



AMERICAN ARBITRATION ASSOCIATION®

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March 30, 2017

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

Re: Response to Comments on AAA Application for Approval of Fee Schedule

Dear Regulatory Affairs Group:

The American Arbitration Association (“AAA”) would like to take this additional opportunity to respond to the comments posted in the Multiemployer Notices section of the Pension Benefit Guaranty Corporation’s (“PBGC”) website, which were in response to the AAA’s application dated on the website as March 23, 2016.

First, we would like to re-emphasize that the AAA’s MEPPA Rules did not change. The only update made in the February 1, 2013 Rules was a fee increase, which the AAA does not consider to be a rule change requiring the PBGC’s approval. However, given the recent litigation challenging this position, we made the decision to reach out to the PBGC for concurrence of the 2013 fee schedule.

The 1986 fee schedule explicitly provided the AAA the discretion to set the fee where the net amount in dispute was in excess of \$5 million. Given this level of discretion provided in the 1986 fee schedule, the AAA set administrative fees equivalent to those reflected in the 2013 fee schedule for cases with claims in excess of \$5 million. Under the 1986 fee schedule, the PBGC approved the AAA’s authority to determine the fees for claims in excess of \$5 million. The PBGC was not involved in calculating the amount of fees the AAA charged for claims in excess of \$5 million. In view of the passage of time since the fees were increased, which was more than 30 years ago, it was necessary to increase the AAA’s fees due to the level of complexity involved in the management of these cases as well as inflation and personnel, technology and general cost increases during the past three decades. With the AAA’s fee schedule being stagnant for more than 30 years, we believe the parties had the benefit of using the

AAA's services at extremely reduced rates. For years, the AAA increased the level of service as a result of the needs of the caseload, without raising fees. The AAA took the lead by providing the services that were necessary because we have the experience and expertise to understand the customer and their expectations.

In support of the AAA's position, we note that the United States Court of Appeals for the Seventh Circuit, stated: *"we hold that the PBGC's approval of a new fee schedule is not required for the new fees to be charged. We add that the agency's delay in responding to the AAA's request for approval may reflect a judgment that, since only the fee schedule is changed by the new rules and the old rules appear to have allowed fee changes without separate approval, the agency has no reason to act quickly on the request."* Central States, Southeast and Southwest Areas Pension Fund and Arthur H. Bunte, Jr., Trustee vs. Bulk Transport Corp., 820 F.3d 884,888-89 (7th Cir. 2016).

When the AAA's rules were approved by the PBGC in 1981, the AAA assumed administration would be similar to the administration of labor arbitrations. This was based primarily on the fact that many of the cases referenced an arbitration provision in a collective bargaining agreement. In addition, the arbitrators selected for these cases came from the AAA's Labor Panel. Based on our experience in managing these cases over the last 30 years, the AAA has found that the management of these cases is very similar to large complex commercial arbitrations. Unlike labor, these cases involve large dollar amounts; there is often extensive discovery, numerous conference calls, multiple days of hearing, multiple arbitrator lists, multiple appointments, bifurcated issues, motions, extensive briefing, heightened disclosure requirements, and the management of the billing for the arbitrator on each case. The administration of MEPPA arbitrations, due to the aforementioned complexities, could span a period of two to three years from initiation to final resolution based upon counsel and parties' expectations and requirements.

Nevertheless, the AAA would like to take this opportunity to respond to some specific issues made by the commenters.

- **Comment No. 1:** *Courts have identified as a congressional goal of MPPAA's arbitration requirement "to provide pension funds with an economical and expeditious alternative to the courts for establishing withdrawal liability." ERISA Section 4221 also states, in pertinent part, that, "[a]n arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures promulgated by the corporation."* (Page 2 of Randy G. DeFrehn's [NCCMP] letter of May 23, 2016.)

Response No. 1: Based on MEPPA cases closed as awarded in 2016, administered under the 2013 fee schedule, the average AAA administrative fee was \$7,857 and the median administrative fee was \$3,938.00. There were 64 MEPPA cases filed in 2016: 50% involved a claim amount of at least \$500,000 and 39% involved a claim of at least \$1,000,000. For cases closed as awarded in 2016, the median time from filing to award was 795 days. Please note that only 12% of these cases proceed to an award, which means the Final Fee is not due in most cases, saving the parties between \$200.00 and \$6,000.00 depending on the claim amount. The Final Fee is incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.

Also, in support of the AAA's position, there is no question that the rate of inflation has had an economic impact on the fees charged by the AAA. One factor that heavily contributed to the

increase in administrative fees charged by the AAA was the wage increases needed to cover higher labor costs. Labor rates typically increase at a rate slightly higher than inflation. For example, the CPI (Consumer Price Index) inflation in 2016 was 2.1%¹, but salary increases for the AAA averaged 3.3%.

The AAA's fees under the 2013 fee schedule, and combined with the arbitrators' fees, are still likely to render a less expensive and more expeditious process than both litigation and ad hoc arbitration. AAA-administered MEPPA cases are not subject to the prolonged nature of litigation and the attorneys' fees involved or the high hourly fees charged by arbitrators in ad hoc arbitrations to address administrative matters. The arbitrators hearing MEPPA cases are extremely well versed in the law surrounding these cases, and therefore do not require the amount of briefing needed in court, and all administrative matters are handled by AAA professional Case Administrators instead of by the arbitrators themselves.

- **Comment No. 2:** *The PBGC regulations, in 29 C.F.R. Section 4221.14(b) provide that PBGC-approved alternative arbitration procedures, if adopted by the pension plan or agreed to by the parties, shall govern all aspects of the arbitration with certain exceptions. The exceptions include that the "costs of arbitration shall be allocated in accordance with Section 4221.10." 29 C.F.R. Section 4221.10(b) in turn states that, other than witness and transcript costs, and other than attorneys' fees which are addressed separately, "the parties shall bear the other costs of the arbitration proceeding equally unless the arbitrator determines otherwise". Thus, the fees charged by the AAA as set forth in the 2013 Fee Schedule are, in theory, borne equally by the employer and the pension plan unless the arbitrator determines otherwise. (We note that the same is true for the arbitrator's fee, which, depending on the complexity of the case, can itself be quite substantial.) The high cost of the AAA fees, then, hurts the pension fund directly, to the extent that it has to pay half of the cost, even where the decision to initiate arbitration is made entirely by the employer. Multiemployer plans that have assessed withdrawal liability are by definition underfunded. The 2013 Fee Schedule is not reasonable to multiemployer plans because the plan's obligation for its share of the high filing fees consumes resources that should be going to fund pension benefits. The high cost of those fees also hurts the plan indirectly to the extent that the employer has to pay its share to the AAA, which consumes employer assets that would otherwise be available to pay withdrawal liability owed to the plan. (Page 3 of Randy G. DeFrehn's [NCCMP] letter of May 23, 2016.)*

Response No. 2: In accordance with the AAA's 2013 fee schedule, the initial filing fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Section 37 of the MEPPA Rules – *Form of Award* -- indicates that the arbitrator shall provide for an allocation of costs in accordance with 29 CFR 2641.9. The Standard Fee Schedule provides for refunds. 100% of the filing fee is refunded, above the minimum fee of \$350, if the case is settled or withdrawn within five calendar days of filing; 50% of the filing fee is refunded if the case is settled between six and 30 calendar days of filing and 25% of the filing fee is refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing. Nine percent (9%) of the cases that closed prior to award in 2016 had a filing fee refunded pursuant to the fee schedule. The 2013 fee schedule also eliminated postponement fees. Twenty-two percent (22%) of the

¹ <http://www.kiplinger.com/article/business/T019-C000-S010-inflation-rate-forecast.html>

filers in 2016 chose the Flexible Fee Schedule as opposed to the Standard Fee Schedule.² This Schedule is partly in response to the current economic challenges affecting organizations worldwide, as well as to customers' who expressed service needs, by offering parties to arbitration cases the opportunity to initiate these cases at reduced fees. With the AAA's Flexible Fee Schedule, there are lower initial filing fees and increased flexibility. The parties have ninety (90) days to decide if they are going to move forward with the case or close it out.

