Pension Benefit Guaranty Corporation

86-26

December 8, 1986

REFERENCE:
[*1] 4022 Benefits Guaranteed

OPINION:

This is in response to your letter requesting an opinion of the Pension Benefit Guaranty Corporation ("PBGC") with respect to the receipt of pension benefits from the referenced pension plan (the "Plan") by certain employees and former employees of the A Division * * * of X Corporation * * * under the circumstances described below.

The facts, as we understand them, are as follows: filed for reorganization under Chapter 11 of the Bankruptcy Code on November 25, 1985. During the few months after the filing in which X attempted to reorganize, it took steps to reject collective bargaining agreements and pension plans covering employees at its * * * operations in * * *, * * *. Eventually, operations at * * * ceased. Throughout the reorganization proceedings, though, X continued to operate * * * and maintain the Plan that covered employees of that division.

On February 25, 1986, X's reorganization was * * * converted by order of the Bankruptcy Court to a Chapter 7 liquidation proceeding. That order provided, inter alia, that the interim trustee was authorized to continue to operate until further order of the court those portions of X's business that [*2] were still "in operation" as of February 25, 1986. It is our understanding that as of that date the only portion of X's business still "in operation" was A, and that the trustee continued to operate thereafter until it was sold.

In March, 1986, the PBGC commenced proceedings in the Bankruptcy Court pursuant to Section 4042 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1342, to terminate the Plan. On April 9, 1986, the Bankruptcy Court entered an order terminating the Plan, appointing the PBGC as statutory trustee, and setting a termination date no earlier than February 25, 1986. (The establishment of the actual date of termination of the Plan under Section 4048 of ERISA, 29 U.S.C. § 1348, is an issue still before the Bankruptcy Court.) Since April 9, the PBGC has administered the Plan as a plan terminated under Title IV of ERISA.

In July, 1986, pursuant to an auction ordered by the Bankruptcy Court, A was sold to the Y Corporation * * * * * *. As we understand it, the sale was of the assets of A only and no liabilities were assumed by the buyer. Further, there was no cessation of operations at A, and all former X employees at A on [*3] the date of sale became Y employees (such employees are hereinafter referred to as "workers"). Y has negotiated a collective bargaining agreement with Local of * * * * * * (the "Union") that provides for a pension plan that appears to be identical in many relevant respects to the Plan.

You have noted that both before and after X's bankruptcy proceedings commenced, employees at A retired under the early retirement provisions of the Plan (30-year retirement and 60/15 retirement, Sections 2.2 and 2.3 of the Plan). Those individuals are currently receiving benefits guaranteed under Title IV of ERISA, 29 U.S.C. § § 1301-1461, from the PBGC. Certain of those individuals (hereinafter referred to as the "returnees") have been offered employment by Y at the A facility. You contend that those returnees should continue to receive their guaranteed benefits from the PBGC after they commence such employment with

I have also been informed by the PBGC's Division of Case Processing that a number of the A workers have inquired whether they may apply for and commence receiving benefits under the Plan while still employed by Y. The PBGC views the A workers' inquiries as involving the same issues [*4] as your request concerning the returnees and therefore, will address both situations in this letter.

Among other things, you contend that the Plan participants' employment with Y should not affect receipt of benefits "just as their accepting employment from any other employer would not affect their continued receipt of benefits." The PBGC does not agree. Retirement benefits are intended generally to provide retirement income for participants who are no longer employed in the business operation under which such benefits accrue. As one court has observed, "[i]nitially, it would appear most unlikely that any employee would reasonably believe that early retirement benefits could commence

while he or she was still working at the same job even though a different employer had taken over salary obligations." Esler v. Northrop Corp., Case No. 20537-B (W.D. Mo. Aug. 4, 1981) Slip Op. p. 5.

The PBGC does not find a clear indication in the Plan that retirement benefits are payable to eligible participants who continue working in the business, albeit for a purchaser of the business. Indeed, if a retiree is reemployed in the business, retirement benefits are discontinued. See, Section [*5] 6 of the Plan. Absent a clear indication in the Plan that retirement benefits become payable solely as a result of a formal change of ownership rather than loss of employment in the transferred business, it is the PBGC's view that continued employment in the transferred business precludes the participant from receipt of retirement benefits.

