U.S. Department of Labor Labor-Management Services Administration
Washington, D.C. 20216

Reply to the Attention of:

APR 15 1982

Mr. C.W. Crumpecker, Jr.
Swanson, Midgley, Gangwere, Clarke & Kitchin
1500 Commerce Bank Building
Kansas City, Missouri 64106

Re: The Yellow Freight Profit-Sharing Trust and the Yellow Freight System, Inc. Employee Stock Ownership Trust
Identification Number: F-2044

Dear Mr. Crumpecker:

This responds to your letter dated July 28, 1981, requesting an advisory opinion under the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA) concerning the sale of employer stock between employee benefit plans sponsored by the same plan sponsor.

Your letter contains the following facts and representations. Yellow Freight System, Inc. (the Employer) sponsors The Yellow Freight Profit-Sharing Trust (the Trust) and The Yellow Freight System, Inc. Employee Stock Ownership Trust (the TRASOP). The First National Bank of Kansas City, Missouri is the trustee for both plans.

The TRASOP was adopted in 1976 and qualifies under section 401(a) of the Internal Revenue Code of 1954 (the Code) and section 301 of the Tax Reduction Act of 1975. It is an individual account plan invested primarily in the common stock of the Employer (employer stock). The employer stock is traded on the over-the-counter market.

The Trust was adopted in 1962 and is a qualified plan under section 401(a) of the Code. The Trust documents provide, among other things, that the Trust may invest up to 50 percent of the market value of Trust assets in employer stock. At present, the Trust has approximately 51 percent of its assets invested in employer stock. The Trust proposes to sell, for cash, that amount of employer stock in excess of 50 percent of its assets to the TRASOP. The purchase price for the employer stock in the proposed transaction will be determined by averaging the bid price for employer stock, as reported through NASDAQ, for the 20 consecutive trading days immediately preceding the date of the sale. In addition, no commission will be charged with respect to the proposed transaction.

You request an advisory opinion that:

(1) The proposed transaction is exempt from the prohibited transaction provisions of section 406 of ERISA and from the taxes imposed by section 4975 of the Code by reason of section 408(e) of ERISA, and

(2) The method of determining the purchase price of the common stock is permissible under section 408(e) of ERISA.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings under section 4975 of the Code has been transferred, with certain exception not here relevant, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to the corresponding sections of the Code.

Section 406(a)(1)(E) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or indirect acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a). Section 406(b)(2) of ERISA provides that a fiduciary with respect to a plan shall not act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries.

Further, section 406(a)(2) of ERISA provides that no fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if the fiduciary knows or should know that holding that security or real property violates section 407(a). Section 407(a) of ERISA provides, in pertinent part, that a plan may not acquire or hold any employer security which is not a qualifying employer security.

However, ERISA section 408(e) provides, in part, that:

> Sections 406 and 407 shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5))…
>
> (1) if such acquisition [or] sale is for adequate consideration…
> (2) if no commission is charged with respect thereto, and
> (3) if-
>   (A) the plan is an eligible individual account plan (as defined in section 407(d)(3))….

Section 407(d)(1) of ERISA, in pertinent part, defines the term "employer security" to mean a security issued by an employer of employees covered by the plan, or by an affiliate of the employer. A "security" is defined in section 3(20) of ERISA as having the same meaning as that term under section 2(1) of the Securities Act of 1933. The term "qualifying employer security" is defined in section 407(d)(5) of ERISA to mean an employer security which is stock or a marketable obligation (as defined in section 407(e) of ERISA). The term "eligible individual

account plan" is defined in ERISA section 407(d)(3)(A) to include an employee stock ownership plan.

Based on your representations, it is the view of the Department that the TRASOP is an eligible individual account plan as defined in section 407(d)(3) of ERISA. Furthermore, the employer stock is a qualifying employer security within the meaning of section 407(d)(5) of ERISA. Accordingly, the proposed transaction between the Trust and the TRASOP would be exempt from the prohibitions of section 406(a) and section 406(b)(2) of ERISA provided the purchase price for the employer stock is for adequate consideration.

The above portion of this letter constitutes an advisory opinion under ERISA Procedure 76-1 and is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

With respect to your second question, as here relevant, the term "adequate consideration" is defined for purposes of section 408(e) in 29 CFR §2550.408e(d)(2) as a price not less favorable to the plan than the price determined under section 3(18) of ERISA. With regard to a security which is not traded on a national securities exchange registered under section 6 of the Securities Exchange Act of 1934, but for which there is a generally recognized market, section 3(18)(A)(ii) defines "adequate consideration" as a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest. At present, no regulations have been issued under section 3(18).

Section 5.02(a) of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976) provides that the Department ordinarily will not issue advisory opinions relating to whether certain consideration constitutes adequate consideration for purposes of section 3(18). Accordingly, the determination whether the disposition by the Trust of the employer stock and the acquisition by the TRASOP of that stock for a price determined under a formula constitutes "adequate consideration" within the meaning of section 3(18) is a determination which must be made by the appropriate plan fiduciaries. In this regard, see Treasury Reg. §1.503(e)-2(b)(2)(iii), which defines "offering price" in a similar context.

This letter addresses only the sections of ERISA described herein. It does not cover other provisions of ERISA, including section 404, relating to the prudence of investments or compliance with the documents and instruments governing the plan.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs