

Pension Benefit Guaranty Corporation

75-99

December 5, 1975

REFERENCE:

[\*1] 4062(a) Liability of Employer in Single Employer Plans. Applicability  
4064 Liability of Employers in Multiple Employer & Multiemployer Plans

OPINION:

This is in further response to your letters with enclosures, and conversations with \* \* \* of this Office, regarding two pension plans, "Plan A" and "Plan B." You have stated that contributions are made pursuant to a collective bargaining agreement and that in your view these plans are multiemployer plans.

The pertinent facts, as I understand them, are as follows. Your client presently contributes to Plan A and Plan B. Plan A was established prior to 1968; Plan B was established in 1968 and all the then employed beneficiaries of Plan A were transferred to Plan B, leaving Plan A with approximately 40 retired beneficiaries. Your client is the only employer contributor to Plan A and has never "participated" in the Plan in any capacity other than to make contributions required by collective bargaining agreements.

Plan A has not been adequately funded for at least five years. The union now wants to terminate Plan A and provide that the contributions now being paid into Plan A will henceforth be paid into Plan B. But, the union does not propose [\*2] that Plan B will assume the existing liabilities of Plan A.

You ask whether your client would be liable pursuant to Sections 4062 and 4064 of the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act") upon the termination of Plan A, and suggest that since the employer had not \* \* \* "maintained" the Plan, and the Plan would be terminated prior to January 1, 1978, no liability would be incurred.

Liability under ERISA Sections 4062 and 4064 applies to \* \* \* employers who "maintained" a plan at the time such plan was terminated. Although ERISA does not specifically define the term "maintained," the Conference Report (H.R. Rep. No. 1280, 93d Cong. 2nd Sess. (1974)) indicates that an employer who contributes to a pension plan is in fact "maintaining" such plan, under Section 4064. Referring to an earlier version of that Section, the Report states:

"[T]he employer liability on termination of a multiemployer plan was to be allocated among employers who had contributed to the plan during the five years before termination . . ." (Emphasis added.) (Conference Report at 380).

Furthermore, another statutory provision governing plan management and [\*3] administration indicates that an employer may "maintain" a plan even though it does not administer it. Thus, a plan must name fiduciaries who have authority to "control and manage the operation and administration of the plan." (ERISA Section 402(a) (1). "[A] person who is an employer . . . with respect to the plan . . . or . . . an employer and . . . an employee organization acting jointly" may identify the named fiduciary (Act, Section 402(a) (2)), thus implying that the employer or employer and union jointly who ". . . established or maintained . . ." the plan need not administer it. See Act, Section 3(2). We conclude that an employer which contributes to a plan "maintains" it within the meaning of Section 4062 of the Act.

We also disagree with your view that your client would not be liable in the event the plan terminated prior to January 1, 1978, You base your view on an assumption that the Plan is a "multiemployer plan." See Act, Section 4082(c) (1). However, ERISA Section 4001(a) (3) by its reference to \* \* \* Section 414(f) of the Internal Revenue Code makes plain that if more than 74 percent of the aggregate contributions of all employers under a plan have been made by [\*4] a single employer in a plan year, the plan is not a "multiemployer plan." \* \* \* Since you state that your client is presently the sole employer contributor to Plan A, it is not a multiemployer plan, and Section 4082(c) (1), delaying the effective date of the Act's guarantee provisions with respect to multiemployer plans, is inapplicable.

We regret the delay that has intervened between your last conversation with attorneys on our staff and the completion of our written response. We hope that this information will prove helpful to you. Should you desire further assistance, please contact \* \* \*.

Henry Rose  
General Counsel