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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-198903 **DATE:** August 6, 1981

MATTER OF: Alaska Railroad - Employees' Compensation - Life Insurance - Health Insurance - Erroneous Payments

DIGEST:

1. Congress passed Federal Employees Health Benefits Act (5 U.S.C. §§ 8901, et. seq.) (FEHBA) to establish comprehensive health benefits program for Federal employees. Act imposes 75 percent ceiling on an agency's contributions to employee premiums and all participating agencies are bound by that limitation unless specifically exempted. Thus, although Alaska Railroad Act of March 12, 1914 (43 U.S.C. §§ 975, et. seq.) confers broad authority on President or his designee to fix the compensation of employees of the Railroad, Alaska Railroad may not independently restructure its participation in FEHBA program by increasing its contribution beyond the 75 percent ceiling.

2. Alaska Railroad has in the past contributed more than 75 percent toward employee premium costs for health insurance in contravention of 5 U.S.C. § 8906(b)(2). Comptroller General concurs with the Railroad's assertion that administrative costs of conducting full 6-year audit and maintaining such a large number of relatively small individual collection actions are likely to exceed the realistic estimated recovery and go far beyond the point of diminishing returns. Thus, this case meets standards for termination of collection set forth in Federal Claims Collection Act of 1966 (31 U.S.C. §§ 951, et. seq.) and implementing standards.

3. Under color of its authority to fix compensation of its employees, Alaska Railroad negotiated collective bargaining agreements with railroad unions representing Railroad employees which erroneously included provisions for Railroad to contribute more than 75

[Request for Decision Involving Employee Health and Life Insurance Plans]

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percent toward employee premium costs for health insurance in contravention of 5 U.S.C. § 8906(b)(2). Since collective bargaining provisions here involved have been negotiated over a long period and this decision is first stating such provisions are illegal, Railroad, in order to cushion impact, is authorized to delay compliance with this decision until the adjournment of the 97th Congress.

4. Alaska Railroad is not legally obligated to assist in the prosecution of claims against its interest by conducting special audit to identify and reimburse possible over-deductions from employees for life insurance premiums, especially where employees have capacity to compute the correctness of their own deductions. However, waiver of over-deductions under 5 U.S.C. § 5584 is not available for the benefit of the Government in these circumstances. Railroad should provide general notice of potential discrepancy, and individually audit and adjudicate claims subsequently submitted within applicable limitations period.

5. The Alaska Railroad may not on its own initiative or through collective bargaining impair or alter the specific limits established by 5 U.S.C. § 8906(b)(2) for its contributory participation under the Federal Employees Health Benefits Act (FEHBA). However, we find nothing in our combined review of the Alaska Railroad Act and the FEHBA that prohibits an agency from continuing pre-existing health programs. Congress was aware of the existence since 1954 of the Alaska Railroad Medical Association Program and nothing in the FEHBA or its legislative history indicates congressional intent to require the Railroad to discontinue that program.

Our opinion is requested by the Administrator, Federal Railroad Administration, on four questions that have been submitted in connection with a sample audit by the Department of Transportation (DOT) of the payroll system of the

Alaska Railroad, a bureau of the Federal Railroad Administration (FRA). These questions involve employee health and life insurance programs and are stated below together with our answers.

QUESTION 1

"1. May the Railroad's contribution for Federal Employee Health Benefits (FEHB) insurance premiums exceed the 75% ceiling established by 5 USC 8906(b)(2)?

"The sample audit identified 404 employees or about 55% of the Railroad's work force who were having 100% of their FEHB insurance premiums paid by the Railroad. The audit report noted that this practice exceeds the 75% ceiling on government contribution under 5 USC 8906(b)(2) and asked the DOT General Counsel whether the statutory ceiling applies to the Railroad. On June 4, 1979, DOT Counsel issued an opinion that the ceiling does apply to the Railroad. Counsel for the Railroad disagrees with this opinion. In support of his view that the Railroad may exceed the 75% ceiling, Railroad counsel points out that the Railroad Enabling Act (43 USC 975 et. seq.) grants broad authority to fix employee compensation. Under this authority the Railroad has negotiated collective bargaining agreements with both public sector unions and private sector railroad unions representing Railroad employees which cover pay and fringe benefits. Some of these agreements provide for the payment of 100% of the FEHB costs."

