

**U.S. Department of Labor**

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



Reply to the Attention of:  
**OPINION NO. 82-51A**  
Sec. 203(a)(3)(B)

SEP 28 1982

Dr. David T. Livingston  
Vice President and Corporate Director of Research  
TIC International Corporation  
2323 North Mayfair Road, Suite 500  
Milwaukee, Wisconsin 53226

Dear Dr. Livingston:

This is in response to your request for an advisory opinion on behalf of the Plasterers and Cement Masons Local 109 Pension Fund (hereinafter referred to as either the Fund or the Plan), which you state is a multiemployer plan,<sup>1</sup> regarding the application of the offset rule in the suspension of benefits regulation issued by the Department of Labor under section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) (46 Federal Register 8894 (January 27, 1981), amended 46 Federal Register 59243 (December 4, 1981)).

You ask how the offset provision of that regulation should be applied to six situations which you have set forth as indicated hereinafter.

The offset provision limits deductions for the recapture of payments previously made by the plan during those calendar months or pay periods in which the employee was engaged in section 203(a)(3)(B) service to 25 percent of that month's total benefit payment which would have been due but for the offset as to payments beyond the initial one upon resumption; that initial payment may be offset without limitation (§2530.203-3(b)(3)).

The regulation provides also that benefit payments shall resume no later than the first day of the third calendar month after the calendar month in which the employee ceases to be employed in section 203(a)(3)(B) service, provided that the employee has complied with any reasonable procedure adopted by the plan for notifying it that he has ceased section 203(a)(3)(B) service (§2530.203-3(b)(2), 46 Federal Register 8904 (January 27, 1981)). Accordingly, until the employee gives the plan such notice, the plan may continue to treat the employee as if that service is continuing, but, of course, benefits could actually be forfeited only for those months in

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<sup>1</sup> This accords with the latest annual report (Form 5500) on file with the Department of Labor, in which the plan administrator has checked that the plan is a multiemployer plan.

which the employee in fact engaged in section 203(a)(3)(B) service. In addition, the regulation provides that in certain cases a plan would be permitted to apply a rebuttable presumption that a retiree's employment in section 203(a)(3)(B) type service exceeded the plan's minimum hours of employment requirement applicable to such service (§2530.203-3(b)(7)).

Our answers regarding the situations you posed are conditioned upon the Plan's being, in fact, a multiemployer plan, the employment in question meeting the requirements for "section 203(a)(3)(B) service;" and the plan's compliance with all other applicable requirements of the suspension of benefits regulation.

### SITUATION 1

In the first of these situations, you state:

The retiree works 40 hours or more in the same industry, same trade and same geographic area during the month of April. The Fund Office discovers his reemployment when contributions came in during the month of May for work performed in April. Meanwhile, the pension check for May is issued late in April. Consequently, one overpayment is made.

Upon discovering his reemployment in May, the Fund Office immediately suspends benefits under the presumption rule and does not issue a check for the month of June. However, the retiree notifies the Fund Office in June that he has not worked since April 30th.

As noted above, under the suspension of benefits regulation benefit payment would not be required to resume until the first day of the third calendar month in which the employee notifies the plan that he ceased being employed in section 203(a)(3)(B) service. See §2530.203-3(b)(2). As you state, in that case that would be September 1st.

We concur in your conclusions that if benefits are not resumed until September 1st, they must cover the months of July and August as well as September plus any underpayments minus any overpayments and that in that case, the overpayment for the month of April (when the participant worked in section 203(a)(3)(B) service but the plan had not yet learned of that service) and the underpayment for the month of June (after the plan became aware of the participant's section 203(a)(3)(B) service and presumed it continued), effectively cancelled each other out so that the check paid on September 1st would cover three months.

### SITUATION 2

You set forth the second situation as follows. This is similar to Situation 1

except two months go by before the previous overpayments are discovered. In this case, both overpayments are discovered in June for work performed in April and May. However, in June the retiree notifies the Fund Office that he is no longer working. Consequently, the Fund did not apply the presumption rule and no future benefits were suspended.

