Pension Benefit Guaranty Corporation

84-2

January 17, 1984

REFERENCE:
[*1] 4021(a) Plans Covered. Requirements of Coverage
4021(a)(1) Plans Covered. Tax Qualification in Practice
4021(a)(2) Plans Covered. Tax Qualification by IRS Determination
4042 Termination by PBGC
29 CFR 2615 Reporting & Notification Requirements for Reportable Events

OPINION:

In a * * * order, Judge * * * of the United States District Court, * * * of * * *, remanded this case to the Pension Benefit Guaranty Corporation ("PBGC") for a final decision as to whether the * * * * * * Fund * * * is a single pension plan or an aggregate of separate plans. PBGC has carefully reviewed the materials in the administrative record n1 and the additional information that has been submitted by counsel for the Fund and for the * * * Company (A). For the reasons stated below, PBGC affirms its prior determination that the Fund is an aggregate of plans, and that * * * cessation of participation therein constituted a plan termination under Title IV of the Employee Retirement Income Security Act ("ERISA").

n1 Hereinafter "R" denotes references to the PBGC administrative record and "Supp." refers to the supplemental record that PBGC submitted in * * *.

On * * *, B Inc. * * * and * * * Union (Local O) entered [*2] into a collective bargaining agreement which required them to establish a pension plan. B and LOCAL O thereafter executed a trust agreement which created the B * * *, * * * Union Pension Plan * * *, effective * * *. The name of the plan was changed to the * * * Fund ("the Fund") in * * *.

In * * *, A joined the Fund as a participating employer. At that time, A made contributions to the Fund pursuant to its collective bargaining agreement with Local O, which represented A employees in the * * *, * * * area. In * * *, pursuant to its collective bargaining agreement with * * * Union (Local X) * * *, A agreed to bring its * * *, * * * employees within the Fund's coverage.

In * * *, A closed all of its stores in the and * * * areas and ceased its participation in the Fund. The Fund thereafter notified PBGC that A pension plan had terminated.

After several years of fact finding, consultation with the parties, review and negotiation, PBGC determined that the Fund was an aggregate of separate pension plans, and that the plan established by A had terminated on * * *. On * * *, Matthew Lind, then PBGC's Executive Director, sent a letter to the parties stating PBGC's decision. On [*3] * * *, PBGC applied to the United States District Court, * * * of * * *, for an order to terminate the A Plan pursuant to 29 U.S.C. § 1342, and to appoint PBGC trustee of the plan. The parties filed motions for summary judgment on the question of whether the Fund is a single plan or an aggregate of plans. The court subsequently remanded the case to PBGC for a final determination on this issue.

The court ruled that the proper standard for PBGC to apply in this case is:

"Plan" means a single plan (whether it be a single employer, multiemployer or multiple employer plan), as opposed to a number of plans, if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. [29 C.F.R. § 2615.2 (1982) (previously codified as 29 C.F.R. § 2617.2 (1980)]. n2

n2 PBGC has recently proposed an amendment which simplifies this provision, although it makes no substantive changes in the definition of "Plan":

"Plan" means a single-employer plan as defined in section 4001(b)(2) of the Act.

48 Fed. Reg. 37231 (1983). This proposed version of 29 C.F.R. § 2615.2 does not apply in this case.

PBGC's November 16, [*4] 1977 comments on this definition of a single plan provided in pertinent part:

A plan will not fail to be one plan solely because:

(1) The plan has two or more distinct benefit structures that apply either to the same or different groups of participants;

(2) The plan has several plan documents;

(3) Several employers, whether or not "affiliated" contribute to the plan;

(4) The assets of the plan are invested in several trusts or annuity contracts;

(5) The plan has purchased irrevocable commitments from an insurer to pay all or part of the participants' benefits; or

(6) Separate accounting is maintained for purposes of costs allocation, but not for purposes of providing benefits under the plan.

