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May 5, 1976

Dear :

This is in response to your letter of December 5, 1974, and subsequent conversations with of this office, concerning the application of the fiduciary responsibility provisions set forth in Part 4 of Title I of the Employee Retirement Income Security Act of 1974 (the Act) to two transactions engaged in by the Laborers Pension Fund, (the Plan).

Your letter sets forth the following factual representations. The Plan is a multiemployer plan created pursuant to an agreement to which the Laborers District Council (the District Council) is a party. Although not clarified in your letter, we assume for purposes of this response that members of the District Council, or members of local unions affiliated with the District Council, are covered under the Plan. In July 1974, the trustees of the Plan voted to invest assets of the Plan in the National Bank, (the Bank), a director of which is one of the trustees of the Plan, in the Life Insurance Company (the Insurance Company), of which one of the directors, the late was at the time of such investment the President of (the International Union). The District Council and, we assume, local unions affiliated with the District Council are affiliated with the International Union. According to your letter, the trustee of the Plan who is a director of the Bank does not have a controlling interest in the Bank, and does not own any "substantial" amount of the Bank's stock. In addition, your letter states that the President of the International Union had no voice or control of any kind in setting policy or making any decisions with respect to the Plan.

In your letter you inquire specifically whether the investment of assets of the Plan in the Bank constitutes a "conflict of interest" because of the status of the trustee of the Plan as director of the Bank, and whether the investment of assets of the Plan in the Insurance Company constitutes a "conflict of interest" because of the status of the President of the International Union as a director of the Insurance Company.

Section 406{a) of the Act, in relevant part, prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he knows or should know that such transaction constitutes one or more of several types of direct and indirect transactions set forth in that section between the plan and a party in interest. The term "party in interest" is defined in section 3(14) of the Act. Section 406(b) of the Act prohibits a fiduciary with respect to a plan from engaging in certain types of self-dealing described in that section.

Solely on the basis of the factual representations and assumptions set forth above, it appears that neither the investment of assets of the Plan in the Bank, nor the investment of assets of the Plan in the Insurance Company, is a transaction which is prohibited under section 406(a) of the Act. Further, with regard to the investment of assets of the Plan in the Bank, the fact that a trustee of the Plan serves as a director of the Bank would not, in the absence of further information, make the Bank a party in interest with respect to the Plan, within the meaning of section 3(14) of the Act. The investment of assets of the Plan in the Bank would not, therefore, constitute a transaction between a plan and a party in interest which would be prohibited under section 406(a) of the Act. However, you should note that a prohibited transaction under section 406(b) might occur in connection with the investment of assets of a plan in a bank of which a trustee or other fiduciary of such plan serves as a director. In this regard, you should note particularly that section 406(b) prohibits a fiduciary from acting in any capacity in any transaction involving a plan on behalf of any party or representing any party whose interests are adverse to the interests of the plan or its participants or beneficiaries. A determination as to whether violations of section 406(b) have occurred can be made only on the basis of all of the facts and circumstances surrounding a particular transaction or transactions. Your letter does not provide sufficient information regarding these facts and circumstances for us to make such a determination.

With regard to the investment of assets of the Plan in the Insurance Company, the fact that the President of the International Union served as a director of the Insurance Company would not, in the absence of further information, make the Insurance Company a party in

interest with respect to the Plan within the meaning of section 3(14) of the Act. The investment of assets of the Plan in the Insurance Company would not, therefore, constitute a transaction between a plan and a party in interest prohibited under section 406(a) of the Act. In addition, if the President of the International Union was not a fiduciary (within the meaning of section 3(2l)(A) of the Act) with respect to the Plan, he would not have been in a position to engage in a prohibited transaction under section 406(b) of the Act. From the facts and representations set forth in your letter, it appears that the President of the International Union was not a fiduciary with respect to the Plan.

Our response to the questions posed in your letter relates only to the application of section 406 of the Act to the transactions described in your letter. It does not deal with the provisions of any other statute, to such transactions. Specifically, our response does not deal with the application of the fiduciary duties set forth in section 404(a)(l) of the Act to such transactions.

Because your letter also raises questions under section 4975 of the Internal Revenue Code of 1954, we have conferred with representatives of the Internal Revenue Service and they concur in the views set forth above as they apply to such section.

Sincerely,