

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION NO. 83-47A  
Sec. 3(2)

SEP 13 1983

Mr. Harold J. Bagley  
Law Department  
Northern States Power Company  
414 Nicollet Mall  
Minneapolis, Minnesota 55401

Dear Mr. Bagley:

This is in reply to your letter requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the severance benefits provided by Northern States Power Company (the Company). Specifically, you seek an advisory opinion stating the Company's severance benefits constitute an employee welfare benefit plan within the meaning of section 3(1) of ERISA and not an employee pension benefit plan within the meaning of section 3(2) of ERISA.

Your letter and the material connected with your submission contain the following facts and representations. You advise that the Company negotiates with a joint bargaining committee representing several labor unions. You enclose an example of such an agreement (the Agreement) between the Company and Local Union 160 of Minneapolis, Minnesota, of the International Brotherhood of Electrical Workers (the Local Union). As the Agreement recites, the Company and the Local Union entered into the Agreement January 1, 1980. You state that the Agreement was originally implemented in 1969 and was amended in 1976. You state that no amendments were made during 1981 negotiations. You also state you are enclosing a pension plan referred to in the Agreement. No pension plan was received with your submission. However, you describe the Company's pension plan as a qualified defined benefit plan adopted in 1950. You also state that the Company's pension plan pays 1 and 19/35 percent of an average of a covered employee's highest 5 years of compensation times years of service which result in a maximum benefit of 54 percent of average pay minus half the employee's primary Social Security amount after 35 years of service.

In general, provisions of the Agreement are such that severance benefits provided by the Company may exceed 2 years pay and may be provided for 2 years or longer. You point out that you are particularly concerned with paragraphs 16 and 17 of the Agreement. Paragraph 16 provides that, except as required by paragraph 17, severance benefits are paid according to a schedule in which the severance pay allowances increase from 1 month of pay to 10 months of pay depending on length of service between 5 years and 10 years. After 10 years, an eligible employee receives 1 month pay for each year of covered service. In choosing to receive severance benefits, however, an employee must accept a distribution of the present value of his vested benefits under the pension plan at the same time. The present value of any vested benefit is paid directly to the employee by the trustee under the pension plan.

Paragraph 5 of the Agreement provides that the Local Union requests severance benefits in writing and that eligible employees are 30 or more years of age and, with certain exceptions, have been on the Company payroll for at least 5 years. Former employees of any second party from whom the Company purchases property must be retained as Company employees for 1 year before being eligible for severance

benefits. In addition, severance benefits are paid only due to job loss for specified reasons. Acceptance of severance benefits by an eligible employee results in loss of all seniority rights and privileges except for credit for vested service under the Company's pension plan. At the Company's election, severance pay may be either a single lump-sum or equal monthly installments.

According to paragraph 17 of the Agreement, employees eligible for severance benefits may exercise certain other options. An employee age 60 who is scheduled for lay-off may remain on Company payroll and the Company will determine his work assignment or may apply for early retirement and the Company will supplement early retirement pension benefits during the employee's lifetime up to the level of the full pension credit earned under the pension plan. An employee with 20 years of service between ages 30 and 60 may elect a lifetime annuity based on pension credits as of lay-off. At age 62 such employee's annuity will begin to have one-half the Social Security primary insurance amount deducted in accordance with the Company's pension plan. The annuity will cease when the employee receives a vested monthly benefit from the Company's pension plan as a result of retaining all vested rights under the Company's pension plan. Eligible employees with 10 years of service but less than 20 may elect to receive 6 months' pay in monthly installments and retain vested rights under the Company's pension plan. Eligible employees with 5 years of service but less than 10 will receive a minimum of 6 months' severance pay payable monthly.

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 Agreement 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 the Company under a schedule of benefits in which benefits are neither expressly limited to 2 years of employee compensation as to amount nor to 2 years after termination as to duration. 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 Agreement are available to employees, we believe that benefits under the Agreement 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 Agreement has the effect of providing retirement income to employees, since payments under the Agreement include a distribution of the employee's benefit under the pension plan. Accordingly, it is the Department's position that the Company's severance 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,

Jeffrey N. Clayton  
Administrator  
Pension and Welfare Benefit Programs