Comment No. 3: *The AAA serves the same important function in every case no matter how large or small the assessment amount. To the extent that the AAA's most important and presumably most costly contribution to the arbitration process occurs in every case regardless of the size of the claim, the AAA has not justified the steeply graduated fee schedule.* (Page 4 of Randy G. DeFrehn's [NCCMP] letter of May 23, 2016.)

Response No. 3: The AAA's fee schedules have historically had different fee levels based on the amount in dispute. We would like to point out that a graduated fee schedule from the onset of the MEPPA Rules has been part of our fee structure. Our experience shows that the graduated fee schedule encourages the parties to designate a realistic claim rather than an inflated claim. Our fees are transparent and there are no hidden charges. There are no additional fees regardless of how much time and services are provided. As a not-for-profit organization that receives the majority of its funding through the administrative fees earned on cases, we need to ensure that the fees associated with the administration of a particular caseload cover our costs. Our experience shows that larger claims typically require an increased level of service and case management oversight. To that end, the AAA provides a graduated fee schedule that addresses the complexity and service required to meet the parties' case management expectations associated with the administration of larger claims. The AAA's large claim management provides the following:

- assignment of a dedicated AAA Vice President to provide administrative oversight;
- promotion of flexible ADR options, including mediation;
- continual review of the AAA's panel, including recruitment and training;
- on-going development of case management functionality to promote expedited case management.

In reality, both advocates and arbitrators bill differently on larger claims because of the complexity of the case and the amount of time involved on the case, which is not any different than how the AAA has structured its fee schedule.

² The AAA offers parties two options for the payment of the administrative fees – The Standard Fee Schedule and the Flexible Fee Schedule. For both schedules, administrative fees are based on the amount of the claim or counterclaim and are to be paid by the party bringing the claim or counterclaim at the time the demand or claim is filed with the AAA. The Standard Fee Schedule is a two-payment schedule that provides for higher initial filing fees but lower overall administrative fees for cases that proceed to a hearing. The Flexible Fee Schedule is a three-payment schedule that provides for lower initial filing fees and then spreads subsequent payments over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to hearing. As an example of the two Schedules, for claims ranging from \$500,000 to \$1,000,000, the initial filing fee under the Standard Fee Schedule is \$6,200 and the initial filing fee under the Flexible Fee Schedule is \$2,500. The Final Fee is the same under both Schedules. Under the Flex Fee Schedule, there is a Proceed Fee.

- **Comment No. 4:** *The nature of AAA’s typically limited role does not seem to justify the 2013 Fee Schedule.* (Page 4 of Randy G. DeFrehn’s [NCCMP] letter of May 23, 2016.)

Response No. 4: The AAA is actively involved in the administration of the cases from the filing of the demand through the closing of the case. Based on our experience in managing these cases, we have identified some of the administrative tasks in the various phases of the process.

