

Pension Benefit Guaranty Corporation

82-40

December 27, 1982

REFERENCE:

[*1] 4062(d) Liability of Employer in Single Employer Plans. Corporate Reorganizations
4203 Complete Withdrawal
4204 Sale of Assets
4218 Withdrawal - No occurrence

OPINION:

This in response to your recent letter to Edwin Jones, regarding section 4218 of the Multiemployer Pension Plan Amendments Act of 1980, which amended the Employee Retirement Income Security Act of 1974. Your letter poses the question whether section 4218 of the Act shields an employer from withdrawal liability in a sale of assets where the seller's name, plant, employees, and inventory are simply taken over and continued by the purchaser. You state that the purchaser has continued to contribute to the multiemployer pension plan on behalf of all of the seller's unit employees except one. The plan has asserted that the seller has "withdrawn" from the plan, and is claiming withdrawal liability in connection with the event. You assert that the purchaser is a "successor" within the meaning of section 4218 of the Act and should be deemed the original employer. In your view, no withdrawal has occurred.

Under section 4203, a withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan, [*2] or permanently ceases all covered operations under the plan. Under the facts you describe, and assuming that the seller does not continue to contribute to the plan on behalf of employees or operations in which it has an ownership interest of 80% or more, the selling employer has permanently ceased to have an obligation to contribute under the plan. Congress recognized in section 4204 of the Act, however, that where a purchaser in an arms-length bona fide sale of assets continues to contribute to the plan on behalf of substantially the same contribution base units, and assumes the contribution history (and thereby the liability history) of the seller for the year of the sale and the preceding four years, the plan is not harmed, and therefore no withdrawal should occur. Accordingly, section 4204 provides that where the requisite conditions of that section are met, no withdrawal shall occur.

You rely instead on section 4218. In our view, this reliance is misplaced. Section 4218 provides that a withdrawal shall not occur if an employer ceases to exist by reason of a change in corporate structure described in section 4062(d) or a change to an unincorporated form of business, so long [*3] as there is no interruption of employer contributions or obligations under the plan. The kinds of corporate restructuring referred to in section 4062(d) are reorganizations which involve "a mere change in identity, form or place of organization, a liquidation into a parent corporation, or a merger, consolidation or division. These types of restructuring are inapposite to the facts of the case you present. In the situations described in section 4218, the entity contributing to the plan after the transaction is considered to be the same as the entity contributing prior to the transaction. Consequently, the entity after the sale is responsible for the allocable unfunded vested benefits for years both before and after the transaction. In your case however, the seller's obligation to the plan would totally cease as of the date of the sale. In this situation, Congress intended the seller to pay his allocated share of the plan's unfunded vested benefits, i.e., that share which was accrued during his participation in the plan. The purchaser has no obligation for this past liability and is treated as a new employer contributing to the plan with respect to the transferred operations. [*4] Thus, unless the seller is considered to have withdrawn from the plan, the seller's share of the plan's unfunded vested benefits would fall on the remainder of the contributing employers. This is precisely the result Congress sought to avoid with the passage of the Multiemployer Act.

The PBGC has issued a regulation governing the exemption procedures under section 4204 and a class exemption which may be relevant to your facts. Should the seller and purchaser agree to comply with the terms of section 4204, withdrawal liability on the seller might be avoided. Copies of these documents are enclosed.

I hope this information has been helpful. If I can be of further assistance to you, please do not hesitate to contact me.

Henry Rose

General Counsel