



FOLLOW THE MONEY FOR WITHDRAWAL LIABILITY

The Multiemployer Plan Protection Amendments Act of 1980 (“MPPAA”) amended the Employee Retirement Income Security Act of 1974 (“ERISA”) to allow plans from whom an employer withdrew to collect “withdrawal liability,” an actuarially determined “exit fee,” in order to ensure that the plan retained sufficient assets to cover employee retirement benefits. However, withdrawn employers are often in financial distress, frustrating collection. In such cases, *Trustees of IAM Nat’l Pension Fund v. M&K Emp. Solutions, LLC, D.D.C. No. 1:20-cv-0043* (Sept. 18, 2023) shows how a plan can collect from various affiliated and related entities instead.

M&K Employee Solutions LLC (“M&K”) is one of multiple interrelated truck dealerships. M&K contributed to the IAM National Pension Fund (the “Fund”) under a collective bargaining agreement until it withdrew from the Fund in December 2018, incurring \$6,125,168 in withdrawal liability. M&K filed for statutory arbitration to challenge the assessment but failed to make two quarterly payments during the challenge as required by MPPAA. Consequently, the Fund accelerated the liability and sued for the full \$6M.

Judge Royce C. Lamberth granted the Fund summary judgment against M&K for the full amount of withdrawal liability plus liquidated damages, interest, costs and attorneys fees, notwithstanding the pending arbitration. MPPAA expressly mandates a “pay now, dispute later” procedure that M&K violated. Should M&K prevail at arbitration, the Court explained, the Fund would refund the payments. Interestingly, the Fund had received some interim payments for M&K from related companies, and the Court applied that money to cover accrued interest, leaving the principal owed completely unsatisfied.

Next, the Court found several companies affiliated with M&K jointly and severally liable for the withdrawal as trades or businesses under common control with M&K. MPPAA expressly makes such entities liable for the withdrawal liability of any entity with common control. Since Chad and Jodi Boucher owned all these companies and M&K, all these companies were liable for M&K’s withdrawal liability.

Third, the Court found additional companies jointly and severally liable for M&K under theories of single employer or alter ego. Each Company was “extensively interrelated” with M&K, employed common management, jointly exercised common control over labor relations and shared common ownership.

Fourth, the Court held that two newly established companies succeeded to the liabilities of M&K and its affiliates. These new companies had substantially assumed M&K’s assets and continued operations without interruption or substantial change despite actual or constructive notice of M&K’s withdrawal liability.

Finally, the Court held owners Chad and Jodi Boucher personally liable for M&K's withdrawal liability. Although individual owners are not usually employers, ERISA makes entities under common control jointly and severally liable. The Bouchers operated an unincorporated "home flipping" business. Since the Bouchers owned both that business and M&K, they became personally liable for M&K's withdrawal liability under ERISA.

Though collecting withdrawal liability can be challenging, *Trustees of IAM Nat'l Pension Fund* offers guidance to plan trustees determined to follow the money.

NLRB RULES EMPLOYER CANNOT UNILATERALLY END PAY DIFFERENTIAL

On December 28, 2023, the National Labor Relations Board ("Board" or "NLRB") found that an employer violated the National Labor Relations Act ("Act") when it unilaterally ceased paying shift differentials to employees after negotiating a collective bargaining agreement with the union. The case is *Twinbrook OpCo, LLC*, 373 NLRB No. 6 (2023). The employer, Twinbrook OpCo, LLC ("Employer" or "Twinbrook"), operates a skilled nursing facility with employees represented by SEIU Healthcare Pennsylvania, CTW, CLC ("Union" or "SEIU"). When Twinbrook took over the skilled nursing facility in April 2021, it continued the previous operator's practice of paying bargaining unit employees a shift differential of an additional \$1.00 per hour for the second shift and \$0.50 per hour for the third shift.

Twinbrook and SEIU bargained over their collective-bargaining agreement ("CBA") from April to July 2021. During bargaining, the Employer increased the shift differential to \$2.00 per hour for the first shift and \$1.00 an hour for the third shift without informing the Union. The CBA was agreed to and put into effect in July 2022. The Employers continued to pay the shift differential until the second half of August 2022 when it ceased to do so, again without informing the Union. Twinbrook denied SEIU's grievance, and the NLRB General Counsel brought a charge against the Employer.

