

The Division of Railroad Retirement Benefits in a Divorce in Nebraska

by Angela Lennon

The retirement structure for railroad employees is unique, as rail employees do not participate in the Social Security system. The railroad retirement program is similar, but legislatively and administratively distinct from the Social Security system. The distinctions in rail employees' benefits need to be addressed and accounted for in a divorce. For example, certain portions of a rail employee's federal benefits resemble a private pension that is divisible in a divorce. Practitioners need to be aware of the differences and complexities of the railroad retirement system to judiciously advocate for their clients.

Railroad Retirement Act

The Railroad Retirement Act (RRA), passed in 1935, replaced the Social Security Act for railroad employees. Instead of contributing to and receiving Social Security, rail

employees receive a railroad annuity. The monthly annuity is based on the employees' age, service, and/or disability. Instead of contributing to Social Security, railroad employees pay taxes pursuant to the Railroad Retirement Tax Act to fund the rail annuities.

The railroad annuity is administered by the United States Railroad Retirement Board. While the Railroad Retirement Board administers the annuities pursuant to the RRA, it does not administer any private pension or retirement plans through individual railway employers.

Railroad Retirement Annuities

The railroad retirement annuities are comprised of several components.

Tier I: The tier I component of the annuity mirrors the benefit that the Social Security Act would provide if the employee's railroad employment were covered under the Social Security Act.

Section 14 of the Railroad Retirement Act (45 U.S.C. 231(m)) sets forth that the tier I component of the annuity is not divisible via a property division in a divorce.

This prohibition on division of the tier I component makes sense, as employees with social security benefits are prohibited from dividing Social Security Act benefits pursuant to a property division.

Tier II: The tier II component of the annuity is based on the employee's years of employment and earnings during employment. Prior to 1983, the Railroad Retirement Act did not allow for any of the annuity components to be divided pursuant to a divorce. However, the Act was amended to now allow for a division of Tier II annuities as a property distribution.

Angela Lennon



Angela Lennon is a partner at Koenig|Dunne, PC, LLO, practicing primarily in the area of family law, including collaborative divorce. Angela is the Chair of the Young Lawyer's Division of the Omaha Bar Association and serves on the OBA's Executive Council. She was a contributor to *Divorce in Nebraska: The Legal Process, Your Rights, and What to Expect*, published in 2013. Angela presented

to the Family Law Section of the NSBA in 2016 regarding the division of Railroad Retirement benefits in divorce. You can find more information about Angela's practice and contact her at www.KoenigDunne.com.

RAILROAD RETIREMENT BENEFITS IN A DIVORCE IN NEBRASKA

There are several other additional annuities that a railroad employee may be entitled to and which may be subject to division.

- **Supplemental Annuity:** The supplemental annuity applies for an employee who has completed 25 years of service within the railroad industry before 1981. He or she may receive a supplemental annuity; however, the amount is minimal: \$23 per month to \$43 per month.
- **Vested Dual Benefit:** The vested dual benefit is a benefit received by employees who were/are fully insured under both the Railroad Retirement Act and the Social Security Act prior to 1975.
- **Overall Minimum Increase:** If an employee's annuity pursuant to the Railroad Retirement Act is less than the amount he or she could receive pursuant to a Social Security award, the annuity may be increased to reflect the amount her or she would have received from Social Security. However, only the amount of the increase between the Railroad Retirement Annuity and the Social Security Act payment is divisible pursuant to a property distribution.

Working with the Railroad Retirement Board

The Railroad Retirement Board (RRB) is an independent agency in the executive branch of the federal government whose primary function is to administer benefits to railroad employees and their families.

During the course of a divorce case, working with the RRB can be very helpful. For instance, you can contact the Board to find out the estimated amount of the employee annuity. Upon written request, the Board will provide a report of the estimated monthly annuity and a breakdown of all of the individual components.

However, this report can only be obtained if the employee has completed five years of service after 1995 (or ten years of service before 1995). Note that these estimates are calculated as of June in each calendar year and as such, the report may not reflect the exact amount of the annuity as of the date requested.

