

L-99-13
January 25, 2000

TO : Peter A. Larson
Director of Fiscal Operations

FROM : Steven A. Bartholow
General Counsel

SUBJECT : Request for Legal Opinion
Norfolk Southern (NS) "Salary Continuation" Policy

This is in response to your memorandum of September 1, 1999, wherein you stated that Norfolk Southern Corporation (NS) has taken issue with Legal Opinion 92-20 which concerns the Norfolk Southern's Salary Continuation Policy and Long Term Disability Plan. In L-92-20 we indicated that, in our view, payments from this plan were pay for time lost and thus compensation under the Railroad Retirement Act (RRA).

The Norfolk Southern Corporation Salary Continuation Policy provides that full salary will continue to be paid to certain employees "who are unable to work because of illness, including a temporary disability resulting from pregnancy and conditions related thereto, or injury." The policy further states that an employee will be placed on salary continuance, upon the provision of certain information by the employee's department head, after the employee has been absent from work due to a medical condition for a period of at least fifteen calendar days.

The policy provides coverage for up to six months, depending upon years of service with the company. If at any point after an employee goes into salary continuance status it is determined by the Norfolk Southern Medical Director that the employee will be unable to return to work at or before the end of the applicable maximum salary continuance period, the employee will be placed on long term disability under the Norfolk Southern Long Term Disability Plan. Hence, the Norfolk Southern Salary Continuance Policy serves solely as a short term sickness and disability plan. Norfolk Southern does not have a plan for occasional sickness (i.e., minor sicknesses or injury causing employees to miss work

for less than fifteen calendar days), and for such absences Norfolk Southern pays regular salary and withholds both Tier I and Tier II railroad retirement taxes.

Section 1(h)(6)(v) of the RRA excludes from the definition of compensation payments under a plan or system made to an employee, or the employee's dependents, on account of sickness or accident disability. Section 3231(e) (1)(i) of the Railroad Retirement Tax Act (RRTA) provides for a similar exclusion, except that the exclusion does not apply with respect to the tier I tax for payments made prior to the expiration of six calendar months after the last month worked. Sick pay payments to which the tier I tax applies are compensation for purposes of the computation of the tier I component of the RRA annuity by virtue of section 1(h)(8) of the RRA.

Historically we have taken the position that a plan which provides full continuation of salary was in effect pay for time lost and thus compensation under the RRA by virtue of section 1(h)(1). In short, such payments were not considered sick pay to which the exclusion of section 1(h)(6)(v) would apply.

However, recently we have deferred to an Internal Revenue Service determination as to what constitutes sick pay for purposes of the Internal Revenue Code. Consequently, if NS's treatment of the payments in question as sick pay is in accord with an IRS letter ruling or audit, then such payments will be treated as sick pay under the RRA. Please note that even if such payments are excludable from compensation under the RRA they still would be remuneration under the Railroad Unemployment Insurance Act, unless paid pursuant to a non-governmental plan for sickness insurance, which the plan in question does not appear to be. Sec 20 CFR part 323.