* * *

[T]he PBGC would view a multiple employer plan-a plan to which more than one employer makes contributions, which does not meet the full statutory definition of a multiemployer plan-as a single plan if, on an on-going basis, all plan assets are available to satisfy all participants' benefits, even though the plan contains restrictions on its obligations to participants in the event their employer withdraws from the plan.

* * *

In contrast, more than one plan exists if, on a going [*5] concern basis, a portion of the assets is not available to pay some of the benefits, irrespective of whether each plan has the same benefit structure or plan document or if all of part of the assets are involved in one trust.

42 Fed. Reg. 59285, 59286 (1977). n3

n3 These PBGC comments demonstrated that PBGC had effectively adopted the Internal Revenue Service's counterpart regulation, 26 C.F.R. § 1.414(1)-1(b)(1). See 42 Fed. Reg. 33770, 33771 (1977); 42 Fed. Reg. 59285, 59286 (1977). The letters which were exchanged between the two agencies in 1977 confirmed that the intent of the drafters was to coordinate their policies by promulgating consistent regulations. (R. 98-101, 104-105).

In the August 20, 1980 comments on the final version of 26 C.F.R. § 2617.2 (recodified as 26 C.F.R. § 2615.2), PBGC further explained that:

Our determination as to the nature of an entity-whether it is a single plan or an aggregate of single plans-is based on its structure and how it actually operates on an ongoing basis. We look to the documents governing the entity and to relevant evidence of how it has operated and continues to operate. Such evidence may include the reasonable [*6] expectations and intent of the parties.

The availability of funds held by an entity to provide benefits on an ongoing basis is a central factor in our analysis. Ongoing restrictions on the use of such funds indicate that the entity may be an aggregate of single plans . . . . If the evidence shows that payments are effectively restricted, by whatever means, so that there is a minimal risk of funds attributable to the contributions of one employer being used to pay the benefits of another employer's employee-participants, then the entity is an aggregate of single plans.

45 Fed. Reg. 55636, 55637 n.2 (1980).

Thus, the test which PBGC must apply in order to determine whether a given plan is a single plan or an aggregate of separate plans is whether all of the plan assets are available to pay all benefits under the plan on an ongoing basis. The guidelines which PBGC has published in the Federal Register will be followed. PBGC will evaluate the plan documents and other relevant evidence of how the plan has operated or continues to operate, including evidence of the intent of the parties and their reasonable expectations.

The first step in our analysis of the Fund is to review [*7] the documents under which the Fund was administered at the time A ceased its contributions: the * * * Pension Fund Agreement and Declaration of Trust ("Trust Agreement"), and the * * * Pension Fund Rules and Regulations ("Rules").

The relevant provisions of the Trust Agreement state:

(1) each employer shall contribute to the Fund the amount required by the applicable collective bargaining agreement between the employer and its union local (Article V, Section 1) (R. 337);

(2) an employer or union local may adopt and become a party to this Trust Agreement by executing a counterpart of it (Article IX, Section 2) (R. 341); and

(3) the termination of an individual employer occurs when such an employer no longer is obligated to make contributions to the Fund pursuant to a collective bargaining agreement with the union local, or when the trustees determine that such an employer is delinquent in his contributions or reports to the Fund (Article XII, Section 1) (R. 344).

In addition, the Rules provide:

(1) an employer may be accepted by the trustees as a contributing employer if they determine that such acceptance will not adversely affect the actuarial soundness of the Fund after they [*8] review the name, sex, date of birth and employment history for each employee covered by the collective bargaining agreement between the union local and the employer (Article II, Section 2) (R. 350);

(2) prior to acceptance of a new employer, the trustees must designate the benefit level that will be supported by the contributions the employer will make for that employee group (Article III, Section 3(a)) (R. 351);

(3) a new employer's acceptance may be conditioned upon any special terms (to be incorporated in the standard participation agreement it is required to sign) necessary to preserve the actuarial soundness of the Fund and an equitable relationship between the employer's contributions and the benefits provided to each employee group (Article II, Section 4) (R. 350);

(4) the pension benefits payable to an employee who has worked for more than one contributing employer shall be the sum of the amounts attributable to employment with each contributing employer (Article III, Section 3(h)(i)) (R. 369); and

(5) if a contributing employer ceases his contributions, the Fund will be liable for benefits to the employees of that employer only to the extent that benefits can be provided [*9] by the contributions that employer has made (Article II, Section 6) (R. 350).