- The **“Initiation Phase”** of the process includes: Case Intake perfects the case before assigning it to a Case Administrator, which includes making sure the filing requirements have been met, adding the case to the AAA’s database, billing and ensuring that the appropriate filing fee has been paid; Case Administrator reviews the demand documents to identify special requests and/or services; customizing correspondence in accordance with the parties’ contract and/or agreement; addressing all correspondence to multiple representatives for both sides; answering statements; preparing the initiation letter; addressing locale issues; addressing arbitrability issues; addressing consolidation issues; preparing and pre-screening the list of arbitrators for specific areas of expertise and creating lists in accordance with the parties’ needs, which includes reviewing the arbitrator resumes.
- The **“Arbitrator Selection Phase”** of the process includes: reviewing the parties’ arbitrator lists for the mutual choice; sending a second arbitrator list, if necessary; confirming extensions on the lists; extending an invitation to the arbitrator to serve on the case; giving the arbitrator the authority to access the case in the AAA’s online platform and identifying which documents he/she can access; involvement with any party-appointed arbitrators; reviewing disclosures and following up with the arbitrator should the disclosures appear incomplete or not otherwise in compliance with the AAA’s guidelines prior to transmitting the disclosures to the parties; making decisions when there are objections to the arbitrator as well as being involved with decisions when there is a vacancy should an arbitrator resign, die, withdraw, refuses to serve, be disqualified, or is unable to perform the duties of the office.
- The **“Preliminary Hearing Phase”** of the process includes: obtaining proposed dates from the arbitrator for the parties’ consideration; confirming a date; conference call set-up; sending out reminder notices; maintaining close contact with the arbitrator to ensure schedule change requests and all administrative matters are promptly addressed; facilitating constructive dialogue between contentious parties, often helping to resolve disputes before they are escalated to the arbitrator; participation in the conference call; sending out the scheduling order; monitoring the due dates; keeping track of documents submitted and uploading them to the AAA’s online platform; addressing subpoena requests; addressing requests for reconsideration of rulings; addressing court-related actions; billing for advanced deposits on arbitrator compensation for preliminary services; working with the parties to develop a convenient payment plan for the arbitrator deposits; additional billing and party involvement when an arbitrator charges for fiduciary liability insurance; exploring the possibility of mediation, including explaining the benefits when parties may be reluctant to use that process; assisting the parties in securing a neutral hearing location by reserving rooms at an AAA facility or providing alternative options such as a local hotel; serving as a facilitator when important documents need to be

shared between the parties and ensuring the timing of transmittal is simultaneous to preserve neutrality. During this phase, there are motions, pre-hearing briefs, bifurcated issues, discovery exchanges, requests for additional conference calls, numerous follow-ups on cases being held in abeyance, or status updates on settlement discussion.

- The **“Hearing Phase”** of the process includes: scheduling hearing dates; billing for advanced deposits on arbitrator compensation for hearing and study time as well as reviewing the arbitrators’ invoices; arranging for a conference room; handling postponement and rescheduling requests.
- The **“Post-Hearing”** phase of the process includes: confirming the arrangements for the hearings such as the briefing schedule or post-hearing document submissions; transmittal of briefs; monitoring the award due date; reviewing the award to include the allocation of fees so the parties are clear on the responsibility of the costs of the arbitration; final billing; financial closing, reopening of the hearing, clarification requests and modification requests.
- We also handle **“Other Administrative Services”**: The AAA provides seamless coverage at all times due to a sophisticated back-up system. In addition to a skilled Case Administrator assigned to assist with the procedural elements of a case, the AAA provides a variety of enhanced case administration services. Throughout the entire process, the AAA addresses and responds to procedural questions pertaining to the rules. The AAA maintains a website for the parties and the arbitrators; maintains and recruits qualified arbitrators to the panel; our Financial Department assists with billing; Administrative Review Council (ARC) assists with locale disputes, filing requirements and disclosures; the AAA’s online platform offers a range of tools and technologies that provide fast and flexible dispute management including on-line filing, credit card payment and case management.

➤ **Comment No. 5:** *Where employers are not required by plan rules to use the AAA, the high fees in the 2013 Fee Schedule create an incentive for employers to sidestep the AAA and simply select an arbitrator independently with the pension plan, as provided in the PBGC regulations. This creates additional work for the parties’ lawyers, however, in researching arbitrators’ qualifications and availability, which adds to the expense of the arbitration to both the plan and the employer. This also does not further the public interest in well-administered arbitrations to the extent that AAA is correct that its involvement adds value, which the NCCMP believes it does. (Page 5 of Randy G. DeFrehn’s [NCCMP] letter of May 23, 2016.)*