ANSWER

For the reasons set forth below, we conclude that the 75 percent ceiling on Government contributions for Federal Employees Health Benefits insurance premiums is applicable to the Alaska Railroad.

The Alaska Railroad was created by the Act of March 12, 1914, c.37, 38 Stat. 305, 43 U.S.C. §§ 975, et. seq., commonly known as the Alaska Railroad Act. This legislation authorized the President of the United States, in the interest of national defense, territorial development, and commerce generally, to acquire, construct, and operate a railroad

or railroads in Alaska. Organizationally, the Alaska Railroad is presently a bureau of the Federal Railroad Administration, Department of Transportation, to which it was transferred from the Department of the Interior by enactment of section 6(i) of the Department of Transportation Act, Pub. L. No. 89-670, October 15, 1966, 49 U.S.C. § 1655(i) (1970). As the Department of Transportation is an executive department under 5 U.S.C. § 101 and is, therefore, an executive agency within the meaning of 5 U.S.C. § 105, it follows that Alaska Railroad employees are civilian officers or employees in the executive branch of the Government. See B-158876, July 27, 1966.

The Railroad has broader authority than is ordinarily granted to Government agencies in respect to employment policies and practices. The statutory provisions of 43 U.S.C. § 975 provide in relevant part:

> "The President of the United States is empowered, authorized, and directed * * * to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of said sections; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of said sections * * * to fix the compensation of all officers, agents, or employees appointed or designated by him * * *."

Since the Alaska Railroad is excluded by 5 U.S.C. § 5102(a)(1)(iii) and 5 U.S.C. § 5331(a) from the statutory provisions governing the classification of General Schedule positions and rates of pay, and is similarly excluded from coverage under the Prevailing Rate System Act by 5 U.S.C. § 5342(a)(1)(C), the compensation of Alaska Railroad employees is administratively established within the limits set by the annual appropriation acts of the Department of Transportation.

Pursuant to the Federal Employees Health Benefits Act of 1959 (FEHBA), Pub. L. 86-362, 73 Stat. 708, September 28, 1959, as now amended and codified in chapter 89 of title 5, United States Code, Federal employees and annuitants may purchase health insurance as a fringe

benefit of their Government employment. In accordance with FEHBA, the Health Benefits Program consists of a group of "health benefit plans" which are group insurance policies, contracts or similar group arrangements with nongovernmental organizations, called "carriers," established for the purpose of "providing, paying for or reimbursing expenses for health services." 5 U.S.C. §§ 8901(6) and (7). The Government pays part of the cost of coverage for each employee, with the employee assuming the remainder under criteria set forth in section 8906 of title 5. Section 8906(b)(2) of title 5 provides that "[t]he biweekly Government contribution for an employee or annuitant enrolled in a plan under this chapter shall not exceed 75 percent of the subscription charge."

Chapter 89 of title 5 designates the Office of Personnel Management (OPM) as the agency responsible for the administration of the Federal Employees Health Benefits Program. Only plans approved by OPM are encompassed by the Federal program, and alterations of benefits or premiums under ongoing plans must garner OPM's acceptance before they become effective. See 5 U.S.C. §§ 8902(e)-(i), 8904, 5 C.F.R. §§ 890.201 et. seq.

In accordance with 5 U.S.C. § 8901(1)(A) and 5 U.S.C. § 2105(a), Alaska Railroad employees are "employees" for purposes of coverage under the Federal Employees Health Benefits Act, and as the record before us discloses, the Alaska Railroad participates in the program. However, the Alaska Railroad has not been abiding by the 75 percent ceiling on agency contributions imposed by 5 U.S.C. § 8906(b)(2). In support of the Railroad's practice of paying 100 percent of the insurance premiums for some of its employees, counsel for the Railroad argues that:

> "* * * The Railroad Enabling Act (43 USC 975 et. seq.) grants broad authority to fix employee compensation. Under this authority the Railroad has negotiated collective bargaining agreements with both public sector unions and private sector railroad unions representing Railroad employees which cover pay and fringe benefits. Some of these agreements provide for the payment of 100% of the FEHB costs."

