OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1555; 84-1567

TITLE JOHN L. CONNOLLY, ET AL., ETC., Appellants V. PENSION BENEFIT GUARANTY CORPORATION, ETC., ET AL.; and WOODWARD SAND COMPANY, INC. Appellant V. PENSION BENEFIT GUARANTY CORPORATION, ETC., ET AL.

PLACE Washington, D. C.

DATE December 2, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN L. CONNOLLY, :

ET AL., ETC., :

Appellants : Nc. 84-1555

v. :

PENSION BENEFIT GUARANTY :

CORPORATION, ETC., ET AL. :

- -x

WOODWARD SAND COMPANY, INC., :

Appellant : Nc. 84-1567

v. :

PENSION BENEFIT GUARANTY :

CORPORATION, ETC., ET AL. :

- -x

Washington, D.C.

Monday, December 2, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

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BARUCH A. FELLNER, ESQ., Washington, D.C.;
on behalf of Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Jett, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF WAYNE JETT, ESQ.

ON BEHALF OF THE APPELLANTS IN NO. 84-1555

MR. JETT: Mr. Chief Justice, and may it please the Court:

This case presents the question whether a federal statute which creates a new legal obligation requiring one private party to pay money to another private party takes property in violation of the taking clause of the Fifth Amendment. This statute, known as ERISA, enacted in 1974, as amended in 1980, requires an employer who ceases participation in a multiemployer pension trust to pay money to the pension trust in amounts computed according to the statute as withdrawal liability.

The essential undisputed fact in this case is that absent the statute imposing the obligation, the employer otherwise would have no obligation to pay money to the pension trust. Under the statute, the obligation to pay the money as withdrawal liability is triggered when the employer withdraws or ceases to have an obligation to contribute to the pension trust.

Now, in practice and in the case before this

Court, this means that the employer has failed to enter into a new collective bargaining agreement requiring a continued contribution into the pension trust. Therefore, in effect, if there is no ability to arrive at a consensual agreement between the union and the employer which includes continued contributions into the pension trust, the withdrawal liability taking of property is triggered.

QUESTION: Mr. Jett, may I inquire just a moment. Now, you're trustees of the operating engineers pension trust, is that right?

MR. JETT: That is correct.

QUESTION: And not the employers?

MR. JETT: That is correct, Your Honor.

QUESTION: And you challenged below the determination that the plan was a defined benefit plan?

MR. JETT: That is correct, Your Honor.

QUESTION: And lost.

MR. JETT: That was under the 1974 statute, that is correct.

QUESTION: Okay, and that issue has been resolved against you and it's not part of this case?

MR. JETT: That is correct, Your Honor. It was resolved --

QUESTION: So what's your interest as trustee

in arguing the imposition of the withdrawal liability on the employers?

MR. JETT: Your Honor, it is this interest. To get back to your original point, the statutory interpretation in effect was resolved against us before the 1980 amendment. When the 1980 amendment was passed, it made clear that Congress did intend to include this type of plan under its statute. So therefore we did not contest the interpretation of the '74 statute any longer.

As far as the interest that the trustees have in the plan, under the statute as amended the statute uses the board of trustees as its instrumentality, the instrumentality of government to take the property. It is true that the property is taken and given to the pension trust.

Nevertheless, the pension trust, when it is being used by this statute and required affirmatively to expend its own funds and to take affirmative action to collect this money, we believe that we have the standing to say that when this property is coming to us in violation of constitutional rights we have the standing and the right to --

QUESTION: Well, whose rights? The employers? I just don't see why the trustees would care

one way or another. You just want to know what has to come in for you to administer, and I don't see why you care what the rule is.

MR. JETT: Well, Your Honor, as far as the trust and the relationship between the trust and the employer, the trust agreement establishes the trustees as responsible for the administration of the fund, including the integrity of the trust document. The effect of the statute would be to invalidate substantial provisions of the trust document.

The trustees are responsible for caretaking that document and are entitled to assert the constitutional right of the infirmity of the statute in order to protect those provisions.

QUESTION: Well, in this case has the liability of the employers been determined? And if so, how much have they been asked to pay?

MR. JETT: Your Honor --

QUESTION: It wasn't clear to me at all from reading the briefs whether we're just looking at this on the basis that there will be some liability imposed, but we don't know how much, or whether something has already been determined.

Have the trustees assessed a specific amount against the employers in this particular plan and case?

MR. JETT: The trustees have assessed, according to the statute, a liability against the particular employer who has intervened in this case and against other employers as well. The intervenor in this --

QUESTION: What about premiums? Don't you pay premiums?

MR. JETT: The premium statute requires the payment of premiums by the trustee. That has been --

QUESTION: But if you win this case, the premium -- you don't pay premiums?

MR. JETT: That is correct.

QUESTION: Well, isn't that a fairly substantial interest?

MR. JETT: Yes, Your Honor, that is certainly another interest that we have in it. We have contested that and we have done so since the 1974 statute was passed. We believe that the premium provisions of the statute are invalid because inseparable from the withdrawal liability provisions --

QUESTION: And isn't that one of the questions --

MR. JETT: That is correct, Your Honor.

QUESTION: -- raised in this case?

MR. JETT: Yes, it is.

QUESTION: Do you mind going back to my question, then, and telling me how much has been determined that the employer here would have to pay?

MR. JETT: Woodward Sand Company has been assessed a liability of something in excess of $200,000, about 201, I believe, thereabouts. That particular assessment relates to -- or has been taken through the arbitration procedure and the amount was established by arbitration as provided under the statute.

