PBGC
Protecting America's Pensions
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

December 31, 2013

Re: Appeal 2013-[ ];
PBGC Case Number: [ ];
Plan Name: Munksjö Paper Inc. Retirement Plan (the "Munksjö Plan" or the "Plan")

Dear Messrs. [ ]:

This Appeals Board decision responds to the appeal you filed on behalf of your client Munksjö Paper Inc. ("Munksjö") regarding PBGC's January 17, 2013 determination. PBGC's determination letter stated that Munksjö has incurred liability in the amount of $3,616,679 under section 4062(e) of the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to the Munksjö Plan.[1] For the reasons we explain below, the Board found that your appeal did not provide a sufficient basis for changing PBGC's determination; we must, therefore, deny your appeal.

Introduction

Section 4062(e) provides financial protection for pension plans, their participants, and PBGC. The section 4062(e) liability arises when two conditions are met: (1) "an employer ceases operations at a facility in any location;" and (2) "as a result of cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and

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[1] ERISA § 4062(e) ("section 4062(e)") is codified at 29 United States Code ("U.S.C.") § 1362(e). In this decision, we will cite to ERISA and omit parallel citations to its codification in the U.S.C.

maintained by him are separated from employment."[2] These are strict criteria. Individual factors such as the financial condition of the sponsor or the plan's funding level are not relevant in determining liability. PBGC may, however, take such factors into account in its enforcement decisions. The Appeals Board reviews only determinations of liability under section 4062(e).

ERISA section 4063 provides that an employer may satisfy section 4062(e) liability by placing the amount owed in escrow with PBGC.[3] Alternatively, PBGC may require a bond for up to 150 percent of the section 4062(e) liability.[4] If the pension plan remains underfunded and terminates within five years of the section 4062(e) event, the escrowed amount is forfeited, or PBGC will "realize on the bond."[5] The proceeds held in escrow (or covered under the bond) then become assets of the terminated pension plan.[6] If the plan does not terminate within the five-year period, the escrow will be refunded to the employer, without interest, or the bond is cancelled.[7]

PBGC's Determination

PBGC's January 17, 2013 determination notified Munksjö that it had incurred liability under section 4062(e) in the amount of $3,616,679 because it met the statutory criteria for the following reasons:

- Munksjö ceased manufacturing operations at the Fitchburg, Massachusetts, facility on June 27, 2009; and
- As a result of the cessation of manufacturing operations at the Fitchburg facility, 76.99 percent of the total number of Munksjö's employees who were participants in the Munksjö Plan were separated from employment.

PBGC's determination further states that Munksjö may satisfy its liability under ERISA sections 4062(e) and 4063 by placing that amount in escrow with

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2 PBGC uses the term "section 4062(e) event" when it refers to the conditions under which section 4062(e) liability is incurred. *See* 29 Code of Federal Regulations ("C.F.R.") § 4062.8(b) (example of "section 4062(e) event"). In this decision, we similarly use the term "section 4062(e) event" to refer to the conditions under which section 4062(e) liability is incurred.

3 ERISA § 4063(b).

4 ERISA § 4063(c).

5 ERISA § 4063(c)(3).

6 *Id.*

7 ERISA § 4063(c)(2).

PBGC, or, alternatively, by posting a bond for up to 150 percent of the section 4062(e) liability. PBGC also informed Munksjö that, in appropriate cases, PBGC has the authority to consider alternative arrangements for satisfying the section 4062(e) liability.

Finally, PBGC's January 17, 2013 determination notified Munksjö that the determination is subject to appeal under PBGC Regulations at 29 C.F.R. § 4003, Subpart D: Administrative Appeals. As Munksjö filed a timely appeal, PBGC has taken no further action with respect to Munksjö's liability under section 4062(e) while this appeal has been pending.

Your Appeal

On September 6, 2013, you filed a 70-page appeal brief ("Appeal Brief" or "Appeal") that requests that the Appeals Board: (1) reverse PBGC's January 17, 2013 determination and issue a final agency determination that Munksjö has no liability under section 4062(e); (2) refer this matter to PBGC's Director, with a recommendation that the Director exercise his discretion to decide not to enforce section 4062(e) liability against Munksjö; or (3) remand the matter to the PBGC department that issued the initial determination, with instructions to "recalculate the liability amount in accordance with applicable law." Appeal at 2.

Your September 6, 2013 Appeal Brief includes three general topics, under which you raise several more specific issues. We list below the three general topics in your appeal.

