

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION 81-48A
3(1), 3(3)

MAY 28 1981

C. P. Lambos, Esq.
Lorenz, Finn, Giardino & Lambos
The Cunard Building
25 Broadway
New York, New York 10004

Dear Mr. Lambos:

This is in response to your letter of June 27, 1978. Specifically, you request an opinion that the collectively bargained Job Security Program (the Program), administered by the JSP Agency, Inc. (JSPA), is not an employee benefit plan subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

Your letter contains the following representations. As part of a collective bargaining agreement entered into on November 29, 1977, between the International Longshoremen's Association (ILA) and all steamship carriers engaged in vessel operations on the east and gulf coasts of the United States, the Program was established to protect the fiscal soundness of existing local port employee benefit plans, which are employee benefit plans subject to the provisions of ERISA. The Program is designed to generate funds through the imposition of a tonnage assessment upon all steamship carriers transporting cargo that is handled by ILA dockworkers in the 34 ports covered by the agreement, pursuant to a formula set forth in the agreement. Such funds will then be used to offset any shortfalls or deficits encountered by covered local port guaranteed annual income, pension, or medical and hospitalization plans which arise as a result of unexpected decreases in employer contributions caused by reduced manhours and/or cargo tonnages. The agreement expressly provides that the carriers will administer the Program, and on December 16, 1977, the JSPA was incorporated as a non-stock, non-profit membership association to perform this function. The principle activities of the JSPA are: to estimate on a quarterly basis the total obligations for shortfall incurred for the past quarter and, depending upon experience, to increase, decrease, adjust or suspend the amount of the assessment; to collect and invest assessments; and to transfer funds to any covered plan upon satisfactory application by such plan, after the JSPA has been satisfied that the plan has experienced a shortfall which is reimbursable under the terms of the Program. The agreement provides that the funding for the local port plans shall be based upon actuarially and/or statistically sound principles.

Based upon the above representations, it is the opinion of the Department that the Program is not an employee benefit plan subject to the provisions of ERISA. Welfare and pension benefits are provided to ILA members through their local port plans, which are subject to ERISA, and not through the Program. Although the Program is designed to ensure adequate funding for the local port plans, participants of the local port plans do not participate in the Program and establishment of the Program does not affect their entitlement to, or levels of, benefits under the local port plans. This result is consistent with regulation 29 C.F.R. §2510.3-3(b) (40 FR 34532, August 15, 1975), which states, as a general matter, that the term "employee benefit plan" shall not include any plan, fund, or program under which no employees are participants covered under the plan. In this regard, however, we note that the Department does not agree with your contention that the Program is an "Industry Advancement Program" within the meaning of regulation 29 C.F.R. §2510.3-1(i) (40 FR 34531, August 15, 1975). This section states that:

For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a program maintained by an employer or group or association of employers, which has no employee participants and does not provide benefits to employees or their dependents, regardless of whether the program serves as a conduit through which funds or other assets are channelled to employee benefit plans covered under Title I of the Act.

Based on your description of the Program and the collectively bargained provisions establishing it, it does not appear that the Program is designed to engage in, or in fact engages in any of the activities usually indicative of an industry advancement program, e.g., public relations services, sponsorship of seminars (see the preamble to proposed regulation §2510.3-1(i), 40 FR 34643, June 9, 1975).

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

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs