BY THE COMPTROLLER GENERAL

Report To The Chairman, Committee On Labor And Human Resources, United States Senate

OF THE UNITED STATES

Concerns About Controlling Union Employees' Benefit Funds By The Carpenters Collection Agency, Youngstown, Ohio

The Collection Agency, established by union affiliates, collects payments from employers primarily for union employee fringe benefit funds. It is administered by five trustees who are also union trustees of one of the benefit plans served by the Collection Agency. Operating costs are paid from interest earned on employer payments before disbursement to the funds.

The Department of Labor determined that some fringe benefit fund trustees violated their fiduciary responsibilities under the Employee Retirement Income Security Act; however, Labor did not take aggressive action to correct the violations. Also, the Collection Agency may have violated the Labor-Management Relations (Taft-Hartley) Act by accepting employer payments.

GAO/HRD-83-8
NOVEMBER 12, 1982

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-206934

The Honorable Orrin G. Hatch
Chairman, Committee on Labor
and Human Resources
United States Senate

Dear Mr. Chairman:

In response to your November 24, 1981, letter and subsequent meetings with your office, we have examined into (1) the legality and functions of the Carpenters Central Collection and Administrative Agency and (2) the timeliness and effectiveness of the Department of Labor's investigation and reporting on the Collection Agency activities. We made our review at (1) the Collection Agency and Ohio Carpenters Health and Welfare Fund in Youngstown, Ohio, and (2) the Labor headquarters in Washington, D.C.; the regional office in Chicago, Illinois; and the area office in Cleveland, Ohio.

The details of the methodology used in our review are discussed in appendix I. Our findings, conclusions, and recommendations are summarized below and discussed in more detail in appendixes II, III, and IV.

COLLECTION AGENCY

The Collection Agency, established in May 1978 as a nonprofit Ohio corporation, is controlled by five trustees who also serve as union trustees for the Ohio Carpenters Health and Welfare Fund, one of the participating employee fringe benefit plans. The Agency began operating in August 1978, and it collects fringe benefit contributions from about 1,200 building trade employers primarily for union carpenters, maintains union employees' records showing the number of hours worked and fringe benefits paid on their behalf, and disburses the collected moneys along with related employee information to the employee fringe benefit plans. Employers submit fringe benefit payments for their employees to a bank for deposit to the Agency's trust account. The bank invests the trust funds in short-term securities until the Agency has processed employee hourly information and determined the amount of money to be disbursed to each participating plan. Trust account funds are transferred to an Agency checking account from which disbursements are made to the employee fringe benefit plans.

To pay the Collection Agency for its services, trustees of each participating plan entered into agreements authorizing the Agency to retain and apply to its costs the interest earned on investments in the trust account and penalty fees assessed employers for late payments. From August 1978 through July 1981, the Agency received interest and penalty assessments of nearly $1.4 million, had operating costs of about $700,000, and retained the remaining income amounting to over $650,000. As of September 20, 1982, the Agency had distributed $250,000 of this remaining income to the participating fringe benefit plans.

LABOR DID NOT TAKE AGGRESSIVE ACTION TO REQUIRE TRUSTEES TO FULFILL THEIR FIDUCIARY RESPONSIBILITIES

Labor did not take aggressive action to require Health and Welfare Fund trustees to correct Employee Retirement Income Security Act (ERISA) violations identified in its investigations of the Collection Agency activities. Although Labor's initial investigation of the Agency was completed in May 1980, Labor's recommendations for corrective actions were not communicated to Health and Welfare Fund trustees until July 1981 and, as of September 20, 1982, necessary corrective actions had not been taken. As a consequence, the Agency has continued to control and use union employee fringe benefit funds in violation of ERISA provisions that are designed to prevent abuses in the use of union employee benefit fund assets.

The Cleveland Area Office reported to the Chicago Regional Office in May 1980 that the Collection Agency trustees' interests were adverse to the fund's interests because they were also Health and Welfare Fund trustees and therefore in violation of ERISA. Further, it reported that Health and Welfare Fund trustees did not use due care and prudent judgment in approving an agreement authorizing the Agency to collect and administer employer contributions to the fund. The Cleveland Area Office believes the agreement does not adequately safeguard plan assets and constitutes a potential for abuse.

For nearly a year, the area office report was in Labor's Office of the Solicitor because the case was given low priority. The violations were not communicated to the Health and Welfare Fund trustees until July 1981, and the suggested corrective actions which were developed by Labor's Office of the Solicitor and approved by the Office of Enforcement were not specific. The trustees responded by creating a new agreement that further defined the relationship with the Collection Agency. However, this action did not fully correct the ERISA violations because the Agency trustees who had adverse interests continued as trustees

and the Health and Welfare Fund trustees did not make an adequate effort to determine the reasonableness of the fee to compensate the Agency.

Based on its followup investigation in early 1982 which showed that the ERISA violations continued, Labor's Cleveland Area Office with the concurrence of the Chicago Regional Office recommended that stronger action be taken. The Office of Enforcement agreed with the area office and in a July 27, 1982, letter to the Office of the Solicitor recommended that a demand letter be sent to the Fund's trustees requesting them to enter into a consent order which would require specific actions to correct the ERISA violations. The proposed actions include the requirements that the contract entered into in December 1981 between the Health and Welfare Fund and the Collection Agency be rescinded and that a new contract be entered into which, among other things, contains (1) a formula and timetable for allocation and distribution of excess revenue over expenses, (2) a requirement that the Agency prepare an annual budget that would have to be approved by the participating entities, (3) a dissolution clause governing distribution of assets if the Agency is terminated, and (4) a requirement that a representative of each participating entity be placed on the governing board of the Agency. The Solicitor's Office had not completed its review of the Office of Enforcement's recommendations as of September 20, 1982.

We agree with the Office of Enforcement that stronger action is necessary, and we are recommending that the Secretary of Labor issue a demand letter to the Health and Welfare Fund trustees directing them to enter into a consent order. The actions proposed by the Office of Enforcement to eliminate the reported ERISA violations should be considered in the preparation of the demand letter.

COLLECTION AGENCY OPERATIONS MAY VIOLATE THE LABOR-MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT

The Collection Agency collects and controls union membership fringe benefit payments by employers which may violate section 302(c) of the Labor-Management Relations Act of 1947, as amended (commonly referred to as the Taft-Hartley Act). The trustees of the Agency appear to meet the definition of a "representative" and, as such, are prohibited from collecting employee benefit funds from employers unless they meet the three conditions of a Taft-Hartley trust. These conditions require that:

--The funds be used for the sole and exclusive benefit of the employees.

--A written agreement exists between the employers and an employee representative.

--Employees and employers are equally represented in the administration of the funds.

According to the attorney who handled the legal matters associated with establishing the Collection Agency, the Agency was created by Ohio affiliates of the International Brotherhood of Carpenters. The Agency is administered by five trustees who are officers in local or State union organizations and, as such, act as representatives of union employees. Thus, it appears that the Agency trustees are representatives of union employees. Consequently, the Agency would be prohibited from collecting employee benefit funds unless they meet the three conditions of a Taft-Hartley trust.

