

U.S. Department of Labor

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



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 81-75A
Sec. 3(2)

OCT 6 1981

Mr. Richard J. Gillingham
Associate Counsel
Office of the General Counsel
Western Union Telegraph Company
One Lake Street
Upper Saddle River, New Jersey 07458

Dear Mr. Gillingham:

This is in reply to your letter of August 6, 1980, for an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Western Union Telegraph Company-Communication Workers of America, AFL-CIO, Severance Pay Agreement (SPA) is a pension plan, a welfare plan, or neither.

You advise that the SPA is contained in section 13 of the collective bargaining agreement between Western Union Telegraph Company (Western Union) and the Communication Workers of America, AFL-CIO (CWA). Under section 13(d) of that agreement, employees subject to force reduction are granted four options, including what is termed an "involuntary furlough."

Under the SPA, employees who choose to accept an involuntary furlough are given severance pay. The severance pay to which an employee is entitled is determined by multiplying the employee's weekly pay prior to force reduction by a factor that increases with years of service, and by subtracting from this amount the present value of the employee's vested pension benefits under a separate pension plan to which Western Union contributes. In choosing to receive involuntary furlough severance payments, however, an employee must accept a distribution of the present value of his vested benefits under the pension plan at the same time, so that the total amount of severance and pension payments made to the employee is equal to the product of his weekly pay prior to force reduction and the applicable factor based on his years of service. Generally, an employee may elect to receive these payments in a lump sum, in four equal monthly payments, or in weekly payments equal to his basic weekly rate of pay.

Section 3(2) of ERISA, in relevant part, provides as follows:

3(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" 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 ...

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which --

(i) severance pay arrangements ...

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment, a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

Department of Labor regulation 29 C.F.R. §2510.3-2(b) identifies certain arrangements which will not be considered to be employee pension benefit plans within the meaning of ERISA section 3(2) solely by reason of the payment of severance benefits on account of the termination of an employee's service.

Among other conditions specified in regulation section 2510.3-2(b) which such arrangements must meet in order not to be considered to be pension plans, paragraph (b)(1)(i) of that section requires that payments must not be contingent, directly or indirectly, upon the employee's retiring.

As noted above, payments under the SPA which are characterized as severance benefits generally are not available unless an employee accepts a distribution of his vested pension benefits under a pension plan maintained by Western Union. In the case of an employee who is in the later years of his working career, we believe that a termination of the employee's service with the employer, accompanied by a distribution of the employee's retirement benefits, amounts in effect to the employee's retiring. Since these are the circumstances under which benefits under the SPA are available to employees, we believe that benefits under the SPA are indirectly contingent upon an employee's retiring, at least in the case of older employees. Further, it is our view that under the circumstances, the SPA has the effect of providing retirement income to employees, since payments under the SPA include a distribution of the employee's benefit under the pension plan. Accordingly, it is the Department's position that the SPA benefits are not a severance pay program described in regulation section 2510.3-2(b) and do constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA.

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
Pension and Welfare Benefit Programs