U.S. Department of Labor

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

Reply to the Attention of:

OPINION NO. 83-46A
Sec. 3(2), 3(1), 3(3)

SEP 8 1983

Mr. Theodore M. Forbes, Jr.
Gambrell & Russell
4000 First Atlanta Tower
Atlanta, Georgia 30383

Dear Mr. Forbes:

This is in reply to your inquiry concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to an Investment Bonus Agreement (the Agreement) collectively bargained between Eastern Air Lines, Inc. (Eastern) and the International Association of Machinists and Aerospace Workers, District 100 (the Union). Specifically, you submitted the original Agreement to the Department of Labor (the Department) as well as your subsequent proposal to amend the Agreement. You are requesting from the Department an advisory opinion stating that the Agreement is not an employee benefit plan within the meaning of section 3(3) of title I of ERISA.

Your correspondence and the materials you forwarded pursuant to your request contain the following facts and representations. The purpose of the Agreement is merely to vary a portion of employee compensation in accordance with Eastern's financial success. You note that Eastern also has a pension plan for its mechanics and that its pension plan is separate from this Agreement. The Agreement replaces a Variable Earning Program previously agreed on by Eastern and the Union. According to the Agreement, each pay period until June 30, 1984 Eastern identifies within its general assets a specific amount for each employee participating in the Agreement. Ordinarily, the amount identified is 3.5 percent of the employee's compensation. This amount is not included in the employee's taxable income at the time it is identified. Interest on the amount is paid at 10 percent per year or at the prime rate if lower than 10 percent. With Eastern's approval, participating employees may increase the 3.5 percent figure in increments of 1 percent.

You state in your correspondence that the amounts identified by Eastern under the Agreement are payable to the participating employee with interest either from Eastern's profits or, ultimately, from its general accounts during the first 30 days of 1987 without regard to profits. You explain that, if Eastern makes a profit, amounts identified are payable earlier and, if the profit is great enough, the participating employee will receive a bonus.

Bonus amounts are payable as follows: in years when Eastern calculates, based on a formula provided in the Agreement, that an initial profit/revenue ratio is less than plus 2 percent of total operating revenues, the difference between plus 2 percent of total operating revenues for that year and the actual profit will be retained in an Agreement account. Any amount of money not retained in the Agreement account will be paid to employees on a pro

rata basis of the Agreement account of each employee. If the profit revenue ratio is greater than 2 percent plus the amount of money required to return all money identified according to the Agreement account including interest during that year, then Eastern will pay one-third of all such net income above this sum to each employee on a pro rata basis of the percent of compensation held under the Agreement including interest. Such payments constitute a bonus and not a basis for determining the level of benefits related to wages. The payment of any monies as a result of the above rules shall be carried out as early as possible after December 31 of each calendar year.

Funds credited under the Agreement during the period July 4, 1982, through December 31, 1982, and not returned above shall be paid in the following manner: (l) at termination of employment from Eastern as a result of retirement, resignation, discharge, death, or layoff which extends beyond 4 months; or (2) if not previously paid, then in 1986 as a return of one-third of 1985 profits in excess of 2 percent of revenues on a pro rata basis to employees to the extent amounts held under the Agreement are owed, including interest. Although no provision is included in the Agreement to indicate that such funds not previously paid are payable to employees at the close of the 1986 accounting year, we assume for purposes of this opinion that all funds identified by Eastern during this period will eventually be payable to the participating employee and that they will be payable prior to the limit on refund date extensions specified below.

Funds credited under the Agreement during the period January 1, 1983, through June 30, 1984, and not returned under the rules using the profit/revenue ratio shall be paid as follows: (1) at termination of employment from Eastern as a result of retirement, resignation, discharge, death, or layoff which extends beyond 4 months; or (2) if not previously paid, then in 1986 as a return of one-third of 1985 profits in excess of 2 percent of revenues on a pro rata basis to employees to the extent amounts held under the Agreement are owed, including interest; or (3) if not previously paid under (1) or (2) above, at the closing of the 1986 accounting year all funds remaining including interest are paid to employees within 30 days. The payment of one-third of profits called for above is not cumulative. In no event is more than one-third of profits in excess of 2 percent of revenues proportionate to the employees involved in the program paid in a single year.

The Agreement as originally submitted contained a clause allowing a participating employee to exercise an irrevocable option at the inception of the Agreement to allow Eastern to retain all identified amounts and interest until the employee's termination of employment. The option was exercisable only within 60 days after ratification of the Agreement. As originally submitted, the Agreement also contained a clause allowing any participating employee to extend any scheduled payment date in 1 year increments within 60 days before such scheduled payment date. However, as revised, the Agreement's irrevocable option for payment to termination of employment is deleted and the Agreement is modified to disallow refund date extensions beyond February 1, 1991 or the 60th anniversary of the participating employee's birthdate, whichever is earlier.

Section 3(3) of ERISA defines the term "employee benefit plan" to include an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

Section 3(2)(A) of ERISA defines the term "employee pension benefit plan" to include any

program established or maintained by an employer to the extent that by its express terms or as a result of surrounding circumstances it provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. In regulations issued under this section (29 C.F.R. §2510.3-2(c)), the Department has taken the position that the term "pension plan" does not include bonus programs established by an employer unless such bonus payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.

The Agreement prior to amendment provided for deferral of income to termination of employment or beyond by its express terms. The Agreement as amended, on the other hand, does not by its express terms defer income to termination of employment or beyond. However, the Agreement as amended would apparently continue to defer income to periods extending to termination of covered employment or beyond at least for employees who receive funds identified during the period of their employment which are payable at termination of their employment with Eastern. In the Department's view, the mere fact that a plan provides that payments which would otherwise be made on a specified date may be paid earlier in the event an employee terminates employment does not automatically mean that the arrangement is a pension plan by its express terms. Rather, the Department views such a provision as one factor to be considered along with other surrounding facts and circumstances in making the determination of whether the agreement may be providing retirement income to participants. The Department will not render an opinion concerning whether the Agreement is a pension plan as a result of surrounding circumstances; however, surrounding circumstances may include, for example, the manner in which Eastern or the Union provides information about participating employees' creditor status under the Agreement, solicits salary reduction in excess of 3.5 percent of compensation, solicits refund date extensions from employees, or otherwise maintains the Agreement. In addition, you should note that in ERISA Opinion 81-27A, the Department viewed the plan under consideration as one which might be a pension plan as a result of surrounding circumstances indicating that if, for example, distributions under a program are skewed toward the last years of the participants' careers, the program might be an employee pension benefit plan. We also believe that a relatively long payout schedule is one factor which should be considered in determining whether an arrangement is a pension plan as a result of surrounding circumstances.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" as 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). You argue that the Agreement is not for the purpose of providing any benefit included in section 3(1) of ERISA. The Department does not disagree with that assertion based on the materials you have provided.

This opinion is not intended to interpret any Federal law other than title I of ERISA.

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

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs