or she meets all of the following requirements:

(1) Has been credited with at least 25 years of railroad service;

(2) Stopped working in the railroad industry “involuntarily and without fault” on or after October 1, 1975, or was on furlough, leave of absence or absent for injury on that date;

(3) Did not decline an offer of employment in the same “class or craft” as his or her most recent railroad service; and

(4) Was alive on October 1, 1981.

(c) “*Involuntarily and without fault*” defined. An employee is considered to have stopped railroad employment involuntarily and without fault if:

(1) The employee loses his or her job;

(2) The employee could not, through the exercise of seniority rights, remain in railroad service in the same class or craft as his or her most recent railroad service, regardless of the location where that service would be performed; and

(3) The employee did not lose his or her job because of poor job performance, misconduct, medical reasons or other action or inaction on the part of the employee.

(d) *Effect of separation allowance*. An employee who accepts a separation allowance and in so doing relinquishes his or her seniority rights to railroad employment is deemed to have voluntarily terminated his or her railroad service. However, if the employee stopped railroad employment involuntarily and without fault, as defined in paragraph (c) of this section, receipt of a separation allowance will not affect a current connection under paragraph (b) of this section.

(e) “*Class or craft*” defined. The terms “class or craft,” as used in this section, have the same meaning as they do generally in the railroad industry.

(f) *For supplemental annuities only*. An additional special current connection test is required for an individual who was receiving a disability annuity which terminated due to the individual’s recovery from disability. If the individual becomes entitled to a new annuity, a new current connection test based on the new annuity beginning

date must be made. This test is made using the rules contained in §§216.13 and 216.17.

§216.16 What is regular non-railroad employment.

(a) Regular non-railroad employment is full or part-time employment for pay.

(b) Regular non-railroad employment does not include any of the following:

(1) Self-employment;

(2) Temporary work provided as relief by an agency of a Federal, State, or local government;

(3) Service inside or outside the United States for an employer under the Railroad Retirement Act, even if the employer does not conduct the main part of its business in the United States;

(4) Involuntary military service not creditable under the Railroad Retirement Act;

(5) Employment with the following agencies of the United States Government:

(i) Department of Transportation;

(ii) Interstate Commerce Commission;

(iii) National Mediation Board;

(iv) Railroad Retirement Board;

(v) National Transportation Safety Board; or

(vi) Surface Transportation Board.

(6) Employment entered into after early retirement by an employee who is receiving an annuity under Conrail’s voluntary annuity program. This program is provided under the Staggers Rail Act of 1980 (Pub. L. 96-448); or

(7) Employment with the Alaska Railroad so long as it is an instrumentality of the State of Alaska.

[56 FR 28692, June 24, 1991, as amended at 62 FR 11324, Mar. 12, 1997]

§216.17 What amount of regular non-railroad employment will break a current connection.

The amount of regular non-railroad employment needed to break a current connection depends on when the applicable 30-month period ends (see §216.13 of this part), as follows:

(a) If the 30-month period ends in the calendar year before or in the same calendar year as the annuity begins or the

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month the employee dies, the current connection is broken if the employee:

(1) Works in each month in the interval after the end of the 30-month period and before the earlier of the month the annuity begins or the employee dies; or

(2) Works and earns at least \$200 in wages in any 3 months within the interval described in paragraph (a)(1) of this section.

(b) If the 30-month period ends more than a year before the calendar year in which the annuity begins or the employee dies, the current connection is broken if the employee:

(1) Works in any 2 consecutive years wholly or partially within the interval after the end of the 30-month period and before the month the annuity begins or the employee dies, whichever is earlier; and

(2) Earns at least \$1,000 in wages in any year wholly or partially within the interval described in paragraph (b)(1) of this section (but not counting earnings during the 30-month period and after the annuity beginning date), even if that year is not one of the 2 consecutive years described in paragraph (b)(1) of this section.

Subpart C—Railroad and Last Non-Railroad Employment

§216.21 General.

To be eligible for an employee, a spouse, or a divorced spouse annuity, the Railroad Retirement Act requires that an applicant must stop work for pay performed as an employee for a railroad employer. In addition, no employee, spouse or divorced spouse annuity may be paid for any month in which the employee, spouse or divorced spouse annuitant works for pay for any railroad employer after the date his or her annuity began. No annuity may be paid to a widow or widower, surviving divorced spouse, remarried widow or widower, child, or parent for any month such individual works for pay for a railroad employer.

§216.22 Work as an employee which affects payment.

(a) *Work for a railroad employer.* Work for pay as an employee of a railroad employer always prevents payment of an annuity.

(b) *Work for last non-railroad employer.* Work for pay in the service of the last non-railroad employer by whom an individual is employed will reduce the amount of the tier II benefit of the employee, spouse and supplemental annuity as provided in part 230 of this chapter. An individual's last non-railroad employer is:

(1) Any non-railroad employer from whom the individual last resigned (in point of time) in order to receive an annuity; and

(2) Any additional non-railroad employer from whom the individual resigned in order to have an annuity become payable. Employment which an individual stops within 6 months of the date on which the individual files for an annuity will be presumed in the absence of evidence to the contrary to be service from which the individual resigned in order to receive an annuity.

(c) *Corporate officers.* An officer of a corporation will be considered to be an employee of the corporation. A director of a corporation acting solely in his or her capacity as such director is not an employee of the corporation.

§216.23 Work which does not affect eligibility.

An individual may engage in any of the following without adversely affecting his or her annuity:

(a) *Work for a railway labor organization.* An individual may work for a local lodge or division of a railway labor organization if the pay is under \$25 a month, unless the work performed is solely for the purpose of collecting insurance premiums.

(b) *Work without pay.* Work performed for any person or entity for which no pay is received, or where the pay merely constitutes reimbursement for out-of-pocket expenses, or where the amount received consists only of free will donations and there is no agreement that such donation shall constitute remuneration for services, does not affect entitlement to an annuity.

(c) *Self-employment.* Self-employment is work performed in an individual's own business, trade or profession as an independent contractor, rather than as an employee. An individual is not self-employed if the business is incorporated. The designation or description

of the relationship between the individual and another person as anything other than that of an employer and employee is immaterial. If the Board determines that an employer-employee relationship exists, the fact that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like will be disregarded. An individual determined to be an employee of a railroad employer pursuant to part 203 of this chapter is not self-employed. Whether an individual performing services is an employee depends upon the degree to which the recipient of services controls the individual's work. Control is determined in accordance with general legal principles delineating an employer-employee relationship. Among the factors considered are:

(1) *Instructions.* An individual required to comply with instructions about when, where, and how to work is ordinarily an employee. Instructions may be oral or in the form of manuals or written procedures which show how the desired result is to be accomplished. An individual who ordinarily works without receiving instructions because he or she is highly skilled or knowledgeable may nevertheless be an employee if the employer has a right to instruct the individual in performance of the work.

(2) *Training.* Training provided an individual by an employer indicates that the employer wants the work to be performed in a particular method or manner, especially if the training is given periodically or at frequent intervals. An individual may be trained by an experienced employee working with him or her, by correspondence, by required attendance at meetings, or by other methods.

(3) *Integration into the employer's business.* Integration of an individual's services into the business operations of an employer generally shows that the individual is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the individuals who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

(4) *Services rendered personally.* A requirement that an individual personally work for the employer indicates that the employer is interested in the methods as well as the results, and that the employer intends to control the result by controlling who does the work.

(5) *Hiring, supervising, and payment of assistants.* An employer generally hires, supervises, and pays assistants. An individual who hires, supervises, and pays other workers at the direction of the employer may be an employee acting as a representative of the employer. However, if an individual hires, supervises, and pays his or her own assistants pursuant to a contract under which the individual agrees to provide materials and labor and under which the individual is responsible only for the attainment of a result, this factor indicates an independent contractor status.

(6) *Continuing work relationship.* A work relationship between an individual and an employer which continues over time indicates that the individual is an employee. A relationship may continue if the individual works at frequently recurring, though somewhat irregular intervals, either on call of the employer or when work is available.

(7) *Set hours of work.* A requirement that an individual work for an employer during a specified period of the day, week, month or year, or for a specified number of hours daily indicates that the individual is an employee. An individual whose occupation renders fixed hours impractical may be an employee if required by the employer to work at certain times.

(8) *Full time required.* A requirement that an individual devote full time to the employer's business indicates that the individual is an employee. What full time means may vary with the intent of the parties, the nature of the occupation, and customs in the locality. Full-time work may be required indirectly even though not specified in writing or orally. An individual required to produce a minimum volume of business for an employer may be compelled to devote full time to producing the work. Prohibiting work for

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any other employer may require an individual to work full time to earn a living. However, part-time work performed on a regular basis, or on call of the employer, or when work is available, may also render an individual an employee.

(9) *Working on employer's premises.* Working on the employer's premises may indicate that an individual is an employee where by nature the work could be done elsewhere, because the employer's place of business is physically within the employer's direction and supervision. Desk space, telephone, and stenographic services provided by an employer place the worker within the employer's direction and supervision unless the worker has the option not to use these facilities. Work done off the employer's premises does not by itself indicate that the worker is not an employee because some occupations require that work be performed away from the premises of the employer. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required.

(10) *Order or sequence set.* Performing tasks in the order or sequence set by the employer indicates that the worker is an employee. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so.

(11) *Oral or written reports.* Regular oral or written reports submitted to the employer indicate that the worker is an employee, compelled to account to the employer for his or her actions.

(12) *Payment by hour, week, month.* Payment at a fixed rate per hour, week, or month indicates that an individual is an employee. Payment by commission with a guaranteed minimum salary, or by a drawing account at stated intervals with no requirement to repay amounts which exceed the individual's earnings, also indicates that an individual is an employee. Payment in a lump sum for a completed job indicates that an indi-

vidual is self-employed. The lump sum may be computed by the number of hours required to do the job at a fixed hourly rate, or by weekly or monthly installments toward a lump sum agreed upon in advance as the total cost. Payment made on a straight commission basis generally indicates that the worker is an independent contractor.

(13) *Payment of business and/or traveling expenses.* Payment by the employer of expenses which an individual incurs in connection with the employer's business indicates that the individual is an employee.

(14) *Furnishing of tools and materials.* The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship.

(15) *Investment in facilities.* If the worker invests in facilities which are used by the worker in performing services and which are not typically maintained by employees, such as an office rented by the worker from a party unrelated to the worker or to the employer, this factor tends to indicate that the worker is an independent contractor. On the other hand, if all facilities necessary to the work which an individual performs are furnished without charge by the employer, this factor indicates the existence of an employer-employee relationship. Facilities include equipment or premises necessary for the work, other than items such as tools, instruments, and clothing which may be commonly provided by an employee in a particular trade.

(16) *Realization of profit or loss.* An individual not in a position to realize a profit or suffer a loss as a result of work performed for an employer is an employee. An individual has an opportunity for profit or loss if he or she:

- (i) Hires, directs, and pays assistants;
- (ii) Has his or her own office, equipment, materials, or other facilities for doing the work;
- (iii) Has continuing and recurring liabilities or obligations, and success or failure depends on the relation of receipts to expenditures; or
- (iv) Agrees to perform specific jobs for prices agreed upon in advance and

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pays expenses incurred in connection with the work.

(17) *Working for more than one firm at a time.* If a worker performs more than *de minimis* services for a number of unrelated persons or firms at the same time, this factor generally indicates that the worker is an independent contractor. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

(18) *Making service available to the general public.* The fact that an individual makes his or her services available to the general public on a regular and consistent basis rather than to one employer indicates that the individual is self-employed rather than an employee of any one firm. An individual may make services available to the public by working from his or her own office with assistants, from his or her own home, by holding business licenses, by a listing in a business directory, or by advertising.

(19) *Employer's right to discharge.* The right to discharge a worker is a factor which indicates that the worker is an employee and the person who possesses the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An employer's right to discharge exists even if it is restricted due to a collective bargaining agreement. An employer ordinarily cannot end a relationship without incurring liability with a self-employed individual who meets contract specifications.

(20) *Employee's right to terminate.* The fact that an individual has the right to end his or her relationship with an employer at any time without incurring liability for work to be performed indicates that the individual is an employee. A self-employed individual is legally obligated to satisfactorily complete a specific job.

§ 216.24 Relinquishment of rights to return to work.

(a) *What return to work rights must be given up.* Before an individual may receive an annuity based on age, he or she must give up any seniority or other

rights to return to work for any railroad employer.

(b) *When right to return to work is ended.* An individual's right to return to work for a railroad employer is ended whenever any of the following events occur:

(1) The employer reports to the Board that the individual no longer has the right;

(2) The individual or an authorized agent of that individual gives the employer an oral or written notice of the individual's wish to give up that right and:

(i) The individual certifies to the Board that the right has been given up;

(ii) The Board notifies the employer of the individual's certification; and

(iii) The employer either confirms the individual's right has been given up or fails to reply within 10 days following the day the Board mailed the notice to the employer;

(3) An event occurs which under the established rules or practices of the employer automatically ends that right;

(4) The employer or the individual or both take an action which clearly and positively ends that right;

(5) The individual never had that right and permanently stops working;

(6) The Board gives up that right for the individual, having been authorized to do so by the individual;

(7) The individual dies; or

(8) The individual signs a statement that he or she gives up all rights to return to work in order to receive a separation allowance or severance pay.

(The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 3220-0016)

Subpart D—Employee Annuity

§ 216.30 General.

The Railroad Retirement Act provides annuities for employees who have reached a specified age and have been credited with a specified number of years of service. The Act also provides annuities for employees who become disabled. In addition, to be eligible for an annuity an employee must comply with the work restrictions outlined in subpart C of this part.

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§ 216.31 Who is eligible for an age annuity.

The Railroad Retirement Act provides annuities based on the employee's age for employees who have been credited with at least 10 years of railroad service.

(a) *Annuities based on 10 years of service.* An employee with 10 years of railroad service but less than 30 years of service is eligible for an annuity if he or she:

- (1) Has attained retirement age; or
- (2) Has attained age 62 (the annuity cannot begin prior to the first full month during which the employee is age 62) but is less than retirement age. All components of the annuity are reduced for each month the employee is under retirement age when the annuity begins.

(b) *Annuities based on 30 years of service.* An employee who has been credited with 30 years of railroad service is eligible for an annuity at age 60 (the annuity cannot begin prior to the first full month the employee is age 60). The Tier I component of the annuity is reduced if the employee meets the following conditions:

- (1) The employee annuity begins before the month in which the employee is age 62; and either
- (2) He or she had not attained age 60, prior to July 1, 1984; or
- (3) He or she had not completed 30 years of railroad service prior to July 1, 1984.

(c) *Change from employee disability to age annuity.* A disability annuity paid to an employee through the end of the month before the month in which the employee attains retirement age is converted to an age annuity beginning with the month in which he or she attains retirement age.

§ 216.32 Who is eligible for a disability annuity.

The Railroad Retirement Act provides two types of disability annuities for employees who have been credited with at least 10 years of railroad service. An employee may receive an annuity if his or her disability prevents work in his or her regular railroad occupation. An employee who cannot be considered for a disability based on ability to work in his or her regular

railroad occupation may receive an annuity if his or her disability prevents work in any regular employment.

