Pension Benefit Guaranty Corporation

79-14

October 17, 1979

REFERENCE:
[*1] 4041 Termination by Plan Administrator
4062 Liability of Employer in Single Employer Plans
4063 Liability of Substantial Employer for Withdrawal

OPINION:

This is in response to your requests for a determination by the Pension Benefit Guaranty Corporation whether the * * * Retirement Plan (the "Fund") constitutes a single pension plan or an aggregate of separate plans. We have concluded that the Fund constitutes one plan.

We understand that the Fund was established in 1958 pursuant to a trust agreement ("the 1958 Trust") between three trustees and twelve employers, all of which were members of the * * *, Inc. The 1958 Trust was amended in its entirety in 1971 ("the 1971 Trust"). The 1971 Trust has been amended from time to time, most recently in 1977. The Fund is not collectively bargained.

Our determination as to the nature of an entity -- whether it is a single plan or an aggregate of single plans -- is based on its structure and how it actually operates on an ongoing basis. We look to the documents governing the entity and to relevant evidence of how it has operated and continues to operate. Such evidence may include the reasonable expectations and intent of the parties.

The availability [*2] of funds held by an entity to provide benefits is a central factor in our analysis. Restrictions on the use of such funds indicate that the entity may be an aggregate of single plans. For example, if separate accounts are maintained for each contributing employer, it may be possible to restrict the use of assets from each separate account to pay only the benefits of the employee-participants of the employer maintaining the account. If the evidence shows that payments are effectively restricted, by whatever means, so that there is a minimal risk of funds attributable to the contributions of one employer being used to pay the benefits of another employer's employee-participants, then the entity is an aggregate of single plans.

We note that since the inception of the Fund, all Fund assets have been pooled for investment; actuarial valuations are made on the basis of all covered employees of all contributing employers; and contribution rates are the same for all employers.

On an ongoing basis, the Fund does not maintain separate accounts, i.e., an account for each employer that is credited with the subject employer's contributions and its allocable share of investment income [*3] and charged with benefit disbursements to its employees and with its allocable share of investment losses. The 1958 Trust and the 1971 Trust do not provide that on an ongoing basis the contributions of each employer may be used to fund the benefits of only that employer's employee-participants. In fact, ongoing Fund practice makes all assets available to pay any normal retirement benefit. This practice is evidenced by the fact that the employee participants of four contributing employers have received benefits in excess of the amount of Fund assets attributable to the contributions of their respective employers. ["Estimated Allocation of Assets and Minimum Actuarial Funding Requirements as of January 1, 1976."]

Under the 1958 Trust, retirement benefits were payable only if a participant were employed by a contributing employer at the time of retirement. n1 The benefits of participants already in pay status were not affected by the cessation of participation in the Fund by their former employer. n2 However, no benefit was payable under the 1958 Trust if a participant's employer withdrew before the participant retired. n3 Additionally, if an employer ceased participation, the [*4] Fund retained all the employer's contributions, whether or not they were in excess of the amount necessary to fund the benefits of that employer's retirees. n4 The 1958 Trust also provided that upon termination of the entire Fund, assets were to be allocated according to an express order of priorities with respect to all Fund participants. n5 No consideration was to be given to the separate contributions of each employer.

n1 1958 Trust, section VI.

n2 Id.

n3 Id.

n4 1958 Trust, sections IX and XI(2).

n5 1958 Trust, section XI(3).

The 1971 Trust provided that a participant could only receive benefits if he/she were employed by a contributing employer at the time of retirement. n6 Also, all retirement payments to a retiree entitled to or receiving benefits ceased if his/her employer withdrew before it had participated in the Fund for five years. n7 Additionally, the 1971 Trust did not permit the reversion of any contributions upon the withdrawal of an employer.

n6 1971 Trust, Article 4, section 4.01.

n7 1971 Trust, Article 5, section 5.041 and Article 14, sections 14.02(c) and (d).

The 1971 Trust contained a provision relating to the withdrawal of an employer [*5] that participated in the Fund prior to 1971, but that had not made all required contributions by 1971. If such an employer withdrew from the Fund prior to March, 1976, the retirees of that employer would not receive benefits in excess of the amount that could be provided by the actual contributions of their employer.

In 1977, the 1971 Trust was amended effective March, 1971. n8 One 1977 amendment provides that if an employer withdraws from the Fund, the accrued benefits of its employees "shall be 100% vested to the extent that such accrued benefit is funded." n9 The extent of funding is determined by allocating the Fund assets as though the Fund had terminated on the date of withdrawal. The 1971 Trust provides that upon termination of the Fund, a distribution is made according to an express order of priorities with respect to all Fund participants.

n8 The 1977 amendments did not affect the provision discussed in the preceding paragraph.

n9 May 25, 1977 amendments to 1971 Trust, Article 7, section 7.05.

No consideration is given to the separate contributions of each employer. The distribution priority is a function of age and years of service.

We also note that all interested [*6] parties want to implement either the spin off rule or the special temporary rule, both found at proposed Treasury Regulation § 1.414(1). These rules can be used only by a single plan to which more than one employer contributes.

Examining the evidence under the analysis set forth above, we conclude that the Fund is a single plan. Therefore, the cessation of participation by a contributing employer does not constitute a separate plan termination.

We are in the process of resolving the other issues that you have raised with regard to the Fund. Should you need further assistance, please contact * * * of this Office at (202) 254-4873.

Henry Rose
General Counsel