

Pension Benefit Guaranty Corporation

77-132

February 18, 1977

REFERENCE:

[*1] 4047 Restoration of Plans

OPINION:

This is in response to your letter requesting that the Pension Benefit Guaranty Corporation (the "PBGC") consider a proposed alternative to termination of * * * (the "Plan"), which would involve a restoration of the Plan on a curtailed basis. This also will serve to acknowledge receipt of the Notice of Intent to Terminate the Plan (the "Termination Notice"), which was received by the PBGC with your letter on * * *, proposing a termination date of December 31 1976.

n1 We should note that Section 4041(a) of the Employee Retirement Income Security Act of 1974 (the "Act") requires that a Notice of Intent to Terminate be filed with the PBGC at least 10 days before the proposed date of termination. A Notice of Intent to Terminate is deemed to have been filed on the date on which it is received by the PBGC. 29 C.F.R. § 2604.5 (1976).

As we understand the pertinent facts, the Plan was adopted, effective * * *, by * * * (the "Company") and its affiliate, * * * n2 The Plan has insufficient assets to pay all guaranteed benefits under the Plan. Although the Company, as plan administrator, has submitted a Termination Notice for the Plan, the Company expressed [*2] a willingness to continue the Plan, subject to the adoption of a Plan amendment, effective as of January 1, 1976, which would provide, as follows:

- 1) Benefit accruals under the Plan will cease as of January 1, 1976;
- 2) No employee will be eligible to become a participant in the Plan after December 31, 1975;
- 3) The Company will contribute to the Plan in accordance with the requirements of Section 412 of the Internal Revenue Code;
- 4) Each bargaining unit member will be afforded the opportunity to elect to receive a lumpsum payment of his or her accrued benefit under the Plan as of December 31, 1975, which will be considered to be 100% vested to the extent of Plan assets allocable to such benefit as of December 31, 1976; each bargaining unit member who so elects would be required to execute a form under which that participant waives any claim he or she might have to "future benefits" under the plan or Title IV of the Act;
- 5) Participants who do not receive a lump-sum payment, pursuant to paragraph 4, will continue to receive credited service in accordance with the "elapsed time system."

n2 We will assume, for the purposes of this letter, that the Plan actually is one pension plan. That is, we will assume that benefits under the Plan are not payable with respect to each participant only to the extent of the Plan assets attributable to the employer who employed that participant. Rather, all Plan assets are available to pay all benefits under the Plan. But see, Plan, Article 13.1. [*3]

The proposed amendment also will make other changes in the Plan so that the Plan will comply with the Act.

You asked whether the PBGC will permit the Plan to be restored on a curtailed basis in accordance with the above-mentioned proposed Plan amendment should the Company request that it be allowed to withdraw the Termination Notice, and, if not, what adjustments would have to be made for the PBGC to permit a withdrawal. The PBGC will permit the Plan to be restored if certain adjustments are made in the proposal. The proposed Plan amendment should be revised so that no employee will be eligible to become a participant in the Plan after December 31, 1976, benefit accruals will cease after December 31, 1976, and paragraph 4 is deleted, i.e., the Plan is not amended so as to afford bargaining unit members the opportunity to elect to receive a lump-sum payment of any amount (the "Revised Proposed Plan Amendment"). The adoption of the Revised Proposed Plan Amendment will not result in the imposition of employer liability under the Act.

Some of these changes in the proposal are necessary because of the PBGC's policy not to agree to a withdrawal of a termination notice where [*4] it results in prejudice to the PBGC or to participants or others. See generally, PBGC, Guidelines on Voluntary Termination, Publication No. 503 (January, 1977). The PBGC will not exercise its discretionary authority under Section 4047 of the Act and permit the Termination Notice to be withdrawn in a situation such as this where an employer seeks retroactively to cease benefit accruals as of a date one year or more prior to the termination date since it would appear that the PBGC's action under such circumstances would not be in the best interests of Plan participants. It also is not clear that Section 4047 authorizes the PBGC to take such action. The other changes in the proposal are necessary because the PBGC will not permit a restoration where the employer intends to offer participants the opportunity to elect to receive a lump-sum payment of an amount less than their guaranteed benefit under Title IV.

Should you wish to pursue this matter any further, please contact * * * of my staff at * * * or at the above address.

Henry Rose
General Counsel