Pension Benefit Guaranty Corporation

78-16

June 2, 1978

REFERENCE:
[*1] 1015(l). (IRC § 414) Definitions and Special Rules. Mergers, Consolidations and Other Transfers of Plan Assets
4021(a) Plans Covered. Requirements of Coverage
4001(a)(3) Definitions. Multiemployer Plan
1015 (IRC § 414) Definitions & Special Rules

OPINION:

This is in follow-up to our meetings regarding the * * * Pension Fund. Given the protracted proceedings in this case, a recapitulation is appropriate.

As you know, this Fund first came to our attention when it notified the PBGC, by a letter dated March 19, 1975, that it intended to partially terminate because of the withdrawal of * * * The Fund explained that it would pay full benefits to * * * employees until June 30, 1975, when those payments would be reduced to benefits based solely on service with * * * during the period it contributed to the Fund. After some correspondence between the Fund and the PBGC, PBGC advised the Fund and * * * in a letter of February 2, 1976 that it considered the Fund to be a group of single employer plans.

Shortly after the issuance of our February 2, 1976 letter, the PBGC undertook reconsideration. This reconsideration was instigated by a letter from counsel for * * * dated February 4, 1976, and took [*2] place in the context of the PBGC's intensive review and consultation with other agencies regarding the problems involved in categorizing plans and treating employer withdrawals. As you know, decisions in this area must be coordinated with the Internal Revenue Service and the Department of Labor in view of their jurisdiction and the need for consistent application of ERISA. For more than a year and a half, the PBGC received a number of letters and submissions from various interested parties, and met with representatives of the Fund and * * * Of course, all were aware that we were involved in an uncharted area in which no final policy or regulations have been adopted. During this period the Fund notified the PBGC of withdrawals from the Fund and requested that they be treated as single employer plan terminations. The state of uncertainty in the proceedings with respect to the Fund is reflected in a March 29, 1977 letter from the Fund's counsel to me that stated that based on correspondence with the PBGC, the Fund "has been designated as a multiple employer plan, which is comprised of a confederation of single employer plans."

In a September 2, 1977 letter from * * *, of the PBGC, [*3] to * * * director of the Fund, we noted that the question of the categorization of the Fund was still under consideration, and that payments to participants should not be interrupted pending its resolution.

On November 14, 1977, we informed you that the Internal Revenue Service had advised us that the segregation of assets and liabilities upon the withdrawal of an employer would be considered a spinoff from a plan governed under § 414(1) of the Internal Revenue Code. We noted that no spinoff occurs unless a plan splits into two or more plans. We advised you that if a spinoff has occurred, and the spunoff plan is a successor plan under § 4021(a) of ERISA, PBGC would consider the termination of the spunoff plan an insurable event under Title IV.

We have continued to consult with IRS regarding the types of problems presented here, and have been in touch with you and the Fund. On December 22, 1977, we wrote to * * * to inform him that benefit applications for early retirement should continue to be processed. Members of the General Counsel's office met with you on December 22, 1977 to discuss the ramifications of our November 14, 1977 letter. Your letter to me of February 6, 1978 [*4] indicated some misunderstanding as to how we expected to proceed, and so our meeting of March 2 was arranged. Pending that meeting, I reiterated in my letter of February 23, 1978 that the Fund should pay benefits to eligible participants.

As a result of our discussions with IRS, the PBGC has concluded that the * * * Pension Fund is not an aggregate of single employer plans. Under the IRS definition of "plan" in proposed Treas. Reg. § 1.414(1)-1(b)(1), a "plan" is a 'single plan' if and only if all the plan assets are available to pay benefits to employees who are covered by than plan

. . . . [M]ore than one plan will exist if a portion of the plan assets is not available to pay some benefits." The proposed definition of a plan in the PBGC's proposed Reportable Events Regulation, 42 Fed. Reg. 59285, 59290 § 2616.2 (November 16, 1977) contemplates the same concept.

The information submitted to the PBGC indicates that all the Fund's assets were available to pay all benefits earned under the Fund. The governing documents do not expressly restrict the use of assets contributed to the Fund. Moreover, this Fund's practice does not demonstrate an intent to avoid payment of one group's [*5] benefits out of separate assets dedicated to the benefits of a different participant group.

For example, the Fund does not account for its assets in a manner that demonstrates an intent to dedicate specific employer funds to the satisfaction of specific benefits for that employer's employees. The actuarial reports submitted to the PBGC by the Fund show that calculations were performed based on the employers in the aggregate. In your submission of August 15, 1977 it was noted that * * *

[a]ctuarial cost factors are calculated individually for each Participant. These costs are then accumulated to produce totals for the Fund as a whole without distinction by individual Employers. Administrative expenses, asset figures and actuarial assumptions are for the Fund as a whole.

The treatment of employers that entered or withdrew from the Fund is consistent with the way in which the Fund was maintained with respect to constinuing employers. A special asset account is not established when an employer joins the Fund. Under Section 10.4 of the plan document, new employers may be required to make a lump sum contribution to the Fund or may be offered a lower level of benefit accruals for [*6] its employees for years prior to the employer's participation in the Fund, or a waiting period may be imposed. However, once participation by an employer commences, its former employees' benefits are paid from the Fund's assets as a whole.

Upon termination of participation by an employer, separate funds are not established. Section 10.5(c) provides that participants employed by the withdrawn employer shall continue to be treated as participants of the Fund. Section 10.5(d) of the plan document authorizes the trustees of the Fund to reduce or terminate benefits payable to participants employed by the withdrawing employer. In your submission of August 15, 1977 you advised the PBGC that under this provision the Fund would compare the contributions paid by the withdrawing employer with the benefit payments made to its former employers. If the net contributions (contributions minus the benefits paid) were in excess of the value of the benefits payable to the withdrawing employer' former employees, the Fund would pay the benefits and retain the excess. If the benefit liabilities exceeded the net contributions, the Fund would pay reduced benefits from the Fund assets.

The foregoing [*7] are examples of the evidence that on an ongoing basis the Fund does not restrict the assets available to pay participants' benefits. The same information indicates lack of intent to avoid payment of the benefits of one employer's former employees out of the assets attributable to another employer's contributions.

As we explained at our meeting of March 2, based on our conversations with representatives of the Internal Revenue Service regarding the definition of a multiemployer plan, PBGC believes that IRS would consider a plan such as the Fund to be a multiemployer plan under § 414(f) of the Internal Revenue Code. Section 4001(a)(3) of ERISA defines a multiemployer plan under Title IV as one that is a multiemployer plan under Code § 414(f). Therefore, an IRS conclusion that the Fund is a multiemployer plan would be controlling. If the Fund is a multiemployer plan, the proposed IRS regulation under Code § 414(1) would not apply to the transfer of plan assets or liabilities of the Fund. However, we note that assets or liabilities would have to be spunoff to a "plan" in order for there to be a proper transfer. If you should decide to seek an authoritative determination from the [*8] IRS as to whether the Fund is a multiemployer plan, we would be happy to cooperate with you.

The characterization of plans such as the Fund under ERISA is a very complex problem. Initially, we attempted to categorize the Fund at a time during which there were no regulations dealing with the question, even in proposed form. Even now, we do not have the benefit of final IRS regulation relating to the definition of multiemployer plans, or defining what constitutes a plan. Of course we attempt to avoid confusion in the administration of Title IV, but the lack of guidance in this area, due to the newness of the law and the need to address many complex issues in concert with other agencies, has resulted in unavoidable uncertainty at times.

In retrospect, we realize that our attempts to advise the Fund during this nascent period in ERISA's development resulted in incorrect conclusions at times. We understand that action may have been taken based on PBGC statements that may have resulted in damage. We are willing to discuss with you ways in which any damages, if they exist, can be

recouped or reimbursed.

Matthew M. Lind
Executive Director