

Pension Benefit Guaranty Corporation

89-1

February 8, 1989

REFERENCE:

[*1] 4041(a)(3) Multiemployer Termination. Termination - Plan Amendment - Individual
4041(b) (2) (c) Notice from the Corporation of Noncompliance
4041 (b) (2) (D) Final Distribution of Assets in Absence of Notice of Noncompliance

OPINION:

I write in response to your letter of October 26, to Kathleen Utgoff, Executive Director of the Pension Benefit Guaranty Corporation (the "PBGC"). In that letter, you alleged that * * * Company * * * intended to claim a reversion of surplus assets upon the termination of a pension plan for certain employees of * * *. Further, you alleged that * * * 's claim for this reversion was in violation of collective bargaining agreements that earmarked such surplus assets for benefit increases. Finally, you stated that your union intended to challenge the reversion of the surplus assets to the employer through either arbitration proceedings and/or a lawsuit filed in court.

Subsequent to our receipt of your letter, we received from * * *, Esquire, a copy of a complaint filed by former employees against * * * in the United States District Court for the Western District of Pennsylvania (Brytus, et al. v. Spang & Company, et al., Civil Action No. 88-2548). In a letter to the PBGC that accompanied this complaint, * * * references your October 26th letter and asks that the PBGC not process the proposed plan termination until the lawsuit is resolved.

I have assumed that your letter [*2] of October 26, and * * * 's request of December 9, are both based upon the provisions of Section 4041(a)(3) of the Employee Retirement Income Security Act, as amended ("ERISA"), which provides that the PBGC "shall not proceed with a termination of a plan . . . if the termination would violate the terms and conditions of an existing collective bargaining agreement." As stated by the PBGC in Opinion Letter 87-4, a copy of which is enclosed, for the PBGC to suspend a termination it must be advised in a timely manner of a formal challenge to the termination.

The Brytus suit, though, does not appear to be a formal challenge to the termination of the plan. The complaint makes no allegation that termination of the plan would violate terms of an existing collective bargaining agreement. While the complaint does allege that * * * is violating terms of the plan by refusing to use surplus assets for increased pension benefits, it fails to challenge termination, itself. Further, the exhibits to the complaint indicate that at the time * * * initiated the plan termination in 1988, there was no existing collective bargaining agreement calling for the maintenance of the plan. See [*3] Complaint Exhibit C, Shutdown Agreement, paragraph 4. Therefore, we cannot conclude that a formal challenge to plan termination has been initiated.

In addition, it appears that neither your letter nor * * * 's letter was received by the PBGC in a timely matter. Your letter was received by the PBGC three months after the PBGC had received * * * 's July 27, 1988 standard termination notice and some thirty days after the expiration of the sixty-day period in which the PBGC can issue a notice of noncompliance. See section 4041(b)(2)(C) of ERISA. * * * 's notice of a formal challenge was received at an even later date. Consequently, neither your letter nor * * * 's submission of the Brytus complaint would constitute timely submissions on which the PBGC could act to suspend the termination.

Finally, you should be aware of the PBGC's position that the requirement under section 4041(b)(2)(D) of ERISA that a plan administrator distribute plan assets as soon as practicable after the expiration of the PBGC's 60-day review period does not apply to surplus assets when there is a dispute as to the proper distribution of such assets. Section 4041(b)(2)(D) requires only that the distribution [*4] of assets satisfy all benefit liabilities under the plan. Surplus assets may be placed in escrow, or otherwise set aside, pending resolution of the dispute.

Should you have questions, please contact the attorney handling this matter, John Foster. His telephone number is (202) 778-8850.

John H. Falsey
Acting General Counsel