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

DEC 16 2003

[redacted]

Re: Appeal [redacted] The Retirement Plan for Salaried Employees of Sharon Steel Corporation ("Salaried Plan," Case #: 161810)

Dear [redacted]

The Appeals Board has reviewed your appeal of PBGC's April 4, 2000 determination of your Salaried Plan benefit. As explained below, we are denying your appeal.

PBGC's letter said that you were entitled to a benefit of $1,299.09 per month, if payments began on March 1, 2011 (the first of the month following your 65th birthday) as a single life annuity with no survivor benefit. PBGC's files show that, effective March 1, 2001, you began receiving an estimated benefit of $619.87 per month. After receiving a filing extension, you filed an appeal on September 12, 2002, which raised three issues regarding the freeze of benefit accruals under the Salaried Plan:

1. The amendment freezing accruals ("freeze amendment") was invalid because the notices dated June 1, 1987, and July 29, 1988, were defective as notices under §204(h) of the Employee Income Retirement Security Act (ERISA);

2. The freeze amendment was invalid because Sharon's Board of Directors failed to approve it; and

3. PBGC's phase-in regulation should not apply to the calculation of benefits after expiration of the temporary freeze on June 1, 1991.

Participant Notice

The Salaried Plan adopted the freeze amendment on March 11, 1988, which froze benefit accruals (but not vesting or eligibility service) retroactively to June 30, 1987. As to your first issue, the amendment's validity did not depend on either notice meeting the requirements of a

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§204(h) notice under ERISA.[1] Rather, as an amendment to retroactively reduce accruals, the freeze amendment had to comply with §412(c)(8) of the Code.[2] To comply, a special application had to be filed with the IRS pursuant to Rev. Proc. 79-18, 1979-1 C.B. 525, and IRS had to either grant its approval of the amendment or allow the 90-day review period to expire without taking action. Sharon filed the required application and IRS granted its approval on September 8, 1988.

Rev. Proc. 79-18, which describes the procedure for filing notice with, and obtaining approval from, the IRS does not require advance notice. Because §412(c)(8) of the Code has as its focus amendments that retroactively reduce accruals, imposing an advance notice requirement on such amendments would make little sense. The only notice IRS required with regard to §412(c)(8) of the Code is the notice described by Martin Slate of the IRS is his letter of June 9, 1988, to Philip Smalley, Sharon's Senior Vice President - Human Resources. That letter stated:

> The notice [to affected parties] must state that an application for approval of the amendment has been filed with the Service and that the Service will ordinarily consider any relevant information submitted if that information is submitted within 30 calendar days from the date the notice is mailed or hand delivered.

Sharon provided such notices to affected parties on July 29, 1988. (You included a copy of this notice as Exhibit F to your appeal filing.) Further, IRS approved the retroactive amendment to the Plan after the 30-day comment period had expired. Accordingly, the Appeals Board rejects your contention that the retroactive amendment should be found invalid based on improper notice to plan participants.

Company Approval of the Freeze Amendment

In your second issue, you question whether Sharon's Board of Directors approved the freeze amendment. In deciding this issue, the Appeals Board has followed the legal principles set forth by the Supreme Court in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). The Court in *Schoonejongen* concluded that the determination of whether a plan amendment procedure was followed in a particular case will depend on "a fact-intensive inquiry, under applicable

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Section 204(h) was added to ERISA by the 1986 Budget Reconciliation Act. It provided that a single-employer plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date. . . ." Section 204(h) further prescribes the parties that are entitled to receive such notice.

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Section 412(c)(8) of the Code and section 302(c)(8) of ERISA provide that no amendment may be used to reduce the accrued benefits of any plan participant unless the Secretary of Labor either approves such amendment or fails to disapprove the amendment within 90 days after the date on which a notice of such amendment is filed with the Secretary. Reorganization Plan No. 4 of 1978, which became effective December 31, 1978, transferred this function to the Secretary of the Treasury.

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corporate law principles, into what persons or committees . . . possessed amendment authority, either by express delegation or impliedly . . . ." *Id.* Further, in the event that an amendment was not properly authorized when issued, "the question would then arise whether any subsequent actions [by the company's officers] served to ratify the provision *ex post*." *Id.*

You assert that, "[a]lthough Sharon Steel was operating in bankruptcy under James Toren, a Chapter 11 trustee, Mr. Toren did not seek the Board 's approval of the [amendment] . . . ."[3] You offered no evidence to support your claim that Mr. Toren had acted without the Board of Director's approval. We note, however, that a Chapter 11 trustee generally has the authority to act in place of the Board of Directors. As the Supreme Court stated in *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343 (1985), "Congress contemplated that when a trustee is appointed, he assumes control of the business, and the debtor's directors are 'completely ousted.' *See* H.R.Rep. No. 95-595, pp. 220-221 (1977)." *Id.* at 352-353. Accordingly, if Mr. Toren had authorized the freeze amendment without seeking the Board of Directors's approval, he likely would have done so under the powers granted to him by the Bankruptcy Court.

