



**Legal Opinion L-2006-16**  
**August 4, 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  
Massachusetts Bay Commuter Railroad Company, LLC  
401(k) Plan for Bargaining Unit Employees

This is in reply to your request for my opinion as to whether the Massachusetts Bay Commuter Railroad Company, LLC 401(k) Plan for Bargaining Unit Employees 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. For the reasons set forth below, in my opinion this Plan does not meet the definition of a supplemental employer pension plan, and consequently will have no effect on the computation of a supplemental annuity under the RRA.

The Massachusetts Bay Commuter Railroad Company (Mass. Bay Commuter), which has been determined to be a covered rail carrier employer under the RRA (BA 1910), has submitted a copy of the Plan, and has returned a completed "Request for Information About New or Revised Employer Pension Plan" (Board Form G-88r). These documents state that anyone who is employed by Mass. Bay Commuter, or anyone who is employed by any other company authorized by Mass. Bay Commuter to participate in the Plan, is an eligible employee under the Plan, but only if that employee is a member of a collective bargaining unit with a bargaining agreement explicitly authorizing Plan participation. An eligible employee may make a Salary Reduction Agreement with the employer designating a percentage of the employee's total compensation to be paid to his Salary Deferral Contribution Account. This amount contributed is excluded from the employee's earnings for Federal income tax purposes, subject to certain limitations imposed by the Internal Revenue Code. Employee participation in the Plan is not mandatory, and the Plan does not provide for contributions by Mass. Bay Commuter independent from deferred salary contributed by the employee.

Employees have an immediate and full vested interest in all amounts they contribute to their account. The Plan provides that the total vested account balance must be paid in a lump sum to the employee at termination of employment if the total is \$5,000 or less. A balance over \$5,000 may be paid in full at termination of employment with the employee's consent, or at such later time as the employee consents, but the first distribution must be paid by April of the calendar year following the later of the year the employee attains age 70 ½ or retires. The full balance must also be distributed in a lump sum if employment terminates due to disability, or at the employee's death.

The employer also advises that the plan is not reduced by any portion of a monthly annuity under the RRA which the employee may receive, including the supplemental annuity. Mass. Bay Commuter further advises that the Plan was established pursuant to a collective bargaining agreement, and that it has been approved by the Internal Revenue Service, although a copy of the IRS letter was not furnished. Finally, the employer confirms that "no company funding is provided" to the Plan.

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:



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(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
- (4) 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.

The Plan under consideration is in writing and is established by a covered employer for a defined group of employees. The Plan therefore meets the first two criteria under section 216.42(a) of the regulations. However, payments under the Plan consist of distributions from the employee's account balance. The Plan formula does not provide a definitely determinable benefit which is payable over a period of years. Consequently, the Plan is not a defined benefit supplemental pension plan as defined by section 216.42(a) of the Board's regulations.

A private pension which does not provide definitely determinable benefits under section 216.42(a) may still require reduction of the supplemental annuity under RRA section 2(h)(2) if the plan obligates the employer to make fixed contributions which are not dependent upon profits, as required by section 216.42(b). In this case, though, the Mass. Bay Commuter Plan for Bargaining Unit Employees is funded solely by contributions from the participating employees; the Plan has no requirement whatsoever for employer contributions, whether fixed or otherwise. Therefore, the Plan also does not meet the requirements specified by section 216.42(b) for a defined contribution plan.

Based on the documents provided with your inquiry, the Mass. Bay Commuter Plan for Bargaining Unit Employees does not meet either definition of a plan which requires a reduction of a supplemental annuity as set forth by section 216.42 of the Board's regulations. Accordingly, it is my opinion that the above-described pension plan is not private pension within the meaning of section 2(h)(2) of the RRA. Benefits



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paid under the plan will not reduce the supplemental annuities paid to retired employees of the Massachusetts Bay Commuter Railroad Company, LLC.