



Legal Opinion L-2006-11
May 12, 2006

U.S. Railroad Retirement Board Phone: (312) 751-7139
844 North Rush Street TTY: (312) 751-4701
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

TO: Catherine A. Leyser
Director of Assessment and Training

FROM: Steven A. Bartholow
General Counsel

SUBJECT: Supplemental Pension Plan
Montreal, Maine & Atlantic Corp.
401(k) Plan for Non-Bargaining Unit Employees

This is in reply to your request for my opinion as to whether the Montreal, Maine & Atlantic Corp. 401(k) Plan (the Plan) is a supplemental employer pension plan which must offset a supplemental annuity under the Railroad Retirement Act (RRA) as required by section 2(h)(2) of the RRA.

As you know, supplemental annuities are payable to employee annuitants who meet the entitlement requirements specified by section 2(b) of the RRA in amounts ranging from \$23 to \$43 per month as calculated under section 3(e) of the Act. However, section 2(h) (2) of the Act requires that:

(h)(2) The supplemental annuity provided an individual by subsection (b) shall, with respect to any month, be reduced by the amount of the supplemental pension, attributable to the employer's contribution, that such individual is entitled to receive for that month under any other supplemental pension plan: Provided, however, That the maximum of such reduction shall be equal to the amount of the supplemental annuity less any amount by which the supplemental pension is reduced by reason of the supplemental annuity.

Regulations of the Board at 20 CFR 216.42(a) define a "supplemental pension plan" for purposes of section 2(h) (2) of the RRA as follows:

(a) What is a private railroad pension. * * * 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.

As you point out, the Plan under consideration is in writing and is communicated to the employees to whom it applies. The Plan is established by a covered employer for a defined group of employees. The Plan is funded by employer contributions, although the employer may allow employees to make rollover and/or transfer contributions to the Plan. According to Section Five ("Distributions and Loans") of the



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General Information Sheet, one may request distribution of the vested portion of an Individual Account in the form of a lump sum only. However, Section Five ("Distribution of Benefits, Claims Procedure and Loans") of the Summary Plan Description Booklet states that if the Plan is not subject to the Retirement Equity Act (REA) safe harbor provisions, and the vested Individual Account balance is more than \$5,000 "your payouts will be in the form of an annuity, unless the annuity option is waived". According to the General Information Sheet, the REA safe harbor provisions of the Plan do not apply; therefore, it appears that payouts will be in the form of an annuity, which must be purchased from an insurance company.

The Plan is intended to meet all the requirements of the Internal Revenue Code of 1986, as amended, and the Montreal, Maine & Atlantic Corp. advises that the Plan has been approved by the Internal Revenue Service, providing a copy of the IRS letter dated January 29, 2004.

On the basis of my review of the documents provided with your inquiry, it is my opinion that the above-described pension plan is a defined contribution plan, and as such, is a private pension within the meaning of section 2(h) (2) of the Railroad Retirement Act and section 216.42 of the Board's regulations. Accordingly, benefits under the plan will reduce the supplemental annuities of employees of the Montreal, Maine and Atlantic Corp. to the extent those plan benefits are based upon employer contributions.