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Re: [redacted] Case 194601, Northwestern Steel & Wire Co. Pension Plan B ("Salaried Plan")

Dear [redacted]

The Appeals Board has reviewed your appeal of the Pension Benefit Guaranty Corporation's ("PBGC") August 23, 2004 determination of your benefit under the Salaried Plan. In your appeal, you request a recalculation of your Salaried Plan benefit without applying a phase-in reduction of your Rule-of-65 shutdown benefit. For the reasons stated below, we deny your appeal.

Background

The Northwestern Steel & Wire Company ("Company") maintained two defined benefit pension plans. The Salaried Plan covered non-union workers, while Plan A ("Hourly Plan")(collectively, the "Plans") covered union workers.

The Pension Plans Prior to 1988

The Rule-of-65 ("R65") early retirement benefit was included in both the Salaried and Hourly Plans effective in 1980. Both plans provided an unreduced early retirement benefit to employees meeting

certain age and service requirements, if (1) the employee was disabled, or (2) the Company and the employee agreed that the employee's retirement was mutually beneficial for the employee and the Company. See Exhibits 1A, 1B. Additionally, under the Hourly Plan an employee could qualify for the R65 benefit if the employee was laid off following a plant shutdown with no prospect of future long-term employment with the Company. See Exhibit 1B.

Treasury Regulation 1.411(d)-4

In 1988, the Treasury Department issued a regulation, generally effective for plan years beginning on or after January 1, 1989, prohibiting plans from conditioning the availability of a benefit, such as early retirement, on the employer's consent. Treas. Reg. §§ 1.411 (d)-4, Q-4 through Q-9. Under this regulation, a plan sponsor was required to amend any such plan provisions to reflect one of the following options: (1) eliminate the consent requirement, (2) eliminate the benefit conditioned on the consent, or (3) condition the availability of the benefit on objective criteria set forth in the plan. Id.

Subsequent Plan Amendments

To comply with the 1988 Treasury Regulation, in December 1994, the Company restated the Hourly and Salaried Plans, effective August 16, 1988, removing the provision allowing participants to receive the

R65 benefit with the Company's consent.[1] Following these changes, the Hourly Plan continued to provide a R65 shutdown benefit. See Exhibits 3A, 3B. However, the Company did not amend the Salaried Plan to allow for the R65 benefit in the event of a plant shutdown until November 1998. See Exhibit 4, Second Amendment of Pension Plan B of Northwestern Steel & Wire Co.

PBGC's Phase-In of R65 Benefits in the Salaried Plan

On August 28, 2001, PBGC terminated and trusteed both the Salaried and Hourly Plans. PBGC guarantees the pension benefits under each Plan, subject to certain limitations imposed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2000 & Sup. III, 2003) ("ERISA").

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[1] In your appeal, you note that plan sponsors are required to provide notice to participants of any material modifications to a plan's terms. You argue that since you did not receive notice of the 1989 amendment eliminating the "mutual consent" provision as an eligible event for the R65 benefit ("1989 Amendment"), it should not be considered a change or material modification to the plan. While ERISA does not define "material modification," courts have found that the addition or deletion of qualification provisions concerning benefits is a material modification, requiring notice to participants. See Ward v. Maloney, 386 F.Supp.2d 607, 612 (M.D.N.C. 2005); Baker v. Lukens Steel Co., 793 F.2d 509, 512 (3d Cir. 1986). Thus, the 1989 Amendment, which eliminated the "mutual consent" as a qualifying event for the R65 benefit, constituted a "material modification." As a result, the Company provided notice to participants of the modification in a revised Summary Plan Description ("SPD"), pursuant to 29 U.S.C. §§ 1202(a), 1204(b)(4). See Exhibit 2.

With respect to the 1998 amendment of the Salaried Plan adding plant shutdown as a qualifying event for the R65 benefit, PBGC does not know whether the Company issued an updated SPD as required under 29 U.S.C. § 1204(b)(4). Failure to issue a SPD as required, however, does not entitle participants to a substantive remedy. Garst v. Wal-Mart Stores, Inc., 2002 WL 409414 (6th Cir. 2002). Instead, a violation of this section merely subjects a plan administrator to a penalty. Id.

One of those limitations requires PBGC to "phase in," or pay only a percentage of, benefit increases added to plan within five years of its termination. 29 U.S.C. § 4022(b). This "phase-in" is equal to the greater of twenty percent of the increase in the monthly benefit, or $20.00 per month, for each full year the plan amendment was in effect before plan termination. 29 U.S.C. § 4022(b)(7). In this case, the Salaried Plan was amended in November 1998 to include plant shutdown as a qualifying event for the R65 early retirement benefit. Because the Salaried Plan terminated in August 2001, the amendment was in effect more than two years, but less than three years, before termination. As a result, ERISA requires PBGC to phase in such a benefit increase by the greater of 40% or $40. 29 U.S.C. § 4022(b)(7).

Benefit Determination and Appeal

In its August 23, 2004 determination letter, PBGC informed you that you are entitled to a monthly payment of $584.64. PBGC's Benefit Statement indicated that your R65 shutdown benefit was subject to a 40%/$40 phase-in. See Exhibit 5, Benefit Statement. On September 18, 2004, you appealed the benefit determination, contending the R65 shutdown benefit under the Salaried Plan should not be phased-in. See Exhibit 6.