If you need other information regarding the employee's railroad employment information (e.g., compensation, cumulative record of railroad service, etc.), do not attempt to subpoena the RRB for this information. Any attempts to subpoena the RRB will be treated as a request for a benefit estimate statement only (discussed above). Instead, instruct the employee spouse to complete an Authorization for Release of Information to Attorney and submit the Release to the RRB. Upon receipt of the Authorization, the Board will provide the requested information.

Finally, each year, the RRB issues Form BA-6 to railroad employees. This form details the previous years' service and compensation, along with total service months and a complete

history of compensation. If you choose not to submit the Authorization for Release to the Railroad Retirement Board, it may be helpful to request Form BA-6 in discovery requests.

Division of Railroad Retirement Annuities

To effectuate a transfer of railroad retirement annuities pursuant to a divorce, counsel must recognize that benefits derived from the Railroad Retirement Act are not subject to the Employee Retirement Income Security Act (ERISA). ERISA is a federal law that provides standards and protections for voluntarily-established retirement plans.

Because railroad retirement benefits aren't subject to ERISA, a Qualified Domestic Relations Order is not required to partition the divisible portions of the railroad annuity. In fact, a separate order is not required to divide the railroad retirement annuity if the appropriate language is included within the divorce decree.

The basic requirements to divide a railroad retirement annuity are as follows:

- The order must be a final order;
- The order must specifically set forth that the benefits to be divided are pursuant to the Railroad Retirement Act and are not pursuant to a private pension or retirement plan subject to ERISA;
- The award must be that of a property settlement, and not an award of alimony or spousal support;
- The order must require that the Railroad Retirement Board pay the former spouse his or her benefits directly, rather than obligating the employee spouse to make said payments;
- The order cannot attempt to divide the tier I portion of the annuity; and
- The order must provide for the award as a percentage, a fixed dollar amount, or as a fraction of the employee's annuity.

Counsel may submit a draft of the Order Dividing Railroad Retirement Benefits to the Office of General Counsel for accuracy and pre-approval. The contact information for the Office of General Counsel is: Office of General Counsel, U.S. Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611-2092. Draft orders can also be faxed to (312) 751-7102.

Post-Decree Actions

Once the decree or order dividing the railroad retirement annuities is entered with the court, a certified copy must be sent to the Railroad Retirement Board. Once received, the Board will determine whether the order complies with the railroad partition regulations and advise counsel and parties of same.

If the railroad employee is currently receiving an annuity,

RAILROAD RETIREMENT BENEFITS IN A DIVORCE IN NEBRASKA

the former spouse must take the following steps. First, the former spouse must complete the Agreement of Spouse or Former Spouse form. This form acknowledges that the disbursement payment is from the Department of the Treasury via the RRB and confirm that any erroneous payments received by the former spouse will be returned, and if the annuity payments are supposed to terminate, the former spouse has an obligation to notify the RRB of the termination. The second action the former spouse must take is to complete the direct deposit sign-up form and submit it to the Board, so the former spouse can begin to receive payments directly from the Board.

If the former spouse does not complete the two above-identified actions immediately, the Railroad Retirement Board will send a reminder request to the former spouse and will hold his or her portion of the annuity payment for three months and disburse the payment to the former spouse when the requirement documentation is received. If the Agreement of Spouse or Former Spouse and the direct deposit-sign up form is not submitted to the Board within three months, the Board will release the withheld amounts directly to the employee.