The application of the foregoing interpretation effects a reasonable result and in addition produces uniform treatment of participants in cases involving all business transfers. For example, it seems clear that absent a specific plan provision permitting receipt of retirement benefits while still working in the business, a change of ownership as a result of the sale of the stock of the business is not an event that precipitates the payment of retirement benefits to participants who are eligible for the same and continue working in the business. Had A been a subsidiary of X and had sold its stock to Y, clearly former X employees now working under Y's control would not receive retirement benefits as a result of the change of ownership. Your position would place primary emphasis on the form of the transfer of ownership, i.e., a sale of assets [*6] vs. a sale of stock. In our view, that emphasis is misplaced.

While the foregoing is dispositive of the issue, we note that your other arguments in support of the position that the returnees should continue to receive pension benefits from the Plan are either inapposite or not supported by the facts or the law. Those arguments also do not support the payment of benefits to the A workers. First, you contend that for labor law purposes, Y should not be viewed as a successor employer. You make that contention notwithstanding the results of the sale of A: a substantial continuity of the business operations at the same plant, using the same equipment, the same workforce, the same type of jobs, and producing substantially the same products; and the assumption of the bargaining obligation with the Union without any question concerning representation. Regardless of what those facts may give rise to under labor law, though, we believe they would require a finding of successorship under Title IV of ERISA. Moreover, while Y did not assume the X collective bargaining agreement covering employees, the future pension plan it negotiated with the Union appears to be identical in many respects [*7] to, and so fully integrates with, the Plan, at least insofar as the brief description attached to your letter reveals, that for purposes of the Plan, it would be difficult not to find Y to be a successor. Under its new pension plan, Y has assumed the responsibility for payment of all non-guaranteed benefits under the Plan to A workers who stay employed with Y for at least five years or until they reach age 62. Thus, Y has agreed essentially to pay those participants' past service liabilities under the Plan not otherwise payable by the PBGC: those were liabilities accrued by Plan participants while employed by X.

Second, you argue that since the early retirement benefits received by the returnees are all actuarially reduced, the PBGC would incur no additional cost in continuing the payment of guaranteed benefits while the returnees work for Y. Also, as noted above, some A workers are asking whether they may receive 30-year retirement benefits while continuing to work for Y. As we understand them, the 30-year retirement benefits, which may be received prior to age 62, are not subject to actuarial reduction. Thus, there would be additional costs to the PBGC in continuing the payment [*8] of such benefits. But, whether such benefits present an additional cost to the PBGC is irrelevant to the determination whether returnees or A workers could receive retirement benefits from the Plan while employed by Y.

Lastly, after the X bankruptcy was converted to a Chapter 7 liquidation and the Plan was rejected by "operation of law", you contend that employees at A ceased accruing pension benefits under the Plan. It is the position of the PBGC that all accruals under a pension plan cease when the plan terminates under Title IV of ERISA. Rejection of a pension plan in a bankruptcy, whether by a debtor-in-possession or a Chapter 7 trustee, may alter the contractual obligations under the plan, but does not alter the statutory obligations. A pension plan continues as an ongoing plan, and active participants continue to accrue benefits, until that plan is terminated or benefits are frozen in accordance with the requirements of ERISA. As you are well aware, the PBGC's contention that the Plan terminated under Title IV of ERISA on February 25, 1986, has been contested by the Union, and that issue will be decided initially by the Bankruptcy Court. Thus, the time when the accruals [*9] under the Plan ceased cannot at present be determined. Even assuming a Plan termination date of February 25, 1986, though, we do not view the cessation of accruals or Y's purchase as affecting the participants' entitlement to receive pension benefits where they continued working for Y.

I hope this letter is of assistance. If you have further questions on this matter, please contact Frank McCulloch of my staff at the above address or at (202) 778-8821.

Edward R. Mackiewicz
General Counsel