The Collection Agency apparently does not meet the statutory requirements of a Taft-Hartley trust. Specifically, we are not aware of any written agreement between the Agency and employers. Second, we found that the Agency's five trustees represent only the employees, and therefore, employers and employees are not equally represented in the administration of the Collection Agency's funds. Third, the agreements between the Agency and the employee benefit plans do not ensure that employee payments to the plans will be used for the sole and exclusive benefit of employees. The agreements allow the Agency to control employer payments until they are distributed to the various plans and permit reimbursement to the Agency for its expenditures without limitation. In addition, the Agency is not required to distribute to the plans any excess interest income earned on employer payments while under the Agency's control.

As previously stated, the Office of the Solicitor is reviewing the Cleveland Area Office followup investigative report on ERISA violations and related letters from the Chicago Regional Office and the Office of Enforcement. The Office of Enforcement in its letter recommended that the Solicitor's Office, before taking action on the ERISA violations, request an opinion from the Department of Justice on whether the current or proposed arrangement between the Collection Agency and the Health and Welfare Fund violates section 302(c) of the Taft-Hartley Act. The Solicitor's Office had not completed its review of the Office of Enforcement's request as of September 20, 1982.

We are recommending that the Secretary of Labor have the Solicitor seek the opinion of the Department of Justice as to whether the Collection Agency (1) is a union representative and (2) violates section 302(c) of the Taft-Hartley Act by collecting employee benefit funds from employers.

LABOR'S REPORTING REQUIREMENTS SHOULD INCLUDE SUCH ORGANIZATIONS AS THE COLLECTION AGENCY

Although the Collection Agency was established and administered by union officials for the benefit of union members, it is not entirely clear that the Agency can be considered a "labor organization" under the provisions of the Labor-Management Reporting and Disclosure Act (LMRDA) and Labor's implementing regulations. Because organizations like the Agency do not meet the strict definition of a labor organization, they have not been required to comply with the LMRDA reporting and disclosure standards. As a result, these organizations do not report to Labor on their activities. Labor does not have a systematic method of identifying these organizations and obtaining information on financial transactions and administrative practices which may disclose possible improprieties by these organizations involving employee fringe benefit funds.

Labor's Cleveland Area Office and Chicago Regional Office believe the Collection Agency, because of its ties and affiliation with the Ohio Carpenters union organization, should be required to file appropriate reports under LMRDA. They have been unsuccessful so far in obtaining headquarters' agreement with their position. This question of whether the Agency is a labor organization was referred by the Office of Enforcement to the Office of the Solicitor on July 27, 1982, and as of September 20, 1982, this question was still under consideration by the Solicitor's Office.

If the Solicitor's Office determines that the Collection Agency is not a labor organization under LMRDA and the Collection Agency cannot be required to report through the administrative process, we are recommending that the Secretary of Labor propose to the Congress that the statutory definition of a "labor organization" be changed to include such entities as the Agency.

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We did not obtain agency comments on this report. However, we did obtain unofficial oral comments from Department of Labor, Ohio Carpenters union, Collection Agency, and Health and Welfare Fund officials which were considered by us in preparing this report.

Also, as agreed with your office, unless you publicly announce the report's contents earlier, we plan no further distribution of the report until 30 days from its issue date. At that time, we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

Charles A. Bowsher

Comptroller General
of the United States

Contents

ABBREVIATIONS

CPA	certified public accountant
ERISA	Employee Retirement Income Security Act
GAO	General Accounting Office
LMRDA	Labor-Management Reporting and Disclosure Act
LMSA	Labor-Management Services Administration
PWBP	Pension and Welfare Benefit Programs

INTRODUCTION

In a November 24, 1981, request from the Chairman, Senate Committee on Labor and Human Resources, we were asked to review several allegations of mismanagement of union funds by the Carpenters Central Collection and Administration Agency of the Ohio Carpenters Union and the Department of Labor's investigation of the Collection Agency. After a preliminary examination of the activities, we agreed with the Committee's office to concentrate our review on (1) the legality and functions of the Agency and (2) the timeliness and effectiveness of Labor's investigation and reporting on the Agency's activities.

COLLECTION AGENCY

The Collection Agency was incorporated on May 24, 1978, under the Non-Profit Corporation Law of Ohio. The Agency was established for the benefit of about 30 local unions and 6 district councils affiliated with the United Brotherhood of Carpenters and Joiners of America and the Ohio State Council of Carpenters. Under its articles of incorporation, the Agency was established to collect, record, deposit, and disburse fringe benefit funds collected from employers pursuant to the terms of collective-bargaining agreements entered into by the Ohio Carpenters Union and employers who employ Ohio Carpenters Union members. The Agency collects fringe benefit funds from about 1,200 employers covering about 10,000 union carpenters in most of the counties in Ohio and portions of Kentucky, West Virginia, and Pennsylvania.

Before the Collection Agency was created, a bank in Cleveland, Ohio, received employer contributions and forwarded them after processing to the various Ohio Carpenter fringe benefit funds. The bank was paid for its services from the interest earned on union employee vacation funds on deposit at the bank. The bank experienced many problems with the employers in carrying out its collection activities, particularly with employers who were delinquent in their payments. In addition, the amount of the vacation funds on deposit decreased, but the volume of contributions increased. This resulted in the bank receiving less compensation while performing increased services. Because of these circumstances, bank officials informed the benefit plans in 1974 of their intent to discontinue the collection service. The bank continued its services until August 1978 when the Agency commenced operations.

The bank continues to perform certain services for the Ohio carpenters fringe benefit funds, such as processing employers' checks and employees' records through its Lock Box Department and investing the funds through its Trust Department for the Collection Agency. The bank invests the funds in short-term securities until the Agency determines the amount of money to be disbursed to

each participating plan. The collection account funds are transferred to the Agency checking account from which disbursements are made to the employee fringe benefit plans.

We checked the length of time the Collection Agency controlled the union funds by testing collections received during September 1981 and February 1982. For each month, the Agency made distributions to the 53 fringe benefit payees on or near the 15th and 25th of the month following receipt of the funds. Thus, the time frame between collection from employers and disbursement to the 53 payees ranged from 25 to 40 days.

The Collection Agency is compensated for its services from the interest earned on the fringe benefit funds invested by the bank and penalty fees assessed employers for late payments. Trustees from each participating plan entered into agreements with the Agency authorizing this method of compensation. The agreements authorize the use of the income to pay the Agency's operating costs, but do not specifically require distribution of excess income. Excess income is recorded in the Agency's accounting records as moneys owed the participating plans.

The following table, which we prepared from the certified public accountant (CPA) audit reports that had been completed at the time of our review, shows the funds received, distributed, and expended by the Collection Agency from its beginning on August 1, 1978, through July 31, 1981.

Fiscal years ended July 31	Employer payments received and distributed	Interest and penalty income	Operating costs	Excess of income over expenses
1979	$26,289,000	$ 297,000	$179,000	$118,000
1980	29,208,000	479,000	223,000	256,000
1981	29,092,000	589,000	306,000	283,000
Total	$84,589,000	$1,365,000	$708,000	a/$657,000

a/In April 1982, the Collection Agency distributed $250,000 of the excess income to the various benefit plans. As of September 20, 1982, no further distributions had been made.

THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

The Employee Retirement Income Security Act of 1974 (ERISA), as amended (29 U.S.C. 1001 et. seq.), provides the Federal Government--particularly Labor--with the tools to regulate, investigate, and review operations and management of plans, such as the Ohio Carpenters Health and Welfare Fund. To protect the interests of plan participants, ERISA established a comprehensive framework of standards, including standards of conduct, responsibilities, and obligations for administrators, trustees, and fiduciaries of plans.

An important feature of ERISA, designed to prevent abuse and misuse of plan funds, is the stringent requirements placed on persons acting as fiduciaries--persons who exercise control or authority over plan management and assets. ERISA requires fiduciaries to discharge their duties solely in the interest of the participants and beneficiaries in providing them with benefits and defraying the reasonable expenses of administering the plan. Fiduciaries must exercise care, skill, prudence, and diligence in managing the plan and its assets. ERISA provides that a trustee is a fiduciary and, as such, is subject to the act's provisions covering fiduciary responsibilities and duties.

ERISA provides that fiduciaries who breach their responsibilities, obligations, or duties shall be (1) personally liable to make good any losses resulting from their actions, (2) subject to removal, and (3) subject to civil and criminal prosecution.

LABOR-MANAGEMENT RELATIONS ACT AND LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), as amended (29 U.S.C. 401 et. seq.), provides for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations to assist Labor in eliminating or preventing improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives.

The Labor Management Relations Act of 1947, as amended (29 U.S.C. 141-197), is commonly known as the Taft-Hartley Act. Subsection 302(a) of the act (29 U.S.C. 186(a)) makes it unlawful for any employer or person acting for an employer to pay, or agree to pay, money or other things of value to any labor organization, any officer or employee of a labor organization, or any representative of any of his or her employees. Subsection 302(b) (29 U.S.C. 186(b)) makes it unlawful for any person to request, demand, receive, or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection 186(a). Subsection 302(c) (29 U.S.C. 186(c)) excludes certain employer payments from the provisions of subsections (a) and (b). These exceptions include compensation for services to an employee, settlement of legal judgments and arbitration awards, sales or purchases in the regular course of business, deductions and payments of union member dues, and contributions to trust funds.

Concerning trust funds, subsection 302(c)(5) (29 U.S.C. 186(c)(3)) provides that such funds must be (1) managed for the sole benefit of eligible employees and their beneficiaries, (2) governed by a written agreement specifying the employer payments/contributions and employee benefits, and (3) administered by an equal number of representatives from the employees' and employers' organizations.

ENFORCEMENT

Labor has the primary responsibility for administering and enforcing the reporting, disclosure, and fiduciary provisions of ERISA and the reporting and disclosure provisions of LMRDA. The Office of Labor-Management Standards Enforcement directs and administers programs to carry out the provisions of LMRDA. The Pension and Welfare Benefit Program's (PWBP's) office in the Labor-Management Services Administration (LMSA) enforces ERISA. LMSA, under the Assistant Secretary of Labor-Management Relations, enforces ERISA through a staff at headquarters and in 6 regional and 24 area offices nationwide.

ERISA cases flow through Labor from their inception to resolution in the following sequence:

--The LMSA area office completes its investigation and submits a case to the regional office for review and approval.

--The LMSA regional office reviews and forwards the case for review and approval to headquarters.

--PWBP's Office of Enforcement reviews and forwards for review the approved case with the recommendations to the Office of the Solicitor.

--The Office of the Solicitor's Division of Plan Benefits Security reviews the case and recommends the action to be taken to resolve the case.

At any of the steps, the case can be closed or referred back for additional information or action. Labor's Office of the Solicitor is empowered to seek legal remedies of ERISA violations in U.S. district courts. Labor investigations which disclose possible Taft-Hartley violations are generally referred by headquarters to the Department of Justice for consideration.

OBJECTIVES, SCOPE, AND METHODOLOGY

We directed our efforts primarily to Collection Agency activities and Labor's handling of its investigation of the Agency. We made our review at (1) the Collection Agency and Ohio Carpenters Health and Welfare Fund (which are jointly located and administered) in Youngstown, Ohio, and (2) the Labor headquarters in Washington, D.C.; the regional office in Chicago, Illinois; and the area office in Cleveland, Ohio. Our review was performed in accordance with generally accepted government auditing standards.

Review of Collection Agency and Health and Welfare Fund activities

We interviewed the following persons to obtain information pertinent to the policies, procedures, and practices of the Collection Agency and Health and Welfare Fund: (1) current and former Collection Agency and Health and Welfare administrative officials, (2) the attorney for the Collection Agency and Health and Welfare Fund, (3) current and former union members and officials, (4) an attorney for a builders association in Ohio, (5) the Chairman of the Board of Trustees for the Collection Agency and the Health and Welfare Fund, and (6) officials of a bank used by the Agency in Cleveland, Ohio.

To evaluate the legality, functions, and internal controls of the Collection Agency's organization, we examined its financial records, minutes from the Board of Trustees' meetings, procedural guidelines, legal opinions, articles of incorporation, agreements with participating plans, contractors' reports, and other pertinent documents covering varying time periods during its first 3 years of operations. Based on our evaluation of CPA audits, which we found to be adequate, we limited our review of financial operations to testing transactions from several different months during this period. Our tests of transactions did not disclose any deficiencies.

We also attempted to compare the fees paid to the Collection Agency with fees paid to the bank for providing the collection service. Meaningful data could not be obtained from the bank to make a comparison. The bank earned interest from vacation funds on deposit, but bank officials said no records were maintained to show the amount of earnings. Also, we could not determine the value to the bank of holding the fringe benefit funds 1 to 2 weeks before disbursement to the various funds. Not having data on bank earnings for providing the collection service, a comparison to fees paid to the Agency could not be made.

Review of Labor

Our evaluation of the effectiveness of Labor's investigation and its processing of the Ohio Carpenters Union case at the headquarters level was based mainly on interviewing knowledgeable officials and reviewing pertinent procedural guidelines and documents in the Ohio Carpenters files in Office of the Solicitor, Division of Plan Benefits Security, and PWBP's Office of Enforcement.

In the Chicago Regional Office, we reviewed case files and interviewed key LMSA officials regarding their role and involvement in the investigation of the Ohio Carpenters case. At the Cleveland Area Office, we reviewed Labor's ERISA guidelines for investigating union activities, pertinent records in the case file, and the Report of Investigation to determine if the office

followed required investigative procedures and also to determine the timeliness and completeness of its investigation of the Ohio Carpenters case.

Review of CPA audits

The CPA firm responsible for auditing the Collection Agency provided us its workpapers and audit reports for the first 3 fiscal years of operations that began August 1, 1978. We reviewed the workpapers to determine the scope of their audits and performed tests to evaluate the adequacy of the work. We discussed the workpapers and audit reports with key CPA firm officials. This firm has also audited the Health and Welfare Fund for the last 2 years ended September 30, 1981.

We also interviewed an official of the Health and Welfare Fund's former CPA firm regarding Collection Agency activity and reviewed their audit report of the Health and Welfare Fund for the year ended September 30, 1979.

Review at the Department of Justice

We interviewed agents of the Federal Bureau of Investigation at the Austintown, Ohio, office to obtain information on the results of their investigation of activities related to the Ohio Carpenters Union.

