U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

July 11, 1997

97-17A
ERISA SEC. 3(1), 403(c)(1), 404(a)(1)

Mr. Richard Van Vacter
The A.T. & S.F. Employees' Benefit Association
620 S.E. Madison
P.O. Box 1979
Topeka, Kansas 66601-1979

Dear Mr. Van Vacter:

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) to the A.T. & S.F. Employees Benefit Association (the Association). Specifically, you ask us to consider the effect of a proposed decision by the Association to serve as a "point-of-service" provider of health care services under a managed care program sponsored by the Railroad Employees National Health Care Plan (the National Plan) on the status of the Association and the health benefit program sponsored by the Association for its own members under Title I of ERISA.

You advise that the Association is a Kansas not-for-profit corporation organized for the purpose of providing health benefits to employees of the Santa Fe Railroad (Santa Fe) and their dependents. The Association originally was part of the Atchison Railroad Employees Association, which was formed in 1884 and has been reorganized and divided twice, in 1891 and 1966. The Association currently operates as a voluntary employees' beneficiary association under section 501(c)(9) of the Internal Revenue Code. Membership in the Association is open to all employees of Santa Fe, including, but not limited to, those employees included in a collective bargaining unit, and to retired employees of Santa Fe. By directly operating health clinics, the Association provides health services to its members and their dependents. The members pay a monthly fee established annually by the Association.

The Association is governed by a Board of Directors consisting of eight members, each serving a four year term. Four of the Directors are selected by unions that represent Santa Fe employees who are eligible for membership in the Association. The four other Directors were originally selected by Santa Fe, but now are selected by the Board of Directors as vacancies arise. Santa Fe currently exercises no control over the actions of these Directors. At least two of the Directors selected by the Board of Directors must be retired members of the Association.

Under previous collective bargaining agreements between Santa Fe and other railroads represented by the National Carriers' Conference Committee (the National Committee) and the unions representing railroad employees, Santa Fe and other employer railroads were obligated to pay contributions on behalf of their active employees (and their dependents) either to the National Plan or to a railroad hospital association, such as the Association, for health coverage as elected by their employees. Employees of Santa Fe who were not members of a collective bargaining unit were also given an election to participate in the health benefit program offered by the Association or in a separate group health program offered by Santa Fe for non-bargaining unit employees.

Under the latest collective bargaining agreement you submitted, Santa Fe and the other employers will be obligated to contribute only to the National Plan on behalf of their active employees and their dependents.[1] Retired employees and their dependents will be able to continue being covered under the health benefit programs offered by the railroad hospital associations (e.g., the Association). The National Plan provides that active employees of railroads and their dependents will have a choice between two programs for health benefits: a comprehensive health care program administered under contract by a national insurance company or a "point-of-service" managed care program. The "point-of-service" program will comprise several managed care networks. Under contract with the National Plan, the "point-of-service" providers will furnish health services and administration under a hybrid health maintenance organization (HMO)/preferred provider organization (PPO).

The Association estimates that, once the managed care networks are fully operational, membership in the health care program offered by the Association will drop from 18,000 participants to approximately 11,000, a reduction of approximately 40%. You have represented that, as a result, the fixed assets of the Association (i.e., its medical care and claims processing capacity) will be substantially underutilized. You further represent that the Association will not be able to afford to maintain its fixed assets after the anticipated loss of members unless some productive use of its excess capacity is undertaken.

Based on the factors detailed above, the Board of Directors has determined that the best use of the excess capacity of the Association's fixed assets would be to contract with the National Plan to provide point-of-service care and claims administration as a managed care provider to participants in the National Plan employed by any railroads operating in the Association's geographical service area. You also represent that only the excess capacity of the Association's fixed assets would be utilized to provide such services to participants in the National Plan and that the Association would maintain separate fiscal accounting for its activities as a service provider to the National Plan, including the use of segregated accounts for fees received from the National Plan and premiums paid on behalf of the Association's members covered under the Associations's health care program.[2] All net income generated by the provision of services to the National Plan would be used to benefit the Association's health benefit program and participants. Further, none of the liquid assets of the Association (e.g., premiums paid on behalf of its members and earnings thereon) would be used to provide or subsidize the services to the National Plan, and segregated accounts would be used for the Association's activities with respect to the National Plan and the Association's health benefit program.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include any plan, fund, or program established or maintained by an employer or an employee organization, or by both, to provide group health coverage. The Association clearly provides benefits identified in section 3(1) of ERISA to its members.