(a) *Disability for work in regular railroad occupation.* An employee disabled for work in his or her regular occupation, as defined in part 220 of this chapter, is eligible for a disability annuity if he or she:

- (1) Has not attained retirement age; and
- (2) Has a current connection with the railroad industry; and has either:
 - (3) Completed 20 years of service; or
 - (4) Completed 10 years of service and is at least 60 years old.

(b) *Disabled for work in any regular employment.* An employee disabled for work in any regular employment, as defined in part 220 of this chapter, is eligible for a disability annuity if he or she:

- (1) Is under retirement age; and
- (2) Has completed 10 years of service.

§ 216.33 What is required for payment of an age or disability annuity.

In addition to the eligibility requirements listed above, an employee may be required to meet other conditions before payment of his or her annuity may begin.

(a) To receive payment of an employee annuity based on age, an eligible employee must:

- (1) Apply to be entitled to an annuity; and
- (2) Give up the right to return to service with his or her last railroad employer.

(b) If a disability annuity is converted to an age annuity when the annuitant attains retirement age, the age annuity cannot be paid until the employee gives up the right to return to work as described in subpart C of this part. The employee may authorize the Board to relinquish any such right on his or her behalf at the time when he or she applies for the disability annuity.

(c) To receive payment of an employee annuity based on disability, and eligible employee must apply to be entitled to an annuity.

(d) When requested, the employee must submit evidence to support his or

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her application, such as proof of age or evidence of disability.

(The information collection requirements contained in this section were approved by the Office of Management and Budget under control number 3220-0002)

Subpart E—Supplemental Annuity

§ 216.40 General.

An employee with a current connection with the railroad industry at the time of retirement may qualify for a supplemental annuity in addition to the regular employee annuity. Supplemental annuities are paid from a separate account funded by employer taxes in addition to those assessed for regular annuities. The Board reduces a supplemental annuity if the employee receives a private pension based on contributions from a railroad employer.

§ 216.41 Who is entitled to a supplemental annuity.

An employee is entitled to a supplemental annuity if he or she:

(a) Has been credited with railroad service in at least one month before October 1981;

(b) Is entitled to the payment of an employee annuity awarded after June 30, 1966;

(c) Has a current connection with the railroad industry when the employee annuity begins;

(d) Has given up the right to return to work as shown in subpart C of this part; and either

(e) Is age 65 or older and has completed 25 years of service; or

(f) Is age 60 or older and under age 65, has completed 30 years of service, and is awarded an annuity on or after July 1, 1974.

§ 216.42 How a private railroad pension affects a supplemental annuity.

(a) *What is a private railroad pension.* The Board determines whether a pension established by a railroad employer is a private pension that will cause a reduction in the employee's supplemental annuity. A private pension for purposes of this subpart is a plan that:

(1) Is a written plan or arrangement which is communicated to the employees to whom it applies;

(2) Is established and maintained by an employer for a defined group of employees; and

(3) Provides for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement or disability. Such a plan is sometimes referred to as a defined benefit plan.

(b) *Defined contribution plan.* A plan under which the employer is obligated to make fixed contributions to the plan regardless of profits (sometimes known as a money purchase plan) is a private pension plan. A plan under which the employer's contributions are discretionary is not a private pension plan under this section.

(c) *Other than retirement benefits.* A plan which provides benefits not customarily considered retirement benefits (such as unemployment benefits, sickness or hospitalization benefits) is not a private pension plan under this section.

(d) *Effective date of private railroad pension for supplemental annuity purposes.* A private pension reduces a supplemental annuity payment effective on the first day of the month after the month the Board determines that it is a private pension as defined in paragraph (a) of this section.

(e) *Effect of private railroad pension.* A supplemental annuity is reduced by the amount of any private pension the employee is receiving which is attributable to an employer's contributions, less any amount by which the private pension is reduced because of the supplemental annuity. The supplemental annuity is not reduced for the amount of a private pension attributable to the employee's contributions. The Board will determine the amount of a private pension for any month which is attributable to the employee's contributions.

§ 216.43 Effect of a supplemental annuity on other benefits.

(a) *Employee annuity.* A supplemental annuity that begins after December 31, 1974, does not affect the payment of a regular employee annuity. A supplemental annuity beginning prior to 1975 causes a reduction in the employee annuity as provided by section 3(j) of the Railroad Retirement Act of 1937.

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(b) *Spouse or survivor annuity.* The payment of a supplemental annuity does not affect the amount of a spouse or survivor annuity.

(c) *Residual lump-sum.* The amount of a supplemental annuity is not deducted from the gross residual lump-sum benefit. See part 234 of this chapter for an explanation of the residual lump-sum benefit.

Subpart F—Spouse and Divorced Spouse Annuities

§ 216.50 General.

The Railroad Retirement Act provides annuities for the spouse, and divorced spouse, of an employee who is entitled to an employee annuity. A spouse may receive an annuity based on age, or on having a child of the employee in his or her care. A divorced spouse may only receive an annuity based on age. No spouse or divorced spouse annuity may be paid based upon disability.

§ 216.51 Who is eligible for a spouse annuity.

(a) To be eligible for an annuity, a spouse must:

(1) Be the husband or wife, as defined in part 222 of this chapter, of an employee who is entitled to an annuity described under subpart D of this part; and

(2) Stop working for any railroad employer.

(b) Where the employee's annuity began before January 1, 1975, the employee has completed less than 30 years of railroad service, and is age 65 or older, the spouse must be:

(1) Age 65 or older;

(2) Less than age 65 and have in his or her care a disabled child or minor child (a child under 18 years old if the spouse claimant is a wife, or under 16 years old if the spouse claimant is a husband) of the employee; or

(3) Age 62 or older but under age 65. In such case, all annuity components are reduced for each month the spouse is under age 65 at the time the annuity begins.

(c) Where the employee's annuity begins after December 31, 1974, the employee has completed 10 years but less than 30 years of railroad service, and

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has attained age 62, the spouse must be:

(1) Retirement age or older;

(2) Less than retirement age and have in his or her care a disabled child or a minor child (a child under 18 years old if the spouse claimant is a wife, or under 16 years old if the spouse claimant is a husband) of the employee; or

(3) Age 62 or older but under retirement age. In such case, all annuity components are reduced for each month the spouse is under retirement age at the time the annuity begins.

(d) Where the employee's annuity began after June 30, 1974, the employee has completed 30 years of railroad service, and is age 60 or older, the spouse must be:

(1) Age 60 or older;

(2) Less than age 60 and have in his or her care a disabled child or a minor child (a child under 18 years old if the spouse claimant is a wife, or under 16 years old if the spouse claimant is a husband) of the employee; or

(3) Age 60 but less than retirement age. In such case, the tier I component is reduced if the following conditions are met:

(i) The employee was under age 62 at the time his or her annuity began;

(ii) The employee annuity began after June 30, 1984;

(iii) The employee was under age 60 on June 30, 1984 or completed 30 years of railroad service after June 30, 1984; and

(iv) The spouse annuity begins after June 30, 1984.

§ 216.52 Who is eligible for an annuity as a divorced spouse.

To be eligible for a divorced spouse annuity, the employee annuitant must be at least age 62 and the divorced spouse (see § 222.22 of this chapter) must:

(a) Be the divorced wife or husband of an employee;

(b) Stop work for a railroad employer;

(c) Not be entitled to an old-age or disability benefit under the Social Security Act based on a primary insurance amount that is equal to or greater than one-half of the employee's tier I primary insurance amount; and either

(d) Have attained retirement age; or

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(e) Have attained age 62 but be under retirement age. The annuity is reduced for each month the spouse is under retirement age at the time the annuity begins.

§ 216.53 What is required for payment.

An eligible spouse or divorced spouse must:

(a) Apply to be entitled to an annuity; and

(b) Give up the right to return to work for a railroad employer.

(Approved by the Office of Management and Budget under control number 3220-0016 and 3220-0042)

§ 216.54 Who is an employee's wife or husband.

An employee's wife or husband is an individual who—

(a) Is married to the employee; and

(b) Has been married to the employee for at least one year immediately before the date the spouse applied for annuity;

(c) Is the natural parent of the employee's child;

(d) Was entitled to an annuity as a widow(er), a parent, or a disabled child under this part in the month before he or she married the employee; or

(e) Could have been entitled to a benefit listed in paragraph (d) of this section, if the spouse had applied and been old enough in the month before he or she married the employee.

Subpart G—Widow(er), Surviving Divorced Spouse, and Remarried Widow(er) Annuities

§ 216.60 General.

The Railroad Retirement Act provides annuities for the widow(er), surviving divorced spouse, or remarried widow(er) of an employee. The deceased employee must have completed 10 years of railroad service and have had a current connection with the railroad industry at the time of his or her death. A widow(er), surviving divorced spouse, or remarried widow(er) may receive an annuity based on age, on disability, or on having a child of the employee in his or her care.

§ 216.61 Who is eligible for an annuity as a widow(er).

(a) A widow(er) of an employee who has completed 10 years of railroad service and had a current connection with the railroad industry at death is eligible for an annuity if he or she:

(1) Has not remarried; and either

(2) Has attained retirement age;

(3) Is at least 50 but less than 60 years of age and became disabled as defined in part 220 of this chapter before the end of the period described in § 216.68 (this results in a reduced annuity);

(4) Is less than retirement age but has in his or her care a child who either is under age 18 (16 with respect to the tier I component) or is disabled and who is entitled to an annuity under subpart H of this part; or

(5) Is at least 60 years of age but has not attained retirement age. (In this case, all components of the annuity are reduced for each month the widow(er) is age 62 or over but under retirement age when the annuity begins. For each month the widow(er) is at least age 60 but under age 62, all components of the annuity are reduced as if the widow(er) were age 62).

§ 216.62 Who is eligible for an annuity as a surviving divorced spouse.