Railroad Retirement Act Benefits

Identification of benefit(s) divisible in divorce action
<ul style="list-style-type: none"> • Tier I • Tier II • Supplemental Annuity • Vested Dual Benefit • Overall Minimum Increase
Order Dividing Railroad Retirement Benefits Requirements
<ul style="list-style-type: none"> • Final order • Pursuant to RRA and not ERISA • Property settlement and not alimony award • RRB to pay directly to former spouse • May not divide non-divisible tier I benefit • Set forth partition of benefit via percentage, fixed dollar amount, or fraction of employee's annuity
Post-Decree Actions
<ul style="list-style-type: none"> • Submit draft order to RRB for pre-approval • Submit final certified copy of order to RRB for approval • Former spouse to complete Agreement of Former Spouse and Direct-Deposit Sign Up form (or) • Notify former spouse to keep RRB apprised of current address
Payment/Termination of the Annuity
<ul style="list-style-type: none"> • Commences (1) date in decree; (2) when Office of General Counsel receives and approves order; or (3) upon both parties attaining age 62 • Terminates (1) date set forth in the decree; (2) upon death of former spouse
Divorced Spouse Annuity
<ul style="list-style-type: none"> • Eligibility (1) married 10 consecutive years; (2) divorced from employee spouse; (3) not currently married; (4) not entitled to social security benefits in excess of divorced spouse annuity • Commences (1) both spouses attain age of 62 and 1 month; or (2) first month former spouse meets full retirement age • Amount of annuity equal to employee's tier I benefit, minus his or her own social security earnings • Terminates (1) death of former spouse; or (2) former spouse becomes eligible for benefits in excess of divorced spouse annuity
Surviving Divorced Spouse Annuity
<ul style="list-style-type: none"> • Eligibility with no children (1) married 10 consecutive years; (2) divorced from employee spouse; (3) not currently married; (4) age 60 or older • Eligibility with children (1) former spouse caring for employee spouse's child upon death of employee • Termination (1) remarriage; (2) death of surviving divorced spouse (3) former spouse becomes eligible for benefits in excess of divorced spouse annuity

RAILROAD RETIREMENT BENEFITS IN A DIVORCE IN NEBRASKA

If the employee is eligible for a future annuity but isn't currently entitled to receive it, the Railroad Retirement Board will file the order or decree under the railroad employee's social security number for future reference. When the employee becomes eligible to receive the annuity, the Board will send a notice to the former spouse to complete the Authorization and direct-deposit forms. Thus, it is imperative for the former spouse to keep the Board apprised of his or her current mailing address. Otherwise, the former spouse may not be aware when he or she is entitled to begin receipt of the annuity payments. Because the files are organized by social security number, any correspondence sent to the Board by the former spouse or counsel, must contain the employee's social security number.

Payment of the Annuity

Once the decree or order has been finalized and approved by the Board, the payments of the retirement annuity may begin (1) on the date specified in the decree or partition order; (2) the month the Office of General Counsel receives the certified decree or partition order; or (3) the first month in which both the employee and former spouse attain or have attained the age of 62.

If the employee dies before he or she becomes eligible to receive the annuity, the former spouse's payment may begin when all three of the following conditions have been met: (1) the employee completed ten years of railroad service (or five years of service after 1995); (2) the former spouse is age 62; and (3) the employee would have been age 62.

If the former spouse dies, the payment that the former spouse was receiving, or would be eligible to receive, reverts back to the employee. The annuity payment does not become property of the former spouse's estate and is not awarded to his or her designated beneficiaries.

Termination of Annuity Payments

Annuity payments to the former spouse will terminate upon the earliest following date: (1) the date set forth in the decree or order which sets forth a termination date, or (2) when the former spouse dies.

It's important to note that the marital status of the former spouse does not impact his or her eligibility to receive the annuity payment (unless this condition is specifically set forth in the decree or order). The annuity award, although in the form of a monthly payment, is an award of property, and not an award of support that may otherwise be impacted by marital status.

Railroad Retirement Annuity and Enforcement of Support Obligations

Once the payment of the annuity commences, one thing practitioners should keep in mind is that the annuity payments

pursuant to the Railroad Retirement Act can be subject to enforcement and/or garnishment proceedings to meet a child support or alimony obligation.

While the entire portion of the annuity is not divisible pursuant to a property distribution (i.e. tier I benefit is non-divisible), all components of the railroad retirement annuity are subject to an enforcement and/or garnishment action.

If your client is seeking to utilize a railroad retirement annuity to satisfy a child support or alimony obligation, you can contact the Railroad Retirement Board to request certain information about the obligor's benefit, including the current monthly amount being paid to the obligor. However, please note that the RRB will not provide the obligor's current address or any other personal information.

Divorced Spouse Annuity

In addition to the divisibility of the railroad retirement annuity in a divorce, a former spouse may be eligible to receive a divorced spouse annuity. A divorced spouse annuity is a benefit provided pursuant to the Railroad Retirement Act to former spouses who meet certain criteria.

