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

[redacted]

NOV 3 0 2007

Re: Consolidated Appeal for 246 Participants in the Thunderbird Mining Co. Pension Plan (the "Plan"), Case 199929

Dear [redacted]

The Appeals Board reviewed the May 31, 2007 appeal brief that you filed on behalf of a group of "approximately 240 participants" concerning PBGC's determinations of their vested Plan benefits. For the reasons we state below, the Appeals Board concluded that PBGC is unable to guarantee shutdown benefits for your clients because Thunderbird Mining Company was not permanently shut down before the Plan terminated on July 24, 2003.

Scope of this Consolidated Appeals Board Decision

The Appeals Board has confirmed that you filed timely appeals on behalf of the 246 participants listed on the **Enclosure**, most of whom were granted extensions of time to appeal their PBGC benefit determinations through requests submitted by themselves or by you on their behalf on January 22, January 29, February 5, and March 6, 2007. The Appeals Board exercised its discretion under Section 4003.56 of PBGC's regulations and consolidated the appeals that you filed on behalf of these 246 individuals. The Board concluded that the respective appeals arise out of the same or similar facts, and that they seek the same or similar relief.

This Appeals Board decision is PBGC's final agency action only with respect to the issues raised in your appeal brief. Some of your clients submitted separate appeal letters concerning individual issues unrelated to shutdown benefits and they will receive separate decision letters from the Appeals Board regarding their individual issues. The names of participants who raised other issues are highlighted in boldface on the Enclosure.

Background

The Plan was originally effective July 31, 1966 for hourly employees of Eveleth Taconite Company covered by its collective bargaining agreement with the United Steelworkers of America ("USW"). On January 1, 1968, a separate plan was established to cover salaried employees, both represented and non-represented.

On January 1, 1977, the plans were assumed by Oglebay Norton Company. On May 23, 1997, Oglebay Norton's taconite mining operations spun off into a separate company, Thunderbird Mining Company ("T-Bird"), which assumed the plans. On January 1, 1998, the plan for salaried employees split into separate plans for represented and non-represented employees.

On April 27, 2000, the two plans covering salaried employees and the original plan covering hourly employees merged into one plan, taking the name of the hourly plan.

T-Bird, a subsidiary of Eveleth Mines LLC (sometimes referred to as EVTAC) and doing business as EVTAC Mining, was a private employer that produced taconite pellets, which supply the iron ore needed for the production of iron and steel. EVTAC's facilities were located in and around Eveleth, Minnesota. EVTAC was owned by Rouge Steel (45%), AK Steel (40%), and Stelco (15%). EVTAC's business arrangement was to sell its pellets to the owners.

On January 1, 2003, Rouge Steel elected to purchase pellets from another source, Cleveland Cliffs, Inc., and AK Steel switched most of its requirements to Iron Ore Co. of Canada.

On February 14, 2003, T-Bird sent a confidential letter to the Director of District 11 of the USW informing the USW of its "intention...to close permanently the Eveleth Mines, LLC, dba EVTAC Mining operation" due to "a lack of customer orders". The letter noted, however, that T-Bird was prepared to meet with representatives of the USW to discuss T-Bird's "proposed course of action" and to "suggest alternative courses."

On March 10, 2003, T-Bird issued a notice to its employees under the Worker Adjustment and Retraining Notification ("WARN") Act. The notice advised the employees that the entire plant was to be closed and that the planned action was to be temporary but only if anticipated pellet orders were received during the shutdown period. The notice did not specify the length of the shutdown period.

On March 17, 2003, T-Bird filed a "Petition for Trade Adjustment Assistance" with the Department of Labor ("DOL"). The petition stated that "closure will be permanent if no additional orders are received." The DOL denied the petition (68 FR 33196, June 3, 2003).

Stelco's contract with EVTAC expired on May 14, 2003 and was renewed at a much lower requirement.

EVTAC filed for Chapter 11 bankruptcy protection in the United States District Court for the District of Minnesota on May 1, 2003, citing the loss of the bulk of its contract business. T-Bird filed for Chapter 11 bankruptcy protection on May 15, 2003 in the same court. The Minnesota District Court subsequently consolidated the bankruptcies. And on May 15, 2003, T-Bird ceased operations and laid off substantially all of its employees.

