

Pension Benefit Guaranty Corporation

83-13

June 10, 1983

REFERENCE:

[*1] 4203(b) Complete Withdrawal. Building & Construction Industry Exemption

OPINION:

This is in response to your recent letter to the Pension Benefit Guaranty Corporation concerning the application of section 4203(b) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") to the * * * and * * * Pension Funds ("the Funds").

In your letter you represent that:

(1) The Funds involve approximately 880 employers and cover about 2,600-3,000 participants who are employed in construction and related activity.

(2) Contributing employers are engaged in the contracting and subcontracting of work done in connection with the construction, alteration, painting, or repair of buildings, docks, sewers, structures, highways, excavations, or similar work, and the supply of materials utilized by employers engaged in such work, including asphalt, concrete, cement or other similar material or supplies.

(3) About 2 percent of all contributing employers are construction equipment vendors who employ mechanics to repair cranes and other equipment used in construction projects. These employers have about 300 covered employees, about half of whom perform repair and maintenance work on-site.

(4) [*2] About 34 of the employers, with about 50 covered employees, operate concrete and asphalt plants, some which are located at the site of a construction project, or in close proximity to the project.

Based on these representations, you ask our opinion on the following questions:

(1) Under the facts and circumstances described, do the Funds primarily cover employees in the building and construction industry within the meaning of section 4203(b)?

(2) Under these circumstances, may the bargaining parties consistent with Title IV of ERISA agree that Act section 4203(b) applies to an employer who is obligated to contribute to the Funds where substantially all of the employees for whom that employer is obligated to contribute, perform work in the building and construction industry?

(3) Accordingly, do you find anything in the contract proposal (Exhibit A) relating to section 4203(b) improper or illegal from the point of view of Title IV of ERISA?

With respect to your first question, ERISA does not specifically define those activities that are included within the term "building and construction industry". The Senate report on section 4203(b) indicates that PBGC and plan sponsors should [*3] refer to labor-management relations law in defining the term "building and construction industry." Summary & Analysis of S. 1076 (Senate Labor Comm.), p. 14 (April 1980). PBGC is currently in the process of developing a regulation on section 4203(b), which will define the activities that are included within the building and construction industry, as well as the terms "primarily" and "substantially all", which are critical to the implementation of section 4203(b).

Our understanding of the cases under the labor-management relations law is that the term "building and construction industry" includes, but is not necessarily limited to, work performed at the site of a building or other structure in connection with the erection, alteration of the building or other structure. cf. Carpet, Linoleum & Soft Tile Local Union 1247, et al., 156 NLRB 951 (1966). You have represented that only about 8 percent of the employees covered under the plans are engaged solely in work performed off the site of construction projects. Thus, since 92 percent of the covered employees perform work at the site, it would appear that the Funds primarily cover employees in the building and construction [*4] industry under section 4203(b).

With respect to your second question, if substantially all of the employees with respect to whom an employer is obligated to contribute under a plan perform work in the building and construction industry ("construction employer"), the special withdrawal rule in section 4203(b) applies by operation of law to that employer, if the plan primarily covers employees in the building and construction industry. The adoption of an agreement by the bargaining parties is not necessary to give effect to the rule in section 4203(b) in that case, but we know of nothing in Title IV which would prohibit the adoption of such an agreement.

Finally, you ask whether the provisions in the contract proposal, designated as Exhibit A, relating to section 4203(b) are improper or illegal from the point of view of Title IV of ERISA. The contract proposal provides that section 4203(b) shall apply to an employer who is obligated to contribute to the Funds if substantially all of the employees for whom the employer is obligated to contribute perform work in the building and construction industry, as that term is defined in subparagraph B of the contract proposal. The contract [*5] proposal further provides that the understanding as to the applicability of section 4203(b) shall be effective, retroactive to April 28, 1980, subject to applicable statute, interpretative rule or regulations.

As previously noted, we know of nothing in Title IV which would prohibit the adoption of an agreement by the bargaining parties that section 4203(b) applies to a "construction employer." As to the definition of the term "building and construction industry" in subparagraph B of the contract proposal, the PBGC has not yet issued any regulation, opinion or ruling on that term for purposes of Title IV. We are currently in the process of developing a regulation defining that term for purposes of section 4203(b). Once that regulation is issued and becomes final, plans will have to implement section 4203(b) in accordance with the regulation. In this regard, we note that the contract proposal is specifically made subject to applicable statute, interpretative rule or regulations.

Henry Rose
General Counsel