

Pension Benefit Guaranty Corporation

81-27

August 28, 1981

REFERENCE:

[*1] 4203 Complete Withdrawal
4205 Partial Withdrawals
4231 Mergers & Transfers Between Multiemployer Plans
4234 Asset Transfer Rules
4235. Transfers Pursuant to Change in Bargaining Representative
4235(a). Transfers Pursuant to Change in Bargaining Representative
4235(g). Transfers Pursuant to Change in Bargaining Representatives

OPINION:

You have requested an opinion from the Pension Benefit Guaranty Corporation (the "PBGC") on the effect of Section 4235 of the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. No. 96-364 (1980)) ("ERISA as amended") on a proposed merger of certain union locals.

You have informed us that the proposed merger involves certain locals of the * * * (the "Union"). The jurisdiction of Union Local 1 generally covers the geographic area of * * *. Four employers currently hire members of Union Local 1 and these employers make contributions to the captioned fund * * *.

Further, the jurisdiction of Union Local 2 and Union Local 3 generally covers the geographic area of * * *. Approximately one hundred employers currently hire members of Union Locals 2 and 3, and make contributions [*2] to the Local Union No. 2 and * * *, Local Union No. 3 * * * (the "Joint Fund").

As you have described the proposed merger, Union Local 1 proposes to merge with Union Locals 2 and 3. As a result, the four employers who hire Union Local 1 members would cease making contributions to the * * * Fund on behalf of members of Union Local 1. From your description, it appears that these four employers would begin making contributions to the Joint Fund on behalf of members of Union Local 1. Members of Union Local 1, in any case, would cease to participate in the * * * Fund and would begin to participate in the Joint Fund.

You have also stated that as a result of the merger the * * * will begin work under a * * * contract; that Union Local 1 would cease to represent its members in collective bargaining with the four employers; and that Union Local 2 or Union Local 3, or both, would become the collective bargaining representative to those four employers. You have not specified, however, whether this change in representative will be certified under the Labor Management Relations Act of 1947, 29 U.S.C. § 141.

Under the facts presented above, you have asked for PBGC's opinion whether Section [*3] 4235 of ERISA as amended will apply. The purpose of Section 4235 is to provide special rules for the specific situation in which an employer undergoes withdrawal from a plan because the union bargaining with that employer, has been changed as a result of the certification of a different union. The critical fact for the applicability of Section 4235, therefore, is whether the change of bargaining representative has been certified.

Section 4235(a), 29 U.S.C.A. § 1415(a) (1981 Supp.), provides as follows:

In any case in which an employer has completely or partially withdrawn from a multiemployer plan (hereafter in this section referred to as the "old plan") as a result of a certified change of collective bargaining representative occurring after April 28, 1980, if participants of the old plan who are employed by the employer will, as a result of that change, participate in another multiemployer plan (hereafter in this section referred to as the "new plan"), the old plan shall transfer assets and liabilities to the new plan in accordance with this section.

This subsection sets forth four elements which must exist before the "old plan" (here, the * * * Fund) is required to transfer [*4] assets and liabilities to the "new plan" (here, the Joint Fund), in accordance with the special rules of Section

4235.

First, there must be a complete or partial withdrawal from the * * * Fund, within the meaning of Section 4203 or Section 4205 of ERISA as amended, 29 U.S.C.A. § § 1383, 1385 (1981 Supp.).

Second, the change of representative must be a "certified change of collective bargaining representative" as specified in Section 4235(g) of ERISA as amended. The National Labor Relations Board has jurisdiction of such determinations.

Third, the employer's withdrawal from the * * * Fund, whether "complete" or "partial," must occur as a result of the certified change of representative.

Finally, employees formerly covered by the * * * Fund must begin participation in the Joint Fund to meet the fourth condition for application of Section 4235.

From the facts you have provided us, it appears that the first and fourth elements are present in your transaction. We have no evidence, however, that a certified change in bargaining representative has occurred. Therefore all conditions have not been met and Section 4235 does not apply to your proposed transaction. Of course, whether [*5] or not the special conditions of Section 4235 are met, a transfer of assets and liabilities may be arranged by mutual agreement of the two funds pursuant to Sections 4231 and 4234, of ERISA as amended, 29 U.S.C.A. § § 1411, 1414 (1981 Supp.).

If you have any questions concerning this letter, please telephone * * * the attorney assigned to this matter, on (202) 254-4895.

Henry Rose
General Counsel