We disagree with counsel for the Railroad and find the Railroad's practice is illegal. Under the clear and unambiguous terms of 5 U.S.C § 8906(b)(2) a Federal agency may not

pay more than 75 percent of the subscription charges for employees enrolled in health insurance plans under the Federal Employees Health Benefits Act. While the Alaska Railroad is excluded by 5 U.S.C. § 5102(a)(1)(iii) and 5 U.S.C. § 5331(a) from the provisions governing the classification of positions and rates of pay, no similar exclusion is found in chapter 89 of title 5, United States Code, or any section thereof, which governs the Federal Employee Health Benefits program. There is nothing in the Federal Employees Health Benefits Act nor its legislative history to indicate that the Alaska Railroad retains a discretionary right to restructure its participation by modifying the clear terms of that law. The broad powers conferred by the Alaska Railroad Act of March 12, 1914, are necessarily subject to statutory limitations in the same manner as in other instances in which administrative or executive discretion is vested. See for example 4 Comp. Gen. 19, 20 (1924). Therefore, while, under the provisions cited by counsel for the Railroad, compensation of Alaska Railroad employees may be administratively established within the limits set by the annual appropriation acts for the Department of Transportation, such provisions do not provide authority to nullify the express provision of 5 U.S.C. § 8906(b)(2) by increasing the Government's contributory participation beyond the 75 percent limit presently set by that statute.

Accordingly, the Alaska Railroad's internal policies and practices implementing the Federal Employees Health Benefits Act (5 U.S.C. §§ 8901, et. seq.) must be made consistent with that law. Congress passed the Act to establish a comprehensive health benefits program for Federal employees and provided for a 75 percent ceiling on agencies' costs contributions and all participating agencies are bound by that limitation. The Alaska Railroad is covered by and participates in the FEHBA program, and is consequently subject to the limitation on contributions set out in 5 U.S.C. § 8906(b)(2). If the Alaska Railroad believes it is necessary to have an exemption from the statutory limitation, it should obtain an express statutory exception such as the Postal Service has secured. 1/

1/ Under a provision of the Postal Reorganization Act of 1970, Pub. L. 91-375, codified at 39 U.S.C. § 1005(f), the Postal Service received specific authority to raise its contribution level above the 75 percent ceiling when warranted in the process of bargaining with its union employees.

Moreover, although under 43 U.S.C. § 975 Executive Order No. 11491, and chapter 71, title 5, United States Code, the Railroad has had and continues to have authority to negotiate collective bargaining agreements with unions representing Railroad employees, its authority is limited by applicable statutes. Executive Order 11491, as amended, 3 C.F.R. 254 (1974), entitled "Labor Management Relations in the Federal Service," provided in section 12(a) that labor management agreements are subject to applicable laws and regulations. See generally 56 Comp. Gen. 131, 135 (1976). The Executive order has been superseded by Title VII of the Civil Service Reform Act, Pub. L. No. 95-454, October 13, 1978 (presently codified at 5 U.S.C., chapter 71), but the essence of this requirement is contained in 5 U.S.C. § 7117. It provides that the duty to bargain in good faith does not extend to matters which are inconsistent with Federal law or Government-wide rule or regulation. As a result, since any provision in a collective bargaining agreement binding the Railroad to contribute more than 75 percent of an employee's biweekly health insurance subscription charge clearly contravenes the express requirements of 5 U.S.C. § 8906(b)(2), and since the Railroad is without authority to modify or nullify the statutory provisions comprising the Federal Employees Health Benefits Act, such provision in a negotiated agreement or such practice by the Railroad is clearly illegal. The Alaska Railroad's contribution for insurance premiums under the Federal Employees Health Benefits Act may not exceed percentage limits established by 5 U.S.C. § 8906(b)(2).

