

U.S. Department of Labor

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



APR 25 1990

ERISA OPINION 90-11A
Sec. 3(1), 3(4), 3(5)

Mr. Gerald R. Ortals
Greenfelder, Hemker, & Gale, P.C.
1800 Equitable Building
10 South Broadway
St. Louis, Missouri 63102-1774

Dear Mr. Ortals:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Missouri Pacific Employees' Health Association (MPEHA) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that MPEHA was created in 1890 and incorporated as a nonstock corporation in 1920. According to the MPEHA By-Laws, its purposes include the provision of "life, medical or other benefits to its members, their dependents, or designated beneficiaries." You further state that MPEHA contracts to deliver medical care to the members on a prepaid basis from medical providers. Under Article III of the By-Laws, membership in MPEHA is currently limited to employees of the Union Pacific Railroad (a/k/a Missouri Pacific Railroad) and the transportation subsidiaries of that railroad (Union Pacific), MPEHA, the Terminal Railroad Association (TRA), and Manufacturers Railway Company (MRC). TRA serves the railroads that use the switching facilities and railyards in metropolitan St. Louis. Union Pacific is the largest participant in the consortium of railroads that supports and utilizes TRA. MRC is a wholly-owned subsidiary of Anheuser-Busch which provides shortline service and rail support to connect Anheuser-Busch with Union Pacific. The only employees of TRA or MRC eligible for membership in MPEHA are those who are members of labor unions represented on the MPEHA Board of Managers.

The MPEHA Board of Managers consists of thirteen individuals (ten representing the six labor unions which have collective bargaining agreements with Union Pacific, one at-large union representative elected by MPEHA members who are not represented by any of the six unions, and two at-large representatives designated by Union Pacific).

Section 3(1) of title I 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).

The programs described above clearly provide the types of benefits enumerated in section 3(1)(A). Therefore, the focus of inquiry is whether a program is "established or maintained by an employer, an employee organization or both."

The term "employer" is defined in section 3(5) to mean:

. . . 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.

The Department of Labor (the Department) has taken the position that one employee welfare benefit plan may be established or maintained by more than one employer if the employers comprise a bona fide employer group or association. Among the factors the Department has considered in ascertaining the existence of such a bona fide employer group or association are the manner in which members are solicited; the presence of a pre-existing relationship among members; the process by which the association was formed; the purpose for which the group was formed; and the identification of the parties who actually control and direct the activities of the association and its benefit program. In the Department's view, the employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

In the case of MPEHA, there is no indication that the employers of the participants control or direct the Association or benefit program. Rather, of the thirteen representatives on the MPEHA Board of Managers, only two are designated by an employer. In addition, here is no indication that either TRA or MRC appoints or controls any members of the MPEHA Board of Managers.

Accordingly, MPEHA is not established or maintained by a bona fide employer group or association within the meaning of section 3(5).

When it appears that a program of benefits has not been established or maintained by an employer, it still remains to be determined under section 3(1) whether that program has been established or maintained by an employee organization within the meaning of section 3(4) of the Act. Section 3(4) states:

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.

With respect to the first part of the definition (before the semi-colon), it should be noted that, unlike section 3(5), section 3(4) does not provide that a group of labor unions, etc., may be treated as one employee organization. With respect to the second part of the definition (after the semi-colon), the Department has employed the criteria developed under the Welfare and Pension Plan Disclosure Act for determining whether an employee group is an employees' beneficiary association. These four criteria are: (1) the membership in the association must be conditioned on one's employment status; (2) the group must have some degree of formal organization such as officers, bylaws, rules or any other indication of some degree of formality; (3) it does not deal with employers; and (4) it must be established for the purpose, in whole or in part, of establishing a welfare or pension plan.

With regard to the first part of the definition in section 3(4), it does not appear that MPEHA is established or maintained by one labor union or similar entity. Rather, coverage is open to participants on the basis of membership

in a variety of unions, and many, but not all, of such unions have representatives on the MPEHA board. Coverage is required for participants whose unions opt for participation in MPEHA. Such employees are represented on the MPEHA board through their union. MPEHA membership is also available to employees whose unions have opted out of MPEHA. Such employees have no representation on the MPEHA board. Because of this divergence in representation, MPEHA will be an ERISA-covered plan only if it has been established or maintained by an employees' beneficiary association within the meaning of the second part of section 3(4).

Examining MPEHA in light of the WPPDA criteria, it is clear that MPEHA has a formal organization and that it was founded for the purpose of providing welfare benefits. However, it does not appear that membership is conditioned on employment status. There is no commonality of employment requirement since members may be employed by a variety of employers in the railroad industry. Similarly, because of employer participation on the MPEHA board, it cannot be said that MPEHA does not deal with employers. As a result, it does not appear that MPEHA is established or maintained by an employees' beneficiary association.

Our conclusion, therefore, is that neither an employer (as defined in section 3(5)) nor an employee organization (as defined in section 3(4)) has established or maintained MPEHA for the purposes of section 3(1). Therefore, MPEHA is not an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA. However, it is the view of the Department that, if an employer or an employee organization adopts for its employees or members a program of benefits sponsored by a group or association that does not itself constitute an "employer" or an "employee organization," such an employer or employee organization may have established a separate, single-employer (or single employee organization) employee welfare benefit plan covered by title I of ERISA.

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

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations