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PENSION BENEFIT GUARANTY CORPORATION
AGENCY: Pension Benefit Guaranty Corporation.

48 FR 28374

June 21, 1983

Approval of Special Withdrawal Liability Rules; Division 1181 Amalgamated Transit Union-New York Employees Pension Fund and Plan
ACTION: Notice of approval.

SUMMARY: The Pension Benefit Guaranty Corporation has granted the request of the Division 1181 Amalgamated Transit Union-New York Employees Pension Fund and Plan for approval of a plan amendment providing for special withdrawal liability rules under section 4203(f) of the Employee Retirement Income Security Act of 1974, as amended. A notice of pendency of the request for approval was published on January 3, 1983 (48 FR 104). The effect of this notice is to advise the public of the decision approving the request.

ADDRESS: The request for approval, the comments received and the PBGC response to the request are available for public inspection at the PBGC Public Affairs Office, Suite 7100, 2020 K Street, N.W., Washington, D.C. 20006, between the hours of 9:00 a.m. and 4:00 p.m. A copy of these documents may be obained by mail from the PBGC Disclosure Officer (160) at the above address.
FOR FURTHER INFORMATION CONTACT:James M. Graham, Office of the Executive Director, Policy and Planning (140), 2020 K Street, N.W., Washington, D.C. 20006; (202) 254-4862.

TEXT: SUPPLEMENTARY INFORMATION:

Background

Under section 4203(f) of Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. 1383(f), the Pension Benefit Guaranty Corporation ("PBGC") may authorize plans in industries other than construction and entertainment to adopt special complete withdrawal liability rules similar to those in section 4203 (b) and (c) for the construction and entertainment industries. ERISA section 4208(e)(3) provides that PBGC may permit plans to adopt special partial withdrawal liability rules upon a finding by PBGC that the rules are consistent with the purposes of Title IV of ERISA. Under ERISA section 4203(f) and @ 2645.4(a) of the PBGC's regulation on procedures for extension of special withdrawal liability rules (29 CFR Part 2645), PBGC will approve a plan amendment establishing special withdrawal rules if the PBGC determines that the plan amendment --

(A) Will apply only to an industry that has characteristics that would make use of the special withdrawal rules appropriate; and

(B) Will not pose a significant risk to the insurance system.

In order for the PBGC to determine whether a special withdrawal rule is appropriate, @ 2645.3(d)(7) of the regulation requires that plans provide information on the industry which is the subject of the rule. This includes information on the effects of withdrawals on the plan's contribution base, as well as information sufficient to demonstrate the existence of industry characteristics which would indicate that withdrawals in the industry do not typically have ad adverse affect on the plan's contribution base. (These characteristics include the mobility of employees, the intermittent nature of employment, the project-by-project nature of the work, extreme fluctuations in the level of an employer's covered work under the plan, the existence of a consistent pattern of entry and withdrawal by employers, and the local nature of the work performed.)

Under @ 2645.2(a) of the regulation, a special partial withdrawal rule must be consistent with the rule the plan has adopted on complete withdrawals. The regulation also requires that a plan indicate how the special rules will operate in the event of a sale of assets by a contributing employer or the withdrawal from the plan of all employers (@ 2645.3(d)(4)). Finally, @ 2645.4(b) requires PBGC to publish a notice of the pendency of a request for approval of special withdrawal rules in the Federal Register, and to provide interested parties with an opportunity to comment on the request.

Decision

On January 3, 1983 (48 FR 104), PBGC published a notice soliciting public comment on a request from the Division 1181 Amalgamated Transit Union-New York Employees Pension Fund and Plan (the "Plan") for approval of a Plan amendment providing for special withdrawal liability rules. Five comments were received in response to the notice. One comment favored, while the remaining four comments opposed, approval of the special rules in this request. Two of the comments opposing the rule were identical in content.

The Plan is a multiemployer plan, with approximately 84 contributing employers, that is maintained pursuant to collective bargaining agreements between Division 1181-1061 Amalgamated Transit Union, AFL-CIO (the "Union"), and employers operating school buses under contract with the Board of Education of the City of New York (the "Board of Education"). The Plan covers drivers, maintenance employees and martron-attendant escorts on buses used to transport school children to and from the New York City public schools. The Plan also covers employees who transport handicapped and emotionally disturbed children to and from public and nonpublic schools in New York City. Virtually all of the employees covered by the Plan work in the school transportation industry in New York City. As of August 31, 1982, the Plan covered 4,259 active workers and 519 retired and terminated vested participants. With minor exceptions, all of the current contributing employers are school bus operators. The only non-school bus contributors are the Union and three organizations connected to it, and those organizations account for only 39 of the total participants in the Plan.

The school bus transportation contracts under which employers operate are subject to competitive bidding and are normally for a three-year period. Pursuant to a 1979 court-ordered agreement between the Board of Education and the Union (the "Mollen Agreement"), school bus contracts involving an employer with more than five vehicles must contain certain employee protection provisions regarding hiring preference and pension fund participation. Under the Mollen

Agreement, a successful bidder is required to give priority in employment to any employee who was employed prior to June 1, 1982 under a school bus contract, and who is on furlough or is unemployed as a result of a loss of contract or a reduction in service ordered by the Board of Education ("Master Seniority List Employees"). In addition, a successful bidder who is not a signatory to the Plan, is required to sign an agreement with the Plan to contribute on behalf of Master Seniority List Employees. Though in theory new employees could be hired if the Master Seniority List were exhausted, the actual experience to date indicates that there have always been available employees on the list who must be given priority in employment.

The Mollen Agreement authorized the Board of Education to cancel any transportation contract if an employer willfully fails to comply with the employee protection provisions. The Mollen Agreement was originally due to expire in 1983. However, by action effective July 27, 1982, the New York State legislature amended the New York Education Law @ 305 to authorize the Board of Education to extend all existing pupil transportation contracts, which include the exployee protection provisions of the Mollen Agreement, for a period of ten years. The Board of Education is now implementing this authorization.

As part of its request, the Plan submitted copies of its two most recent actuarial valuation reports. These reports were for the plan years ended August 31, 1977 and August 31, 1981. (The valuations were as of August 31, 1977 and August 31, 1980.) Plan costs for funding purposes are determined on the Frozen Initial Liability Method. In addition to the actuarial reports, the Plan submitted its Forms 5500 (including Schedule B) and audited financial statements for all plan years commencing in 1976 through 1980.

The information submitted shows that from August 31, 1977 to August 31, 1981 the Plan experienced growth in its population base. The number of active participants increased 36.0 percent, representing an average annual compound growth rate of 8.0 percent. The number of retirees, as a percentage of the number of actives, went from 7.0 percent to 11.3 percent.

Employers contribute a certain dollar amount per week on behalf of each covered employee. During the period under discussion, total annual contributions to the Plan went from $3,741,159 to $5,437,254. The contribution rate for employers increased, while that for employees remained constant. Annual benefits plus expenses increased from $889,132 to $2,182.807. The excess of contributions over benefits and expenses, per year went from $2,852,030 to $3,254,447. Assets have almost doubled ($17,445,817 to $34,687,944) and, for the plan year beginning in 1980, were 16 times greater than total disbursements.

There was a benefit increase effective January 1, 1981, which increased the Plan's unfunded accrued liability as of August 31, 1980 by approximately $5.5 million. This benefit increase consisted of raising the minimum benefits payable under the Plan. An increase in the assumed interest rate from 5 1/2 to 7 percent lowered unfunded accrued liability as of September 1, 1979 by approximately $4.4 million. Overall, the Plan's unfunded accrued liability decreased from $23,292,422 as of August 31, 1977, to $21,168,484 as of August 31, 1980. As of September 1, 1980, approximately 50 percent of the active participants were under age 42.5; approximately 82 percent were under age 52.4; and only about one percent were age 62.5 or older.

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A summary of the actuarial information is set forth below.

Summary of Actuarial Valuation Results

	Aug. 31, 1981	Aug. 31, 1980	Aug. 31, 1979	Aug. 31, 1978	Aug. 31, 1977
A. Participants and benefits :					
1. Number of participants and beneficiaries:					
a. Active	4,259	<1> 4,251	3,143	3,113	<2> 3,132
b. Retired	483	<1> 389	317	240	<2> 221
c. Terminated vested and beneficiaries in pay status	58	<1> 35	19	33	<2> 9
2. Benefit formula: [Percentage of pay, depending upon years of service, with specified minimum benefit.]					
B. Income and Expenses (in dollars):					
1. Annual Contributions:					
a. Employer	4,042,997	3,938,503	2,479,024	2,965,091	2,567,886
b. Employee	1,394,257	1,425,309	922,848	1,192,207	1,173,273
c. Total	5,437,254	5,363,812	3,401,872	4,157,298	3,741,159
2. Benefits and Expenses:					
a. Annual Benefit payout including refunds of employee contributions	1,729,630	1,508,269	1,168,045	886,515	706,205
b. Expenses	453,177	234,789	177,345	162,765	182,924
c. Total	2,182,807	1,743,058	1,345,390	1,049,280	889,129
C. Plan Assets and Liabilities (in dollars):					
1. Frozen Initial Liability Normal Cost For Plan Year Ending	1,902,156	2,137,418	1,101,015	1,086,462	1,016,621
2. Net Charge to Funding Standard Account (without regard to Prior Year Credit Balance) For Plan Year Ending	3,517,688	3,341,623	2,405,175	2,390,622	2,410,781
3. Unfunded Value					

of:					
a. Accrued Liability-FIL	(NA)	n1 21,168,484	(NA)	(NA)	n2 23,292,422
b. Liability for Vested Benefits	(NA)	n3 3,974,918	n4 6,416,439	(NA)	(NA)
4. Market Value of Assets	34,687,944	31,266,626	25,865,105	22,070,753	17,445,817
D. Interest Rate used to Value Liabilities	(NA)	7%	7%	(NA)	5 1/2 %

n1 From 1981 Actuarial Report.

n2 From 1977 Actuarial Report.

n3 From 1980 Schedule B -- September 1, 1980 figure.

n4 From 1979 Schedule B -- September 1, 1979 figure.

(NA)=Not available from information submitted.

Source: Forms 5500 and attached financial statements except where otherwise noted.

On April 28, 1982, the Plan adopted an amendment prescribing special complete and partial withdrawal rules to take effect as of January 1, 1981. The amendment was modified by the Plan on November 10, 1982 and on March 10, 1983. As modified and as submitted for approval, the Plan amendment reads as follows:

Article XI -- Withdrawal Liability for Employers Engaged in Pupil Transportation

"Section 1.

"(A) Complete withdrawal from this Plan shall occur, if

"(1) An Employer, engaged in pupil transportation pursuant to contract between that Employer and the Board of Education of the City of New York, ceases to have an obligation to contribute under the Plan, and

"(2) Such Employer --

"(a) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

"(b) resumes such work within five years after the date on which the obligation to contribute under the Plan ceases, and does not renew the obligation at the time of resumption.

"(3) In the event the Plan is terminated by mass withdrawal as defined in section 4041A(a)(2) of ERISA, paragraph (2)(b) above shall be applied by substituting 'three years' for 'five years'.

"(B) Partial withdrawal from the Plan shall occur if, on the last day of the plan year, for such year --

"(1) there is a 70-percent contribution decline in any such Employer's contribution to the Plan, which shall be defined in accordance with the appropriate provisions of ERISA section 4205, or

"(2) there is a partial cessation of such Employer's contribution obligation which shall be defined in accordance with the appropriate provisions of ERISA section 4205, and

"(3) in addition to (1) or (2) above, such Employer is performing work of the type for which contributions were required in the jurisdiction of the collective bargaining agreement of a non-covered basis.

"Section 2.

"(A) The special withdrawal rules for Employers engaged in pupil transportation set forth in Section 1 above, shall not apply to the year in which termination of the Plan, as defined in section 4041A(a)(2) of ERISA, occurs and for cessation of any Employer's obligations to contribute occurring during any of the three Plan years immediately preceding the year in which such termination occurs.

"(B) The special withdrawal rules set forth in Section 1 above, apply to an Employer only if substantially all of the employees with respect to whom the Employer has an obligation to contribute under the Plan, are engaged in pupil transportation pursuant to contract between the Employer and the Board of Education of the City of New York."

Therefore, the Plan proposes to modify the general statutory rules for complete and partial withdrawal by adding the condition that for a withdrawal to occur, the employer must, after the cessation, continue to perform previously covered work in the jurisdiction of the collective bargaining agreement or resume such work within five years of the cessation, without being obligated to contribute to the Plan for the work. (However, PBGC notes that, if the cessation of the obligation to contribute occurs as a result of a sale of assets that complies with ERISA section 4204, the seller is protected by operation of law from withdrawal liability, even if the seller continues to perform previously covered work.) Thus, employers who go out of business, or otherwise cease to operate in the jurisdiction of the collective bargaining agreement, will not incur withdrawal liability.

The special rules quoted above contain two substantive changes which the Plan made after the notice of pendency was published. First, the Plan limited the application of the special rules to only those contributing employers who have substantially all of their covered employees engaged in pupil transportation pursuant to a contract with the Board of Education. Second, the Plan modified the special rules, so that they will not apply to complete or partial cessations that occur in years in which the Plan terminates by mass withdrawal, pursuant to ERISA section 4041A(a)(2), or in any of the three Plan years preceding the year in which the mass withdrawal termination occurs.

In determining whether an industry has the characteristics that would make use of special rules appropriate, an important, although not necessarily dispositive, line of inquiry is the extent to which the particular industry possesses those characteristics that led Congress to adopt special rules for the construction and entertainment industries. An industry that is similar to construction or entertainment in terms of those characteristics is generally appropriate for rules similar to the construction and entertainment rules.

The particular industry in this request is the school bus transportation industry in New York City. Employers are obligated to contribute to the Plan under private competitive contracts with the Board of Education. The contracts are normally for a three-year term. Thus, as in the case of the construction industry, an employer's level of work is dependent on its ability to successfully obtain contracts. If an employer does not obtain contracts, it will no longer be in the industry, and its place will be taken by successful bidders. Therefore, the coming and goings of individual employers do not normally affect the Plan's contribution base. That base is dependent on the demand for private school bus transportation services in New York City and not on the existence of individual employers. A second major similarity between this industry and the construction industry is the local nature of the work. Work in the New York City school bus industry can only be performed in the jurisdiction of the Plan; the work cannot be performed elsewhere. Thus, if an employer leaves the Plan's jurisdiction, it can no longer compete with remaining employers for work in the industry. A further factor indicating that the Plan's contribution base is not harmed by the normal attrition of employers is the requirement under the Mollen Agreement that successful bidders hire workers who are on the Master Seniority List, and that the new employer participate in the Plan on behalf of those workers.

On the basis of all of the above factors, PBGC believes that the industry which is the subject of this request possesses characteristics that would make use of the proposed special withdrawal rules appropriate.

To determine whether the use of the special rules present a significant risk to the insurance system, PBGC has reviewed the financial and actuarial information submitted by the Plan. That information suggests that the Plan is in healthy financial condition: Vested liabilities are almost fully funded, the ratio of active participants to retirees is high, the income to disbursements ratio is likewise favorable, and participation is increasing. These are indications of a plan in which use of the special rule will not pose a significant risk to the insurance system.

PBGC has reviewed the five comments received from the public on the notice of pendency. As previously mentioned, one comment urged PBGC to approve the Plan's request. Two comments opposed the request for reasons unrelated to this specific application. For example, one of those comments stated that, rather than proceeding on a case-by-case basis, PBGC should "re-evaluate the total program and . . . act realistically at this time rather than waiting for [all businesses] to appeal one by one for exclusions." However, Congress has directed PBGC to consider, on a plan-by-plan basis, special withdrawal rules submitted under ERISA section 4203(f). Section 4203(f) does not give PBGC authority to approve special withdrawal rules on a class basis, but only on a case-by-case basis in the context of a specific request.

The remaining two comments received, both of which opposed the request, were identical in content. The comment first argued that PBGC lacked the statutory authority to approve special rules for a "single plan" in a "limited geographic area", and that instead PBGC could only proceed by providing an exemption from the general withdrawal rules for an entire industry on a nationwide basis. As previously mentioned, PBGC's authority under ERISA section 4203(f) to consider special withdrawal liability rules is limited to actual plan amendments adopted by individual plans. The plan in question may cover an entire industry "or portions thereof". Where Congress thought it was appropriate to establish special withdrawal rules applicable to an entire industry, it did so in the statute, i.e. the constructions and entertainment industry rules. With respect to other industries, Congress determined that authority to adopt special withdrawal rules should be granted solely on a plan-by-plan basis.

The same comment also stated that the special rule "leaves unanswered the question of what would happen to the [Plan] if the employees of some or all of the participating employers should decertify the [Union] of choose another union to represent them." PBGC disagrees with that statement. If an employer ceases to have an obligation to contribute to the Plan, whether as a result of a change in union representation or for any other reason, and continues to perform previously covered work in the jurisdiction of the collective bargaining agreement, then under the Plan's special rules a withdrawal would occur.

The comment further objected to the possibility of a withdrawal occurring in the event of a change in union representation by employees, and seemed to urge that the special rules should provide relief from that perceived inequity. PBGC points out that in such an event, a withdrawal would result under the general statutory rules. It would be incorrect for PBGC to deny approval of this request on the grounds that the special rules provide the same result as the general statutory rules.

This comment concluded by stating that PBGC must "provide relief to the trustees" if PBGC determined that it had the legal authority to consider the application. The conclusion was based on the comment's concern that, due to their fiduciary obligations, Plan trustees would each be placed "in financial jeopardy" should the request "prove capricious and result in substantial underfunding of the [Plan] due to the trustees' failure to collect and enforce withdrawal liability in all cases consonant with [the Multiemployer Act]." In response to this comment, PBGC points out that adoption of a special rule by a plan is a discretionary act. ERISA does not require that the rule be adopted. Therefore, in deciding whether to request approval of special withdrawal rules, as in any other decision they make, Plan trustees must carefully weigh various factors to determine whether that action is in the Plan's best interests. Further, PBGC notes that it has no statutory authority to "provide relief to the trustees," as suggested by the comment, and that PBGC's decision on approval of a special rule must be made solely on the basis of the standards prescribed in ERISA section 4203(f).

Based on the facts of this case and the representations and statements made in connection with the request for approval, PBGC has determined that the Plan amendment will apply only to an industry that has characteristics that would make use of the special withdrawal rules appropriate, and will not pose a significant risk to the insurance system. PBGC also finds that the proposed partial withdrawal rule is consistent with the rule the Plan proposes for complete withdrawals. Therefore, PBGC hereby grants the Plan's request for approval of the special withdrawal liability rules as set forth herein. Should the Plan wish to amend these rules at any time, PBGC approval of the amendment will be required.

Issued at Washington, D.C. on this 15th day of June, 1983.

Edwin M. Jones,

Executive Director, Pension Benefit Guaranty Corporation.
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