U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

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2013-02A
ERISA SEC.
3(37)

Dear Mr. Zazzali:

This is in reply to your request on behalf of the Teamsters Joint Council No. 73 Pension Plan (Plan) for an advisory opinion regarding Title I of the Employee Retirement Income Security Act of 1974 (ERISA). The Plan is a defined benefit pension plan that provides benefits for "officers, business agents, trustees, or clerical employees" of Local Unions affiliated with the Teamsters Joint Council No. 73 (Joint Council) or of the Joint Council. You asked the Department of Labor (Department) to determine that certain documents involving participation in the Plan by the Local Unions constitute "collective bargaining agreements" for purposes of making an election that the Plan be treated as a multiemployer plan pursuant to ERISA section 3(37)(G)(i)(II).

Facts and Representations

You supplied the following facts and representations in connection with your request. On or about August 17, 1971, the Joint Council executed a trust agreement with its Executive Board for the Executive Board members to become the trustees of the Plan. By a resolution adopted at the Joint Council Convention in August, 1971, the Local Unions approved the Plan. The Plan rules governing eligibility have been amended from time to time. Initially, the Local Union and Joint Council contributions as employers were paid at the rate of 4.25% per month of the employee's monthly wages, with a minimum contribution of $4.25 per month or $51.00 per year. The Executive Board of the Joint Council periodically requested that the Council and Local Unions, in their capacity as contributing employers, consider increases to the contribution rates. Some increased rates, and others did not. Rates currently range from 5% of pay to 10% of pay.

According to your submission, in 1974, the Plan began paying premiums to the Pension Benefit Guaranty Corporation (PBGC) as a multiemployer plan. You provided copies of the Plan's PBGC Form 1 (Annual Premium Payment) for 1985, 1986 and 1987, which indicate that the Plan submitted premium payments to PBGC as a multiemployer plan through 1987. After 1987, and currently, the Plan has characterized itself as a multiple employer plan rather than a multiemployer plan. For example, in its most recent Form 5500 filing, for 2010, the Plan checked the box to indicate it was a "multiple-employer" plan, and included Schedule SB "Single-Employer Defined Benefit Plan Actuarial Information," a schedule filed by plan administrators of single employer defined benefit plans and multiple employer defined benefit plans that are subject to the minimum funding standards. You have not been able to provide any documentation or an explanation concerning the Plan's change from characterizing itself as a multiemployer plan to a multiple employer plan. You represent that PBGC informally advised the Plan that PBGC has no record of any formal request by the Plan to revoke its multiemployer

plan status. In addition, you represent that the only documentation that you have been able to locate is a handwritten note in the Plan's former actuary's file which indicates the Plan would be submitting premiums to PBGC for 1988 as a multiple employer plan without providing any further explanation.

By letter dated August 17, 2007, the Plan, through its actuary, Basil Castrovinci Associates Inc., submitted a request to PBGC to elect multiemployer plan status under ERISA section 3(37)(G)(i)(II) pursuant to PBGC's notice of election procedures, *Election of Multiemployer Plan Status,* 72 Fed. Reg. 40176 (July 23, 2007). You indicated that PBGC determined that the Plan was not a multiemployer plan and that the Plan asked PBGC for reconsideration. You stated that upon its review of the matter, PBGC advised the Plan that, consistent with its initial decision, PBGC did not consider the Plan to be a multiemployer plan. You represented that PBGC also advised the Plan that, for purposes of the election provided under ERISA section 3(37)(G), the Plan could seek review by the Department with respect to a determination of whether or not there is sufficient evidence that the relationship between the Joint Council and its affiliated Local Unions constitutes a collective bargaining relationship such that the Plan is maintained pursuant to one or more collective bargaining agreements within the meaning of ERISA section 3(37)(A)(ii). You indicated that PBGC said that PBGC would review the matter again if the Department's determination was contrary to PBGC's conclusion on that issue.

You represent that the Joint Council is a "labor organization" as defined by applicable federal law, exempt from federal taxation under section 501 of the Internal Revenue Code of 1986 (Code), and that the Joint Council files Form LM-2, "Labor Organization Annual Report" with the Department's Office of Labor Management Standards (OLMS). The Local Unions are also exempt from federal taxation as "labor organizations" and also file Form LM-2s with OLMS.

According to your submission, the Joint Council functions as the employee organization that represents the employees covered by the Plan for purposes of collective bargaining with their employers, the Local Unions. You provided the following documents to illustrate the existence of collectively bargained agreements between the Joint Council and the Local Unions to establish and maintain the Plan:

- a trust agreement for the Plan dated February 4, 1971, by and between the Joint Council and the Executive Board of Joint Council 73, as the Plan Trustees;
- minutes of meetings of the Plan trustees;
- illustrative examples of correspondence from the Local Unions acknowledging their obligation to make contributions to the Plan on behalf of their employees;
- illustrative examples of modifications of employer contribution rates for the Local Union contributions to the Plan, including correspondence and minutes of various Local Union meetings; and
- illustrative examples of monthly remittance forms submitted by the Local Unions.

These documents all focus on the existence of an obligation to make contributions to the Plan. For example, the sample remittance forms include the following language: "By remitting these monies and signing this form, the employer agrees to comply with all of the terms and conditions

of the Trust Agreement governing the employers' obligation to make contributions to the Teamsters Joint Council No. 73 Pension Plan."

You also submitted a 2008 affidavit of Salvatore Provensano who states that he was an officer of the Joint Council in 1968 when the Pension Plan was established, and supplies the following recollection:

> We the officers of Joint Council No. 73, acting on behalf of all employees of Local Unions within the jurisdiction of Joint Council No. 73 negotiated with the Local Unions for Pension benefits for the employees of all Local Unions in Joint Council No. 73. As a result of those negotiations, the Local Unions, including my Local Union No. 560, as employers, agreed to participate in and contribute to, the Joint Council No. 73 Pension Plan on behalf of all employees of such Local Unions.

Relevant Law and Analysis

The term "multiemployer plan" is defined in section 3(37) of ERISA. Section 3(37)(A) of ERISA provides in pertinent part:

> (A) The term "multiemployer plan" means a plan –
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> (i) to which more than one employer is required to contribute, [and]
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> (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer . . . .

The Pension Protection Act of 2006 (PPA) added section 3(37)(G) to ERISA and parallel section 414(f)(6) to the Code, which permit an eligible plan to elect to be a multiemployer plan for all purposes under ERISA and the Code. ERISA section 3(37)(G) provides in relevant part:

> (i) Within 1 year after the enactment of the Pension Protection Act of 2006 –
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> * * *
>
> (II) a plan that meets the criteria in clauses (i) and (ii) of subparagraph (A) of this paragraph . . . may, pursuant to procedures prescribed by the Pension Benefit Guaranty Corporation, elect to be a multiemployer plan, if –
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> (aa) for each of the 3 plan years immediately preceding the first plan year for which the election under this paragraph is effective with respect to the plan, the plan has met those criteria or is so described,
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> (bb) substantially all of the plan's employer contributions for each of those plan years were made or required to be made by organizations that were exempt from tax under section 501 of the Internal Revenue Code of 1986, and

(cc) the plan was established prior to September 2, 1974.

In 2007, section 3(37)(G) of ERISA was amended to provide:

> (vii) For purposes of this Act and the Internal Revenue Code of 1986, a plan making an election under this subparagraph shall be treated as maintained pursuant to a collective bargaining agreement if a collective bargaining agreement, expressly or otherwise, provides for or permits employer contributions to the plan by one or more employers that are signatory to such agreement, or participation in the plan by one or more employees of an employer that is signatory to such agreement, regardless of whether the plan was created, established, or maintained for such employees by virtue of another document that is not a collective bargaining agreement.

The Department has not issued regulations interpreting the phrase "maintained pursuant to a collective bargaining agreement" for purposes of ERISA sections 3(37)(A)(ii) and 3(37)(G). The Department has defined a similar phrase found in ERISA section 3(40)(A)(i). *See* 29 CFR 2510.3-40. Section 3(40)(A) of ERISA defines the term "multiple employer welfare arrangement" (or MEWA) in pertinent part, as an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) of section 3 of ERISA to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is "*established or maintained-- (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements . . . .*" (Emphasis added) The Department's regulation at 29 CFR 2510.3-40 provides specific criteria that must be present in order for an employee welfare benefit plan to be deemed to be established or maintained under or pursuant to a collective bargaining agreement or agreements for purposes of ERISA section 3(40). While many of the criteria in 29 CFR 2510.3-40 are specific to distinguishing collective bargaining relationships from health insurance arrangements in the MEWA context, the regulation sets forth several indicia that the Department sees as relevant to determining more generally whether a plan is maintained pursuant to an agreement which is a bona fide collective bargaining agreement.

