Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

December 16, 2021

Appellant
Address
Address
Address

Re: Appeal 2020-*xxxx*; Case No. 224906; Mexicana Pension Plan for Non-Union Employees (the "Plan")

Dear *Appellant*:

The Appeals Board is responding to your appeal of PBGC's July 6, 2020 benefit determination regarding your PBGC-payable benefit under the Plan. PBGC determined that you are entitled to a monthly benefit of $359.94 paid as a Straight Life Annuity ("SLA") on your Normal Retirement Date ("NRD"). The Benefit Determination Statement ("BDS") enclosed with PBGC's determination stated that federal pension law prohibits PBGC from guaranteeing any benefits earned after August 9, 2010, the date on which the Plan's sponsor filed for bankruptcy.[1] The BDS further explained that your participation, salary, benefit service, and vesting service earned after the filing date are not included in the calculation of your guaranteed benefit.

In your initial July 13, 2020 correspondence with the Appeals Board, you asserted that the correct monthly benefit payable at your NRD is $381.45. You further asserted that the correct form of benefit payable is a joint and survivor benefit, not an SLA, because you are married.

In subsequent correspondence dated September 8, 2020, you pointed out that you continued to be employed by Compañía Mexicana de Aviación S.A. de C.V. ("Mexicana Airlines"), the Plan's sponsor, after August 9, 2010. You also asserted that a foreign representative of Mexicana Airlines filed a petition for recognition of a foreign main proceeding under Chapter 15 of the Bankruptcy Code, not a petition seeking liquidation under Chapter 7 or reorganization under Chapter 11 of the Bankruptcy Code. Therefore, you believe that PBGC erred in its July 6, 2020 determination because your monthly benefit should have been calculated to include your total period of employment.

[1] The BDS incorrectly stated that "[y]our plan sponsor filed for bankruptcy on 08/09/2010." On August 2, 2010 (not August 9, 2010) Compañía Mexicana de Aviación S.A. de C.V. filed a petition in the U.S. Bankruptcy Court for the Southern District of New York for recognition of a foreign main proceeding under Chapter 15 of the U.S. Bankruptcy Code.

Summary of Decision

The Appeals Board finds that your PBGC-payable benefit under the Plan should not have been calculated based on the August 2010 date on which Mexicana Airlines filed the petition for recognition of a foreign main proceeding under Chapter 15 of the Bankruptcy Code. Accordingly, the Board is granting your appeal. PBGC's Office of Benefits Administration ("OBA"), the office responsible for calculating and paying benefits, will recalculate the amount of your PBGC-payable benefit. OBA will issue a revised benefit determination regarding the amount of your PBGC-payable benefit; you will have a new 45-day right of appeal following issuance of the revised benefit determination.

Background

PBGC is the U.S. government agency that insures pensions in accordance with Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). If a plan sponsor is unable to support its tax-qualified, defined benefit pension plan, PBGC becomes the plan's statutory trustee and pays pension benefits according to the plan's provisions, subject to legal limits set by Congress under Title IV of ERISA.[2]

On August 2, 2010, Mexicana Airlines filed a voluntary petition in Mexico to reorganize its operations under Mexico's *Ley de Concursos Mercantiles* (the "Concurso Proceeding").[3] On that same date, Mexicana Airlines' foreign representative (the "Foreign Representative") filed a petition for recognition of a foreign main proceeding and request for relief under Chapter 15 of the Bankruptcy Code (*Ancillary and Other Cross-Border Cases)*, with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").[4] Mexicana Airlines subsequently suspended its flight operations on August 28, 2010.[5]

On November 8, 2010, the Bankruptcy Court issued an order recognizing the Concurso Proceeding as a foreign main proceeding under Chapter 15 of the Bankruptcy Code.[6] During the Concurso Proceeding, Mexicana Airlines was unable to find a suitable buyer for its operations,

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[2] Some of the claims made in your appeal correspondence relate to information contained in a November 2016 "Fact Sheet" concerning employer bankruptcy, issued by the U.S. Department of Labor's Employee Benefits Security Administration ("EBSA"). Later in this decision, we discuss EBSA's role in administering Title I of ERISA vis-à-vis PBGC's role in administering Title IV of ERISA.

[3] *See* Enclosure 1. We note tangentially that Recital C of this document erroneously stated that Mexicana Airlines established the Plan on July 1, 1973. The Plan was established on June 1, 1973.

[4] Mexicana Airlines' Board of Directors appointed the Foreign Representative and authorized her to seek relief in the Bankruptcy Court under Chapter 15 of the Bankruptcy Code. In the petition for recognition, the Foreign Representative stated that "Mexicana seeks the protections of Chapter 15 to ensure consistent and smooth operations without disruption while the Concurso Proceeding moves forward." The petition further stated that "this Chapter 15 proceeding will complement Mexicana's primary proceedings in Mexico to ensure the effective and economic administration of Mexicana's restructuring efforts." Verified Petition for Recognition of Foreign Main Proceeding and Request for Chapter 15 Relief at 7, 27, Case No. 10-14182 (Bankr. S.D.N.Y.).

[5] *See* Enclosure 1.

[6] Order Pursuant to 11 United States Code ("U.S.C"). §§ 1504, 1515, 1517 and 1520 Recognizing Foreign Representative and Foreign Main Proceeding, Case No. 10-14182 (Bankr. S.D.N.Y.).

and ceased operations effective August 28, 2012. On April 3, 2014, a Mexican court declared Mexicana Airlines bankrupt and ordered the liquidation of its assets to repay creditors.[7]

Mexicana Airlines established and sponsored the Plan from its June 1, 1973 effective date until the Plan was terminated. In a September 30, 2014 Notice of Determination, PBGC determined that the Plan had not met the minimum funding standard required under section 412 of the Internal Revenue Code, and would be unable to pay benefits when due. PBGC further determined that the Plan should terminate under ERISA section 4042(c), 29 U.S.C. section 1342(c).[8] By agreement dated November 14, 2014 between PBGC and Mexicana Airlines, the Plan was terminated; the date of Plan termination was established as April 3, 2014; and PBGC was appointed trustee of the Plan.[9]

When PBGC becomes statutory trustee of a terminated defined benefit plan, it collects participant information and copies of the plan's governing documents from the plan administrator, and audits that data. PBGC relies on the information it receives from a plan administrator unless its audit shows that the information is incorrect or incomplete, or a participant supplies PBGC with documents showing that the information is incorrect or incomplete. PBGC follows the terms of the plan, the provisions of ERISA, and PBGC's regulations to determine the benefits it can pay to plan participants.

PBGC's records contain the following information about you:

- You were born on *date of birth*;
- You began employment as a maintenance representative with Mexicana Airlines on *date of hire*;
- You became a Plan participant on *date of participation*;
- As previously noted, Mexicana Airlines suspended flight operations on August 28, 2010;
- As a result of the suspension, effective September 1, 2010, Mexicana Airlines placed you on an unpaid furlough "temporarily until the flight operation gets restored and the company has work for you";
- You never returned to active employment with Mexicana Airlines after September 1, 2010; and
- PBGC notified you on February 13, 2015 that it was "now responsible for your pension plan."

[7] *See* Enclosure 1.

[8] *See* Enclosure 2.

[9] *See* Enclosure 1.

PBGC's Benefit Determination, Your Appeal, and Related Correspondence

One of the enclosures to PBGC's July 6, 2020 benefit determination was the BDS, dated June 3, 2020. Page 2 of the BDS stated the following, in relevant part:

> Your plan sponsor filed for bankruptcy on 08/09/2010. According to federal pension law, PBGC does not guarantee any benefits [earned] after 08/09/2010. Therefore, your participation, salary, benefit service, and vesting service earned after 08/09/2010 are not included in the calculation of your guaranteed benefit. However, service from 08/09/2010 to the earlier of the date you terminated employment and the date of plan termination is included to determine your earliest retirement date.

On July 13, 2020, you appealed PBGC's benefit determination via email. Your appeal stated:

> I am writing to you in response to the Benefit Determination Statement Letter dated 06/03/20. The Monthly Benefit at NRD indicates $359.94. This is incorrect. The correct Monthly Benefit at NRD must be $381.45.
>
> In the mentioned letter, it also states that there are no survivor benefits. This is incorrect. I am married, never divorced, therefore there is a Joint and Survivor benefit.
>
> Please see the attached document from Mexicana Airlines/New York Life Administrator, in which evident, the correct monthly benefit at NRD and Joint and Survivor benefit are stated.
>
> Please correct both items and please send a new Benefit Determination Statement letter showing the new corrections.

Upon receipt of your appeal, the Appeals Board informed you that, due to the nature of the concerns you had raised, your letter had been referred to OBA. The Board further informed you that OBA would respond to you in writing with either an explanation letter or a corrected benefit determination, and that, if you were not satisfied with OBA's response, you would have an additional 45 days from the response date to request Board review of your case.

In its August 24, 2020 response, OBA advised you that it had found the July 6, 2020 determination to be correct. OBA explained its finding as follows:

> Your plan sponsor filed for bankruptcy on August 9, 2010. According to federal pension law, PBGC does not guarantee any benefits earned after that date. For this reason, the number of years of credited service used in the calculations of your PBGC benefit was 10.25 as of August 9, 2010, which resulted in a smaller benefit amount than what was specified in your letter.
>
> . . .

> If you still do not agree with PBGC's determination as further explained in this letter, you have the right to a review by the Appeals Board. . . .

On September 8, 2020, you faxed your appeal to the Appeals Board.[10] In your correspondence, you stated in part:

> Mexicana Airlines was a foreign carrier operating domestically in the United States. It was part of Mexicana Group which comprised of Mexicana, Mexicana Click, Mexicana Link, and Mexicana MRO (Maintenance Repair Organization, which I was part of in 2007). Its main station and business address were in Mexico City. During those economic times in 2010, the Swine Flu, worldwide recession, and high energy prices, were hurting the travel industry. Mexicana Group was no exemption.
>
> Mexicana Airline's Foreign Representative . . . commenced a case before the US Courts (Southern District of New York) under **Chapter 15**, on August 9, 2010. This is **not** a **Chapter 7** or a **Chapter 11** that was being filed in the United States. Chapter 15 is a **petition**, for recognition of the "Concurso" Proceedings as a foreign main proceeding, which was to be conducted in Mexico. If the Mexican Court "Concurso," was recognized by the US Court, as a foreign main proceeding, then an automatic stay against creditors action against Mexicana Group and its property located in United States, would automatically follow. Pending entry of the order granting or denying recognition, foreign representatives requested temporary or provisional relief usually designed to maintain status quo. The decision took past the month of September to make that determination. In United States, in the month of August 2010, with 147 employees in the United States, **were still employed, with flight operation being conducted**. A hearing on the preliminary injunction until a determination on recognition was made, was scheduled for August 16, 2010 at 10:00am in New York.
>
> As mention before, All 147 or 146 employees, in the US, were working in August of 2010, there were flight operations during this time we were not declared by the US Court officially as bankrupt by chapter 7 or chapter 11. In fact, **Mexicana MRO, continued** to operate **after Chapter 15!**
>
> In the attached documents, as evident, a letter from the Director Human Resources of Mexicana Airlines in United States, dated August 31, 2010, indicated that suspension of flight operations . . . began on August 28, 2010, and that effective ***September 1, 2010, I was being furloughed from work temporarily***, until flight operations got restored and company had work for me. It also indicated, that my **"employment relationship continues the same in relation to other employment benefits** such as your health insurance coverage." I have included my salary check stubs during this time period to prove of my earned work all through August 2010.

[10] You also sent a copy of your appeal to the Board that same day via priority mail.

After been furloughed on Sept 1, 2010, there were many rulings between the Mexican Court and the US Courts. US Courts recognized later that the main proceedings in the Mexicana Court were to be honored (Chapter 15 in effect). Mexican Courts accepted the "Concurso" pleading, which gave Mexicana Airlines protection through restructure. Only then did Mexicana Airlines enter, in Mexico, Bankruptcy in Mexico. The restructuring would be the equivalent to a Chapter 11 in the US, but has never filed a chapter 7 or 11 in the US.

Many months and years went by, with two corporation at different times that were willing to invest in Mexicana Group, but the Mexican court ruled that they did not have capital to make the Company continue service.

Around the year 2015, Mexican Court moved to Liquidate, which would be the equivalent a chapter 7 in the US. With Chapter 15 being effective in the United States, the US Court conceded with the ruling in Mexican Court, and helped Liquidate US assets.

In reference to the Department of Labor's Employee Benefits Security Administration, administers the Employee Retirement Income Security Act of 1974 . . . which governs retirement plans like pensions. Chapter 11 (reorganization) usually means that company continues business under the courts protection while attempting to reorganize its financial affairs. **A Chapter 11 Bankruptcy did not affect my retirement years of Service, especially when I was Furloughed in 2010.** When Mexicana Airlines, liquidated in 2015, in Mexico, the US Mexicana Pension was recovered in whole and transferred to PBGC. You have the exact date . . . it was transferred. I can safely say it was not in September of 2010.