Further, it is the position of the Department of Labor (the Department) that Santa Fe and the labor unions representing collective bargaining unit employees of Santa Fe have jointly established and maintain the program of benefits that the Association offers its members which therefore constitutes an employee welfare benefit plan under

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[1] Inasmuch as you have not requested an opinion regarding the status of the National Plan under Title I of ERISA, we express no opinion herein as to whether the National Plan constitutes an employee welfare benefit plan under that title.

[2] We assume that the Association and the National Plan would negotiate at arms' length to determine the fees the National Plan would pay to the Association. We also assume that the Association would consider, in negotiating its fee schedules with the National Plan, not only the amounts that would compensate the Association for its direct expenses in providing services to the National Plan (e.g., doctors' salaries, costs of medications) but also that portion of any expenses incurred by the Association with respect to its fixed assets (e.g., mortgage, property taxes, etc.) that reflect the use of the fixed assets in providing services to the National Plan.

Title I.[3] The manner in which these entities have divided among themselves the ability to control the benefit program does not affect the conclusion that together they jointly established and maintain the program of benefits offered by the Association. Whether or not the Association becomes a point-of-service provider under the National Plan, the program of benefits offered to members of the Association who are employees or former employees of Santa Fe will continue to be an employee welfare benefit plan within the meaning of section 3(1) of Title I of ERISA.

However, if the Association becomes a point-of-service provider under the National Plan, those individuals who receive benefits from the Association as a service provider, but who are covered under the National Plan rather than as members of the Association, would participate in the National Plan and would not be participants in the employee welfare benefit plan offered by the Association to retirees of Santa Fe and their dependents.[4] As the National Plan for active railroad employees and their dependents and the program of benefits offered to members of the Association who are retired employees of Santa Fe and their dependents would be separate entities, fiduciaries of the respective programs would have to view their responsibilities under Part 4 of Title I of ERISA in light of this separation between the two plans.

If the proposed course of action is followed, the Association would be a service provider (as defined in ERISA section 3(14)(B)) with respect to the National Plan.[5] The Association would provide health care benefits to participants in the National Plan (including active employees of Santa Fe and their dependents) pursuant to a contractual arrangement with the National Plan. The National Plan specifies the benefits to which participants are entitled. Such benefits would then be provided for in the National Plan's service contract with the Association. The Association would continue to maintain its health benefit program for retirees of Santa Fe and their dependents.

Based on your representations concerning the use of the Association's fixed assets, it is the Department's view that the use of the excess capacity of the Association's fixed assets to provide services to the National Plan would not, in

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[3] We note that, in order to receive employer contributions, certain trust funds may be required to comply with section 302(c)(5) of the Labor Management Relations Act of 1947 (the LMRA), 29 U.S.C. § 186(c)(5), including provisions requiring equal representation of employers and union representatives in the administration of the fund. In arrangements not covered by the LMRA, the proportion of employer and union representatives may be different from that required by the LMRA. See the Railway Labor Act, 45 U.S.C. § 152; U.S. v. Davidoff, 359 F. Supp. 545 (EDNY 1973). We recognize that, in such arrangements, the employer may actively support and participate in the establishment and maintenance of a plan, even though the employer neither dominates nor has equal representation in the administration of the plan. Nothing in this opinion, however, is intended as an interpretation of any provision of the LMRA or the Railway Labor Act.

[4] The issue of whether and to what extent the provisions of sections 3(40) and 514(b)(6) regarding multiple employer welfare arrangements (MEWAs) would apply as a result of the Association's entering into an arrangement with the National Plan is not addressed in this advisory opinion inasmuch as the information submitted with your request was insufficient for us to address this issue at this time.

[5] To the extent that the Association exercises any discretionary authority or responsibility regarding the management or administration of the National Plan in the course of providing managed care services to participants of the National Plan, the Association may become a fiduciary with respect to any employee welfare benefit plan created under the National Plan. The Association could exercise such discretionary authority, for instance, if it has discretion in determining the eligibility of National Plan participants for benefits, or in the amount of benefits to provide. Whether the Association has such discretionary authority is an inherently factual question.

itself, constitute a violation of ERISA's exclusive purpose rule contained in sections 403(c)(1) and 404(a)(1). However, because violations of sections 403(c)(1) and 404(a)(1) could occur in the course of the provision of services by the Association, the Department is unable to rule that the described arrangement would not violate those sections in operation. In particular, we wish to emphasize that only the excess capacity of the Association's fixed assets may be used to provide services to the National Plan. To the extent that the provision of services to the National Plan causes the Association to be unable to provide benefits to its own members, or to delay or otherwise impair the provision of such benefits, violations of ERISA sections 403(c)(1) and 404(a) would occur.

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,

Susan G. Lahne
Division of Coverage, Reporting and Disclosure