Discussion

Reading the R65 Shutdown Benefit Provision into the Salaried Plan Prior to 1998

In your appeal, you argue that even though the Salaried Plan did not provide the R65 benefit in the event of a plant shutdown until November 1998, PBGC should nonetheless calculate R65 benefits under the Salaried Plan in the same manner as the Hourly Plan, since it was the employees' understanding and the Company's long-standing policy, that the plans were identical. ERISA requires that all pension plan documents be in writing[2] in order to ensure that "every employee may, upon examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. REP. NO. 1280, *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038, 5077-78. PBGC must discharge its duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [Title I] and title IV." 29 U.S.C. § 1104(a)(1)(D) (2005). Here, the R65 provision in the Salaried Plan prior to and after the 1998 amendment is consistent with Title I and Title IV of ERISA; consequently, PBGC must administer the plan according to its written terms, subject to limitations imposed by ERISA.

While there are limited circumstances in which PBGC may look beyond the written plan documents to determine a participant's benefit,

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[2] 29 U.S.C. § 1102(a)(1) (2005).

such as when a plan provision is ambiguous[3], such circumstances do not exist in this case. See Epright v. Envtl. Res. Mgmt., Inc. Health & Welfare Plan, 81 F.3d. 335, 340 (3d Cir. 1996) (noting that extrinsic evidence is only to be used when there is an ambiguity in the plan's terms). Here, the terms of the Salaried Plan are clear.[4] Under the 1988 restatement of the Salaried Plan, plant shutdown is clearly not a qualifying circumstance for the R65 benefit. See Exhibit 3A. Moreover, the Salaried Plan's 1988 Summary Plan Description, which describes the plan provisions in plain language, also does not include plant shutdown as a qualifying event. See Exhibit 2. It was not until ten years later, as a result of the 1998 amendment, that plant shutdown was added as an eligible event for the R65 benefit under the Salaried Plan. Since the R65 provision is not ambiguous, PBGC will not look to extrinsic evidence.

Two Year "Look-back" Provision

When calculating a participant's benefit, PBGC looks to the participant's status (i.e., vested or non-vested) and benefit accrual as of the date of plan termination ("DoPT"). 29 U.S.C. § 1322(a); 29 C.F.R.

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[3] "An ambiguity exists when the terms or words of a pension plan are subject to more than one reasonable interpretation." McDaniels v. The Chevron Corp., 203 F.3d 1099, 1110 (9th Cir. 2000).

[4] Your appeal included an e-mail, two letters, and actuarial reports as evidence of the Company's understanding that the plans were identical and the Company's intention to provide the R65 shutdown benefit to all employees whether hourly or salaried. As noted above, there are limited circumstances in which PBGC may look beyond the written plan documents to determine a participant's benefit, such as when a plan provision is ambiguous. The Salaried Plan is not ambiguous on the R65 benefits. Therefore, PBGC cannot take these documents into account to determine a participant's benefit.

§ 4022.3. According to the records obtained by PBGC upon termination and trusteeship of the Plans, you were a participant in the Salaried Plan entitled to any vested benefits you had accrued under the terms of that Plan as of its DoPT of August 28, 2001.

In your appeal, you note that there are several supervisors receiving the unreduced R65 shutdown benefit from the Salaried Plan. Those participants, however, fell within the two year "look-back" window provided by the collective bargaining agreement between the Company and the United Steelworkers of America, which allowed salaried employees whose positions were eliminated within two years of their transfer to the Salaried Plan to return to the Hourly Plan upon their request. See Exhibit 7. Based on a Third Step Grievance filed by the Chairman of the Grievance Committee on May 29, 2001, it appears those salaried employees made the necessary request to be transferred back to the Hourly Plan. See Exhibit 8, Third Step Grievance. Based on the documentation provided to PBGC, see Exhibit 8, that the Company failed to effectuate the transfers, PBGC decided to treat those participants as Hourly Plan participants for the R65 shutdown benefit only. PBGC has no authority, however, to transfer participants from one Plan to another post-DoPT absent a showing of clear error. As you state in your appeal, you did not request such a transfer back to the Hourly Plan. Moreover, you transferred to the Salaried Plan approximately three years before the elimination of your position, making you ineligible for the protection afforded by the two-year lookback provision. Therefore, your benefit was properly calculated under the terms of the Salaried Plan.

Decision

For the reasons stated above, the Board denies your appeal. You may, if you wish, seek court review of this decision. If you need other information from PBGC, please call the Customer Contact Center at 1-800-400-7242.

Sincerely,

Charles W. Vernon
Chair, Appeals Board

Enclosures

Exhibit 1A – Salaried Plan SPD 1980 Rule-of-65 Provision
Exhibit 1B – Hourly Plan SPD 1980 Rule-of-65 Provision
Exhibit 2 – Salaried Plan SPD 1988 Rule-of-65 Provision
Exhibit 3A – Salaried Plan Rule-of-65 Provision Effective 8/16/88
Exhibit 3B - Hourly Plan Rule-of-65 Provision Effective 8/16/88
Exhibit 4 – Second Amendment of Salaried Plan
Exhibit 5 – Benefit Statement
Exhibit 6 – Benefit Appeal
Exhibit 7 – Article X, Section 5(a) of 1996 CBA Between USWA and Northwestern Steel & Wire
Exhibit 8 – Third Step Grievance – May 29, 2001