

Pension Benefit Guaranty Corporation

82-24

August 5, 1982

REFERENCE:

[\*1] 4001(a)(3) Definitions. Multiemployer Plan  
4041A(a) Multiemployer Termination. Termination  
4041A(a)(1) Multiemployer Termination. Termination - Plan Amendment - Credited Service  
4041A(a)(2) Multiemployer Termination. Termination - Mass Withdrawal  
4041A(a)(3) Multiemployer Termination. Termination - Plan Amendment - Individual Account Plan  
4041A(c)(2) Multiemployer Termination. Annuity Requirement  
4041A(f)(1) Multiemployer Termination. Lump Sum Payments  
4042 Termination by PBGC  
4201 Withdrawal Liability Established  
4209 De Minimis Rule  
4219(c) Notice & Collection of Withdrawal Liability - Payment  
4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass Withdrawal  
4219(c)(7) Notice & Collection of Withdrawal Liability - Alternate Payment  
4219(c)(8) Notice & Collection of Withdrawal Liability - Cessation of Payments  
4224 Alternate Method for Payment  
4225 Limitation on Withdrawal Liability

OPINION:

This is in response to your recent letter requesting an opinion concerning the application of the Employee Retirement Income Security Act of 1974, as amended (the "Act") to the termination of the \* \* \* Pension Fund (the "Plan").

You state in your letter that the Plan is a [\*2] multiemployer plan as defined in section 4001(a)(3) of the Act. Your letter states that the trustees of the Plan intended to adopt an amendment before June 30, 1982, which ceases the crediting of service for all purposes under the Plan as of June 30, 1982, and reduces accrued benefits to the level in effect on June 30, 1981. All contributing employers were expected to withdraw from the Plan on or before June 30, 1982. As of June 30, 1981, the Plan had assets of \* \* \* and vested accrued benefits of \* \* \* (valued at PBGC single employer termination rates).

Different obligations and rules apply under the Act depending on the type of multiemployer plan termination. Under section 4041A(a) of the Act, a multiemployer plan termination occurs as a result of--

- (1) the adoption . . . of a plan amendment which provides that participants will receive no credit for any purpose under the plan for service with any employer after the date specified by the amendment;
- (2) the withdrawal of every employer from the plan, within the meaning of section 4203, or the cessation of the obligation of all employers to contribute under the plan; or
- (3) the adoption of an amendment to the plan which causes [\*3] the plan to become a plan described in section 4021(b)(1).

If all employers withdraw from a plan, or otherwise cease to be obligated to contribute, the plan is subject to the rules that apply to a termination described in section 4041A(a)(2) ("termination by mass withdrawal"), even if the plan had previously terminated within the meaning of section 4041A(a)(1) or (3). Thus, if all employers withdraw from the Plan, the rules for plans terminated by mass withdrawal will apply.

The first issue you raised was whether the PBGC wished to become trustee of the Plan upon termination. While section 4042 of the Act provides that the PBGC may be appointed trustee of a terminated multiemployer plan, whether the PBGC will seek such an appointment is determined by the facts and circumstances of each case. At the present time, the PBGC has insufficient facts to determine whether it will seek to be appointed trustee of the Plan.

You also inquired about post termination administration of the Plan if the PBGC does not become trustee and whether the Plan can expend all of its liquid assets to purchase annuities. The Act requires a plan sponsor of a plan terminated by mass withdrawal to continue [\*4] to administer the plan until a trustee is appointed under section 4042 of the Act or until plan assets are distributed in full satisfaction of all nonforfeitable benefits. Examples of duties required during the continued administration of such a plan include determining and collecting withdrawal liability in accordance with sections 4201 through 4225 of the Act, monitoring the plan's financial outlook pursuant to section 4281 of the Act, and when necessary, adjusting the plan's benefit levels pursuant to section 4281 of the Act. The plan sponsor may delegate, in accordance with the applicable governing documents of the plan, administrative functions regarding the payment of benefits and collection of withdrawal liability to other persons, such as a salaried or contract administrator.

Section 4041A(c)(2) of the Act provides that except as provided in section 4041A(f)(1), the plan sponsor of a plan terminated by mass withdrawal shall "pay benefits attributable to employer contributions, other than death benefits, only in the form of an annuity, unless plan assets are distributed in full satisfaction of all nonforfeitable benefits under the plan."

This provision means that benefits [\*5] must be paid in periodic installments from plan assets. A plan sponsor may only provide benefits in an alternative form (e.g., purchase annuities from an insurance company or distribute a lump-sum payment) if: (1) plan assets are distributed in full satisfaction of all nonforfeitable benefits (section 4041A(c)); (2) the entire nonforfeitable benefit of a participant does not exceed \$1,750 (section 4041A(f)(1)); or (3) PBGC determines that the distribution is not adverse to the interest of the plan's participants and beneficiaries generally and does not unreasonably increase PBGC's risk of loss (section 4041A(f)(1)).

The limitation regarding the method of providing benefits in section 4041A(c)(2) is necessary to preserve plan assets in order to protect the benefits of participants not now in pay status, and to prevent an unreasonable loss to the PBGC. Utilizing a terminated plan's liquid assets to purchase annuity contracts for some participants jeopardizes the benefits of other participants. As you acknowledged in your letter, if all or a substantial portion of a plan's assets are used to purchase annuity contracts, the plan's ability to meet benefit payments for other participants [\*6] would be exclusively, or largely dependent, on the stream of withdrawal liability payments. The benefits of these other participants would be jeopardized because the withdrawal liability payments may not be sufficient to provide the level of benefits that would have otherwise been available.

The PBGC also incurs a greater risk because assets that would otherwise have been available to provide guaranteed benefits are distributed from the plan. If the withdrawal liability payments are not sufficient to pay guaranteed benefits, the PBGC has to provide financial assistance. Such assistance might not have been required if the plan had retained the assets and made only periodic benefit payments from those assets. Furthermore, if the plan had retained its assets it may have realized experience gains (e.g., interest and mortality) that would have enabled it to avoid insolvency, or to at least reduce PBGC's exposure.

You have also asked whether the Plan could adopt a rule under sections 4219(c)(7) and 4224 of the Act, by which all employers' withdrawal liability payment schedules would be for the same period of time. You indicated that the desired result from such a rule would be to [\*7] prevent windfall advantages to employers whose obligation to make withdrawal liability payments may cease under section 4219(c)(8) of the Act prior to the satisfaction of their withdrawal liability.

Section 4219(c) of ERISA prescribes the schedule for the payment of withdrawal liability. Sections 4219(c)(7) and 4224, which are virtually identical, permit plans certain latitude regarding the satisfaction of an employer's withdrawal liability. Section 4224 provides that:

"[a] multiemployer plan may adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability if such rules are consistent with this Act and with such regulations as may be prescribed by the corporation."

The legislative history indicates that the purpose of providing latitude in the area of collection of withdrawal liability was to enable trustees to weigh the cost of collection against the expected return in order to maximize net recovery.

"[Section 4224] authorizes plans . . . to provide an alternative method for payment of withdrawal liability. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary [\*8] duties and characteristic of a responsible creditor concerned with maximizing the total ultimate recovery at supportable

costs. Thus, for example, where it is prudent and in the participants' interest, plan trustees may decide to settle a withdrawal liability dispute for less than the full amount claimed, to cooperate with an employer's other creditors in a contractual or court-supervised renegotiation of the employer's indebtedness, or even to forego the assessment of further collection of liability where it is apparent from the circumstances that the costs involved would exceed the amount likely to be recovered." [126 Cong. Rec. H7889 (daily ed., August 26, 1980) (remarks of Rep. Thompson.)]

We conclude that your proposal is inconsistent with the Act and is not permissible under section 4224 or 4219(c). Under your proposal the annual payment of certain withdrawn employers would be reduced and their payment period extended to coincide with the payment periods of other withdrawn employers. Your proposal would reduce the annual income of the Plan and increase the risk of insolvency and noncollection of withdrawal liability.

Finally, you inquired whether employer contributions [\*9] made to the plan from July 1, 1981, through June 30, 1982, could be treated as advance payment by the employers toward the satisfaction of their withdrawal liability in view of the fact that the Plan Trustees are reducing accrued benefits to the level in effect on June 30, 1981.

First, it is important to note that section 4041A(a)(1) of the Act provides that a multiemployer plan termination occurs as a result of the adoption of a plan amendment which provides that participants will receive no credit for any purpose under the plan for service with any employer after the date specified by such amendment. That section does not authorize Plan trustees to reduce benefits retroactively. See, Internal Revenue Code, section 411(d)(6).

Employer contributions made from July 1, 1981, through June 30, 1982, are obligations that arose under collective bargaining or related agreements. They are not withdrawal liability payments pursuant to section 4219. An employer's withdrawal liability obligation arises only when the employer withdraws from a multiemployer plan.

In the case of a withdrawal, other than a withdrawal to which section 4219(c)(1)(D) applies, an employer's withdrawal liability [\*10] is generally determined as of the end of the plan year preceding withdrawal. An employer's allocable share of the plan's unfunded vested benefits is determined as of that date. Although Congress provided for various reductions to be made in determining an employer's liability (e.g., the De Minimis rule in section 4209 and the rules in section 4225), it did not provide a reduction for contributions made after the end of the year preceding withdrawal.

Section 4219(c)(1)(D) applies in the case of a termination by mass withdrawal. That section requires the total unfunded vested benefits in the plan to be allocated among withdrawing employers. Treating contributions made prior to the date of plan termination as advance withdrawal liability payments would be inconsistent with section 4219(c)(1)(D) because it would result in the allocation of less than 100 percent of the plan's total unfunded vested benefits.

We hope this information is of assistance to you.

Henry Rose  
General Counsel