On June 5, 2003, T-Bird again filed a "Petition for Trade Adjustment Assistance", this time stating that "EVTAC Mining is now totally shut down and only a skeleton crew is employed." The DOL granted the petition (68 FR 43372, July 22, 2003).

On June 15, 2003, T-Bird laid off all of its remaining employees.

On or about July 5, 2003, former USW Local 6860 President [redacted] met with Congressman Jim Oberstar and EVTAC President Howard Hilshorst. During that meeting, Congressman Oberstar discussed EVTAC's failure to secure new sales contracts and recommended that Hilshorst negotiate with Laiwu, a Chinese corporation, either to secure sales contracts with Laiwu or, alternatively, sell EVTAC's assets to Laiwu.

After receiving notice of T-Bird's Chapter 11 filing, PBGC began its investigations regarding the Plan's prospects. PBGC engaged the services of a private consulting group. Based on the consultant's analysis of EVTAC's prospects and PBGC's own calculations of the contributions needed to continue the Plan, PBGC issued a Notice of Determination on July 23, 2003, stating that PBGC determined, pursuant to Section 4042(a)(2),(4) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), that (1) the Plan will be unable to pay benefits when due, and (2) the possible long-run loss of the PBGC with respect to the Plan may reasonably be expected to increase unreasonably if the Plan is not terminated. The Notice further stated that PBGC determined, pursuant to ERISA § 4042(c), (1) that the Plan must be terminated in order to avoid an unreasonable increase in the liability of the PBGC insurance fund and in order to protect the interests of the Plan's participants; (2) that PBGC should assume trusteeship of the terminated Plan; and (3) that July 24, 2003 should be established as the Plan's termination date. PBGC sent notice of its determinations to T-Bird, in its role as the Plan's sponsor, and the USW. PBGC also published notice of the determinations in one national newspaper and several Minnesota newspapers.

PBGC proceeded to file an action against T-Bird, in its role as the Plan's sponsor, in the United States District Court for the District of Minnesota on July 24, 2003 to enforce its administrative determinations by asking the court to (1) terminate the Plan, (2) appoint PBGC as the Plan's trustee, and (3) establish July 24, 2003 as the Plan's termination date. The USW filed a motion for leave to intervene as a party defendant, suggesting that the Plan's termination date should be postponed to a later date.

On or before October 8, 2003, representatives of Cleveland-Cliffs, Inc. and the Chinese state-owned Laiwu Steel Group, Ltd. made a joint offer to purchase EVTAC's assets. According to an Associated Press wire report of the offer, Congressman Oberstar "helped broker the deal because of his relationship with Yang Jiechi, the Chinese ambassador to the United States."

On or before November 14, 2003, Cleveland-Cliffs, Inc. and Laiwu Steel Group, Ltd. filed a draft asset-purchase agreement under which EVTAC's taconite business would become United Taconite, LLC. On November 16, 2003, T-Bird's Chapter 11 bankruptcy was converted to a Chapter 7 bankruptcy. On November 25, 2003, U.S. Bankruptcy Court

Judge Gregory F. Kishel approved the sale of EVTAC to Cleveland-Cliffs and Laiwu Steel Group after a two-hour sale hearing. Duluth News-Tribune reported in the Final Edition of its November 26, 2003 newspaper that former EVTAC President Hilshorst testified at that sales hearing that: "Hilshorst, Vice President-Controller James Hecemovich and Vice President-Treasurer Robert Verville had worked since spring with several interested parties to find a new owner or pellet contracts."

The Court granted the USW's motion to intervene as a party defendant and, on December 3, 2003, the USW filed its Answer to PBGC's July 24, 2003 complaint. In that answer, the USW raised three affirmative defenses, namely, (1) the Complaint failed to state a claim upon which relief can be granted; (2) termination of the Plan effective July 24, 2003 would not be in the best interests of the participants of the Plan and would be contrary to law; and (3) termination of the Plan effective July 24, 2003 would be contrary to the justifiable expectations of the participants of the Plan.

In the meantime, on December 1, 2003, after obtaining approval of the bankruptcy court, EVTAC closed on a transaction with United Taconite, LLC ("United"), under which United purchased all of EVTAC's operating assets. According to the USW's Settlement Agreement with EVTAC and T-Bird, on that date, T-Bird permanently laid off all of its Employees, except three members of management, and through December, United hired substantially all of those permanently laid-off USW Employees under the terms of a new Collective Bargaining Agreement ("CBA"). Pursuant to the USW's Settlement Agreement with EVTAC, the old CBA ended as of December 1, 2003.

In January 2004, EVTAC requested the bankruptcy court's approval of the Settlement Agreement between EVTAC and USW, which resolved all the outstanding issues between them. The Settlement Agreement provided in part as follows:

> The Company and USWA will execute the necessary documents to effectuate the dismissal of the complaint filed by the Pension Benefit Guaranty Corporation ("PBGC") to terminate the defined benefit pension plan sponsored by Thunderbird Mining Company in order to allow participants to be in "pay status" by January 31, 2004. It is understood that this includes the consent to the date of plan termination proposed by PBGC.

On August 19, 2004, Judge Michael J. Davis of the United States District Court for the District of Minnesota granted PBGC's motion for summary judgment and ordered that the Plan was terminated, that PBGC was appointed the Plan's trustee, and that July 24, 2003 was established as the Plan's termination date.

PBGC's Determination Letters and Your Appeal

PBGC's determination letters, issued between December 21, 2006 and May 15, 2007, did not specifically state that your clients failed to meet the eligibility requirements for a shutdown benefit under the Plan. However, because the determination letters did not say that your clients met those eligibility requirements while determining that they were eligible for other, non-shutdown benefits, we have decided that you correctly inferred that PBGC determined your clients did not meet the eligibility requirements for a shutdown

benefit before the Plan terminated. As a result, we have decided to accept your appeal on behalf of all of your clients with respect to their eligibility for Plan shutdown benefits insofar as that eligibility depends upon whether the temporary shutdown of EVTAC's facilities became permanent before the Plan terminated.

Your May 31, 2007 appeal brief claimed that:

> The refusal of EVTAC and PBGC to consider the cessation of operations at the plant on May 15, 2003 as a 'permanent shutdown' does not control the finding as to whether a permanent shutdown had occurred prior to the date of plan termination, and, consequently, whether PBGC is obligated to pay shutdown benefits.
>
> . . .
>
> In accordance with the relevant case law, an objective review of the facts and circumstances surrounding the closure demonstrates that EVTAC permanently shutdown the facility prior to the July 24, 2003 date of plan termination.

Your brief claimed that "USW has been unable to find relevant PBGC case law addressing the circumstances in which it may be found that a permanent shutdown has occurred for purposes of a retirement benefit such as that provided under the Company's plan." Instead, your brief offered several examples in which arbitrators determined that the "label" a company assigns to a plant closure is secondary to the facts surrounding the closure. As a preliminary matter, we note that these arbitral decisions did not involve PBGC and, in any event, are not binding on PBGC's Appeals Board. That being said, pursuant to Section 4003.59 of PBGC's regulations, we have considered all of the material you submitted in connection with this appeal, including the arbitral decisions cited in your brief. You said that, in *Wean United*, 24 Steel Arb. 18063 (Teple, Arb. 1984), Arbitrator Teple cited four specific reasons why a plant had *not* shutdown: a) the company kept the plan in standby condition; b) the remaining equipment was properly maintained; c) the phone lines were intact; and d) new orders were in process.

In support of your permanent plant shutdown argument, you asserted the following:

> a. Management's written statements indicate its intent to permanently close the plant if additional orders were not received, and, in fact, no additional orders were received from May 15 through July 24. . . .
>
> b. EVTAC failed to secure new sales contracts and/or sell the Company, and EVTAC further failed to demonstrate any concrete plans to reorganize the company. . . .
>
> c. Management failed to place the plant on "standby" and failed to maintain the equipment, thereby foreclosing any reasonable likelihood of resuming operations.
>
> . . .
>
> d. Prior to terminating the Plan on July 24, 2003, PBGC repeatedly acknowledged that EVTAC was not viable and that there was no reasonable expectation that the facility would resume operations. . . .
>
> [Boldface suppressed.]