The Board analyzed the issue under the "contract coverage" doctrine. Under contract coverage, the NLRB examines "the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally On the other hand, if the agreement does not cover the employer's disputed act and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason." *MV Transportation*, 368 NLRB No. 66, slip op at 2 (2019).

The Board determined that the CBA did not authorize Twinbrook to act unilaterally. The CBA article covering wages did not speak to the shift differential. However, the Board found it covered, among others, minimum rates of pay, relative pay rates and pay increases. The article did not foreclose the payment of shift differentials. Further elimination of the shift differential would be inconsistent with the article's wording that stated that "no employee's rate shall be lowered after hire." Further, the management's right article did not address the shift differential payments but instead stated that the Employer needed to give the Union 10 days' notice before making any changes.

The Board also found that the Union did not waive the right to bargain over the issue. Waiver is determined by looking at bargaining history, past practice and the CBA, and must be explicit, clear and unmistakable. Here, the employer argued the CBA's "zipper" clause, which excludes any external agreements not made an explicit part of the CBA from coverage, constituted a waiver by the Union. The Board rejected this, holding that a generally worded zipper clause can only be construed as a waiver of statutory bargaining rights if the matter had been fully discussed and consciously explored during negotiations and the union has consciously yielded or clearly and unmistakably waived its interest in the matter. Here, the zipper clause did not explicitly mention shift differential, shift differential was not discussed during bargaining, and the Employer gave the workers every expectation that the shift differentials would continue from its offer to hire "at your current rate of pay" when Twinbrook took over and from including the shift differential until bargaining concluded and through the first pay period after the CBA went into effect. Therefore, there was no clear, unmistakable waiver.

Accordingly, the Board ordered the Employer to make workers whole, reinstate the shift differential pay and bargain with the Union.

U.S. COURT OF APPEALS STRIKES A CHORD IN SEIU DISPUTE

The U.S. Court of Appeals for the Seventh Circuit recently affirmed the Service Employees International Union ("SEIU") International's authority in a contentious dispute with its Local 73 chapter. *Christine Boardman v. SEIU, et al.*, No. 22-2957. The dispute centered around the internal strife within SEIU Local 73, leading to the International's intervention and the subsequent removal of Local President Christine Boardman. Boardman challenged this action, alleging that the trusteeship was a pretextual retaliation for her protected speech under the Labor Management Reporting and Disclosure Act (LMRDA).

The Seventh Circuit, in an opinion authored by Judge Wood and joined by Judges Easterbrook and Kirsch, provided a comprehensive analysis, upholding the International's decision to impose the trusteeship. The court found that the trusteeship, aimed at restoring democratic procedures and addressing governance issues within Local 73, was justified. A key aspect of the decision was the court's rejection of Boardman's proposed mixed-motive theory. This theory suggested that one bad motive would invalidate the trusteeship. However, the court emphasized that a trusteeship is valid if it serves at least one bona fide purpose. The court detailed the internal conflicts within Local 73, including the feud between Boardman and Secretary-Treasurer Matthew Brandon, which justified the International's intervention. Furthermore, the court found insufficient evidence to support Boardman's claim that the trusteeship was a retaliatory action for her past criticisms of International President Mary Kay Henry.

This decision underscores the autonomy of international unions in managing their local chapters, especially in situations of internal conflict and mismanagement. It clarifies the legal standard for imposing a trusteeship, emphasizes the need for at least one valid purpose, and rejects the notion that mixed motives can invalidate such actions. Additionally, the decision highlights the importance of maintaining democratic procedures and governance within labor unions, a core principle of the LMRDA.

Accordingly, the court's decision reaffirms the legal framework governing labor unions' internal governance and the imposition of trusteeships. It strikes a balance between protecting the rights of union members and the need for international unions to intervene in local affairs for legitimate purposes. This ruling will provide clarity and guidance for future internal disputes within labor organizations.

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