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7th Circuit affirms withdrawal liability judgment against sole proprietor owner of withdrawing motor carrier

By William D. Brejcha, Scopelitis, Garvin, Light & Hanson, P.C.

The U.S. Court of Appeals for the Seventh Circuit has affirmed a judgment entered against a sole proprietorship found to have been a commonly controlled trade or business with a motor carrier employer assessed with ERISA withdrawal liability in *Central States, Southeast & Southwest Areas Pension Fund v. Neiman,* Case Nos. 01-1964 and 01-2379 (7th Cir., April 2, 2002). Mr. Neiman had owned several motor carriers in the early 1990s, two of which were South Coast and Transcon. In 1991, South Coast partially withdrew from the pension fund, triggering a Central States assessment of almost $2 million in withdrawal liability. In 1993, South Coast completely withdrew from the pension fund and Central States assessed $500,000 in additional withdrawal liability. In 1993, Neiman sold his interest in Transcon to a third party.

In 1991, Neiman had also been an officer and shareholder of NCO Financial Corp. (NCO), a real estate management company, which paid him $37,000 per month. NCO reported these Neiman payments to the IRS on 1099s as non-employee compensation and internally on its cash disbursement journal as "mgmt. fees." Neiman reported this NCO income to the IRS on IRS Schedule C for Profit Or Loss From Business (Sole Proprietorship). On his IRS tax return, Neiman represented that he had provided management services to NCO, that he materially participated in the business throughout the year, that the business used the cash accounting method, and that his principal business was "business management."

In 1993, Neiman was employed by a Transcon subsidiary, named TC Services. In an SEC proxy statement concerning Transcon's Fall 1993 sale to a third party, Transcon reported that Neiman would serve as a Transcon consultant for 1993's final months after the sale. Neiman was thereafter paid some $100,000 by Transcon before 1993 ended. Transcon reported these payments to the IRS on 1099s as nonemployee compensation. Neiman's 1993 IRS tax return reported his Transcon payments on IRS Schedule C, Profit Or Loss From Business (Sole Proprietorship) as revenue from his management service business. Neiman also represented his active participation in that business, that all of his investment in that business was at risk, and that his Schedule C business had filed Schedule C returns in prior years. Neiman also used his 1993 Schedule C income as the basis for claiming over $100,000 in typical business expenses tax deductions. Neiman's signature on the 1993 return, like that on his 1991 return, attested to the facts that he had both read the return prior to signing it and the return's contents were accurate.

Based on the foregoing facts, Central States sued Neiman to recover unpaid South Coast withdrawal obligations. Central States alleged that Neiman commonly controlled several trades or businesses in 1991 and 1993 which included not only South Coast, but also NCO and TC Services, such that Neiman himself was personally responsible for South Coast's corporate withdrawal liability. Central States relied upon 29 U.S.C. 1301(b)(1) which imposes on the withdrawing employer and "all trades or businesses" under "common control" with the withdrawing employer the statutory obligation to continue payments to the pension fund after employee contributions cease. The 7th Circuit had previously held in *Central States v. Ditello*, 974 F.2d 887, 890 (7th Cir., 1991) that the "common control" provision of 1301(b)(1) was intended to prevent employers from "fractionalizing" their assets among several entities (e.g., NCO and TC in this case) to avoid ERISA withdrawal liability. The parties agreed that the only issue for resolution in Central States' claim against Neiman was whether Neiman had operated a sole proprietorship under common control with South Coast. If the court concluded that South Coast and the sole proprietorship had been operated under "common control," then Central States would prevail and the sole proprietorship (and Neiman personally) would be responsible for South Coast's withdrawal liability.

After a trial, the district court for the Northern District

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of Illinois entered judgment for Central States. Central States relied entirely on Neiman's 1991 and 1993 tax returns, the records of TC and NCO, the Transcon proxy and the 1099s issued to Neiman by TC and NCO. Neiman responded by arguing that Central States' documentary evidence failed to sustain its burden of proof on the issue of whether Neiman operated a trade or business. To support this proposition, both Neiman and his accountant testified that the information on the tax returns and the TC and NCO records had been mischaracterized. The district court rejected Neiman's arguments and entered judgment against Neiman for $3.7 million, finding that Neiman had engaged in regular activities with NCO and TC for profit, that he operated a trade or business in 1991 and 1993, and that he was obligated to pay the South Coast unfunded pension liability.

On review, Neiman challenged the District Court's common control finding. Neiman's first argument urged the Seventh Circuit to adopt a *de novo* standard of review. The Seventh Circuit rejected Neiman's standard of review argument, finding that there was "no question" that the clearly erroneous standard of review applied, citing *Commission v. Groetzinger*, 480 U.S. 23, 36 (1987).

As to the merits, the Seventh Circuit also rejected Neiman's argument that his revenues from NCO and TC were mere "passive investments," noting that his own tax returns impeached his arguments and that the district court had rejected them too. As the "clearly erroneous" standard applied, the Court of Appeals stressed its inability to "second guess" the trial judge. Neiman also argued that imposition of personal withdrawal liability upon him contravened ERISA's purpose, citing case law holding that business owners should not be penalized with unrelated personal withdrawal liability. The Seventh Circuit disagreed, finding *Neiman* is precedent to be inapplicable because the record below demonstrated Neiman's personal trade or business was operated under common control with South Coast, an entity which owed substantial amounts to Central States. The court went on to find that the judgment at issue furthered ERISA's purpose in protecting pension funds from employers who disregard their pension responsibilities. The Seventh Circuit stated that ERISA included no requirement for any "economic nexus" or relatedness between the businesses under common control before withdrawal liability can be imposed. Accordingly, the Seventh Circuit affirmed the judgment.

This case is significant for several reasons. First, while the 7th Circuit recently rejected Central States' efforts to expand 1301(b)(1)'s reach in the recent decisions of *Central States v. Fulkerson,* 238 F.3d 891 (7th Cir. 2001) and *Central States v. White*, 258 F.3d 638 (7th Cir. 2001), the *Neiman* court allowed Central States to extend the withdrawal liability of a defunct business to its owner, personally, based on the owner's own tax returns. Second, the *Neiman* case demonstrates that if business owners are not careful about how they conduct and report their various businesses and income, they might face a potential $3.7 million judgment like Mr. Neiman now faces as a result of the Seventh Circuit's decision.

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Surface Transportation Board issues decisin on use of arbitration to resolve disputes

Surface Transportation Board (Board) Chairman Linda J. Morgan announced various steps the Board has taken to address the appropriate role of arbitration in resolving disputes involving railroad matters on May 22, 2002. These steps include preparing an updated roster of available arbitrators, amending its rules to impose a new requirement that complainants bringing cases before the Board must state that they have considered using the agency's voluntary arbitration process, and reporting to Congress on public comments filed with the agency regarding whether binding arbitration of small railroad rate disputes should be mandated through legislation. These actions follow the Board's initiation of a proceeding in which it sought comments from interested parties on several matters relating to the use of arbitration as an effective means of resolving disputes subject to Board jurisdiction.

After reviewing public comments, the Board prepared an updated roster of 29 available arbitrators with relevant experience. Any party interested in pursuing arbitration under the procedures of Part 1108 of Title 49, United States Code (49 CFR Part 1108) may obtain a copy of the roster by telephoning the Board's Office of Congressional and Public Services at (202) 565-1594. Additionally, as a reminder to parties of the availability of voluntary arbitration under 49 CFR Part 1108, and to encourage the use of arbitration procedures where appropriate, the Board added a new requirement, at 49 CFR 1111.1, that, in complaint cases potentially arbitrable under Part 1108, the complainant must include a statement that arbitration was considered, but rejected, as a means of dispute resolution.

Finally, when it instituted its proceeding, the Board sought to provide a record for Congress on the issue of whether binding arbitration of small rail rate disputes should be mandated through legislation. In the decision issued today, the Board noted that it had received comments from 21 parties, including governmental entities, railroads and railroad groups, shippers and shipper groups, and others. It also noted that the comments revealed basic differences of opinion as to whether or not legislative change to mandate arbitration would be appropriate or desirable, and as to matters such as which types of disputes should be covered, what standards (if any) should apply, the scope of review of arbitral awards, and other matters. A summary of the comments submitted is being provided by letter to Congress.

The Board issued its decision on May 22, 2002 in the proceeding entitled, "Arbitration—Various Matters Relating to its Use as an Effective Means of Resolving Disputes That Are Subject to the Board's Jurisdiction," STB Ex Parte No. 586. A printed copy of the decision is available for a fee by contacting D 2 D Legal Copy Service, Suite 405, 1925 K Street, N.W., Washington, DC 20006, telephone (202) 293-7776, or via e-mail at da2dalegal@earthlink.net. The decision also is available for viewing and downloading via the Board's Web site at http://www.stb.dot.gov.

U.S. imposes new safety rules for motor carriers

By William D. Brejcha, Scopelitis, Garvin, Light & Hanson, P.C.

The Federal Motor Carrier Safety Administration (FMCSA) of the United States Department of Transportation (DOT) has proposed an interim final rule to establish new minimum requirements for American and Canadian applicants for new motor carrier operating authority. The new rule is to take effect on January 1, 2003 and is intended to improve the safety performance of new entrant motor carriers by insuring that the entrant motor carriers are knowledgeable about federal motor carrier safety standards.

New applicants will be required to certify that they will comply with FMCSA's driver qualification provisions, hours of service rules, drug and alcohol testing rules, vehicle maintenance provisions, accident monitoring rules and hazardous material transport requirements. FMCSA also intends to offer educational and technical assistance to new entrant motor carriers. After the agency is satisfied that the new entrant carriers are knowledgeable about safety, the new entrants will be authorized to operate for an 18-month period within which the new entrants will be required to pass an FMCSA safety audit prior to the receipt of permanent DOT registration as an authorized motor carrier. It is anticipated that the 18-month monitoring period and the safety audit requirement will combine to give new entrant motor carriers a better opportunity to learn to efficiently operate under the safety rules and to allow FMCSA to promptly identify and correct deficiencies in new entrant motor carrier safety practices.

Parties interested in commenting on the interim final rules may send their comments by June 30, 2002 to the U.S. DOT Docket Facility, ATTN: Docket No. FMCSA-2001-11061, Room PL-401, 400 South Seventh Street, S.W., Washington, D.C. 20590-0001 or faxed to 202-493-2251. Comments may also be submitted electronically at http://dms.dot.gov/Support/. The rule is available for viewing at http://dms.dot.gov/.

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