

Pension Benefit Guaranty Corporation

83-7

1983 PBGC LEXIS 18

March 21, 1983

REFERENCE:

[\*1] 4261 Financial Assistance

OPINION:

This responds to your letter to \*\*\* of my staff dated \*\*\* regarding the above-referenced plan (the "Plan"), which was received by the Pension Benefit Guaranty Corporation (the "PBGC") on \*\*\*. You requested that the plan sponsor of the Plan, the \*\*\* International Union Pension Fund (the "International Fund"), be relieved of the obligation to send to the PBGC the employer contributions paid to the Plan. You also requested that the International Fund be permitted to use employer contributions paid to the Plan to pay the union dues of participants and retirees under the Plan or, in the alternative, that the PBGC increase the amount of the "monthly assistance" to the Plan to allow the International Fund to "meet its full obligations to the retiree of maintaining his continued membership in the Union."

We understand your requests to be addressed to the provisions of the Security Agreement executed by the PBGC and the plan sponsor of the Plan on \*\*\* (the "Agreement"), which secures repayment by the Plan of the financial assistance loan made by the PBGC to the Plan pursuant to Section 4261(c) of the Employee Retirement Income Security Act of 1974 ("ERISA"), [\*2] as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364 (1980), 29 U.S.C. § 1431(c), in the amount of \*\*\*. Pursuant to Section One of the Agreement, the Plan has granted to the PBGC a security interest in certain collateral. Pursuant to Section Two of the Agreement, the collateral securing repayment of the loan consists of all of the Plan's accounts and general intangibles, including all of the Plan's rights to receive employer contributions. Pursuant to Section 3(b)(9) of the Agreement (page 3), the Plan has covenanted and warranted to the PBGC that the accounts and general intangibles comprising the collateral include all employer contributions to the Plan, regardless of whether the contributions are physically paid to the plan itself or to the International Fund. Under Section 3(b)(1) and 3(b)(2) of the agreement, the Plan has also bound itself to pay guaranteed benefits within the meaning of Section 4022A of ERISA, 29 U.S.C. § 1322a, and no more than guaranteed benefits, to the retirees and beneficiaries under the Plan, and has bound itself not to use the PBGC's loan for any other purpose except to pay administrative expenses upon the [\*3] PBGC's prior written approval. Pursuant to Section 6(b)(2) of the Agreement (page 5), the Plan has agreed to deliver to the PBGC "all cash, checks, drafts . . . which may be received by [the Plan] at any time in full or partial payment of collateral" unless the PBGC consents otherwise in writing. The Plan has further agreed not to commingle such cash, checks or drafts with any other funds of the Plan and to hold them in express trust for the PBGC, unless the PBGC consents otherwise in writing.

Pursuant to Section 6(a) of the Agreement, the PBGC has the power to notify any employers obligated to make contributions to the Plan to pay such contributions directly to the PBGC, and the Plan has agreed to notify such employers to make such payment directly to the PBGC if we so request. Finally, under Section 11(e) of the Agreement (page 7), the Plan has covenanted and agreed to deliver to the PBGC "any note, trade acceptance, chattel paper or other instrument or writing" which constitutes evidence of the collateral.

\*\*\*, an officer of the plan administrator of the Plan, informed \*\*\* on \*\*\*, that the pension benefits for all of the approximately \*\*\* retirees and beneficiaries [\*4] under all of the plans sponsored by the International Fund are disbursed from account number \*\*\* at the Bank of \*\*\*, \*\*\*. In a telephone conversation on \*\*\*, \*\*\*, the Cashier and a vice-president of the Bank of \*\*\*, informed \*\*\* that account number \*\*\* is in the name "Officers and Employees of the Locals for the \*\*\* International Union," and that this account is used solely to pay out pension benefits and not to pay administrative expenses. \*\*\* also informed \*\*\* that \*\*\*, Incorporated, the Plan's administrator, makes the decisions about what funds are to be deposited in account \*\*\*. Subsequently, on \*\*\* the PBGC received from the Bank of \*\*\* a copy of the document establishing account \*\*\*, and a copy of the signature card for that account. The signature card shows the name of the account as \*\*\* International Union Pension Benefit Account." The document establishing the account shows the name of account \*\*\* as "Officers and Employees of the Locals \*\*\* Unfon." This document is a resolution executed by officers of \*\*\*, Inc. on \*\*\*, designating the Bank of

\* \* \* as "a depository in which the funds of this Corporation may be deposited . . . [\*5] . ." [Emphasis added.] However, \* \* \*, Inc., is the plan administrator and not the plan sponsor of the Plan. The PBGC is therefore uncertain whether the Plan sponsor has sufficient control over account number \* \* \*.

