

**U.S. Department of Labor**

Pension and Welfare Benefits Administration  
Washington, D.C. 20210



JAN 8 1987

87-02A  
Sec. 3(1), 3(4), 3(5)

Mr. Franklin L. Damon  
Wyman, Bautzer, Rothman, Kuchel & Silbert  
Two Century Plaza, Fourteenth Floor  
2049 Century Park East  
Los Angeles, California 90067

Dear Mr. Damon:

This is in reply to your request for an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask whether the National Transportation Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that the Trust was established pursuant to a trust agreement effective January 1, 1985, between the National Transportation Safety Association, Inc. (NTSA) as Trustor and First Wisconsin National Bank of Madison as Trustee. Recital A of that agreement states that the primary purpose of the Trust is to obtain and provide a group benefit program for participating members of NTSA, their dependents and beneficiaries and any other eligible person. Recital B states that the group benefits will include (but are not limited to) life, health, accident, legal or other benefits protecting the participating members, their dependents and their eligible employees and other persons associated with the participants as determined by the Board of Directors of NTSA, or its Executive Committee. NTSA may remove the Trustee and appoint a successor Trustee.

Article IV, Section 1 of the NTSA Bylaws provides:

**SECTION 1. Qualifications**

There shall be one class of membership in this corporation. Any person eighteen (18) years of age or older, of good character, dedicated to the purposes of this corporation, shall be eligible for regular membership on acceptance of his or her application by the board of directors and payment of such dues and initiation fees as may from time to time be fixed by the board of directors.

All members are eligible to vote at the annual meeting or at any special members meeting. Directors of the NTSA are elected by the members at the annual meeting for a one year term. The Directors elect the officers of the NTSA who serve at the pleasure of the Board of Directors.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

... 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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Although the Trust provides health benefits which are among those benefits identified in section 3(1), in order to be an employee welfare benefit plan, the Trust must also, among other criteria, be established or maintained by an employer, an employee organization, or both.

The terms "employee organization" and "employer" are defined respectively by ERISA section 3(4) and 3(5) as:

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

There is no indication in your submission that NTSA, which established and maintains the Trust, is an employee organization within the meaning of section 3(4) of ERISA. NTSA does not exist "... for the purpose, in whole or in part, of dealing with employers...." Furthermore, in several opinion letters the Department of Labor (the Department) has identified criteria for purposes of determining what constitutes an "employees' beneficiary association" as that term is used in section 3(4). One of those criteria is that membership in such an association must be conditioned

on employment status -- for example, where membership is limited to employees of a certain employer or members of one union. However, membership in NTSA is not conditioned upon one's employment status but rather is open to both employers and employees.

With regard to the issue of whether NTSA is an "employer" within the meaning of section 3(5) of ERISA, the definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits to their employees.

The Department has taken the position that where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of employer status, and where control of such a group or association is not vested solely in employer members, such group or association is not a bona fide group or association of employers within the meaning of section 3(5) of ERISA. Membership in NTSA is open to anyone engaged in a particular industry and is not conditioned on one's status as an employer. Thus, it would appear that NTSA is not a bona fide association of employers.

The program of benefits offered by the Trust, therefore, is not an employee welfare benefit plan within the meaning of section 3(1) of ERISA because it is not established or maintained by an employee organization or an employer, as those terms are defined in sections 3(4) and 3(5) of ERISA, respectively. Any employer that establishes and maintains a welfare benefit program for its employees through the Trust, however, may have established a separate, single-employer, welfare benefit plan covered by title I of ERISA. This letter does not, however, address any of the issues surrounding the ERISA duties or obligations of the National Transportation Trust or any of its agents with respect to such an ERISA plan.

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 thereof, relating to the effect of advisory opinions.

Sincerely,

Elliot I. Daniel  
Associate Director for Regulations and Interpretations