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Director of Data Processing and Accounts

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General Counsel

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Sick leave - Personnel Policy and Procedures Manual of
the Elgin, Joliet and Eastern Railway Company

This is in further reply to your memorandum of October 14, 1977, in which you asked whether the sick leave provisions of the above-indicated Manual would qualify as a "plan" or "system" under section 1(h)(6)(vi) of the Railroad Retirement Act of 1974 (45 U.S.C. § 231(h)(6)(vi)). Sickness benefits paid under a qualified plan are not creditable as compensation under the Railroad Retirement Act.

Section 1(h)(6)(vi) of the Railroad Retirement Act of 1974 provides that the term "compensation" shall not include:

"* * * the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability * * *."

The legislative history of section 4 of Public Law 94-547, 90 Stat. 2523, which provided section 1(h)(6)(vi) of the Railroad Retirement Act and clause (i) of section 3231(e)(1) of the Railroad Retirement Tax Act, which is identical, indicates that these sections would provide the same exclusions under the railroad retirement program for sickness benefits as was then currently provided similar payments under the social security program. The language of these amendments is patterned after the sickness benefit exclusion contained in section 209(b) of

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the Social Security Act (42 U.S.C. § 409(b)) and section 3121(a)(2) of the Federal Insurance Contributions Act (26 U.S.C. § 3121(a)(2)). H.R. Rep. No. 1465, 94th Cong., 2nd Sess. 9 (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 5608, 5609. See General Counsel's opinion L-77-147.

In order to be excluded from compensation, which is defined in section 1(h) of the Railroad Retirement Act (45 U.S.C. § 231(h)), sickness benefit payments must satisfy all of the following requirements:

1. The payments must be made under an established plan or system.
2. The payments under the plan or system must be available on the same basis to all employees in a class of employees of which the payee is a member.
3. The payments must be made on account of bona fide sickness or accident disability, or on account of medical or hospital expenses associated with such sickness or disability.

Plan or System

Although administering a similar provision, neither the Social Security Administration nor the Internal Revenue Service has promulgated regulations defining a plan or system. The Social Security Administration provides guidelines in its Claims Manual (see, for instance sections 1111.1, et seq.), and this office has dealt with a similar question in determining what qualifies as a pension plan for purposes of administering the supplemental annuity program (see General Counsel's opinion L-76-604). Based on these sources, and without attempting to be definitive, the following factors should be considered in determining whether the authority under which sickness payments are made constitutes an established plan or system:

1. A formal plan is usually in writing. Plans or systems not reduced to written form will rarely, if ever, qualify. Not every writing in this regard qualifies as a formal plan. A written policy statement, providing for sickness benefits generally, which leaves decisions as to amount or

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duration of benefit payments or other important decisions open to management discretion is not likely to qualify as a plan within the meaning of section 1(h)(6)(vi) of the Act.

2. Programs established by negotiated agreements, as well as plans referred to specifically in the employment contract (subject to considerations applicable when determining whether benefits paid under the plan are available to a "class" of employees), or to which employees contribute, will most likely be considered qualifying plans. These factors will often demonstrate a legally enforceable right on the part of employees, and any program under which an employer is legally obligated to pay sickness benefits is a qualifying plan.
3. The existence of a special fund, separate from the salary account, will often denote a formal plan.
4. Formal plans will have definite provisions governing eligibility, the amount of benefits, and the duration of benefit payments. There should be no discretion regarding the question of eligibility. Amount and duration of benefits may vary with individual circumstances such as length of service, compensation level and other factors; however, definite standards for ascertaining minimum amount and duration of benefits for all covered employees must be provided. A plan will not fail because the company has discretion to provide benefits in excess of the minimum.

As can be seen, the chief characteristic of an established plan is that it does not allow the company to exercise discretion on a case by case basis with respect to eligibility, minimum benefits, and minimum duration of benefit payments. Any program which imposes a legal obligation on an employer to pay benefits to every employee in the class covered by the plan, is a qualified plan; however, a program voluntarily established by an employer and which the employer can unilaterally abolish at any time may also be an established plan or system provided it does not permit discretion on a case by case basis as to eligibility,

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and the amount and duration of benefits paid to covered employees, while the plan is in effect. It is especially worth noting that the plan or system need not be a wage continuation plan to qualify as a plan or system under section 1(h)(6)(vi) of the Act.

Class of Employees

In order to be excluded from compensation pursuant to section 1(h)(6)(vi) of the Act, the benefits must be paid under a plan which provides benefits to a class of employees. Generally, class means a group sharing one or more common characteristics; however, it is not inconceivable that at certain times only one individual will be in a class covered by a plan. The important point is that sickness benefits provided to an individual are paid to him because he falls within the class covered by the plan, and not because there is an obligation to pay him personally.

The plan may provide benefits for more than one class of employees, and it can also provide employee benefits to dependents of members of the class or classes of employees covered by the plan.

Bona fide Sickness or Disability

In order to be excluded from compensation under section 1(h)(6)(vi) of the Act, the benefits paid under the established plan or system must be for bona fide days of sickness or accident disability, or for medical or hospitalization expenses resulting from days of sickness or disability. A number of plans provide benefits for days of work missed by employees who attend the funeral of a relative. Some plans may provide a lump-sum payment for accrued but unused sick leave. Such payments for funeral leave or for accrued and unused sick leave are not excludable from compensation under section 1(h)(6)(vi) of the Act.

Analysis

In reviewing the sickness benefit payment provisions of The Elgin, Joliet and Eastern Railway Company applicable to management employees, I note the following:

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1. Sick leave with pay may be granted management employees at the discretion of the Company.
2. Sick leave is not to be construed as an obligation to the employee.
3. The duration of such payments is unspecified. The first six months is at the discretion of the Responsible Officer. Payments beyond six months must be approved by the Company President.
4. Such payments will be at regular salary rate; however, a lesser amount can be paid if "circumstances" so warrant, and such "circumstances" are not specified.

It is obvious that the applicable sections of the Personnel Policy and Procedures Manual of The Elgin, Joliet and Eastern Railway Company provide discretion to the Company in regard to the individuals who will be eligible, and the duration and amount of sickness benefits. Therefore, the sickness benefit provisions of the Personnel Policy and Procedures Manual do not qualify as a plan under section 1(h)(6)(vi) of the Act, and payments under those provisions may not be excluded from "compensation" for purposes of the Railroad Retirement Act.

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LRS:das