1. ***Did Munksjö cease operations at a facility within the meaning of section 4062(e)?*** (Appeal at 34-50)

2. ***Should PBGC seek to enforce section 4062(e) liability in this case without a final regulation in force?*** (Appeal at 50-56)

3. ***Is the liability formula in PBGC's regulation, in general or as applied to Munksjö, contrary to law?*** (Appeal at 56-68)

The Appeal also asserts that: (a) PBGC should not enforce the section 4062(e) liability without evidence of a substantial threat to participants or to PBGC, (b) PBGC did not comply with its own regulations in determining the amount of the liability, and (c) there are calculation errors that should be corrected.

After you received documents pursuant to Freedom of Information Act ("FOIA") requests, you filed supplements to your appeal on November 5, 2013, and December 17, 2013. The first supplement to the Appeal concerns the following: (a) the legal standard for judicial review, (b) a request for an *in camera* review of documents withheld from the response to a FOIA request, and (c) records reflecting communications to the Appeals Board. The second supplement to the Appeal discusses additional funding contributions made to the Plan in excess of the minimum contributions required for the 2013 plan year.

Background

1. *Corporate and pension plan history.*

Munksjö AB was a manufacturer and retailer of specialty paper and pulp products based in Stockholm, Sweden, at the time when the events leading to the issuance of PBGC's determination letter occurred.[8] Munksjö AB did business in the United States specialty paper market through Munksjö, its United States subsidiary. According to your Appeal Brief, from 1996 to 2008, Munksjö was engaged in the business of manufacturing and selling specialty décor paper products from its facility in Fitchburg, Massachusetts. Munksjö AB employed approximately 3,000 employees throughout its facilities in Europe and North America.

Hourly and salaried employees at the Fitchburg location earned benefits under the Munksjö Plan, a qualified single-employer defined-benefit plan sponsored by Munksjö. According to your Appeal Brief, the Plan was largely a product of collective bargaining between Munksjö and its employees' union, Teamsters Local No. 170. In 2007, Munksjö froze benefit accruals under the Plan and instituted a 401(k) plan for its Fitchburg employees.

2. *The cessation of manufacturing operations at Munksjö's Fitchburg facility.*

In 2008, Munksjö experienced both a decline in demand for its products and an increase in production costs due to rising oil prices. In March of that year, Munksjö AB and Munksjö developed a plan to cut costs and improve Munksjö's operations. Munksjö continued, however, to experience losses in 2008. Ultimately, Munksjö AB decided on October 29, 2008, that Munksjö would cease all décor paper manufacturing operations at the Fitchburg facility.

On April 21, 2009, Munksjö notified its employees that manufacturing operations at the Fitchburg facility would terminate. Subsequently, on June 27, 2009, Munksjö ceased manufacturing operations and terminated its manufacturing employees. Munksjö did not resume manufacturing operations after that date; however, its European parent company, Munksjö AB, resumed those operations at its ongoing European plants.

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[8] On May 27, 2013, Munksjö AB and Ahlstrom Corporation's Label and Processing Business merged to form a new corporation named Munksjö Oyj. We note that "AB" is an abbreviation of "aktiebolag," which is the Swedish term for a corporation. "Oyj" is an abbreviation of "julkinen osakeyhtiö," which is the Finnish term for a publicly traded corporation.

3. ***Relevant statutory provisions.***

a. The statutory language in section 4062(e).

Section 4062(e), which applies to single-employer plans covered by Title IV of ERISA, states:

> (e) **Treatment of substantial cessation of operations.**—If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 4063, 4064, and 4065 [of ERISA] shall apply.

b. Additional requirements in ERISA section 4063.

Section 4062(e) provides that, if an event triggering liability occurs, the employer "shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections [4063, 4064, and 4065 of ERISA] shall apply."[9] While (as discussed below) the requirements in ERISA section 4063 are important with respect to your appeal, ERISA sections 4064 and 4065 do not appear to impact upon the issues you have raised.[10]

ERISA section 4063 applies to single-employer plans that have two or more contributing sponsors, at least two of whom are not under common control (i.e., multiple employer plans). Liability under section 4063 is triggered when a "substantial employer" withdraws from a multiple employer plan. As PBGC stated in its preamble to its section 4062(e) regulation, the cessation of operations at a

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9 Under section 4001(a)(2) of ERISA, "substantial employer," for any plan year of a single-employer plan, means one or more persons--

> (A) who are contributing sponsors of the plan in such plan year,
> (B) who, at any time during such plan year, are members of the same controlled group, and
> (C) whose required contributions to the plan for each plan year constituting one of—
> (i) the two immediately preceding plan years, or
> (ii) the first two of the three immediately preceding plan years, total an amount greater than or equal to 10 percent of all contributions required to be paid to or under the plan for such plan year.

10 ERISA section 4064 applies to the termination of a single-employer pension plan that has, or had, two or more sponsors that are not members of the same controlled group. ERISA section 4065 requires PBGC-covered, single-employer plans to file annual reports with PBGC.

facility (as defined in section 4062(e)) is "analogous," but not "equivalent," to a withdrawal from a multiple employer plan.[11]

Under section 4063, if a section 4062(e) event occurs:

- The employer must notify PBGC of the event within 60 days. PBGC shall, as soon as "practicable" thereafter, determine the amount of the liability and notify liable persons;[12] and

- Any amount collected by PBGC shall be held in escrow.[13] In the alternative, the employer may be required to furnish a bond to PBGC in an amount not exceeding 150 percent of the liability.[14]

ERISA section 4063(b) further provides that, "[i]n addition to and in lieu of" the manner of computing the liability prescribed in that provision, PBGC "may also determine such liability on any other equitable basis prescribed by the [PBGC] in regulations."

c. The duration and end of section 4062(e) liability.

ERISA section 4063(c)(2) provides that, if the plan does not terminate within five years, "the liability is abated and any payment held in escrow shall be refunded without interest (or the bond cancelled) in accordance with bylaws or rules prescribed by the corporation."

ERISA section 4063(c)(3) provides that the following shall occur in the event of pension plan termination within the five-year period:

> If the plan terminates under [ERISA] section 4041 (c) or 4042 within the 5-year period . . . , [PBGC] shall—
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> (A) demand payment or realize on the bond and hold such amount in escrow for the benefit of the plan;
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> (B) treat any escrowed payments under this section as if they were plan assets and apply them in a manner consistent with this subtitle; and
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> (C) refund any amount to the contributing sponsor which is not required to meet any obligation of [PBGC] with respect to the plan.

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11 71 Fed. Reg. 34,819, 34,821 (June 16, 2006).

12 ERISA § 4063(a).

13 *Id.*

14 ERISA § 4063(c).

d. Alternative arrangements for satisfying section 4062(e) liability.

ERISA section 4067 authorizes PBGC to make "alternative arrangements" with any contributing sponsors or members of their controlled group for satisfaction of section 4062(e) liability. As authorized by this provision, PBGC has taken a flexible enforcement approach as to how a plan sponsor satisfies its section 4062(e) liability, evaluating each case based on its facts and circumstances. For example, PBGC and employers often agree on "alternative arrangements" for section 4062(e) liability under which additional funding contributions are made to pension plans.

4. ***Regulations and Enforcement Program.***

Section 4062(e) was included in the original 1974 version of ERISA. In 2006, PBGC exercised its authority under section 4063 and promulgated a final liability calculation rule for section 4062(e). From 2006 to 2010, PBGC negotiated settlements in 37 enforcement actions under section 4062(e) for more than $600 million.

In 2010, PBGC decided to "clarify the meaning of statutory terms used to describe when an event covered by section 4062(e) occurs" through a proposed section 4062(e) regulation. 75 Fed. Reg. 48283, 48284 (Aug. 10, 2010). The proposed regulation sought to clarify PBGC's interpretation of several terms in the statute. For example, it explained PBGC's position that a section 4062(e) cessation of operations occurs when an employer ceases a single operation — an "organizationally, operationally, or functionally distinct unit of an employer." 75 Fed. Reg. 48285. The proposed regulation also indicated that "section 4062(e) may apply to an employer's cessation of an operation at one facility even if the employer continues or resumes the operation at another facility." *Id.* The 2010 proposed regulation has not become a final regulation.

On November 2, 2012, PBGC established a "4062(e) Enforcement Pilot Program." Under this program, PBGC focuses its 4062(e) enforcement efforts on plan sponsors who present the greatest risk of plan termination.

Discussion

1. Did Munksjö cease operations at a facility within the meaning of section 4062(e)? (Appeal at 34-50)

Liability under ERISA section 4062(e) is incurred when: (1) an employer **ceases operations at a facility in any location**," and (2) "as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment." (Emphasis added.)

a. Section 4062(e) does not require that "all operations" cease at a facility in order for a section 4062(e) event to occur.

In your appeal, you state the following reasons why Munksjö should not be held liable under section 4062(e):

- You assert that Munksjö did not cease operations under section 4062(e) because it terminated only its "paper production" activities at the Fitchburg facility, which was just one part of the "operations" conducted there. Appeal at 34-38.

- You assert that the transfer of the paper manufacturing operations from the Fitchburg facility to affiliated facilities in Europe did not result in a cessation of the paper manufacturing operations at the Fitchburg facility. Appeal at 38-39.

- You assert that although Munksjö ceased paper manufacturing operations at the Fitchburg facility on June 27, 2009, Munksjö continued other operations (namely, sales and support operations) at the Fitchburg facility. Appeal at 40.

- You assert that PBGC's determination that a section 4062(e) event occurred despite the fact that sales and support operations continued at the Fitchburg location is "inconsistent with the plain meaning" of section 4062(e) and its legislative history. Appeal 40-48.

Several of your arguments relate to the plain language of section 4062(e). You claim that the statute's plain meaning conflicts with PBGC's interpretation of section 4062(e) and its application to Munksjö's cessation of manufacturing operations at the Fitchburg facility. The Appeals Board, however, disagrees with your reading of the "plain meaning" of section 4062(e). We find nothing in the language of section 4062(e) to support your claim that an employer must cease all significant operations at a facility for 4062(e) liability to arise. Indeed, if Congress had intended the cessation of "all" operations at a facility to be required for 4062(e) liability to arise, it could have easily so specified.

As a general rule, statutory language, unless otherwise defined, is to be given its ordinary, common meaning. *See, e.g., Summit Valley Indus., Inc. v. Loc. 112, United Bhd. Of Carpenters & Joiners of Am.*, 456 U.S. 717, 722 (1982); *see also Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1358 (2012) (stating "in construing . . . any statute, we first look to its language, giving the words used their ordinary meaning."). In the case of section 4062(e), the term "operations" is not defined. In common usage, the term can apply to both a plural and singular set of activities.

Although you claim that the legislative history does not support PBGC's interpretation of the term "operations" in section 4062(e), you cite no portion of the

legislative history and the Appeals Board found nothing in the legislative history that indicates the term "operations" was intended to mean "all operations."

In finding that a section 4062(e) event occurred when the manufacturing operations at the facility in Fitchburg ceased, PBGC concluded that manufacturing operations are "operations" under the common, ordinary meaning of the term. Thus, section 4062(e) applies to the Munksjö Plan due to (1) the cessation of those operations at the facility in Fitchburg; and (2) the accompanying 76.99% decrease in the number of active employees who were participants in the Munksjö Plan. The fact that sales and support operations at the Fitchburg facility continued after the cessation of the manufacturing operations has no bearing on the application of section 4062(e) to the Munksjö Plan. The Appeals Board finds PBGC's application of section 4062(e) to the cessation of manufacturing operations at the Fitchburg facility is firmly based on a straightforward reading of the language of section 4062(e).

PBGC's interpretation of "operations" is also consistent with the federal rules of statutory construction set forth in the Dictionary Act. Specifically, 1 U.S.C. § 1 provides as follows:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words importing the singular include and apply to several persons, parties or things; words importing the plural include the singular. (Underlining added for emphasis.)

As this provision indicates, singular and plural terms in a statute can be understood to include their counterparts when permitted by the statute's context and purpose. See, e.g., *A.F. Stoddard & Co., Ltd. v. Dawn*, 564 F.2d 556 (D.C. Cir. 1977) (holding that a patent statute allowing joint inventors to correct and resubmit patent applications containing harmless errors also applies to single inventors pursuant to 1 U.S.C. § 1).

In previous instances, courts have found that federal agencies may freely substitute singular for plural terms in a statute. For example, in *Soto-Hernandez v. Holder*, 729 F.3d 1 (1st Cir. 2013), the First Circuit considered whether it was appropriate for the Department of Homeland Security ("DHS") to seek removal of an illegal alien for unlawful "trafficking in firearms." Although the alien in that case had been convicted of unlawfully selling a single firearm, the court held that under the Dictionary Act, the statutory term "firearms" could apply to the singular term "firearm." *Id.* at 5. The court found nothing in the removal statute that would suggest that Congress specifically required only a plural construction, and therefore, DHS's interpretation of the statutory term "firearms" was permissible. *Id.*

Similar to the statute in question in *Soto-Hernandez*, the Appeals Board found nothing in the context or purpose of section 4062(e) that would preclude application of the Dictionary Act's general rule of construction and PBGC's use of the term "operation" for the plural "operations." Moreover, we believe that PBGC's

interpretation of the term "operations" to include a single operation furthers the evident Congressional goals in enacting this provision.