. . .

As indicated in my furlough letter sent to me, all benefits were still being active from September 1, 2010. Furthermore, the Benefit Statement letter with both Mexicana Airlines and New York Life dated May 31, 2012 shows that the Pension had not been terminated by Mexicana Airlines and New York Life. . . .

. . .

- EBSA administered the (ERISA) of 1974, which in their website guidance says that . . . **["w]hen your employer files for bankruptcy you should contact the administrator of each plan to request an explanation of the status of your plan or benefits."**
- **With the above statement, *I do not refer to PBGC for the status of benefits, but rather the plan Administrator*.**
- As evident with the attached documents, reference Mexicana Airlines/New York Life Statement Benefits, dated May 31, 2012, key statement **"*Participant.* Your monthly accrued benefit as of 05/31/2012 is $381.45. You are 100%**

> **vested in this benefit"** the date was approximately, 2 years after the petition of 2010! **My plan administrator is indicating that I am still accruing!**

(Emphasis in original.)

Discussion

For purposes of determining PBGC-guaranteed pension benefits under a plan, section 4022(g) of ERISA treats a plan's termination date as the date on which a plan's contributing sponsor petitions for liquidation or reorganization under the Bankruptcy Code. The primary issue raised in your appeal is whether—under ERISA section 4022(g)—a petition for recognition of a foreign proceeding under Chapter 15 of the Bankruptcy Code constitutes a "petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision."[11]

As discussed below, the Appeals Board finds that a Chapter 15 petition for recognition of a foreign proceeding is not a "petition seeking liquidation or reorganization." Therefore, we conclude that ERISA section 4022(g) does not apply to a plan whose contributing sponsor (1) files a Chapter 15 petition for recognition of a foreign proceeding, and (2) does not file petitions under Chapter 7 or Chapter 11.

The Board has identified additional issues raised in your appeal, including the date on which you ceased to accrue benefits under the Plan, the number of benefit forms available to you at your retirement date, and the relationship between PBGC and other federal agencies with jurisdiction over defined benefit pension plans. We respond to these additional issues later in this decision.

ERISA and the Bankruptcy Code

PBGC guarantees the payment of nonforfeitable benefits, subject to statutory limitations, in a terminated pension plan covered under Title IV of ERISA.[12] A benefit is nonforfeitable when a participant has satisfied all of the necessary plan conditions establishing his right to receive it.[13] In order to be eligible to receive a PBGC-guaranteed benefit, a participant must meet all of those conditions by the plan's termination date.[14] For a plan that is terminated under section 4042 of ERISA, such as the Plan, the plan's termination date is the date established by PBGC and agreed to by the plan administrator.[15]

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[11] ERISA § 4022 covers benefits guaranteed under terminated single-employer defined benefit pension plans such as the Plan.

[12] *See* ERISA § 4022(a).

[13] *See* PBGC's regulations at 29 Code of Federal Regulations ("C.F.R.") § 4022.3(a)(1).

[14] *See* ERISA § 4001(a)(8) and 4022. *See also* 29 C.F.R. §§ 4022.3 and 4022.4(a)(3).

[15] *See* ERISA § 4048(a)(3), as well as Enclosure 1. If there is no agreement between the parties, the date is established by a court; *see also* ERISA § 4048(a)(4). As previously noted, April 3, 2014 was established, by agreement, as the Plan's termination date.

In 2006, Congress passed the Pension Protection Act of 2006 ("PPA 2006").[16] One of the goals of PPA 2006 was to improve PBGC's financial condition. Section 404 of PPA 2006 sought to further this goal by addressing a situation PBGC was repeatedly facing, in which a plan's funded status would significantly deteriorate while its sponsor was in bankruptcy.[17] More specifically, section 404 of PPA 2006 amended ERISA to add a new section 4022(g), covering certain bankruptcy proceedings initiated by plan sponsors on and after September 16, 2006. The added section, titled *Bankruptcy Filing Substituted for Termination Date*, provides the following:[18]

> If a contributing sponsor of a plan has filed or has had filed against such person a petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision, and the case has not been dismissed as of the termination date of the plan, then this section shall be applied by treating the date such petition was filed as the termination date of the plan.

Thus, where section 4022(g) of ERISA applies, PBGC guarantees the amount of a participant's benefit under a pension plan as of the date of the contributing sponsor's petition for liquidation or reorganization, rather than as of the plan's termination date.

