

Pension Benefit Guaranty Corporation

88-8

May 2, 1988

REFERENCE:

[*1] 4203(e) - Date of Complete Withdrawal
4212(a) - Obligation to Contribute - Definitions
4218(2) - Withdrawal - Suspension of Contributions

OPINION:

We write in response to your request for an opinion of the Pension Benefit Guaranty Corporation ("PBGC") as to the date of an employer's withdrawal from a multiemployer pension plan in the construction industry. In particular, you asked the PBGC for a "clarification" of Opinion Letter 86-4 (Feb. 28, 1986) "to fit the instant facts."

Section 4203(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provides that the withdrawal of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry occurs if --

- (A) an employer ceases to have an obligation to contribute under the plan, and
- (B) the employer --

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

According to your request: [*2]

[The] factual situation involves an Association Agreement which expired on June 15, 1983. The employer timely notified the Union of the withdrawal of its collective bargaining power from the association and upon the expiration of the Association Agreement began to bargain on its own with the Union. The employer continued to make contributions after the expiration of the Association Agreement through August 1983 when it notified the Pension Trust that it had reached impasse and ceased contributions. Thereafter, the employer continued the same type of covered work without making contributions as a non-union contractor.

As we understand the facts, there is no dispute that the employer ceased to have an obligation to contribute to the plan, and continued to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required. Therefore, there is no dispute that a complete withdrawal occurred. The sole issue is the date of the withdrawal. The employer contends that it withdrew on June 15, 1983, when the Association Agreement expired, and that its liability for withdrawal on that date is \$ 201,565. The plan sponsor, [*3] however, determined that the employer withdrew when contributions to the plan ceased in September 1983, a date that falls in the subsequent plan year. Accordingly, it assessed liability in the amount of \$ 308,294.

Under Section 4202 of ERISA, the initial responsibility for determining the date of a complete withdrawal lies with the plan sponsor. Section 4221 of ERISA then provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 shall be resolved through arbitration," subject to review in the federal courts. The PBGC does not interject itself into this dispute resolution process by issuing advisory opinions on the application of the law to particular facts. The PBGC, however, will continue its practice of answering general questions of interpretation under the Act.

Opinion Letter 86-4 addressed the question of the date of withdrawal in the context of the "labor dispute" exemption in Section 4218(2) of ERISA. The employer in that case initially suspended its contributions to the plan because of a strike by its union-represented employees, and the plan sponsor determined that [*4] the contribution suspension was covered by Section 4218(2). In the subsequent plan year, however, the plan sponsor determined that Section 4218(2)

no longer applied. The PBGC was asked for an opinion as to whether the date of withdrawal should relate back to the date that the employer initially suspended contributions as a result of the labor dispute or should be set in the subsequent plan year when the plan administrator determined that the labor dispute exception no longer applied. The PBGC responded, as a general matter of interpretation, that the date of the strike would be the date of the complete withdrawal under Section 4203(e) of ERISA if that "was the date on which covered operations or the obligation to contribute ceased."

Section 4203(e) of ERISA provides that "the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." In the case of the withdrawal of a construction employer from a multiemployer plan in the construction industry, only the date of the cessation of the employer's obligation to contribute is relevant. Section 4212(a) of ERISA defines "obligation to contribute" as an obligation [*5] arising under one or more collective bargaining (or related) agreements or as a result of a duty under applicable labor-management relations law. See 126 Cong. Rec. S11672 (daily ed. Aug. 26, 1980) (Senate floor explanation). In this case, the arbitrator must decide whether the obligation to contribute ceased on June 15, 1983, the date the Association Agreement expired, or was extended under principles of contract or labor law as a result of the employer's continued bargaining and contributions after that date. n1

n1 We do not understand either party to be arguing for a date of withdrawal earlier than June 15, 1983, and therefore express no opinion whether relevant principles of labor law could result in a cessation of the obligation to contribute on a date before the expiration of the Association Agreement in other circumstances.

If you have any further questions, please feel free to contact Jeanne Beck of my staff at the above address or at (202) 778-8824.

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