FORM G-115/ (11-88)

UNITED STATES GOVERNMENT

MEMORANDUM

RAILROAD RETIREMENT BOARD

JUL 15 1991

L-91-90

TO: Director of Retirement Benefits

FROM: Deputy General Counsel

SUBJECT: The Santa Fe Southern Pacific Long Term Disability Plan for Salaried Employees

This is in response to your memorandum of May 17, 1991, wherein you inquired as to whether payments made pursuant to the above plan are pay for time lost and, thus, compensation under the Railroad Retirement Act (RRA) and Railroad Unemployment Insurance Act (RUIA). See 1(h)(1) of the RRA (45 U.S.C. § 231(h)(1)) and 1(i)(1) (45 U.S.C. § 351(i)(1)) of the RUIA.

The plan covers permanently assigned full-time salaried employees of the Santa Fe Southern Pacific Railroad Company. It provides for payment in the case of disability of 60% of an employee's basic monthly salary commencing after the employee has been continuously disabled for a period of 182 days. The payments terminate at the earlier of plan temrination, cessation of disability, death, or attainment of a specified age, in most cases 65. Payments under the plan are reduced by any benefits payable under the RRA, RUIA or worker's compensation law but not by an individual's private insurance. During receipt of benefits under the plan an individual may participate in health and life insurance coverage and accrue pension benefits. The plan may be terminated at any time and is funded on a pay-as-you-go basis.

As you know, section 1(h)(1) of the RRA provides that "compensation" means any form of money or remuneration paid to an individual for services rendered as an employee to one or more employers, including remuneration paid for time lost as an employee. Furthermore, section 1(h)(2) provides that an employee shall be deemed to be paid for time lost the amount he is paid by an employer with respect to an identifiable period of absence from the service of the mployer, including absence on account of personal injury.

However, section 1(h)(6)(v) of the RRA excludes from the definition of compensation under the RRA payments made to an employee by an employer under a plan or system which makes provision for his employees generally, or for a class or classes

of his employees, on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability. Payments under such a plan or system made prior to 6 months after the employee ceases work are subject to the tier I level tax under the Railroad Retirement Tax Act (26 U.S.C. § 3231(e)(4)).

Section 1(h)(v) (previously numbered (vi)) was added to the RRA by Public Law 95-547, 90 Stat. 2523, along with a companion section in the Railroad Retirement Tax Act (RRTA) (see 26 U.S.C. 3231(e)(1)(i)). The purpose of its enactment was to provide the same treatment of sick pay under the RRA as was provided for in section 209(b) of the Social Security Act. H.R. Rep. No. 1465, 94th Cong., 2nd Sess.; reprinted in 1976 U.S. Code Cong. Ad. News 5608-5609.

A qualifying plan or system under section 1(h)(6)(v) is one established by an employer which meets all the following requirements:

> "(1) makes provision for employees generally, and/or their dependents; or a class or classes of employees and/or their dependents; provides for payment to or on behalf of an employee or any of the employee's dependents, and assures employee awareness, i.e., the terms and conditions must be communicated directly or indirectly, via a bulletin board or similar method customarily used by the employer, to all employees or the class affected;
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> "(2) contains definite payment eligibility standards that may include length of service, salary, classification, or occupation, but may not be based solely on need, efficiency, or loyalty;
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> "(3) contains a formula for determining the minimum benefit amount for each eligible employee; and
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> "(4) specifies the minimum period of payments, e.g., payments will be made for the duration of the employee's illness, or for as long as the employment relationship continues.
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> "The payment eligibility standards, the formula or the minimum period discussed in (2), (3), and (4), respectively, may not be left to the discretion of the employer. With respect to (3) and (4), above, if a plan provides that the employer may, at his or her discretion,

> make payments for a period longer than specified and/or in addition to the minimum amounts specified in the plan, such payments will be deemed paid under the plan. Only payments made after the plan was adopted, i.e., the effective date of the plan, are excluded from wages." CCH Unemployment Insurance Report, par. 10,274.07

I am of the opinion that the plan in question meets the requirements of section 1(h)(6)(v) and consequently payments made under the plan are not compensation under the RRA. I note that the plan is essentially a wage continuation plan. Such plans have been considered as qualified sick pay plans. See L-77-147, citing Rev. Rul. 65-275, C.B. 1965-2, 385. See also Rev. Rul. 82-190, C.B. 1982-2, 222, and Rev. Rul. 81-265, C.B. 1981-2, 199. I note that since any payments made under the plan are not made until after 6 months following the employee's last day of employment they would not appear to be taxable under the RRTA and thus not creditable as tier I compensation under section 1(h)(8) of the RRA.

The wage continuation plan discussed in my April 30, memorandum is distinguishable. That plan provided for continuation of full salary, paid through the regular payroll, during periods of temporary absence due to on the job injury. It was my opinion that the intent of that plan was to make the employee whole for time lost due to injury and that payments under that plan were compensation as pay for time lost.

Finally, I note that the Director of Unemployement and Sickness Insurance has previously ruled that this plan was a nongovernmental plan for sickness insurance under section 1(j) of the RUIA and thus payments under such plan are not compensation under the RUIA.

Steven A. Bartholow

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