U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

Sep 25 1989 89-29A

Ronald E. Richman, Esq.
Chadbourne & Parke
1230 Avenue of the Americas
1st Floor
New York, NY 10112

Re: Textile Workers Pension Fund
Identification No.: F-3813A

Dear Mr. Richman:

This is in response to your letters requesting an advisory opinion regarding the application of sections 403, 404 and 406 of the Employee Retirement Income Security Act of 1974 (ERISA) to the proposed merger of three multiemployer pension plans.

You represent that the Textile Workers Pension Fund (the Fund) is the sponsor and administrator of four multiemployer pension plans: the National, New England, Mid Atlantic, and Philadelphia Pension Plans.[1] The National, New England and Mid Atlantic Plans (the Plans) are each independent legal entities. Each plan has its own tax identification number, plan benefits, summary plan description, actuarial valuation, and files its own Form 5500. The assets of each plan are used only to pay the benefits and expenses of such plan.[2]

You further represent that the Fund provides all administrative services for the Plans. Most of the Plans' assets are invested in a commingled trust and assets attributable to each plan are allocated to the plan in accordance with strict accounting principles. The Trustees of the Fund are trustees and fiduciaries of each of the multiemployer plans participating in the proposed merger. Some of the Fund's Trustees are stockholders and/or employees of contributing employers to the New England and Mid Atlantic Plans. The Fund's Trustees make all policy decisions for the Plans. The Fund Manager is responsible for the operation of the Plans on a day-to-day basis. In addition, the Amalgamated Clothing and Textile Workers Union (ACTWU) is the collective bargaining representative for all employees who participate in the Plans.

Each of the Plans has a different level of funding. The National Plan has assets well in excess of vested benefits. The New England Plan has assets slightly in excess of vested benefits. The Mid Atlantic Plan has less assets than vested benefits.[3]

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[1] The Philadelphia Plan will not participate in the merger.

[2] By letter dated May 17, 1989, you notified the Department that the contributing employers to the New England Plan have ceased contributing to the New England Plan and are now contributing to the National Plan.

[3] As of October 1, 1988, the Mid Atlantic Plan had unfunded vested benefits in the amount of $18,285,000.

You state that the Trustees of the Fund propose to merge the New England and Mid Atlantic Plans into the National Plan. Under the terms of the proposed merger, participants in each of the Plans will maintain all benefits accrued to the date of the merger. Immediately subsequent to the merger, all participants in the merged National Plan will earn future benefits at the present National Plan formula. Individuals who participated in the National Plan prior to the merger will continue to earn past and future benefits in accordance with the formula used to calculate benefits in the National Plan which was in effect prior to the merger.

The merger proposal contains four elements designed to reduce the Mid Atlantic Plan's pre-merger unfunded liabilities. First, contributing employers to the New England and Mid Atlantic Plans will enter the merged National Plan with a "withdrawal liability" account balance equal to the amount of unfunded vested benefits allocable to them by the plan to which they contributed prior to the merger.[4] Contributing employers to the National Plan will maintain their "withdrawal liability" account balances as calculated under the National Plan's modified direct attribution withdrawal liability method. Since the merged National Plan will maintain the National Plan's method of calculating withdrawal liability, the former contributing employers to the Mid Atlantic Plan (the only plan which has unfunded vested benefits) will have the ultimate responsibility for paying the unfunded vested benefits attributable to the Mid Atlantic Plan. This liability will be terminated if the merged National Plan has no unfunded vested benefits at the conclusion of five years after the merger.

Second, effective September 1987, the contributing employers to the Mid Atlantic Plan increased their contributions from $57 per participant per month to $90 per participant per month. The merger proposal calls for continued contributions at this rate for at least five years. In each year, the first $1 million of contributions from former Mid Atlantic employers will be allocated to reduce the existing unfunded liability. Third, the balance of the contributions, after the first $1 million is allocated to the existing unfunded liability, will be used to provide future service benefits under the National Plan formula. Under the merged National Plan, former Mid Atlantic Plan employees will be provided past service benefits in accordance with amounts accrued under the former Mid Atlantic Plan. It is represented, therefore, that the balance of such contributions will exceed the amount required (on an actuarial basis) to provide future service-only benefits. This excess amount will also be used to offset the Mid Atlantic Plan's pre-merger unfunded vested benefits.

Fourth, as a condition precedent to the merger, the ACTWU and contributing employers to the Mid Atlantic Plan will transfer a lump sum of $6 million to the Mid Atlantic Plan. The collective bargaining parties will obtain this money by terminating the Dyers Vacation and Welfare Fund (the Dyers Fund) and contributing $6 million of the Dyers Fund's assets in excess of the assets necessary to satisfy all of the Dyers Fund's liabilities to the Mid Atlantic Plan.[5] You have stated that the termination will comply with section 403(d)(2) of ERISA.