It is clear that Congress included section 4062(e) in ERISA to provide PBGC with security when an employer experiences an event that makes plan termination more likely. An interpretation of the term "operations" to mean "all operations" would allow employers to cease all meaningful operations at a facility but avoid liability by retaining one or two employees in ancillary operations such as security or maintenance. Such an interpretation of the statute would frustrate Congress's intent of protecting PBGC from assuming large, unfunded liabilities of plan sponsors after plan terminations.

Moreover, because liability arises under section 4062(e) only if the employer both ceases operations at a facility and terminates more than 20 percent of the plan's participants, the statute naturally distinguishes those events that Congress deemed to constitute a risk to a plan from those that do not. It appears irrelevant to the Appeals Board whether there is a cessation of "all" operations or a cessation of a single "operation" because, in either event, a substantial number of the participants have been terminated and a substantial risk to the plan exists. If an employer ceases an operation but retains more than 80% of its employees who are participants in the plan, section 4062(e) does not apply. Thus, the statute naturally limits PBGC's enforcement authority to only those circumstances in which a true potential threat is presented to the plan.

For the above reasons, the Appeals Board found that a section 4062(e) event occurred in 2009 despite the continuation of non-manufacturing operations at the Fitchburg facility.

b. Relocations of operations fall within the scope of section 4062(e).

In your appeal, you claim that the "transfer" or "relocation" of the paper manufacturing operations from the Fitchburg facility to other facilities in European locations run by Munksjö's European affiliate did not result in a cessation of the paper manufacturing operations at the Fitchburg facility. Appeal at 38-39. You rely in your appeal on an early PBGC Opinion Letter — 77-134 — for the proposition that relocations of operations do not fall within the purview of section 4062(e).

We note that the terms of section 4062(e) do not provide any exceptions for cessations of operations that result from a transfer or relocation of operations. Under the plain statutory language, section 4062(e) applies whenever an employer "ceases operations at a facility in *any location*" and as a result, more than 20 percent of the participants in a plan sponsored by the employer are separated from service. (Emphasis added.)

We note also that section 4062(e) does not distinguish between a temporary cessation, a permanent cessation, or a relocation of operations. There is no exception for plan sponsors who cease operations at a facility but later resume them elsewhere. Thus, under the plain terms of section 4062(e), liability may arise

when an employer temporarily ceases operations and transfers those operations from one facility to another and more than 20 percent of the plan's participants are separated from service.

Furthermore, the Appeals Board found that your reliance on Opinion Letter 77-134 is misplaced. Opinion Letter 77-134 addressed whether a particular plan sponsor's relocation of a particular plant within a metropolitan area, and the resulting reduction of 20 percent of employees covered by a plan, would constitute a section 4062(e) cessation of operations. The Letter concluded that under the facts presented in that case, there was "neither a termination of the Plan under Title IV of the Act nor do the provisions of Sec. 4062(e) of the Act apply."

The facts surrounding the cessation of Munksjö's paper manufacturing operations at the Fitchburg facility are materially different from the facts considered in Opinion Letter 77-134. In Opinion Letter 77-134, the operations in question were relocated in the same geographical location. Munksjö did not transfer manufacturing operations to any other facility in the geographical area of Fitchburg, Massachusetts. The fact that Munksjö AB, Munksjö's European parent company, resumed some of the manufacturing operations in Europe is irrelevant in determining whether Munksjö ceased its paper manufacturing operations in Fitchburg.[15]

For the reasons explained above, the Appeals Board has concluded that the advice offered in Opinion Letter 77-134 is not applicable to Munksjö's cessation of its paper manufacturing operations at the Fitchburg facility.

c. Conclusion.

For the reasons we cited above, the Appeals Board has concluded that PBGC's application of section 4062(e) to Munksjö's cessation of paper manufacturing operations at its Fitchburg facility was in accordance with a straightforward interpretation of the language of section 4062(e), and thus the determination was consistent with the plain meaning of the statute. The Appeals Board found no reason to change PBGC's determination that Munksjö is liable under ERISA section 4062(e).