There are no express requirements in the Trust Agreement or in the Rules that benefit payments must be restricted to certain assets of the Fund in all circumstances; nor are there express requirements that all assets of the pension plan must be available to satisfy all participants' benefits on an ongoing basis. As noted above, Article II, Section 6 of the Rules limits the Fund's liability for the payment of benefits to participants after their employer has stopped contributing to the Fund. This provision is not dispositive of the question here, however, because PBGC will view a plan to which more than one employer contributes as a single plan if all plan assets are available to satisfy all participants' benefits on an ongoing basis, regardless of whether the plan contains restrictions on its obligations to participants in the event their employer withdraws from the plan. See supra at 3; 42 Fed. Reg. at 59286. As these documents do not clearly reveal whether all of the plan assets are available to pay all benefits on an ongoing basis, we must examine evidence of the Fund's actual practices. [*10]

The administrative record shows the following:

(1) In 1969, the trustees adopted an amendment to Rules Article III, Section 3(a) changing the language which conditions the admittance of a new employer group from "will not adversely affect the actuarial soundness of the fund" to "will be supported by contributions to be made for that group" (R. 64);

(2) Correspondence between the President of Local O (a union trustee of the Fund) and A in * * * indicates that the Fund had determined that A contributions were not sufficient to satisfy the benefit level set by the trustees for A participants (R. 246, 247);

(3) In a * * * letter addressing the plan changes required by ERISA, the Fund's actuarial consultant informed the

Executive Officer of Local O (a union trustee of the Fund) that precise asset information would be needed for each participating unit of the Fund (R. 267);

(4) The Fund Consultant reported at the * * * trustees' meeting that four employer units were underfunded, several months before the termination of the A Plan (R. 415);

(5) Although the Fund's annual Financial Statements did not include allocations of assets to individual employers until the plan year ending * [*11] **, such information had been gathered and retained each plan year (R. 583-589, 672, 775, 960; Supp. 38, 40);

(6) The Fund's actuarial consultant stated that investment income and expenses were regularly allocated to employers according to their share of assets and number of participants respectively (R. 775, 787);

(7) In 1975, the Fund's actuaries reconstructed their previous financial statements to include an allocation of assets among the various employers (R. 672, 958);

(8) The only retire who had worked for more than one of the Fund's contributing employers received two pension checks from the Fund each month which reflected each employer's payment of its proportional share of her benefits (R. 956, 960);

(9) Information booklets were prepared for each employee group which stated the benefit level applicable to the particular group, and that the cost of those benefits were to be borne by "your employer's contributions" (R. 123, 286, 322); and

(10) Several individuals who were involved in the establishment and operations of the Fund (including the representative of B who participated in the negotiations which resulted in the establishment of the Fund as a successor to the [*12] B Plan, and an actuary who was associated with the Fund from its inception) have submitted affidavits to PBGC attesting to the intent of all parties that the Fund was to operate as a group of single plans joined together for administrative ease, joint investment management and portability of benefits (R. 774-777, 947-952, 958-960).

The above facts and circumstances relevant to the status of the Fund at the time A ceased making contributions convince us that all of the plan assets were not available on an ongoing basis to pay benefits to all Fund participants. Indeed, there are a number of indications that the Fund restricted the use of assets attributable to a particular employer's contributions when it paid benefits, and that the parties reasonably expected such restrictions. We find significant support for this determination in the 1969 amendment of Rules Article III, Section 3(a); the 1973 correspondence between Local O and A the 1975 report that four employer units were underfunded; the payment of separate benefit checks to a retiree who had worked for two of the Fund's contributing employers; the affidavits of individuals who had been involved in the Fund's establishment and [*13] operation; and the Fund's actuarial practices. n4

n4 * * * argues that the Fund demonstrated its intent to operate as a single plan by filing consolidated returns with the Department of Labor, the Internal Revenue Service, and PBGC before 1975. The fact that the Fund chose to file consolidated government reports does not demonstrate whether all of the plan assets were available on an ongoing basis to pay benefits to all participants, and accordingly, is not significant to our analysis.

