

U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
Pension and Welfare Benefit Programs
Washington, D.C. 20216



OCT 6 1978

Mr. Norman Zolot
Attorney at Law
9 Washington Avenue
Hamden, Connecticut 06514

OPINION 78-20 A

203(b) (2) (A)

204(b) (3) (B)

Dear Mr. Zolot:

This is in response to your letter of February 23, 1978, requesting an advisory opinion regarding the crediting of service under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask (1) whether the method of crediting hours of service used by the New England Teamsters and Trucking Industry Pension Fund (NET Fund) is an acceptable method under ERISA and the Department's regulations thereunder, and (2) whether the NET Fund's method of determining the accrual of benefits for less than a full year of service is acceptable under ERISA and the Department's regulations. These two questions are discussed separately below.

1. Method of crediting hours of service.

Under section 203(b) (2) (A) of ERISA, the term "year of service" is defined generally to mean a year during which the participant has completed 1,000 hours of service. The method of determining "hours of service" for this purpose is to be determined pursuant to regulations issued by the Department. 1/

1/ See sections 203(b) (2) (B) and 202(a) (3) (C) of ERISA.

The Department's regulation 29 CFR §2530.200b-3 under ERISA provides, in paragraph (a), that for all purposes for which hours of service are required to be determined, such determination shall be made (1) from records of hours worked and hours for which payment is made or due; (2) by means of one of the equivalent methods for determining hours of service described in paragraphs (d), (e), and (f) of the regulation; or (3) by any method which results in the crediting of no less than the actual number of hours of service required to be credited under 29 CFR §2530.200b-2 (a).

It appears from your letter that employers contributing to the NET Fund do not maintain records of employment in a form which would permit use of the first method described above. Instead, service is credited on the basis of hours worked or paid for, except that no credit is given for hours in excess of 40 per week. Since this method does not result in employees necessarily being credited for all the hours they work, it does not meet the standards of 29 CFR §2530.200b-2 (a), and thus is not consistent with the third method described above. Therefore, the NET Fund's method of crediting service would be acceptable under 29 CFR §2530.200b-3 only if it conformed with one of the equivalent methods for determining hours of service specified therein.

Under certain of those equivalent methods, certain hours for which an employee is paid need not be taken into account in crediting service, provided that, depending upon the method used, only 870 hours worked or 750 regular time hours, rather than 1,000 hours of service, are required for an employee to be credited with a year of service. You suggest that, even though the tests established in connection with these equivalent methods are not met by the NET Fund, other features of the system of credit used by the NET Fund make it, on balance, more favorable to employees than the methods of crediting hours described in the regulations.

The Department's regulations make no provision for alternative methods of crediting hours of service other than the methods described therein. Since, as noted above, hours of service must be determined in accordance with those regulations, it is the position of the Department that the method of crediting hours of service which you described is not consistent with the requirements of ERISA.

2. Method of determining accrual of benefits for less than a full year of service.

You state that, for purposes of benefit accrual, employees with respect to whom the plan receives contributions representing 1,800 or more hours of service per year are credited with a full year of service. For employees with respect to whom less than 1,800 hours of contributions are made to the plan, one month's credit is granted for each 150 hours of contributions. You suggest that, in most cases, this formula results in such employees being credited with a partial year of participation which is equivalent to at least a ratable portion of a full year of participation, as required under section 204(b) (3) (B) of ERISA and the Department's regulation 29 CFR §2530.204.2(c) thereunder. However, you note that, at certain levels of hours, the number of months credited to an employee represents slightly less than a ratable portion of a full year of service. ^{2/} You request advice as to whether this method of granting credit for a partial year of service satisfies regulation 29 CFR §2530.204-2(c), notwithstanding the discrepancies.

^{2/} Your computations, which are set forth in the chart on page 6 of your letter, are based upon the assumption that a full-time employee would have 2,080 hours of service. However, we note that the chart uses brackets based upon intervals of 150 hours. Since the highest bracket begins at 1800 hours, the top of that bracket would be 1950 hours, and 1950 hours should thus be used as the basis in determining whether the credit given for a partial year of participation represents at least a ratable portion of a full year. When this basis is used, the discrepancies between the number of months credited for a partial year of participation and a ratable portion of a full year of participation are somewhat greater than your chart suggests. The ratio of the top of each bracket to 1950 hours expressed as a percentage is, from the top to the bottom of the chart, 100%, 92.3%, 84.6%, 76.9%, 69.5%, 53.8%, and 46.1%.

Under section 204(b) (3) (C) of ERISA, in calculating an employee's period of service for purposes of benefit accrual, a plan is not required to take into account service during a twelve-month period during which the employee's service is less than 1,000 hours of service or the equivalent thereof as determined under 29 CFR §2530.200b-3. Accordingly, the abovedescribed requirements of section 204(b) (3) (B) and regulation 29 CFR §2530.204-2(c) do not apply with respect to employees who have less than 1,000 hours of service in a twelve-month period, and the regulation by its terms so provides. However, where those provisions do apply i.e., in the case of employees with 1,000 or more hours of service in a year, there are no exceptions from the requirement that such employees who have less than a full year of participation be credited with a partial year of participation which is equivalent to at least a ratable portion of a full year of participation although properly proportioned brackets may be used. ^{3/} Therefore, to the extent that discrepancies would occur with respect to employees who have more than 1,000 hours of service but less than a full year of participation, the NET Fund's method of determining the accrual of benefits does not comport with ERISA and the regulations thereunder.

In addition, we note from your submission that the NET Fund appears to credit hours of service, at least for some purposes, only with respect to hours for which the employer made contributions to the plan. You should be

^{3/} It might be noted that, in computing a ratable portion of a full year of participation for this purpose, there is no requirement that the computation be made on the basis of hours of service. Such computation may be made on the basis of either hours of service or some other permissible unit of credit, such as wages earned. See 29 CFR §2530.200b-1(a).

aware that, as the Department has previously advised the NET Fund, 4/ for purposes of participation, vesting and benefit accrual credit must be given solely on the basis of service performed for a participating employer, regardless of whether that employer is required to contribute for such service or has made or defaulted on his required contributions 5/.

Because the above discussion raises questions under section 411 of the Internal Revenue Code of 1954 (the Code), which is within the jurisdiction of the Internal Revenue Service (the Service), we have conferred with representatives of the Service and they concur in the analysis and conclusions set forth above as they relate to section 411 of the Code and to the Treasury Regulations thereunder.

4/ Letter from James D. Hutchinson to Margurita McCaffrey, August 31, 1976 (copy enclosed).

5/ It should be noted that, under certain circumstances, credit must be granted for some purposes under a multiple employer pension plan not only for service with respect to which an employer fails to make required contributions, but also for service with respect to which an employer is not required to make contributions. For example, when an employee moves from a job classification which is covered under the plan to a job classification which is not covered under the plan, credit must generally be granted for purposes of vesting. See section 211 of ERISA and 29 CFR §2530.210 thereunder.

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This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 FR 36281. Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions. We have considered your request for a conference under section 8 of the procedure and have decided that a conference would not be necessary or appropriate in providing an advisory opinion.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Enclosure