

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELAINE L. CHAO, Secretary of the)	
United States Department of Labor,)	
)	
Plaintiff,)	No. 78 C 342
)	
v.)	(Moran, J.)
)	
ESTATE OF FRANK E. FITZSIMMONS,)	
<u>et al.</u> ,)	
)	
Defendants.)	
_____)	

**RESPONSE AND PARTIAL OBJECTION OF THE SECRETARY OF
LABOR TO THE TRUSTEES' AND FUND'S MOTION FOR ORDER
APPROVING AND AUTHORIZING (1) THE TRUSTEES'
APPOINTMENT OF A CUSTODIAN FOR ALL INVESTMENT ASSETS,
(2) THE ALLOCATION OF NEW FUNDS FROM UNITED PARCEL
SERVICE, INC. AND (3) THE TRUSTEES' DECISIONS THAT
ESTABLISH THE NEW PASSIVE EQUITY INDEX ACCOUNT**

Plaintiff Elaine L. Chao, Secretary of the United States Department of Labor ("the Secretary"), submits this Response and Partial Objection to the Motion of the Trustees of Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund") and the Pension Fund ("Movants") for an Order Approving the:

- Appointment of Mellon Bank, N.A. to serve as the custodian for all assets of the Fund under Section II of the Consent Decree;

- Allocation of the \$6.1 billion payment to the Pension Fund from United Parcel Service, Inc., ("UPS Payment") which is anticipated to be received by the Pension Fund on December 26, 2007 as follows:
 - o \$900,000,000 to be allocated to the Passive Fixed-Income Index Account,
 - o \$4,200,000,000 to be allocated to the new Passive Equity Index Account, and,
 - o \$1,000,000,000 to be allocated to Northern Trust Global Advisors, Inc. as a Named Fiduciary of the Pension Fund;
- Establishment of a "Court Authorized Allocation" to the new Passive Equity Index Account of 20% of all investment assets of the Pension Fund in accordance with Section II.F of the Consent Decree;
- Appointment of Mellon Bank., N.A. to serve as the investment manager of the new Passive Equity Index Account;
- Approval of a new Investment Policy Statement for the new Passive Equity Index Account; and,
- Transfer of \$1,200,000,000 in Pension Fund assets from Goldman Sachs as a Named Fiduciary of the Pension Fund to the new Passive Equity Index Account on or about December 26, 2007.

The Secretary does not object to the appointment of Mellon Bank, N.A. as the custodian for all of the Pension Fund's investment assets. Nor does the Secretary object to the appointment of Mellon Bank, N.A. as the investment manager for the new Passive Equity Index Fund designed to match the total return of the Standard & Poor's 500 Index ("S&P 500 Index") or the proposed Investment Policy Statement for the new Passive Equity Index Account. In addition, and with one exception, the Secretary does not object to the proposed allocation of the \$6.1 billion UPS Payment.

As set forth more fully below, however, the Secretary is unable to approve and, therefore, must object to the remainder of the Motion.

Insufficient Time Provided to the Secretary to Allow Her to Respond:

The instant Motion was first provided to the Secretary in the afternoon on Monday, December 17, 2007, only two (2) hours before it was filed with the Court (less than three (3) days before the scheduled hearing on the matter). The papers provided to the Secretary on December 17, 2007 were the first notification to the Secretary that:

- Along with allocating the \$6.1 billion UPS Payment, the Pension Fund also intended to seek Court approval to

transfer \$1.2 billion away from Goldman Sachs as a Named Fiduciary, and

- The Pension Fund intended to transfer \$1 billion in additional funds to Northern Trust as a Named Fiduciary.

Immediately upon receipt of the instant motion, in the afternoon of December 17, 2007, counsel for the Secretary contacted counsel for the Pension Fund by phone and asked for information regarding the reasons for the indirect transfer of money from Goldman Sachs to Northern Trust (each as a Named Fiduciary of the Pension Fund).

Rather than providing the requested information, counsel for the Pension Fund informed counsel for the Secretary that no further information would be forthcoming ahead of the December 20, 2007 Court hearing. Instead, counsel for the Pension Fund suggested that the hearing scheduled for December 20, 2007 may be turned into an evidentiary hearing on the issues, including the testimony of individuals familiar with the issues.

Counsel for the Secretary informed counsel for the Pension Fund that the Secretary could not agree to such a hearing on such short notice, that the Pension Fund's behavior was inconsistent with the provisions of the Consent Decree and that the Secretary would most likely file an objection with the Court to the new matters included in the Pension Fund's December 17, 2007 Motion.

Consequently, the Secretary has been provided with unreasonably late notice of the proposed transfers of assets to and from the Named Fiduciaries, the Pension Fund has refused to help cure this problem by providing requested information regarding those transfers to the Secretary and the Secretary has been unable to meet and confer with ISC McGarr regarding these new matters. As a result, the Secretary has been left without a meaningful opportunity to consider the merits of the proposed transfers and must object.

Insufficient Basis Provided to the Secretary to Allow Her to Respond:

Fed. R. Civ. P. 7(b) provides, among other things, that every Motion "shall state with particularity the grounds therefore." The instant Motion does not satisfy these requirements since it includes no factual basis, reasons or evidence to justify the proposed transfers of billions of dollars of Pension Fund assets between the Named Fiduciaries. At best, the motion includes some historical context regarding some of the matters (regarding actions and decisions taken by the Trustees) - but that does not equal substantive evidence or add up to information sufficient to allow the Secretary to determine whether, or not, the proposed transfers are appropriate. Indeed, the Motion provides no reasons or grounds for the proposed transfer of over a billion dollars worth of the Pension Fund

assets away from Goldman Sachs or the proposed transfer of a billion dollars in Pension Fund assets to Northern Trust. The Motion therefore fails to satisfy, even minimally, the requirements of Fed. R. Civ. P. 7(b).

The Pension Fund and Trustees' failure to provide substantial justification for the requested order is inconsistent with past practice in this matter. Historically, the division of assets between the Named Fiduciaries for the Pension Fund has been a matter requiring notice to the Secretary and ISC McGarr and providing an opportunity for both to comment or object. See Consent Decree Section II.A. From 1984 until 1999, Morgan Stanley was the exclusive Named Fiduciary of the Pension Fund with control over 100% of the Pension Fund's actively-managed investment assets. Id.

In 1999, that changed and the Pension Fund's actively managed investment assets were divided up equally into two parts ("Group A" and "Group B") and apportioned among two Named Fiduciaries. Id. Later, the division of the Pension Fund's actively managed assets was changed again so that Goldman Sachs became responsible for 75% of those assets (all of the "Group B" assets and half of the "Group A" assets) and Northern Trust became responsible for the remaining 25% of those assets (half of the "Group A" assets). See Court Order of April 6, 2005.

Throughout the history of the Consent Decree, the reallocation of assets from one Named Fiduciary to two Named Fiduciaries and then among those Named Fiduciaries has been a matter subject to notice to the Secretary and ISC McGarr as well as an opportunity to comment or object provided to both of them before decision by the Court. The Pension Fund's surprise proposal to shift \$1.2 billion away from Goldman Sachs and \$1 billion to Northern Trust breaks from this historical process since it is made without providing the Secretary (and possibly ISC McGarr) with a meaningful opportunity to comment or object.¹

Section VI of the Consent Decree, entitled "Cooperation With the Secretary", provides, among other things that:

[T]he Pension Fund shall cooperate fully with the Secretary, both in the prosecution of this action and in the exercise of [her] other enforcement responsibilities under ERISA, by promptly providing such documents, information, and persons under its control as the Secretary from time to time may request.

The Pension Fund's refusal to provide the requested information is inconsistent with this provision as well.

¹ The recent amendments to the Consent Decree, particularly the amendments to Sections II.A and II.B.1, do not relieve the Pension Fund or the Trustees of their obligations to provide cogent reasons to the Court, ISC McGarr and the Secretary underlying proposed changes to the allocation of the Pension Fund's actively managed investment assets or otherwise foreclose their obligation to provide the Secretary and ISC McGarr with the information necessary (and a realistic opportunity) to review and comment on those proposed changes.

Conclusion:

For these reasons and, in particular, because parts of the Pension Fund's motion are inconsistent with the Consent Decree and the Secretary has been provided with insufficient notice or information with which to respond to parts of the Pension Fund's Motion, the Secretary objects to the Pension Fund's requests:

- (a) To transfer assets away from Goldman Sachs as a Named Fiduciary, and
- (b) Transfer assets received as part of the UPS Payment or otherwise to Northern Trust as a Named Fiduciary.

The Secretary does not object to the Pension Fund's Motion to the extent it seeks the:

- (a) Establishment of a "Court Authorized Allocation" to the new Passive Equity Index Account of 20% of all investment assets of the Pension Fund in accordance with Section II.F of the Consent Decree,
- (b) Approval of a new Investment Policy Statement for the new Passive Equity Index Account;
- (c) Appointment of Mellon Bank, N.A. as the custodian for all of the Pension Fund's investment assets,
- (d) Appointment of Mellon Bank, N.A. as the investment manager for the new Passive Equity Index Fund

designed to match the total return of the Standard & Poor's 500 Index ("S&P 500 Index"), and,

- (e) Proposed allocation of the \$6.1 billion UPS Payment except to the extent that any part of the UPS Payment is transferred to Northern Trust as a Named Fiduciary.

Respectfully submitted,

/s/ Michael Schloss
Michael Schloss
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Counsel for the Secretary

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing RESPONSE AND PARTIAL OBJECTION OF THE SECRETARY OF LABOR TO THE TRUSTEES' AND FUND'S MOTION FOR ORDER APPROVING AND AUTHORIZING (1) THE TRUSTEES' APPOINTMENT OF A CUSTODIAN FOR ALL INVESTMENT ASSETS, (2) THE ALLOCATION OF NEW FUNDS FROM UNITED PARCEL SERVICE, INC. AND (3) THE TRUSTEES' DECISIONS THAT ESTABLISH THE NEW PASSIVE EQUITY INDEX ACCOUNT was served upon the following named individuals both by arranging Notice of Electronic Filing by the Electronic Filing System of the Court upon each of these individuals who is a registered E-Filer (pursuant to the General Order on Electronic Case Filing) and (b) by distribution of copies of the Notice of Motion and of the Motion to each of the following individuals via first class U.S. Mail, this 19th day of December 2007.

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