

FISHER & PHILLIPS LLP

A T T O R N E Y S A T L A W

www.laborlawyers.com

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Atlanta

1075 Peachtree Street, NE
Suite 3500
Atlanta, GA 30309

(404) 231-1400 Tel

(404) 240-4249 Fax

Writer's Direct Dial:

(404) 240-4256

Writer's E-mail:

rchristenson@laborlawyers.com

VIA UNITED STATES MAIL

Regulatory Affairs Group
Office of the General Counsel
Pension Benefit Guaranty Corporation
1200 K Street NW
Washington, DC 20005-4026

Re: *AAA Request for Approval of Revised Fee Schedule for
Multiemployer Arbitrations*

To Whom It May Concern:

This letter comments on AAA's November 20, 2015 request to Pension Benefit Guaranty Corporation ("PBGC") for approval of a new and substantially increased fee schedule for administration of Multiemployer Pension Plan arbitrations. These comments are those of the author alone, and are submitted pursuant to PBGC's request for comment published in the Federal Register on March 23, 2016 (Vol. 81, No. 56, p. 15578). As an attorney who has arbitrated withdrawal liability disputes under both the AAA Rules and under PBGC's Procedures (found at 29 CFR Sections 4221.1 *et seq.*), I urge PBGC to reject the AAA request. Although I am a strong proponent of AAA and its efforts in the multiemployer arena, I believe the proposed increases as presented are unjustified and unwarranted, and serve only to add to the stiff burdens employers, especially small employers, already face when subjected to withdrawal liability demands.

DISCUSSION

AAA is requesting an increase in administrative fees charged when a demand for withdrawal liability arbitration is filed. Under its earlier rules (effective September 1, 1986, and approved by PBGC), arbitrations involving up to \$1 million in withdrawal liability required a filing fee of \$650; those involving \$1 to \$3 million required a fee of \$1000; those involving more than \$3 million and up to \$5 million required a fee of \$1450; and AAA set fees for arbitrations involving more than \$5 million.

Of course, these fees are never paid by pension plans, since under the statutory scheme it is up to the employer to demand arbitration if it disagrees with a pension fund's assessment.

The new rules effective February 1, 2013 increase filing fees many fold. For example, a \$1 million claim under the old rules would require a filing fee of \$650. By contrast, under the new "standard" rules, the filing fee would be \$6200 plus a "final" fee of \$2500, totaling \$8700. This is an increase of over 13 times the prior amount. AAA has also proposed "flexible" rules which would result in a \$9500 filing fee (14.6 times the old fee) if a \$1 million demand is arbitrated to conclusion.

Under the new rules, requests to AAA for arbitration of other withdrawal liability amounts face similar increases. In fact, if an arbitration involves a withdrawal liability assessment of more than \$10 million, AAA fees can go as high as \$71,000 (\$65,000 "filing fee" and \$6,000 "final fee").

Under PBGC Regulation Section 4221.14(d), PBGC approves applications such as AAA's request "if it determines that the proposed procedures will be substantially fair to all parties involved in the arbitration of a withdrawal liability dispute...". Among other requirements, PBGC Regulation Section 4221.14(c) states that the application must demonstrate why the new procedure satisfies this criterion for approval. In other words, the application should show that the increased fees are fair to all parties acting under the rules in withdrawal liability arbitrations.

Unfortunately, AAA's application makes no such showing. While AAA states that "costs associated with the administration of a particular [withdrawal liability] caseload" must not "vastly exceed the fees earned," AAA makes no effort to back up this conclusory statement with any studies or data explaining or identifying its costs. AAA states that the fee increase is necessary "because of the substantial administrative costs and staffing associated with these complex arbitrations," but it makes no effort to inform PBGC or the public what those costs and staffing might be, or how they have increased over the years.

It is especially enlightening to contrast the proposed AAA fee schedule with costs incurred by employers arbitrating withdrawal liability disputes under PBGG regulations. In this case, the employer and fund simply pick an arbitrator and go forward. The arbitrator controls procedural issues and there is no need for third party oversight. Significantly, there are no outside "filing" or "administrative" fees involved.

It is undisputed that AAA adds value to the withdrawal liability arbitration process by providing lists of qualified arbitrators from which the parties may choose. However, it is not necessary to resort to AAA to find highly qualified withdrawal liability arbitrators. To justify its fee increases, AAA should provide facts demonstrating fairness by correlating the value it adds to the increased fees it is requiring.

Without actual facts and figures, AAA presents no justification for its proposed fee increases, and makes no showing that these procedures are “substantially fair” to employers who must pay the new fees to proceed to arbitration. Indeed, failure to arbitrate means an employer waives its defenses to a withdrawal liability demand, so the employer must pay to have any chance to defend itself.

The withdrawal liability statute is already stacked heavily against employers. Employers have short time periods in which to assert requests for internal fund review, or waive all defenses (ERISA Section 4219(b)(2)(A)). Even if they are aware of these time periods and successfully seek review, employers then have a short time period to demand arbitration, or again, waive all defenses (ERISA Section 4221(a)(1)). While this is going on, the employer must pay withdrawal liability installments even if it has good defenses to the fund’s withdrawal liability claim (ERISA Section 4221(d)). Moreover, once in arbitration, the employer has the burden of proving that the fund’s conclusions are wrong (ERISA Section 4221(a)(3)(A)).

Multiemployer pension funds are well aware of these rules and burdens, and use them to full effect to gain leverage over withdrawn employers. For example, some pension plans adopt requirements that employers use the more expensive AAA process rather than PBGC’s more streamlined approach. See, *Central States, Southeast and Southwest Areas Pension Fund v. Allega Concrete Corporation*, 19 F.Supp. 3d 792, 796 (ND Ill. 2014); *aff’d* 772 F.3d 499 (7th Cir. 2014). As the Court observed in *Central States, Southeast and Southwest Areas Pension Fund v. Bulk Transport Corp.*, 60 EBC 1975 (ND Ill, 2015), when discussing AAA’s new fee schedule, “The higher the fee, the more likely it is that employers will be dissuaded from asserting their statutory right to challenge withdrawal liability.”

Indeed, although certain underfunded pension plans may be in long-term economic distress, in the short term they have millions or even billions of dollars to finance their withdrawal liability collection efforts. Given their advantages, they have little incentive to be reasonable or settle differences with employers, and can apply their economic muscle to enforce sometimes questionable demands.

As noted above, AAA’s new increases only impact employers, since only employers are forced to request arbitration in order to defend themselves against withdrawal liability demands. Employers are already required to pay withdrawal liability installments and hire professionals to try to extract themselves from purported withdrawal liability obligations which many of them had no idea existed prior to receiving a demand for payment. Adding AAA’s increased fees to the burden --- especially without any disclosure of financial information justifying them --- merely piles additional and unfair economic hardships on employers.

As noted above, AAA new fees can run as high as \$71,000 in an arbitration. It is difficult to understand how “administration” and “staffing” can justify this when the same case costs

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nothing if arbitrated under PBGC rules.

Without more, PBGC should reject AAA's request because it fails to justify any increase and fails to demonstrate how the increases are "substantially fair" to the employers required to pay them.

Very truly yours,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Robert C. Christenson, Esq.

RCC:jta

Cc: Bruce Perlin, Esq.