

Pension Benefit Guaranty Corporation

81-38

November 18, 1981

REFERENCE:

[*1] 3(16) Definitions. Administrator
4001(a)(1) Definitions. Administrator
4041 Termination by Plan Administrator

OPINION:

This concerns the validity under Section 4041 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (September 26, 1980), 29 U.S.C.A. § 1341 (1981 Supp.), of the document entitled "Notice of Intent to Terminate" ("NOIT") filed with the Pension Benefit Guaranty Corporation ("PBGC") with respect to the above-referenced pension plan (the "Plan"). We acknowledge the submission of statements by yourself and * * * an attorney for UAW * * * in that regard. Review of the submissions has not altered our conclusion that the NOIT in this case is invalid.

The facts, as we understand them, are that the NOIT in controversy was signed by the president of * * * (the "Company") and received by PBGC on April 29, 1981. On June 25, 1981, PBGC received a letter from * * * an attorney for UAW * * * (the "Union"), requesting that PBGC defer processing of the case pending disposition of an unfair labor practice charge filed by the union to contest the employer's attempted termination [*2] of the Plan. PBGC tentatively concluded that the notice was invalid for lack of signature by the Board of Administration ("Board") composed of both employer and union representatives and specifically designated as "plan administrator" by the terms of the Plan. ERISA § 4041, 29 U.S.C.A. § 1341 (1981 Supp.), and PBGC Regulation 2616.3(b), renumbered from PBGC Regulation 2604.3(b) 29 C.F.R. 2604.3(b), 46 Fed. Reg. 32575 (June 24, 1981) require that a valid NOIT to terminate a single employer defined benefit pension plan be signed by the "plan administrator" of the plan as defined in § 3(16) and 4001(a)(1) of ERISA, 29 U.S.C. § 1002(16), 1301 (a)(1). Further * * * statements were requested from the company and union. A copy of the letter stating PBGC's tentative conclusion is enclosed for reference purposes.

The Company's subsequent submission indicates that the Company's personnel department has handled the payment of benefits to retirees from the pension trust and that it is not clear that any Board as specified in the Plan has ever been appointed. The Company's submission further indicates that * * * Regional Director of the National Labor Relations Board ("NLRB"), refused [*3] to issue an unfair labor practice complaint on the union's charge because:

The investigation did not reveal any evidence that the Employer unlawfully terminated the pension plan. Rather, the evidence disclosed that the termination of the pension plan was discussed during negotiations, and the Union agreed to the termination or waived its right to further negotiate on the subject by acquiescing to the Employer's proposal, and concluding the negotiations without preserving its right to further negotiate regarding the pension plan. Moreover, although the Union protested the elimination of the pension plan, no evidence was disclosed that it ever requested to bargain over the issue after the Employer presented the proposal to it. I am, therefore, refusing to issue complaint in this matter.

On the basis of these facts, the Company claims to be a de facto plan administrator and to be entitled to terminate the Plan as a result of its negotiations with the Union.

The Union indicates that it never agreed to terminate the Plan and that it is appealing the administrative dismissal of its unfair labor practice charge to the General Counsel of the NLRB. The union claims that the [*4] requirement of both union and employer representatives on the Board was specifically designed to prevent unilateral action by either side. It appended a letter from Company counsel, dated April 20, 1981, indicating a need for "evidence of the Union's concurrence in the termination", to its submission as evidence of a similar understanding by the Company.

As indicated in our previous letter, the Plan clearly provides that the plan administrator of the Plan is a Board composed of both union and employer representatives, Plan, Article III, Section 1, and that a quorum of the Board requires, at least, one union and one employer representative, Plan, Article III, Section 3. The Plan also seems to provide

that it may only be amended through joint consent of the Company and Union in collective bargaining, Plan, Article XI. The fact that the Company's personnel department has handled the routine procedures to assure payment of benefits to retirees from the pension trust and that a properly constituted Board may, as yet, not have been appointed do not alter the clear terms of the Plan nor make the Company a de facto plan administrator for purposes of compliance with ERISA § 4041 [*5] and PBGC Regulation 2616.3(b).

This letter constitutes an initial determination of the PBGC which is subject to administrative reconsideration under PBGC Regulations Part 2606, renumbered from 29 C.F.R. Part 2618, 46 FR 32576 (June 24, 1981). A copy of the current regulation is enclosed for your convenience.

Please contact PBGC * * * at (202) 254-4873 or the above address if you have any questions.

Thank you.

Henry Rose
General Counsel