QUESTION 2

"2. May past erroneous under-deductions from employees for health and life insurance premiums be waived without a full audit?

"The sample audit report found a number of instances where the Railroad failed to deduct the correct amount required for employees for health and life insurance. The audit report recommended that the Railroad conduct a full audit to identify all such under-deductions in order to begin collection actions against employees and to increase payment to the Civil Service Commission (now OPM) to make up for the past under-payments. We have been advised informally by * * * [the] Chief of the Audit Division at OPM, that it is not necessary to pay OPM for the

amount of under-payments in past years. His oral recommendation is that the Railroad correct the payroll deduction schedules for the future (which has already been done) and waive the past erroneous under-deductions. These under-deductions did not result in any reduction or loss of health or life insurance benefits for any employee or family. The health insurance policy in force was not changed by the under-deductions, and there were no claims for life insurance benefits during the period.

"It is unlikely that employees would have known about the under-deductions. Roughly half were not aware what amount was being paid to the Civil Service Commission for their FEHB coverage because the Railroad pays 100 percent of the cost. As for the other half, they probably would not have noticed that the Railroad failed to raise the FEHB deduction rate in 1976 because the Railroad uses a multiple Appointment System that results in irregular amounts of pay from one pay period to the next. For the same reason, it is unlikely that employees would have detected the small errors in deductions for life insurance coverage that were identified by the auditors.

"For these reasons, we seek Comptroller General approval to waive the under-deduction from employees under 5 USC 5584 in the following three instances:

"a. The Railroad erroneously applied the 1975 employee deduction rate for 27 pay periods in 1976 and 1977. It is estimated that this resulted in 8,900 deduction errors or roughly $90,000 in under-deductions from all employees who participated in the FEHB plans. The Railroad has experienced nearly a 40% reduction in employment from over 900 full-time employees in 1976 when these errors were made to less than 550 full-time employees today. Consequently, it would be difficult, if not impossible, to locate and collect from former employees who would owe a significant part of the $90,000. It is our view that the cost to identify the amount owed by each employee and initiate the collection action is greater than the amount that would ultimately be collected and, therefore, claims for these 27 pay periods should be waived."

ANSWER

For the reasons set forth below, we conclude that this case meets the standards for termination of collection set forth in the Federal Claims Collection Act and the implementing Federal Claims Collection Standards issued jointly by the Comptroller General and the Attorney General, 4 C.F.R. Parts 101-105. This course of conduct should be distinguished from actions initiated under the waiver authority provided in 5 U.S.C. § 5584. However, based on our review of the record here, it is clear that the overpayments (under-deductions) were caused by administrative error on the part of the Alaska Railroad and there is no indication of fault on the part of the Railroad employees involved. Thus, terminating collection action would appear to be consistent with the principles of the waiver statute, 5 U.S.C. § 5584, since such payments presumably were accepted in good faith by the employees and would be proper for waiver. See B-181467, July 29, 1976; and 53 Comp. Gen. 701 (1974).

Although agencies are required to take aggressive action to collect the claims of the United States, the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951, et seq., authorizes the head of an agency to compromise a claim or to terminate or suspend collection action when the amount in controversy does not exceed $20,000 and (1) no person liable on the debt has the present or prospective financial ability to pay any significant sum thereon, or (2) the cost of collecting the claim is likely to exceed the amount of recovery. However, no compromise can be effected other than by the Attorney General with respect to a fraudulent or false claim, a claim based in whole or in part on a violation of the antitrust laws, or a claim involving misrepresentation on the part of the debtor or any other party having an interest in the claim. Section 104.4 of title 4, Code of Federal Regulations, instructs agencies to refer such matters to the General Accounting Office when it has doubts as to whether collection action should be suspended or terminated.

The GAO Policy and Procedures Manual for Guidance of Federal Agencies also instructs agencies that administrative collection procedures should provide for the establishment and observance of realistic points of diminishing returns beyond which further collection efforts by the agency

are not justified. In establishing such points, consideration should be given to estimated or actual recovery rates in relation to (1) the cost of the different types of actions (2) the size of the debt, and (3) the apparent possibilities of collection through the agency's efforts and those of other agencies. 4 GAO Manual § 69.3.

