June 15, 1998
L-98-15

TO **:** Jerome F. Kever
Management Member

FROM **:** Steven A. Bartholow
Deputy General Counsel

SUBJECT **:** Regular Railroad Occupation and the Americans with Disabilities Act

This is in response to your memorandum of May 7, 1998, in which you inquire as to whether an employee's accommodated job in compliance with the Americans with Disabilities Act would constitute the employee's regular railroad occupation for purposes of adjudication of entitlement to an occupational disability annuity.

The Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) prohibits discrimination against persons with disabilities in employment and in public services, including transportation, public accommodation, and certain other services provided by private entities. Those provisions prohibit discrimination against qualified persons with disabilities in connection with employment including "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." The Act does not apply to the Federal Government as an employer. 42 U.S.C. §§ 12111(5) and 12112.

It is a defense to a charge of discrimination that the allegedly discriminatory criteria used to deny employment or a benefit are "job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. § 12113(a). "Reasonable accommodation" may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations * * *." 42 U.S.C.
§ 12111(9).

Section 2(a)(1)(iv) of the Railroad Retirement Act (hereinafter "Act") (45 U.S.C. § 231a(a)(1)(iv)) provides for payment of a disability annuity to individuals who have a current connection with the railroad industry, whose permanent and physical or mental condition is such as to be disabling for work in their regular railroad occupation, and who have completed 20 years of service or who will have attained the age of 60.

Section 2(a)(2) of the Act further provides that the Board, with the cooperation of employers and employees, shall secure standards for determining disability in the "several occupations" in the railroad industry. An individual who was disqualified for work in his or her regular railroad occupation based upon these standards would be considered disabled for his or her regular railroad occupation. If the employee had not been disqualified, but nevertheless sought payment of the occupational disability annuity, the Board shall:

> * * * [D]etermine whether his condition is disabling for work in his regular occupation in accordance with the standards generally established; and, if the employee's regular occupation is not one with respect to which standards will have been established, the standards relating to a reasonably comparable occupation shall be used. If there is no such comparable occupation, the Board shall determine whether the employee's condition is disabling for work in his regular occupation by determining whether under the practices generally prevailing in industries in which such occupation exists such condition is a permanent disqualification for work in such occupation. * * *

An individual's regular railroad occupation is defined in section 2(a)(2) as follows:

> * * * For purposes of this subdivision and paragraph (iv) of subdivision (1), an employee's "regular occupation" shall be deemed to be the occupation in which he will have been engaged in more calendar months than the calendar months in which he will have been engaged in any other occupation during the last preceding five calendar years, whether or not consecutive, in each of which years he will have earned wages or salary, except that, if an employee establishes that during the last fifteen consecutive calendar years he will have been engaged in another occupation in one-half or more of all the months in which he will have earned wages or salary, he may claim such other occupation as his regular occupation.

Section 220.11 of the Board's regulations (63 Fed. Reg. 7541) (formerly codified 20 CFR 211.11 (1997)) more precisely defines "regular occupation" as an employee's railroad occupation:

> * * * [I]n which he or she has engaged in service for hire in more calendar months than the calendar months in which he or she has been engaged in service for hire in any other occupation during the last preceding five calendar years, whether or not consecutive; or has engaged in service for hire in not less than one-half of all of the months in which he or she has been engaged in service for hire during the last preceding 15 consecutive calendar years. * * *

The occupational disability provisions were added to the Railroad Retirement Act of 1937 by section 205 of Public Law 572, 79th Cong. (1946), 60 Stat. 722 (commonly known as the '46 amendments). The provisions of the 1937 Act were carried over into the present Act without change. The fact that the drafters of these provisions provided for disability for work in an employee's regular occupation, as opposed to simply providing for an annuity when an individual was unable to perform the demands of his or her particular job, indicates that they assumed that railroad jobs could be defined generically, so that, for example, with respect to the craft of "fireman" it was assumed that there were certain physical demands of an individual generically associated with that craft. This is made clear from the legislative history which provides:

> It is proposed, therefore, that in the first place the Board should cooperate with employers and employees in bringing about a greater degree of standardization of employers' practices with respect to occupational disqualification. Then, if the employee is disqualified in accordance with standard practices, he is considered occupationally disabled. If he is not so disqualified either because the employer has not disqualified him at all or because he has disqualified him but has not followed standard practices, the Board must make a decision, upon the employee's application, as to whether he would be disqualified under generally prevailing standards in the railroad industry. * * * Senate Report No. 1710, Part 2, Supplemental Report, page 13, 79th Cong. 2d Sess. (1946).

The drafters of the occupational disability provisions described the methodology for determining an individual's regular occupation as follows:

> "Regular occupation" is also a perfectly simple concept which everyone understands but on which opinions may differ when it comes to its application to concrete cases. Here, however, it is possible to draw a fairly precise line even though opinions might differ as to just where the line should be drawn. The bill proposes that normally an individual's regular occupation shall be considered to be the occupation in which he worked for more calendar months than in any other occupation during the last 5 years in which he worked. Recognizing, however, that an individual may in the last few years have shifted from an occupation in which he spent most of his working life to a new occupation, provision is made for recognizing the former rather than the latter as the individual's regular occupation; if the employee during the last 15 years worked in a particular occupation for one-half or more of his total working months he may claim that occupation as his regular occupation. In other words, if the 5-year test and the 15-year test would show different occupations to be the regular occupation, it is felt that either one might reasonably be regarded as the employee's regular occupation and the employee is allowed to choose which of the two is to be used in judging occupational disability. Id. at page 13.