QUESTION: Has there been judicial review of that amount yet?

MR. JETT: There has not been. It is a case that is pending in court. I would say, however, Your Honor --

QUESTION: How does that differ in total amount from what would have been determined had it been a defined contribution plan, a defined benefit plan?

MR. JETT: Well, Your Honor, under that determination it treats the plan as a defined benefit plan. In other words, in the 1980 amendment it made clear that Congress intended these kinds of plans to be treated as a "defined benefit plan" under this statute.

QUESTION: Yes, I misspoke. Had it been a defined contribution plan, what would the amount have been?

MR. JETT: It would have been zero, because a defined contribution plan would not be covered by this statute. A defined contribution plan prior to the statute was one in which the employer promised to pay a fixed or defined contribution. The statute, the lower court held before the 1980 amendment, had changed that in a technical way to in effect mean that an individual account plan, a defined contribution plan, is no longer judged on that criterion.

Now, the point I would make about the '74 statute, as I would make about the '80 amendment, is that from the date of enactment of that statute there was a taking of property from the employer based on two events that were not subject to the control of the employer.

The first event was the termination of the plan, and under the statute, Sections 4041 and 4042, there are two ways basically in which the plan can be terminated. It can be terminated voluntarily by the trustees administering the plan or it can be forceably terminated by the PBGC through certain procedures. That certainly is not subject to control by the individual employer.

The second event is, after the termination the PBGC under the '74 statute had the discretion to

guarantee the benefits, and if it did and if there was any need for additional funds they would assess the employer and he had to pay it at that time. So both of those events were completely outside of the control of the employer to effect whether or not his property would be taken.

We come then to the 1980 circumstance, and we have still a statute, as this Court determined in the R.A. Gray case, that Congress did not permit an opportunity for the employer to decide whether he would or would not continue in the pension plan under this new circumstance in which the statute imposes the liability.

Under that circumstance, there was never a hiatus period allowing the employer to withdraw from the plan before this new liability came into effect. And as a matter of fact, as R.A. Gray said, they wanted to make sure he didn't have that opportunity.

So we cannot have under the statute at any time since the enactment date in '74 any point at which there is a consensual opportunity for the employer to agree to the taking of his property.

QUESTION: Why is this much different than the Social Security Act that Congress passed in 1937, that says after such and such a date all employers pay such

and such a tax for every covered employee that's covered by it? No one ever had any opportunity to withdraw from that?

MR. JETT: That, Your Honor, you see, is a statute, as we have cited in our brief, the Darlington case, in which it takes effect from that day forward and you go forward. If you do not wish to engage in the activity, then you just don't engage in it. But if you do engage in it from that day forward, including any executory contracts, they must be subject to that and you must pay on a continuing basis.

QUESTION: But haven't we held that some tax acts can be retroactive?

MR. JETT: There can be -- well, I would have to say this. The tax statutes, the tax cases, I believe are of a different nature --

QUESTION: Why?

MR. JETT: -- than the taking clause, because they fall under the Article I, Section 8 power of taxation.

QUESTION: Well, but surely the power to tax doesn't give the Government the power to take property without just compensation. These remedies come -- the Act you're talking about here comes under the commerce power, and the commerce power doesn't give the right to

take property without just compensation.

But it seems to me you've got to deal with the taxing cases if you're going to say that every exaction by the Government from a private employer is potentially a taking that amounts to a compensable taking.

MR. JETT: Your Honor, we have dealt with the taxing cases in our reply brief. The point was made in the answering brief that if we have to pay compensation for this, this taking, the Government could not possibly afford it. As a matter of fact, the Government could not even go on, because it would have not even the power of taxation.

We have pointed out there that this Court in its opinions looks at the taxing cases under Article I, Section 8, as in effect a concurrent power and interprets that power to tax as being consistent with the taking protection in the Fifth Amendment.

QUESTION: Well, what do you say is taken here? Is it the contractual right to be free from additional liability under the plan, or is it the money that eventually has to be paid?

MR. JETT: It is the money, Your Honor.

QUESTION: It is the money.

MR. JETT: It is the property.

QUESTION: That's the property, the money that

eventually has to be paid?

MR. JETT: That's correct, Your Honor.

QUESTION: You say they're transferring money out of your client's pocket to somebody else?

MR. JETT: No, Your Honor, I'm not. As a matter of fact, I'm saying that the statute by its effect transfers money out of the pocket of the employer into the pension trust.

QUESTION: Right. Well, into somebody else's pocket.

MR. JETT: That is correct. It is a giving -- it is a taking of property from one private party and giving it to another by Government act, and without compensation.

QUESTION: So I take it that you must be saying, then, that the statute could not have just suddenly said that no employer may withdraw from a pension plan?

MR. JETT: I believe that would be the effect --

QUESTION: I would think so.

MR. JETT: -- of the Brooks-Scanlan type of decisions.

QUESTION: The contract says you can withdraw if you want to.

MR. JETT: That is correct.

QUESTION: And if this statute came along and said, well, no, you can't, you must go on making your payments periodically, of course you have got your choice. You can either pay them periodically or you can get out and pay this lump sum.

MR. JETT: And this statute goes even further than that. In effect, it doesn't say you can get out if you're willing to pay this amount. It says you can get out and pay this amount or agree to terms of economic cost to you set by the union, because the statute does not say that it's only an agreement on the contributions to plan.

The union can say, we're not signing an agreement because you don't agree to a five dollar an hour wage increase, or various other provisions, and there would be a resulting failure to reach an agreement.

So all of those terms of business under the collective bargaining agreement --

QUESTION: Well, I know. But you don't need to agree with the union on the employment terms.

MR. JETT: In order to have an agreement requiring contributions to the trust you do, Your Honor. In other words, that --

QUESTION: Well, let's assume at the next negotiation of the collective bargaining agreement you come to impasse and there's a strike.

MR. JETT: Correct.

QUESTION: And you hire replacements.

MR. JETT: Correct. There is a withdrawal from the plan and a withdrawal liability.

QUESTION: For the unfunded for the past, is that it?

MR. JETT: That is correct. Under the Section, the amounts that are charged accrding to the statute.

Now, we believe that the concessions made by PBCC here basically --

QUESTION: Nevertheless, here you don't agree with -- if you had agreed with the union there'd be increased contributions, wouldn't there?

MR. JETT: If the employer --

QUESTION: Wouldn't there? If you had agreed with the union on a five dollars an hour raise, your contributions would be higher than if they didn't get --

MR. JETT: Not necessarily, Your Honor. There's completely different provisions and it simply leaves the contributions into the plan as the only

operative of the statute, but that agreement is a part of an entire collective bargaining enterprise that covers all wages and conditions of employment.

QUESTION: Would you have to make contributions to the plan if you didn't agree with the union or hired replacements who were not union members and you had no relationship with the union any more? Would you have to make contributions?

MR. JETT: No, Your Honor, you would not.

QUESTION: No, of course you wouldn't.

MR. JETT: Under the statute, it means then that the employer must pay the withdrawal liability. The taking of property occurs because of that.

QUESTION: You'd have to pay the withdrawal liability in a lump sum right then?

MR. JETT: That is either in a lump sum or in monthly payments according to the statute.

QUESTION: He could pay it, he could go on and pay it based on the old --

MR. JETT: Right. And all of that is a taking of property in the sense that there was no obligation except for the statute that this money must be paid.

QUESTION: May I ask a question, Mr. Jett. Supposing Congress passed a statute and said that every employer who has more than 200 employes, whatever it

might be, must contribute to a pension plan, whether he's done so voluntarily or not, at least $100,000 a year, say.

Would that be a taking, whether you've already signed up or not?

MR. JETT: Your Honor, it would not be a taking if you are measuring the contribution by events after the date of the statute, by the employment after the statute. If it were a requirement that you must pay money --

QUESTION: If it was based on last year's business, you'd say it would be a taking?

MR. JETT: That is correct. It would be a taking of property.

Basically what Congress has done is said, they've looked at a problem they've regarded as intractable and said: We would like to deal with this in a way that is more tractable if we can take some money from here and increase the property owned by this other party. And that is the essential thing that the taking clause says cannot be done. You cannot take property without compensation by statute.

QUESTION: Mr. Jett, as I understand it the Act provides for alternative methods of calculating withdrawal liability. Does the record tell us which

method was used here? Was it the presumptive method used here?

MR. JETT: Your Honor, it does not state in this record as far as Woodward Sand is concerned.

QUESTION: And your attack on the Act does not include a challenge to a particular method --

MR. JETT: No, Your Honor, it does not.

QUESTION: -- of calculating withdrawal liability?

MR. JETT: It in effect states that any taking of property to any degree is a complete taking of the property. That is, that the property ownership must be given up entirely. And when that occurs, the taking clause must be satisfied.

QUESTION: And your attack does not include an attack on the procedures set up under the Act?

MR. JETT: It does not, Your Honor.

QUESTION: For review.

MR. JETT: It does not.

I will reserve what I have for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Freeman.

ORAL ARGUMENT OF RICHARD M. FREEMAN, ESQ.

ON BEHALF OF APPELLANT IN NO. 84-1567

MR. FREEMAN: Mr. Chief Justice and may it

please the Court:

I stand here before you representing the employer, Woodward Sand, in his case, and I would like to point out to the Court, which is pointed out in the footnotes to our brief, that at the beginning of this proceeding I represented three other additional employers and the total liability assessed against them by this pension fund approached a million dollars.

It is correct that Mr. Jett stated the liability that has now finally been determined by Woodward Sand under the arbitration procedure is $201,000, and the period of 30 days which the trust fund could have had to review that number has now passed and there was no review being sought. So that is a right number in so many words.

I would like to emphasize to the Court that in this case there are three parties to the scenario, not two, as the Government's brief would have you believe. There is the pension fund, there is the union, and there is the employer.

In cases where property is completely expropriated and transferred to another property or the Government, the Court has really looked at two themes in determining whether there has been a taking: One, has the property been completely transferred and

extinguished, which is what occurred in this case, because the employer pays all money over to the trust fund within 60 days of the time the claim is made, even before there's a final adjudication on the accurate amount.

And secondly, that money is being put to Government-directed use. This is not a situation where, like in the Eagle Feathers case, there's a statute passed and there is no longer much value to the property. The property is actually being taken, given to another private person, and the Government has directed the particular use of that property, which is paying for pension funds.

QUESTION: Mr. Freeman, may I ask you the same question I asked Mr. Jett. Do you claim the property taken is the contractual right to be free from additional liability?

MR. FREEMAN: No. We claim that it is all the assets of the employer, the entire bundle of rights.

QUESTION: It's the money you have to pay?

MR. FREEMAN: It's either the money we have to pay or the entire assets of the employer that have to be liquidated in order to pay that money.

I would like to point --

QUESTION: And to clarify what you've just

said a moment ago, there is to be no appeal from the arbitration award of the calculation of liability. So as far as your clients are concerned, that's now fixed and we know what the liability is?

MR. FREEMAN: Yes, Your Honor.

I'd like to point out to the Court that in Webb's Fabulous Pharmacies the Court pointed out that there was merely a contract right in the claimant to the interest that had been deposited in the court. The claimants themselves did not have in their possession the money.

And that's very similar to this case. What we're asking the Court to do is look past the general statement of obligation and look at the fact that there is money there: personalty, realty, goodwill, the entire bundle of rights of the employer, with unlimited liability, that can be expropriated from the employer based upon past acts and some future acts which are beyond the employer's control.

It's very important for this Court, I believe, to keep in mind its decision in Amax Coal. Very recently, this Court has stated that trustees of union pension funds are solely responsible for the funding of pensions. Even without the disclaimer clause in this case, prior to the enactment of this scheme there was no

liability on the part of the employers because there was no promise, other than their good faith promise in collective bargaining agreements to pay the level of contributions which they agreed to.

Throughout the Government's brief, there is an underlying theme of blame here, and that is a red herring. The employers are not to blame. There are two things going on with this statute, both of which the Government I believe directs towards the employer in justifying that goodness and fairness somehow ought to be imposed, should impose the liability on them.

One is the withdrawal. Mr. Jett has ably pointed out that withdrawal is often beyond the control of the employer. In fact, the lower courts in the Ninth Circuit in the Thompson Building Materials case, in the Pacific Iron and Metal case, which are cited in the brief, point out that most withdrawals are involuntary.

QUESTION: Were the ones here involuntary?

MR. FREEMAN: Yes. They were reached based upon an inability to reach an agreement with the union. And I'd like to point out, as Mr. Jett did, that all terms and conditions of an agreement relative to contributing to the pension fund, which really establishes the level of contributions, could be agreed upon and yet, if the union is asking for a five dollar

an hour wage increase, impasse is reached, and the withdrawal liability is assessed. That can hardly be blamed on the employer.

By the same token, the underfunding which is the real problem in this case, not the employer's withdrawal, the underfunding has been in the exclusive control of the trustees.

QUESTION: Well, nevetheless, I suppose that if you can't reach an agreement with the union at the next bargaining time and there's an impasse, would the entire withdrawal liability be assessed if you said: Look, I'm willing to go right ahead and make the payments based on what I have been paying.

MR. FREEMAN: Your Honor, that is exactly what the law provides. Section 302(c)(5) requires that a written agreement between the union and the employer exist in order for the employer to have a right to make those contributions. So that by operation of law, regardless of the desires of the employer to continue, he has withdrawn and the potentially debilitating withdrawal liability is assessed against him.

The Government argues throughout its brief that this case should be decided on due process rationality grounds. It asserts that this law is needed very badly by the Government. It asserts that pensions

are very good and underfunding is a real problem. And it asserts that the Government really can't afford this program and somebody ought to pay for it, and let's make the employers do it.

Well, I submit to you you have faced these arguments many, many times before and rejected them on every occasion. The Government's inability to afford a program is not a justification for a taking. The Government's desire to have a good program for the common purpose is not a justification for taking property.

The issue here is who is going to pay for this program. We don't argue with the notion that pension funds should be funded. It's a question of whether the employers should have their property taken to fund it or whether the Government should fund it.

QUESTION: Well, in looking at the taking clause cases in determining the issue that you raise, is it -- do we normally look at whether there is some valid reason why Congress has imposed this liability on employers generally, rather than on the private at large?

MR. FREEMAN: I would say no, Your Honor.

QUESTION: No? That doesn't enter into the determination of whether it's a taking?

MR. FREEMAN: I would say that that's what the Government would like the Court to do, that somehow there is a rational basis for this, or under the due process clause. But I --

QUESTION: Well, but is that part and parcel of the inquiry that's made to determine the takings issue routinely?

MR. FREEMAN: I would say no. I would say that that -- we're talking about a consensual undertaking here -- or a non-consensual one. That might be rational if there had been a consensual undertaking to enter into the risk. But here the rules of the game were set very clearly and that risk was not there. And unless you can find blame, which I submit to the Court you cannot, on the part of the employers, because they have fulfilled all their obligations, there is no rational nexus there justifying this unlimited debilitating liability.

I can't strenuously enough urge this Court to not be misled by the Government's urging that this case be analyzed under due process rationality grounds, that the Court not be lured into the notion that because a pension funding is a good thing and because the Government program as currently structured needs more money, that we therefore must take from one private

party and give to another when the private party having the property taken from him it is stipulated has had no responsibility for the problem that is purportedly being solved.

QUESTION: Would it be your view, just to get it thought through, that there could never be a valid statute imposing withdrawal liability on an employer unless there was sufficient advance notice to let him out of the pension fund cost-free?

MR. FREEMAN: Yes, Your Honor. If there is a forewarning, if one proceeds and then takes the risk in the system, that is --

QUESTION: But apart from the advanced notice, you'd say, and no matter how small the obligation? I'm trying to -- I'm not clear, in other words, whether your argument turns in part on the fact that $200,000 is a lot of money for your client. It would be the same case if it was 20 cents and your contribution level was a million dollars?

MR. FREEMAN: Yes, Your Honor, it would, because it would involve taking property from one party, transferring it to another, for a reason totally beyond the control of the party who is being deprived.

QUESTION: May I ask if the record shows what your rate of contributions are? Your withdrawal

liability as I understand is about $200,000.

MR. FREEMAN: I think the record will reflect that Woodward Sand Company contributed over 500 or $600,000 to the pension fund in the history that it had with the trust fund.

QUESTION: How much would that be per year, roughly?

MR. FREEMAN: Approximately maybe $100,000 a year.

Thank you.

CHIEF JUSTICE BURGER: Mr. Fellner.

ORAL ARGUMENT OF BARUCH A. FELLNER, ESQ.

ON BEHALF OF APPELLEES

MR. FELLNER: Mr. Chief Justice and may it please the Court:

We will make two arguments this afternoon: first, that the taking clause simply does not apply to the Multiemployer Act; and secondly, that even if this statute does implicate the taking clause, that it meets any and all of the tests articulated by this Court in resolving taking clause questions.

Now, our threshold position is that the taking clause has never been thought to apply to socioeconomic legislation which simply imposes a liability on one party to compensate another party for the harm or

potential harm that he causes. This Court decided in Pension Benefit Guaranty Corporation versus R.A. Gray in 1984 that the Multiemployer Act -- and I quote from the Court's opinion -- "merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal."

Using the words of the Fifth Amendment, private property is simply not being taken for the public use without just compensation. When the Congress requires withdrawing employers to pay for the consequences of their own conduct, no taking clause violation is implicated.

Now, this is precisely the kind of compensatory statute to which the taking clause should not be applied.

QUESTION: Precisely what conduct of the employer are you referring to, Mr. Fellner?

MR. FELLNER: The conduct of the employer, Mr. Chief Justice, involved here is an inchoate business decision. The employer, subsequent to the enactment of this statute, must decide as to whether it's in his best economic interest to continue contributing to the plan, to bargain to impasse, given all of the other issues that are present insofar as collective bargaining is

concerned, or to withdraw from the plan.

And under those circumstances, to suggest that we have specific identifiable property, as Justice O'Connor's questions were going to that particular point, in this case is illusory. We have, to return to the Chief Justice's question, simply an inchoate business decision, and that does not implicate property insofar as the taking clause is concerned.

QUESTION: Well, I guess the worry here is the fact that the plan may have been one which is sponsored and effectively controlled by the union, not the employer, and the employer may have been induced to join it be representations by the union that their liability would be limited in accordance with the terms of the plan, and in fact their withdrawal may be automatically imposed without the fault of the employer, and yet here is this vast potential liability.

Those are the hard facts that certainly cause one to be concerned.

MR. FELLNER: Those are the hard facts that are not before the Court. There are no such facts that are present in the case at bar to indicate that any such inducement occurred. Quite the contrary, in this particular case we have a trust in which there are equal numbers of employer and employee representatives. There

is no suggestion in this record that this trust was dominated by union interests, that in any way, shape, or form they caused the withdrawal here and therefore triggered the liability.

QUESTION: Well, there is certainly evidence of an expectation that the liability would be limited.

MR. FELLNER: That expectation flowed from contract.

QUESTION: Yes.

MR. FELLNER: And I daresay, Justice O'Connor, that similar expectations were prevalent prior to the passage of the National Labor Relations Act, which allowed employes to be fired at will. And similarly, one could go down a litany of statutes. The Civil Rights Act changed the expectations of employers that they relied upon in terms of their contracts.

QUESTION: How many of those had retroactive effect?

MR. FELLNER: This statute, Your Honor, has a post-enactment date, and insofar as the retroactive effect was concerned, while there was a contract that limited the liability of the employers in this case, Justice Rehnquist, it is quite clear in Norman versus Baltimore, in the Motley case, and in the Gray case, that one cannot insulate oneself from requirements

simply by making a contract out of them.

Now, I would submit that the statute at issue here, precisely as Justice Rehnquist pointed out, is very much like the social security statute. It is like the black lung statute which was at issue in Usery Elkhorn.

And these are statutes which adjust the burdens and benefits of economic life, and such socioeconomic legislation should be tested only by its rationality under the due process clause, a test which Appellants --

QUESTION: Well, but those are statutes where the employer can say: Well, given the change in the law, I'm not going to stay in business, I'll get out of business, I won't have any employees and I won't have any liability. That choice isn't open to these employers.

MR. FELLNER: Oh, yes it is open to these employers.

QUESTION: No, because the liability will be imposed regardless of whether they terminate their business.

MR. FELLNER: I understand your question, Justice O'Connor. That is correct, the liability will be imposed regardless of whether they terminate their

business.

However, I would point out an ameliorative provision which tempers that liability. It is Section 4225 of the statute, which, when an employer liquidates his business, there is a sliding scale which allows the withdrawal liability to be reduced to a tremendous degree under that particular provision.

But assuming for the moment that Section 4225 does not alleviate the problem in its entirety, we return to the basic notion, and that is these are liabilities, as this Court pointed out in the PBGC versus R.A. Gray case, these are liabilities that the withdrawing employer leaves behind. And those liabilities, regardless of whether his withdrawal from the plan is voluntary or involuntary, those are liabilities which in the first instance under the taking clause should be tested be a justice and fairness standard.

Moving to the applicability of the takings clause, it seems to me that under notions --

QUESTION: Before we get to that, let me ask you a question. Supposing Congress, in one of its socioeconomic moods that you refer to, when it passed the Fair Labor Standards Act in 1938 said: You know, we're laying down minimum wages now, but we're really

offended by what these businesses have been paying workers in the past. So another provision they add, that wasn't in the bill they actually passed but in my hypothetical: That you pay minimum wages for the last five years, even though, regardless of what your contract was.

Now, is that just one of these socioeconomic things that adjusts burdens and benefits of economic life, and if it's rational it's okay?

MR. FELLNER: Sounds to me like it's the black lung statute, which this Court sustained in its retroactive impact on Turner Elkhorn. That is precisely the kind of statute where the employer, the current employer, was required to pay for the ills retroactively created in the past.

And I might add, Your Honor, that insfar as the Turner Elkhorn statute was concerned, it was the last employer in time. I.e., an employee could have worked for an employer for 30 years and been exposed to coal dust in the mines, and for his last year worked for a different employer. It is that different employer for whom he worked for one year who must pay the entire liability of black lung.

It seems to me the retroactive effect in that case is even greater than in the case at bar, and it was

sustained in the Turner Elkhorn case.

Now, if we may move to the standard set for --

QUESTION: Presumably, Mr. Fellner, that could have been avoided in your hypothetical if, instead of buying a company, the purchaser had bought the assets and not the employees and then let the market take of supplying the new employees for the newly incorporated enterprise.

Would he be able to avoid it that way?

MR. FELLNER: Mr. Chief Justice, let me suggest that there are numerous ways in which withdrawal liability can be avoided by the seller. For example, if there is a simple sale of stock, no withdrawal liability is triggered. If there is a sale of assets and certain bonds are taken out by both the purchasing and selling employer, and the purchasing employer remains responsible for the same contribution base units that the selling employer was responsible for, under those circumstances no withdrawal liability is triggered.

And consequently, in order to judge this statute in terms of its entirety -- and that's why rationality should be the touchstone of judging a statute from stem to stern -- it seems to me that under those circumstances the Court should take into

consideration all of the ameliorative provisions in this statute before it can strike it down.

Now, assuming arguendo that, as Appellants claim, the taking clause does apply in this case, we submit that basic notions of justice, of fairness, have informed this Court's analysis, and under those notions the Multiemployer Act is clearly constitutional.

As Justice O'Connor pointed out in her colloquy with Mr. Freeman, the predominant question under the taking clause is whether withdrawing employers hae been arbitrarily singled out to share the costs -- and I emphasize, share the costs, because as one court put it, the pain is indeed spread around among participants and among withdrawing employers, as well as those that pay premiums, and remaining employers, those who continue to contribute to the plan.

The question is whether withdrawing employers have been singled out to share those costs of maintaining pension plan stability, and I return to this Court's opinion in the R.A. Gray case.

QUESTION: May I ask you one question. Justice O'Connor raised the question about the standing of the trustee to litigate on behalf of the employers. What's your view on that, that issue?

MR. FELLNER: Well, we recognize, of course,

that the standing issue is certainly the primary difficulty of the Appellants rather than the Appellees in this particular case. However, on balance we feel that the trustees do have standing in this case. The trustees have alleged -- we believe their allegations do not rise to the level of constitutional significance, but they have alleged that certain kinds of harm which they feel are triggered by withdrawal liability endanger or may endanger new employers from joining the plan. They may endanger ultimate pension plan viability.

Now, that allegation is contrary to the findings of Congress in this case. However, it seems to me that that basic allegation is probably sufficient, and I point the Court to a footnote in Andrus versus Allard. It's footnote 21, in which the Court faced a similar, not on all fours, but a similar kind of standing difficulty, and overcame I believe that particular standing difficulty. It seems to me that that's sufficient.

We do, however, in response to Justice O'Connor's initial questioning, we do however insist that Woodward Sand has no standing. And contrary to the representations made by Woodward Sand in this particular case, they have very deftly preserved the argument that they owe no withdrawal liability. And they have

suggested in their briefs that they may have withdrawn prior to the enactment date of this statute. If that allegation is so, they owe nothing.

Similarly, the allegations of a million dollars insofar as the totality of liability owed by all the four withdrawing employers who began this case, that allegation must be taken with a salt shaker, because in point of fact the trustees have told the other three employers in this case that they owe nothing because they withdrew prior to the enactment date. Under these circumstances, we really do not have before the Court, it seems to me, a viable withdrawing employer challenging this statute.

Standing, however, is preserved to proceed in this case insofar as the trustees are concerned.

Returning to the taking clause question, let me remind the Court what it said in PBGC versus Gray, and there the Court concluded that if withdrawal liability were not exacted from withdrawing employers, those employers that remain in the plan would have to increase their contributions to cover the liabilities that withdrawing employers, be they voluntary or involuntary, Justice O'Connor, those remaining employers would have to increase their contributions in order to cover the liabilities that withdrawing employers leave

behind.

The Court also concluded in PBGC versus Gray that withdrawals could ultimately affect plan stability. Accordingly, the costs which Congress linked to employer withdrawals should be borne, not by the public as a whole, nor by remaining employers, but indeed we suggest by those that withdraw.

Withdrawing employers are not like the homeowner who happens to be in the path accidentally of the public's highway. Typically, takings involve the transfer of property between unrelated parties or between a private party and the government acting in its entrepreneurial capacity.

Here, on the other hand, Congress concluded that employers who withdraw from multiemployer plans should continue their pension funding obligations. They, after all, have received the benefit of their bargain. They, after all, have received the benefit of their employes' labor, as well as the benefits of reduced wages in return for deferred compensation.

QUESTION: Well, they didn't receive the benefit of their bargain in their agreement to fund the trust plan, did they?

MR. FELLNER: Insofar as the contract is concerned, you're absolutely right. Insofar as, Justice

Rehnquist, the overall responsibility for funding these pension benefits and the liabilities that they create, indeed they have received the benefit, the entire benefit.

QUESTION: Well, you're using it in a rather specialized sense.

MR. FELLNER: That is correct.

Now, this kind of a compensatory statute clearly meets this Court's often articulated justice and fairness rule under the takings clause. In Andrus versus Allard, for example, the Court said:

"Suffice it to say that Government regulation by definition involves the adjustment of rights for the public good. Often this adjustment curtails some potential use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the Government to regulate by purchase."

It seems to me that that language in that case applies with special force to the case at bar.

As part of this Court's consideration of justice and fairness, it has further articulated three factors. They are the character of the Government's action, the economic impact of regulation, and the interference with reasonable investment-backed

expectations. Those three factors appear to infuse this Court's notions of justice and fairness.

First, the character of the Government's action in this case does not amount to a governmental appropriation or a physical occupation, as in Loretto versus Teleprompter or as in Penn Central versus City of New York, where the Court observed that a taking is more readily found when the Government physically invades than when interference arises from a public program adjusting the benefits and burdens of economic life.

QUESTION: Well, would you think if the statute, as well as doing this, said that we're going to make a further adjustment in the burdens of economic life, we're going to say that any group of employers in and any pension fund can be required to contribute to another pension fund in another industry whenever that pension fund needs some money, is that any different in kind?

MR. FELLNER: It seems to me that, once again, that kind of a question touches on rationality. If Congress were --

QUESTION: It certainly does, it certainly does. But nevertheless it poses a question I want to ask you, so go ahead and answer it.

MR. FELLNER: If the Court is posing it in the

context of the taking clause, and if the Court is suggesting that there is no relationship between the withdrawing employer and the ex-pension fund that he is required by Congress, required by Congress to contribute to, whether or not that constitutes a taking, I would suggest, Your Honor, that perhaps even that does not constitute a taking because, because the Court has never held that the kind of "property" which allegedly is at stake here, namely money or an inchoate business decision -- the Court has never held, it seems to me, that that kind of property constitutes property cognizable under the taking clause, even --

QUESTION: Even though it's property that may not be taken without due process of law?

MR. FELLNER: Even though it may be property not taken, that's correct. As this Court has pointed out, judgment as much as logic sometimes infuses the decision as to whether or not a taking occurs. And while logically, Justice White, your question definitely leads me down the road of concluding that it constitutes taking, in terms of the basic judgment involved that may violate due process.

It may be property for purposes of due process in terms of an irrational act by Congress, if we want to create that hypothetical. But whether it constitutes

the specific identifiable property cognizable under the taking clause, I would submit that it does not.

QUESTION: Well, of course, if an employer comes to impasse, there's a strike, he hires replacements and there's no union, he has no relationship any longer with the union or with a single person, not a single one of his prior employees --

MR. FELLNER: Let me first of all suggest that under Section 4218 of the statute any withdrawal that is triggered by a strike does not trigger withdrawal liability. It seems to me that that is the short answer to that particular question.

Congress recognized in this statute that there were extremes of manipulation which could create a withdrawal liability that they did not want to do, and under 4218 that particular hypothetical does not occur.

QUESTION: You just disagree with your colleague on the other side?

MR. FELLNER: That is correct.

The second factor involved in a fairness or taking clause violation is whether or not the impact of the regulation is so great as to, if I can borrow the term, shock the conscience of the Court. That economic impact in this case, it seems to me, cannot be judged. We have before the Court a facial challenge. We do not

have an as-applied challenge in this case.

Even Appellant Woodward Sand, as we've indicated earlier, may owe nothing. Given the complex --

QUESTION: Well, but for your revelation in argument about the fact that there may be no liability in this case --

MR. FELLNER: We have indicated in our brief.

QUESTION: -- I suppose it is an as applied challenge.

MR. FELLNER: I'm sorry, Justice O'Connor?

QUESTION: Well, but for your allegation that there will in fact be no liability here on the employers, it would have been an as applied challenge, because the amount of withirawal liability had been determined.

MR. FELLNER: The court below concluded that this was a facial challenge. The court below precluded the Pension Benefit Guaranty Corporation from conducting discovery in order to put the facts alleged by the four employers below into a broader context, for example that net worth is not the appropriate measure of impact upon a specific employer.

The court below precluded us from developing this evidence precisely because it presented and it

concluded that this case was a facial challenge, and the simple presence of money, of $201,000 as an assessment, does not constitute sufficient evidence to transform this case from a facial to an as-applied challenge.

And this Court is faced with, and the concession is by the parties below as well as the conclusion is by the court below, that we have only here before us a facial challenge and not an as-applied challenge, which has gone completely through all of the complex procedures in this particular statute.

And it seems to me that any kind of measurement of economic impact on a specific employer, because if we only have $201,000 that doesn't tell us in terms of the takings clause cases that this Court has decided, that doesn't tell us the influence or the impact of this particular alleged taking on this specific employer.

Third, we submit that withdrawal liability does not interfere with reasonable investment-backed expectations in this case. The trustees --

QUESTION: Mr. Fellner, I have to confess I have one very difficult problem on this case. This is a facial challenge and not an as applied challenge, so we really don't have to know whether as applied to any litigant before the Court there's really a problem. Is

there standing in such a case?

Are there facial challenges on the taking clause?

MR. FELLNER: Yes, there are. Interestingly enough, in Agins versus Tiburon, I believe that that was presented to this Court as a facial taking challenge.

QUESTION: And we didn't decide the merits.

MR. FELLNER: Yes, I believe the merits were decided in that particular case.

Now, I know this Court in Williamson County struggled with precisely that question, as to whether there was a sufficient amount of facts in that case --

QUESTION: Didn't we reject the facial challenge because as applied it was valid?

MR. FELLNER: In which case, Agins versus Tiburon? I'm not sure, Justice White. I believe it was presented as a facial challenge and I believe this Court concluded that as a facial challenge it did not constitute a taking.

QUESTION: To be invalid, it has to have some particular effect.

MR. FELLNER: It is conceivable that a taking challenge -- in response to both of your questions, it is conceivable that a taking challenge, when viewed in the context of an entire statute, i.e. this Court could

conclude that there is sufficient standing if one dollar is taken. If the Court concludes that money is property, if the Court concludes, notwithstanding our arguments, that it is unfair to take one dollar from any withdrawing employer, then under those circumstances it is entirely conceivable that the Court could determine that a facial taking challenge is valid.

QUESTION: Well your opponent made that argument. He said even if they only take ten dollars without advance notice --

MR. FELLNER: That's correct.

QUESTION: -- that's their whole argument.

MR. FELLNER: That's correct. But under the second prong of this Court's analysis, namely the degree of economic impact, that particular prong is inapplicable to such a facial challenge. But the Court could consider the question in terms of basic justice and fairness and in terms of the other prongs to that particular analysis.

The third one, of course, deals with the degree of investment-backed expectations, and we submit that the trustees had no investment-backed expectations in terms of seeing to it that withdrawal liability is not exacted. Their interests are to the contrary.

And once again, insofar as withdrawing

employers are concerned, they did so with their eyes open. They must have understood what the impact would be on their business. Employer expectations have been tempered by six years of ERISA, contingent withdrawal liability, extensive Congressional debate.

And as this Court found in Gray, even with respect to employers that withdrew prior to the enactment date, we believe, said the Court, employers had ample notice of withdrawal liability imposed by MEPA.

Finally, it would be anomalous, I would suggest, indeed for this Court, having sustained the retroactive imposition of withdrawal liability under the due process clause, to strike down its prospective application under the taking clause. If the taking clause becomes a vehicle to set aside this regulatory scheme to ensure stability in pension plans, if the payment of money to defray the costs of one's own obligations is classified as a compensable taking, I would respectfully suggest that the ghost of Lochner may indeed walk again.

If the Court has no further questions, we ask that the decision of the court below be affirmed.

CHIEF JUSTICE BURGER: Mr. Jett, you have three minutes remaining.

REBUTTAL ARGUMENT OF WAYNE JETT, ESQ.,

ON BEHALF OF APPELLANTS IN NO. 84-1555

MR. JETT: Mr. Chief Justice, may it please the Court:

I would say first, Turner Elkhorn and R.A. Gray both were cases that answered only due process issues. They did not involve the taking clause. The only thing they have to say about a taking clause issue is that there was a deprivation of property there.

Now, in terms of whether there's a different type of property for due process and the taking clause, they appear in the same Fifth Amendment and they don't change the type of property. There is no state, and certainly not this Court, that would decide that money is not property.

And in fact, the taking clause in its very essence was intended as a prohibition against Government action taking wealth from one minority party and transferring it to someone favored by the majority. It was intended first and foremost as a protection of minority rights against oppression by the majority. And if we look to any of the issues that have been raised by PBGC -- rationality, ameliorating provisions, whether the statute is precisely suited to the regulatory purpose, whether it's fair -- every one of those

arguments has no protection for minority rights. They are all decided in the view of the majority.

QUESTION: Can I ask you, do you have any response to your colleague's disagreement with you about withdrawal liability in a strike?

MR. JETT: Certainly, Your Honor. The statute that he cited involves only the situation in which there is a short interim hiatus during bargaining. If there is no final agreement reached, the withdrawal liability applies. It only says you don't go out and collect the withdrawal liability while the union's on strike.

QUESTION: That's certainly what you said before, and he heard you, but he disagrees with you.

MR. JETT: No question about it. In my opinion it is absolutely clear and it says so in so many words.

QUESTION: Well, let's assume he's right. Let's assume he's right and all you have to do is, which is quite a bit, I know, to take a strike, reach an impasse, then --

MR. JETT: All you have to do is leave. If there's no withdrawal liability, then there's no taking of property. But certainly that's exactly what the statute says you can't do.

QUESTION: But what if there was no withdrawal

liability assessed except that you had to go on paying at the same rate you did with respect to the employees you had up to that date?

MR. JETT: Your Honor, it still is a taking of property.

QUESTION: Right.

MR. JETT: It is a taking by the statute that would not exist otherwise.

Money is property. They have not made any argument against our citations of this Court's authority. Household Finance versus Sniadach holds that money is property. Webb's Fabulous Pharmacies says that if you took interest on this money and it's property, then it's a violation of the taking clause.

QUESTION: Mr. Jett, is it true that the trustees have agreed that none of these employers will be liable for anything on withdrawal liability because the withdrawal was before the effective date of the Act?

MR. JETT: That is not true, Your Honor. There is certainly a claim and in fact an arbitration award against Woodward Sand to the effect that it is --

QUESTION: The trustees have not conceded that there would be no liability?

MR. JETT: No, Your Honor. There were three

other intervenors in the case. Those did fall prior to the time that the statute was later amended after Gray and cut off their liability. Those dropped out.

Woodward still has a liability. And in any case --

CHIEF JUSTICE BURGER: Your time has expired, counsel.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:58 p.m., oral argument in the above-entitled matter was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1555 - JOHN L. CONNOLLY, ET AL., ETC., Appellants V. PENSION BENEFIT GUARANTY CORPORAT ETC., ET AL.,; and

#84-1567 - WOODWARD SAND COMPANY, INC., Appellant V. PENSION BENEFIT GUARANTY CORPORATION, ETC., ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)