LABOR DID NOT TAKE AGGRESSIVE ACTION TO REQUIRE TRUSTEES TO FULFILL THEIR FIDUCIARY RESPONSIBILITIES

Labor did not take aggressive action to require Health and Welfare Fund trustees to correct ERISA violations identified in its investigations of the Collection Agency's activities. Although Labor's initial investigation of the Agency was completed in May 1980, its recommendations for corrective action were not communicated to Health and Welfare Fund trustees until July 1981 and, as of September 20, 1982, necessary corrective actions had not been taken. As a consequence, the Agency has continued to control and use union employee fringe benefit funds in violation of ERISA provisions that are designed to prevent abuses in the use of union employee benefit fund assets.

DISCLOSURE OF VIOLATIONS TO TRUSTEES DELAYED IN THE OFFICE OF THE SOLICITOR

The LMSA Cleveland Area Office reported to the Chicago Regional Office in May 1980 significant ERISA violations by trustees of the Ohio Carpenters Health and Welfare Fund. This report was processed through Labor's LMSA/PWBP Divisions in the Chicago Regional Office and the Office of Enforcement and the Office of the Solicitor's Division of Plan Benefits Security in the Washington, D.C., headquarters. The Solicitor's Office assigned low priority to the Ohio Carpenters case. According to the Solicitor's Office, because it was backlogged with many cases and because there was no recommendation for litigation, it did not complete its review and make its proposal for the official action to be taken on the Ohio Carpenters case for nearly a year after it received the case.

Labor has responsibility for administration and enforcement of title I of ERISA. Title I sets forth the standards governing the operations of employee benefit plans like the Ohio Carpenters Health and Welfare Fund. Generally, these standards protect the participants in employee benefit plans and their beneficiaries by

--requiring disclosure and reporting to participants and beneficiaries of financial information,

--establishing standards of conduct and responsibility and obligation for fiduciaries of employee benefit plans, and

--providing appropriate remedies and access to the Federal courts.

Labor's investigation which discovered specific violations of title I standards is discussed below.

Cleveland Area Office investigation

The Cleveland Area Office received a complaint from an attorney who represented an employer's builders association that some union trustees had formed a private corporation--the Collection Agency--to collect and distribute Ohio Carpenters Union employee benefit funds in a manner which might not be legal under LMRDA and ERISA and commenced an investigation of the Agency in September 1979. After its investigation, the Cleveland Area Office submitted its investigation report to the Chicago Regional Office. The significant details of the area office findings and Labor's actions on the area office report follow.

Collection Agency trustees, who are also fund trustees, have interests adverse to fund interests

The Cleveland Area Office reported that the Collection Agency trustees' interests were adverse to fund interests because they were also Health and Welfare Fund trustees. The area office concluded that this violates subsection 406(b)(2) of ERISA, which states that:

> "A fiduciary with respect to a plan shall not * * * in his individual or any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries * * *."

The area office found that five of the Health and Welfare Fund trustees were also the trustees of the Collection Agency and had participated in approving the agreement to authorize and compensate the Agency for collecting and administering employer payments for the Health and Welfare Fund. The area office stated that the interests of the Agency and the Health and Welfare Fund were adverse to fund interests. Consequently, it concluded that the fiduciary provisions of ERISA (406(b)(2)) were violated because of the dual role of the five Agency trustees and the conflicting interest of the Health and Welfare Fund and the Agency.

Fund trustees allowed the Collection Agency to use and control fund assets without adequate safeguards

The Cleveland Area Office reproted that the Health and Welfare Fund trustees allowed the Collection Agency to use and control plan assets without adequate safeguards, which violates subsection 404(a)(1)(B) of ERISA which states that:

> "A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims * * *."

The area office found that Health and Welfare Fund trustees did not use due care and prudent judgment in authorizing the Collection Agency to collect and administer employer contributions to the Health and Welfare Fund. Under ERISA, fund trustees have responsibility for controlling and safeguarding plan assets for the benefit of employee participants of the fund. However, the area office believes the agreement between the Health and Welfare Fund and the Agency does not adequately safeguard plan assets and constitutes a potential for abuse, thereby violating subsection 404(a)(1)(B) because the Collection Agency

--was permitted to retain plan assets for an indeterminate period of time and the amount of income increases the longer the assets are retained and

--had sole authority to decide when and if interest earned in excess of costs would be distributed to participating union plans.

The Cleveland Area Office issued its first report in May 1980 on the Collection Agency with supporting documentation to the Chicago Regional Office. The report contained the above findings concerning violations of ERISA provisions and recommendations to correct the deficiencies.

Labor's actions on the area office report

The Chicago Regional Office agreed with the area office's report findings and recommendations and forwarded the report file within a month from receipt to the Office of Enforcement. Because the Chicago Regional Office believed that the Health and Welfare Fund trustees would not voluntarily comply with Labor's recommendations, it suggested that the Office of the Solicitor seek a remedy either through a consent decree or litigation to avoid any delay that would occur from pursuing voluntary compliance.

The Office of Enforcement reviewed the case and agreed with the Cleveland Area and Chicago Regional Offices that the Health and Welfare Fund trustees were imprudent in allowing the Collection Agency to hold plan assets, earn interest on these assets, and retain the income earned. The Office of Enforcement sent the case to the Office of the Solicitor by a July 11, 1980, letter

which did not recommend litigation and requested the concurrence of the Solicitor's Office on the sending of a demand letter to the Health and Welfare Fund trustees requiring them to:

--Recover from the Agency all income earned from fund assets.

--Rescind the agreement between the fund and the Agency or revise the financial terms of the agreement so as to prevent the Agency from using, benefiting, or dealing with fund assets in its own interest.

--Remove the fund trustees who are also members of the Board of Trustees of the Agency if they did not relinquish their Agency trusteeship. The Office of Enforcement said that this action should be taken if the Agency continued to provide services to the fund.

Labor had established guidelines to secure correction of certain ERISA violations short of litigation. The LMSA Notice No. 3-80 dated January 9, 1980, entitled "Guidelines With Respect To Voluntary Compliance With ERISA," provided procedures to follow in cases where an area office, with regional office approval, could pursue ERISA compliance voluntarily. The Notice also specified that cases involving certain conditions need headquarters' approval. With regard to the Ohio Carpenters case, the Cleveland Area Office, the Chicago Regional Office, and the Office of Enforcement agreed that the fund trustees would not likely take corrective action on a voluntary basis and that a demand letter would be appropriate in this instance. A demand letter would require headquarters' approval.

In considering the request for approval for sending a demand letter, the Office of the Solicitor decided that the case did not meet its criteria for a priority case--it must have a high degree of public interest or require litigation involving a large dollar value and have an impact on a large number of persons. Representatives in the Solicitor's Office said cases had to be handled on a priority basis because the Office of Enforcement was referring a large volume of cases, regardless of their significance, to the Solicitor's Office for an opinion. As a result, we were told that the staff attorneys had become overloaded with cases. In 1980 the Solicitor's PWBP Office received about 150 new cases that had to be handled by the office's 20 staff attorneys. We were also told that many cases, which were in the litigation stage, required a major portion of the attorneys' time, and as a result, a lower priority was assigned to cases, such as the Ohio Carpenters case.

The priority of the Ohio Carpenters case was upgraded by the Office of the Solicitor in the spring of 1981 when the Office of Enforcement informed the Solicitor's Office that the case was receiving a large amount of public attention in local newspapers. Nearly a year after it received the case, the Solicitor's Office prepared a letter for the signature of the Cleveland Area Administrator. The Office of Enforcement approved the sending of the letter as drafted by the Solicitor's Office and the Cleveland Area Office sent the letter to the Health and Welfare Fund trustees on July 23, 1981, setting forth Labor's views for correcting the deficiencies.

Although the Office of the Solicitor agreed with the case findings, the letter that it prepared contained recommendations which were for the most part general in nature and did not propose specific actions to correct the deficiencies. An example is the finding concerning the Collection Agency's retention of interest income for compensation for the services provided. The letter recommended that the trustees who did not have a conflicting interest reexamine the plan's compensation arrangement with the Agency to ensure that any future arrangement would result in the Agency not earning more than reasonable compensation for the services it performed.

However, the letter did not communicate the recommendations of the Cleveland Area and Chicago Regional Offices and the Office of Enforcement to prohibit the use of benefit funds by the Agency to generate a profit and to require disbursement of benefit funds to the appropriate plans immediately upon collection from employers. As a consequence of the general wording of the recommendation, the Health and Welfare Fund trustees determined that the compensation arrangement with the Agency was reasonable and did not need to be changed.

Another example is the case finding concerning the violation of subsection 406(b)(2) of ERISA which addressed adverse interests of the Collection Agency trustees. While the July 23, 1981, letter discussed this violation, no recommendations were made to correct the problem and the trustees did not make any changes in the composition of the board of trustee membership of the Collection Agency and the Health and Welfare Fund.

ACTIONS BY TRUSTEES HAVE NOT SATISFACTORILY CORRECTED VIOLATIONS

In response to the Cleveland Area Office's July 23, 1981, letter to the Health and Welfare Fund trustees, the trustees appointed a committee comprised of four of its trustees (two union-appointed trustees and two employer-appointed trustees) that were not trustees of the Collection Agency. The committee was charged with examining the financial and administrative arrangements between the fund and the Agency to determine whether (1) the compensation received by the Agency for its services was

reasonable and appropriate and (2) the arrangements had resulted in the Agency receiving other than reasonable compensation for its services.

The Health and Welfare Fund trustees, through its attorney, informed the Cleveland Area Office that the committee had concluded that the Collection Agency operated on a cost, nonprofit basis; performed services that met the collection and administrative needs of the Health and Welfare Fund; and charged a reasonable fee for the services it provided to the Health and Welfare Fund. These conclusions were based on the premise that the Agency operating expenses were less than 1 percent of total collections which the committee viewed as reasonable. The committee also cited that the excess income over expenses for the first 2 years of operating the Agency had totaled about $374,000. 1/

The committee noted that the Collection Agency carried the excess income on its books as a long-term liability to the various plans for whom it collected the benefit funds and that the Health and Welfare Fund's share was nearly $102,000. This amount was determined by the Agency's CPA firm using a formula that computed the percentage of each plan's receipts to the total receipts collected by the Agency. None of the excess moneys, however, had been distributed to the plans as of late 1981 when the committee performed its work. Also, the Committee did not comment on the propriety of the Collection Agency retaining the excess income.

In an attempt to satisfy Labor's concerns of providing additional safeguards of the plan's funds, the committee assisted in developing a new agreement between the Collection Agency and the Health and Welfare Fund. The agreement was conveyed to the Cleveland Area Office through the Health and Welfare Fund's legal counsel by a December 11, 1981, letter. The Cleveland Area Office responded to the trustees' actions by requesting several documents, primarily those that supported the results of the committee's conclusions. The attorney, when providing some documentation, asked the Cleveland Area Office to comment on the proposed agreement before its submission to the trustees for approval.

On December 23, 1981, in separate meetings, the attorney for the Health and Welfare Fund and the Collection Agency presented the new agreement to the respective boards of trustees for approval. The attorney told the trustees that the Cleveland Area Office had not commented on the agreement, but in his opinion, the agreement addressed all of the concerns of Labor. Both boards of trustees approved the agreement.

1/Although the Collection Agency's third year of operation had ended at the time of the committee's review, the CPA firm had not completed its audit, and therefore, the committee did not include income and expense figures for fiscal year 1981 operations in making its computations.

APPENDIX II

SUBSEQUENT LABOR INVESTIGATION SHOWS VOLUNTARY COMPLIANCE EFFORTS NOT SUCCESSFUL

Because of continued congressional interest in the activities of the Collection Agency, the Cleveland Area Office, at the suggestion of the Office of Enforcement, performed additional investigative followup work in early 1982. The results of the investigations showed that the Agency continued to acquire additional fixed assets and that the excess revenues over expenses continued to increase without being distributed to the various benefit plans. The Cleveland Area Office believed that the Health and Welfare Fund trustees had taken only minimal effort to determine the reasonableness of the fee charged by the Agency and that meaningful voluntary compliance would not be achieved unless Labor set forth specific reforms to be undertaken by the trustees.

Subsequent to the Cleveland Area Office's initial investigation completed in May 1980, the Chicago Associate Regional Administrator, PWBP, and Cleveland Deputy Area Administrator, LMSA, made an onsite visit to the Collection Agency in January 1981. In touring the facility the officials observed that a new computer had been installed in the basement of the building. Both officials were concerned about the amount of employee fringe benefit funds being expended on computer equipment. The Associate Regional Administrator orally communicated his concern to the Office of Enforcement that an additional large amount of employee fringe benefit funds would be invested by the Agency in automated equipment unless Labor took quick action.

In a March 31, 1982, letter to the Chicago Regional Office (more than a year after the January visit), the Cleveland Area Office reported the results of its additional investigative work, and expressed its concern that the Collection Agency continued to acquire additional fixed assets, particularly computer equipment. By investing in fixed assets, it said the Agency could effectively deny the benefit plans their share of excess revenues.

The Cleveland Area Office also believed that the Health and Welfare Fund trustees did not make an adequate effort to determine the reasonableness of the fee to compensate the Collection Agency. In the March 31, 1982, letter the Cleveland Area Office reported:

> "The trustees of the subject plan executed a participation agreement with the CCA [Collection Agency] whereby the CCA may retain the interest it earns on the plan's employer contributions in transit, penalties, court costs and attorney fees. In addition, CCA may charge a proportionate share of the costs to the funds involved in the event this interest is not sufficient. CCA's means of defraying operational

costs, whereby they retain interest earned on employer contributions and employer penalties, is indirectly the method CCA is paid for their services and represents compensation. The CPA reports reflect that income over expenses for fiscal years ending 7/31/79, 7/31/80 and 7/31/81 was $117,961, $255,594 and $283,249 respectively. Consequently the compensation CCA has received is in excess of the services rendered in violation of Section 406(a) (1) (c) and not exempted by Section 408(b) (2). These annual retentions are imprudent, and not in the interest of the participants and beneficiaries in violation of Section 404(a) (1) (A) and (B). Further, in the event a proportionate share of the excess revenue over expenses is considered Plan funds and Subject Plan has no ownership interest in CCA, this holding of funds is an extension of credit in violation of Section 406(a) (1) (B). The means of funding CCA constitutes the single greatest area for abuse in that Plan fiduciaries have allowed another agency CCA to use their money with no controls. This represents a violation of Sections 406(b) (2) and 404(a) (1) (B). Management trustees disclosed that they had little knowledge of the ownership of or funding arrangement with the CCA. The trustees' failure to take meaningful corrective action constitutes further violations of 404(a) (1) (A) and (B) and Section 405(a), cofiduciary responsibility."

To remedy these violations, the Cleveland Area Office proposed that the Health and Welfare Fund trustees be required to implement specific changes. In acknowledging that voluntary compliance efforts had not remedied the violations previously cited by Labor, the Cleveland Area Office believed that future actions by Labor should take the form of a demand letter.

The Chicago Regional Office generally agreed with the findings and recommendations made by the Cleveland Area Office in its March 31, 1982, letter. However, it believed that corrective actions should take the form of discussing violations with plan trustees in an effort to obtain compliance on a voluntary basis. According to chapter 20 (revised Feb. 5, 1982) of Labor's PWBP Compliance Manual governing voluntary compliance which supersedes LMSA Notice No. 3-80, a Regional Administrator can approve letters to trustees which seek to correct violations on a voluntary basis.

However, cases involving certain recommendations, such as those recommending removal of trustees, need prior approval from the Office of Enforcement. The Chicago Regional Office is seeking removal of the five Health and Welfare Fund trustees that also serve as Collection Agency trustees. Therefore, approval was needed from the Office of Enforcement before the Chicago

Regional and Cleveland Area Offices could proceed. The Chicago Regional Office submitted its findings and recommendations to the Office of Enforcement on June 2, 1982. The Office of Enforcement reviewed the area office report and regional office letter and in a July 27, 1982, letter to the Office of the Solicitor recommended that a demand letter be sent to the Fund's trustees requesting them to enter into a consent order which would require:

1. Recision of the contract entered into in December 1981 between the Fund and the Collection Agency.

2. A new contract between the Fund and the Collection Agency which contains:

   --A specific formula and timetable for the allocation and distribution of any excess revenue over expenses.

   --A requirement that the Collection Agency prepare an estimated budget at the beginning of each year. The budget would have to be approved by the Fund, the Ohio Carpenters Pension Fund, and any other participating entity. Any proposed acquisition of fixed assets would have to be included in the proposed budget and enough information provided for the participating entities to decide whether the expenditure is justified.

   --A dissolution clause governing the distribution of assets if the Collection Agency is terminated. The dissolution clause would provide that any assets of the Collection Agency would revert to the participating entities on the basis of a fixed nondiscriminatory formula.

   --A representative of each participating entity be placed on the governing board of the Collection Agency.

   --Financial disclosure within 5 months of the close of the fiscal year to all participating entities in a financial report specifying information in narrow specific categories. Information to be included in the report would include a breakdown of any amounts paid to anyone associated with the Collection Agency and why the payment was made. Also, information regarding payments to other corporations in which either someone associated with the Collection Agency or a member of their family has an ownership interest.

3. The amendment of the Collection Agency's articles of incorporation and code of regulations to be in conformity with the new contract.

The Solicitor's Office had not completed its review of the Office of Enforcement's recommendations as of September 20, 1982.

CONCLUSIONS

We believe the Cleveland Area Office's investigations of ERISA provisions were performed in a thorough and timely manner. The findings and conclusions were well documented and presented and all three levels of review (Regional, Enforcement, and Solicitor) agreed with them. The Chicago Regional Office and the Office of Enforcement both performed their review functions in a timely manner. The Office of the Solicitor, however, did not take immediate action on the case because it had a large number of cases being litigated in comparison to the number of staff attorneys and gave this case a low priority.

When the Solicitor's Office reviewed the case upon receipt from the Office of Enforcement and decided to give the case a low priority, we believe it should have returned the case to the Office of Enforcement and allowed that office to take appropriate corrective action as specified in the voluntary compliance guidelines. The recommendations in the letter prepared by the Solicitor's Office, and approved by the Office of Enforcement and sent to the plan trustees by the Cleveland Area Office were so general in nature that the trustees, after making minor changes to their agreement with the Collection Agency, have continued operating in violation of ERISA provisions.

In appendix III, we point out that the Collection Agency collects and controls union membership fringe benefit payments by employers which may violate the Taft-Hartley Act, as amended. Pending a resolution of this matter, we believe that the Agency's ERISA violations, which have been identified by Labor, should not be allowed to continue.

RECOMMENDATION TO THE SECRETARY OF LABOR

We recommend that the Secretary issue a demand letter to the Health and Welfare Fund trustees directing them to enter into a consent order. The actions proposed by the Office of Enforcement to eliminate the reported Collection Agency's ERISA violations should be considered in the preparation of the demand letter.

COLLECTION AGENCY OPERATIONS MAY VIOLATE THE LABOR MANAGEMENT RELATIONS (TAFT-HARTLEY) ACT

The Collection Agency's collection and control of union membership fringe benefit payments by employers may violate the Taft-Hartley Act, as amended (29 U.S.C. 186). The trustees of the Agency appear to meet the definition of a "representative" and, as such, are prohibited from collecting employee benefit funds from employers unless they meet the following three conditions of a Taft-Hartley trust:

--Funds are used for the sole and exclusive benefit of the employees.

--A written agreement exists between the employers and an employee representative.

--Employees and employers are equally represented in the administration of the funds.

The Agency apparently does not meet these conditions.

The Department of Justice has exclusive responsibility for interpreting and enforcing the provisions of the Taft-Hartley Act. The Chicago Regional Office raised a possibility of a Taft-Hartley violation and asked Labor's Washington, D.C., headquarters to seek an opinion from the Department of Justice as to whether a violation had occurred. Labor's Office of Enforcement requested the Office of the Solicitor on July 27, 1982, to seek such an opinion; however, as of September 20, 1982, the Office of the Solicitor had not acted on this request.

The cited purpose of the Taft-Hartley Act is to provide orderly and peaceful procedures for preventing interference by either employees or employers with the legitimate rights of the other and to protect the interests of individual employees in their relations with labor organizations. Taft-Hartley (29 U.S.C. 186) makes it unlawful for any employer or person acting for an employer to pay, or agree to pay, money or other things of value to any representative of any of his or her employees and conversely forbids an employees' representative to accept or agree to accept money or anything of value from an employer. In a 1956 U.S. Supreme Court case, 1/ the term "representative" was defined to include any person authorized by the employees to act for them in dealings with their employers, and the court decision stated that the term was not to be narrowly construed and was not limited to an exclusive bargaining representative.

1/United States v. Ryan, 350 U.S. 299, 302, 304, 305 (1956).

APPENDIX III

Section 302(c) of the act excludes certain employer payments to employee representatives. These exceptions include compensation for services to an employee, settlement of legal judgments and arbitration awards, sales or purchases in the regular course of business, deductions and payments of union member dues, and contributions to trust funds.

Since the Collection Agency is receiving payments from contractors for trust funds which include the Pension and the Health and Welfare Plans, we directed our efforts to determine whether the trustees of the Agency can be considered as representatives of employees and whether the Agency meets the criteria for the exception cited in Taft-Hartley concerning trust funds.

ARE THE COLLECTION AGENCY TRUSTEES REPRESENTATIVES OF UNION ORGANIZATIONS?

Before the Collection Agency was created, a bank in Cleveland, Ohio, received employer contributions and forwarded them after processing to the various Ohio Carpenter fringe benefit funds. In March 1977, the employer and employee trustees of the Health and Welfare Plan authorized a study directed toward implementing a central collection system to replace the bank's operations. In November 1977, the trustees went on record supporting the development of a centralized collection system on behalf of the carpenter fringe benefit funds. At a March 1978 meeting, the trustees agreed to be a participant in a central collection agency and to support the concept of such an agency. At that time, the Chairman of the Board of Trustees, Ohio Health and Welfare Plan, reported that he had asked the plan's attorney to draft articles of incorporation for a nonprofit central collection agency.

The Collection Agency was established in May 1978 as a nonprofit corporation to provide a centralized agency to (1) collect fringe benefit funds from building trade employers for its union carpenter employees and (2) disburse the collected funds to employee fringe benefit funds. Each of the administrators of these plans signed an agreement allowing the Agency to perform these functions on their behalf. According to the attorney who handled the legal matters associated with establishing the Agency, it was created by Ohio affiliates of the International Brotherhood of Carpenters.

The Collection Agency began operations August 1, 1978, under the control of five trustees. The trustees were selected by the Chairman of the Board of Trustees (who is a union trustee) of the Health and Welfare Fund. The trustees designated in the Agency's Articles of Incorporation are union officers in local and State union organizations and, as such, act as representatives of union employees. Further, the code of regulations for the Agency provides that each participating District Council and/or local union is entitled to appoint a representative to act as a member of the Agency.

APPENDIX III

Thus, it appears that the Trustees of the Collection Agency are representatives of Ohio carpenter union employees. As discussed earlier, Taft-Hartley forbids employers to pay anything of value to an employee representative and conversely forbids an employee representative to accept or agree to accept anything of value from an employer unless such payment is specifically excepted. Since the employers pay the fringe benefit payment to the Agency for employee benefit plans (including the Pension and the Health and Welfare Plans), the Taft-Hartley Act would be violated if (1) the Agency is considered a representative of employees and (2) none of the exceptions listed in Taft-Hartley for such representatives is applicable.

IS THE COLLECTION AGENCY A TAFT-HARTLEY TRUST?

Since the payments for the Pension and the Health and Welfare Plans are for trust funds and since the other exceptions relate to compensation for actual services performed, i.e., payments in satisfaction of certain judgments and awards, sales of goods, and union membership dues, we need only consider whether this payment is related to the employee trust fund exceptions. To fall under the trust fund exception, it must be shown that the Collection Agency is considered a trust fund under the Taft-Hartley Act. Apparently, the Collection Agency does not meet the statutory requirements of a Taft-Hartley trust.

Taft-Hartley requires three conditions for the trust exception to be applicable: (1) employer payments must be for the sole and exclusive benefit of employees, (2) a written agreement must exist between the employers and employees which states the detailed basis on which payments are made, and (3) employers and employees must be equally represented in the administration of the fund.

The agreements between the Collection Agency and the participating benefit plans do not ensure that employer payments to employee benefit plans will be used for the sole and exclusive benefit of employees. The agreements allow the Agency to control employee fringe benefit funds until the funds are distributed to the various plans, and they permit reimbursement, without limitation, of the Agency expenditures from the interest earned on benefit funds while under the Agency's control. Further, even though the Agency distributed $250,000 of excess interest income to the participating plans and funds in April 1982, such distributions are not required by the agreement and the timing and amount of any voluntary distribution is entirely up to the Agency trustees.

In addition, we are aware of no written agreement between employers and the Agency. Lastly, the Agency's five trustees are all employee representatives so that employers and employees are not equally represented in the administration of the fund.

APPENDIX III

Thus, the Collection Agency does not appear to meet the exception provisions for a Taft-Hartley trust fund. In this regard, the attorney for the Agency said that it is not a Taft-Hartley trust and is not, in his opinion, subject to the requirements for the establishment and operations of such trusts.

WHETHER A TAFT-HARTLEY VIOLATION HAS OCCURRED HAS NOT BEEN RESOLVED

In a May 1980 letter to the Chicago Regional Office containing the results of its 1979 review of the Collection Agency, the Cleveland Area Office raised the possibility of a Taft-Hartley violation. The Cleveland Area Office advised the Chicago Regional Office that employer contributions received by the Agency, whose only trustees are union representatives, could be in violation of Taft-Hartley and the matter should be considered for referral to the Department of Justice. However, the regional office in forwarding the area office report to the Washington, D.C., headquarters reemphasized the ERISA violations, but did not discuss the possible Taft-Hartley violation or suggest referral of the matter.

As previously discussed, the area office was asked to perform additional investigative work. Its March 31, 1982, report on the subsequent investigation did not address potential Taft-Hartley violations, but the regional office in transmitting the report on June 2, 1982, to PWBP's Office of Enforcement raised some questions concerning the Agency and the Taft-Hartley law. The regional office commented that the earnings by the Agency did not appear to meet the exclusive benefit requirements in the act and the Agency operation might not be the type of employee benefit function described in the act as being exempt.

Further, the Chicago Regional Office believed that the circumstances surrounding the establishment of the Collection Agency indicated that the agency was a subsidiary organization of the Ohio State Council of Carpenters and its affiliated locals and district councils. The regional office suggested that headquarters, if it agreed that the Agency was a subsidiary organization, should obtain an opinion from the Department of Justice on the permissibility of the arrangement between the Agency and the Ohio Carpenters Health and Welfare Fund.

The Office of Enforcement in its July 27, 1982, letter recommended that the Office of the Solicitor, before taking action on the ERISA violations, request an opinion from the Department of Justice on whether the current or proposed arrangement between the Collection Agency and Health and Welfare Fund violates section 302(c) of the Taft-Hartley Act. As previously stated, the Solicitor's Office is reviewing the area office followup investigative report on ERISA violations and related letters from the Chicago Regional Office and

the Office of Enforcement. The Solicitor's Office had not completed its review of the Office of Enforcement's request as of September 20, 1982.

CONCLUSIONS

The Collection Agency appears to meet the definition of a union representative. It does not, however, meet any of the three conditions of a Taft-Hartley trust each of which is required for a union representative to collect employee benefit funds from employers. The Agency, by maintaining custody of the employer payments, retaining interest earned on the payments, and obtaining reimbursement for its expenditures, does not appear to meet the trust requirement that funds be used for the sole and exclusive benefit of the employees. Moreover, we are aware of no written agreement between the employers and the Agency, and employers are not equally represented in the administration of the agency--all five trustees of the Agency are union representatives.

Based on the above, the Collection Agency may be operating in violation of the Taft-Hartley Act, and we believe that action is needed to have the Department of Justice resolve the question.

RECOMMENDATION TO THE SECRETARY OF LABOR

We recommend that the Secretary have the Solicitor seek the opinion of the Department of Justice as to whether the Collection Agency (1) is a union representative and (2) violates section 302(c) of the Taft-Hartley Act by collecting employee benefit funds from employers.

LABOR'S REPORTING REQUIREMENTS SHOULD INCLUDE SUCH ORGANIZATIONS AS THE COLLECTION AGENCY

Although the Collection Agency was established and is administered by union officials for the benefit of union members, it is not entirely clear that it can be considered a labor organization under LMRDA and Labor's implementing regulations. Because such organizations as the Agency do not meet the strict definition of a labor organization, they have not been required to comply with the LMRDA reporting and disclosure standards. As a result, these organizations do not report to Labor on their activities. Labor does not have a systematic method of identifying these organizations and obtaining information on financial transactions and administrative practices which may disclose possible improprieties by these organizations involving employee fringe benefit funds.

