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Please Don't Take Away My Pay Guarantee!

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Q: I am an enlisted member of the Illinois Army National Guard. My commanding officer is a member of ROA, and she directed my attention to your "Law Review" articles on ROA's Web site, www.roa.org. I have found the articles most useful, especially the articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I am a railroad engineer on the "extra board." That means that I have no set hours, but I must remain available for call when another engineer gets sick or does not show up for work for whatever reason. The scheduler calls me, and I show up in Chicago within two hours, ready to drive a train to wherever. I am guaranteed pay for 40 hours per week. I get paid \$1,000 for a 40-hour-week, regardless of how many hours I actually work. If I work more than 40 hours in a week, which almost never happens, I get paid for the actual hours I work, including overtime. But most weeks I only work 16–24 hours, and some weeks I do not get called at all.

I have read and reread Law Review 5 (August 1998). I followed your advice. In September 2003, I gave the railroad's personnel office a letter setting forth my National Guard drill schedule (generally, the first weekend of each month) for FY04 (October 2003 through September 2004). Now, the railroad's personnel office has taken the position that I have "broken the guarantee" for those weeks when I have National Guard drills scheduled.

I generally drill on Saturday and Sunday. Because the week starts on Sunday, the railroad takes the position that I have broken the guarantee for the first two weeks of the month. Saturday is the last day of the first week, and Sunday is the first day of the second week. Thus, I lose my pay guarantee for two of the month's four weeks, just for serving my country in the National Guard. What I get paid by the National Guard does not come close to what I am losing.

I feel that I have been misled. When I was considering joining the National Guard, the recruiter told me that my National Guard pay would be in addition to, not instead of, my regular civilian pay—extra pay for a part-time job. But it has not worked out that way. Serving in the National Guard costs me a lot of money, just so I can be ready for mobilization.

I enjoy being part of the Army, and I want to stay in the National Guard, but I am having a hard time explaining to my wife why I am away from home one weekend each month (sometimes much more) and why I am making myself available for mobilization when this is costing our family thousands of dollars in lost income. What do you advise?

A: I think that the railroad's practice violates USERRA, and specifically section 4311(a). That subsection provides: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." [38 U.S.C. 4311(a).] In its report on the bill that became USERRA, the House Committee on Veterans' Affairs wrote: "The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced." House Report No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2456.

I recommend that you call the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590. ESGR will put you in touch with an ombudsman (trained volunteer) in your state, and that ombudsman will contact the railroad on your behalf. If that does not work, the ombudsman will put you in touch with the Veterans' Employment and Training Service, U.S. Department of Labor. For more information about USERRA's enforcement mechanism, see Law Reviews 12, 24, 34, 61, 65, 67, and 89.

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.