

Pension Benefit Guaranty Corporation

81-29

August 31, 1981

REFERENCE:

[*1] 4001(a)(2) Definitions. Substantial Employer
4063 Liability of Substantial Employer for Withdrawal
4063(d) Liability of Substantial Employer for Withdrawal. Partitioning of Plan
4063(e) Liability of Substantial Employer for Withdrawal. Waivers
4064 Liability of Employers in Multiple Employer & Multiemployer Plans
4064(b) Liability of Employers in Multiple Employer & Multiemployer Plans. Amount of Employer Liability

OPINION:

This is in reference to the withdrawal of A from the B Union Pension Plan (the "Plan"). You asked about A's liability under sections 4063 and 4064 of the Employee Retirement Income Security Act of 1974, as amended (the "Act") with respect to such withdrawal.

The PBGC has determined that the Plan is a collectively bargained non-multiemployer plan. The Plan has a calendar year plan year. The Plan covered two employers - B and A until July 31, 1978, when A withdrew from the Plan. At the time of its withdrawal, A was a substantial employer within the meaning of section 4001(a)(2) of the Act with respect to the Plan. n1 During the five plan years prior to its withdrawal, A made 46 percent of the total Plan contributions. The assets of the Plan as of July 31, 1978 [*2] were approximately \$3 10,000. The Plan's unfunded guaranteed benefits were approximately \$320,000 as of that date.

n1 A substantial employer is an employer who makes 10 percent or more of the total contributions to the plan during any consecutive two of the preceding three plan years. Act, section 4001(a)(2).

Under section 4063 of the Act, a substantial employer is required to post security for satisfaction of its contingent termination liability to the PBGC. The amount of the security is a measure of the amount for which the withdrawing employer would be liable if the plan terminated on the date of the withdrawal. The security may be in the form of an escrow deposit or a bond. Alternatively, the PBGC may accept an indemnity agreement (section 4063(e)) or partition the plan (section 4063(d)).

Section 4064 imposes liability on each employer who maintains the plan at the time the plan terminates and each employer who contributed to the plan within the five years preceding the termination date. The general rule is that each employer's liability is a pro rata share of the total plan insufficiency determined according to each employer's required rate of contributions during [*3] the five plan years preceding plan termination.

Based on our examination to date, A's section 4063 liability as of July 31, 1978, is approximately \$140,000. The PBGC has determined that A is contingently liable under section 4064 with respect to a Plan termination before January 1, 1984.

I understand that A and B intend to enter into an agreement under which A will pay \$140,000 to the Plan and B will agree to pay A's liability under section 4064 with respect to the Plan in the event of a Plan termination prior to January 1, 1984. n2 Based on the facts and circumstances of this case, if A and B execute such an agreement, the PBGC will treat the agreement as adequate under section 4063(e), and will not seek any alternative security arrangement under section 4063 with respect to the withdrawal of A from the Plan. I note that both employers within the meaning of Title IV have substantial net worth. In the event of a Plan termination before January 1, 1984, the PBGC would allocate liability to A and B in accordance with section 4064. (For purposes of this calculation, the PBGC will not treat the \$140,000 payment by A under the agreement as a Plan contribution in computing the fraction [*4] based on contributions set forth in section 4064(b)(1) and 4064(b)(2).) However, the PBGC would have no objection if, consistent with the terms of the agreement, B were to pay A's liability under section 4064.

n2 I am advised that PBGC staff has discussed with * * * and * * * the approximate allocation of liability under section 4064 for a Plan termination prior to January 1, 1984.

I trust this information is of assistance.

Henry Rose
General Counsel