

Pension Benefit Guaranty Corporation

78-5

April 28, 1978

REFERENCE:

[*1] 4063(d) Liability of Substantial Employer for Withdrawal. Partitioning of Plan

OPINION:

This is in response to your April 12, 1978 letter regarding the possibility of a partition of the * * * Pension Plan (the "Plan") pursuant to § 4063(d) of the Employee Retirement Income Security Act of 1974 ("ERISA").

Subsection 4063(d) of ERISA is an unusually complex provision, which does not lend itself to the identification of detailed objective criteria without a thorough survey of the contexts in which the subsection might be applied. Moreover, the provision gives PBGC limited discretion to afford extraordinary relief, which in effect amounts to Title IV benefit guarantees in certain types of partial termination situations. For these reasons the PBGC has chosen to interpret § 4063(d) on a case-by-case basis, evaluating each situation against the terms and intent of the law, rather than attempting to delineate a formal catalogue of generally applicable tests.

Although I cannot, therefore, answer each of your specific questions, it may be useful to point out some of the issues that would make the instant case a difficult one in which to attempt to apply § 4063(d).

1. It is our understanding that [*2] participants in the * * * Plan do not have long-term employment relationships with specific employers, which would enable the Plan to identify individuals whose benefit rights are attributable to service with a particular shipping company. Subsection 4063(d) authorizes an allocation "between those participants no longer working in covered service under the plan as a result of their employer's withdrawal, and those participants who remain in covered service under the plan . . ." Such an allocation may not be feasible or equitable in a mobile employment situation.

2. It is possible that benefits for the terminated portion of a multiemployer plan that is partitioned under § 4063(d) may only be guaranteeable by PBGC in accordance with § 4082(c) of ERISA, as amended. This means that the general limitations on discretionary guarantees for multiemployer plans would apply, if the Plan were partitioned prior to July 1, 1979, and the affected participants' benefits would be vulnerable to future cutbacks, depending on the availability of funds for discretionary guarantees. The PBGC has not taken a final position on this question, and it is unlikely that the issue will be decided in the [*3] near future.

3. Another undecided issue that may be of interest is the treatment of employer liability for benefits guaranteed pursuant to a § 4063(d) partition. It is possible that liability for any benefits guaranteed under § 4063(d) might be imposed proportionately on all of the employers that contributed to the Plan during the five years preceding the § 4063(d) partition, unless an alternative liability allocation is both authorized and equitable. The amount of recoverable employer liability would be an important consideration in determining the extent to which benefits can be guaranteed under the discretionary multiemployer program, if it is determined that § 4082(c) of ERISA applies. Again let me emphasize that the question of the allocation of employer liability is likely to take substantial time to resolve.

4. The PBGC's partition power under § 4063(d) has generally been reserved for situations in which a plan clearly could not continue after a significant decline in its contribution base, without special relief from certain liabilities. In the case of the * * * Plan, the Maritime Administration will underwrite much of the increased contribution expense that might be [*4] caused by the expected reduction in covered employment levels. Given the availability of a government subsidy for the Plan's funding on an on-going basis, it is questionable whether relief under § 4063(d) would be appropriate.

If, despite these uncertainties, the Plan would like the PBGC to consider partition under § 4063(d) of ERISA, you may make a request in writing to that effect. Any such request should explain in detail how the affected participants would be identified. We cannot predict how the assets and liabilities would be allocated without an extensive actuarial study to accompany our policy and legal examination.

I hope this is of assistance.

Matthew M. Lind
Executive Director