

Pension Benefit Guaranty Corporation

90-4

August 3, 1990

REFERENCE:

[\*1] >4022A>

>4022A(b)(1)(A)>

>4022A(b)(2)(A)>

4219(c)(1)(D) Notice & Collection of Withdrawal Liability - Payment on Mass Withdrawal.

>29 CFR 2648.6(b)>

>29 CFR 2676.2(a)>

>29 CFR 2676.13>

>29 CFR 2676.15>

OPINION:

I write in response to your request for the opinion of the Pension Benefit Guaranty Corporation (the "PBGC") on issues raised in connection with the termination of the \* \* \* by the mass withdrawal of all contributing employers (the "Employers").

You ask whether changes in interest rates occurring after the mass withdrawal valuation date may be taken into account in determining the amount of the Plan's unfunded vested benefits for the purpose of assessing reallocation liability. In support of your position that such changes should be taken into account, you cite PBGC Opinion Letter 88-5, which states that "trustees may make decisions about . . . the amount of reallocation liability to be assessed to [withdrawing] employers at any time before payment of the liability is demanded." You also recognize, however, that Opinion Letter 88-5 states that "the trustees may not base those decisions on events that occur, [\*2] or conditions that come into being, after the times specified in the reallocation regulation and ERISA."

Pursuant to Section 4219(c)(1)(D) of ERISA and 29 C.F.R. § 2648.6, a plan that is terminating in a mass withdrawal is to reallocate the plan's unfunded vested benefits among the withdrawing employers. The plan's unfunded vested benefits are to be valued as of the plan's mass withdrawal date. 29 C.F.R. § § 2648.6(b), 2676.2(a). The amount of the plan's unfunded vested benefits is to be determined in accordance with the PBGC's regulation entitled "Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal." 29 C.F.R. Part 2676. Pursuant to 29 C.F.R. § 2676.13(a), the interest rate to be used in valuing plan benefits is determined pursuant to 29 C.F.R. § 2676.15. Under this section of the regulation, the interest rate to be used is established as of the plan's mass withdrawal valuation date. 29 C.F.R. § 2676.15(c). Accordingly, the PBGC regulations do not permit consideration of interest rate changes after the mass withdrawal valuation date in the plan's calculation of unfunded vested benefits for the purpose of determining reallocation liability upon a mass withdrawal. [\*3]

You also seek the PBGC's views regarding whether a Plan amendment increasing benefits was adopted more than 60 months before the Plan's termination date of October 31, 1988. The amendment in question increased benefits for Plan participants effective September 1, 1983. You request that the PBGC consider the amendment to have been adopted on September 13, 1983, the date the contributing employers of the Plan and the Union representing Plan participants entered into an agreement to increase the level of contributions to be made by the employers. If the date you request is accepted, payment of the benefit increase would be guaranteed by the PBGC pursuant to Section 4022A of ERISA, 29 U.S.C. § 1322A. If, however, the date the Plan Trustees formally approved the benefit increase, December 2, 1983, is determined to be the adoption date of the amendment, payment of the benefit increase would not be guaranteed by the PBGC. Section 4022A(b)(1)(A) of ERISA, 29 U.S.C. § 1322A(b)(1)(A).

In a case such as this, the PBGC has historically required that the proponent of a date earlier than the formal date of adoption (here December 2, 1983) demonstrate through clear and convincing evidence that [\*4] the amendment was actually adopted on an earlier date.

You have submitted evidence showing that:

1) On September 13, 1983, the Union and employers reached a written agreement (the Collective Bargaining Agreement or "CBA") providing that the employers' contributions to the Plan be increased by 5 cents per person-hour effective September 1, 1983, from 35 cents to 40 cents, and by another 5 cents per person-hour effective September 1, 1984, to 45 cents;

2) In early August, during negotiation of the CBA, \* \* \*, the Plan's actuary, had been asked to determine the benefit level the Plan would be able to support if contributions were increased to 45 cents per person-hour. By Memorandum dated December 1, 1983 (the "Actuary's Report"), \* \* \* advised the Trustees that, if the Plan reamortized its liabilities over a 15 year amortization schedule (to replace the ten years remaining on the Plan schedule then in use), a 45 cents per hour contribution rate would support a \$ 1.00 increase per year of service in the Plan's monthly benefit level, with some margin for experience. The Actuary's Report also commented that a 39.1 cent contribution rate would support the current benefit level of the Plan. [\*5] It noted that these conclusions were based on the assumption that the Plan's contribution base would remain stable, a fact that was inconsistent with the erosion of this base over the ten prior years. The Actuary's Report commented that if the contribution base continued to decline by 20 to 30 percent, "it would be difficult to recommend a substantial benefit increase";

3) On December 2, 1983, the Plan Trustees, after review of the Actuary's Report, unanimously approved a \$ 1.00 increase per year of service in the Plan's benefit level (which increased the maximum benefit under the Plan by thirty dollars), effective September 1, 1983;

4) The handwritten notes of the Trustees' December 2, 1983 meeting, taken by the Plan's Counsel (the "Counsel's Notes"), indicate that, after the Actuary's Report was presented, \* \* \*, a Union Trustee, stated that a benefit increase was promised in negotiations over the CBA, and that the Union would take action if an increase was not approved. In response, \* \* \*, an Employer Trustee, stated that the employers in the negotiations pointed out that the first 5 cent increase in contributions should be used to shore up the condition of the Plan, and that [\*6] the deferred contribution increase should be used to effect a benefit increase. After \* \* \* stated that the Union would not ask for an increase after the September 1, 1984 contribution increase, the Trustees approved the benefit increase;

5) The Plan had a history of approving benefit increases simultaneously with increases in the rate of employer contributions. Such changes were made in 1971, 1974, 1977 and 1980. The 1980 increase provided for a partially deferred increase in the Employers' contribution rate, while the full amount of the increase in the Plan's benefit level was effective immediately; and

6) In a membership meeting concerning the September 1983 contract, the Union negotiators reported that "the pension would be increased by \$ 30, or whatever the fund could stand after \* \* \* did an actuarial evaluation and that this increase would be retroactive to September 1, 1983."

Item 6 above was presented in a March 29, 1990 letter to the PBGC from \* \* \*. The other facts were deduced from the historical documents you submitted in support of your opinion request. You argue that these facts demonstrate that "[i]t was intended by the parties that the increase in contributions [\*7] [included in the CBA] would be accompanied by a benefit increase under the Plan", and that, accordingly, September 13, 1983 should be considered the date the amendment was adopted. However, in order for such a benefit increase to be viewed as adopted by the Plan, there must be sufficient evidence to demonstrate that both the Union Trustees and the Employer Trustees agreed during negotiation of the CBA that such an increase be effective on a date more than 60 months before the Plan's termination date. The PBGC does not believe the evidence you have submitted demonstrates that such an agreement was reached before the December 2, 1983 Trustees' meeting, particularly in view of the fact that the Trustees debated the appropriate effective date of the increase at that meeting. Accordingly, absent any additional evidence on the effective date of the increase, the PBGC would conclude that the benefit increase was adopted on December 2, 1983, not September 13, 1983, and that the PBGC would not guarantee payment of the increase.

If you have further questions regarding this matter, please contact John Sutter of my staff at (202) 778-8821.

Carol Connor Flowe  
General Counsel