As indicated by the submission here, the Alaska Railroad asserts that (1) the administrative costs in terms of time and expense of identifying and collecting the overpayments (under-deductions) would be diverse and excessive; (2) the size of the debt in individual cases is minor; and (3) the possibilities of collection are significantly retarded and in many cases almost impossible because many of the individuals are no longer employed by the Railroad, employee grievance actions may be anticipated, and all of the overpayments would - in the Railroad's estimation - be eligible for favorable waiver consideration on an individual basis.

Based upon our review of the comprehensive administrative record before us, we concur with the Railroad's assertion that the administrative costs of conducting a full audit to identify overpayments and maintaining such a large number of relatively small individual collection actions are likely to exceed the realistic estimated recovery and go far beyond the point of diminishing returns. Therefore, this case meets the standards for termination of collection set forth in the Federal Claims Collection Act Standards, Part 104, title 4, Code of Federal Regulations (1979). See B-181467, July 29, 1976; and 53 Comp. Gen. 701 (1974).

Accordingly, we concur with the Railroad's proposal to forego further action on the overpayments (under-deductions) to the employees involved to the extent of the circumstances of this part of the question here considered. The Railroad's file on these debt claims may be closed.

> "b. If you decide the that 75% ceiling under 5 USC 8906(b)(2) applies to the Railroad, then the Railroad has failed to deduct the employees' 25% share for health insurance from roughly half of its employees. The audit report estimates that these under-deductions total about $170,000 per year or about $1 million for the past six years. Collection of under-payments

before that time would be barred by the Statute of Limitations.

"Because most of these under-deductions resulted from collective bargaining agreements that required the Railroad to pay 100% of the FEHB premiums, it would be most difficult for the Railroad to maintain a collection action against present and former employees who were party to the agreements. Moreover, an effort by the government to collect these under-payments may give rise to counter claims for back pay increases in those cases where the Railroad agreed to pay the full 100% share in lieu of an increase in wages as part of the negotiating process.

"We request that any claim for improper under-deduction resulting from the Railroad practice of paying 100% of these premiums be waived without a full audit. The Railroad estimates the minimum cost to conduct a detailed audit of health insurance withholding records for the past six years to be about $6,000. The cost of collecting from present and former employees has not been estimated."

ANSWER

For the reasons which follow, we hold that the Alaska Railroad may forego collection action on the subject overpayments that have been made or that are made during the additional period permitted below. Moreover, we recognize that the collective bargaining provisions here involved have been negotiated over a long period, and that this decision is the first one holding such provisions to be illegal. In view thereof and in order to cushion the impact of this decision, the Alaska Railroad is authorized to implement remedial measures throughout the period of the 97th Congress.

In accordance with our conclusion in Question 1, the Railroad has indeed made erroneous overpayments in the form of excessively high contributions for health insurance premiums for approximately half of its employees.

Under the provisions of the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951, et. seq., 4 C.F.R. Part 104,

and 4 GAO Manual § 69.3 regarding the termination of collection action, and applying essentially the same analysis as we incorporated in our response to Question 2(a) above, we hold that the Alaska Railroad may forego collection action on the subject overpayments that have been made or that are made during the additional period permitted below. We base our holding on the belief that administrative costs of identifying and collecting overpayments would be excessive, the possibility of collections from former employees is doubtful, and all of the overpayments would be eligible for and likely receive favorable waiver consideration under 5 U.S.C. § 5584. See 57 Comp. Gen. 259, 265 (1978), citing B-181467, July 29, 1976. In addition we are mindful of the fact that the retroactive application of the 75 percent ceiling on Government premium contributions would undoubtedly result in the filing of many employee grievances and the prospect of protracted litigous efforts to enforce multiple collective agreements.

