

Pension Benefit Guaranty Corporation

86-4

February 28, 1986

REFERENCE:

[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4218(2) Withdrawal - Suspension of Contributions

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation regarding the effect of section 4218(2) of the Employee Retirement Income Security Act, as amended (ERISA). Specifically, you pose the following question:

"Where an employer ceases making contributions to a multiemployer plan solely because of a strike by its union-represented employees, and where it is determined that the employer ceased to be covered by the section 4218(2) labor dispute exemption in a subsequent plan year, is the year of withdrawal for purposes of calculating withdrawal liability owed to the plan, i) the plan year in which contributions ceased because of the strike, or ii) the plan year in which the section 4218(2) labor dispute exemption ceased to be applicable to the employer?"

As we understand your question, there is no dispute that a complete withdrawal has occurred and the sole issue is the date of the withdrawal. Based on this understanding, it is our opinion that the date of the withdrawal is the date on which the employer ceased to have an obligation [*2] to contribute under the plan or ceased all covered operations under the plan, even if, as is the usual case, that date is not the date on which section 4218(2) of ERISA ceased to apply to the employer.

Section 4203(a) of ERISA provides that a complete withdrawal from a multiemployer plan occurs if an employer either "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." In the context of an ongoing labor dispute, it is often impossible to determine whether there has been a permanent cessation of either covered operations or the obligation to contribute. Thus, section 4218(2) of ERISA provides as follows:

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because -

* * *

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

Section 4218(2) protects employers from unwarranted or premature assessments of withdrawal liability during a labor dispute. Without section 4218(2), withdrawal liability might be assessed at the outset of a labor dispute even though at that point it is [*3] generally not clear whether the cessation of the obligation to contribute or of covered operations is permanent or temporary.

If the dispute ends with the employer's obligation to contribute eliminated, it is clear that the cessation was permanent and that a withdrawal has occurred. (Moreover, if the employer has permanently ceased covered operations or ceased to have an obligation to contribute, rather than simply suspended contributions during a labor dispute, a withdrawal has occurred regardless of whether a labor dispute continues to exist.)

By its terms, section 4218(2) addresses only the issue of whether an employer "shall be considered to have withdrawn from a plan." Section 4218(2) does not attempt to define the date of a withdrawal that has been determined to have occurred.

Once it has been determined that a complete withdrawal has occurred, the date of the complete withdrawal is governed by section 4203(e) of ERISA, which provides:

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute

or the date of the cessation of covered operations.

Thus, in your case, if the date of the strike was the date on [*4] which covered operations or the obligation to contribute ceased, that date is used for purposes of calculating withdrawal liability.

This conclusion is consistent with basic features of ERISA's formulas for withdrawal liability, under several of which the amount of an employer's liability is based in part on the level of its recent contributions. In particular, under the method of section 4211(c)(3) of ERISA, 29 U.S.C. § 1391(c)(3), if the date of withdrawal were the date on which the section 4218(2) exemption ceased to apply to the employer, an employer that suspends contributions at the beginning of a labor dispute would frequently see its withdrawal liability reduced by the passage of time, thus gradually transferring its share of the plan's unfunded obligations to remaining and newly entering employers. (Indeed, if such an employer were determined to have withdrawn six years after the initial suspension of contributions it would escape withdrawal liability entirely.) Such a possibility exists, to a lesser extent, with other withdrawal liability formulas. Our conclusion prevents such a gradual transfer by assessing the employer the same withdrawal liability that it would have [*5] been assessed if the cessation of its obligation to contribute or of its covered operations had immediately been identified as permanent.

Your letter cites *Marvin Hayes Lines v. Central States, Southeast and Southwest Areas Pension Fund*, a case recently decided by the United States District Court for the Middle District of Tennessee, in support of your contention that the year of withdrawal in the circumstances you describe is the plan year in which the section 4218(2) labor dispute exemption ceased to be applicable to the employer. The *Marvin Hayes Lines* decision is currently being reviewed by the United States Court of Appeals for the Sixth Circuit. The PBGC has participated in the case as *amicus curiae*. The PBGC has urged the Court to remand the case to the District Court because, *inter alia*, we believe that the District Court did not adequately consider the proper date of the withdrawal. The *Marvin Hayes Lines* decision therefore does not change our conclusion regarding the question you have asked.

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate [*6] Policy and Regulations Department. His telephone number is (202) 956-5050.

Edward R. Mackiewicz
General Counsel