Mr. Sidney S. Alderman, Solicitor General for the Southern Railway, testifying on behalf of the Association of American Railroads, thought the definition too complex, and described it as follows:

> This remarkable definition first undertakes to lay down a fixed legislative rule as to what is "regular occupation" based on five years' past experience * * * and then ends by substantially nullifying that rule by leaving to the employee the election, if he prefers, to choose another occupation as his "regular" one, based this time on 15 consecutive years' past experience. * * * Characteristically, the employer is left no voice in the matter * * *. Hearings on H.R. 1362, supra, at page 556.

Mr. Alderman described the goal of standardization, quite accurately as it turns out, as unrealistic. He stated:

> Conditions vary widely from railroad to railroad throughout the United States. * * * The requirements of individual jobs within a common occupational designation are subject to the widest possible variance. House Hearings on H.R. 1362, Part 2, page 559, 79th Cong. 1st Sess. (1945).

The goal of standardization of railroad jobs, as contemplated by the authors of the occupational disability provisions, has been an elusive one, and in practice the Board has focused on the actual physical and mental demands of an employee's job to determine his or her regular occupation since comprehensive generic job descriptions have never been developed. This approach is embodied in section 220.13(b) of the Board's regulations which provides as follows:

(b) If the Board finds that the employee does not have an impairment described in (a) above, it will—

(1) Review the occupations which the employee has held in the last 5-15 calendar years in which he or she was employed, to determine his or her regular occupation (see § 220.11); and

(2) Determine what the physical and mental demands of the employee's regular occupation are. In making this determination, the Board will consider the employee's own description of his or her regular occupation and all information obtained from his or her employer(s). The Board may also take administrative notice of reliable job information available from various governmental and other publications; and

(3) Evaluate the employee's physical and mental impairments to determine what limitations these impairments cause. The Board will consider the effect of all of the employee's medically documented impairments to determine whether he or she retains the capacity to meet the physical and mental demands of his or her regular occupation. [20 CFR § 220.13(b) (1997).]

A plain reading of section 2(a)(2), the legislative history surrounding the occupational disability annuity provisions, and the Board's regulations suggests that in determining an employee's regular occupation, the Board is to apply a "look back" test and examine what the employee has done for the last 5 or 15 years. Consequently, an employee's accommodated job would not generally be an employee's regular occupation unless the employee has engaged in the accommodated job for a sufficient period so that it is his or her regular occupation under either the 5 or 15 year test in section 2(a)(2) or unless the accommodation is consistent with the way the job is or has been done.[1] Thus, the determination of an employee's regular occupation must necessarily be made on a case by case basis. In this regard, examples might be helpful in understanding the effect of the ADA on occupational disability determinations.

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[1]Compare the definition of "past relevant work" under section 404.1520(e) of the regulations of the Social Security Administration. An employee's past relevant work is either:

1. The actual functional demands and job duties of a particular past relevant job; *or*

2. *The functional demands and job duties of the occupation as generally required by employers throughout the national economy.*

Social Security Administration Ruling 82-62 (emphasis added).

Example 1. Because of a permanent injury an employee can no longer perform the lifting requirements normally associated with his job as he has performed it over the last 15 years. The employer offers to accommodate the employee by waving the lifting requirements. This accommodation changes an aspect of the job in a manner that changes the job itself. Under the ADA the employee is not required to accept the accommodation.[2] His regular occupation for determining occupational disability entitlement would not be the accommodated job, but rather his job as he has performed it over the last 15 years. To hold otherwise would render meaningless the concept of regular railroad occupation by allowing, in the name of accommodation, the substitution of a new job for the employee's actual job.

[2]In order to invoke the protection of the Americans with Disabilities Act an employee must establish that he can perform the essential functions of his job despite his or her disability or with reasonable accommodation for the disability. 42 U.S.C. § 12111(8). In other words, the ADA does not force an employee to perform an accommodated job, but merely requires that reasonable accommodation be made available.

Example 2. The situation is the same as in example 1, but the employee accepted the accommodation of waiving the lifting requirement and performed the accommodated job for a period of 8 years. The accommodated job would become his regular occupation. This is because he has performed the job for the preceding 5 years and in the last 15 consecutive years he has not worked in another job for at least half the time.

In addition, in our view, an accommodation that does not change an employee's railroad job as it is customarily performed would not constitute a different railroad occupation. For example, if the lifting requirement in the above example were so nonessential to the performance of the employee's particular occupation that, in its absence, the employee could still continue to perform his occupation as it is customarily performed, removal of lifting would not change the regular railroad occupation and, if the employee can perform the job without lifting, he would not be considered occupationally disabled. This result is consistent with the legislative history surrounding the occupational disability provision because the employee still can perform the duties of his craft as they are generally recognized in the industry. As noted above, such cases would have to be decided on a case by case basis. We would suggest that the Board consider adopting a regulation to flesh out this aspect of the interaction of the Americans with Disabilities Act and the occupational disability program.

cc: Chair
Labor Member Speakman
Secretary to the Board
Director of Programs
Director of Hearings and Appeals