(a) A surviving divorced spouse of an employee who completed 10 years of railroad service and had a current connection with the railroad industry at death, is eligible for an annuity if he or she:

(1) Is unmarried;

(2) Is not entitled to an old-age benefit under the Social Security Act that is equal to or higher than the surviving divorced spouse's annuity before any reduction for age; and either

(3) Has attained retirement age;

(4) Is at least 50 years of age but less than retirement age and is disabled as defined in part 220 of this chapter before the end of the period described in § 216.68 (this results in a reduced annuity.);

(5) Is less than retirement age but has in his or her care a child who either is under age 16 or is disabled and who is entitled to an annuity under subpart H of this part; or

(6) Is at least 60 years of age but has not attained retirement age. In this

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case, the annuity is reduced for each month the surviving spouse is under retirement age when the annuity begins.

(b) A disabled surviving spouse's annuity is converted to an annuity based on age beginning the month he or she becomes 60 years old. The annuity rate does not change.

(c) If a surviving divorced spouse marries after attaining age 60 (or age 50 if he or she is a disabled surviving divorced spouse), such marriage shall be deemed not to have occurred.

§216.63 Who is eligible for an annuity as a remarried widow(er).

(a) A widow(er) of an employee who completed 10 years of railroad service and had a current connection with the railroad industry at death is eligible for an annuity as a remarried widow(er) if he or she:

(1) Remarried either:

(i) After having attained age 60 (after age 50 if disabled); or

(ii) Before age 60 but the marriage terminated;

(2) Is not entitled to an old-age benefit under the Social Security Act that is equal to or higher than the full amount of the remarried widow(er)'s annuity before any reduction for age; and

(3) Has attained retirement age;

(4) Is at least 50 but less than 60 years of age and is disabled as defined in part 220 of this chapter before the end of the period described in §216.68 (this results in a reduced annuity);

(5) Has not attained retirement age but has in his or her care a child who either is under age 16 or is disabled, and who is entitled to an annuity under subpart H of this part; or

(6) Is at least age 60 but has not attained retirement age. (In this case, the annuity is reduced for each month the remarried widow(er) is under retirement age when the annuity begins.)

(b) An individual entitled to a widow(er)'s annuity may be entitled to an annuity as a remarried widow(er) if he or she:

(1) Remarries after having attained age 60 (after age 50 if he or she has been determined to be disabled prior to his or her remarriage) and is not a surviving divorced spouse; or

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(2) Is entitled to an annuity based upon having a child of the employee in his or her care and marries an individual entitled to a retirement, disability, widow(er)'s, mother's, father's, parent's, or disabled child's benefit under the Railroad Retirement Act or Social Security Act.

§216.64 What is required for payment.

An eligible widow(er), surviving divorced spouse, or remarried widow(er) must:

(a) Apply to be entitled for an annuity; and

(b) Submit evidence requested by the Board to support his or her application.

(Approved by the Office of Management and Budget under control number 3220-0030)

§216.65 Who is an employee's widow(er).

An individual who was married to the employee at the employee's death is the deceased employee's widow(er) if he or she:

(a) Was married to the employee for at least 9 months before the day the employee died;

(b) Is the natural parent of the employee's child;

(c) Was married to the employee when either the employee or the widow(er) adopted the other's child, or they both legally adopted a child who was then under 18 years old;

(d) Was married to the employee less than 9 months before the employee died but, at the time of marriage, the employee was reasonably expected to live for 9 months; and

(1) The employee's death was accidental;

(2) The employee died in the line of duty while he or she was serving active duty as a member of armed forces of the United States; or

(3) The surviving spouse was previously married to the employee for at least 9 months;

(e) Was entitled in the month before the month of marriage to either:

(1) A benefit under section 202 of the Social Security Act as a widow, widower, spouse (divorced spouse, surviving divorced spouse), father, mother, parent, or disabled child; or

(2) An annuity under the Railroad Retirement Act as a widow, widower,

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divorced spouse, or surviving divorced spouse, parent or disabled child; or

(f) Could have been entitled to a benefit listed in paragraph (e) of this section, if the widow(er) had applied and been old enough to qualify therefor in the month before the month of marriage.

§ 216.66 Who is an employee's surviving divorced spouse.

An individual who was married to the employee is the deceased employee's surviving divorced spouse if he or she:

(a) Was married to the employee for a period of at least 10 years immediately before the date the divorce became final, and applies for an annuity based on age or disability; or

(b) Applies for an annuity based on having a "child in care" and either:

(1) Is the natural parent of the employee's child;

(2) Was married to the employee at the time the employee or the surviving divorced spouse adopted the other's child who was then under 18 years old; or

(3) Was married to the employee at the time they adopted a child who was then under 18 years old.

§ 216.67 "Child in care."

(a) *Railroad Retirement Act.* Part 222 of this chapter sets forth what is required to establish that a child is in an individual's care for purposes of the Railroad Retirement Act. This definition is used to establish eligibility for the tier II component of a female spouse or widow(er) annuity under that Act. Under this definition a child must be under age 18 or under a disability before any benefit is payable based upon having the child in care.

(b) *Social Security Act.* In order to establish eligibility for the tier I components of a spouse or widow(er) annuity, and eligibility for a surviving divorced spouse annuity based upon having a child of the employee in care, the definition of "child in care" found in the Social Security Act is used. Under this definition, a child must be under age 16 or under a disability.

§ 216.68 Disability period for widow(er), surviving divorced spouse, or remarried widow(er).

A widow(er), surviving divorced spouse, or remarried widow(er) who has a disability as defined in part 220 of this chapter is eligible for an annuity only if the disability began before the end of a period which:

(a) Begins in the later of:

(1) The month in which the employee died;

(2) The last month for which the widow(er) or surviving divorced spouse was entitled to an annuity for having the employee's child in care; or

(3) The last month for which the widow(er) or surviving divorced spouse was entitled to a previous annuity based on disability; and

(b) Ends with the earlier of:

(1) The month before the month in which the widow(er) or surviving divorced spouse or remarried widow(er) become 60 years old; or

(2) The last day of the last month of a 7-year period (84 consecutive months) following the month in which the period began.

Subpart H—Child's Annuity

§ 216.70 General.

The Railroad Retirement Act provides an annuity for the child of a deceased employee but not for the child of a living employee. The Act does provide that the child of a living employee can establish another individual's eligibility for a spouse annuity or cause an increase in the annuities of an employee and spouse. The eligibility requirements described in this subpart also apply for the following purposes, except as otherwise indicated in this part:

(a) To establish annuity eligibility for a spouse under subpart F of this part if he or she has the employee's eligible child in care;

(b) To establish annuity eligibility for a widow(er), or surviving divorce spouse or remarried widow(er) under subpart G of this part if he or she has the employee's child in care; or

(c) To provide an increase in the employee's annuity under the Social Security Overall Minimum Guaranty (see

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part 229) by including the eligible child.

§216.71 Who is eligible for a child's annuity.

An individual is eligible for a child's annuity if the individual:

(a) Is a child of an employee who has completed 10 years of railroad service and had a current connection with the railroad industry when he or she died;

(b) Is not married at the time the application is filed;

(c) Is dependent upon the employee as defined in part 222 of this chapter; and

(d) Meets one of the following at the time the application is filed:

(1) Is under age 18; or

(2) Is age 18 or older and either:

(i) Is disabled as defined in part 220 of this chapter before attaining age 22 (the disability must continue through the time of application for benefits);

(ii) Is under age 19 and is a full-time student as defined in §216.74 of this part; or

(iii) Becomes age 19 in a month in which he or she is a full-time student and has not completed the requirement for, or received a diploma or certificate from, a secondary school.

§216.72 What is required for payment of a child's annuity.

An eligible child of a deceased employee is entitled to an annuity upon applying therefor and submitting any evidence requested by the Board.

(Approved by the Office of Management and Budget under control number 3220-0030)

§216.73 Who may be re-entitled to a child's annuity.

If an individual's entitlement to a child's annuity has ended, the individual may be re-entitled if he or she has not married and he or she applies to be re-entitled. The re-entitlement may begin with:

(a) The first month in which the individual is a full-time student if he or she is under age 19, or is age 19 and has not completed requirements for, or received a diploma or certificate from, a secondary school;

(b) The first month the individual is disabled, if the disability began before he or she attained age 22 and continues

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through the time of application for benefits; or

(c) The first month in which the individual is under a disability that began before the last day of a 7-year period (84 consecutive months) following the month in which the previous child's annuity ended, or the individual was no longer included as a disabled child in a railroad retirement annuity paid under the Social Security Overall Minimum Annuity (see part 229).

§216.74 When a child is a full-time elementary or secondary school student.

(a) A child is a full-time elementary or secondary school student if he or she meets all of the following conditions:

(1) The child is in full-time attendance at an elementary or secondary school; or

(2) The child is instructed in elementary or secondary education at home in accordance with a home school law of the State or other jurisdiction in which the child resides; or

(3) The child is in an independent study elementary or a secondary education program administered by the local school, district, or jurisdiction, which is in accordance with the law of the State or other jurisdiction in which he or she resides.

(b) The child is in full-time attendance in a day or evening non-correspondence course of at least 13 weeks duration and he or she is carrying a subject load that is considered full-time for day students under the institution's standards and practices. If he or she is in a home schooling program as described in paragraph (a)(2) of this section, he or she must be carrying a subject load that is considered full-time for day students under the standards and practices set by the State or other jurisdiction in which the student resides.

(c) To be considered in full-time attendance, scheduled attendance must be at the rate of at least 20 hours per week unless one of the exceptions in paragraphs (c) (1) and (2) of this section applies. If the student is in an independent study program as described in paragraph (a)(3) of this section, the number of hours spent in school attendance is determined by combining

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the number of hours of attendance at a school facility with the agreed upon number of hours spent in independent study. The student may still be considered in full-time attendance if the scheduled rate of attendance is below 20 hours per week if the Board finds that:

(1) The school attended does not schedule at least 20 hours per week and going to that particular school is the student's only reasonable alternative; or

(2) The student's medical condition prevents him or her from having scheduled attendance of at least 20 hours per week. To prove that the student's medical condition prevents him or her from scheduling 20 hours per week, the Board may request that the student provide appropriate medical evidence or a statement from the school; or

(3) The student is not attending classes, but is graduating in that month and classes ended the month before.

(d) An individual is not a full-time student if, while attending an elementary or secondary school, he or she is paid compensation by an employer who has requested or required that the individual attend the school. An individual is not a full time student while he or she is confined in a penal institution or correctional facility because he or she committed a felony after October 19, 1980.

(e) A student who reaches age 19 but has not completed the requirements for a secondary school diploma or certificate and who is a full-time elementary or secondary student, as defined in paragraph (a) of this section, will continue to be eligible for benefits until the first day of the first month following the end of the quarter or semester in which he or she is then enrolled, or if the school is not operated on a quarter or semester system, the earlier of:

(1) The first day of the month following completion of the course(s) in which he or she was enrolled when age 19 was reached; or

(2) The first day of the third month following the month in which he or she reached age 19.

[63 FR 17326, Apr. 9, 1998]

§ 216.75 When a child is a full-time student during a period of non-attendance.

A student who has been in full-time attendance at an elementary or secondary school is considered a full-time student during a period of non-attendance (include part-time attendance) if:

(a) The period of non-attendance is 4 consecutive months or less;

(b) The student shows to the satisfaction of the Board that he or she intends to return, or the student does return, to full-time attendance at the end of the period; and

(c) The student has not been expelled or suspended from the school.

Subpart I—Parent's Annuity

§ 216.80 General.

The Railroad Retirement Act provides an annuity for the surviving parent of a deceased employee. The deceased employee must have completed 10 years of railroad service and have had a current connection with the railroad industry at the time of his or her death. A parent may only receive an annuity based on age.

§ 216.81 Who is eligible for a parent's annuity.

(a) Where the employee is not survived by a widow(er), or child who is or ever could be entitled to an annuity as described by subpart G or H of this part, a parent of the deceased employee is eligible for both the tier I and tier II components of an annuity if he or she:

(1) Is age 60 or older;

(2) Has not married since the employee died;

(3) Received one-half of his or her support (as defined in part 222 of this chapter) from the employee at the time the employee died; and

(4) Files proof of support as provided for in paragraphs (b)(4) and (b)(5) of this section.

(b) Where the employee is survived by a widow(er), or child who is or ever could be entitled to an annuity as described by subpart G or H of this part, a parent of the deceased employee is eligible for an annuity consisting of the tier I component alone if he or she:

(1) Is age 60 or older;

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(2) Has not married since the employee died;

(3) Is not in receipt of an old age benefit under the Social Security Act equal to or exceeding the amount of the parent's tier I annuity amount before it is reduced for the family maximum but after the sole survivor minimum is considered;

(4) Received at least one-half of his or her support (as defined in part 222 of this chapter) from the employee either:

(i) When the employee died, or

(ii) At the beginning of the period of disability if the employee has a period of disability (as explained in part 220 of this chapter) which did not end before death; and

(5) Files proof of support with the Board within 2 years after either:

(i) The month in which the employee filed an application for a period of disability if support is to be established as of the beginning of the period of disability; or

(ii) The date of the employee's death if support is to be established at that point.

(c) The Board may accept proof of support filed after the 2-year period for reasons which constitute good cause to do so as that term is defined in part 219 of this chapter.

§216.82 What is required for payment.

An eligible parent must file an application and submit the evidence requested by the Board to be entitled to an annuity.

(Approved by the Office of Management and Budget under control number 3220-0030)

Subpart J—Eligibility for More Than One Annuity

§216.90 General.

An individual may meet the eligibility provisions for more than one annuity described in this part. The Railroad Retirement Act generally requires that the total amount of annuities otherwise independently payable to one individual must be reduced if that individual is entitled to multiple annuities. Entitlement as a survivor includes entitlement as a widow(er), surviving divorced spouse, remarried widow(er), child, or parent.

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§216.91 Entitlement as an employee and spouse, divorced spouse, or survivor.

(a) *General.* If an individual is entitled to an annuity as a spouse, divorced spouse or survivor, and is also entitled to an employee annuity, then the spouse, divorced spouse or survivor annuity must be reduced by the amount of the employee annuity. However, this reduction does not apply (except as provided in paragraph (b) of this section) if the spouse, divorced spouse or survivor or the individual upon whose earnings record the spouse, divorced spouse or survivor annuity is based worked for a railroad employer or as an employee representative before January 1, 1975.

(b) *Tier I reduction.* If an individual is entitled to an annuity as a spouse, divorced spouse or survivor, and is also entitled to an employee annuity, then the tier I component of the spouse, divorced spouse or survivor annuity must be reduced by the amount of the tier I component of the employee annuity. Where the spouse or survivor is entitled to a tier II component, then a portion of this reduction may be restored in the computation of this component.

§216.92 Entitlement as a spouse or divorced spouse and as a survivor.

If an individual is entitled to both a spouse or divorced spouse and survivor annuity, only the larger annuity will be paid. However, if the individual so chooses, he or she can receive the smaller annuity rather than the larger annuity.

§216.93 Entitlement to more than one survivor annuity.

If an individual is entitled to more than one survivor annuity, only the larger annuity will be paid. However, if the individual so chooses, he or she can receive the smaller annuity rather than the larger annuity.

§216.94 Entitlement to more than one divorced spouse annuity.

If an individual is entitled to more than one annuity as a divorced spouse, only the larger annuity will be paid. However, if the individual so chooses, he or she can receive the smaller annuity rather than the larger annuity.