

Pension Benefit Guaranty Corporation

87-6

July 15, 1987

REFERENCE:

[*1] 4041(c)(2)(B)(iii) (SEPPAA) - Unreasonably Burdensome Pension Costs

OPINION:

We are writing to respond to your recent letter to * * * of PBGC. In your letter, you requested that your clients be permitted to participate in any proceedings before the Pension Benefit Guaranty Corporation ("PBGC") regarding the proposed distress termination of the above-referenced plan ("Plan") as of January 13, 1987 under Section 4041(c)(2)(B)(iii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

As PBGC has previously informed you, PBGC will consider written submissions from your clients, former * * * employees of the * * *, regarding a proposed distress termination of the Plan under Section 4041(c)(2)(B)(iii) of ERISA. Indeed, all affected parties may submit comments to PBGC on the proposed termination. As you are aware, you may obtain documents relating to the proposed termination from PBGC under the Freedom of Information Act, or from * * * Corporation. In addition, given the circumstances of this case, PBGC was pleased to meet with you and your clients on June 12, 1987 to discuss the financial condition of the plan sponsor, and PBGC's termination procedures.

In response [*2] to the arguments set out in your letter to PBGC, we note that in PBGC termination proceedings neither ERISA nor constitutional due process require PBGC to provide all parties with an opportunity to respond to the submissions of all other parties. PBGC's termination determination involves a purely financial factual inquiry. PBGC must determine whether a company can survive while continuing its pension plan, not whether the interests of the participants in continuation of the plan outweigh those of the company in terminating the plan. Therefore, we believe that the due process requirements the Supreme Court announced in *Brock v. Roadway Express, Inc.*, 55 U.S.L.W. 4530 (April 22, 1987) (No. 85-1530), do not apply to PBGC's termination proceedings.

Accordingly, PBGC will seek the evidence necessary to make its determination in such manner as each case requires, and therefore may, as here, accept and review data submitted by parties other than the plan sponsor. However, we do not believe that notice and participation in the determination by all affected parties is either required by ERISA or necessary to provide due process.

Gary M. Ford
General Counsel