Law, Regulations and Policy

PBGC records indicate that, when the Plan terminated on July 24, 2003, it did not have sufficient assets to satisfy the benefits guaranteed by PBGC under Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").

Entitlement to a guaranteed benefit is determined by the provisions of the Plan's governing document that were in effect when the Plan terminated, and by ERISA and PBGC's regulations. ERISA § 4022(a) provides that, subject to certain limitations, PBGC shall guarantee the payment of all nonforfeitable benefits under a covered pension plan that terminates. ERISA defines a "nonforfeitable" benefit as ". . . a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of [ERISA]." See ERISA § 4401(a)(8), 29 U.S.C. §1301(a)(8); 29 C.F.R. § 4001.2 (definition of nonforfeitable benefit). PBGC regulations provide that a guaranteed benefit must be nonforfeitable on or before the plan's termination date. See 29 C.F.R. § 4022.3.

The issue in this appeal is whether your clients qualified for Rule-of-65 or 70/80 retirement benefits based on their "Continuous Service" being broken due to a "permanent shutdown of a plant, department, or a subdivision thereof." Conditions such as these, which involve how the employment relationship is terminated, are substantive requirements established under Plan terms that must be satisfied by the termination date. *See Fetty v. PBGC*, 915 F. Supp. 230 (D. Colo. 1996), *aff'd,* 104 F.3d 367 (10th Cir. 1996), *cert. denied* 522 U.S. 812 (1997) (subsidized early retirement benefits based upon plant shutdown are not guaranteed if the shutdown occurs after the date of plan termination); *see also PBGC v. Republic Technologies Int'l*, 386 F.3d 659 (6th Cir. 2004) (court affirms PBGC's selection of a pre-shutdown termination date that avoided vesting of shutdown benefits). In plans that do not specifically define "permanent shutdown," PBGC must determine whether a permanent shutdown has occurred before a plan's termination date based on the facts and circumstances. *Dycus et al. v. PBGC*, 133 F.3d 1367 (10th Cir. 1998) (court affirms PBGC's determination that there was no permanent shutdown where the company sold its assets to a new owner).

A PBGC policy, "Payment of Benefits to Working Retirees," provides guidelines for PBGC's payment of shutdown benefits. Under this policy, PBGC "will scrutinize shutdown benefits and make case-by-case determinations of whether facility shutdowns have occurred." The policy defines a "shutdown benefit" as "a subsidized early retirement benefit that becomes payable when all or substantially all of an employer's operations at a facility cease, resulting in a loss of jobs that is expected to be permanent for all or substantially all of the employees at that facility who are participants in the plan." Finally, PBGC's policy states that: "The sale of an employer's assets does not automatically constitute a shutdown. A PBGC determination that a shutdown has not occurred does not affect participants' entitlements to other, non-shutdown benefits under the plan."

Relevant Plan Provisions

Section 2.6 of the Pension Agreement defines "70/80 Retirement." Section 2.7 of the Pension Agreement defines "Rule-of-65 Retirement." 70/80 Retirement benefits and Rule-of-65 Retirement benefits are payable to certain participants only if their "continuous service is broken by reason of a permanent shutdown of a plant, department or subdivision thereof."

Section 5.1(b) of the Pension Agreement defines when a participant's continuous service is broken as follows:

> (b) Continuous service shall be broken by:
>
> (1) quit;
>
> (2) discharge, provided that if the Employee is rehired within six month the break in continuous service shall be removed;
>
> (3) termination (if and when termination occurs pursuant to the Basic Agreement) due to permanent shutdown of a mine, department or subdivision thereof;
>
> (4) absence which continues for more than two years, except that (i) absence in excess of two years due to compensable disability incurred during course of employment shall not break continuous service, . . .; and (ii) if an Employee absent on account of layoff or disability in excess of two years returns to work with the Company within the period during which he retains his accumulated continuous service in accordance with the seniority provisions of the Basic Agreement, the break in continuous service shall be removed;

The Pension Agreement contains no definition of "permanent shutdown".

Discussion

In cases like this one, where the Plan provides benefits contingent on a "permanent shutdown" and the Plan does not define the term "permanent shutdown," PBGC must determine whether a permanent shutdown occurred based on all the facts and circumstances.

1. *You argued that no additional orders were received from May 15, 2003 through July 24, 2003 and that management's written statements indicate its intent to permanently close the plant if no additional orders were received.*

The Appeals Board notes that T-Bird's WARN Act notice to the participants clearly stated that the closing of the plant was to be temporary if anticipated orders were received during the shutdown period. In addition, the WARN Act notice did not specify how long the "shutdown period" would last. The fact that T-Bird did not specify an anticipated end date for the "shutdown period" suggests that T-Bird was not certain as to when it might receive

the necessary pellet orders. Furthermore, the indefinite duration of the shutdown period suggests that T-Bird did not want to limit its options by specifying an end date that was too early.

The Declaration of [redacted] that you submitted with your appeal states that on or about July 5, 2003, Congressman Oberstar recommended to President Hilshorst that he negotiate with Laiwu "to either secure sales contracts with Laiwu or alternately sell all company assets to Laiwu." While the record suggests that President Hilshorst was already familiar with Laiwu at that time, the record shows that President Hilshorst and others continued to pursue sales contracts or an asset sale arrangement with Laiwu for quite some time after July 24, 2003 and that Congressman Oberstar continued to help well after July 24, 2003. Based upon the above facts and sequence of events, the Appeals Board concluded that the Declaration of [redacted] provides substantial support for PBGC's conclusion that the shutdown period did not end before July 24, 2003.

2. *You argued that EVTAC failed to secure new sales contracts and/or sell the company, and EVTAC further failed to demonstrate any concrete plans to reorganize the company.*

Contrary to this second claim above, the record indicates that on or before October 8, 2003, representatives of Cleveland-Cliffs, Inc. and the Chinese state-owned Laiwu Steel Group, Ltd., made a joint offer to purchase EVTAC's assets. According to an Associated Press wire report of the offer, Congressman Oberstar "helped broker the deal because of his relationship with Yang Jiechi, the Chinese ambassador to the United States."

Later, the purchase of EVTAC's assets by Cleveland-Cliffs and Laiwu was approved by the bankruptcy court. As a result, the T-Bird plant in Eveleth was reopened under the name of United Taconite, and the great majority of former T-Bird workers were re-employed in presumably similar positions with the new company.

We assume that this second claim was meant to say that the described events did not happen before July 24, 2003. As we noted above, however, we have found that the record contains ample evidence that the "shutdown period" described in the WARN Act notice was not intended to end and did not end until after the Plan terminated.

3. *You argued that management failed to place the plant on "standby" and failed to maintain the equipment, thereby foreclosing any reasonable likelihood of resuming operations.*

While you allege that T-Bird failed to place the plant on "standby", the Appeals Board does not agree that such a failure would foreclose any reasonable likelihood of resuming operations. The record shows that EVTAC, in fact, took the necessary steps to make the plant ready for production before the sale of the plant to United Taconite could be completed. The facts, in this case, speak for themselves. The plant did, in fact, resume

operations under new management in December 2003, approximately 6½ months after the start of the temporary shutdown period.

While the Appeals Board agrees that T-Bird's actions in this regard suggest that T-Bird's management did not anticipate reopening the plant within a matter of weeks after the temporary closure began, the Appeals Board has found that these actions did not foreclose the likelihood of resuming operations.

4. *You argued that prior to terminating the Plan on July 24, 2003, PBGC repeatedly acknowledged that EVTAC was not viable and that there was no reasonable expectation that the facility would resume operations.*

Under this claim, your appeal brief cited three documents found in PBGC's trusteeship decision record, namely, (1) the Business Viability Evaluation by Metal Strategies dated July 14, 2003, (2) the Trusteeship Working Group ("TWG") Memorandum dated July 15, 2003, and (3) the TWG Minutes dated July 16, 2003.

The function of the TWG is to determine when it is necessary or appropriate for PBGC either to accept a proposed plan termination by a plan administrator or to initiate termination proceedings itself. The TWG makes termination decisions based on recommendations by PBGC's Department of Insurance Supervision and Compliance ("DISC"). At the time of the Plan's termination in July 2003, however, termination recommendations were made by the Corporate Finance and Negotiations Department ("CFND"), DISC's predecessor.

