

Pension Benefit Guaranty Corporation

81-26

August 24, 1981

REFERENCE:

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

OPINION:

In a telephone conversation with \* \* \* an attorney on my staff, regarding the pending termination of the above-captioned plan (the "Plan"), you informed \* \* \* that the Plan has assets exceeding the benefits it will be required to pay upon termination. You informed \* \* \* that \* \* \* (the "Company") was terminating the Plan in order to gain control of these excess assets, but that it was your opinion that the employees participating in the Plan have a right to the surplus assets.

The Company established a pension plan and trust for all employees in 1943 (the "Old Plan and Old Trust"). The Old Trust was restated in 1974 (the "Restated Trust") and the Old Plan was amended in 1977 (the "Revised Plan") to conform to the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA") (amended by Pub. L. No. 96-364 (1980)). In November 1980, the Company partitioned the Revised Plan into two plans, one for bargaining employees (the "Plan") and one for non-bargaining employees. A trust agreement for the Plan was also created in 1980 (the "New Trust").

The Restated Trust adopted in 1974 provides [\*2] in Paragraph 12.2(b) that no amendment to the trust "shall have the effect of vesting in the Company any interest in or control over any property subject to the terms of this trust, or change the provisions of paragraph 1.2 or 1.3 thereof . . . ." (Emphasis added.) Paragraph 1.2 of the Restated Trust provides in full as follows:

This Trust is irrevocable. Under no circumstances whatever shall any part of the principal or income of this Trust revert to or be paid to, or be used or enjoyed by, \* \* \* or any other company which shall make contributions hereunder. No part of the principal or income of this Trust shall ever be diverted to, or used for, any purpose other than for the exclusive benefit of employees of \* \* \* or any other company which shall make contributions hereunder. (Emphasis supplied.)

Contrary to this prohibition, in 1977 the Company adopted the Revised Plan and in 1980 adopted the Plan and the New Trust. The Revised Plan and the Plan both provide in Paragraph 11.05 that "any funds remaining after the satisfaction of all liabilities . . . due to erroneous actuarial computations shall be returned to the Employer." The New Trust provides in Section 8.01 [\*3] that "[i]n no event shall any part of the corpus or income of the Trust Fund be paid to or for the benefit of the Employer, except in the case of erroneous actuarial computations ascertained at the time of the termination of the Plan and Trust."

Because of the amendments contained in the Revised Plan, the Plan and the New Trust, the Plan appears to permit a reversion to the Company, pursuant to Section 4044(d)(1)(C) of ERISA, 29 U.S.C. § 1344(d)(1)(C), of excess assets attributable to employer contributions. We express no opinion, however, as to whether such distribution of excess assets to the Company contravenes any other provision of law. Accordingly, the PBGC will not be objecting to a reversion to the Company of excess assets (if any) attributable to employer contributions. Further, we express no opinion as to whether participants may have any rights, under laws not administered by the PBGC, to excess assets attributable to employer contributions, in view of the prior provisions of the Plan which restrict the Company's power to amend the Plan.

Please contact \* \* \* of this Office on (202) 254-4895 if you have any questions.

Henry Rose [\*4]  
General Counsel