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VIA EMAIL at reg.comments@pbgc.gov

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

Re: Comment on AAA Application for Approval of Alternative Rules
Docket ID: PBGC-2017-0005

Dear Sir/Madam-

I take this opportunity to respond to the application filed by the AAA. The application should be rejected. Moreover, the PBGC (as it apparently plans to do) should make changes (as directed by the statute, through notice and comment rulemaking) to its rules governing withdrawal liability arbitrations to level the playing field. Currently, withdrawn employers are at a huge disadvantage, which exists in large part due to the PBGC regulation allowing multiemployer plans to force such employers to utilize the services of a third-party, and pay the accompanying huge filing fees, simply to contest the plan's assessment. This was not intended by Congress, it conflicts with the clear statutory language, and is fundamentally unfair.

Discussion

1. The AAA Falsely Represents That Its Rules Did Not Change

The AAA asserts that its “rules did not change,” and that the “only update made in the February 1, 2013 Rules was a fee increase....”¹ This is simply not true.

Indeed, at the same time it drastically increased the filing fees, the AAA also eliminated an entire section of the prior rules. That section contained several protections for employers, and was originally embodied in Section 46 of the 1981 Rules.² Section 46 provided, in full:

¹ AAA Response dated March 30, 2017, at p. 1 (hereafter “Response”).

² The 1981 Rules were issued by the AAA in 1981, and by their own terms purported to be effective June 1 of that year. However, contrary to the AAA's statement, the rules were not “approved by the PBGC in 1981[.]” Response, p. 2. Indeed, the rules were not approved by the PBGC until 1985. *See* Arbitration of Disputes in Multiemployer

Administrative Fees

As a nonprofit organization, the AAA shall prescribe an Administrative Fee Schedule, a Refund Schedule and a Schedule of Other Service Charges to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing, refunding or service shall be applicable.

The administrative fees shall be advanced by the initiating party or parties, subject to final apportionment by the Arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the Refund Schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.³

This section was also contained verbatim in the 1986 Rules, although it was no longer designated as Section 46.⁴ But in its 2013 Rules, the AAA completely removed this section. The as-yet unacknowledged removal has potentially drastic implications for a withdrawn employer.

First, both versions of the AAA rules approved by the PBGC contained language that seemingly strictly limited the AAA's fees only to those necessary "to compensate it for the cost of providing administrative services." With this language removed, there is no longer any basis to believe that the fees charged by the AAA represent the costs of providing administrative services. If the PBGC assumed that the AAA's fees would merely compensate it for its costs, and approved the fees on that basis, to justify its application the AAA should provide clear evidence showing what those costs are and how they have increased. It has not.

However, a few interesting points can be extrapolated from the sparse information provided by the AAA. It states that it administered 64 arbitrations in 2016.⁵ Of those cases, "50%

Plans, 50 Fed. Reg. 38046 (Sept. 19, 1985). The timing is informative – the statute itself provided a safe harbor, allowing parties faced with an assessment of withdrawal liability to take "any reasonable action," which would "be treated as complying with such regulations for such period." *See* P.L. 96-364, Title IV, §405(a), 94 Stat. 1303 (Sept. 26, 1980). However, once the PBGC issued final regulations, those promulgated regulations were to control. *See* P.L. 96-364. *See also* PBGC Op. Ltr. 82-32 (Oct. 28, 1982) ("*In the interim*, multiemployer plan sponsors may use reasonable procedures, such as those established by the [AAA]") (emphasis added).

³ Sec. 46, 1981 Rules.

⁴ Administrative Fees, 1986 Rules.

⁵ Response, p. 2. Despite its seeming relevance, the AAA failed to provide data for any other years, or any other data at all.

involved a claim amount of at least \$500,000.00 and 39% involved a claim of at least \$1,000,000.”⁶ This means that the remaining 11% of claims were below \$500,000. Accordingly, we can determine what the fees would have been under the AAA’s prior (approved) schedule.

