



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

March 30, 2007



Re: Appeal , Case 194672, Outboard Marine Corporation Employees Retirement Plan (the "Plan")

Dear :

We are responding to your appeal of PBGC's September 24, 2004 determination of your benefit under the Plan. For the reasons stated below, we are denying your appeal.

PBGC's Benefit Determination and Your Appeal

PBGC determined that you are entitled to a monthly benefit of \$2,247.12 payable as a Straight Life Annuity starting on April 1, 2012. PBGC also included a Benefit Statement, which: (1) listed your type of retirement benefit as Deferred Vested; (2) stated that you terminated employment on March , 2001, and had earned 29. years of Vesting Service; and (3) provided information concerning how PBGC calculated your final benefit amount. The Benefit Statement also indicated that, if you retired on your Earliest PBGC Retirement Date of April 1, 2007, you would receive a monthly benefit of \$1,572.98.

In your appeal letter of November , 2004, you contended that PBGC should find you eligible for the Plan's Advanced Retirement benefit, which would allow you to start your benefits as of June , 2001. You noted that you signed an agreement on December , 1993, on a form provided by the Plan that allowed you to retain your Advanced Retirement eligibility by opting out of the corporation's matching 401(k) program.¹

¹ We agree that you retained your eligibility to qualify for an Advanced Retirement based on this December 1993 document. However, for the reasons discussed in this decision, PBGC correctly denied you an Advanced Retirement benefit because you did not meet the service requirement for the benefit.

You also asserted that Outboard Marine Corporation ("OMC") had a documented history of "bridging" terminated employees who were within three years of being eligible for an Advanced Retirement benefit. You claimed a right to similar treatment because, at the time OMC terminated your active service on March , 2001, you had 29 years of Continuous Service, and you were 3 days short of attaining eligibility for Advanced Retirement. You also stated that OMC's human resources department was negligent in not providing "bridging" service to you and to some other participants. With your appeal, you included additional documents and correspondence regarding retirement from the Plan, including documents showing that other Plan participants had qualified for Advanced Retirement based on "bridging" service.

Background

When the Plan terminated on December 6, 2002, it did not have sufficient assets to provide all benefits PBGC guarantees under Title IV of the Employee Retirement Income Security Act ("ERISA"), and PBGC became the Plan's trustee. As trustee, PBGC pays pension benefits to Plan participants based on the terms of the Plan's documents, subject to the limitations and requirements set by Congress under ERISA.

1. *Relevant Plan Provisions*

On September 9, 1999, OMC adopted the September 30, 1999 Restatement of the OMC Employees Retirement Plan ("Restatement"). The Restatement applies to "exempt" employees such as you who worked at OMC's Corporate office ("Location 0").

Section 2 of the Restatement defines "Normal Retirement Age" as the later of age 65 or when the participant completes five years of service or participation. Restatement § 2.1(dd)(1). This document further provides that a participant reaches his "Advanced Retirement Age" when either: (1) he attains both age 62 and 10 years of Continuous Service; or (2) completes 30 years of Continuous Service or has at least 88 "Retirement Units," provided that the participant elected to retain eligibility for "Advanced Retirement" as of December 31, 1993. Restatement § 2.1(dd)(2).

Section 4 of the Restatement, which describes the types of benefits that the Plan provides, states a participant may receive: (1) a Normal Retirement benefit, if he retires after reaching his Normal Retirement Age (§ 4.2); (2) an Advanced

Retirement benefit, if retires after having attained his Advanced Retirement Age (§ 4.3); (3) an Early Retirement benefit, if he retires after attaining age 60 with at least 10 years of Continuous Service (§ 4.4); or (4) a Vested Deferred Retirement Benefit, if he has earned at least five years of Continuous Service when he terminates employment, but has not qualified for a Normal Retirement, Advanced Retirement, Early Retirement, or disability benefit.

The Restatement provides that a participant who qualifies for an Advanced Retirement Benefit will receive both: (1) a monthly retirement benefit unreduced for early commencement, and (2) a monthly temporary supplemental benefit payable until age 62. Restatement § 4.3. The Vested Deferred Retirement Benefit, however, (1) is not payable before age 60; (2) is reduced for early commencement if payments begin before age 65; and (3) does not include a temporary supplement. Restatement § 4.6.

The Restatement provides that Continuous Service "is determined in completed full years and completed twelfths of years in excess of completed full years" (Restatement § 2.1(j)(1)), and is computed as follows:

An Employee shall receive credit for one full year of Continuous Service for any calendar year during which he has at least 1000 Hours of Service. If an employee has less than 1000 Hours of Service for any calendar year, he shall receive credit for Continuous Service in monthly increments during that calendar year at the rate of one month for each full 190 Hours of Service he has during the calendar year. An employee who is actively employed on a full-time basis for at least one day in any calendar month is credited with 190 Hours of Service for that month.

Restatement § 2.1(j)(2).

The Restatement's "Hour of Service" provision states that an OMC employee receives credit for each hour for which he is directly or indirectly paid by the employer. Restatement § 2.1(s)(1), (2). Additionally, an employee is credited for service based on:

The number of normally scheduled work hours for each day of authorized leave of absence granted by the Employer or non-participating Subsidiary for which the Employee is not compensated, and each day of layoff for which credit is allowed.

Restatement § 2.1(s) (3); see also Restatement § 2.1(s) (3) (F).

2. *The Plan's Practice of "Bridging Service"*

The Plan's governing documents do not contain the term "bridging." Based on the correspondence that PBGC has received from the Plan's participants and their representatives, we have concluded that "bridging" was understood by the Plan's administrators and participants to mean any method by which a participant with less than 30 years of active service with OMC could nevertheless become eligible for an Advanced Retirement Benefit.

One method by which Plan participants obtained bridging service was through Plan amendments. These amendments granting additional service were limited to a specific time period and covered a well-defined subset of OMC's workforce. For example, Plan § 4.20 provided up to three (3) additional years of age and/or Continuous and Credited Service to exempt employees at the OMC Corporate Data Processing Center or at the OMC SystemMatched Parts and Accessories Data Processing Center who were currently employed at those locations as of July 22, 1993.²

A second way that OMC and the Plan's administrators provided bridging service to certain participants was by allowing them to accrue additional hours of service based on unpaid "leaves of absence." If a participant had earned 27 or more years of Continuous Service and was to have his employment ended as the result of a permanent lay-off or reduction-in-force, OMC's usual practice was to provide the participant with a General Release and Settlement Agreement ("Settlement Agreement"). The Settlement Agreements generally specified that: (1) the individual's employment in his current job position was to be terminated; and (2) the employee would be placed on an "unpaid

² In order to receive the additional service under this amendment, such an employee had to elect to retire on December 31, 1993. This retirement incentive was available only to affected employees who would have attained their Advanced Retirement Age or their Early Retirement Age on or before December 31, 1996.

leave of absence" until a specified date (which usually was the first date at which they would reach or surpass 30 years of Continuous Service). Among other items, the General Release and Settlement Agreements stated that the employee agreed to release OMC from all claims directly or indirectly based on his employment relationship with OMC, including any claims based on age discrimination.

Based on our review of participant data received from OMC, the Appeals Board found that OMC had always (starting at least as early as 1993) granted leaves of absence to participants who had at least 27 but less than 30 years of Continuous Service when they lost their jobs due to a permanent layoff. OMC stopped this practice, however, on the day before OMC filed for bankruptcy on December 22, 2000. The Appeals Board found no evidence that any participant was granted a bridging leave of absence after December 10, 2000. Also, our research indicated that 14 participants with over 27 years of service were laid off on December 21, 2000, and none of the 14 was granted a bridging leave of absence.

