

Pension Benefit Guaranty Corporation

80-22

December 16, 1980

REFERENCE:

4041A Multiemployer Termination

4041A(a)(2) Multiemployer Termination. Termination - Mass Withdrawal

OPINION:

This is in response to the Notice of Intent to Terminate filed by you on April 21, 1980, as Chairman of the Board of Administration (the "Board") of the Retirement Benefit Plan * * * with Certain Commercial Employers (the "Plan"), a multiemployer plan. In brief, you proposed to terminate the Plan as of April 30, 1980, while freezing benefit accruals as of December 31, 1979, and continuing employer contributions to the Plan through October 31, 1980. As explained more fully below, the Pension Benefit Guaranty Corporation (the "PBGC") has determined, based on all the information disclosed, that the Plan did not terminate as of April 30, 1980.

As we understand the facts, the Plan was established pursuant to collective bargaining in 1956 between * * * Union No. * * * (the "Union") and the * * * Union Employers' section of the * * * Inc. and other * * * employers (the "Employers"). It is jointly administered by the Board with an equal number of members appointed by the Union and the Employers. The Plan has been amended [*2] often and was entirely restated in 1976 to comply with the various requirements of ERISA. The Plan was most recently qualified by the Internal Revenue Service in October, 1977.

Over at least the last nine years, the only reference to the Plan in the collective bargaining agreements between the Union and Employers has been a single provision prescribing the Employers' obligation to make monthly contributions and defining their level. The current collective bargaining agreement came into effect on November 1, 1977 and expired on October 31, 1980.

On April 15, 1980, the Board, finding that the number of contributing employers and covered participants had declined significantly, adopted a Resolution to Terminate the Plan. Under the Resolution, the date of Plan termination would be April 30, 1980, but employer contributions would continue until the expiration of the collective bargaining agreement, October 31, 1980. In addition, the Resolution ceased benefit accruals retroactively to December 31, 1979.

The Board notified PBGC by letter received on April 21, 1980, of its intention to terminate the Plan on April 30. In subsequent conversations with PBGC employees, the Administrative [*3] Agent for the Board has stated that this multiemployer plan would not seek discretionary coverage under Title IV of ERISA, even though a preliminary estimate indicated Plan liabilities exceeding assets by about \$600,000.

In a case such as this, PBGC must look to various indicia of plan status to determine whether a termination has occurred. The fact that the Board attempted to terminate the Plan by resolution is one indicia, but is not necessarily controlling in PBGC's determination of the date or fact of plan termination. Other important factors in that determination are the cessation of employer contributions, compliance with plan provisions regarding termination, and cessation of benefit accruals and vesting.

A critical element in this case is that the Board's Resolution explicitly makes no alteration in the obligation of each participating employer to contribute to the Plan through October, 1980. As a result, contributions have continued to be made to the Plan each month since April, 1980. It has been the position of the PBGC that the continuation of the contribution obligation and the payments pursuant to that obligation is one of the key indicia that a plan is ongoing. [*4] Inasmuch as the obligation and the payments to the Plan continue unchanged pursuant to the collective bargaining agreement and the Resolution until October 31, 1980, it is PBGC's view that no termination can have occurred as of April 30. At best, the actions of the Board could be viewed as a freeze of the Plan on April 30, 1980, in anticipation of termination as of November 1, 1980.

Moreover, there is no indication in the information provided to us by you that the provisions of the Plan pertaining to termination were followed. Plan Section 9.2 provides:

"Subject to the provisions of any applicable collective bargaining agreement, the Plan may be discontinued or terminated by the Employers or the [PBGC] . . ." [Emphasis supplied.] *

* The definition of the word "employer" in Section 1.16 of the Plan clearly does not mean the Board or some other limited group, but means all employers signatory to the Plan.

The applicable collective bargaining agreement contains no provisions concerning the rights and obligations of the Union and Employers to terminate the Plan. Section 9.2 of the Plan also explains that the Employers may terminate the Plan at any time as long as such [*5] action does not contravene the terms of the collective bargaining agreement. Further, the Plan provides that the date of termination is established by the employers, the PBCC, or-by the court. In spite of the Board's assertion in the Resolution that Section 9.2 of the Plan empowers it to terminate the Plan, a thorough reading of all plan provisions indicates no such authority, not even by implication.

Further, there is no indication in the information provided to us by you that the termination procedure was commenced by the participating Employers in the Plan. Nor is there evidence that the employers sought to alter their obligations under the collective bargaining agreement to prevent ongoing contributions after the "termination."

For the above reasons, PBGC finds that the Plan did not terminate on April 30, 1980. Therefore, we will take no action with respect to the Notice of Intent to Terminate filed on April 21, 1980.

In light of PBGC's determination, we wish to call the Board's attention to a recent change in the law affecting multiemployer plans. On September 26, 1980, President Carter signed into law the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"). [*6] Under the MPPAA the cessation of the obligation of all employers to contribute under a plan constitutes a withdrawal of all employers from the plan. Section 4041A(a)(2) of ERISA, as amended. Thus, if the Union and Employers in collective bargaining should agree not to continue the contribution obligation to the Plan after October 31, 1980, such a withdrawal will occur, and under the new liability provisions in the MPPAA, the employers would have withdrawal liability to the Plan.

This letter constitutes an "initial determination" subject to reconsideration under the PBGC's administrative review regulation, 29 CFR Part 2618 (copy enclosed). If you wish to file for reconsideration, you must do so in writing within 30 days of the date of this letter.

Mitchell L. Strickler
Acting General Counsel