Moreover, even if Sharon's Board of Director's had retained authority for plan amendments after Mr. Toren's appointment, we conclude that it likely had given the necessary approval. Before Mr. Toren was appointed as trustee in bankruptcy, Sharon took action to freeze the Plan as evidenced by the written notice by Mr. Smalley dated June 1, 1987. Furthermore, given the financial status of Sharon Steel at the time of amendment, the retroactive freezing of accruals significantly impacted upon Sharon Steel's ability to reorganize under Chapter 11 of the Bankruptcy Code. Thus, the retroactive freezing of accruals was an action that Sharon's Board of Directors, as well as the Chapter 11 trustee, reasonably would have taken.

Finally, the Appeals Board concluded that the following additional factors support the holding that the freeze amendment had been properly authorized, either by explicit approval or by subsequent ratification:

- On March 11, 1988, Mr. Smalley signed a Plan amendment implementing the freeze, which stated that "the Company has caused this amendment to be executed by its duly authorized officer . . . ."
- Mr. Smalley submitted an affidavit to PBGC (Exhibit H to your appeal filing) that indicated that the decision to freeze the plan was made with the full knowledge and authorization of Sharon's Board of Directors.
- Following the adoption of the freeze amendment, Sharon Steel (who was Plan Administrator) implemented the freeze in the benefit calculations for Plan participants.

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[3] Mr. Toren had been appointed Chapter 11 trustee in January 1988, which was after the freeze amendment process was initiated but was before the actual plan amendment was signed.

Phase-in of PBGC's Guarantee of Benefit Increases

When the Salaried Plan terminated, effective October 17, 1993, its assets were not sufficient to provide all benefits PBGC guarantees under Title IV of ERISA. Because of legal limitations under ERISA and PBGC's regulations, the benefits that PBGC guarantees may be less than the benefits a pension plan would otherwise pay.

ERISA sections 4022(b)(1) and (b)(7) phase-in PBGC's guarantee of "any increase in the amount of benefits under a plan resulting from a plan amendment" made or effective within the five years before Plan termination. This phase-in is equal to the greater of 20 percent of the benefit increase per month, or $20.00 per month (but not more than the amount of the increase), for each full year the Plan amendment was in effect before Plan termination. Under ERISA, the time a benefit increase is in effect begins with the later of the date the increase was adopted or the date it became effective.

Section 4022.2 of PBGC's regulation on *Benefits Payable in Terminated Single-Employer Plans* defines a benefit increase as "any benefit arising from the adoption of a new plan or an increase in the value of benefits payable arising from an amendment to an existing plan." This section further states that "benefit increase" includes "any change in plan provisions which advances a participant's or beneficiary's entitlement to a benefit, such as liberalized participation requirements or vesting schedules, reductions in the normal or early retirement age under a plan, and changes in the form of benefit payaments."

PBGC treated the Plan amendment unfreezing benefit accruals as a benefit increase subject to phase-in. PBGC determined that this amendment was "in effect" under ERISA for two full years between its effective date (June 1, 1991) and the Plan's termination date (October 17, 1993). Thus, PBGC phased-in its guarantee of benefits attributable to post-June 1, 1991 accruals at the rate of 40%/$40 per month.

As to your third issue, you said that the accrual freeze was intended to be temporary and the unfreezing merely a resumption of old benefits, not a benefit increase. To support your position, you cited Mr. Smalley's affidavit (Exhibit H). While the affidavit does assert that company officials intended the freeze to be temporary, it also notes that the intent was to unfreeze the plan "at such time as the business prospects of Sharon Steel Corporation improved." However, ERISA's phase-in rule establishes a "bright-line" test governed only by the occurrence of a benefit increase. ERISA does not permit PBGC to ignore a required phase-in based on the intent or particular economic circumstances of a plan sponsor. Moreover, the terms of the freeze amendment did not place any conditions on its effectiveness, nor did it contain an expiration date. Thus, even if the freeze was intended to be temporary, a plan amendment clearly was required to "unfreeze" the Plan.

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As a result of the March 11, 1988 freeze amendment, participants could accrue no additional benefits under the Salaried Plan, but instead were limited to the benefits they had earned as of the effective date of the freeze (June 30, 1987). Then, solely by operation of the June 1, 1991 unfreeze amendment, participants resumed accruing benefits based on their service and earnings after that date. The economic impact of this amendment was to increase immediately after June 1, 1991 the accrual rate of zero that was in effect immediately before June 1, 1991.

For the reasons described above, the Appeals Board concluded that the amendment unfreezing benefit accruals resulted in an increase in the value of benefits payable to Salaried Plan participants arising from an amendment to an existing plan.

Decision

Having applied the law, Plan provisions and PBGC regulations and policies to the facts in this case, the Appeals Board found that (1) the Freeze Amendment was validly adopted; (2) affected parties received proper notice under ERISA and the Code; (3) the 1991 Plan amendment lifting the freeze on benefit accruals is a benefit increase under ERISA section 4022(b)(1)(B); (4) the amendment was in effect under ERISA for two full years before the Plan termination date; and (5) PBGC's guarantee of the amount of any benefit increase resulting from the Plan amendment is phased-in at the 40%/$40 rate. Therefore, we found no basis for changing PBGC's determination of your benefit and must deny your appeal.

This is the Agency's final decision with respect to this matter and you may, if you wish, seek court review. If you have any questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,

Linda M. Mizzi
Member, Appeals Board