As in our decision in 57 Comp. Gen. 259 (1978), we are aware that the circumstances presented by the Railroad's submission here, when taken with the impact of our determinations here, will require a form of remedial relief that facilitates resolution of potential labor-management issues by providing realistic time-frames for reforming applicable collective bargaining agreements. We recognize that although the collective bargaining provisions here involved have been negotiated over a long period, this decision is the first one stating such provisions are illegal. In view thereof and in order to cushion the impact of this decision, the Alaska Railroad is hereby authorized to delay compliance with this decision until the adjournment of the 97th Congress. We believe all of the contract provisions should be continued for a reasonable period of time so that the Railroad may request that Congress consider the matter. Also, it is our view that all contract provisions should terminate on the same date if Congress takes no action. Therefore, our decision is to authorize the Alaska Railroad to continue, or to renegotiate, the contract provisions in question until the end of the Second Session of the 97th Congress. If Congress has taken no action by that time, the decision as to the 75 percent limitation becomes fully effective as to all agreements and all employees on that date. See 57 Comp. Gen. 575 (1978).

"c. The audit report found numerous errors in the amount of Regular and Optional Life Insurance

in force and the employee payroll deduction for life insurance. The individual amounts in error were small and the audit report estimated the cost to recalculate and collect for past errors to be in excess of the amount under-deducted. We agree with the auditors finding that it would be impractical to attempt to adjust Regular and Optional Life Insurance amounts and deductions for prior years; and, accordingly, we seek a waiver of past under-deductions for these two programs."

ANSWER

Applying essentially the same analysis as we incorporated in our response to Question 2(a) above, collection action may be terminated under the Federal Claims Collection Act and the implementing standards and such action would appear to be consistent with the principles of the waiver statute, 5 U.S.C. § 5584, and its implementing regulations contained at 4 C.F.R. §§ 91, et. seq.

QUESTION 3

"3. Does the Alaska Railroad have an obligation to identify and reimburse past over-deductions from employees for life insurance premiums.

"In both the Regular and Optional Life Insurance programs, the auditors found a small number of payroll deductions in excess of the amount required for the level of insurance in force. DOT counsel has suggested that the Railroad may have an obligation to conduct a full audit of the past six years to identify these over-deductions and to pay the affected present and former employees the amount of the over-deductions. We have been advised by the OPM Office of Audits that funds are not available from OPM to pay back for erroneous over-deductions. OPM informally recommended that we correct the payroll deduction schedule for future coverage and rely on individual employees to assert claims for return of any past over-payment, rather than attempt to identify and pay back each over-deduction.

"As recommended by the audit report, the Railroad reviewed the accuracy of its deduction schedules and adjusted its procedures so that the correct amount is now being deducted for the level of life insurance selected by each employee. In addition, the Railroad has reimbursed those individual employees identified in the sample audit as having had over-deductions in the past. The question that remains is whether the Railroad is required to conduct a full audit to identify all over-deductions and make retroactive reimbursements.

"The Railroad estimates that the cost to conduct a full audit of Regular and Optional Life Insurance payroll deductions for the past six years would be about $55,000, which is greater than the estimated amount owed present and former employees. Moreover, it may be difficult to locate many former employees who could be entitled to reimbursement.

"Given the estimated cost and difficulty to identify and correct these errors, may the Railroad waive these past over-deductions, without conducting a full audit? To date no employees have requested to be reimbursed for over-deductions in the past."

ANSWER

We do not believe it is necessary for the Railroad to conduct a full audit to identify all past over-deductions of life insurance premiums.

We have reviewed the provisions of chapter 87 of title 5, United States Code, pertaining to the group life insurance programs available to Government employees as a fringe benefit of their employment. We have also reviewed the implementing regulations in Parts 870 and 871 of title 5, Code of Federal Regulations, which were promulgated by the Office of Personnel Management pursuant to 5 U.S.C. § 8716. In all of this authority we are unable to find guidance addressing the substance of the question presented here. Further, our review of the comprehensive legal authority directed toward the consideration of potentially adversary claims against the United States reveals no statutory obligation on the part of the Government to assist in the prosecution of claims against

its interest. For example, regulations of this Office promulgated under authority provided in 31 U.S.C. § 71 and set forth at section 31.7 of title 4, Code of Federal Regulations, state that claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. The burden is on claimants to establish the liability of the United States, and the claimants' right to payment.