Furthermore, the \* \* \* resolution of the Plan's administrator reveals that the same resolution was used as authority for opening accounts numbers \* \* \* and \* \* \*. Two dates are entered on the face of the resolution beside these account numbers, \* \* \* and \* \* \*, respectively. Signature authority over account \* \* \* was vested in \* \* \* and \* \* \*; we are aware that \* \* \* is currently a union trustee of the Plan. Please advise us whether \* \* \* was also a trustee of the Plan and, if so, whether he was a union trustee or a management trustee. Similarly, the \* \* \* resolution vested signature authority over accounts \* \* \* and \* \* \* in \* \* \* and \* \* \*, currently a management trustee of the Plan and a union trustee of the Plan, respectively. The persons in whom signature authority is vested by the resolution purport to be "of this Corporation," yet our understanding is that none of these persons are officers, directors or employees of \* \* \* Inc., nor have they ever been. Please [\*6] advise us whether this understanding is correct. In addition, please explain to us the purpose served by accounts \* \* \* and \* \* \*, and advise us whether these accounts were in fact opened on and \* \* \*, respectively, whether they are still active accounts and, if not, when and why they were closed.

\* \* \* informed \* \* \* on \* \* \* that he had opened a new account at the Bank of \* \* \*, account number \* \* \* in the name "\* \* \* Pension Fund-- \* \* \* Plan." \* \* \* confirmed this fact in a conversation with \* \* \* on \* \* \* told \* \* \* that effective \* \* \* all employer contributions to the Plan and all other monies received by the Plan, including future advances by the PBGC, will be deposited directly in account number \* \* \* and in no other bank account, and that starting in \* \* \* all benefits paid to retirees and beneficiaries under the Plan will be disbursed from account number \* \* \*, and from no other bank account.

On the basis of the provisions of the Agreement summarized above, and the facts reviewed above, we have determined that the plan sponsor need not deliver to the PBGC employer contributions paid to the Plan, nor any other cash, checks, drafts, notes or other instruments or writings [\*7] which the Plan may receive in payment of collateral or which constitute evidence of collateral under the Agreement. The PBGC's consent to the Plan's request to maintain custody of the employer contributions, however, is contingent upon the following: (1) strict observation of the banking procedures discussed in the previous paragraph; (2) delivery by the Plan to the PBGC each month of a copy of the statements issued by the Bank of \* \* \*, and a copy of the check books, for accounts numbers \* \* \* and \* \* \*; (3) execution of a resolution by the Plan on the form used by the Bank of \* \* \* which designates the Bank of \* \* \*, account number \* \* \*, as a depository for the funds of the Plan (and not for the funds of the Plan's administrator), and delivery of a copy of such resolution to the PBGC by \* \* \*, \* \* \*; and, (4) submission to the PBGC of the explanations and information requested above regarding accounts \* \* \* and \* \* \*. The information and documents specified in items (2) through (4) above should be delivered or mailed to \* \* \*, Deputy Director, Office of Program Operations, Mail Stop 511, Pension Benefit Guaranty Corporation, 2020 K Street, N.W., Washington, D.C. 20006. [\*8] (refer to Case No. \* \* \*).

Pursuant to Sections 3(b)(1) and 3(b)(2) of the Agreement, the PBGC declines to consent to the use of employer contributions, PBGC financial assistance, or any other monies received by the Plan to pay union dues for retirees and beneficiaries under the Plan. Pending a final decision regarding the payment of union dues by the Plan, the PBGC also declines to increase the amount of any interim assistance which it may provide the Plan under Section 4261(c) of ERISA, 29 U.S.C. § 1431(c), by the amount required to be paid in union dues.

I hope this addresses your concerns.

Mitchell L. Strickler  
Acting General Counsel