In your case, you filed a formal written request with OMC on February , 2001, asking for bridging service. You also may have attempted to notify OMC of your request on other occasions. However, it appears - based on the information available to the Appeals Board - that OMC never responded to you regarding your request for the additional bridging service.

3. OMC's Bankruptcy Filing and PBGC's Termination of the Plan

Beginning in 1997, OMC lost considerable market share and restructured itself, closing several manufacturing facilities and reducing corporate staff. One of the last major group layoffs of OMC employees occurred on December 21, 2000, the day before OMC filed a Chapter 11 Bankruptcy petition.

On February 1, 2001, the Bankruptcy Court issued an order that allowed certain OMC employees to work for OMC under an incentive package for the period of time while OMC searched for a buyer to purchase the company as an on-going concern. On February 9, 2001, the Bankruptcy Court approved the sale of substantially all of OMC's assets to a joint venture of Genmar, Inc. and Bombardier Motor Corp. of America. The sale of OMC's operations occurred on March 9. Three days later, upon the motion of creditors, OMC's bankruptcy case was converted to one

under Chapter 7 of the Bankruptcy Code.

Earlier, on February 22, 2001, PBGC had issued a Notice of Determination that PBGC intended to terminate the Plan effective February 28, 2001. This Notice was subsequently rescinded and replaced by a second Notice of Determination dated September 20, 2001, which stated that PBGC intended to terminate the Plan as of August 17, 2001. The Plan was terminated effective August 17, 2001, by an agreement between PBGC and OMC dated October 3, 2001. This agreement also provided for PBGC's appointment as the terminated Plan's trustee.

Discussion

PBGC's Determination of Your Continuous Service

The documents PBGC obtained from the Plan's former administrator indicate you were working for OMC on December , 2000, when the last major group layoffs of OMC employees occurred. Also, as noted above, the Bankruptcy Court issued an order on February 1, 2001, that allowed certain OMC employees to work for OMC under an incentive package for a limited period of time. You signed a retention agreement on February , 2001, that provided for such employment. On March , 2001, the date that OMC's assets were sold, your employment ended under the retention agreement.

PBGC determined, based on Plan records, that your date of hire was October , 1971, and your date of termination of employment was March , 2001 (when your work under the retention agreement ended). Applying the Plan's definitions of "Continuous Service" and "Hours of Service" (see discussion of Plan Provisions above), to the above dates of employment, your total years of Continuous Service is 29 years and months or 29.. The following table breaks down the calculation:

Period of Employment	Continuous Service
10/ <input type="text"/> /1971 - 12/ <input type="text"/> /1971	0 Years & <input type="text"/> Months
01/ <input type="text"/> /1972 - 12/ <input type="text"/> /2000	29 Years & <input type="text"/> Months
01/ <input type="text"/> /2001 - 03/ <input type="text"/> /2001	0 Years & <input type="text"/> Months
Total:	29 Years & <input type="text"/> Months

Thus, the Appeals Board found that PBGC correctly had determined that you had earned less than 30 years of Continuous Service as of your March , 2001 termination of employment date, and therefore you did not then qualify for Advanced Retirement.³

PBGC's Denial of "Bridging Service"

Shortly after PBGC became the Plan's trustee, certain exempt salaried employees at Location 0 petitioned PBGC to receive bridging service. These employees asserted that the Plan's consistent practice was to award bridging service to employees who terminated employment within three years of becoming eligible for an Advanced Retirement benefit, and they asked that PBGC continue that practice. PBGC, however, concluded that the Plan's governing documents did not provide for the automatic bridging of service for the Location 0 employees. Therefore, PBGC denied Advanced Retirement benefits to those Location 0 employees who were credited with less than 30 years of Continuous Service at the time they terminated employment.

PBGC, however, decided it would allow a participant to qualify for an Advanced Retirement benefit based on bridging service if: (1) the participant had entered into a General Release and Settlement Agreement with OMC that credited him or her with additional service based on an unpaid leave of absence; and (2) the additional unpaid leave of absence hours resulted in the participant attaining 30 years of Continuous Service prior to the Plan's termination date (August 17, 2001). PBGC, however, decided that a Location 0 employee was not entitled to additional bridging service if he or she had not entered into a Settlement Agreement or had not otherwise been granted a leave of absence by OMC.⁴

³ You provided PBGC with a listing of your "Paid Vacation" with OMC, which you claimed would provide you with an additional 13 hours of service during the period of March through May , 2001. However, you still would not have earned 1,000 hours of service for the period of employment between January and May , 2001, even if you were credited with these additional 13 hours. Accordingly, even if we decided to grant your additional hours of service based on "Paid Vacation," you still would not have earned the 30 years of Continuous Service needed to qualify for Advanced Retirement.

⁴ The PBGC policy group that reviewed the Plan's bridging service issues decided, in May 2002, that Location 0 participants were entitled to bridging service only in the limited situation where the participant had a Settlement Agreement placing him or her on an unpaid leave of absence.

We identified one Location 0 participant, however, who later was

It is a general principle under ERISA that "all agreements relating to pension benefits must be in writing." *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10 (2d Cir. 1992) (citing ERISA § 402(a)(1)). Similarly, the fiduciaries of a pension plan are required, in carrying out their duties, to act "in accordance with the documents and instruments governing the plan." ERISA § 404(a)(1)(D).

Applying these principles, the Appeals Board upheld PBGC's decision that the Plan's governing documents did not provide for the automatic bridging of service for the Location 0 employees, and, therefore PBGC could not grant such automatic bridging notwithstanding the alleged "plan practice." Although many OMC employees at Location 0 were provided with written Settlement Agreements that granted bridging service, we concluded that these documents did not result in an amendment of the Plan. There is no evidence that those individuals who had the authority to amend the Plan considered the Settlement Agreements to be Plan amendments. Rather, the Settlement Agreements themselves demonstrate an intent to administer the Plan within the terms of the existing Plan documents, since the existing documents provided that participants could accrue Hours of Service while they were on an unpaid leave of absence. See Restatement § 2.1(s)(3), (3)(F).⁵

credited with bridging service by PBGC even though there was no signed Settlement Agreement. In this instance, an OMC manager had hand-written the following note on the employee's termination of employment notice: "Leave as active non-paid employee from 1/1/01 thru 6/1/01 when he becomes retirement eligible." Furthermore, two of the Plan's former administrative personnel told an employee of PBGC's Benefit Processing and Administrative Department (BAPD) that the notation on the termination notice was the "equivalent" of a Settlement Agreement that placed an employee on an unpaid leave of absence until a particular date. BAPD, relying on this information, then issued a benefit determination that granted bridging service to this participant and provided him with an Advanced Retirement benefit.

⁵ We are aware that, with respect to well-defined groups of OMC-Milwaukee and OMC-Waukegan salaried employees, PBGC concluded that Plan amendments had occurred in early 2000 even though the Plan's governing documents were not formally amended. Since you were not an OMC-Milwaukee or OMC-Waukegan salaried employee, the question of whether or not PBGC's determination was correct for those groups of employees is not an issue that the Appeals Board must resolve in your appeal.

There are, however, some factual differences between the OMC-Corporate salaried employees and the other two groups of salaried employees. For example: (1) for non-exempt hourly employees at OMC-Milwaukee and OMC-Waukegan, the company entered into shutdown agreements that amended the

The Appeals Board also decided that you are not entitled to additional bridging service based on the Plan's leave of absence provisions. Traditionally, a leave of absence is based on two elements: permission to leave work and an intent to return.⁶ Absent specific evidence to the contrary - and having found none in the records available to the Appeals Board - we must assume that OMC employees could not obtain a leave of absence unless they received specific authorization from OMC to do so. Indeed, in the Appeals Board review of instances where the bridging of service had occurred, there always was some written record that a leave of absence had been granted to the employee. In your case, there is no such written record. Thus, we are unable to conclude that OMC had granted you a leave of absence, or that you had a right based on your employment relationship with OMC to obtain one.

Your appeal in fact did not assert that you had been granted a leave of absence, but rather you stated that OMC's human resources department was "negligent" in not providing bridging service to you and to some other participants. It is unclear to us how, if we assumed OMC's human resources department had been "negligent" in this way, you then would be entitled to an Advanced Retirement benefit from PBGC. In any event, we denied your claim because you failed to establish that OMC was negligent in not providing bridging service to you.

Plan to provide for bridging service for union employees; (2) there is some evidence that OMC intended to amend the Plan to treat salaried OMC-Waukegan employees similar to union OMC-Waukegan employees; and (3) for the OMC-Milwaukee group, the "Release and Settlement Agreements" (which were executed by all seven salaried employees in that group) contained different language from the Settlement Agreements that were executed by OMC-Corporate employees (which was a much larger group, in which not all employees were provided with settlement agreements).

⁶ Black's Law Dictionary 801 (5th ed. 1979); *Reagan Outdoor Advertising, Inc., v. Lundgren*, 692 P.2d 776 (Utah 1984). See also, *Blinn v. Board of Trustees*, 414 A.2d 263, 264 (N.J. 1980) (leave of absence is "simply an authorized temporary absence from active service which ... implies the right of the employee to return to active employment in the employer's service at the conclusion of such leave of absence"); and Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works*, 748-49 (4th ed. 1984) (except as restricted by agreement "the granting or denial of leaves of absence is a prerogative of management, and the judgment of management will not be disturbed so long as the action taken is not unreasonable or discriminatory").

We agree with the suggestion in your appeal that OMC's managers should have given you an answer with respect to your request for bridging service. We are unable to conclude, however, that the only reasonable response would have been to grant the request. As discussed above, the last major group lay-offs of OMC employees occurred on December 21, 2000, the day before OMC filed a Chapter 11 Bankruptcy petition. After that date, the company's efforts were focused on finding a buyer to purchase the company as an on-going concern. It is difficult for us to discern any reasonable business reason for OMC to continue its employment practice of granting routine leaves of absence, when most of OMC's employees had been laid off with little likelihood of returning to long-term employment with the company.

Furthermore, upon filing the bankruptcy petition, OMC became a "Debtor-in-Possession" under Chapter 11 of the Bankruptcy Code, and thus was under the supervision of a bankruptcy court. A Debtor-in-Possession also owes fiduciary duties to all creditors, including the duty of loyalty and the duty of care. This in turn includes the duty to preserve and conserve bankruptcy estate assets, so as to maximize benefits available to all creditors. See 11 United States Code § 1106. One of the creditors of OMC's bankruptcy was PBGC, who had a claim for the amount of the Plan's underfunding as of its termination date. ERISA § 4062; 29 United States Code § 1362. Thus, if OMC had continued to grant leaves of absences to allow participants to qualify for Advanced Retirement benefits, the effect would be that PBGC's claim with respect to the Plan's underfunding would increase. For this reason, OMC's discontinuance of its practice of granting leaves of absences, which coincided with its filing for bankruptcy, was reasonable in light of its fiduciary duties to creditors under bankruptcy law.

Decision

Having applied Plan provisions and the law to the facts of your case, we found no basis for changing PBGC's September 24, 2004 determination. This decision is the agency's final action regarding the issues you raised in your appeal. You may, if you wish, seek court review of this decision.

We regret the delay in responding to your appeal and appreciate your patience while we completed our review. If you need other information from the PBGC, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,

A handwritten signature in cursive script that reads "Charles Vernon".

Charles Vernon
Appeals Board Chair