U.S. Department of Labor

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

Reply to the Attention of:

OPINION 81-50A
3(21)(A)

JUN 4 1981

Curtis L. Roy, Esquire
Dorsey, Windhorst, Hannaford, Whitney and Halladay
2300 First National Bank Building
Minneapolis, Minnesota 55402

Re: George A. Hormel & Company
Local P-9, United Food and Commercial Workers, AFL-CIO
Identification Number: F-1591A

Dear Mr. Roy:

By letter dated June 27, 1980, you requested an opinion as to whether an arbitrator would, under circumstances described below, be a fiduciary within the meaning of section 3(21)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) and, if so, whether an agreement by an employer and/or union to indemnify the arbitrator, out of non-plan funds, against any potential fiduciary liability would violate section 410 of ERISA. In a telephone conversation of September 25, 1980, this office asked for certain additional information, which you submitted by letter dated September 26, 1980. On September 30, 1980, you submitted an additional letter for the purpose of clarifying your letter of September 26, 1980. By letter dated February 10, 1981 this office requested further clarification, which you provided by letter dated February 24, 1981.

Your letters include the following facts and representations:

The collective bargaining agreement between George A. Hormel & Company (the Employer) and Local P-9, United Food and Commercial Workers, AFL-CIO (the Union) provides for the arbitration of grievances arising under the agreement. The George A. Hormel & Company Non-Exempt Employees' Pension Plan (the Pension Plan) was negotiated by the Employer and the Union, and is administered by the Employer. The Pension Plan document contains no independent arbitration provisions.

The Employer and the Union have selected Mr. Abner Brodie from among a panel of arbitrators to resolve a grievance concerning pension accrual. The issue before him may be summarized as follows.

On April 24, 1957, the Employer and the Union executed a letter agreement providing, in part, that

> "female employees when recalled to work shall be considered as having been on the payroll continuously for purposes of … retirement benefits."

Beginning with the Pension Plan Agreement dated July 23, 1957 each Pension Plan Agreement negotiated by the Employer and the Union, including the current one, has provided that

> "For the purpose of computing periods of Company and Union seniority for pension benefits there shall be excluded any absence to the extent that it exceeds two continuous years …"

Mr. Brodie must decide whether the provision contained in the letter agreement or the provision contained in the Pension Plan Agreement controls. His decision will determine the extent to which female employees will be entitled to pension credit for pregnancy leaves of absence occurring prior to the enactment of the Civil Rights Act of 1964. In its capacity as Plan Administrator, Hormel has interpreted the Plan as not providing pension credit for more than the first two years of an employee's absence from work.

You represent that the Employer and the Union have, in the instant case, asked Mr. Brodie to interpret only their contractual commitments. You state that this is not a case in which a Plan participant filed a claim for benefits, which claim was denied. The Plan's claims procedure is not involved here, and the document setting forth the terms of the Plan and pursuant to which the Plan is administered was not submitted for the arbitrator's consideration. Rather, you maintain that the issue relates solely to the extent of Hormel's collectively bargained promise to provide benefits (set forth in the letter and Pension Plan agreements), and does not involve administration of the current provisions of the Plan (set forth in the Plan document). You represent that Hormel would be bound by the arbitrator's award, but only in its capacity as a party to a collective bargaining agreement. You claim that Hormel would be free to comply with the award by, if necessary, amending the current Plan or by providing alternative benefits from some other source.

After the close of the hearing and the submission of post-hearing briefs, Mr. Brodie informed the Employer and the Union that his concern over potential fiduciary liability could cause him to withdraw from the case without rendering a decision. To allay his concern, the Employer and the Union have proposed entering into an indemnification agreement under which the Employer or the Union or both would satisfy, from non-plan funds, any liability Mr. Brodie might incur by reason of his actions in the arbitration, should he be deemed to be a fiduciary.

The term "fiduciary" is defined in section 3(21)(A) of ERISA. Section 3(21)(A) provides, in pertinent part, that a person is a fiduciary with respect to a plan to the extent

(i) he exercises any discretionary control respecting management or disposition of its assets,

(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

In Advisory Opinion No. 78-14 (July 27, 1978), the U.S. Department of Labor (the Department) stated that an arbitrator would be a fiduciary if he performed any of the functions described in section 3(21)(A) of ERISA, but concluded that under the facts presented, the arbitrator would not be a fiduciary of the plan involved by virtue of his deciding the rate at which employers would be required to contribute to the plan.

In Advisory Opinion No. 79-66A (September 14, 1979), the Department found that, by deciding a question of a participant's entitlement to benefits under a plan, an arbitrator would be a plan fiduciary, because he would be exercising discretionary authority respecting the management and administration of the plan.

Advisory Opinion No. 79-66A cited an example contained in Question and Answer No. D-3 of ERISA Interpretive Bulletin 75-8 (29 CFR sec. 2509.75-8). The example sets forth the Department's view that a plan employee who has final authority to grant or deny benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating to eligibility for benefits would be a fiduciary within the meaning of section 3(21)(A) of ERISA.

Accordingly, if Mr. Brodie would be deciding a particular plan participant's entitlement to benefits under the Pension Plan pursuant to the Plan's lawful claims procedure,[1] he would be

---

[1] In this regard, section 503 of ERISA and 29 CFR §2560.503-1 set forth requirements regarding an employee benefit plan's procedure for handling claims for benefits. Section 12.3 of the document, furnished with your letter of September 26, 1980, which you refer to as an "Unofficial Working Copy of the Plan Document," appears to set forth the Plan's claims procedure. The procedure calls for submission of written claims to the "Pension Board," and provides for a "review hearing" before this same body of claims which have been denied. However, in your September 26, 1980, letter you state that claims for Plan benefits are initially made to the Employer's Manager of Employee Benefits, and that a participant whose claims has been denied would "have the option of filing a grievance under the grievance and arbitration procedures of the collective bargaining contract, rather than a claim arising under the terms of the plan." In your September 30, 1980, letter of clarification you indicate that the Employer, "in its capacity as Plan Administrator," decides benefit claims. Finally, in your February 24, 1981 letter, you again state that applications for benefits are made initially to the Manager of Employee Benefits, but then you state that this person also reviews claim denials. In these circumstances, we must remind you that section 404(a)(1)(D) of ERISA requires plan fiduciaries to act in accordance

acting as a fiduciary with respect to the Pension Plan. However, you indicate that the instant matter does not involve disposition of a claim by a Plan participant for benefits under the Plan, or of an appeal from a refusal to grant such a claim. It appears that the arbitrator has been called upon to construe two documents which comprise, at least in part, the collectively bargained agreements between the Union and the Employer, but that the outcome of the arbitration would have no immediate effect on administration of the plan or on the rights of Plan participants to benefits under the Plan as it is currently drafted. Although the outcome of the proceeding might increase the entitlement of some Plan participants to benefits, it appears that the arbitrator's decision would not affect the long-standing interpretation given to existing Plan provisions. If we understand you correctly, a participant's entitlement to benefits under the Plan would be affected only if the Employer were to amend the Plan to achieve compliance with a ruling by the arbitrator.

Based on your representations, it is our understanding that the instant proceeding resembles an extension of the process of collective bargaining between the Union and the Employer. Accordingly, to the extent that the instant matter is solely a part of the process by which the parties design and create a plan (as opposed to a matter of Plan administration), then it is our view that Mr. Brodie would not be acting as a fiduciary in serving as arbitrator to decide the question presented to him.

It appears that the above discussion has mooted your question regarding possible indemnification by the Employer, the Union, or both, of an arbitrator who would be acting as a fiduciary under ERISA with respect to the Plan in the instant matter. We believe, however, that the following information might be useful in this regard.

Section 410(a) of ERISA, in pertinent part, voids, as against public policy, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under Part 4 of Subtitle B of Title I of ERISA.

In ERISA Interpretive Bulletin 75-4 (29 CFR sec. 2509.75-4), the Department interpreted section 410(a) to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability under Part 4 of Subtitle B of Title I. Interpretive Bulletin 75-4 states, in part, that indemnification provisions, which leave the fiduciary fully responsible and liable, but merely permit another party to satisfy any liability incurred by the fiduciary, are not void under section 410(a) of ERISA. Example of permissible indemnification provisions include indemnification of

---

with the documents and instruments governing the plan, insofar as these are consistent with the provisions of ERISA. Accordingly, it appears that an examination of the Plan's claims procedures would be called for. In this connection, we express no opinion as to whether any of the above-referenced procedures by which claims for benefits under the Plan might be decided would satisfy the requirements of section 503 and §2560.503-1.

a plan fiduciary by an employer, any of whose employees are covered by the plan, or by an employee organization, any of whose members are covered by the Plan.

Accordingly, it is the view of the Department that an agreement by an employer and/or a union to indemnify an arbitrator, out of non-plan funds, against any fiduciary liability he might incur by reason of acting in an arbitration proceeding in such a manner as would make the arbitrator a fiduciary with respect to a plan would not violate section 410(a) of ERISA.

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

Sincerely,

Ian D. Lanoff
Administrator
Pension and Welfare Benefit Programs