U.S. Department of Labor

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

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92-11A
Sec. 403(a); 404(a)

Mr. Stanley Neyhart
Neyhart, Anderson, Nussbaum, Reilly & Freitas
P.O. Box 7426
San Francisco, CA 94120

Dear Mr. Neyhart:

This is in response to your letter requesting an advisory opinion under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an opinion regarding the legality under ERISA of unit voting by the Boards of Trustees of the Greyhound Lines, Inc. - Amalgamated Council Retirement and Disability Trust; Greyhound Lines, Inc. - Amalgamated Council Health and Welfare Trust; Greyhound Lines, Inc. - Amalgamated Council Cash or Deferred Trust; and the West Des Moines-Greyhound Amalgamated Council Health and Welfare Trust (collectively, the Trusts).

Your represent that all of the Trusts, and the plans of which they are a part, are sponsored by Greyhound Lines, Inc. (Greyhound) and the Amalgamated Council of Greyhound Local Unions (the Council) under section 302 of the Labor Management Relations Act of 1947 (LMRA). The Boards of Trustees of each of the Trusts consist of six Trustees appointed by the Council and six Trustees appointed by Greyhound.

Each of the Trusts has identical voting procedure provisions to be utilized by their respective Boards of Trustees. Currently, the Council Trustees and the Greyhound Trustees each vote as a separate unit, with each unit in the aggregate exercising one vote. The vote by each unit on an issue is determined by a majority vote of the Trustees that comprise that unit. In the event that a tie or deadlock results under unit voting, the parties have adopted a stop-gap procedure under which the Trustees will decide the issue by a majority vote of the members of the Board of Trustees who are present. Council Trustees and Greyhound Trustees shall have the right to cast an equal number of votes whether or not an equal number of Council and Greyhound Trustees are present. If the Department issues a favorable advisory opinion on unit voting, tied or deadlocked votes will be determined by arbitration.

Section 5 of ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976) provides that advisory opinions ordinarily will not be issued regarding problems of an inherently factual nature or on the form or effect in operation of a plan or particular provisions thereof. Interpretations of plan documents normally fall within those categories. Therefore, we wish to emphasize at the outset that the response of the Department of Labor in this case should not be construed in any manner as a basis for a particular interpretation of the provisions of the trust instrument that are described in your letter. Rather, the Department's response is based solely upon the assumption you have posited, i.e., that plan provisions require unit voting by the Board of Trustees of the above-referenced Trusts.

Section 403(a) requires that all assets of an employee benefit plan shall be held in trust by one or more trustee(s) and that such trustee(s) shall have exclusive authority and discretion to manage and control the assets of the plan, with certain exceptions not here relevant.

Section 404(a)(1)(A) requires a fiduciary to discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their

beneficiaries and defraying reasonable expenses of administering the plan. In addition, section 404(a)(1)(B) requires a fiduciary to discharge his or her duties to a plan with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character with like aims.

Section 404(a)(1)(D) of ERISA requires fiduciaries to discharge their duties with respect to a plan in accordance with the documents and instruments governing the plan, insofar as such documents and instruments are consistent with the provisions of title I and title IV of ERISA.

There is nothing in section 403(a) or section 404(a)(1) of ERISA which expressly prohibits or limits the exercise of any particular method of decision making by plan trustees. Thus, in the Department's opinion, violations of section 403(a) and 404(a)(1) would not occur merely because applicable trust provisions require unit voting by the Board of Trustees of the Trusts.

The Department notes that the Trustees should be aware that compliance with unit voting procedures will not operate to relieve individual trustees of liability under sections 403(a) and 404(a)(1) of ERISA in any particular instance. Thus, the general fiduciary responsibility provisions of ERISA remain applicable with respect to each trustees's fiduciary conduct under the voting arrangement. In this regard, the Department reiterates that section 404(a) requires, among other things, that a trustee of a plan act prudently, solely in the best interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries.

In addition, section 405(a) of ERISA imposes co-fiduciary liability upon any fiduciary [including a trustee] for any breach of fiduciary responsibility of another plan fiduciary: (1) if he or she knowingly participates in or conceals such breach; (2) if by his or her failure to comply with section 404(a)(1), he or she enables another fiduciary to commit such a breach; or (3) if he or she has knowledge of the breach of another fiduciary and fails to make a reasonable effort to remedy the breach. Under section 410 of ERISA provisions in a plan document that purport to relieve a fiduciary from responsibility or liability under the fiduciary responsibility provisions of title I of ERISA are void as against public policy.[*]

Finally, it should be noted that this letter addresses only the fiduciary responsibility provisions of title I of ERISA. We offer no comments regarding any other law, including section 302(c) of the Labor Management Relations Act of 1947.

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

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

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[*] In this regard, see 29 C.F.R. section 2509.75-5, FR-10, for a discussion of the steps minority trustees must take to protect themselves from liability under sections 409 and 405(b)(1)(A) of ERISA. In the view of the Department, the discussion contained in FR-10 regarding trustee responsibility would be relevant regardless of whether plan documents provide for trustee decision making by majority vote or by unit voting.