

Pension Benefit Guaranty Corporation

86-21

September 29, 1986

REFERENCE:

[*1] 4203(a) Complete Withdrawal. Definition of Complete Withdrawal
4205 Partial Withdrawals
>4205(b)(2)(A)>

OPINION:

This responds to your request for the opinion of the Pension Benefit Guaranty Corporation on several questions regarding the calculation of withdrawal liability with respect to partners and the application of section 4205 of the Employee Retirement Income Security Act, as amended (ERISA), to circumstances you present.

Your first set of questions relates to partnerships that share vacuum coolers used to prevent spoilage of newly harvested * * * You represent that due to the cost and immobility of vacuum coolers, employers typically enter into agreements for the use of the coolers. Each employer has its own employees and its obligation to contribute to the Pension Trust is determined by its own collective bargaining agreement. A vacuum cooler partnership has its own employees and collective bargaining agreement. Your questions concern withdrawal liability of such a partnership for operations under its collective bargaining agreement.

You state that vacuum cooler arrangements are very fluid, with each partner's percentage during any given season depending on the amount of * * [*2] * it processes through the vacuum cooler. Because * * * growers often change their fields from year to year, it is not unusual for members of a vacuum cooler partnership to change on a yearly basis or even for such a partnership to be formed for a single season only. You assert that the unfunded vested benefit liability of continuing partnerships may be partly attributable to hours worked by partnership employees for the benefit of former partners.

Your first set of questions assumes that a partnership that is obligated to contribute to a multiemployer plan withdraws from the plan. You ask first whether the former members of the partnership are liable for any withdrawal liability. It is our opinion that an employer that is a partnership does not completely withdraw from the plan, as described in ERISA section 4203(a), until the partnership dissolves or otherwise permanently ceases to have an obligation to contribute under the plan. At that time, withdrawal liability should be assessed against only the partners at the time of the withdrawal. Former members of the partnership are not liable for any withdrawal liability.

You next ask whether the partnership's withdrawal liability [*3] is determined exclusively by the collective bargaining agreement(s) in force at the time of withdrawal and whether partners at the time of withdrawal are solely liable for any withdrawal liability. Withdrawal liability is determined by the collective bargaining agreements of the partnership during the period used to calculate withdrawal liability under the allocation method used by the plan. Partners at the time of withdrawal are solely liable for any withdrawal liability.

Your next question is whether the partnership's unfunded vested benefits are reduced by the unfunded vested benefits attributable to former partners. Unfunded vested benefits attributable to former partners are not deducted from the partnership's unfunded vested benefits, unless responsibility for its period of participation is expressly assumed by a former partner. Since the partnership included those partners at the time the unfunded vested benefits were accrued, the partnership's unfunded vested benefits at the time of withdrawal should also include the unfunded vested benefits attributable to the former partners.

You also ask how withdrawal liability should be allocated among partners in the type of partnership [*4] described above. ERISA does not address the allocation of withdrawal liability among individual members of the employer, e.g., trades or business under common control, or partners. Rather, all members of the employer at the time of the withdrawal are jointly and severally liable for the withdrawal liability.

Your final question in this set concerns the ability of the plan to assign unfunded vested benefits to an individual partner. Since the partnership is the employer, withdrawal liability must be assessed against it alone. Unfunded vested benefits attributable to individual partners may not be assigned to them by the plan and later used to increase their

withdrawal liability in a new or related business.

Your second set of questions concerns * * * growers. You represent that * * * have traditionally been harvested in the field, taken to a packing shed and from the packing shed to the market. You indicate that recently a trend toward packing in the field has developed, which eliminates the need for the packing shed. This trend has resulted in the replacement of shed packing employees with field packing employees. While shed employees are unionized and covered by your pension [*5] plan, you represent that most field packing employees are non-unionized and those who are unionized are covered by another pension plan.

The first two questions related to this fact situation are whether an employer who moves his * * * packing operations from a packing shed to his field "continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required" or "transfers such work to another location," for complete and partial withdrawal liability purposes. These questions are relevant only to whether the employer had a partial withdrawal under section 4205(b)(2)(A)(i) of ERISA, and the answers to these questions depend upon a factual question, i.e. whether packing in the field is the same type of work as packing in the shed for purposes of section 4205(b)(2)(A)(i). Section 4205(b)(2)(A)(i) provides that a partial withdrawal occurs if an employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan but continues to perform work in the jurisdiction of the collective [*6] bargaining agreement of the type for which contributions were previously required or transfers such work to another location.

Under the multiemployer provisions of ERISA, the initial responsibility for deciding factual questions necessary to determine whether any particular action constitutes a withdrawal from a multiemployer plan lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. If packing in the field is the same type of work as packing in the shed and the employer permanently ceases to have an obligation to contribute for that work under one or more but fewer than all of its collective bargaining agreements, there is a partial withdrawal under section 4205(b)(2)(A)(i). Whether such work is within the jurisdiction of the collective bargaining agreement or transferred to another location will depend on the language of the collective bargaining agreement. In either event, there is a partial withdrawal under section 4205(b)(2)(A)(i).

Your final question is whether an employer that moves packing operations from the shed [*7] to the field incurs a partial withdrawal under section 4205(a)(2). That section provides that there is a partial withdrawal if there is a partial cessation of the employer's contribution obligation. Section 4205(b)(2)(A) defines two types of partial cessations of the employer's contribution obligation. Whether a partial withdrawal has occurred under the "bargaining unit takeout" provision (section 4205(b)(2)(A)(i)) depends on the answers to the two preceding questions. Whether a partial withdrawal has occurred under the "facility takeout" provision (section 4205(b)(2)(A)(ii)) depends upon what constitutes a "facility" in these circumstances. In Opinion Letter 86-2, we stated that under generally accepted economic terminology, the term "facility" means a discrete economic unit of the employer. The plan sponsor (and, if necessary, an arbitrator and the courts) must apply this definition to the facts in your case to determine whether there is a partial withdrawal under section 4205(b)(2)(A)(ii).

I hope this has been of assistance. If you have further questions please contact the attorney handling this matter, Steven Rothenberg, of the Corporate Policy and Regulations Department. [*8] His telephone number is (202) 956-5050.

Edward R. Macklewicz
General Counsel