A contends that even if the Fund were an aggregate of separate pension plans and there were a separate A pension plan, the A Plan was not a covered plan under Title IV of ERISA because it did not satisfy the prerequisites to such coverage in § 4021(a) of ERISA, 29 U.S.C. § 1321(a)(1976). Specifically, A states that the A Plan failed to meet the "qualification requirements" of § 401(a)(2) of the Internal Revenue Code ("the IRS") n5 (incorporated in § 4021(a) of ERISA), because the A Plan had no trust instrument which imposed the necessary restrictions on the use of the corpus or income of the trust.

n5 Section 401(a)(2) of the Internal Revenue Code, 26 U.S.C. § 401(a)(2) (Supp. V 1981), provides:

if under the trust instrument it is impossible, at any time prior to the satisfaction * * * of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment

within 6 months of such determination). [*14]

Section 4021(a)(2) of ERISA provides, inter alia, that a plan is a covered plan if the Secretary of the Treasury has determined that it meets the requirements of § 401(a) of the IRC. Before 1975 the Internal Revenue Service had determined that the Trust Agreement of the Fund met the qualification requirements of the IRC (R. 1367-1369, 1822). When A joined the Fund, it was required, as were all the other contributing employers of the Fund, to execute a counterpart of the Trust Agreement and a participation agreement which incorporated the Rules (R. 341, 350). n6 A's execution of a separate Trust Agreement, together with its acquiescence in the Rules which restricted the use of plan assets demonstrate that the A Plan satisfied § 4021(a)(2) of ERISA. Moreover, we note that even if the A Plan had not had a written trust instrument, it could still be a covered plan under § 4021(a)(1) of ERISA.

n6 A has claimed that it had no control over the selection of trustees or over the way the trustees operated, but it has failed to show that it was deprived of the control it had agreed to in the Trust Agreement. In any event, A's relationship to the trustees is not probative with respect to the question of whether all of the plan assets were available on an ongoing basis to pay benefits to all participants. [*15]

A also argues that if the Fund were an aggregate of single plans, then there were two A pension plans, one for each of the two union locals of A employees. A notes that it began contributing to the Fund for its Local O employees in * * *, and for its Local X employees in * * *. A has not explained why this contribution history means that all of the assets of the A Plan were not available on an ongoing basis to pay benefits to the employees in both A union locals. In fact, Local O and Local X employees were not treated separately. The trustees changed the benefit level for A employees in 1971 after they reassessed the actuarial data for the A employees of both union locals, as the Rules required (R. 351, 475, 775); A made contributions at the same rate for both union locals (R. 247, 1851); and actuarial valuations were performed on an employer basis (R. 672, 775; Supp. 38, 40). Therefore, we find that there was a single A pension plan for the two union locals of A employees.

In summary, our conclusion that the Fund is an aggregate of separate pension plans is based upon the documents under which the Fund was administered in 1975 and the additional evidence which demonstrates [*16] that the Fund's intent and practice was to use the assets attributable to a particular employer's contributions only to pay the benefits of that employer's employee-participants. Accordingly, we find that A's cessation of participation in the Fund constituted a plan termination under Title IV of ERISA. n7

n7 We stated the reasons that A's cessation of participation in the Fund constituted a plan termination in a * * * letter to A's counsel (R. 718). Article XII, Section 1 of the Trust Agreement, see supra p. 5, further supports our determination that a plan termination occurred.

Charles C. Tharp
Acting Executive Director