Pension Benefit Guaranty Corporation

78-27

November 2, 1978

REFERENCE:
1015(l). (IRC § 414) Definitions and Special Rules. Mergers, Consolidations and Other Transfers of Plan Assets

OPINION:

On October 12, 1978, I informed you that I had reevaluated my decision concerning the effect of the * * * Company's * * * cessation of contributions to the * * * (the "Fund") and was tentatively of the view that the result should be changed. The central issued under consideration is whether the Fund was a "single plan" or an aggregate of "plans" as of May 31, 1975. As I stated in my October 12 letter, the Pension Benefit Guaranty Corporation ("PBGC") is seeking to present an approach that is in conformity with that of the Internal Revenue Service ("IRS") in its application of the definition of a "single plan" contained in proposed Treasury Reg. § 1.414(1)-1(b)(1), as evidenced in the letter ruling (with identifying information deleted) which I enclosed in my October 12 letter to you.

My reevaluation has been made in light of this recent IRS ruling converning the cessation of contributions to a plan which has many features in common with the * * * Plan. As I further stated in the letter, the IRS ruling has cast a new light on the basic issues in [*2] this case. Since the IRS ruling emphasized certain factors not addressed in my June 2 decision, I have concluded that it is appropriate for me to re-study my decision. As a result of this study, I have concluded that the Fund should be considered an aggregate of "plans" rather than a "single plan".

On August 9, 1961, * * * entered into a collective bargaining agreement with Local * * * ("Local * * *"). Pursuant to this agreement, * * * and Local * * * entered into a Trust Agreement which established a pension plan effective August 9, 1961, known as the * * * ("* * * Plan"). On October 21, 1968, Local * * * and * * * entered into a new collective bargaining agreement. The name of the plan was changed to * * * (the "Fund"), effective July 31, 1969. Since 1968, approximately 35 employers have agreed to participate in the Fund.

In 1968, * * * entered the Fund as a participating employer, pursuant to a collective bargaining agreement between and Local * * *. This agreement was applicable to eligible * * * employees in the * * * area. Then in 1971, pursuant to a collective bargaining agreement between * * * and Local * * * agreed to have its employees in the * * * area covered [*3] by the Fund. Documentation concerning the operation of the Fund has been submitted by * * * and the Trustees of the Fund.

The definition of a "single plan" was introduced in the proposed Income Tax Regulations under sections 401(a)(12) and 414(1) of the Internal Revenue Code of 1954 published on July 1, 1977. Specifically, section 1.414(1)-1(b)(1) states: "A plan is a 'single plan' if and only if all plan assets are available to pay benefits to employees who are covered by the plan. For purposes of the preceding sentence, all the assets of the plan will not fail to be available because the plan is funded in part or in whole with allocated insurance instruments. A plan will not fail to be a single plan merely because of the following:

(i) the plan has several distinct benefit structures which apply either to the same or different participants,

(ii) the plan has several plan documents,

(iii) several employers, whether or not affiliated contribute to the plan,

(iv) the assets of the plan are invested in several trusts or annuity contracts, or

(v) separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.

However, [*4] more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan."

Applying the foregoing analysis in the instant case, I find that there is a single plan document, pursuant to which a number of employers contribute to the Fund; the level of benefit for a group of employees depends on the contribution rate of their contributing employer and the characteristics of the employee group; the assets of the Fund are invested pursuant to a common investment policy; and that separate accounting was not maintained, but information which would have been necessary to maintain separate accounts for each employer group has been maintained (see infra, page 5).

In order to determine if any restrictions were imposed on the availability of assets to pay benefits, I turn to the documents under which the Fund was administered, and I find the following:

(1) there is no express requirement that in all circumstances benefits for a particular employee group be paid [*5] from fund assets attributable only to the employer of that group;

(2) upon withdrawal of an employer the benefits of his employees are provided to the extent that they are covered by his allocable share of assets (Article II, Section 6 of the Plan);

(3) if an employer is in arrears in contributions, his allocable share of assets is similarly used to pay benefits to his employees (Article V, Section 4 of the Trust Agreement and Article II, Section 6 of the Plan);

(4) upon termination of the plan, the assets are distributed according to stated priorities without first allocating the assets among the participating employers (Article VI, Section 3 of the Plan).

The IRS, in analyzing four similar provisions (IRS letter ruling at page 3) concluded that such provisions left it unclear whether the entity was a "single plan" or an aggregate of single "plans". Having found this ambiguity, the IRS sought to establish whether it was the intent of the parties to restrict availability of assets of the plan and thereby to resolve the "single plan"/aggregate of single "plans" issue.

In light of my express goal to analyze this issue in accord with the IRS's approach and in recognition of the [*6] recent IRS letter ruling, I conclude that the aforementioned provisions create an ambiguity sufficient to require an examination of the intent of the parties as to the issue of restriction of assets of the Fund. If the intent to restrict assets could be established, then I would consider the Fund an aggregate of single "plans." Weighing all the evidence before me -- that same evidentiary base described in my letter to you of June 2--and considering your views in response to my letter of October 12, I find that it has been the intent of the Fund to operate with asset restrictions. My conclusion is supported by the following facts, among others:

(1) at the outset, * * * was the only employer participating in the plan and, clearly, by the terms of the plan, its assets were available to provide benefits only for its own employees;

(2) on July 31, 1968, the Fund consultant proposed amendments to the plan document to allow new employer groups to be admitted. The trustees adopted an amendment to Plan Article III, Section 3, changing language which conditions the admittance of a new employer group from "will not adversely affectthe actuarial soundness of the fund" to "will be supported [*7] by contributions to be made for the group";

(3) on September 17, 1971, it was proposed that the employee booklets be "tailor-made" for each employer group. Additionally, the employee booklets state that plan costs will be borne "by your employer's contributions";

(4) on April 27, 1973, and September 20, 1974, the trustees, in considering the withdrawal of several employers, recognized the necessity for segregating the assets of those employers;

(5) in March 1974, in a letter to the * * * Fund Board, the Fund attorney asserted that an employer withdrawal was a plan termination, with benefits payable to such participants, under the Fund discontinuance provision, i.e., to the extent of that employer's assets in the Fund;

(6) on April 23, 1975, the trustees recognized that * * * closing might constitute a plan termination under Title IV of ERISA. This recognition occurred prior to any consultation with the PBGC;

(7) actuarial "worksheets", asserted to have been retained for each plan year (see "Affidavit of * * *," September 30, 1977 at page 2), provide, on an employer by employer basis, an asset balance and an unfunded past service liability;

(8) the representative of * * [*8] * who participated in the negotiations which resulted in the establishment of the Fund as a successor to the * * * Plan, and various parties involved with the on-going operations of the Fund -- including an actuary associated with the Fund since its inception -- have submitted affidavits to the PBGC attesting to the intent

of all parties that the Fund operate as a group of single plans.

Based on all the evidence, I conclude that the Fund is an aggregate of single employer plans.

Matthew M. Lind
Executive Director