Pension Benefit Guaranty Corporation

82-37

December 9, 1982

REFERENCE:
[*1] 4201 Withdrawal Liability Established
4203 Complete Withdrawal
4204 Sale of Assets

OPINION:

This responds to your request that the Pension Benefit Guaranty Corporation ("PBGC") rule on several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., as amended by the Act).

You represent the A Pension Fund (the "fund"), which is a multiemployer pension plan covered under Title IV of ERISA. Your questions concern liabilities allocable under ERISA to employers of the employees who clean the G Building, an office building in downtown for which contributions are received by the Fund. Specifically, you wish to know who constitutes an employer for purposes of assessing this liability.

Prior to January 14, 1981, the G Building was owned by the B Company, and managed by C * * *, Inc. * * *. G Building was identified as the employer on the relevant signature page of the collective bargaining agreement. The agreement was signed for the G Building by C * [*2] * *, inc. B Company did not own any other building at which Fund participants were employed. C was engaged, as of January 14, 1981, as managing agent at at least two other buildings where Fund participants were employed. C supervised, hired and fired the G Building cleaning employees, paid them their wages, and made contributions to the Fund on their behalf. The expenses of employing the G Building employees were reimbursed to C * * *, dollar-for-dollar, by the B Company.

On January 14, 1981, the G Building was sold by the B Company to D * * *, Inc. In the agreement of sale between the B Company and D * * *, Inc., B Company assigned the labor agreement to the purchaser of the building. Subsequent to that date, continued to manage the G Building under a "Property Management Agreement" which purported to establish an independent contractorship rather than an agency relationship.

C continued to be reimbursed by the building owner for the expenses of employing the cleaning employees, who were now directly employed by C * * *.

In April, 1981, the employees of C became employees of E * * *, Inc., which assumed the cleaning and security functions at the Building, and which also [*3] assumed the labor agreement applicable to Local employees employed at the G Building.

Under the Act the initial responsibility for determining whether any Particular action constitutes a withdrawal from a multiemployer plan, the amount of any liability resulting therefrom, and the identity of the liable employer lies with the plan. The Act further provides that any disputes between a plan and an employer on these issues are to be resolved first through arbitration, subject to review in the courts. Given this scheme for enforcement of the Act, the PBGC prefers not to interject itself in such determinations by issuing an opinion on the application of the law to the particular transactions you describe. The PBGC, however, will continue its practice of answering general interpretative questions regarding the Act.

Section 4201 of ERISA establishes that an employer is liable to a multiemployer pension plan if it withdraws from the plan. Section 4203 of ERISA defines a withdrawal as a permanent cessation of "an obligation to contribute under the plan." While Title IV does not directly define the term "employer," Section 4001(b) does provide that it includes all trades or businesses [*4] under common control. Thus, if an entity is found to have had an obligation to contribute to the Fund and to have ceased to have such obligation (or ceased covered operations), liability attaches to that entity and all trades or businesses under common control with it.

Section 4212(a) of ERISA defines "obligation to contribute" as

an obligation to contribute arising--

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labormanagement relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

The legislative history of the Act indicates that an employer has an "obligation to contribute" to a plan if the employer has agreed to make contributions to the plan on behalf of workers for work performed:

The committees intend that the term obligation to contribute under a collective bargaining, or related, agreement apply to any situation in which an employer has directly or indirectly agreed to make contributions to a plan. This includes cases in which the employer signs a collective bargaining agreement or a related agreement such as a participation [*5] agreement or memorandum of understanding, and cases in which the employer agreed to be bound by an association agreement. 126 Cong. Rec. 11672 (1980).

You also ask whether a withdrawal has occurred as a result of any of the sales you describe. In many instances, a sale of assets will result in a complete or partial withdrawal because the seller has ceased covered operations and has ceased to have an obligation to contribute for such operations. However, see ERISA Section 4204(a)(1), which provides that, if certain conditions are met, a sale of assets which otherwise would trigger withdrawal liability will not be considered a complete or partial withdrawal.

I hope this response in helpful to you.

Henry Rose
General Counsel.