Response No. 5: The AAA agrees that any perceived incentive to side-step the AAA is shortsighted. What is often overlooked on an ad hoc case is the simple matter of who will perform the necessary administration. In non-administered ad hoc arbitrations, the arbitrator will assume administrative responsibilities and charge at their normal hourly rate. To put this in perspective, if an arbitrator billed the parties for 33 hours of services, at a rate of \$400.00 per hour (note: the average hourly rate for MEPPA arbitrators is \$394), the invoice to the parties would be \$13,200.00. Using that same amount toward the AAA’s fee schedule, that would be more than the initial and final fee for a case with a claim ranging from \$500,000 to \$1,000,000, which amount would be \$8700.00. An ad hoc system can break down when there is a lack of

good faith or experience in the ADR process. Using a provider such as the AAA ensures that the process is private and confidential and serves as a buffer between the parties and the arbitrator. The selection of the arbitrator is the most critical phase of the process. When parties select an arbitrator independently, they are often faced with the dilemma of resolving issues that arise during the arbitrator selection process. For example, what do the parties do when an arbitrator has made a disclosure and there is an objection? How do the parties fill a vacancy if an arbitrator resigns? The AAA's rules provide a process to address those issues. The key goals of a successful arbitration are to minimize judicial involvement, and to reach a reasonably prompt, economical resolution. To accomplish these goals, it would seem sensible to have the arbitrators focus on arbitrating, while using a professional administrator to improve the chances that the parties' dispute will be concluded with a minimum of disruption. What sets the AAA apart as an industry leader are the value-added benefits we provide to the parties. In addition to the Rules, the Panel of Arbitrators and the case management services, we can provide state-of-the-art hearing rooms and provide timely awards and risk management to help keep a case moving by handling any complications that may arise. As a quality control measure, the AAA utilizes a post-case evaluation survey process as an additional step in seeking to provide the best service possible for every case administered. In this manner, our procedures, staff and panelists are evaluated on a regular basis – which allows improvements to be incorporated into our case management process as appropriate.

We wish to note that the AAA celebrated its 90th anniversary last year (1926-2016) and we are proud to have provided 90 years of trustworthy service to date. Our mission remains the same. We are dedicated to effective, efficient and economical methods of dispute resolution through education, technology, and solutions-oriented service. The AAA provides world-class third-party management that offers clients a variety of value-added services to ensure efficient and effective administration of arbitration and mediation cases. In order to assist the parties with a fast and economical process, we encourage the use of mediation and expedited procedures. An arbitration proceeding is a private and confidential process. Thus, AAA staff and AAA arbitrators have an ethical obligation to keep information confidential. The American Arbitration Association is the global leader in conflict management with core values of integrity and service. Our integrity demands impartial and fair treatment of all people with whom we come in contact, regardless of gender, race, ethnicity, age, religion, sexual orientation, or other characterization. Arbitrators that serve on the AAA panel are bound by the Code of Ethics for Arbitrators. Mediators are bound by the Model Standards of Conduct for Mediators. AAA employees are held to the AAA Standards of Ethics and Business Conduct requiring impartiality in providing AAA administrative services.

The AAA addresses the following non-fee schedule related comments for information purposes only. These comments and responses are based on the 1986 MEPPA Rules, approved by the PBGC.

- **Comment No. 6:** *In those few cases where the fund has disputed an employer's right to arbitrate, the AAA has refused to issue a ruling on the dispute – forcing the parties to go to court (at great expense). AAA refused to decide the timeliness issue. (Page 3 of Littler Mendelson, P.C.'s letter of May 20, 2016.)*

Response No. 6: All issues pertaining to arbitrability, including the timeliness issue, are decided by the arbitrator and not the AAA. Section 15 of the MEPPA Rules – *Pre-Hearing Conferences* -- indicates that “prehearing conferences will be held to arrange matters which will expedite the

arbitration including, but not limited to venue, discovery, clarification of issues, exchanges of information, etc.” It is the responsibility of the parties to raise this issue with the arbitrator. Generally, when these issues are raised, the arbitrator will ask both parties to address the issue through a detailed briefing schedule and/or a conference call and promptly issue a ruling.

- **Comment No. 7:** *The AAA rules substantially reduce the time in which the employer may consider arbitrators, and purports to allow the AAA to force an arbitrator on the parties. For example, under the PBGC regulations, the parties are free to propose any arbitrator they choose to hear the dispute. The other party may accept or reject the proposal, and propose any arbitrator it wishes. The parties have 45 days after arbitration is initiated to agree on a mutually acceptable arbitrator. If the parties cannot agree on an arbitrator within that time, either party or both may ask a district court to appoint an arbitrator. This process is consistent with the PBGC view that the best way to ensure confidence in the arbitrator’s impartiality is to have him “selected by mutual consent”. In sharp contrast, the section 11 of the AAA rules limits the parties’ selection to only five arbitrators proposed by the AAA, and allows seven days to rank the arbitrators. Moreover, if a party doesn’t return the list within seven days, “all persons named therein shall be deemed acceptable”. Worst of all, the AAA rules purport to allow the AAA to impose an arbitrator on the parties. (Page 12 of Epstein Becker Green’s letter of May 23, 2016.)*

Response No. 7: Section 11 of the MEPPA Rules – *Appointment from Panel* -- indicates that the list of names shall not be less than five (5) persons. The AAA generally submits eight (8) names on the first list. The rules do, in fact, specify that the lists are due back within seven (7) days, however, by agreement of the parties that date can be extended, and often is extended. The AAA works with the parties on the arbitrator selection process. The rules also indicate that “all persons named therein shall be deemed acceptable” if a party fails to return its list. In order to allow all parties the opportunity to participate in the arbitrator selection process, if a list is not returned by the due date, the AAA will follow up with that party. The AAA does have the power to make the appointment from among other members of the panel without the submission of additional lists, but that process is rarely used. Although the AAA’s rules specify a method for the selection of the arbitrator, as a value added service, the AAA also provides the parties with the flexibility to select their own arbitrator, even if they are not on the AAA’s Roster.

- **Comment No. 8:** *The one service that AAA does provide to the parties is that it supplies the parties with an initial list of arbitrators, and then if there is no selection from the initial list, AAA provides a second list of five arbitrators from which the parties can order their preferences but not exclude any arbitrators. Since the AAA does not apparently examine the arbitrators on its list to determine if (a) they are currently employed or retained by pension funds or employers or (b) they have actual experience with withdrawal liability disputes, the quality of the arbitration lists varies greatly. (Page 3 of Littler Mendelson’s letter of May 20, 2016.)*

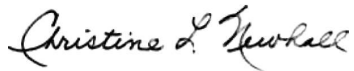
Response No. 8: The parties are allowed to cross names off the second list “for cause.” The AAA’s goal is to appoint an arbitrator that is mutually agreeable to both sides. When lists are prepared, every effort is made to ensure the arbitrators are not related to or involved with the parties. All arbitrators, when invited to serve on a case, have a duty to disclose any potential conflicts. The parties have an opportunity to waive or object to the information disclosed by the arbitrator. In most instances, when disclosures are made, there are no objections to the information that has been disclosed. To provide the best, qualified arbitrators, candidates must

meet the criteria established by the AAA, which is a minimum of 10 years of Pension/ERISA experience with a substantial part of their practice devoted to this area of the law. Arbitrators are also mandated to attend annual training in order to maintain their status on the AAA's Panel.

The AAA respectfully submits this information relating to questions and observations made by the commenters to our request to the PBGC on the AAA's 2013 fee schedule for MEPPA cases.

Thank you for considering the additional comments of the AAA and I look forward to hearing from you about the next steps in this process.

Sincerely,

A handwritten signature in cursive script that reads "Christine L. Newhall".

Christine L. Newhall
Senior Vice President