

Pension Benefit Guaranty Corporation

85-21

August 26, 1985

REFERENCE:

[*1] 4044 Allocation of Assets
4044(d)(1) Allocation of Assets. Distribution of Residual Assets to Employer
Joint Implementation Guidelines

OPINION:

The PBGC has reviewed your presentation of the facts and circumstances surrounding the split-up and proposed termination of the * * * (the "Retirement Plan"). The split-up occurred on * * *, when, as the result of collective bargaining negotiations, employees represented by * * * (the "Union") were transferred to the newly created * * * Plan for Hourly Employees (the "Hourly Plan"). That portion of the Retirement Plan's excess assets attributable to the accrued benefits of the Union participants was likewise transferred to the Hourly Plan. * * * (the "Company"), then proposed terminating the Retirement Plan and establishing a new plan, effective as of * * *, for those employees affected by its termination. n1

n1 A Notice of Intent to Terminate the Retirement Plan was filed with the PBGC proposing a termination date of * * *.

This will advise you that the PBGC has concluded, on the basis of its review of the facts and circumstances of this case, that the split-up of the Retirement Plan and creation of the Hourly Plan followed by the termination [*2] of the Retirement Plan is not subject to the requirements of paragraph 4 of the Implementation Guidelines (the "Guidelines") issued on May 23-24, 1984, by the PBGC, the Treasury Department and the Department of Labor (the "agencies"). Paragraph 4 of the Guidelines applies to "spin-off/termination" cases, and in pertinent part provides that a termination of one part of a split-up plan will not be recognized unless benefits under the ongoing part of the split-up plan are fully vested and nonforfeitable as of the date of termination and all benefits accrued as of the date of termination in the ongoing plan are provided for by the purchase of annuity contracts that represent irrevocable commitments for the benefit of each individual participant.

Your presentation of the facts is as follows. The Retirement Plan was established on * * *, to provide retirement benefits for certain of the Company's employees, including those represented by the Union. At some point prior to the split-up and as part of the collective bargaining process, Company and Union officials met to discuss the termination of the Retirement Plan and reestablishment of a new defined benefit plan. Upon termination of [*3] the Retirement Plan all excess assets would revert to the Company. The Company offered the Union the choice of (1) having hourly employees represented by the Locals "participate" in the termination of the plan (and the adoption of a new defined benefit pension plan), in which event all benefits accrued to the date of the termination would be vested (to the extent not already vested) and annuities would be purchased for such benefits, or (2) "continuing" the present situation, in which event "termination" vesting would not apply, annuities would not be purchased, and benefits would continue to be provided by a trust fund.

The Union chose to have its employees, as well as that portion of the Retirement Plan's excess assets attributable to their accrued benefits, transferred to the new Hourly Plan. You have indicated that the Union chose this course due to its concern about the financial stability of insurance companies and its belief that its bargaining position for future benefit improvements would be adversely affected if there were no excess assets in a plan for its members. On * * *, the Retirement Plan was split-up and the Hourly Plan created, and this was followed by the termination [*4] of the Retirement Plan and proposed reversion of the remaining excess assets to the Company.

Section 4044 of Title IV of ERISA sets forth rules for the allocation of assets where there is a termination of a single employer defined benefit plan. Under Section 4044(d)(1), after all liabilities to participants and beneficiaries have been satisfied, residual assets may be distributed to the employer maintaining the plan if the plan provides for such a distribution. Further, there is no prohibition in Title IV against an employer's effecting a termination of a plan, recovering excess assets from that plan and then establishing a new defined benefit plan for the same group of employees

covered by the terminated plan with the same benefits as in the terminated plan. Such an arrangement is a so-called "termination/reestablishment." See Guidelines paragraph 3.

As a general proposition, nothing in Title IV speaks to responsibilities and limitations in ongoing plans. It follows that nothing in Section 4044 permits the extraction of residual assets from a plan that is ongoing. It is the agencies' interpretation that an employer cannot invoke Title IV provisions that permit asset distribution [*5] merely by taking steps that, in form, appear to bring about a termination of a plan, when in substance the arrangement viewed as a whole does not constitute a full termination. A classic example that in substance fails to constitute a termination is a sequence of transactions that purportedly (1) split a plan with excess assets into two parts: one part for active participants that continues under the same terms and conditions as prior to the split-up and the other part for retirees and deferred vested participants (the "inactives' part"), and (2) permit the termination of the inactives' part with a reversion of excess assets to the employer. Where part of the plan remains ongoing, the effect of the transactions would be the recovery of excess assets from a plan without satisfying the basic elements of a plan termination, the vesting and annuitization of the benefits of all participants. Accordingly, the agencies determined that certain transactions, including, but not limited to, the example set forth above, would violate the law's requirements unless, among other things set forth in the Guidelines, benefits in the ongoing part of the plan were fully vested and annuitized.

The [*6] PBGC has carefully reviewed the events leading up to the split-up and proposed termination of the Retirement Plan. Based on these facts, the PBGC has concluded that the split-up of the Retirement Plan and creation of the Hourly Plan followed by the termination of the Retirement Plan with a reversion of excess assets to the Company is not a transaction to which the spin-off/termination requirements of the Guidelines apply. Accordingly, the PBGC will recognize the termination and proposed reestablishment of the Retirement Plan without the necessity of the vesting and annuitization of benefits under the Hourly Plan.

The conclusions set forth in this letter are limited to Title IV of ERISA only. Any opinions of the consequences under Title I of ERISA and the Internal Revenue Code must be obtained from the Department of Labor and the Internal Revenue Service, respectively.

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