

Pension Benefit Guaranty Corporation

86-27

December 17, 1986

REFERENCE:

[*1] 4041(a) Termination by Plan Administrator. Filing of Notice of Intent to Terminate
4047 Restoration of Plans

OPINION:

This is to advise you that the Pension Benefit Guaranty Corporation (the "PBGC") has reviewed those plans which you have represented as those which X Corporation seeks to adopt. Based on our review of the proposed plan documents, our extensive discussions with you and the Union, and a review of facts and circumstances incidental to adoption of these proposed plans, we have determined that if X were to adopt such plans, the effect would be a de facto continuation of the previously terminated X plans.

Accordingly, pursuant to paragraph 3 of the Agreements entered into between X and the PBGC, and pursuant to the PBGC's authority to enforce Title IV of the Employee Retirement Income Security Act ("ERISA"), the PBGC hereby disapproves the adoption of the proposed plans.

Plan termination insurance is to be provided where plans actually and fully terminate. Thus, for example, partial terminations do not give rise to termination-generated claims for guaranteed benefits. See *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. [*2] 1983). Nor do insurance claims arise from termination schemes which approximate terminations facially, but which, in fact, continue the plans for covered participants. PBGC Opinion Letter 81-11 (May 11, 1981). See also *Interco Inc. v. Pension Benefit Guaranty Corp.*, 620 F. Supp. 688 (E.D.Mo. 1985).

This principle has been established for a number of years. For example, in PBGC Opinion Letter 81-11, the Executive Director of the PBGC wrote that:

In our view, the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program. Accordingly, we believe that a purported termination of one plan, contrived in concert with the establishment of new retirement arrangements which are designed to provide substantially the same benefits for the future, should not be treated as a termination within the statutory contemplation so as to require the payment of PBGC guarantees.

This agency ruling proceeded to make clear that "Section 4047 of ERISA, 29 U.S.C. § 1347, provides PBGC with express authority to limit plan terminations" and that "the breadth of this provision is further reflected in its additional grant of authority to PBGC [*3] to restore to its pre-termination status, a plan whose termination has already been completed."

Plan termination insurance is designed by Congress to provide insurance for plans which actually terminate. The program is set up to protect participants and beneficiaries who would otherwise be deprived of pensions.

The program is not designed to provide supplemental financing for ongoing pension programs. Compare, the single-employer insurance program provisions contained principally in 29 U.S.C. § § 1301-1368 et seq., with the multiemployer assistance program provisions contained in 29 U.S.C. § § 1381-1461.

In this case, X filed notices of its intent to terminate its pension plans on October 29, 1985. Prior to that time, however, X had already agreed with the Union to create a Pensioners' Relief Program to provide financial relief to Union represented employees who might incur a loss of present or future benefits in the event of termination. See 1985 Strike Settlement Agreement (October 15, 1985) at Appendix C.

From the PBGC's perspective, the existence of this relief program, was not in itself, objectionable. However, statements by X management [*4] n1 and the Union n2 concerning the continuation of benefits after the expected termination date of the X plans raised doubts about whether the original plans had in substance been terminated.

n1 See Supplemental Answer of Defendants Binger, Denby, Seymour, Marshall, DePalma, Maxwell, Paulson, Allyn, Anderson and Wilbur, *Tintori v. Allyn*, No. 85-1463 at 2 (W.D. Pa. November 8, 1985) (explaining that the Pensioners' Relief Program provided "for the creation of a pension relief fund the purpose of which is to compensate for any loss in pension benefits resulting from the termination of the pension plans . . . in an underfunded status").

n2 The * * * Union * * * explained to its members that the "money going into the new Pension Program should be sufficient to provide relief to those people comparable in value to what they will lose by reason of termination of the pension plans." Summary of Settlement Agreement, * * * (October 17, 1985) at 4.

The PBGC did not (and does not now) object to * * * participants or beneficiaries receiving all of their promised benefits. The PBGC did object, though, to X's apparent attempt to contrive a new means of improperly diverting [*5] termination insurance funds to payment of ongoing X pension obligations. Consequently, the PBGC questioned whether the pension plans were, in fact, being continued, albeit in another form. Because of these questions, the PBGC did not initially recognize X's termination notices or assume trusteeship of the underfunded plans.

The PBGC was presented with copies of * * *s Pensioners' Relief Program in February 1986 in the form of two Voluntary Employees' Beneficiary Associations ("VEBAs") and an individual account plan. In late February, X proposed to make a payment from these relief programs to provide temporary relief to its employees. The PBGC advised that, in view of its temporary nature, the single payment standing alone would not itself nullify termination. However, the PBGC further advised that:

the one-time payment does not and cannot stand alone. Both actions and statements prior to that one-time payment and actions of X and others subsequent to that payment must be considered in determining whether the one-time payment was one step among several in continuing, rather than terminating, the pension plans. To the extent that the actions of X and others before and after [*6] the one-time payment are determined to negate a finding of termination, PBGC reserves the right to include the one-time payment as part of a pattern inconsistent with X's claim to termination. Moreover, in the event that there had been a pre-existing understanding, written or unwritten, for X to emerge from its current reorganization proceeding with a program designed to provide retirees with pension relief comparable to what they would be receiving under the terminated plans, PBGC reserves the right to consider each step in any such plan, including the one-time payment, as inconsistent with the concept of termination.

Letter of Edward Mackiewicz, General Counsel, PBGC, to * * * (February 27, 1986).

Following protracted negotiations, the PBGC, X and the * * * Union * * * entered into an Agreement, on August 19, 1986, regarding the termination of the hourly pension plans. On the same date, the PBGC and X entered into a second Agreement regarding the termination of the plans of X's salaried employees. These Termination Agreements provided that X's plans "[have] been terminated not later than November 8, 1985, in accordance with the requirements of ERISA." They further provided [*7] that the VEBAs would be terminated no later than the earlier of two years from the date of the Agreements or the approval of a bankruptcy disclosure statement. Finally, they provided that X would submit any additional plans to the PBGC for its review. The PBGC specifically reserved its right to withhold agreement if the proposed follow-on programs either sought to effect a continuation or restoration of the plans terminated under the Agreements, constituted an ongoing employees' benefit program providing benefits substantially equivalent to those provided under the terminated plans, or otherwise failed to comply with applicable law.

In August and September 1986, X submitted to the PBGC for its review a * * * (Union Supplemental Plan) and a * * * (Salaried Supplemental Plan).

Under the proposed Union Supplemental Plan, * * * makes * * * contributions each payroll period based upon the number of hours worked by union employees. n3 A portion of that contribution is then credited to the individual account of each participant in Basic Benefit Status or each beneficiary in Ancillary Benefit Status (i.e., presently eligible to receive benefits).

n3 The contribution derived in this fashion is first reduced by the amount of any contributions previously made to the VEBAs or to a separate individual account maintained for current employees. See Article 5.1. [*8]

The amount credited to each account is the "Partial Benefit Difference", which is defined in Article 5.3(a) as 95% of the difference between the Prior Pension Plan Benefit (defined in Article 1.19) and the Title IV Benefit guaranteed to be paid by the PBGC under ERISA (as defined in Article 1.25). The Salaried Supplemental Plan uses a formula which is similar in overall effect. n4 Thus, participants or beneficiaries who are or will be receiving guaranteed benefits from

the plan termination insurance system would also receive substantial additional benefits from the proposed plans. The effect would seem to be -- by apparent design -- to situate certain (but not all) participants as though the plans had not terminated. n5

n4 Under the Salaried Supplemental Plan, the individual account is credited with 90% of the difference between the Prior Pension Plan Benefit (see Article 1.22) and the Title IV Benefit (see Article 1.30), plus certain additional benefits, up to a total \$1,000 per month. See Article 5.3(a).

n5 The PBGC does not regard as material the relatively small differences between the benefits projected under these proposed Supplemental Plans and those that would have been provided under the original plans. [*9]

Accordingly, we find that the VEBAs, and the proposed supplemental and follow-on plans, when taken together, reflect an overall pension scheme which is designed to continue the plans after the date of termination established under Title IV of ERISA. This continuation in fact is illustrated by the interrelationship of the pre-termination benefit structure of the purportedly terminated plans and the benefit formulas of the post-termination plans. For example, the VEBAs, and supplemental and follow-on plans, taken together, provide for:

1) continuation of service for purposes of vesting in a participant's accrued benefit and entitlement to a fully subsidized early retirement benefit after the date of termination. Under the proposed Supplemental Plans, post-termination service will be taken into account for purposes of determining benefits. The Union Supplemental Plan provides, "In determining the amount of the benefit, a Participant's Service . . . shall be taken into account in determining whether the Participant or his Beneficiary would have been eligible for a benefit (e.g., a disability benefit or a deferred vested benefit) under the terms of a Prior Pension Plan." Article [*10] 1.19; see also the definition of "Service" in Article 1.24. The Salaried Supplemental Plan has similar provisions. See Articles 1.22 and 1.29. Moreover, we understand that this concept would also apply to fully subsidized retirement, such as "30-and-out."

2) recognition of post-termination events (such as disability) for purposes of determining entitlements under pre-termination benefit formulas. Under each of the Supplemental Plans, a participant may receive benefits based upon events (such as disability or retirement) occurring after the termination date. Thus, Basic Benefit Status is defined to include the participant who "would have become entitled to an immediate Prior Pension Plan Benefit on or before the Valuation Date because of retirement or disability had the Prior Pension Plan not been terminated." See Union Supplemental Plan Article 1.4(c); Salaried Supplemental Plan Article 1.4(c).

3) restoration or reimbursement for benefits which are not guaranteed under Title IV of ERISA. Under each of the Supplemental Plans, a participant may receive benefits that fully restore Congressionally-mandated limitations on * * * insured termination benefits. [*11]

Thus, the adoption of the supplemental and follow-on plans would result in a de facto plan continuation. If X adopted such plans and thereby effected a continuation in fact, then the PBGC would be constrained to exercise its authority under Section 4047 of ERISA to restore all or part of the assets and liabilities existing under the previously terminated X plans.

As we have previously agreed, the X plans have terminated, and on a date not later than November 8, 1985. We stand by that agreement. Consequently, if X were to adopt the proposed plans, we would only restore assets and liabilities attributable to participants covered under the adopted plans. With respect to participants who are not covered by such plans, there would be no restoration.

We would encourage you to dissuade X from its intention to adopt these proposed plans, and thus attempt, in effect, to continue the terminated plans, while having the PBGC pay the guaranteed portion of the terminated plans' benefits. Of course, should X or the Union * * * choose to accept restoration and the * * * concomitant obligation to provide all of the affected * * * participants' benefits, we would work with you to help you meet [*12] your pension promises.

In sum, we disapprove the proposed follow-on plans because they would effect an impermissible continuation of terminated plans for which guaranteed benefits are being paid. We urge X not to adopt these plans, but if it should we would restore assets and liabilities attributable to covered participants. We continue to stand ready to work with you to reach mutually acceptable * * * solutions to the difficult issues between us. In this regard we await your proposals on bankruptcy issues, and your performance under the agreements entered into last spring.

Kathleen P. Utgoff
Executive Director

Royal S. Dellinger
Deputy Executive Director and Chief Negotiator