Pension Benefit Guaranty Corporation

86-14

June 26, 1986

REFERENCE:
[*1] 4007 Payment of Premiums

OPINION:

This is in response to your request for our opinion as to whether your client, the * * * Company * * *, is entitled to a premium refund from the Pension Benefit Guaranty Corporation (the "PBGC").

The facts, as set forth in your request, are as follows. A terminated the * * * Plan for * * * Employees (the "Old Plan") on December 28, 1984. On March 28, 1985, the PBGC issued a Notice of Sufficiency. The assets of the Old Plan have not yet completely been distributed. Because Section 4007(a) of ERISA, 29 U.S.C. § 1307(a), provides, in pertinent part, that "[p]remiums shall continue to accrue until a plan's assets are distributed pursuant to a termination procedure," * * * paid premiums to the PBGC for the Old Plan's 1985 plan year, beginning January 1, 1985. The premium payment, which, pursuant to PBGC regulations at 29 C.F.R. § 2610.5(a)(3), must be based on the Old Plan's participant count on the last day of the preceding plan year -- December 31, 1984 -- equalled $2.60 for each of 6,650 participants, and thus totalled $17,290.00.

Effective January 1, 1985, A adopted the * * * Company 1985 Retirement Plan (the "New Plan"), covering 7,364 participants, [*2] including all 6,650 participants of the Old Plan. A paid premiums to the PBGC for the New Plan's 1985 plan year, from January 1, 1985, through December 31, 1985. That premium payment, which, pursuant to 29 C.F.R. § 2610.5(c), must be based on the New Plan's participant count on the date it became covered by Section 4021 of ERISA, 29 U.S.C. § 1321 -- presumably its January 1, 1985, effective date -- equalled $2.60 for each of 7,364 participants, including those 6,650 participants also covered by the Old Plan, and thus totalled $19,146.40.

You request a refund of $17,290.00, representing what you characterize as the "duplicative premiums" your client paid on behalf of the 6,650 participants covered both by the Old Plan and the New Plan. Your request is based on your assertion that the New Plan is a "successor plan" to the Old Plan, as that term is defined in Section 4021(a) of ERISA, 29 U.S.C. § 1321(a), and, as such, constitutes a "continuation" of the Old Plan for the purpose of precluding duplication of premium payments.

We note initially that the PBGC is empowered by Section 4006(a)(3)(B) of ERISA, 29 U.S.C. § 1306(a)(3)(B), to prescribe by regulation the extent to which Title [*3] IV insurance premiums may apply "more than once for any plan year to an individual participating in more than one plan maintained by the same employer . . . ." The PBGC has done so through its regulatory definition of the term "participant" at 29 C.F.R. § 2610.2, as interpreted in a Notice published by the PBGC in the Federal Register at 45 Fed. Reg. 47423 (July 15, 1980). In that Notice, the PBGC announced its determination: 1) that the regulatory definition requires that an individual be counted as a participant in each plan in which he or she earns or retains credited service; and 2) that, because Sections 4006 and 4007 of ERISA, 29 U.S.C. § § 1306, 1307, require that premiums be paid on behalf of each plan participant, premiums would be payable for individuals who participate in the manner described above in more than one plan for each plan in which they participate. The 6,650 individuals for whom you claim paid duplicative premiums thus were "participants" both in the Old Plan (in that they were retaining credited service) and in the New Plan (in that they were earning and/or retaining credited service) in the 1985 plan year, and must therefore be counted in both plans for [*4] premium payment purposes.

It is clear that both the Old Plan and the New Plan -- two separate plans -- were in existence during the 1985 plan year for the purpose of accrual of premium payments. This is so even assuming, as you assert, that the New Plan is a "successor plan" to the Old Plan and therefore, pursuant to Section 4021(a) of ERISA, 29 U.S.C. § 1321(a), "is considered to be a continuation of" the Old Plan for purposes of Title IV. The mere fact that one plan is considered to be a "continuation" of another in no way negates the separate nature of the two plans or changes their respective periods of existence. (The principal, if not the only, significance of successor plan status as a "continuation" of a prior plan is that the time during which benefit increases were in effect under the prior plan will be counted in determining the extent to which such increases may be guaranteed under the "phase-in" provisions of ERISA Section 4022(b)(7), 29 U.S.C. §

1322(b)(7), in the event the successor plan terminates.) The two plans clearly coexisted for a period of time, and must pay premiums accordingly.

For all of the foregoing reasons, we have determined that your client is not [*5] entitled to a refund of premiums. If you have any questions concerning this matter, please feel free to call Harold Ashner or John Falsey at (202) 956-5023.

Edward R. Mackiewicz
General Counsel