This annuity is available to former spouses in his or her own right pursuant to federal law. Thus, state courts do not have jurisdiction to impact the entitlement of a former spouse to the divorced spouse annuity.

Because the divorced spouse annuity is not subject to partition in the divorce process, the payment of the divorced spouse annuity does not impact or reduce the amount of the employee's annuity. Additionally, whether a divorced spouse meets the criteria to receive the divorced spouse annuity does not affect the amount of the divisible portion of the annuity he or she receives in the decree.

To be eligible to receive the divorced spouse annuity, the marriage needs to have lasted for at least ten consecutive years, the parties must be divorced, and the former spouse cannot currently be remarried. Additionally, the employee and former spouse must each be at least age 62 and one month; the former spouse cannot be eligible to receive social security earnings in his or her own right that exceeds the amount he or she would receive pursuant to the divorced spouse annuity; the former spouse and employee need to have been divorced at least two years before the benefits can commence; and the former spouse may not be an employee of the railroad.

If the above conditions are met, generally the divorced spouse annuity can commence when both the former spouse and employee spouse are age 62 and one month (if applying for a reduced age annuity), or the first day of the month in which the former spouse meets the age requirement for a full age annuity.

RAILROAD RETIREMENT BENEFITS IN A DIVORCE IN NEBRASKA

There are other intricate details that may affect the commencement date of the divorced spouse annuity, which can be analyzed by reviewing the publication issued by the Railroad Retirement Board, Form RB-30, which sets forth in detail all aspects of the divorced spouse annuity.

The amount of the divorced spouse annuity is equal to the amount of the employee's tier I benefit, minus any social security benefits the former spouse may be eligible to receive on his or her own earning record. This amount may be impacted by an age reduction and if the former spouse is currently working.

Finally, the divorced spouse annuity will terminate if the former spouse dies, if the employee dies, if the former spouse remarries, or if the former spouse becomes eligible for social security benefits in excess of that received from the divorced spouse annuity.


Surviving Divorced Spouse Annuity

If the employee spouse predeceases the former spouse, the former spouse may be eligible to receive the surviving divorced spouse annuity. To be eligible to receive this annuity, the spouses need to have been married for ten consecutive years, divorced, and the former spouse may not currently be married.

The former spouse needs to be age 60 or older. However, a surviving divorced spouse who is not married may qualify for this benefit at any age and regardless of the length of the couple's marriage if the employee spouse dies and the former spouse is caring for their child under the age of 16.

The surviving divorced spouse annuity benefit will terminate upon the remarriage of the former spouse, upon the former spouse's death, or if the former spouse becomes entitled to social security benefits on his or her own accord that are equal to or exceed the divorced spouse survivor annuity.

While the divorced spouse annuity and the surviving divorced spouse annuity are not benefits subject to division in a divorce, practitioners should be familiar with these benefits to appropriately advise clients of their rights and options post-divorce regarding potentially substantial retirement benefits.

Properly handling the division of a rail employees' benefits in a divorce is complex. From identifying the divisible portion of railroad employee benefits, to advising clients on the amount and duration of their benefits, to ensuring proper division of the benefits and obtaining approval from the RRB, practitioners need to be competent and skilled to properly advocate for their clients. 



THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS NEBRASKA CHAPTER

The following attorneys are recognized for
Excellence in the field of Alternative Dispute Resolution



John BROWNIGG
OMAHA



Mark CHRISTENSEN
LINCOLN



Tim ENGLER
LINCOLN



Michael KINNEY
OMAHA



Wayne MARK
OMAHA



Michael MULLIN
OMAHA



Robert SHIVELY
LINCOLN



David WOODKE
OMAHA

Check Detailed Bios & Available Dates Online at www.NebraskaMediators.org

*As approved by local members of the national plaintiff (AAJ) and defense (DRI) bar associations**

* The National Academy of Distinguished Neutrals (www.NADN.org) is an invitation-only professional association of over 900 litigator-rated mediators & arbitrators throughout the US and a proud partner of the AAJ and DRI. For more info, please visit www.NADN.org/about