

U.S. Department of Labor

Labor-Management Services Administration

Washington, D.C. 20216



OPINION 80-50A

3(32)

4(b)(1)

August 29, 1980

Mr. Robert. R. Prince
Secretary and Counsel
Metropolitan Suburban Bus Authority 347 Madison Avenue
New York, NY 10017

Dear Mr. Prince:

This is in response to your letters of July 13, and August 24, 1979, and in further response to your letter of May 31, 1977. In your letters you requested an advisory opinion on the question whether the proposed pension plan (the Plan) of the Metropolitan Suburban Bus Authority (MSBA) is a governmental plan within the meaning of section 3(32) of the Employee Retirement Income Security Act of 1974 (ERISA) and, therefore, exempt under section 4(b)(1) from title I of ERISA.

The following is a summary of the representations in your letters and the materials provided with them. The MSBA provides bus transportation in Nassau County, New York. The MSBA is a wholly owned subsidiary of the Metropolitan Transportation Authority (MTA). Under New York State Law the MSBA is characterized as a "public benefit" corporation. The MSBA has no stockholders, A board consisting by statute of the members of the MT A. operate the MSBA. Funds for the operation of the MSBA are provided by operating revenues and substantial subsidies by Federal, state, and county governments. The MSBA receives no grants from private sources.

The USBA was created by the MTA pursuant to the provisions of section 1266, subdivision 5, of the New York State Public Authorities Law (the NYPA Law) which generally provides that the MTA may cause any one or more of its powers, duties, functions, or activities to be exercised or performed by a public benefit subsidiary corporation. The MTA was created in 1965.

It is a "public benefit" corporation under New York State Law and its chairman and members are appointed by the governor of the State of New York with the advice and consent of the State Senate. Section 1264, subdivision 2, of the NYPA Law declares that the MTA shall be regarded as performing an essential governmental function for the benefit of the State of New York.

In 1973 MSBA entered into an agreement with the County of Nassau under which the county agreed to condemn substantially all of the assets of the ten privately-owned companies then providing almost all

public bus transportation within the county's boundaries, and MSBA agreed, in turn, (a) to lease those assets from the county for a nominal rental, (b) to hire directly all necessary operating personnel (virtually the entire work force of nine companies and most of the work force of the tenth company were to be transferred to the MSBA payroll and become government employees), and (c) to operate and improve the bus service theretofore furnished by the private companies. Approximately 1 year later MSBA negotiated the Plan, reduced to writing in a memorandum of understanding, with the three unions representing its bus drivers and mechanics. The Plan by its terms covers all of MSBA's officers and employees. Membership is mandatory. The Plan requires both employer and employee contributions. Full credit is given for prior service with the predecessor private companies. The Plan is administered jointly by representatives of the MSBA and the unions. Prior to the 1973 "takeover" by the MSBA of the bus transportation of these companies, five of the ten privately owned companies maintained their own pension plans. The funds of four of these plans will be merged with the MSBA Plan's fund. As for the fifth company's plan, part of its assets will remain in that plan, and part of the fund will be merged with the MSBA Plan's fund.

Section 4(b)(1) of ERISA provides that the provisions of title I of ERISA shall not apply to a governmental plan. The term "governmental plan" is defined in section 3(32) of ERISA, in relevant part, as "... plan established or maintained for its employees by...the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing..."

The representations summarized above indicate that the MSBA is an agency or instrumentality of the State of New York and that the Plan would be maintained by the MSBA for its employees. In ERISA Opinion 79-36A, as your letters of July 13 and August 24, 1979 note, the Department stated its view that a plan maintained by a governmental entity for its employees would not fail to be a governmental plan merely because such plan, like the plan in question, was administered by a joint board composed of trustees appointed by the governmental entity and a labor union in equal numbers. Further, while the plan in your case would provide benefits to a limited number of individuals who may never be employees of the MSBA, the individuals were employees of businesses which the MSBA is currently operating, and the MSBA has assumed financial responsibility for the pension obligations of those businesses. Under these circumstances, the Department is of the opinion that the Plan would be a governmental plan within the meaning of section 3(32) of ERISA and, therefore, would be exempt under section 4(b)(1) from 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,

Ian D. Lanoff
Administrator
of Pension and Welfare Benefit Programs