

Pension Benefit Guaranty Corporation

88-10

December 12, 1988

REFERENCE:

[\*1] 4022 Benefits Guaranteed

OPINION:

We write in response to your letters requesting the opinion of the Pension Benefit Guaranty Corporation (the "PBGC") regarding the impact of certain National Labor Relations Board (the "Board") "make-whole" orders on the PBGC's guarantee of the pension benefits of affected employees. The Board determined that those employees were illegally discharged, and ordered them reinstated with back pay and no loss of seniority or other rights and privileges previously enjoyed. In each case, the order of reinstatement was issued after the date of termination of the pension plan in which the employee was a participant. In determining eligibility for PBGC-guaranteed benefits, the PBGC will, subject to the terms of the plan, recognize pension credit for each such employee for the period after the illegal discharge and ending with the date of plan termination.

As you know, the PBGC guarantees certain nonforfeitable pension benefits under plans which terminate when covered by the pension plan termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The PBGC is statutory trustee of the two pension [\*2] plans at issue in this case, the Pension Plan of \* \* \* and the \* \* \* Pension Plan \* \* \*. The \* \* \* Plan terminated on November 8, 1985; the \* \* \* Plan terminated on August 31, 1981. Both plans provide a deferred vested benefit for participants who terminate employment with 10 years of continuous service.

Pursuant to Section 4022 of ERISA, 29 U.S.C. § 1322, the PBGC guarantees, subject to certain limitations, the benefits of participants who met, as of the pension plan termination date, their plan's requirements for entitlement to the deferred vested benefit.

You have stated that the Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") hired \* \* \* on April 21, 1971, and discharged him on February 25, 1981. The Board found that Mr. \* \* \* was illegally discharged for having engaged in "protected concerted activity," and ordered his reinstatement to his former job, or if it no longer existed, a substantially similar job, with back pay and no loss of seniority or other rights and privileges previously enjoyed. The United States Court of Appeals for the Sixth Circuit affirmed the Board's order. Wheeling-Pittsburgh Steel Corporation v. NLRB, Case Nos. 86-5107 and 86-5157 [\*3] (6th Cir. June 18, 1987). Wheeling-Pittsburgh reinstated Mr. \* \* \* on July 20, 1987.

The Board issued a similar order with respect to Messrs. \* \* \*, \* \* \*, and \* \* \*, former employees of the Lectromelt Casting Division of Akron Standard Division, Eagle-Picher Industries, Inc. ("Lectromelt"), and the United States Court of Appeals for the Sixth Circuit likewise affirmed that order. Lectromelt Casting and Machinery Company v. NLRB, Case Nos. 86-5369, 86-5425, 86-5426, and 86-5507 (6th Cir. Oct. 8, 1987). Messrs. \* \* \* and \* \* \* were discharged in June 1979; we understand that Lectromelt ceased all operations in June 1981 and that there is currently no ongoing entity obligated to comply with the reinstatement aspect of the Board's order.

As we understand the facts, Mr. \* \* \* was a participant in the \* \* \* Plan. You have indicated that Messrs. \* \* \* and \* \* \* may have been participants in the \* \* \* Plan. Subject to our confirmation of the pertinent facts, in determining whether the affected employees are entitled to PBGC-guaranteed benefits, the PBGC will recognize pension credit for both accrual and vesting purposes for each such employee for the period from the illegal [\*4] discharge through the date of plan termination. Thus, in determining Mr. \* \* \*'s entitlement to a PBGC-guaranteed benefit, the PBGC will recognize credited service, subject to the terms of the \* \* \* Plan, from the date Mr. \* \* \* commenced employment with Wheeling-Pittsburgh through November 8, 1985. The PBGC will recognize credited service, subject to the terms of the \* \* \* Plan, for Messrs. \* \* \* and \* \* \* from the respective dates each commenced employment through August 31, 1981. (It appears that Mr. \* \* \* will have the required 10 years of credited service and thus will be eligible for a PBGC-guaranteed benefit; however, if, as you advised Mark Blank of my staff, each of the discharged Lectromelt employees was hired in 1973 or 1974, the additional credited service would not be sufficient for those employees to be vested.)

We request that the Board continue to notify the PBGC when it appears that a make-whole order may seek to affect an employee's rights under a PBGC-trusted pension plan. Appropriate financial arrangements between the discriminating employer and the PBGC may then be completed and included among the terms of the make-whole order.

The PBGC's Insurance Operations [\*5] Department will issue an initial determination letter to each of the affected employees regarding his entitlement to a PBGC-guaranteed benefit. The PBGC's initial determinations will be subject to review by the PBGC Appeals Board pursuant to 29 C.F.R. Part 2606 (1987).

I hope I have been of assistance. If you have any questions, please call the staff attorney assigned to this matter, Mark Blank, at (202) 778-8824.

Gary M. Ford  
General Counsel