As you noted in your appeal brief, CFND stated in its July 15, 2003 TWG Memorandum that: "Although the Company states that it is working toward a plan of reorganization, neither CFND nor its independent consultant believes the company can survive with the Plan ongoing." What you failed to mention in your appeal brief were the estimates of the Plan's underfunding, the anticipated minimum funding requirements, and the estimates of the additional underfunding that would result from a permanent shutdown upon which CFND's recommendations were based.

In the same July 15, 2003 TWG Memorandum, CFND presented its estimates that: (1) the Plan then had Unfunded Benefit Liabilities of $61.2M; (2) the Plan's Unfunded Benefit Liabilities would increase to $129M if the temporary shutdown became permanent; and (3) the Plan's projected minimum funding contribution for 2004 would be $11.9M. It was this great increase in the Plan's underfunding, if the Plan did not terminate before the temporary shutdown could become permanent, that led CFND to recommend that the Plan be terminated pursuant to ERISA § 4042(a)(4) because the possible long-run loss to the PBGC was reasonably expected to increase unreasonably unless the Plan was terminated.

The Minutes of July 16, 2003 TWG Meeting show that the TWG considered the possibility that the plant had already incurred a permanent shutdown. The Minutes specifically stated as follows:

> The TWG asked whether the current cessation of business activities constituted a shutdown that had already triggered shutdown benefits. CFND reported that the Company's position is that this is only a temporary cessation of activities. For example, the WARN notice describes the cessation as temporary; although 300 employees have applied for shutdown benefits, the Company has not paid them; and in other communications between PBGC and the Company, the Company has been clear that a permanent shutdown has not occurred.

As noted above, the TWG's function is to determine when a plan should be or must be terminated, taking into consideration the interests of the plan's participants and PBGC's insurance fund. Given (1) the large amount of the Plan's underfunding, (2) the large projected minimum funding contribution amount, (3) the consultant's pessimistic economic projection for EVTAC, (4) EVTAC's position that the shutdown was temporary while it continued seeking pellet contracts, and (5) the great increase in liabilities if the temporary shutdown were to become permanent, the TWG accepted CFND's recommendation to terminate the Plan pursuant to ERISA § 4042(c). This section of ERISA permits the PBGC to terminate a plan in order to avoid an unreasonable increase in the liability of the PBGC insurance fund and in order to protect the interests of the Plan's participants.

Finally, we note that, it was not until December 1, 2003, the date on which EVTAC closed its sale of assets to United Taconite ("United"), that T-Bird "permanently" laid off all of its employees. It was on this same date that the old CBA ended and the former T-Bird employees were rehired by United under a new CBA.

Given the fact that most T-Bird employees were rehired by United, and assuming that those employees are doing the same or similar jobs they were performing for T-Bird at the same location, it would be difficult for the Board to conclude that a permanent shutdown of the Eveleth taconite plant occurred at all. However, because your clients' eligibility for shutdown benefits depends on whether or not a permanent shutdown occurred *before* the Plan terminated, we have concluded there is no need for us to decide whether a permanent shutdown occurred after the Plan terminated.

Based on all of the facts and circumstances of this case, the Appeals Board has concluded that the temporary shutdown of T-Bird ended with the sale of EVTAC's assets to United Taconite on December 1, 2003 and that a permanent shutdown of the plant did not occur, if at all, before the Plan terminated on July 24, 2003.

In conclusion, because a permanent shutdown of the T-Bird facility did not occur before the Plan terminated on July 24, 2003, shutdown benefits are not payable under the Rule-of-65 and 70/80 retirement provisions of the Plan.

Decision

Having applied the law, Plan provisions, and PBGC rules to the facts of this case, the Appeals Board concluded that PBGC is unable to guarantee shutdown benefits for your clients because T-Bird was not permanently shut down before the Plan terminated on July 24, 2003. This decision is PBGC's final action regarding the issues your appeal

raised. If they wish, your clients may seek court review of this decision in an appropriate federal district court.

If your clients need other information regarding their PBGC benefits, they may call PBGC's Customer Contact Center at 1-800-400-7242 and ask to speak to the Authorized Representative assigned to the Plan (Case 199929).

Sincerely,

Michel Louis
Appeals Board Member

Enclosure