Pension Benefit Guaranty Corporation

79-3

February 12, 1979

REFERENCE:
[*1] 4041 Termination by Plan Administrator
4062 Liability of Employer in Single Employer Plans
4063 Liability of Substantial Employer for Withdrawal
4064 Liability of Employers in Multiple Employer & Multiemployer Plans

OPINION:

This is in response to your letter requesting the opinion of this Office regarding the status of the * * * (as amended to July 1, 1976) (the "Fund") under ERISA sections 4041, 4062, 4063, 4064 and 4066. For the reasons set forth below, we have concluded that the Fund is not a "single plan" and that the Fund is not "a plan under which more than one employer makes contributions", within the meaning of ERISA section 4063(a). Rather the Fund is an aggregate of single plans.

Our conclusion 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 as to how the entity would operate.

The availability of funds held by an entity to provide benefits is a central factor [*2] in our analysis. If such funds are available for payment to any participant or beneficiary, the entity is a single plan. restrictions on the use of such funds indicate that the entity may be an aggregate of single plans. In particular, when 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 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. n1

n1 As indicated in PBGC Opinion Letter 78-27, dated November 2, 1978, we recognize the desirability of consistent decisions in this area by PBGC and the Internal Revenue Service ("IRS"). Through application of the standards summarized above and consultation with IRS, we expect to attain a high degree of consistency.

In examining the Fund as amended to November 21, 1973 ("1973 Fund") and the Fund as amended [*3] to July 1, 1976 ("1976 Fund"), we find that the Fund constitutes an aggregate of single plans.

Turning first to the 1973 Fund, we find that contributions for the participating employers were substantially to be determined separately by the plan actuary based on each employer's normal cost for its participants and amortization of each employer's unfunded liabilities. [1973 Fund section 6.2(b).] For this purpose, the actuary was to consider * * * as an employer, * * * as an employer, and the other participating employers as an employer. * * * and * * * account for almost 85 percent of the contributions to the Fund and almost 80 percent of the participants -- active, retired, and terminated vested -- in the Fund. Further, although the 1973 Fund provided for portability of service credit, it also provided a mechanism for allocating the responsibility and pension liabilities attributable to employees who had worked for more than one employer among such employers. In this regard, each employer was considered a separate employer. [1973 Fund section 2.4(b)(1), (2).] Therefore, the separate contributions of each employer were available only to pay the benefits of employees who had worked [*4] for that contributing employer. We further note that under the provisions of the 1973 Fund, in the event of final termination of the plan as to all employers, each employer's separate share of the fund was to be used only for the benefit of that employer's employees. [1973 Fund section 8.3.] Also, in the event of cessation of contributions by any employer, the benefits of his employees were to be provided to the extent that they were covered by that employer's allocable share of assets [1973 Fund section 8.4].

Based on the aforementioned provisions relating to the scope of available assets and your representations that plan

practice conformed to the provisions of the documents, we conclude that assets were restricted and, therefore, that the 1973 Fund was an aggregate of single plans, rather than a "single plan."

Under the 1976 Fund, separate sub-trusts are maintained for each participating employer, and the plan trustee is authorized to pay benefits to retirees only from the assets of the subtrusts maintained by the employer(s) for which the retiree worked. [1976 Fund sections 7.2 and 7.3.] Therefore, the assets of each sub-trust are expressly not available to pay all participants' [*5] benefits.

Under the documents and facts you have presented to us, each plan is a single employer plan, and, when and if any single employer terminates its participation under the Fund, the obligations of the Plan Administrator to notify the PBGC are controlled by ERISA section 4041(a). It follows that the liability of such a terminating employer is governed by ERISA section 4062 and not under section 4063. Further, if all employers should terminate participation in the Fund, the liabilities of the respective employers will be determined under section 4062 and not under section 4064.

Finally, the provision for annual notification pursuant to ERISA section 4066 is inapplicable.

I hope this response if helpful to you. Should you need further assistance please do not hesitate to contact * * * of this Office.

Henry Rose
General Counsel