U.S. Department of Labor

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

Reply to the Attention of:
John Hunter
(202) 523-8671

OPINION NO. 82-39A
Sec. 403(a), 408(b)(2), 406(b)

AUG 5 1982

Mr. Thomas W. Phillips
Phillips, Wilson, Webster, Smith & Ripley
Post Office Box 436
Oneida, Tennessee 37841

Re: Southern Labor Union Pension Fund (the Plan)
Identification Number: F-2182

Dear Mr. Phillips:

This letter responds to your request for an advisory opinion concerning the establishment of an investment committee for the Plan under the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

According to your letter, the Plan is a trust fund created under section 302(c) of the Labor Management Relations Act, 1947 (LMRA). The Board of Trustees of the Plan is considering the establishment of an investment committee which would manage and control the investment of the Plan's assets. The committee would consist of representatives of contributing employers and representatives of the Southern Labor Union. The committee members would serve without any compensation from the Plan.

You request an advisory opinion that the establishment of the investment committee by the Plan's Board of Trustees to perform investment services for the Plan would not contravene the fiduciary responsibility provisions of ERISA.

Section 403(a) of ERISA provides, in pertinent part, that the assets of a plan are to be held in trust by one or more trustees and that the trustees are to have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that, in accordance with express plan provisions, the trustees are subject to the proper directions of a named fiduciary who is not a trustee, or that authority to manage, acquire, or dispose of plan assets is delegated to one or more investment managers under ERISA section 402(c)(3). The term "investment manager" is defined

by ERISA section 3(38) to include certain banks, insurance companies, and investment advisers registered under the Investment Advisers Act of 1940.

Your letter indicates that the investment committee would not be established under the provisions of section 403(a) which relate to the direction of investments by a named fiduciary and to the delegation of investment authority to an "investment manager." Rather, you describe the committee as one which would serve merely as an arm of the Plan's Board of Trustees, without relieving the trustees of liability under ERISA for the actions taken by the committee.

In our opinion, the appointment of the investment committee by the Board of Trustees would not, in itself, contravene section 403(a) of ERISA. The Board of Trustees would continue to maintain exclusive authority and discretion to manage and control the assets of the plan within the meaning of section 403(a) of ERISA. Therefore, the trustees would be fully liable under the fiduciary responsibility provisions of ERISA for the acts and omissions of the investment committee. Moreover, since the members of the committee would be plan fiduciaries as that term is defined by ERISA section 3(21)(A), they also would be fully liable under the fiduciary responsibility provisions for their acts and omissions.

Section 406(a) of ERISA prohibits certain direct and indirect transactions, including the furnishing of services, between a plan and a party in interest of the plan as defined by ERISA section 3(14). Under section 408(b)(2) of ERISA and regulation section 29 CFR 2550.408b-2, the provision of any service to a plan by a party in interest is exempt from section 406(a) if (A) the service is necessary for the establishment or operation of the plan, (B) the service is furnished under a contract or arrangement which is reasonable, and (C) no more than reasonable compensation is paid for the service. Since the members of the investment committee would not receive compensation from the Plan, their services would be exempt from section 406(a) if the first two conditions stated above are satisfied. Whether these conditions are met in a particular case is an inherently factual question on which the Department of Labor ordinarily will not rule. See section 5.01 of ERISA Procedure 76-1.

Section 406(b) of ERISA prohibits certain acts of fiduciary self-dealing and conflicts of interest, such as a plan fiduciary dealing with the assets of the plan in his or her own interest or for his or her own account. The regulation cited above explains that section 408(b)(2) does not provide relief from acts described in section 406(b) of ERISA. However, as stated in section 2550.408(b)-2(e)(3) of the regulation, the provision of services to a plan without compensation does not, in itself, constitute an act described in that section. Whether an arrangement for the provision of services to a plan otherwise would involve an act prohibited under section 406(b) would depend on the facts and circumstances of the particular case. Nevertheless, we see nothing in the information you furnished which would indicate that the trustees' act of establishing the investment committee would violate section 406(b).

We wish to note that this letter relates only to the sections of ERISA addressed above and not to any other ERISA provisions which may be applicable in the situation you presented. In

particular, we make no comments regarding section 404(a) of ERISA, which requires that, among other things, plan fiduciaries act prudently, solely in the interest of plan participants, and in accordance with the plan documents. Also, we make no comments concerning section 302(c) of the LMRA, since the Department of Justice rather than the Department of Labor has jurisdiction regarding that provision.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of that procedure explains the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs