Pension Benefit Guaranty Corporation

91-7

October 1, 1991

REFERENCE:
[*1] 4219(b) Notice and Collection of Withdrawal Liability. Withdrawal Liability - Assessment and Review
4221 Resolution of Disputes
>29 C.F.R. 2641>

OPINION:

We respond to your request for an advisory opinion from the Pension Benefit Guaranty Corporation ("PBGC") concerning the ability of employers to raise additional issues at various stages of the review and dispute resolution procedures under sections 4219(b) and 4221(a) of the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), 29 U.S.C. § 1381, et seq., as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208 (1980).

As soon as practicable after an employer's withdrawal from a multiemployer pension plan, the plan sponsor must notify the employer of the amount of liability and the schedule of liability payments, and demand payment. ERISA § 4219(b)(1). To contest that determination the employer must first seek review by the plan sponsor under § 4219(b)(2)(A); if the dispute is not resolved, § 4221(a)(1) provides that "[a]ny dispute . . . shall be resolved through arbitration." You ask whether an employer that fails to raise issues in an initial written request for [*2] review under § 4219(b) may later raise such issues for review by the plan, or in arbitration under section 4221. You also ask whether issues may be brought to the arbitrator for review after submission of the initial arbitration demand.

The statute provides that, no later than ninety days after receiving the plan sponsor's notice of liability, an employer may request review of specific matters relating to the determination of liability and the payment schedule, may identify inaccuracies in the determination of the amount of withdrawal liability, and may furnish additional relevant information. ERISA § 4219(b)(2)(A). The statute does not directly address whether the employer may raise new issues after submission of the initial request for review. Of course, if the initial request is submitted before the expiration of the ninety-day period, the employer may, within the remainder of the period, submit additional relevant information. Thereafter, the statute provides an opportunity for a "reasonable review" by the plan sponsor of any matters raised. New issues may become apparent during that review period, before the time for initiating arbitration expires. To the extent that such [*3] issues can then be raised by the employer and addressed by the plan sponsor, and perhaps resolved without the need for arbitration, the review process functions as anticipated. It is therefore our opinion that additional issues may be brought to the plan sponsor for review after submission of the initial request. n1

n1 The time for initiating arbitration continues to run during this period, and is not tolled by raising additional issues with the plan sponsor.

An employer may also raise in its arbitration demand additional issues omitted from the written request for review under § 4219(b). Neither the statutory provision establishing the arbitration mechanism, § 4221, nor the regulations implementing that provision, 29 C.F.R. Part 2641 (1990), limits the arbitration demand to issues raised in the employer's § 4219 request for plan sponsor review. Moreover, it is our opinion that an arbitrator may permit issues omitted from the arbitration demand under § 4221(a) to be raised at a later date in the arbitration proceeding in appropriate circumstances, provided that there is no undue prejudice to the plan sponsor or undue delay in the proceedings. Our conclusion is based on the [*4] nature of arbitration proceedings under the Act and arbitration rules.

The Act provides that "[a]n arbitration proceeding . . . shall be conducted in accordance with fair and equitable procedures to be promulgated by the [PBGC]." ERISA § 4221(a)(2). The PBGC's implementing regulation provides that "[i]f the employer initiates arbitration, it shall include in the notice of initiation a statement that it disputes the plan sponsor's determination of its withdrawal liability and is initiating arbitration. A copy of the demand for withdrawal liability and any request for reconsideration, and the response thereto, shall be attached to the notice . . . . In no case is compliance with formal rules of pleading required." 29 C.F.R. § 2641.2(d) (1990) (emphasis added).

Similarly, the Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes (revised September 1, 1986) ("Arbitration Rules"), administered by the American Arbitration Association, which the PBGC approved pursuant to 29 C.F.R. § 2641.13, do not require the parties to adhere to formal rules of pleading. Under section 7(a) of the Arbitration Rules, a party's demand for arbitration need only give notice [*5] to the other party of its intention to arbitrate with a "brief description of the dispute and . . . the amount involved."

Therefore, it is clear that an employer is not required to perfect its case and flesh out every issue in its arbitration demand. By providing for discovery, the PBGC arbitration regulation anticipates that issues will be fleshed out. 29 C.F.R. § 2641.4(a)(2). Similarly, section 15 of the Arbitration Rules contemplates the subsequent "clarification of issues", and section 24 provides for the later submission of a more detailed statement of claim. Such provisions counterbalance the shortness of the time period for initiating arbitration, and ensure the full airing of all issues.

Although the employer need not perfect its case in its demand for arbitration, the employer is not absolutely free subsequently to raise additional issues. Whether an employer may raise additional issues after filing the initial demand is a procedural question, which the arbitrator should decide in a manner consistent with the Act's requirement that the arbitration be conducted "in accordance with fair and equitable procedures. . . ." ERISA § 4221(a)(2). As the PBGC noted in the preamble [*6] to the proposed rule implementing § 4221(a)(2), "the proposed regulation gives the arbitrator broad discretion in the manner in which he or she will conduct the hearing." 48 Fed. Reg. 31251, 31253 (1983). The PBGC reemphasized this point in the preamble to the final rule, stating that "[a]n arbitrator has wide latitude in conducting arbitration proceedings. . . ." 50 Fed. Reg. 34679, 34680 (1985). The final regulation also provides that "[t]he arbitrator shall establish the procedure for presentation of claim and response in such a manner as to afford full and equal opportunity to all parties for the presentation of their cases." 29 C.F.R. § 2641.5(e)(2).

Therefore, whether an employer may raise additional issues after it has filed its initial demand for arbitration should be decided by the arbitrator based on the facts and circumstances of the case. That decision must comport with the statutory provision requiring the arbitration proceeding to be conducted "in accordance with fair and equitable procedures", ERISA § 4221(a)(2), and the implementing regulation requiring the arbitrator to afford each side a full and equal opportunity to be heard. 29 C.F.R. § 2641.5(e)(2). Arbitrators [*7] operating under alternative procedures approved by the PBGC, 29 C.F.R. § 2641.13, should be guided by those procedures. See Manor Mines, Inc. v. UMW 1950 and 1974 Pension Plans, 5 E.B.C. 1708, 1712-13 (1984) (Polak, Arb.)(Arbitrator found it would be just and equitable to permit amendment of the claim).

As the PBGC stated in PBGC Op. Ltr. 90-2, where the issue was whether a plan should be permitted to revise a withdrawal liability assessment during the course of arbitration, the arbitrator "should consider the relevant facts and circumstances, including whether the plan had access to the data necessary to correct the error at the time of the original assessment, whether the employer was aware or had reason to be aware of the error before the plan discovered it, whether the employer's objections relate to facts that were also applicable to the original assessment, and whether the employer would be prejudiced in maintaining its defense by the revised assessment. Generally, the last factor should be given the greatest weight."

I hope this letter is of assistance. If you have further questions on this matter, please contact Jay Resnick of my staff at the above address or at (202) [*8] 778-8822.

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