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[15] We note that PBGC is not precluded from changing the conclusion reached in Opinion Letter 77-134 through adjudication or otherwise. It is a well-established principle of administrative law that an agency is permitted to change its position if it supplies a "reasoned basis" for the change. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). As the Supreme Court has stated, "regulatory agencies do not establish rules of conduct to last forever . . . and . . . must be given ample latitude to adapt their rules and policies to the demands of changing circumstances." *Id.* (internal citations omitted). And "an agency is free to alter its past rulings and practices even in an adjudicatory setting" if it "provides a reasoned explanation for any failure to adhere to its own precedents." *See also Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981). As discussed, in this case it is not necessary for the Appeals Board to consider whether the conclusion in Opinion Letter 77-134 should continue to apply.

2. *Should PBGC seek to enforce section 4062(e) liability in this case without a final regulation in force?* (Appeal at 50-56)

In your appeal, you claim that Munksjö did not have fair notice of PBGC's interpretation of section 4062(e) at the time the section 4062(e) event occurred.

PBGC has been actively enforcing section 4062(e) liability since its liability calculation rule became final in 2006. The Appeals Board has no reason to believe, and your Appeal Brief provided no argument to suggest, that PBGC treated Munksjö differently from other employers who incurred section 4062(e) liability. As we found above, PBGC's determination of Munksjö's section 4062(e) liability was the result of a straightforward application of the terms of section 4062(e). Thus, the Appeals Board has found that the language of section 4062(e) itself provided sufficient notice to Munksjö of its potential liability under section 4062(e).

3. *Is the liability formula in PBGC's regulation, in general, or as applied to Munksjö, contrary to law?* (Appeal at 56-68)

Your appeal contains several arguments based on issues relating to the validity and reasonableness of PBGC's section 4062(e) regulation and PBGC's use of estimation procedures to determine Munksjö's section 4062(e) liability in accordance with the liability formula in PBGC's 2006 regulation. You also questioned the validity and reasonableness of the liability formula as it applies to Munksjö, based on a letter you submitted with the Appeal from Munksjö's actuary, which cited calculation errors with respect to specific participants.

In your appeal, you recognized that the same issues regarding the validity and reasonableness of PBGC's regulation were raised by the appellant and answered by the Appeals Board in the *Bendix*[16] decision.

We address your arguments concerning the liability calculation below.

a. <u>It is appropriate and necessary for PBGC to use its estimation procedures based on non-seriatim data (gross participant data) in calculating the section 4062(e) liability to avoid undue delay.</u>

As the Appeals Board said in *Bendix*, PBGC's regulation was promulgated by notice-and-comment rulemaking. Through this process, PBGC invited interested parties to submit comments concerning its proposed rule.[17] PBGC further

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16 http://www.pbgc.gov/Documents/apbletter/Decision--Bendix-Commercial-2011-08-08.pdf.

17 *See Liability Pursuant to Section 4062(e) of ERISA*, 70 Fed. Reg. 9258 (proposed February 25, 2005). The comments PBGC received are available on its website at http://www.pbgc.gov/Documents/section4062_ERISA.pdf.

considered the comments it received before it issued its final regulation.[18] In the *Bendix* decision, the Appeals Board concluded that it lacks the authority to review the validity or the reasonableness of a regulation issued through notice-and-comment rulemaking. The Appeals Board finds no reason to deviate from that conclusion in this Appeal.

Furthermore, in its section 4062(e) regulation, PBGC established a rule of general applicability. By the regulation's terms, the liability formula is to be applied whenever a section 4062(e) event occurs, regardless of the facts of a given case. Furthermore, there is nothing to indicate that PBGC intended for the Appeals Board to review in an appeal the regulation as it is applied to a particular employer. The Appeals Board accordingly concluded that it lacks the authority to determine whether or not PBGC's regulation is invalid as applied to Munksjö.

As the Appeals Board explained in *Bendix*, section 4062(e) is inherently different than PBGC's claims for employer liability under section 4062(b) of ERISA, which are calculated according to the procedures outlined in PBGC's Actuarial Technical Manual (the "Manual"). Unlike section 4062(b), nothing in ERISA or PBGC's regulations require PBGC to use the Manual's procedures or perform participant-by-participant calculations in determining liability under section 4062(e). *Bendix* at 20. The decision explained as follows:

> Section 4062(e) liability differs from ERISA section 4062(b) liability in the following significant ways: (1) section 4062(e) requires a liable employer [to] provide "security" to PBGC for a limited time period (five years), while ERISA section 4062(b) liability can be viewed as the employer's "final bill" to PBGC for that plan's underfunding; (2) in contrast to the finality of a section 4062(b) assessment, the employer is released from section 4062(e) liability if the plan does not terminate within five years, with the escrowed funds returned to the employer or the bond cancelled; and (3) even if the plan terminates within the five-year period, the escrowed fund or bond amount will become a plan asset as of the plan's termination date, and PBGC then will do a final accounting under ERISA of what the employer owed to PBGC, and the plan's trustee as of the termination date.

