Pension Benefit Guaranty Corporation

86-7

March 24, 1986

REFERENCE:
[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal

OPINION:

This responds to your request, as supplemented by your letter of March 11, 1986, for the opinion of the Pension Benefit Guaranty Corporation regarding the application of section 4203(a) of the Employee Retirement Income Security Act, as amended, (ERISA) to an employer that ceases to make contributions to a multiemployer pension plan following a union decertification. Specifically, you ask whether such an employer has any special defenses to withdrawal liability. You also ask whether the answer to that question would be affected by the facts that the employer's contributions to the plan exceeded the vested benefits of its employees, and the employer established a new plan for its employees that included past service credit.

Section 4203(a) of ERISA provides:

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer--

(2) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

Section 4203(a) thus makes no distinctions based on the causes of a cessation of an employer's obligation to contribute [*2] under a plan. Since section 4203 expressly provides special withdrawal rules in cases to which Congress did not want the general rule of section 4203(a) to apply, e.g., the entertainment industry and the building and construction industry, we conclude that the absence of any special provision in section 4203 (or elsewhere) for cessations caused by decertification elections indicates that Congress intended for the general provisions of section 4203(a) to apply to such cessations.

This conclusion is supported by the fact that Congress provided relief in section 4235 of ERISA for certain employers that completely or partially withdraw from a multiemployer plan as a result of a certified change of collective bargaining representative. Under section 4235(c), the employer's withdrawal liability to the plan to which it ceased making contributions because of a change in the collective bargaining representative is reduced to the extent the plan sponsor transfers to the new plan unfunded vested benefits allocable to the employer. This section clearly indicates that Congress intended for an employer that ceases contributions as a result of a decertification to be subject to withdrawal [*3] liability. If such an employer were not subject to the general withdrawal liability rule of section 4203(a), there would be no need for the relief provision in section 4235(c).

Your letter characterizes decertification as an involuntary withdrawal and cites legislative history that you believe indicates that Congress did not intend the withdrawal liability provisions to apply to involuntary cessations of contributions. The basic thrust of these citations, you seem to assert, is that the purpose of the Multiemployer Pension Plan Amendments Act of 1980 was to discourage voluntary withdrawals from multiemployer plans.

Without agreeing with your assertion that a decertification constitutes an involuntary withdrawal, it is, in any event, our view that this is too narrow a statement of MPPAA's purposes. These purposes include protection of plans when an employer withdraws, regardless of whether the withdrawal may be characterized as voluntary or involuntary. As the First Circuit stated in Keith Fulton & Sons v. New England Teamsters, 762 F.2d 1124, 1131 (1st Cir. 1984), modified on other grounds, 762 F.2d 1137 (1st Cir. 1985) (en banc):

The MPPAA and its legislative history [*4] show that Congress was concerned about the effect of any withdrawal, not just "voluntary" ones. Any withdrawal causes the same harm to the fund -- it was logical for Congress not to distinguish between them on the basis of voluntariness. [Emphasis in original.]

The court in Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Sup. 523, 526 (W.D. Wash. 1982), applied similar reasoning in upholding liability for a withdrawal that occurred when the union disclaimed any further intent to represent the employer's employees following a contested decertification election.

Although your letter relies on general statements of legislative purpose from the PBGC's Multiemployer Study Required by P.L. 95-214, specific statements in the Study expressly support the conclusion that withdrawal liability applies to withdrawals caused by decertification:

Liability would be assessed when a withdrawal occurs irrespective of the reason for the withdrawal, and irrespective of whether the union, the employer, or both initiate the withdrawal. Liability would be assessed, for example, when employees vote to decertify (footnote omitted) their bargaining representative [*5] or when the employer bargains out of a plan. (footnote omitted) (at p. 101).

This answer is not changed by the additional facts presented in your March 11 letter. In general, an employer in a multiemployer plan is not responsible only for the benefits of its own employees, but rather shares, with the other employers, a responsibility for all the plan's benefit obligations. Indeed, three of the four statutory methods for allocating a plan's unfunded vested benefits to withdrawing employers are based on the plan's unfunded vested benefits, not on the vested benefits attributable to a withdrawn employer's employees. Only in a plan using the direct attribution method (section 4211(c)(4)), is an employer's liability based on the unfunded vested benefits attributable to its employees; but even under this method, the employer is also liable for certain additional amounts.

With respect to your second point, we note that the pension arrangements an employer may make for its employees following a withdrawal from a multiemployer plan do not mitigate the harm to the plan caused by the withdrawal. Therefore, absent the type of situation described in section 4235(c) and section 4211(e), [*6] i.e., where the multiemployer plan transfers some of its unfunded vested benefits to a plan to be maintained by the withdrawing employer, the employer's establishment of a new plan for its employees does not affect the employer's withdrawal liability to the multiemployer plan.

Finally, we call to your attention section 412(a)(1)(B) of the Multiemployer Act, which directs the PBGC to study "the necessity of adopting special rules in cases of union-mandated withdrawal from multiemployer pension plans". The PBGC is currently conducting that study; as yet, no date for its completion has been set.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Ronald Goldstein, of the Corporate Policy and Regulations Department. His telephone number is (202) 956-5050

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General Counsel