In particular, the following factors in 29 CFR 2510.3-40(b)(4), which are not specifically tailored to the MEWA definition, are relevant here:

> (1) The agreement provides for contributions to a labor-management trust fund structured according to section 302(c)(5), (6), (7), (8), or (9) of the Labor Management Relations Act (LMRA) (also referred to as the Taft-Hartley Act), or to a plan lawfully negotiated under the Railway Labor Act.
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> (2) A court, government agency, or other third-party adjudicatory tribunal has determined, in a contested or adversary proceeding, or in a government-supervised election, that the employee organization that is a party to the agreement is the lawfully recognized or designated collective bargaining representative with respect to one or more bargaining units of personnel covered by such agreement.

(3) The employee organization that is a party to the agreement provides, sponsors, or jointly sponsors a hiring hall(s) and/or a state-certified apprenticeship program(s) that provides services that are available to substantially all active participants covered by the plan.

(4) The agreement has been determined to be a *bona fide* collective bargaining agreement for purposes of establishing the prevailing practices with respect to wages and supplements in a locality, pursuant to a prevailing wage statute of any state or the District of Columbia.

(5) There are other objective or subjective indicia of actual collective bargaining and representation, such as that arm's-length negotiations occurred between the parties to the agreement; that the employee organization that is party to the agreement actively represents employees covered by such agreement with respect to grievances, disputes, or other matters involving employment terms and conditions other than coverage under, or contributions to, the employee benefit plan, or that there is a geographic, occupational, trade, organizing, or other rationale for the employers and bargaining units covered by such agreement.

Based on an evaluation of these factors, and the information you presented, the Department is unable to conclude that the Plan should be treated as maintained pursuant to a collective bargaining agreement for purposes of ERISA 3(37)(G) because there is no evidence that the Plan was established or is maintained pursuant to an agreement resulting from a bona fide collective bargaining relationship. In the Department's view, such a conclusion in this case requires evidence of actual collective bargaining between one or more employers and an employee organization that represents the employer(s)'s employees covered by such agreement with respect to grievances, disputes, or other matters involving employment terms and conditions other than coverage under, or contributions to, the Plan. The information you submitted indicates only the existence of agreements by the participating Local Unions (in their capacity as employers) to make contributions to the Plan. These documents do not establish an agreement between the Local Unions, as employers, and the Joint Council, as a chosen representative of the employees, for purposes of negotiating with respect to the Plan or any other terms or conditions of employment.

You argue that ERISA section 3(37)(G)(vii), as incorporated into section 3(e) of the PBGC election procedures, evidences a legislative intent that something less than a traditional collective bargaining agreement outlining terms and conditions of employment, wages, vacations, holidays, etc., will support an election under ERISA section 3(37)(G). It is the Department's view, however, that ERISA section 3(37)(G)(vii) permits an election of multiemployer plan status even if the document establishing the plan is not a collective bargaining agreement, as long as there is a collective bargaining agreement that provides for or permits employer contributions by the signatory employers or participation of the signatory employers' employees. Section 3(37)(G)(vii) does not address whether any particular compilation of documents constitutes a collective bargaining agreement for purposes of ERISA section 3(37), and does not change the underlying requirement of ERISA section 3(37) that a bona fide collective bargaining

relationship exist. This view comports with PBGC's interpretation of its own multiemployer plan election procedures. *See Letters to Basil Castrovinci from PBGC dated June 16, 2008 and March 6, 2010;* PBGC's *Election of Multiemployer Plan Status*, 72 Fed. Reg. at 40180.

You assert, citing federal court decisions under section 302(c)(5)(B) of the LMRA, that the documents you provided should satisfy the definition of a collective bargaining agreement under ERISA 3(37)(G). These cases, however, are not relevant to your request because they do not address what constitutes a "collectively bargained agreement," but instead determine whether a particular employer is obligated to contribute to a collectively bargained plan. *Bricklayers Local 21 v. Banner Restoration, Inc.,* 385 F.3d 761, 768-69 (7th Cir. 2004) (by a course of conduct, the employer agreed to contribute to Funds that were indisputably the product of collective bargaining); *Central States v. Behnke, Inc.*, 883 F.2d 454, 459 (6th Cir. 1989) (employer's contribution obligation may be established by the terms of a written plan or under the terms of the collective bargaining agreement). You have not asked, and we need not determine whether the Local Unions have a legal obligation to make contributions to the Plan. Such a determination is unnecessary because you have not established that a bona fide collective bargaining relationship exists between the Local Unions in their capacity as participating employers and the Joint Council as the employees' representative in connection with the Plan.

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

Sincerely,

Susan Elizabeth Rees
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations