

August 31, 1976

Dear : (Re: 10 Civil Actions)

The Secretary of Labor has been served with copies of complaints filed on your behalf in the above-cited cases. While at the present time we do not propose to exercise our right to intervene in any of these cases pursuant to section 502 (h) of the Employee Retirement Income Security Act of 1974 (ERISA), we nonetheless wish to inform you of our views on two matters referred to in your complaints.

Paragraph 11 of each of your complaints states:

Unless the Pension Fund receives the contributions due it and can credit the same to the Defendant's employees, those employees will not be entitled to credit for hours worked which will result in their ineligibility for pension benefits upon retirement.

Without expressing any opinion on the law as it existed prior to the effective date of the Employee Retirement Income Security Act of 1974 (ERISA), I would advise you that in our opinion the substance of the position expressed in that paragraph is not lawful under ERISA. ERISA sections 202, 203, and 204, 29 U.S.C.A. §§1052, 1053 and 1054, set minimum participation, vesting and benefit accrual standards which are binding on all covered employee pension plans. All three sections provide that the satisfaction of their requirements be based solely on each participant's years of service. A "year of service" is defined as the completion of 1,000 hours of service within a designated 12-month period. The definition of the term "hour of service" was specifically reserved for determination by the Secretary of Labor through appropriate regulations.

On September 8, 1975, a definition of the term "hour of service" was published in the Federal Register. Section 2530.200b-2(a) (1) states, "An hour of service is each hour for which an employee is directly or indirectly paid, or entitled to payment, by the employer for the performance of duties during the applicable computation period..." Although the Department of Labor

will be making certain modifications in these regulations, none of the proposals under consideration would cause a change in our present position that credit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees resolution to the contrary is, in our judgment, unlawful and unenforceable.

Paragraph 4 of your Prayer for Relief in these cases requests:

That this Honorable Court rule and order that the Plaintiff, her principal or agents or other fiduciaries of the [Union] Pension Fund are immune and exempt from any and all criminal or civil actions or claims which may be brought against them by any person, including the Secretary of Labor, because of their inability to comply with the reporting and notice of requirements of law concerning participants and beneficiaries as they pertain to past or present employees of the Defendant for the periods of time wherein the Defendant has failed and refused to file Employer Remittance Reports on behalf of said employees.

Please be informed that the Secretary of Labor does not consider himself bound by orders which may be entered in litigation to which he is not a party.

I hope this information and the expression of these views will be of assistance to you.

Sincerely,