

Pension Benefit Guaranty Corporation

86-10

April 10, 1986

REFERENCE:

[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4212(a) Obligation to Contribute - Definitions

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the withdrawal liability of "joint employers" under Title IV of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you ask whether a withdrawal occurs when an employer ceases making contributions to a multiemployer plan because it entered into an arrangement with another employer that provides employees and that makes some or all of the contributions for those employees. You also ask what contribution history is used in determining the withdrawal liability of the first employer when that employer contributed directly to a multiemployer plan only prior to the enactment of the Multiemployer Pension Plan Amendments Act ("MPPAA") and at all times after enactment was a joint employer with the other company, which eventually withdrew from the plan.

You represent that prior to 1977, A * * * made contributions directly to the * * * Fund * * *. In 1977, A entered into a leasing agreement with B * * * and B began making some contributions to the [*2] Fund for the employees it provided to A. A also made substantial contributions to the fund for those employees during its agreement with B.

B and A terminated their agreement in 1979, and * * * C entered into an agreement with A. Under their agreement, C made all of the contributions to the fund for the employees it provided A. C withdrew from the Fund in 1982. There is no corporate affiliation or common ownership between A and C or A and B. However, you state that A exercised such close supervision and control over the day-to-day working conditions of the employees provided by C and B that in your opinion A was a joint employer for purposes of the NLRA. Further, you represent that as a joint employer was bound under labor law by any collective bargaining agreement covering the employees provided by C and B, and therefore may, like C and B, have been obligated to contribute to the Plan.

Your first question is whether a withdrawal occurred when A entered into the agreements first with B and then with C. Under section 4203(a) of ERISA, a withdrawal from a multiemployer plan occurs when an employer permanently ceases to have an obligation to contribute or permanently ceases [*3] all covered operations under the plan. Section 4212(a) of ERISA defines "obligation to contribute" as an obligation arising under one or more collective bargaining agreements or as a result of a duty under applicable labor-management relations law.

The PBGC addressed a very similar question in Opinion Letter 85-14. In that letter, we concluded that if the first employer was a joint employer with the second employer with whom it entered into the leasing agreement, and if as a result the first employer had an obligation to contribute to the plan, then the first employer would incur a withdrawal upon the permanent cessation of its obligation to contribute. In the instant case, that would have occurred when C permanently ceased to be obligated to contribute. It follows, therefore, that A would not have incurred a withdrawal when it entered into the leasing agreements. This conclusion, of course, assumes that A was a joint employer with C and did have a duty to contribute under the NLRA.

Your other question is how withdrawal liability should be calculated for that withdrawal. The amount of an employer's withdrawal liability is based on its allocable share of unfunded vested benefits [*4] determined under section 4211 of ERISA. This amount is generally proportional to contributions required to be made by the employer. Since neither A and C nor A and B appear to constitute a single employer within the meaning of section 4001(b) of ERISA, A's obligations and liabilities under Title IV would be determined separately from B's and C's.

Since B withdrew from the Fund prior to enactment of MPPAA it is not subject to withdrawal liability. While C withdrew after enactment of MPPAA, you represent that C was not required to contribute to the Fund prior to its relationship with A. Therefore, C's contribution history should encompass only the years after the agreement. With respect to A, the question is whether the years after its agreement with, when it was obligated to contribute as a joint

employer but was not required directly to contribute to the Fund, should be included in its contribution history. You contend that these years should be included.

Opinion Letter 85-14 also addressed this issue and concluded that there is a difference between "an obligation to contribute" and "contributions required to be made by the employer", the latter being the operative term for [*5] purposes of determining an employer's allocable share under section 4211. "An obligation to contribute" is a broader term that includes both the present requirement to make contributions to a plan and an obligation to contribute that is contingent upon an event that has not yet occurred.

It is, therefore, our opinion that years in which A had an obligation to contribute to the Fund but was not required to contribute should not be included in its contribution history for the purpose of calculating its withdrawal liability. Since you represent that A was required to contribute to the Fund only in the years prior to its agreement with C, those are the only years that should be included in its contribution history for purposes of calculating its withdrawal liability.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. His telephone number is (202)956-5050.

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General Counsel