

Pension Benefit Guaranty Corporation

85-31

December 30, 1985

REFERENCE:

- [*1] 29 CFR 2643 Variances or Exceptions from Bond Requirements
- 4204(a)(1)(B) Sale of Assets. Withdrawal - Posting of Security
- 4204(a)(1)(C) Sale of Assets. Secondary Liability of Seller

OPINION:

This is in response to your recent letter describing a sale of assets transaction and requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to whether subpart B of the PBGC's regulation on Variances for Sales of Assets (29 CFR Part 2643) -- specifically § 2643.11 -- requires a multiemployer pension plan to waive the bond/escrow and contract language requirements of section 4204(a)(1)(B) and (C) of the Employee Retirement Income Security Act of 1974 ("ERISA") under the circumstances you describe.

Under section 4204(a)(1) of ERISA, a sale of assets by an employer that contributes to a multiemployer pension plan will not constitute a withdrawal from the plan if certain conditions are met. Your letter represents that the transaction in issue fulfills all but two of these conditions. The two conditions not met are that the purchaser furnish a bond or escrow for the five-plan-year period beginning with the first plan year after the sale, as required by section 4204(a)(1)(B), and [*2] that the sale contract provide for secondary liability on the part of the seller if the buyer withdraws within the five-year period and does not satisfy its liability to the plan, as required by section 4204(a)(1)(C).

In the situation you describe, a legally enforceable contract containing all of the terms and conditions of the sale was signed by the parties in * * * 1980; the sales was closed in * * * 1981; the plan demanded withdrawal liability from the seller in * * * 1983 * * * and revised the amount of its demand in 1983; and the seller first raised the issue of section 4204 with the plan in * * * 1983, more than two years after the sale. You indicate that the plan has brought an action to collect the withdrawal liability it claims from the seller.

Section 4204 of ERISA contemplates in general that a bond or escrow will be furnished at the beginning of the five-year period described in section 4204(a)(1)(B), and maintained throughout that period, unless and until it is waived. This principle is alluded to in PBGC Opinion Letter 83-8 of March 25, 1983, which states that "if at any time during the five year period the plan does not have [the required] security, then the arrangement [*3] does not comply with the requirements of § 4204 of ERISA." The transaction you describe thus does not fall within the ambit of section 4204.

Accordingly, subpart B of the PBGC's regulation on Variances for Sales of Assets has no bearing on the situation you describe. Not only does the regulation apply only to transactions under section 4204, but subpart B was not in effect until May 1984. Furthermore, the regulation contains nothing to alter the result that follows from the statute. Indeed, the preamble to the amendment that added subpart B to the regulation reaffirmed (at 49 FR 22639) the operative principle here: "if at any time during the five full plan years beginning after the sale, the purchaser either does not post the bond/escrow or obtain a variance from the requirement, then the transaction will not be in compliance with section 4204."

Your letter does not raise the question whether the parties to a sale of assets that occurs just at the end of a plan year should be held to a less exacting deadline for providing the bond or escrow, and we express no opinion on that question.

If you have any further questions about this matter, you may call * * * of the PBGC's Corporate [*4] Policy and Regulations Department at 202-956-5050.

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