The 11% of the claims below \$500,000 would have been charged the prior rate of \$650. The 50% of at least \$500,000 would have been charged the same \$650 rate. The remaining 39% were above \$1,000,000. Let’s assume that every other one of the 25 cases in that 39% were claims involving amounts above \$3,000,000 and so required a fee of \$1,450, as opposed to the \$1,000 fee charged for those claims above \$1,000,000 but less than \$3,000,000. This would result in the following fees collected by the AAA:

<u>Assuming Approved Rates</u>	<u>Rate</u>	<u>Total Fees</u>
7 cases below \$500,000	\$650	\$4,550
32 cases at least \$500,000	\$650	\$20,800
13 cases of at least 1,000,000	\$1,000	\$13,000
12 cases at least 3,000,000	\$1,450	\$17,400

Total: \$55,750

Instead, the AAA collected \$502,848 in filing fees, more than *nine times* the amount it would have collected under the approved rates.⁷ Now, perhaps it could justify a nine-fold increase from 2012 to 2013 (when it unilaterally increased its fees without approval from the PBGC), but it has not done so. If we assume the same rate of filings, how can it be that the AAA could administer its MPPAA caseload in 2012 for approximately \$55 thousand dollars, but a year later the same administration costs more than \$500,000? The AAA nowhere shows what its costs for administration were or are. Accordingly, the AAA’s unilateral removal of the language limiting it to recouping its “costs” is significant, and telling.⁸

Second, the AAA also removed the following language: “The administrative fees shall be advanced by the initiating party or parties, subject to final apportionment by the Arbitrator in the award.” Not only did the AAA remove the pre-existing language calling for fees to be split, it added language calling for the filing fees to be paid in full by the initiating party. The 2013 Rules state: “An Initial Filing Fee is *payable in full by a filing party* when a claim, counterclaim or additional claim is filed.” This change in language runs afoul of the PBGC regulations, which state that “the parties shall bear the other costs of the arbitration proceedings equally unless the arbitrator determines otherwise.”⁹ This is true even for so-called “alternative” rules.¹⁰ The

⁶ Response, p. 2.

⁷ Response, p. 2. ($\$7,857 \times 64 = \$502,848$)

⁸ The omission is especially glaring in light of the AAA’s assertion that “we need to ensure that the fees associated with the administration of a particular caseload cover our costs.” (Response, p. 4) The PBGC is left to guess at the actual costs, how they have changed, and why.

⁹ 29 C.F.R. §4221.10(b).

AAA's subtle change in the language of the rules effectively shifts the entire (increased) filing fee to the employer, as no pension fund will ever initiate arbitration.¹¹

Third, in its 2013 Rules the AAA removed language providing for the deferral or reduction of filing fees "in the event of extreme hardship on the part of any party[.]" The removal of this language seems to eliminate any chance of a withdrawn employer initiating arbitration for free, as it can under the properly-promulgated PBGC regulations. And many withdrawn employers are in huge financial straits, and coming up with a *filing fee* that even the AAA admits *averages* \$7,857 is a huge burden. Many plans realize this, which is why so many require it – if an employer fails to initiate arbitration, the plan wins.¹²

The foregoing examples demonstrate conclusively that, at best, the AAA's assertion that its rules "did not change" is a misrepresentation. And in each instance, the language change (like the huge fee increases) works to the detriment of the employer. These changes (as well as others, discussed below) are hardly "fair and equitable procedures," as required by the MPPAA.¹³

2. *The AAA Admits There Are Other Substantive Differences Between Its Rules and the Properly-Promulgated PBGC Rules*

An earlier comment filed by the undersigned noted that the 2013 Rules "substantially reduce the time in which the employer may consider arbitrators, and purport to allow the AAA to force an arbitrator on the parties." I asserted that this substantially undermined the principle of mutual consent on which the PBGC regulations are premised. In promulgating its own regulations, the PBGC noted that the selection of an arbitrator touches on "fundamental fairness":

An arbitrator has wide latitude in conducting arbitration proceedings, and his award is subject to only limited judicial review. Fundamental fairness demands that the impartiality of one in whom such powers are vested be free from reasonable doubt, and *the best way to ensure that all parties will have confidence in his impartiality is to have him selected by mutual consent.*¹⁴

¹⁰ See 29 C.F.R. §4221.14(b)(5).

¹¹ See *Nat'l Shopmen Pension Fund v. DISA Indus., Inc.*, 653 F.3d 573, 579 (7th Cir. 2011)("either party may seek arbitration, but only the employer suffers a consequence for failing to do so").

¹² See e.g. *Robbins v. B and B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987)(failure to pay the AAA filing fee rendered employer's initiation of arbitration untimely); *Board of Trustees v. F.C. Parsons, Inc.*, 5 Empl. Benefits Cas. (BNA) 2277 (D. Wash. 1984)(same); and *Cent. States, Se. & Sw. Areas Pension Fund v. Allega Concrete Corp.*, 772 F.3d 499 (7th Cir. 2014)(same).

¹³ See 29 U.S.C. §1401(a)(2).

¹⁴ Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34679 (Aug. 27, 1985)(emphasis added).

The AAA responds to the earlier comments by admitting that its rules do not provide the same protections in the selection of the arbitrator, which undermines the principle of mutual consent. The AAA admits that its rules “do, in fact, specify that the lists are due back within seven (7) days,” but says this is often extended by the parties.¹⁵ Whether or not both parties agree to an extension, the fact remains that the AAA limits the choices of arbitrators, and substantially limits the time in which a selection must be made (as compared to the properly-promulgated PBGC rules).

The AAA also admits that it has “the power to make an appointment from among ... members of the panel without the submission of additional lists, but that process is rarely used.”¹⁶ Whether rarely used or not, the fact that under its rules the AAA, and not the parties, has the right to select the arbitrator undercuts the principle of mutual consent.

The AAA did not even respond to the further points made regarding the disqualification of an arbitrator.¹⁷ But this is another substantive and meaningful difference between the AAA’s rules and the properly-promulgated PBGC procedures.

3. The AAA Fails to Justify the Huge Increases It Unilaterally Implemented More Than Four Years Ago

The AAA has apparently been charging its new rates since 2013, even though they have never been approved. Belatedly trying to justify the audacious increases, the AAA suggests “it was necessary to increase [its] 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.”¹⁸ The AAA nowhere provides substantive data on which to base these conclusions, and each is easily rebutted.

First, the alleged “level of complexity” of the cases may be true for those handling the substantive issues, but this does not include the AAA. The AAA handles only the administration of the case, not the substantive issues. There is nothing more complex about the administration of a withdrawal liability arbitration than any other proceeding – all substantive issues are handled directly by the arbitrator, with the AAA staff setting up conference calls, acting as “middle men” for filing of briefs, etc. While the MPPAA is undoubtedly complex, no aspect of the arbitration is determined by the AAA. Indeed, the AAA admits that even “[a]ll issues pertaining to

¹⁵ Response, p. 8.

¹⁶ Response, p. 8.

¹⁷ It did, however, assert that it has the power to “mak[e] 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.” Response, p. 5. This again usurps the authority of the parties in selecting an arbitrator, and undermines the concept of mutual consent. See 29 C.F.R. §4221.4.

¹⁸ Response, p. 1.

arbitrability, including the timeliness issue, are decided by the arbitrator and not the AAA.”¹⁹ Nor does the AAA demonstrate how the alleged level of complexity has increased since its fees were last approved.²⁰ Presumably, this is because the complexity of the statute has not materially changed – it was complex back in 1986, too.

Second, the AAA makes no case that “inflation” justifies the huge increases implemented, and admits it has given wage increases greater than inflation.²¹

Third, alleged “personnel” increases also fail to justify the increases. Using the AAA’s own numbers from 2016, it brought in more than half a million dollars to administer 64 cases. Accepting at face value the AAA’s suggestion that each case somehow takes 33 hours of administrative services²² (a figure that seems ridiculously high) this still means that in 2016, the AAA would have provided 2,112 hours of administration for the 64 cases it handled. This is roughly the equivalent of one full-time employee.²³ Notably, the AAA provides no data showing the time it actually spends in administration. But even assuming 33 hours per case is accurate, that amounts to more than \$238 an hour.²⁴ To put it mildly, that seems high.²⁵

Fourth, “technology and general cost increases” do not justify higher fees. The vast gains made in technology actually work against the AAA’s position – we all carry phones and smartphones around in our pocket now, and setting up a conference call (or Skype, or video conference, or FaceTime, or any one a multitude of other services) is easily accomplished with the click of a button. Computers, word-processing, email and texts have made communication with others, even multiple others, drastically easier than it was in 1986.

Although the AAA elsewhere provides similar responses trying to justify its application,²⁶ nowhere does it even attempt to demonstrate how or whether any of the issues it

¹⁹ Response, p. 7.

²⁰ If anything, due to the technological advances, the administrative aspects of the arbitrations must have gotten much easier.

²¹ Response, p. 3.

²² Response, p. 6. And pretending that it is saving the parties money from what an arbitrator would charge is simply not the case. Many arbitrators charge for their time in increments of days or half-days, meaning most “administrative services” are wrapped up in these billings; in effect, making them free (or close to it) for most parties. In any event, most administrative services are incidental to the substantive work, and while it may happen, I am aware of no arbitrator that bills separately for such services. Indeed, many arbitrators separately employ their own administrative staff who handle calls and other necessary administrative matters.

²³ Given that all administration happens telephonically or via email, the AAA would be hard-pressed to argue that it needs multiple employees at various locations (in multiple cities, for example) in order to administer the MPPAA caseload.