Additionally, we are of the opinion that, in view of the elective nature of life insurance coverage under chapter 87 of title 5, United States Code, the amount of an individual employee's correct premium deduction is readily ascertainable by comparing the leave and earnings statement or other comparable document with standardized deduction tables published by the Office of Personnel Management in conformance with applicable statutory provisions. Thus it may be said that those employees unknowingly sustaining the over-deductions in question are not entirely free from fault in view of their own computational complacency. While this observation does not minimize the impact of the Railroad's erroneous over-deductions, it does in our opinion mitigate the Government's responsibility to exhaustively search out those affected employees. In the circumstances presented here, where corrective action has been taken prospectively, we believe the Railroad's only affirmative obligation is - as an employer - to deal fairly with its employees.

We believe the limits of practicability in the present case are similar to those expressed in Question 2 where we stated that agencies must consider the point of diminishing returns beyond which further collection actions are not justified. Here the Railroad states that the cost to conduct a full audit of Regular and Optional Life Insurance payroll deductions for the past 6 years would be about $55,000, which is greater than the estimated amount owed present and former employees, and it would be difficult to locate many former employees who may be entitled to reimbursement. Accordingly, while waiver within the meaning of 5 U.S.C. § 5584 is not available to the Government in the circumstances presented here, we do not believe it is necessary to conduct a complete audit. However, until the

applicable limitations period has run the agency remains responsible for individual claims presented in connection with the over-deductions. In this regard we believe that fairness dictates that an expression of general notice - as for example in an employee news-letter - informing employees of the potential discrepancy would satisfy the agency's obligation. Claims presented in connection with this action would then be individually audited and adjudicated within the agency.

QUESTION 4

"4. May the Alaska Railroad continue a supplemental health plan for its employees separate from the FEHB programs?

"The June 4, 1979, DOT counsel memorandum stated that the Railroad is precluded from maintaining a supplemental health plan for employees because the Railroad participates in the FEHB programs. FRA counsel is of the view that the FEHB programs are not exclusive and the Railroad is free to continue its Alaska Railroad Medical Association Program in addition to the FEHB programs. At the suggestion of DOT counsel, we also seek your view on this question."

ANSWER

As we concluded in Question 1, in the absence of an exemption or other legislative authority to modify such terms, the Alaska Railroad may not on its own initiative or through collective bargaining impair or alter specific terms of the Federal Employees Health Benefits Act (5 U.S.C. § 8901, et. seq.). However, we note that the Railroad has maintained various health plans for employees and dependents since 1916. The present Alaska Railroad Medical Association began in 1954 with the approval of the Department of Interior. It continues to provide supplemental health benefits to employees who participate in the Federal Employee Health Benefits plans as well as full benefits for employees who do not participate in the Federal Employee Health Benefits plans.

We find nothing in our combined review of the Alaska Railroad Act and the Federal Employees Health Benefits Act

that prohibits the Railroad from continuing a preexisting supplemental health program. When it passed the FEHBA, Congress was aware of the existence since 1954 of the Alaska Railroad Medical Association Program and nothing in the FEHBA or its legislative history indicates congressional intent to require the Railroad to discontinue that program. Therefore, in the absence of controlling legal precedent or compelling contrary thesis, we conclude here that the broad authority provided to the President or his designee to operate the Alaska Railroad under 43 U.S.C. § 975, is sufficient to permit the Railroad to provide a supplemental health plan for its employees such as the Alaska Railroad Medical Association Program.

Accordingly, although we recognize that there is a legitimate difference of opinion on this matter, we have no objection to permitting the Alaska Railroad to continue its Alaska Railroad Medical Association Program in addition to the FEHB programs, absent congressional action to divest the Railroad of such authority.

Milton J. Socolar

Acting Comptroller General
of the United States