



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



JUL 21 2005

Re: Case 193468; Brad Whitney Sportswear Manufacturing
Company (BWSMC) Pension Plan (the Plan)

Dear

The Appeals Board reviewed your appeal of PBGC's March 23, 2004 determination of your PBGC benefit from the Plan. For the reasons stated below, the Board found that you presented no reason to increase your PBGC benefit and, therefore, we are denying your appeal.

Background

PBGC provides pension insurance in accordance with the Employee Retirement Income Security Act of 1974, as amended (ERISA). If a plan sponsor is unable to support its pension plan, PBGC becomes trustee of the plan and pays benefits as defined in the plan, subject to the limitations and requirements set by Congress in ERISA.

Records available to the Appeals Board reveal that the Plan terminated on December 31, 1992 and PBGC became the Plan's trustee on July 27, 2001.

After PBGC became the Plan's trustee, PBGC reviewed Plan records and participant data, and determined the amount of the Plan's final assets as of the Plan's termination date. PBGC then calculated the Plan benefits and guaranteed benefits payable to each of the Plan's participants as of the Plan's termination date. Because the Plan's assets as of the Plan's termination date were less than the total value of guaranteed benefits payable to the Plan's participants, PBGC determined that ERISA's limitations came into play.

PBGC's determination letter told you that you are entitled to receive a single lump-sum payment of \$3,352.00 plus interest from the date of Plan termination. PBGC's Benefit Statement, which PBGC enclosed with its determination letter, explained that your benefit was affected by ERISA's Substantial Owner Phase-In limitation.

Your Appeal

Your April 29, 2004 appeal letter claimed that PBGC's determination is wrong because (1) PBGC incorrectly calculated the date on which you became a Substantial Owner, and (2) PBGC did not include "the settlement funds received as a result of the fiduciary breach action that were collected after the plans terminated."

Discussion

1. Inclusion of Stock Certificates 27 and 40 in PBGC's Determination of the Date on Which You Became a Substantial Owner

In your appeal letter, you asserted that PBGC incorrectly used December 7, 1984, as the date you became a "substantial owner". To support your claim, you said that Certificates 27 and 40, for 298 and 288 shares of stock, respectively, were "made out to [redacted] and were held by the [redacted]

[redacted] In addition, you provided copies of stock ownership records prepared by [redacted] the former Plan Administrator. Because Certificates 29 and 40 were not under your care or control, you claimed that these shares should not be included in PBGC's determination as to when you became a Substantial Owner. You said that excluding Certificates 27 and 40 from your ownership interest would result in changing the date you owned more than 10 per cent of the stock from December 7, 1984, to December 25, 1988,

The Substantial Owner Phase-In limitation is described in section 4022(b)(5)(B) of ERISA. ERISA § 4022(b)(5)(A) defines a "substantial owner" as follows:

"(5)(A) For purposes of this title, the term "substantial owner" means an individual who—

... (iii) in the case of a corporation, owns, directly or indirectly, more than 10 percent in value of either the voting stock of that corporation or all the stock of that corporation.

For purposes of clause (iii), the constructive ownership rules of § 1563(e) of the Internal Revenue Code of 1954 shall apply (determined without regard to § 1563(e)(3)(C))."

The constructive ownership rules related to trusts are found in section 1563(e)(3) of the Internal Revenue Code (IRC). IRC § 1563(e)(3) provides as follows:

"(3) Attribution from estates or trusts.—

(A) Stock owned, directly or indirectly, by or for an estate or trust shall be considered as owned by any beneficiary who has an actuarial interest of 5 percent or more in such stock, to the extent of such actuarial interest. For purposes of this subparagraph, the actuarial interest of each beneficiary shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary and the maximum use of such stock to satisfy his rights as a beneficiary.

(B) ...

(C) This paragraph shall not apply to stock owned by any employees' trust in § 401(a) which is exempt from tax under § 501(a)."

Thus, although you claimed in your appeal that you should not have been considered the owner of the stock identified by Certificates 27 and 40 because you had no control over these shares of stock, the IRC's constructive ownership rules make it clear that PBGC properly considered you to be the owner of that stock. As a result, the Appeals Board found that PBGC properly included the shares of stock represented by Certificates 27 and 40 in determining the percentage of your ownership in BWSMC as of December 7, 1984.

2. Inclusion of Settlement Funds Received by PBGC as a Result of the 2001 Fiduciary Breach Judgment Award

After the Plan terminated but before PBGC became the Plan's trustee, a judgment was entered in the United States District Court for the Northern District of California in favor of [redacted] as Trustee of the Plan in the sum of \$229,141.16 together with interest thereon at the legal rate from March 31, 2001 until paid. The Appeals Board noted that the judgment specifically provided as follows: "From any funds received in execution of the judgment, [redacted] shall not receive any benefit until participants with vested accrued benefits in either the Defined Benefit Pension Plan or the Profit Sharing Plan on or after December 15, 1990, that is excluding [redacted] have been paid in full." Thus, the judgment contemplated the possibility that the Plan's trust would still be insufficient to pay the benefits of all the other vested participants even after the judgment was satisfied.

Because the judgment described above remained unpaid, PBGC acted to enforce the judgment once PBGC was appointed the Plan's trustee. This activity resulted in a Settlement Agreement and Release (Agreement) between [redacted] trust dated 12/5/74 and PBGC effective February 8, 2002. As a result of the Agreement, PBGC received a check in the amount of \$169,702.74 by overnight Federal Express on September 11, 2002.

ERISA § 4044 requires that a plan's assets be allocated in a prescribed order to the value of benefits described in six priority categories. PBGC regulations make it clear that, in the case of a plan that is trustee by PBGC, the allocation of assets must be performed as of the date of the plan's termination. See 29 Code of Federal Regulations § 4044.3(b). Thus, in order for the allocation to be performed as of the plan's termination date, PBGC must calculate the total amount of all benefit liabilities as of the plan's termination date and also determine the total value of the plan's assets as of the plan's termination date.

So, after execution of the Agreement, under which PBGC would receive \$167,500 with interest from February 8, 2002, PBGC followed its standard Recovery Valuation Policy to determine the value of the payment as of the Plan's termination date. PBGC determined that the amount PBGC would receive under the Agreement had a value of \$96,325 as of the Plan's termination date (December 31, 1992). So, after adding that

amount to the rest of the Plan's assets, PBGC determined that the Plan's final assets as of the Plan's termination date were equal to \$145,339.

PBGC's final actuarial valuation of the Plan's benefit liabilities, which was completed on September 10, 2003, determined that the total value of guaranteed benefits as of the Plan's termination date was equal to \$185,340. So, because the Plan's assets were equal to \$145,339 as of the Plan's termination date, the Plan's assets were insufficient to pay all of the benefits that PBGC guarantees. The Board noted that PBGC is paying all guaranteed benefits in full despite the \$40,001 shortfall, and that PBGC is also paying 4.94% of all benefit liabilities in excess of guaranteed benefits under ERISA § 4022(c).

Based on the above, the Appeals Board found that PBGC properly accounted for the amount paid under the Agreement when PBGC determined the value of assets available to pay the Plan's vested benefits in accordance with ERISA.

We regret that the outcome of your appeal is not favorable, but the Appeals Board must make its decision in accordance with ERISA, and PBGC's rules and regulations.

Decision

Having applied the law and PBGC's rules to the facts of this case, the Appeals Board found that you presented no reason to increase your PBGC benefit and, therefore, we are denying your appeal. This decision is the agency's final action regarding the issues raised by your appeal, and you may, if you wish, seek court review of this decision. If you need other information about your benefit, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,

A handwritten signature in cursive script that reads "Michel Louis".

Michel Louis
Appeals Board Member