

Pension Benefit Guaranty Corporation

79-10

May 11, 1979

REFERENCE:

[\*1] 4001(a)(1) Definitions. Administrator  
4022 Benefits Guaranteed  
4022(a) Benefits Guaranteed. Type of Benefits Guaranteed  
29 CFR 2605. Guaranteed Benefits  
4063 Liability of Substantial Employer for Withdrawal  
4063(a) Liability of Substantial Employer for Withdrawal. Notice of Withdrawal of Substantial Employer  
4063(d) Liability of Substantial Employer for Withdrawal. Partitioning of Plan  
4064 Liability of Employers in Multiple Employer & Multiemployer Plans

OPINION:

This is in response to your letter concerning the withdrawal of \* \* \* from the \* \* \* (the "Plan"). You asked several questions relating to our interpretation of sections 4022 and 4063 of the Employee Retirement Income Security Act of 1974 (the "Act").

As we understand the pertinent facts, the Plan is a multiemployer plan, as defined in section 414(f) of the Internal Revenue Code of 1954, (the "Code"), that is covered under Title IV of the Act. \* \* \* has been a participating employer since the Plan was established and has always been a substantial employer within the meaning of section 4001(a)(2) of the Act. On April 22, 1978 \* \* \* closed 26 stores and terminated the employment of approximately 750 of its 1000 employees covered [\*2] under the Plan. In November 1978, \* \* \* closed its remaining stores within the Plan's jurisdiction and terminated the employment of its remaining employees covered under the Plan. The Plan provides that upon the withdrawal of an employer from the Plan, the accrued benefits of the employer's participants shall be forfeited to the extent that such benefits accrued as a result of service with the employer before the employer was required to contribute to the Plan. n1

n1 Plan section 9.1 provides: "In the event of the withdrawal from participation in this Plan of any Employer or group of Employers and their Employees, the benefits of, or payable in respect of, retired Participants, vested former Participants, and Participants of such Employer or Employers shall be redetermined by reducing such person's accrued benefits by the portion of such benefit attributable to his service prior to his Employer's Effective Date hereunder." The term "Effective Date" means ". . . as to each Employer, the date of the Employer's first obligation to make contributions to this Plan in accordance with a written agreement with the Trustees or a collective bargaining agreement." Plan section 1.2. [\*3]

Your first question concerns our reading of the term "withdrawal" in section 4063. You asked whether a withdrawal within \* \* \* the meaning of section 4063 occurred on April 22, 1978 \* \* \* when \* \* \* ceased making contributions to the Plan \* \* \* for approximately 75 percent of its covered employees, \* \* \* or in November 1978 when operations ceased?

As you know, section 4063(a) applies upon the "withdrawal" of a substantial employer from a plan to which more than one employer contributes. A "withdrawal" has not occurred when an employer remains obligated to contribute to a plan and is contributing to it. n2 Accordingly, for purposes of section 4063, \* \* \* withdrew from the Plan in November 1978.

n2 The PBGC has not precluded the possibility that it would apply section 4063 to an employer that remained in a plan primarily for the purpose of avoiding liability under section 4063. The PBGC has no reason to believe, however, that \* \* \* continued to operate a few stores between April 1978 and November 1978 to avoid liability under section 4063.

Your second question is, assuming that the PBGC exercises its authority under section 4063(d) to partition the Plan, will that portion [\*4] of the plan treated as a terminated plan be treated as a single employer plan termination to which section 4062 applies or a more than one employer plan termination to which section 4064 applies?

Section 4063(d) provides that the PBGC may, under certain circumstances, partition a plan into two plans, treating one as a terminated plan and the other as a separate plan. We conclude that when a multiemployer plan is partitioned under section 4063(d), the resulting terminated plan should be treated as a multiemployer plan, so that employer liability is determined under section 4064.

Section 4064 imposes liability on each employer who maintains the plan at the time the plan terminates and each employer who contributed to the plan within the five years preceding the termination date. The general rule is that each employer's liability is a pro rata share of the total plan insufficiency determined according to each employer's required rate of contributions during the five plan years preceding plan termination. However, section 4064 also gives the PBGC the authority to determine the liability of each employer "on any other equitable basis prescribed by the [PBGC] in regulations." Because [\*5] the PBGC is aware of situations where the imposition of employer liability in accordance with the formula contained in section 4064 would produce an unjustifiable result for certain employers, the PBGC expects to promulgate regulations, setting forth an alternative method for allocating employer liability under section 4064 and criteria for using this alternative allocation rather than the formula contained in section 4064. See the PBGC's Semiannual Agenda of Significant Regulations Under Development, 43 FR 59942, 59943-4.

Your third question is whether accrued benefits that are cancellable under Plan section 9.1 are treated as nonforfeitable for purposes of section 4022 of the Act. n3

n3 The term "nonforfeitable benefits" is defined in 29 CFR § 2605.6 for purposes of determining those benefits guaranteed under section 4022(a) of the Act. The PBGC has consistently asserted that a benefit that is "nonforfeitable" for purposes of Title IV is not necessarily "nonforfeitable" for the purpose of other titles of ERISA. And, even if a benefit is "nonforfeitable" for purposes of section 4022(a), the benefit is not necessarily guaranteeable under that section. See 29 CFR Part 2605 (1978). Accordingly, a benefit that is nonforfeitable under Treas. Reg. 1.411(a)-4(b)(5) is not necessarily guaranteeable under Title IV. [\*6]

Although, Plan section 9.1, on its face, provides that benefits accrued as a result of service with an employer before that employer was required to contribute to the Plan ("past service benefits") shall be forfeited upon the withdrawal of an employer, it is our understanding that the Plan trustees did not apply Plan section 9.1 to employer withdrawals before the withdrawal of \* \* \*. And, in the case of the \* \* \* withdrawal, we understand that the Plan trustees intend not to apply Plan section 9.1 to all groups of participants. Whether the PBGC guarantee applies to such past service benefits depends on the appropriate interpretation of Plan section 9.1 and that is not clear in view of the apparent discrepancy between the Plan provision and practice.

You also raise a question regarding the classification of participants (e.g., retired individuals) included in the term "no longer working in covered service". Section 4063(d) requires the PBGC to include "participants no longer working in covered service under the plan as a result of their employer's withdrawal" in the portion of the partitioned plan treated as a termination and "participants who remain in covered service [\*7] under the plan" in the surviving plan. With respect to employees who worked for the withdrawing employer, section 4063(d) does not specify whether individuals receiving benefit payments under the plan, or deferred vested individuals who have retired, irrespective of their retirement date, are required to be included in the surviving or the terminating plan. We read section 4063(d) to authorize the PBGC to allocate these participant groups between the two plans in an equitable manner based on the facts and circumstances of the case. Further, we believe the terminated plan should be treated as a "successor plan" for purposes of applying the "phase-in" rules in section 4022(b).

I hope that this information will be helpful to you.

Henry Rose  
General Counsel