²⁴ (\$502,848 / 2112 hours = \$238.09)

²⁵ Under the approved fees, and again accepting the AAA’s assertions for its 2016 caseload, administrative services would come to \$26.40 an hour.

²⁶ See Response, p. 2, 4, 5-6.

handles are different than cases handled under the PBGC-promulgated rules. Many arbitrations are handled pursuant to those rules, and there is no indication the parties using such procedures are dissatisfied or at any disadvantage. Indeed, most employers are better off, as they can initiate arbitration without the costly extraneous fees.

In any event, the tasks performed by the AAA are quite simple, and easily accomplished with today's technology. There is no reason an employer should be forced to foot the bill for a middle man to accomplish what can easily be accomplished for free. Rube Goldberg came up with complicated gadgets to perform simple tasks, but no one was forced to pay him, or use his services to accomplish those tasks. While no one disputes that the AAA should be able to charge whatever it wants to *consenting* customers who *voluntarily* elect to utilize its services, no one should be *compelled* to use the AAA. Let the marketplace decide whether the services it provides justify the fees it charges.

As things stand, many multiemployer funds gain a significant advantage by forcing withdrawn employers to pay these large filing fees simply to contest the plan's assessment. This state of affairs essentially places an employer at the mercy of the plan, as well as the AAA, and its filing fees. For employers, the resulting Hobson's choice boils down to this: either pay the huge fees, or lose your right to contest the withdrawal liability assessment.²⁷

4. *The AAA Failed to Respond to the Numerous Legal Arguments Raised*

The AAA did not respond to the legal arguments raised against its rules and fees. The closest it came was a mere citation to the Seventh Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Bulk Transport Corp.*²⁸

However, the AAA's citation of the *Bulk Transport* case does not refute any of the substantive legal arguments against it: (1) that Congress tasked the PBGC with promulgating rules governing arbitrations, and once those rules were promulgated, they control, (2) that even if the PBGC could allow "alternatives" to its own promulgated regulations, no version of the AAA rules has ever gone through notice and comment rulemaking, (3) that the 2013 Rules have never been approved by the PBGC, and (4) that the PBGC may not delegate its authority to a private entity. The *Bulk Transport* decision inexplicably failed to address any of these issues.²⁹

Moreover, the Seventh Circuit misstated a few key issues. First, apparently not noticing that the AAA dropped from its 2013 Rules the section to which it pointed, the Court said that

²⁷ As noted by this agency: "A withdrawing employer must resort to arbitration if it wishes to challenge the plan sponsor's assessment of liability, while parties to a commercial contract, for instance, are under no obligation to agree in advance to arbitrate rather than litigate their disputes." Arbitration of Disputes in Multiemployer Plans, 50 Fed. Reg. 34679 (Aug. 27, 1985).

²⁸ 820 F.3d 884 (7th Cir. 2016).

²⁹ See the earlier filed comment (May 23, 2016) for substantive discussion of these unrefuted points.

“the statement in the [1986 Rules] that the fee ‘schedule in effect at the time of filing’ of the request for arbitration should govern implies that the fee can be changed at any time without agency approval.”³⁰ But when it unilaterally changed its rules and increased its fees in 2013, the AAA eliminated the entire “separate (unnumbered) section” containing the sentence quoted by the Court.³¹

The Court also erred when it stated that “the *only* change made by the 2013 rules is the change in the fee schedule.”³² To the contrary, as shown above in Section 1, it is irrefutable that the AAA removed substantive language and made substantive changes in its 2013 Rules beyond “merely” multiplying the filing fees, and each of these changes operates to the detriment of employers.

Conclusion

This matter is pretty simple. No multiemployer plan should be allowed to force a withdrawn employer to pay filing fees to a third-party simply to challenge the plan’s assessment of withdrawal liability. A withdrawn employer may challenge a multiemployer plan’s assessment for free under the statute and regulations properly promulgated pursuant thereto. That being the case, by what principle of logic or fairness should the plan – which benefits if no arbitration is initiated – be able to throw up the substantial hurdle to arbitration in the form of filing fees running in the thousands of dollars?

Respectfully submitted,

/s/ Mark M. Trapp
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³⁰ 820 F.3d at 888.

³¹ See Section 1, *supra*.

³² 820 F.3d at 888 (emphasis by Court). While it’s a bit ironic, in support of its conclusion that the “only” change in the rules was the filing fee, the Court cited to an erroneous statement by the PBGC from this very process. *Id.* (citing Pendency of Request for Approval of Alternative Arbitration Procedure; American Arbitration Association, 81 Fed. Reg. 15578, 15579 (March 23, 2016)).