

that determine plan contributions, such as hours worked by employees—by seventy percent or more for three consecutive plan years.

A complete or partial withdrawal of an employer from a pension plan reduces the plan's contribution base and shifts the burden of funding plan benefits to remaining employers. The increased costs of maintaining the plan will in turn encourage other employers to withdraw, and the cumulative damage to the contribution base may eventually cause the plan to fail. "Withdrawal liability responds to these concerns by deterring withdrawals and by shoring up the contribution base of a * * * plan when withdrawals nevertheless occur [and] thus protects the interlocking interests of the PBGC, its premium payers, the non-withdrawn employers" and workers and retirees with vested benefits. *Peick v. PBGC*, 539 F.Supp.1025, 1046–47 (N.D.Ill. 1982), *affd.* 724 F.2d 1247 (7th Cir. 1983). Indeed, "it would be analytically unsound to adopt an approach" that allows a withdrawn employer to escape the costs of reparation to the plan's contribution base. *Calvert & Youngblood Coal Co. v. UMW* 1950 Pension Trust, 6 Employee Benefit Cas. (BNA) 1106, 1112 (N.D. Ala. 1985)(Pointer, C.J.).

Congress nevertheless allowed for the possibility that, in certain industries, the fact that particular employers go out of business (or cease operations in a specific geographic region) might not result in permanent damage to the pension plan's contribution base. In the case of the construction industry, for example, the work must necessarily take place at the construction site; if that work generates contributions to the pension plan, it does not much matter which employer performs the work. Put another way, if a construction employer goes out of business, or stops operations in a geographic area, pension plan contributions will not diminish if a second employer who contributes to the plan fills the void. The plan's contribution base is damaged, therefore, only if the employer stops contributing to the plan but continues to perform construction work in the jurisdiction of the collective bargaining agreement.

This reasoning led Congress to adopt a special definition of the term "withdrawal" for construction industry plans. Section 4203(b)(2) of ERISA provides that a complete withdrawal occurs only if an employer ceases to have an obligation to contribute under a plan, but the employer nevertheless performs previously covered work in the jurisdiction of the collective bargaining agreement at any time within

five years after the employer ceased its contributions.¹ There is a parallel rule for partial withdrawals from construction plans. Under section 4208(d)(1) of ERISA, "[a]n employer to whom section 4203(b) (relating to the building and construction industry) applies is liable for a partial withdrawal only if the employer's obligation to contribute under the plan is continued for no more than an insubstantial portion of its work in the craft and area jurisdiction of the collective bargaining agreement of the type for which contributions are required."

Section 4203(f) of ERISA provides that PBGC may prescribe regulations under which plans that are not in the construction industry may be amended to use special withdrawal liability rules similar to those that apply to construction plans. Under the statute, the regulations "shall permit the use of special withdrawal liability rules * * * only in industries' that PBGC determines share the characteristics of the construction industry. In addition, each plan application must demonstrate that the special rule "will not pose a significant risk to the [PBGC] insurance system." Section 4208(e)(3) of ERISA provides for parallel treatment of partial withdrawal liability rules.

The regulation on Extension of Special Withdrawal Liability Rules (29 CFR Part 4203), prescribes the procedures a multiemployer plan must follow to request PBGC approval of a plan amendment that establishes special complete or partial withdrawal liability rules. Under 29 CFR 4203.3(a), a complete withdrawal rule must be similar to the statutory provision that applies to construction industry plans under section 4203(b) of ERISA. Any special rule for partial withdrawals must be consistent with the construction industry partial withdrawal provisions.

Each request for approval of a plan amendment establishing special withdrawal liability rules must provide PBGC with detailed financial and actuarial data about the plan. In addition, the applicant must provide PBGC with information about the effects of withdrawals on the plan's contribution base. As a practical matter, the plan must demonstrate that the characteristics of employment and labor relations in its industry are sufficiently similar to those in the construction industry that use of the construction

¹ Section 4203(c)(1) of ERISA applies a similar definition of complete withdrawal to the entertainment industry, except that the pertinent jurisdiction is the jurisdiction of the plan rather than the jurisdiction of the collective bargaining agreement.

rule would be appropriate. Relevant factors include the mobility of the employees, the intermittent nature of the employment, the project-by-project nature of the work, extreme fluctuations in the level of an employer's covered work under the plan, the existence of a consistent pattern of entry and withdrawal by employers, and the local nature of the work performed.

PBGC will approve a special withdrawal liability rule only if a review of the record shows that:

(1) The industry has characteristics that would make use of the special construction withdrawal rules appropriate; and

(2) The plan in question would not be adversely affected by the adoption of the special rule. After review of the application and all public comments, PBGC may approve the amendment in the form proposed by the plan, approve the application subject to conditions or revisions; or deny the application.

Request For Comments

On March 28, 2003, the International Longshoremen's and Warehousemen's Union-Pacific Maritime Association Pension Plan ("Plan") asked PBGC to approve a second modification to a previously approved plan amendment that adopted special withdrawal liability rules.² The regulation on Extension of Special Withdrawal Liability Rules provides that any interested party may file comments with PBGC about the request. See 29 CFR 4203.5(b).

The remainder of this Notice contains a synopsis of the application and the various legal arguments and factual representations that were submitted in support of the application.

Applicant

The Plan is a multiemployer plan whose headquarters are in San Francisco, California. The Plan was established in 1951 pursuant to collective bargaining agreements between the International Longshoremen's & Warehousemen's Union ("ILWU") and the Pacific Maritime Association ("PMA").

The PMA

The PMA is an employer association whose principal business is to negotiate and administer maritime labor agreements with ILWU. The PMA is composed of American and foreign flag vessel operators, and stevedore and terminal companies that operate in

² PBGC approved to the original plan amendment in 1984, and the agency approved a revised amendment in 1998. See 49 FR 6043 (1984) and 63 FR 27774 (1998).