

The Railroad Retirement Board's Treatment of Absence from Work for Military Service or Training Is Inconsistent with USERRA, But Unfortunately USERRA Does Not Apply

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[\(Update on Sam Wright\)](#)

1.3.2.3—Pension credit for military service time

1.8—Relationship between USERRA and other laws/policies

Q: I am a noncommissioned officer (NCO) in the Army Reserve and a member of the Reserve Officers Association (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I was particularly interested in Law Review 13137 (October 2013), about the entitlements of the returning veteran or service member in the employer’s pension system.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1600 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ In 2013, ROA members amended the ROA Constitution to make NCOs eligible for full membership in the organization, including voting and running for office.

On the civilian side, I work for a freight railroad. My employer has no retirement system for me and other employees. Instead, we are covered by the Railroad Retirement System (RRS), which is administered by the Railroad Retirement Board (RRB).

The RRB does not credit military service as required by USERRA, in several ways. Is the RRB violating USERRA?

Answer, bottom line up front

The RRB is not violating USERRA because USERRA does not apply to the RRS and the RRB. The RRB is a federal agency that administers a law enacted by Congress. That law provides for RRS pension credit for military service, but in ways that are significantly different from and less generous than USERRA. I want Congress to amend the RRS law to make it consistent with USERRA, but in the meantime the RRB must apply the law the way that Congress enacted it, not the way that I want it to be written.

Explanation

I reiterate what I wrote in Law Review 177 (June 2005):

[T]he reemployment statute (USERRA or its predecessor) simply does not apply to the RRS. The reemployment statute applies to the relationship between an employer and employees. Thus, the reemployment statute applies to pension plans established by employers or by employers and unions together, but the RRS is different.

About 80 years ago, Congress (not railroad employers and unions) established the RRS, about ten years before Congress established the Social Security System (SSS). Like the SSS, the RRS involves a tax imposed on employers and employees, funding benefits for retired employees. The RRS is a Federal Government agency, like the Social Security Administration. Congress, not employers and unions, has imposed a tax upon employers and employees, to fund benefits determined by Congress. In establishing the rules for military service credit under the RRS, Congress was less generous than Congress was when it enacted USERRA.

I invite the reader's attention to the official website of the Railroad Retirement Board (RRB), where this agency identifies itself as "an independent agency in the executive branch of the Federal Government [that] administers comprehensive benefit programs for the nation's railroad workers and their families."⁴

⁴ See <https://www.rrb.gov>.

On its website, the RRB has the following explanation about the very limited conditions under which military service time is credited as railroad work for RRS retirement purposes:

Certain **military service (M/S)** may be used in the same way as railroad service months to provide eligibility for, or to increase the amount of benefits payable to railroad employees and their survivors. Credit is given only for active duty service in the Armed Forces of the United States.

For M/S to be Creditable

Before entering active duty, the employee must have performed some creditable railroad service in the same calendar year, or the year just prior to the year, that the term of M/S began. If a railroad employer has already reported a service month in which M/S also occurred, the compensation for the M/S is still credited, up to the maximum amount reportable, for that month.

Involuntary M/S

Credit is given for any month during which an employee was required (inducted, drafted, called up) to leave a railroad job to enter federal active duty M/S and for the months thereafter that the individual was required to remain in active duty.

Voluntary M/S

Restrictions on M/S credits apply for employees who voluntarily left railroad work and enlisted, re-enlisted, or were commissioned to active duty. The active duty must begin during a time declared to be a war, a war service period, or a state of national emergency. The dates of the latest declared creditable periods are:

- September 8, 1939, through June 14, 1948 (World War II war and post-war service period).
- December 16, 1950, through September 14, 1978 (Korean Conflict, Vietnam Era and post-Vietnam war service period).
- August 2, 1990, and continuing (Gulf Wars state of national emergency).

Other Restrictions if Entry was Voluntary

- M/S of an individual in active duty status December 31, 1946, is creditable through the end of that term of service.
- Voluntary M/S entered January 1, 1947, through June 14, 1948, is creditable only through June 14, 1948, when the national emergency ended.
- Voluntary M/S entered June 15, 1948, through December 15, 1950, is creditable only IF, upon completing M/S, the employee returned to railroad service in the same year, or the next calendar year immediately following, without any nonrailroad employment between the M/S and the return to railroad service.

- Voluntary M/S, including re-enlistment, which began after June 1973, is creditable only through September 14, 1978, when the national emergency ended.

Reservist Active Duty

An individual's call from reserve status to active duty is considered involuntary entry, and it may be credited whenever the employee was required (called or recalled) to enter, and continue in, active federal duty. A call to active duty for training is included in this rule.

Local or State National Guard duty activities and assembly for drills or reserve meetings are not creditable M/S.

M/S That Is Not Creditable As Railroad Service

An employee's active duty M/S that does not meet the requirements described above cannot be used for added railroad service, but the M/S earnings will be considered as wages under the Social Security Act, as allowed by law, in the calculation of RRB benefits.

How to Receive M/S Credit

The employee, or his survivors, must submit proof that the M/S meets the crediting requirements. Official military service documents may be submitted to an RRB office at any time. The RRB will record and store the vital information and, upon request, will advise the number of months of additional railroad service credit.

Original documents will be returned promptly. Always include the railroad employee's name and social security number, a daytime telephone number, and return address with any material mailed to an [RRB office](#).⁵

I think that it is unconscionable that a Reserve or National Guard member or any person who voluntarily enlists in any branch of the armed forces, Active Component or Reserve Component, and who works in the railroad industry does not get the same civilian retirement credit for military service and training that employees in all other industries receive. The remedy for this injustice is in Congress, not in the federal courts. Unfortunately, USERRA does not apply to this situation.

⁵ See <https://www.rrb.gov/Benefits/G-177B>.