Id. at 21.

These obvious differences negate the need for PBGC to perform a precise analysis of a plan's underfunding when calculating liability under section 4062(e). As the Appeals Board explained in *Bendix*, PBGC "must be able to determine section 4062(e) liability without undue delay." *Id.* Since the valuation procedures set forth in the Manual can often take several years to complete, it is not practicable for PBGC to perform such valuations when assessing section 4062(e) liability. Furthermore, in the event the plan terminates within the five years that the section 4062(e) liability is held in escrow, any amounts in excess of that needed to fully satisfy the plan's benefit obligations will be returned to the plan sponsor. For these

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[18] In the preamble to its final section 4062(e) regulation, PBGC discussed in detail the comments it received. 71 Fed. Reg. at 34,820 - 821.

reasons, PBGC need not determine section 4062(e) liability under the precise methods set forth in the Manual.

b. It is not appropriate to offset PBGC's section 4062(e) liability amount by the amount of a potential future claim under section 4062(e) that may never exist.

Your Appeal states that PBGC's Valuation and Allocation of Recoveries Policy (the "Valuation Policy") in section 8.2-1 of the PBGC Operating Policy assigns different values for the separate claims PBGC asserts against a plan sponsor after plan termination. Upon the termination of a plan, PBGC asserts claims for both a plan's Unfunded Benefit Liabilities and Due and Unpaid Employer Contributions ("DUEC"). DUEC claims are for unpaid, mandatory employer plan contributions under section 4062(c). The method by which PBGC values these claims affects PBGC's allocation of a plan's assets under ERISA section 4044 and PBGC recoveries under section 4022(c). Your Appeal claims that the section 4062(e) liability should be offset by a claim under 4062(c).

While the Valuation Policy provides that PBGC should consider its section 4062(c) claims "plan assets," the policy does not require PBGC to offset an employer's section 4062(e) liability by this amount. It is illogical to reduce Munksjö's 4062(e) liability, which it incurred on June 27, 2009, the date on which operations ceased at the Fitchburg facility, by a contingent claim that may never occur. Moreover, if the Plan were to terminate within the five-year period in which the section 4062(e) liability funds were held in escrow, those amounts would be used to offset the PBGC's 4062(c) claims. As in *Bendix*, the Appeals Board rejects your claim that 4062(e) liability should be reduced by a plan's 4062(c) claim.

c. To adjust PBGC's section 4062(e) liability amount using data for individual participants would require PBGC to perform its own seriatim valuation and would result in undue delay.

Your Appeal Brief asserts that even if it is appropriate for PBGC to use its estimation procedures based on non-seriatim data, PBGC should nonetheless change its section 4062(e) liability calculation to make corrections based on calculations for certain individual participants.

The Appeals Board found that PBGC properly based its calculation of Munksjö's section 4062(e) liability on the Plan's last actuarial valuation report that was issued before the section 4062(e) event occurred. As the Appeals Board explained above and in *Bendix*, PBGC has determined that it must calculate the section 4062(e) liability based on non-seriatim data so as to minimize the time it takes to calculate the section 4062(e) liability amount.

In order to evaluate your actuary's suggested corrections based on calculations for individual participants and actual individual payments to participants, PBGC would need to abandon its calculation rules and instead perform individual calculations for every participant in the Plan. Thus, the Appeals Board

has concluded that applying your suggested adjustments to Munksjö's section 4062(e) liability would be inappropriate. The Appeals Board has, therefore, found no reason to adjust Munksjö's section 4062(e) liability based on your actuary's suggested changes.

d. Conclusion.

Based on our discussion above, the Appeals Board found that PBGC's regulation is, in general, and as applied to Munksjö, not contrary to law.

4. Liability vs. Enforcement.

Your Appeal raised concerns regarding PBGC's decision to enforce the section 4062(e) liability against Munksjö. As discussed above, the liability arises when two strict conditions are satisfied. Although PBGC has discretion regarding whether to enforce the liability, the Appeals Board reviews only the liability determination.

a. Whether the Appeals Board should refer this case to PBGC's Director, with a recommendation that the Director exercise his discretion to decide not to enforce section 4062(e) liability against Munksjö.

While the Appeals Board does have authority to refer matters to PBGC's Director, the Appeals Board has decided that it would not be appropriate to do so in this case. We note that the Appeals Board rarely refers appeal matters to PBGC's Director, and we found nothing exceptional about the facts in this case that warrant granting your request.

b. Whether PBGC should cease enforcement activities because the five-year security period is nearing its end.

You argue in the Appeal that PBGC should exercise its discretion not to enforce section 4062(e) liability in this case because the five-year security period under that section is nearing its end. Whether PBGC enforces section 4062(e) liability is beyond the scope of PBGC's determination and is beyond the authority of PBGC's Appeals Board.

While the Appeals Board cannot determine whether PBGC will enforce liability in this case, the Appeals Board believes that it would be reasonable for PBGC to enforce section 4062(e) liability regardless of the amount of time that has elapsed since the section 4062(e) event occurred. If PBGC discontinued enforcement in such circumstances, employers would be encouraged to pursue delays in the final determination of 4062(e) liability by (1) artificially prolonging negotiations regarding its liability; and (2) submitting lengthy and repetitive requests to PBGC for information under the Freedom of Information Act ("FOIA").

c. Whether the Appeals Board should reverse PBGC's determination of liability because there is no risk to the Plan's participants in this case.

You have claimed in your Appeal and your second supplement to the Appeal that PBGC should not enforce Munksjö's section 4062(e) liability because there is no risk to the Munksjö Plan's participants due to (1) the healthy financial state of Munksjö; and (2) Munksjö's recent contribution to the Plan.

Please note that whether a plan's participants are placed at risk as a result of a section 4062(e) event is not a criterion for determining: (1) whether a section 4062(e) event occurred; or (2) the amount of the liability incurred by an employer as the result of the section 4062(e) liability. The Appeals Board does not make section 4062(e) enforcement decisions, and has no authority to reverse PBGC's decision to enforce Munksjö's section 4062(e) liability based on an assessment of the risk to the Plan at the time of the section 4062(e) event or later. We have, therefore, concluded that whether there is a risk to the Plan's participants as a result of the section 4062(e) event in this case is beyond the scope of the Board's review. If you believe that PBGC should not enforce the section 4062(e) liability because of the healthy state of Munksjö or its recent contributions to the Plan, you may wish to discuss these matters with PBGC's Corporate Finance and Restructuring Department.

5. Other Concerns Raised in the Appeal.

a. Documents withheld under the Freedom of Information Act.

In your appeal, you mention that PBGC's Disclosure Division withheld documents responsive to your multiple FOIA requests based on various exemptions under FOIA. You asked that the Appeals Board review the documents that were withheld and release to Munksjö any documents that the Appeals Board thinks should have been released.

Please note that the Disclosure Division's FOIA responses are not subject to review by the Appeals Board. The Appeals Board has no authority to change the Disclosure Division's decision as to what documents it releases as part of the FOIA process. As you noted in your appeal, FOIA responses are appealable to the PBGC's Office of the General Counsel. And PBGC's records show that Munksjö has filed an appeal with the Office of the General Counsel regarding the Disclosure Division's responses to Munksjö's FOIA requests.

The Appeals Board denies your request that we perform an "*in camera*" review of the documents that were not disclosed. Likewise, the Board denies your request for copies of any records reflecting communications to the Appeals Board from persons who performed work on or had input on the initial liability determination. The Board relied on the documents in the administrative record and your appeal in making its decision; the Board did not review the documents withheld by PBGC.

b. The standard for judicial review.

In the first supplement to the Appeal you discuss the level of deference, if any, to be given PBGC's interpretation of section 4062(e). The issue of deference may arise if an action is filed for judicial review of the Appeals Board's decision. It is not relevant for purposes of this proceeding, and the Board will not address the issue here.

Decision

The Appeals Board has reviewed your appeal of PBGC's determination that Munksjö incurred liability, in the amount of $3,616,679, under ERISA section 4062(e). For the reasons explained in this decision, the Appeals Board found that your appeal does not provide a sufficient basis for changing PBGC's determination, and we must, therefore, deny your appeal. This decision is PBGC's final agency action with respect to Munksjö's section 4062(e) liability. Accordingly, Munksjö has exhausted its administrative remedies. If it wishes, Munksjö may seek review of this decision in federal court.

Sincerely,

Michel Louis
Appeals Board Member