U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 84-21A
Sec. 203(a)(3)(B)(ii)

MAY 1 1984

Mr. Rolland R. O'Hare
Ms. Ann E. Neydon
Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P.C.
1000 Farmer
Detroit, Michigan 48226

Dear Mr. O'Hare and Ms. Neydon:

This is in response to your request, on behalf of the Board of Trustees of the Bricklayers Pension Trust Fund-Metropolitan Area (the Plan), a multiemployer plan, for an advisory opinion concerning the application of the suspension of benefits regulation issued by the Department under the Employee Retirement Income Security Act of 1974 (ERISA). We regret that the volume of correspondence concerning ERISA has resulted in a delay in responding to you.

Specifically, you have requested an opinion involving the application of the term "industry", as that term is used in the suspension of benefits regulation (29 CFR §2530.203-3(c)(2)),[1] to a situation in which the work being performed by a retiree for his employer, which is not maintaining the Plan, is identical in kind to work regularly performed for the employer by subcontractors which are employers maintaining the Plan.

In this regard, you indicate that the retiree is employed full-time as a maintenance refractory bricklayer by the Ford Motor Company's Rouge River steel facility. His duties include firebrick masonry and refractory work. He works under a collective bargaining agreement between Ford and the United Auto Workers. Ford is not maintaining the Plan. However, firebrick maintenance and repair work identical to that being performed by the retiree and new firebrick construction work are subcontracted by Ford to employers who are maintaining the Plan. Though Ford's bricklayers do not work on the same project as bricklayers employed by the subcontractors, the two groups often perform identical work on separate projects in close proximity. Prior to his employment by Ford the retiree had been employed by subcontractors to perform bricklaying work at Ford's Rough River steel facility and he had accrued benefits under the Plan as a result of that employment.

Further, you indicate that it is uncontested that the retiree is employed by Ford in the geographic area for more than forty hours a month as a bricklayer. What is contested is whether the retiree's employment is in the same "industry" within the meaning of section 203(a)(3)(B)(ii) of ERISA and 29 CFR §2530.203-3(c)(2). According to your letter, the retiree contends that his employment as a bricklayer at Ford is in the automotive or steel industry and that his previous employment with employers maintaining the Plan was in the construction industry and, therefore, that the Plan may not suspend his pension benefits. The Trustees, however, believe that the work at Ford performed

[1] The suspension of benefits regulation appeared in the Federal Register as follows: 46 Fed. Reg. 8894 (January 27, 1981), amended 46 Fed. Reg. 59243 (December 4, 1981), corrected 46 Fed. Reg. 60572 (December 11, 1981).

by the retiree is in the construction industry and that they may suspend his benefits under the Plan.

Section 203(a)(3)(B) of ERISA provides that, with respect to multiemployer plans, the payment of benefits may be suspended, without being treated as a forfeiture, for such period as an employee is employed "in the same industry, the same trade or craft and the same geographic area covered by the plan, as when such benefits commenced." Under both section 203(a)(3)(B) of the statute and the suspension of benefits regulation, §2530.203-3(c)(2), a multiemployer plan may suspend the payment of benefits of an employee only when each of the three prescribed conditions have been satisfied.

With regard to the "industry" element of section 203(a)(3)(B)(ii), §2530.203-3(c)(2) refers to "[a]n industry in which employees covered by the plan were employed and accrued benefits under the plan as a result of such employment at the time that the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment." The term "industry" is defined, in paragraph (c)(2)(i) of §2530.203-3, to mean:

> the business activities of the types engaged in by any employers maintaining the plan [emphasis supplied].

In this regard, you suggest in your letter that it is not the identity of the employer which determines in which industry an employee works, but rather it is the kind of work performed by the employee. We do not agree. Under section 203(a)(3)(B)(ii) and §2530.203-3(c)(2) the "industry" test is in addition to, and separate from, the "trade or craft" test and, therefore, the "industry" test cannot be applied solely on the basis of the trades or crafts performed by individual employees without being duplicative of the "trade or craft" test. Accordingly, while the trades or crafts performed by employees of an employer may, in some instances, be indicative of the industry or industries of which the employer is a part, an independent determination must be made, for purposes of section 203(a)(3)(B)(ii) and §2530.203-3(c)(2), as to the business activities of the employer, taking into consideration the products and/or services offered by the employer in the course of its business activities and such other facts and circumstances as may be relevant to such a determination.

You indicate in your letter that Ford's Rouge River plant is clearly in the steel industry and that employees who work at the plant also might be considered to work in the automotive industry. However, your letter contains no contention that the Ford Motor Company or its Rouge River plant is in the construction industry. Moreover, you do not contend that any employer maintaining the Plan is in either the steel or automotive industry.

Therefore, on the basis of the facts and representations contained in your letter, it appears that, while the retiree at issue may be performing the same trade or craft that he performed prior to retirement, he is not employed in the "same industry", assuming that the industry in which the retiree is now employed is either the steel or automotive industry and that neither the steel nor automotive industry is an industry in which employees covered under the Plan were employed and accrued benefits under the Plan at the time the payment of benefits commenced for the retiree. Accordingly, the Department is unable to conclude that the Bricklayers Pension Trust Fund-Metropolitan Area may suspend the payments of benefits to the subject retiree under the provisions of section 203(a)(3)(B) of ERISA and the regulations issued thereunder.

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

Sincerely,

Morton Klevan
Deputy Administrator
Office of Pension and Welfare Benefit Programs

Enclosure

cc: Daniel Serrato