

# Seventh Circuit Orders Pension Fund to Return Withdrawal Liability to Employer

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An employer can contest a withdrawal liability assessment and ultimately prevail. That is the moral of *Bulk Transport Corp. v. Teamsters Union No. 142 Pension Fund*, No. 23-1563 (7th Cir. Mar. 22, 2024).

### Withdrawal Liability Generally

Withdrawal liability is a statutory liability imposed on employers whose obligation to contribute to union pension funds (called multiemployer pension plans) ceases in whole or part. These rules were enacted in 1980 as part of the Multiemployer Pension Plan Amendments Act (MPPAA). Because MPPAA is a remedial statute, courts have often held that it should be liberally construed in favor of protecting the participants in multiemployer pension plans. Indeed, the statute is dramatically skewed in favor of pension funds and disfavor employers.

### Background

*Bulk Transport* involved an employer with a collective bargaining relationship with Teamsters Local 142. During 2000-03, the employer was signatory to two agreements with Local 142. The Construction Agreement covered three specified types of construction driving. The Steel Mill Addendum covered four specified types of non-construction driving, including commodities hauling. Both agreements provided for contributions to the Local 142 Pension Fund for each hour of covered work.

During heated renewal negotiations in 2003, Local 142 sought to expand the scope of work covered under the Steel Mill Addendum to include all non-construction work. Eventually, agreement was reached by which commodities hauling work was specifically excluded. Indeed, as renewed in 2003, the Steel Mill Addendum applied to “Steel Mill Operation Work only.”

In April 2004, Bulk Transport entered into a contract to provide substantial commodity hauling services. The recipient of these services was not a steel mill, and the work was therefore not covered under the express text of the Steel Mill Addendum. Nonetheless, when Local 142 threatened to strike, Bulk capitulated and applied the Addendum (including the Fund contribution obligation) to the commodity hauling work. The text of the Addendum, however, was not modified.

Bulk lost the commodity hauling contract in August 2005 and thus stopped making Fund contributions for the contract work. This reduced level of contributions resulted in the Fund assessing (although not for another seven years) partial withdrawal liability of about \$2 million. Bulk proceeded to arbitration in early 2013. The District Court noted that the arbitration was not concluded for nearly nine years. While the arbitrator issued many orders and changed course several times, he ultimately upheld the Fund’s withdrawal liability assessment because Bulk had “by its conduct adopted the contribution requirements of the Steel Mill Addendum and/or the Construction Agreement” as applicable to commodities

hauling work.

### District Court Decision

The District Court phrased the issue as “whether the Arbitrator was incorrect in basing” the “Award on the adoption theory- i.e., that Bulk had adopted the provisions of the Steel Mill Addendum as applicable to” commodities hauling work, “even though the written terms of the agreement clearly excluded that work.” Citing U.S. Court of Appeals for the Seventh Circuit precedent holding that collective bargaining agreements can be modified by subsequent dealings, the District Court affirmed the arbitrator’s award in favor of the Fund.

### Seventh Circuit Decision

On appeal, the Seventh Circuit reversed. The court first noted that the arbitrator’s “adoption by conduct” ruling was a legal determination (reviewable by the court *de novo*) because its propriety turns on the legal effect of an unwritten practice. Next, the court found that under both the National Labor Relations Act (NLRA) and ERISA, the pension contribution provisions of any agreement providing for contributions to a multiemployer pension fund must be in writing; the absence of a written agreement addressing the commodity hauling work “stands out.”

Next, the court described adoption by conduct as the principle that an employer by its conduct may agree to abide by an existing agreement. The holdings of both the arbitrator and the District Court were grounded in the principle. Adoption by conduct, however, does not change the substantive provisions of an agreement, but rather adds employers while leaving the terms unaffected. Here, however, unless the phrase “**Steel Mill Operation Work only**” is erased from the Steel Mill Addendum, Fund contributions for the commodity hauling work are not provided under the terms of the Steel Mill Addendum. What was needed for Fund to prevail, the Seventh Circuit said, was *amendment* by conduct. Under ERISA and the NLRA, however, the writings are conclusive, and employers cannot opt out of these statutes orally or by their conduct. The court concluded that the writing (here, the Steel Mill Addendum) controls regardless of whether any non-written agreement between the employer and the union provided for greater or fewer contributions than those required by the writing.

The court remanded the matter to the district court with instructions to order the Fund to repay to Bulk withdrawal liability it had collected, with interest.

### Employer Takeaways

*Bulk Transport* is an example of the complexity of the law in this area, especially the interaction between MPPAA and labor law. It also emphasizes that although an uphill battle, an employer can successfully contest a withdrawal liability assessment. Both competent counsel and patience are needed. (The Seventh Circuit’s decision represented the end of a 12-year saga.)

If you have any questions regarding this article or withdrawal liability in general, please contact the authors.

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