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This is in further reply to your letter of May 2, 1975, to the Secretary of Labor, concerning the application of the Age Discrimination in Employment Act. We regret the delay in responding.

You inquire whether Article VIII, Section 11, of the contract between the [REDACTED] of [REDACTED], and [REDACTED] (a), (b), (c), (d), and (r) of the [REDACTED] is in violation of the Act. This Section grants "preferred status" to, among others, employees 55 years of age and over, who have been employed or available for employment for 15 years, in obtaining employment in 22 specified job classifications.

Subsection 11(a) states that those employed under this section are: "(1) the ones who have reached the age where his productivity of operating heavy equipment has been restricted because of high speed and technical advances; (2) has attained a bonafide physical handicap; or (3) has been injured in an industrial accident while employed as an Operating Engineer * * *." Subsection 11(c) states that workmen registering in this preferred status shall be ineligible to register and shall not work in any job classification other than those specified therein.

Significantly, Section 11 does not apply to all employees 55 years of age and over, who meet the requisite years of service, but only to those who identify themselves as ones whose productivity has been restricted because of the enumerated factors.

Obviously, as you recognize, it would not be valid to assume that all, or even many, employees in this age group are physically unable to perform certain jobs, and it would not be legal to disqualify workers in this age category for certain jobs absent some actual disability. The question is whether the worker in this age group can voluntarily disqualify himself or herself by requesting "preferred 'A' status," which, although excluding them from certain jobs, gives them priority as to others.

The purpose of Section 11 is apparently to provide a special employment benefit to individuals who are handicapped or otherwise less able to perform the full range of work of an operating engineer. Having extended this benefit, the contract imposes a corresponding burden which excludes them from also taking jobs in any other classification. As long as older workers are not forced into this "preferred 'A' status" classification, and as long as the classification of jobs available to such workers is reasonable, we do not believe that adherence to the provisions of Section 11 would result in a violation of the Age Discrimination in Employment Act.

Workers in the protected age group are not excluded by Section 11 from any job unless they voluntarily apply for preferred status. Although other workers in the protected age group may fail to obtain work in the classifications reserved in Section 11, this would also be true of younger workers. The reason for their exclusion is not age, but a decision to reserve certain jobs for individuals who qualify for preferred status under Section 11. Admittedly, workers 55 years of age or over are permitted to classify themselves as requiring preferred status, without having to establish any handicap. The Age Act, however, is designed to preclude adverse treatment based on age, and not some additional reasonable benefit which will subsequently be available to all other workers when they reach the age of 55.

This opinion revokes the prior opinions issued by Wage-Hour Administrator Robert D. Moran on May 1, 1970 and May 25, 1970 (WH-30 and WH-36). In addition, §860.91(a) of the Interpretative Bulletin (29 CFR 860) will be amended to reflect this change in position.

Sincerely,

US Ronald J. James

Ronald J. James
Administrator