Pension Benefit Guaranty Corporation

81-4

March 12, 1981

REFERENCE:
[*1] 4021(a) Plans Covered. Requirements of Coverage
4021(b)(5) Plans Covered. Employee Contributed Plans
4044(d) Allocation of Assets. Distribution of Residual Assets

OPINION:

This is in response to your recent letter to me concerning the * * * Pension Plan (the "Plan"). You stated that any assets of the Plan which are in excess of the amount necessary to pay Plan benefits guaranteed under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301 et seq. (1976) (amended by Pub. L. No. 96-364 (1980)), and which are not attributable to contributions made by Plan participants, should be returned to the Plan sponsor, the * * * Company * * *. We believe, however, that such assets should be distributed to Plan participants.

As I understand the facts, the Plan is funded pursuant to Group Annuity Contract No. GA102 (the "Contract") issued by the Massachusetts Mutual Life Insurance Company ("Massachusetts Mutual") to * * *. The contract was effective in 1946 and was most recently amended in 1965.

A separate Plan document (the "Plan Document") was promulgated by * * * for the purpose of compliance with requirements imposed by ERISA on ongoing plans. The [*2] Plan Document was not executed until December 1978 and has never been executed or approved by Massachusetts Mutual. * * * executed the Plan Document approximately three months after the cessation of production at the * * * plant and the layoff of all but one Plan participant. On December 21, 1979, a Notice of Intent to Terminate was filed with the PBGC by * * *.

Article IX, Section 15 of the Contract provides:

On each anniversary of this Contract the Insurance Company will ascertain and apportion to this Contract its share of the divisible surplus, if any, declared by the directors of the Insurance Company as applicable to contracts of this class. Any such share of the divisible surplus apportioned to this Contract will be applied towards the payment of premiums hereon. If any such share of the divisible surplus exceeds the Employer's share of the aggregate premium paid during the preceding Contract Year, an amount equivalent to such excess will be applied by the Employer for the sole benefit of the employees, without obligation on the part of the Insurance Company to see to any such application.

This provision precludes a reversion of excess Plan assets to the employer.

Section [*3] 15.02 of the Plan Document states, inter alia, that "excess assets may be refunded to the Employer if attributable to actuarial error." However, Section 1.14 of the Plan Document refers to the Contract, as amended in 1965, as the "most recent prior complete restatement of the Plan." Thus, it is clear that the Plan as originally promulgated was embodied in the Contract and that the Contract may not be modified by absent the consent of Massachusetts Mutual.

Section 15.02 of the Plan document is inconsistent with Article IX, Section 15 of the Contract, and thus cannot be given effect. Accordingly, the Plan does not provide for a reversion to the employer of excess assets.

This determination is subject to reconsideration under the PBGC administrative review regulation (the "Regulation"), a copy of which is enclosed, as a determination with respect to allocation of assets. 29 C.F.R. § 2618.1(b)(4). You may seek reconsideration by following the procedure set forth in Subpart C of the Regulation.

The PBGC has not yet been able to determine whether the value of the Plan's assets upon the date of Plan termination exceeded the value of its guaranteed benefits on that date. Accordingly, [*4] we welcome the offer made in your letter "to authorize the release by Massachusetts Mutual to you of any information you seek in connection with the Plan." * * * PBGC Case Officer, will advise you of the data required for the PBGC's determination as to sufficiency.

I note that you have raised two questions as to Title IV coverage of the Plan, i.e., with respect to tax qualification of the Plan and with respect to the existence of a Plan provision for employer contributions. You indicated that "[n]o

letter of determination has been sought [from] or issued" by the Internal Revenue Service. However, in Paragraph 18 of the Notice of Intent to Terminate you stated, following a reference to the nonexistence of a determination letter:

[I]t is the opinion of counsel that the plan, as amended to conform to ERISA, satisfied all of the requirements for qualification imposed by Sec. 401(a) of the Internal Revenue Code.

It thus appears that the Plan is covered under Section 4021(a) of ERISA, 29 U.S.C. § 1321(a).

You also noted that no employer contributions may have been made since the date of enactment of ERISA. If so, this would not, as you apparently believe, serve to exclude the [*5] Plan from coverage pursuant to Section 4021(b)(5) of ERISA, 29 U.S.C. § 1321(b)(5). It is clear that the Plan at all times has provided for employer contributions notwithstanding any failure to make such contributions (see Contract, Article VI; Plan Document, Article XII).

I hope I have been of assistance. If you have any further questions, please contact the attorney assigned to this matter, * * * at (202) 254-3010.

Henry Rose
General Counsel