As with Situation 1, payments need not resume until September 1st. At that time, in accordance with the December 4, 1981 amendment to §2530.203-3(b)(3), the three months' payments which would have been due for July, August, and September had there been no overpayments may be offset without limitation, so that, as noted in your submission, after the two overpayments for April and May are offset, only one month's payment is due.

### SITUATION 3

Under the third situation you state that:

Three overpayments are made \*\*\* for the months of April, May, and June. In June the Fund discovers that the retiree is reemployed and applies the presumption rule.

Sometime in August the retiree notifies the Fund Office that he ceased working on June 30th. Meanwhile, benefits have been suspended under the presumption rule for the months of July and August.

You are correct that benefits would not have to resume until November 1st and that at that time the payment would have to be for the equivalent of two months. Specifically, it would have to include the five months of July through November minus the three overpayments from April, May, and June.

### SITUATION 4

You state under the fourth situation that:

In this case, overpayments are made for the months of April, May, and June. In August, contributions came in for these three months and also the retiree notifies the Fund Office that he stopped working on June 30th. Meanwhile, checks were issued for July and August when the retiree was not working.

We concur in your conclusions that

three overpayments have been made (for the months of April, May, and June). Resumption of benefits would be postponed until the November check. However, no check would be issued for November because although the Fund owed the retiree for the

months of September, October, and November, it could subtract ... the three months of overpayments for April, May, and June.

#### SITUATION 5

In this case, four months elapse before the Fund Office discovers that the retiree is working. As a result, overpayments are made for the months of April, May, June, and July.

Sometime in July, the Fund Office becomes aware of the retiree's reemployment and applies the presumption rule. As a result, no pension check is issued for August.

Sometime in August, the Fund Office is notified by the retiree that he stopped working as of July 31st.

You indicate also that he worked 40 or more hours in July.

Your conclusion is proper that although the retiree stopped working at the end of July, the suspension of his August benefits was permissible; the grounds, however, is that the plan did not have notice until August and, as stated above, no payment is due until the start of the third month after notice is received, which would be November 1st. However, no payment would be due on November 1st since there could be offset against the payments which would otherwise be due at that time for September, October, and November the overpayments for April, May, and June.

It is noted that the overpayment for July was already balanced against the payment for August which was withheld. Therefore, the first actual payment is due December 1st.

#### SITUATION 6

In the final situation you indicate that:

[T]he retiree goes to work for a non-union employer. It takes five months before his reemployment is discovered. Meanwhile, five overpayments are made covering the months of April through August in which the retiree worked 40 hours or more each month.

In September, a union official reports the retiree's reemployment to the Fund Office. However, the Fund does not apply the presumption rule because the union official also indicates that all work on the project with which the retiree was involved was completed late in August. Meanwhile, the retiree has received his pension check for September.

While you indicate that the plan does not apply a presumption that the work has continued, because when, in September, the plan learned about the retiree's work it learned also that it had

already been completed in August, you indicate that payments were not made in October, November, and December. This would be proper because, as indicated above, §2520.203-3(b)(2) permits the resumption of benefits to be as late as the first day of the third calendar month after notice of cessation of section 203(a)(3)(B) service. That would be December 1st, since there was no notice until September.

However, as you conclude properly, no payment would be due on December 1st because the plan could withhold three of the five months of overpayment at that time. While §2530.203-3(b)(3) permits 100 percent offset against the first payment due (in this case covering three months), subsequent payments may be offset at a rate limited to 25 percent. Accordingly, the remaining two months of overpayment could be recaptured no sooner than eight months thereafter, or on August 1st of the following year.

This letter constitutes an advisory opinion, under ERISA Procedure 76-1 (issued August 27, 1976, copy enclosed). Accordingly, this letter is issued subject to the provision of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton  
Administrator  
Pension and Welfare Benefit Programs

Enclosure