COLLECTION AGENCY DOES NOT REPORT UNDER LMRDA

LMRDA was enacted to protect the interests and benefits of union employees. The act requires labor organizations and officers and certain employees of labor organizations to report on their activities and disclose information concerning their dealings with labor and employer organizations. Section 3 of the act, as amended, defines a labor organization as one:

> "* * * engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor-organization other than a State or local central body."

Labor's inquiry as to whether the Collection Agency is a labor organization

The Cleveland Area Office, in its investigation of the Collection Agency activities in late 1979, found that the Agency was not reporting its activities to Labor and would be required to do so if it was considered to be a labor organization as defined under the LMRDA provision. On February 13, 1981, the area office, in a letter to the Chicago Regional Office, asked that a determination be rendered as to whether the Agency was a subsidiary organization and therefore subject to the filing requirements under section 201 of the act.

The Chicago Regional Office in a February 26, 1981, letter to LMSA, Office of Labor-Management Standards Enforcement, Branch of Investigations and Audits, said that it believed the Collection Agency was a subsidiary organization and therefore subject to the act's filing requirements and recommended that a determination be made concerning the status of the Agency as a subsidiary organization. A May 1981 opinion prepared by the Office of Labor-Management Standards Enforcement, Branch of Interpretations and Standards, concluded that it was doubtful that the Agency could be considered a subsidiary organization as defined by Labor in its instructions for preparing Form LM-2 (incorporated by reference into 29 CFR 403) because more than one labor organization governed and controlled the Agency--the Ohio State Council of Carpenters, district councils, and local unions.

This instruction defines a subsidiary organization as:

> "* * * any separate organization in which the ownership is wholly vested in the labor organization or its officers or its membership which is governed or controlled by the officers, employees or members of the labor organization and which is wholly financed by the labor organization."

Additional information was obtained by the Branch of Criminal Investigations from the area office in July 1981; however, it was not sufficient to change the earlier opinion of the Branch of Interpretations and Standards. On August 4, 1981, in response to a July 24, 1981, request from the Branch of Criminal Investigations, the Branch of Interpretations and Standards said that it was possible that the Collection Agency's activities would be required to be reported to Labor by the Ohio State Council of Carpenters, even if it is not technically a subsidiary organization, provided it could be shown that the Agency's affairs were "inextricably related" to those of the State Council.

In its August 4, 1981, letter, the branch suggested that the Branch of Criminal Investigations might wish to ask the field to pursue this matter further.

As discussed in appendix III, the Chicago Regional Office, in transmitting the Cleveland Area Office's March 31, 1982, report on its investigation of the Collection Agency to PWBP's Office of Enforcement, suggested that, if headquarters agreed that the Agency was a subsidiary organization, it should obtain an opinion from the Department of Justice on the permissibility of the arrangement between the Agency and the Ohio Carpenters Health and Welfare Fund. This opinion was requested by the Office of Enforcement in its July 27, 1982, letter to the Office of the Solicitor, and as of September 20, 1982, it was still under review in the Solicitor's Office.

IS THE COLLECTION AGENCY CONSIDERED TO BE A LABOR ORGANIZATION UNDER LMRDA?

The act's definition of a labor organization does not embrace an organization, such as the Collection Agency because it is an independent service provider and not a group of employees organized to deal with employers on the terms and conditions of employment. However, as mentioned in previous appendixes, the Agency has the appearance of a labor organization--it was created by and for the benefit of union members. The Cleveland Area Office believes the Agency, because of its ties and affiliation with Ohio Carpenters union organizations, should be required to file appropriate labor reports under LMRDA. The area office has been unsuccessful so far in obtaining headquarters' agreement with its position. In view of the foregoing, there appear to be two approaches to the issue.

On the one hand, in light of the Collection Agency's relationship and ties and affiliation with the Ohio Carpenters union organization, it could be argued that the Agency is a "labor organization" within the scope of the purposes sought to be served by the reporting requirements of LMRDA because the affairs of the Agency and Ohio Carpenters union organizations are "inextricably related." 1/

On the other hand, a literal reading of LMRDA would apparently exclude the Collection Agency from its coverage since the Agency is not an organization that "exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours, or other terms or conditions of employment."

Furthermore, the Secretary of Labor has the authority, under section 208 of the act, to issue regulations designed to require such organizations to come under the reporting and disclosure requirements (i.e., objectives) of LMRDA. Specifically, section 208 of the act states in pertinent part:

> "The Secretary shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this title and such other reasonable rules and regulations (including rules and prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements."

1/See Local No. 1419 ILA General Longshore Workers Union v. Smith, 301 F.2d 791 (5th Cir. 1962), and Brennan v. Longshoremen 527 F.2d (9th Cir. 1975).

APPENDIX IV

Labor has exercised this authority in the past. For example, as previously discussed, Labor included a definition of "subsidiary organization" in the instructions for the Labor Organization Annual Report, Form LM-2, and such subsidiary organizations are required to provide Labor with financial and operational disclosure reports. The first mention of the term "subsidiary organization" is in Form LM-2, and in neither LMRDA nor the implementing regulations is there a discussion of what constitutes a "subsidiary organization" or the scope of financial disclosure that is required.

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In a previous related case, we presented testimony before the Subcommittee on Investigations, Senate Committee on Governmental Affairs, involving questions as to whether certain union-affiliated organizations in Hawaii were considered to be labor organizations under LMRDA. 1/ Our testimony concerned our examination of financial activities of Unity House, an entity in Hawaii created by two local unions and, Unity Council, which is owned by Unity House. In our testimony, we pointed out that, in our opinion, the problems associated with these entities' operations and relationships to the union locals for over 21 years seemed to be a lack of a decision by Labor's Office of the Solicitor as to whether Unity House and Unity Council are labor organizations and thus subject to the requirements of LMRDA. As of September 20, 1982, the Solicitor's Office was in the process of making a determination as to whether these entities were labor organizations.

CONCLUSIONS

Organizations similar to the Collection Agency, although created by union members, do not fit the literal LMRDA definition of a labor organization. Notwithstanding that, they seem to exist solely as entities whose purpose is to advance the objectives of such employee organizations, that is, labor organizations. The Agency has not been reporting as a union organization within the framework of legislation enacted to protect employee benefits. A Labor determination that the Agency is a labor organization would place it and other similar organizations under the umbrella of Federal legislation to ensure that their activities are reported, thereby affording Labor an opportunity to review their reports.

1/Testimony on June 23, 1982, before the Permanent Subcommittee on Investigations, Senate Committee on Governmental Affairs, on the examination of financial activities and the Department of Labor's oversight of selected union affiliated organizations in Hawaii.

RECOMMENDATION TO THE SECRETARY OF LABOR

If the Solicitor's Office determines that the Collection Agency is not a labor organization under LMRDA and the Collection Agency cannot be required to report through the administrative process, we recommend that the Secretary propose to the Congress that the statutory definition of a "labor organization" be changed to include such entities as the Agency.

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