A debtor may commence a case under Title 11—the Bankruptcy Code—by filing a petition in a bankruptcy court.[19] The petition is filed under the relevant chapter of the Bankruptcy Code.[20] A petition for liquidation is filed under Chapter 7; a petition for reorganization is filed under Chapter 11.

A debtor in a foreign proceeding may file a petition for recognition of that proceeding in a bankruptcy court under Chapter 15 of the Bankruptcy Code.[21] Chapter 15 was added to the Bankruptcy Code "to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency."[22] The objectives of Chapter 15 include cooperation between courts and other relevant authorities in the United States, and courts and other relevant authorities in foreign countries.[23]

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[16] Pub. L. 109-280 (August 17, 2006).

[17] The preamble to PBGC's final rule amending 29 C.F.R. parts 4001, 4022, and 4044 addresses this concern. *See* 76 Fed. Reg. 114, 34590 (June 14, 2011).

[18] *See also* 29 C.F.R. § 4001.2 for the definitions of *Bankruptcy filing date* and *PPA 2006 bankruptcy termination*, as well as 29 C.F.R. § 4022.3 (*Guaranteed benefits*).

[19] 11 U.S.C. § 301(a).

[20] *Id*.

[21] 11 U.S.C. § 1504.

[22] 11 U.S.C. § 1501(a).

[23] *Id*.

Chapter 15 of the Bankruptcy Code applies where, among other things, "assistance is sought by a foreign representative in connection with a foreign proceeding."[24] A debtor may choose to authorize its foreign representative to commence a case ancillary to its foreign proceeding by filing a petition seeking recognition of a foreign proceeding under Chapter 15.[25] Alternatively, the debtor may file a concurrent case under Chapter 7 or Chapter 11, in the same manner as any domestic debtor.

The Bankruptcy Code defines "recognition" as "the entry of an order granting recognition of a foreign main proceeding or foreign nonmain proceeding under this chapter [15]."[26] A "foreign main proceeding" is defined as a "foreign proceeding pending in the country where the debtor has the center of its main interests."[27] In the Mexicana Airlines case, its Foreign Representative asked the Bankruptcy Court in the Southern District of New York to recognize the Concurso Proceeding as a foreign main proceeding.

Recognition of a foreign proceeding affords a foreign debtor many protections under the Bankruptcy Code with respect to its property in the United States. Those protections include the automatic stay (under section 362 of the Bankruptcy Code) and the right of the foreign representative to operate a business and sell or lease the debtor's property (under sections 361, 363, and 552 of the Bankruptcy Code).[28] In addition, the foreign representative may, if "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interest of the creditors," apply for "any appropriate relief."[29]

Thus, an ancillary proceeding under Chapter 15 allows a foreign representative in a foreign proceeding to rely on many protections granted to a debtor under the Bankruptcy Code without the need for a separate filing under Chapter 7 or Chapter 11. Nevertheless, a debtor whose petition for recognition is granted may, if it wishes, subsequently commence a case under section 301 of the Bankruptcy Code by filing petitions under Chapters 7 or 11.[30]

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[24] A "'foreign representative' means a person or body . . . authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24). A "foreign proceeding" is a "proceeding in a foreign country . . . relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23).

[25] 11 U.S.C. §§ 1504, 1509, 1515. A debtor is not required to have a concurrent proceeding in the U.S. in order for the foreign proceeding to be granted recognition under Chapter 15. *See* 11 U.S.C. §§ 1511, 1517. The foreign representative may advise the court in which the petition for recognition is filed of its intent to commence a case under Bankruptcy Code § 301 (which applies to voluntary cases) before the case is actually commenced. 11 U.S.C. § 1511(b).

[26] 11 U.S.C. § 1502(7).

[27] 11 U.S.C. § 1502(4).

[28] 11 U.S.C. § 1520.

[29] 11 U.S.C. § 1521.

[30] 11 U.S.C. § 1511.

Statutory Interpretation

As previously noted, ERISA section 4022(g) refers to a contributing sponsor's "petition seeking liquidation or reorganization in a case under title 11, United States Code, or under any similar Federal law or law of a State or political subdivision." The language of section 4022(g) does not address a contributing sponsor's petition for recognition under Chapter 15 of the Bankruptcy Code. Nor does it refer to a contributing sponsor's petition seeking liquidation or reorganization in a foreign country. For those reasons, the Appeals Board reviewed section 4022(g) to determine whether the statute applies to a petition for recognition of a foreign proceeding under Chapter 15.

When Congress speaks directly to an issue via statute, a court must follow the language of that statute.[31] If a court finds that the language of a statute is ambiguous, it generally defers to an agency's reasonable interpretation of that language. Under the U.S. Supreme Court's "*Chevron* test":[32]

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

In the first step of the *Chevron* test, a court must use "traditional tools of statutory construction" to determine whether Congress has spoken directly to the issue in the case.[33] In the case at hand, it is not necessary to go beyond the *Chevron* test's first step. Congress directly addressed petitions for reorganization and liquidation in the text of section 4022(g) but did not refer to specific chapters of the Bankruptcy Code. It is clear, however, that section 4022(g) includes a petition for liquidation under Chapter 7 and a petition for reorganization under Chapter 11. Additionally, the application of traditional tools of statutory construction makes it equally clear that a petition for recognition of a foreign proceeding under Chapter 15 is not a petition "seeking liquidation or reorganization," and is therefore not included in the text of section 4022(g) of ERISA.

A basic rule of statutory construction is that we assume that Congress knows the existing law when it enacts a new statute.[34] In this case, we assume Congress knew the distinction made in the Bankruptcy Code between a petition for liquidation or reorganization and a petition for

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[31] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[32] *Id.* at 842-43.

[33] *Id*. at 843 n.9.

[34] *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation").

recognition. As explained earlier in this decision, Chapter 15 applies in certain cases, including when a foreign representative seeks assistance in the United States in connection with a foreign proceeding. A distinction is made between a petition seeking liquidation or reorganization under domestic (U.S.) law and a petition seeking recognition of a foreign proceeding under Chapter 15. Recognition of a foreign proceeding may be sought when a debtor seeks assistance in the United States in connection with a foreign proceeding.[35] But recognition of a foreign proceeding is not, in itself, a proceeding for liquidation or reorganization under the Bankruptcy Code.

Other provisions of Chapter 15 make clear the distinction between petitions under Chapter 15 and petitions under Chapters 7 and 11. For example, section 1511 of the Bankruptcy Code states, "Upon recognition, a foreign representative may commence . . . a voluntary case [in the United States] under section 301." The language in section 1511 itself differentiates a petition seeking recognition of a foreign proceeding from a petition seeking liquidation or reorganization, in that the foreign representative is authorized to file a separate case under Chapter 7 or 11 after a petition for recognition is granted.

Similarly, recognition of a foreign proceeding under Chapter 15 may be sought by a debtor that already has a case pending under Chapter 7 or 11 at the same time as the foreign proceeding.[36] If a petition for recognition under Chapter 15 were itself a petition to commence a case under Chapters 7 or 11, it would be unnecessary for Congress to permit a foreign debtor already in a Chapter 7 or 11 proceeding to initiate a separate proceeding under Chapter 15.

Likewise, the Bankruptcy Code allows a debtor whose petition for recognition is granted to subsequently file a petition under Chapter 7 or 11.[37] This would not be necessary if a petition for recognition under Chapter 15 were itself a petition for liquidation or reorganization.

As discussed, no language in ERISA or the Bankruptcy Code requires a contributing sponsor who files a petition seeking recognition of a foreign proceeding under Chapter 15 to file a petition seeking liquidation or reorganization under Chapters 7 or 11 of the Bankruptcy Code. Therefore, the Appeals Board finds that ERISA section 4022(g) does not apply to a plan whose contributing sponsor files a Chapter 15 petition for recognition of a foreign proceeding, and does not file a petition seeking liquidation under Chapter 7 or a petition seeking reorganization under Chapter 11.[38]

As a result, the Appeals Board further finds that PBGC should not have established August 9, 2010 as Mexicana Airlines' "Bankruptcy Petition Date" in order to calculate your PBGC-payable benefit. The Board's findings will be reflected in the revised benefit determination you will receive from OBA.

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[35] 11 U.S.C. § 1501(b)(3).

[36] 11 U.S.C. § 1501(b)(3) ("This chapter applies where a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently").

[37] 11 U.S.C. § 1511.

[38] *See Anderson v. Carter*, 802 F.3d 4, 9 (D.C. Cir. 2015 ("Courts assume that Congress means what it says in a statute.")

Other Issues Raised in Your Appeal

You Are No Longer Accruing Service Under the Plan

The August 31, 2010 letter you received from Mexicana Airlines' Director of Human Resources states the following, in part:

> Due to the suspension of flight operations that began on August 28, 2010, this is to inform you that effective September 1, 2010 you are being furloughed from work temporarily until the flight operation gets restored and the company has work for you. This means that you will be on unpaid leave until the company recalls you to your current position. This temporary furlough is in effect until you receive confirmation from the company to return to work. Your employment relationship continues the same in relation to other employment benefits such as your health insurance coverage.
>
> Please note that this is not a termination of employment; however, because your wages will be affected you may be eligible to collect unemployment. Please check with your local unemployment office.
>
> Mexicana will keep you updated regarding the status of this suspension as it greatly depends on the development of the current negotiations between the Company and union representatives in Mexico.

(Some punctuation added.)

There is no question that, as stated in the August 31, 2010 letter, you were furloughed effective September 1, 2010 and placed on unpaid leave until such time as you would be notified to return to work. Pursuant to the letter, your employment with Mexicana Airlines was not terminated as of August 31, 2010, and at least certain of your employee benefits continued to be provided. The letter, however, does not specifically address whether you would continue to accrue service under the Plan while on unpaid leave.

You subsequently received a statement from New York Life Retirement Plan Services ("New York Life") regarding your benefit under the Plan, which stated that your "monthly accrued benefit as of 05/31/2012" is $381.45 and that "you are 100% vested in this benefit." This statement was generated after Mexicana Airlines had suspended flight operations on August 28, 2010, but before the company had been declared bankrupt by a Mexican court on April 3, 2014. Thus, as of the statement date, Mexicana Airlines was still in business, you were still a furloughed Mexicana Airlines employee on unpaid leave, and the Plan had not yet terminated. That is why the statement informed you that, as of May 31, 2012, you "currently" had accrued 10.58 years of "vesting credit."

A "Year of Vesting Service" is defined in Plan Section 2.1 as "the aggregate of all time period(s) commencing on [an Employee's] Employment Date . . . and ending on the date a 'period

of severance' . . . commences." Under Plan Section 2.1, vesting service is also granted "for any period of severance of less than twelve . . . consecutive months."[39]

The Appeals Board notes, however, that the vesting service total shown on your New York Life statement was not based on the approximately *number*-year timespan between your *date of hire* "Employment Date" and the statement's May 31, 2012 issuance date. The Board has been unable to establish the basis of New York Life's 10½-year calculation.[40]

We reiterate that the Plan terminated effective April 3, 2014, with insufficient assets to guarantee payment of all benefits to its participants, and that PBGC became its trustee on November 14, 2014.[41] None of the Plan's participants—regardless of their employment status as of April 3, 2014—could accrue any service after the Plan's termination date.[42]

PBGC Will Offer You a Variety of Benefit Options
When You Are Ready to Retire

Under the Plan, vesting service is used to determine your eligibility for certain benefits, such as early retirement. Vesting service is *not* used to compute the amount of your benefit.[43] The Appeals Board has taken note of your efforts to establish 10.58 years as the "correct" amount of your vesting service, but would like to point out that you became 100% vested in your Plan benefit after accruing 5 years of vesting service, and became eligible to retire at or after age 55 after accruing 10 years of vesting service.[44]

In your original July 13, 2020 letter, you asked the Appeals Board to correct the amount of your "Monthly Benefit at NRD" to $381.45, and your form of benefit to a "Joint and Survivor Benefit." The Board notes that the statement you received from New York Life *estimates* that you would be entitled to receive $381.45 per month if you retire at age 62 and elect a "Life Annuity" as your form of benefit. It does not say that you are entitled to receive $381.45 per month regardless of your age or marital status at retirement, nor does it say that there is only one form of benefit you may elect at retirement.[45]

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[39] *See* Section 2.1 of the Plan, at Enclosure 3.

[40] However, the Board agrees with New York Life's statement that you are "100% vested" in a Plan benefit.

[41] In other words, your September 8, 2020 assertion that when Mexicana "liquidated in 2015 . . . the US Mexicana Pension was recovered in whole and transferred to PBGC" is incorrect.

[42] *See* ERISA §§ 4001(a)(8) and 4022. *See also* 29 C.F.R. §§ 4022.3 and 4022.4(a)(3).

[43] Computation of the amount of your benefit is covered under the provisions of Plan Sections 1.11, 2.5, and 4.1, at Enclosure 3. Please note additionally that the "Years of Credited Service" calculations shown on page 2 of the BDS follow these provisions, not the provisions of Plan Section 2.1 for the calculation of vesting service. Unfortunately, OBA's August 24, 2020 letter to you did not clarify this distinction between the total "Credited Service" and the total "Vesting Service" you earned under the Plan.

[44] *See* Plan Sections 4.3, and 4.5, at Enclosure 3.

[45] We note that the statement additionally says, "The benefit(s) set forth above may not reflect the actual amount payable on your behalf following your retirement or other termination of employment."

Section 5.2 of the Plan defines the "50% Joint and Survivor Annuity" referenced on your New York Life statement as follows:[46]

> **Joint and Survivor Annuity.** For any Participant who is married for a period of at least one year prior to his "annuity starting date," his benefit under the Plan shall be paid in the form of a "qualified joint and survivor annuity" *unless the Participant, with the consent of his spouse, elects to waive such form of benefit during the election period* . . . provided, however, that the consent of the Participant's spouse shall not be required if the Participant selects the option set forth in **Section 5.3(b)** and names his spouse as his Beneficiary . . . .
>
> . . .
>
> (a) The "qualified joint and survivor annuity" means an annuity for the life of the Participant with a survivor annuity for the life of the Participant's surviving spouse equal to 50% of the amount of the annuity payable during the joint lives of the Participant and the Participant's spouse. The qualified joint and survivor annuity shall be the Actuarial Equivalent of the Participant's Accrued Benefit payable in the normal form . . . .

(Italicized emphasis added.)

In accordance with these provisions, PBGC's revised benefit determination and its enclosures will provide you with the amount you will receive if you retire under the Plan at age 62 (*i.e.*, at your NRD) and elect an SLA as your form of benefit. You will, however, be given the opportunity to choose from a variety of other benefit forms.[47]

PBGC is the Federal Agency with Jurisdiction Over Benefits Payable to You and Other Plan Participants

In your appeal, you made several references to the U.S. Department of Labor's Employee Benefits Security Administration ("EBSA"). Under ERISA, jurisdiction over employee benefit plans is divided among three federal governmental agencies: the U.S. Department of Labor (Title I of ERISA); the Internal Revenue Service, Department of the Treasury (Title II of ERISA and the Internal Revenue Code); and PBGC (Title IV of ERISA). Although the agencies coordinate with each other on matters of shared relevance, the EBSA fact sheet referenced in your appeal correspondence does not relate to PBGC's determination of your benefit entitlement under the

[46] *See* Enclosure 3.

[47] In its July 6, 2020 determination, PBGC informed you that "PBGC offers several types of annuities you may choose from. Your benefit amount may vary according to the type you choose." Furthermore, page 1 of the BDS enclosed with that determination states, "Below we show your monthly benefit based on different annuity starting dates. Each monthly benefit shown is payable as a Straight Life Annuity. Other forms of benefit are available to you." The Appeals Board anticipates that PBGC's revised determination and its enclosures will contain similar language.

Plan. It is PBGC, not EBSA, that has jurisdiction as statutory trustee of terminated single-employer defined benefit pension plans such as the Plan.[48]

Decision

For the reasons explained above, the Appeals Board is granting your appeal, finding that the date of the recognition of a foreign proceeding under Chapter 15 of the Bankruptcy Code should not have been substituted for the Plan's termination date when calculating your PBGC-payable benefit under the Plan. Because the Board has concluded that ERISA section 4022(g) does not apply to a plan whose contributing sponsor (1) files a Chapter 15 petition for recognition of a foreign proceeding and (2) does not file a petition under Chapter 7 or Chapter 11, OBA will recalculate your benefit amount and issue you a revised benefit determination with a new 45-day right to appeal.

This is the Agency's final decision with regard to substitution of the date of recognition of a foreign proceeding under Chapter 15 for the Plan's termination date, and you may seek review of this decision in an appropriate United States District Court.

If you have any questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,

Grace H. Kraemer
Member, Appeals Board

3 Enclosures:

1. Agreement for Appointment of Trustee and Termination of Plan (3 pages)
2. Notice of Determination and Accompanying Letter to Mexicana Airlines (3 pages)
3. Excerpts from the Mexicana Pension Plan for Non-Union Employees, 2009 Amendment and Restatement (21 pages)

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[48] Please refer to pages 3-4 of the "Annual Funding Notice" you provided to the Appeals Board, which discusses PBGC's role in guaranteeing benefits paid under terminated single-employer pension plans. *See also* page 2 of Enclosure 1.