You have represented that the total of the amounts transferred to the merged National Plan pursuant to the above provisions will be less than 100% of the Mid Atlantic Plan’s unfunded vested benefits as of October 1, 1988. However, the Fund's actuary estimates that, if the merger occurs in accordance

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[4] You indicate that the merger proposal calls for an assessment of withdrawal liability pursuant to individual employer contracts. It was represented that such assessment is outside of the provisions of Title IV of ERISA because the merged National Plan will be fully funded.

[5] All of the Dyer's Fund participants are also participants in the Mid Atlantic Plan.

with the Trustees' proposal, the merged National Plan will have assets slightly in excess of vested benefits.

Finally, you have represented that the proposed merger will satisfy all of the merger requirements for mergers of multiemployer plans set forth in section 4231 of ERISA and regulations promulgated thereunder by the Pension Benefit Guaranty Corporation (PBGC). As a condition precedent to the merger, the Fund will obtain a favorable compliance determination from the PBGC.

You have requested an advisory opinion that:

(1) The proposed merger would not violate sections 403(c)(1) and 404(a)(1) of ERISA; and
(2) The proposed merger would not constitute a prohibited transaction under section 406 of ERISA.

Section 403(c)(1) of ERISA provides, in part, that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Section 404(a)(1) of ERISA similarly requires that fiduciaries of a plan discharge their duties solely in the interest of the participants and beneficiaries of the plan, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable plan administration expenses.

Section 406(a)(1)(D) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Sections 406(b)(1) and 406(b)(2) of ERISA provide that a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account or in his individual capacity or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of the participants or beneficiaries.

Section 408(b)(11) of ERISA provides that the prohibitions of section 406 shall not apply to a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the PBGC to meet the requirements of section 4231 of ERISA. Section 408(f) provides that section 406(b)(2) shall not apply to any merger described in subsection (b)(11).

Finally, section 4231(c) of ERISA provides that the merger of multiemployer plans or the transfer of assets or liabilities between multiemployer plans shall be deemed not to constitute a violation of the provisions of section 406(a) or section 406(b)(2) if the PBGC determines that the merger or transfer otherwise satisfies the requirements of this section.[6]

In discussing section 4231 of ERISA, Congress noted in the legislative history accompanying the Multiemployer Pension Plan Amendments of 1980 Act that:

[6] Section 4231 is contained within Title IV of ERISA which is within the sole jurisdiction of the PBGC.

> The rules regarding mergers and transfers are designed to allow mergers in all cases where the resulting plan will not be expected to be in financial trouble. This facilitates the committee's purpose of encouraging mergers which expand a plan's contribution base to provide greater stability by looking at the prospects for the resulting plan instead of focusing on the narrow mechanical test provided under current law. The committee believes that a merger which complies with the conditions will generally be in the best interest of plan participants.

House Comm. on Education and Labor, H.R. Rep. No. 869, 96th Cong., 2nd Sess. 87 reprinted in [1980] U.S. Code Cong. & Ad. News 2918, 2955.

Issue 1

The provisions of Title I of ERISA do not expressly prohibit or limit mergers of multiemployer pension plans. In the Department's view, whether a proposed merger of multiemployer pension plans complies with the provisions of sections 403(c)(1) and 404(a)(1) of ERISA can only be determined by the appropriate plan fiduciaries based on all relevant facts and circumstances. Based on the statutory framework and the Congressional intent described above, it is the opinion of the Department that, in determining the propriety of a merger of multiemployer pension plans, the fiduciaries of each multiemployer plan must make their determinations under sections 403(c) and 404(a)(1) by reference to the multiemployer plan resulting from the proposed merger. In making such determinations, the fiduciaries must consider the funded status of the resulting merged plan, as well as the long-term financial viability of such plan.[7] In this regard, it is contemplated that the fiduciaries would, among other things, take into account the economic outlook of the industry, demographics of the resultant participant population, current and anticipated contribution rates and administrative expenses. The fiduciaries should be aware that compliance with the requirements of section 4231, as determined by the PBGC, will not, in and of itself, satisfy the fiduciaries' obligations under sections 403(c) and 404(a)(1) of ERISA.[8] Accordingly, the Department expects that the fiduciaries will make independent determinations taking into account all relevant information pertaining to the proposed merger.

Issue 2

You represent that, as a condition precedent to the merger, the Fund will obtain a favorable compliance determination under section 4231 of ERISA from the PBGC. Therefore, it is unnecessary for the Department to address the issues raised under section 406(a) and 406(b)(2) by the proposed merger.

Whether the proposed merger is prohibited by the provisions of section 406(b)(1) of ERISA involves questions of a factual nature which can only be answered by the Trustees based on all of the relevant facts and circumstances.

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[7] In the instant case, we note that the trustees may wish to consider, among other things, actuarial projections made of assets and accrued and vested liabilities for the merged plan under a variety of alternate scenarios.

[8] This analysis of fiduciary duties under sections 403 and 404 of ERISA is limited strictly to instances of multiemployer pension plan mergers.

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure describes the effect of an advisory opinion.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations