U.S. Department of Labor

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

Reply to the Attention of:
Frederic Burke
(202) 523-7901

OPINION 81-65A
Sec. 3(2)

AUG 3 1981

Mr. Alexander Welch
Lynch & Welch
31 St. James Avenue
Boston, Massachusetts 02116

Dear Mr. Welch:

This is in reply to the letter of May 24, 1979, from Mr. Kenneth C. Heavey, and your subsequent letters, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, the inquiries concern the applicability of title I of ERISA to and possible disposition of an account (Escrow Account) established to receive the contributions of August A. Busch and Company of Massachusetts, Inc. (the Company), which had been earmarked for possible entry into the New England Teamsters and Trucking Pension Plan (the New England Plan). You have also inquired as to how the assets in the Escrow Account might properly be distributed.

The following is a summary of events leading to the request for an advisory opinion. The Company in 1970 entered into a 3-year agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 122 (the Union) representing its employees. One of the provisions of the agreement provided that in 1972 the Company would begin contributing 5 cents per hour to the New England Plan. The employees were then and continue to be covered by Company contributions to the Teamsters Central States, Southeast and Southwest Areas Pension Fund (Central States Fund). In 1971 the New England Plan increased the required minimum hourly contribution of the contributing employer from 5 cents to 15 cents per hour. When the Company was informed by the Union that the bargained for 5 cents per hour contribution would not purchase entry into the New England Plan, the Union and Company agreed to place the 5 cents per hour contribution into the Escrow Account at the National Shawmut Bank in Boston, Massachusetts. The Union expected that when the collective bargaining agreement was renegotiated in 1973, the Union would be able to negotiate higher Company contributions than the 5 cents an hour, which increased contributions together with the funds accumulated in the Escrow Account, would then enable the parties to enter the New England Plan. The collective bargaining agreement was renegotiated in 1973 for a

3-year period. The agreement called for increased Company contributions to the Escrow Account from 5 cents to 7 ½ cents per hour in 1974. The 1973 agreement does not specify the use to which the monies in the Escrow Account will be put. Although before negotiations began in 1973, the Union was notified by the Administrator of the Central States Fund that the employees of the Company could not be part of both the Central States Fund and New England Plan, the Union was hopeful of securing permission for employees to be covered by both plans. During renegotiations between the parties for a new contract to run from December 1, 1976, to December 1, 1979, the parties agreed to discontinue Company contributions to the Escrow Account from which no withdrawals have been made since its inception.

The term "employee benefit plan" is defined in section 3(3) of ERISA as "… an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

Inasmuch as the Escrow Account was not established or maintained to provide any of the benefits enumerated in section 3(1) of ERISA, it is not an employee welfare benefit plan within the meaning of that section.

The term "employee pension benefit plan" is defined in section 3(2)(A) of ERISA, in relevant part, to mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -- (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Under the circumstances described in your submissions and summarized above, the creation of the Escrow Account did not in itself constitute the establishment of an employee pension benefit plan to provide retirement or deferred income to employees. Rather, it appears that the Escrow Account was established as a means of funding future entry into the New England Plan, which was not possible. Accordingly, it is the Department's view that the Escrow Account is not an employee pension benefit plan within the meaning of section 3(2) of ERISA. Since, in our view, the Escrow Account is neither an employee pension benefit plan nor an employee welfare benefit plan and, therefore, is not an employee benefit plan within the meaning of section 3(3) of ERISA, it is not subject to title I of ERISA.

This opinion is confined to the applicability of title I of ERISA to the Escrow Account. Accordingly, the Department offers no opinion as to how the funds in that Account might properly be distributed or as to the applicability of the Labor Management Relations Act, 1947 (Taft-Hartley Act). Questions concerning section 302 of The Taft-Hartley Act should be directed to the U.S. Department of Justice.

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,

Morton Klevan
Deputy Administrator
Pension and Welfare Benefit Programs