



OPINION NO. 84-36A
Sec. 407(d)(1), (5), (7)

SEP 27 1984

Mr. Richard A. Watts
Price Waterhouse
1801 K Street, N.W.
Washington, D.C. 20006

Re: Southern Pacific Company Stock Purchase and Savings Plan (the Plan)
Identification Number F-2834A

Dear Mr. Watts:

This responds to your letter of February 7, 1984, requesting an advisory opinion regarding the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Your letter concerns the definition of "qualifying employer securities" under section 407(d)(5) of ERISA.

You represent that Southern Pacific Company (Southern Pacific) established the Plan in June 1969 for the benefit of employees of Southern Pacific and certain of its subsidiaries, including Southern Pacific Transportation Company (SPT) and its subsidiaries. You further state that the Plan is an "eligible individual account plan" within the meaning of section 407(d)(3) of ERISA. Each company whose employees participate in the Plan makes contributions to the Plan amounting to 50 percent of its employees' contributions. Prior to December 23, 1983, the terms of the Plan required the Plan trustee to invest all contributions in Southern Pacific common stock.

Southern Pacific was a holding company with subsidiaries engaged in transportation, pipeline operations and other activities prior to December 23, 1983. Southern Pacific owned 100 percent of the outstanding stock of SPT. SPT and its subsidiaries conducted all of Southern Pacific's railroad and trucking operations and is subject to regulation by the Interstate Commerce Commission (ICC).

On December 23, 1983, Southern Pacific and Santa Fe Industries, Inc. (Santa Fe) combined by becoming wholly owned subsidiaries of the newly formed Santa Fe Southern Pacific Corporation (SFSP). As part of that transaction, Southern Pacific stock and Santa Fe stock, which had been held by the public, were exchanged for stock of SFSP. At the same time, the Southern Pacific stock held by the Plan was exchanged for SFSP stock, and the Plan documents will be amended to require that all future contributions will be invested in SFSP stock.

Prior to the consummation of the combination, the stock of SPT was temporarily placed in an independent voting trust, pending approval by the ICC of the combination of the railroad and trucking operations of Southern Pacific and Santa Fe under the control of SFSP. The Valley National Bank of Arizona (the trustee) holds legal title to the stock of SPT, although Southern Pacific retains the beneficial interest in that stock and instructs the trustee to vote the stock, subject to ICC approval. If the ICC approves the combination and any conditions are accepted by Southern Pacific, Santa Fe and SFSP, then Southern Pacific or SFSP will obtain legal title to the SPT stock

and will regain full voting control. If approval is denied, or if Santa Fe, Southern Pacific or SFSP refuses to accept any conditions which are materially adverse, then Southern Pacific will be required to use its best efforts to dispose of the SPT common stock.

You request an opinion that the SFSP stock held by the Plan constitutes "qualifying employer securities" within the meaning of section 407(d)(5) of ERISA.

Section 407(d)(5) of ERISA defines the term "qualifying employer security" to include an employer security which is stock. Under section 407(d)(1), an "employer security" means a security issued by an employer of employees covered by a plan or by an affiliate of the employer. A corporation is an affiliate of an employer under section 407(d)(7) if it is--

A member of any controlled group of corporations (as defined in section 1563 (a) of the Internal Revenue Code of 1954, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation.

Section 1563(a) of the Internal Revenue Code defines a controlled group of corporations, in relevant part, to include --

One or more chains of corporations connected through stock ownership with a common parent corporation if -- (A) stock possessing ... at least 80 percent of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is owned ... by one or more of the other corporations; and (B) the common parent corporation owns ... stock possessing ... at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations.

Since Southern Pacific is a wholly owned subsidiary of SFSP, Southern Pacific and SFSP are affiliates within the meaning of section 407(d)(7) of ERISA. Accordingly, the SFSP stock held by the Plan constitutes "qualifying employer securities" under ERISA section 407(d)(5) because it is stock issued by an affiliate of an employer of employees covered by the Plan.¹

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure describes the effect of advisory opinions.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator for Regulations and Interpretations

¹ We note that, although the stock of SPT is currently held in a voting trust, Southern Pacific itself is an employer of plan participants as are other subsidiaries of Southern Pacific apart from SPT.