

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308



RANDY G. DEFREHN
EXECUTIVE DIRECTOR
RDEFREHN@NCCMP.ORG

May 23, 2016

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

Submitted electronically at reg.comments@pbgc.gov

Re: Response to comments requested in Fed. Reg., Vol. 81, No. 56 (March 23, 2016) – Pendency of Request for Approval of Alternate Arbitration Procedure – American Arbitration Association (AAA)

Dear Ladies and Gentlemen:

The National Coordinating Committee for Multiemployer Plans (NCCMP) appreciates the opportunity to provide comments in response to the above-referenced request.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the over 10 million active and retired American workers and their families who rely on multiemployer plans for retirement benefits. The NCCMP's purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization under IRC Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer plan universe, including in the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel and trucking industries.

Introduction

The AAA's 1986 Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes ("MPPAR") were approved by the PBGC in 1986. In 2013, the AAA adopted an updated 2013 Fee Schedule creating a revised MPPAR, effective Feb. 1, 2013. Other than significant changes to the Fee Schedule, the 2013 MPPAR is identical to the 1986 MPPAR. AAA has requested the PBGC's approval of the revised Fee Schedule contained in the 2013 MPPAR. The PBGC has requested public comments on the AAA's request for approval of the 2013 Fee Schedule.

While the NCCMP believes that some increase in the AAA's administrative fee is reasonable in view of the passage of time since the prior fees were approved in 1986, the NCCMP believes that the 2013 Fee Schedule increases administrative fees too much. The NCCMP believes that the magnitude of this increase will have adverse consequences to plans because it consumes resources that should be going to the plan in the form of withdrawal liability payments, and it creates an incentive for employers to bypass the AAA, which increases uncertainty and legal costs thereby undermining congressional intent to require arbitration so as to resolve withdrawal liability disputes efficiently and inexpensively.

Legal Background

Withdrawal liability was created by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which amended the Employee Retirement Income Security Act of 1974 (ERISA). ERISA § 4221 provides, in pertinent part, that, “[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 shall be resolved through arbitration.”

Courts that have reviewed MPPAA's arbitration requirement have concluded that the “provisions for informal, expeditious resolution of withdrawal liability disputes were at the heart of the MPPAA.” See *McDonald v. Centra*, 118 B.R. 903, 918 (D. Md. 1990), *aff'd sub nom. McDonald v. Centra, Inc.*, 946 F.2d 1059 (4th Cir. 1991), quoting *Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502, 504 (9th Cir.1987). See also *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1244 (3rd Cir.1987) (“Provisions for the quick and informal resolution of withdrawal liability disputes are an integral part of MPPAA's statutory scheme”).

Likewise, 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.” *In re BFW Liquidation, LLC*, 459 B.R. 757, 766 (Bankr. N.D. Ala. 2011) (emphasis added). See also *Flying Tiger Line*, 830 F.2d at 1248 (“Arbitration of withdrawal liability disputes substantially reduces the expenses incurred by multiemployer plans...”); *Board of Trustees, Sheet Metal Workers' Nat. Pension Fund v. BES Services, Inc.*, 469 F.3d 369, 374 (4th Cir.2006) (“Congress did not intend to create a new, broad category of litigation that would force benefit plans to spend their assets on court costs and attorneys' fees. Rather, it chose to require arbitration, with judicial review, to create a more efficient dispute-resolution process.”); *Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc.*, 935 F.2d 114, 119 (7th Cir.1991) (“Arbitration is supposed to speed final decision and reduce the costs of getting there.”)

ERISA § 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.” The PBGC promulgated default arbitration rules pursuant to this section, which took effect for arbitration proceedings initiated on or after September 26, 1985. 29 C.F.R. Part 4221. Section 4221.14 of those regulations provides for the PBGC to approve alternative arbitration procedures and lays out procedures and criteria applicable to that approval. The regulation states, in pertinent part, that the PBGC shall approve an application if it determines that the proposed procedures will be substantially fair to all parties involved in the arbitration of a withdrawal liability dispute. 29 C.F.R. § 4221.21(d).

In 1985, the PBGC, on its own initiative, approved the Multiemployer Pension Plan Arbitration Rules effective June 1, 1981, sponsored by the International Foundation of Employee Benefit Plans and administered by the AAA. 50 FR 38046 (Sept. 19, 1985). The 1981 rules were modified in 1986, and the 1986 MPPAR was approved by the PBGC in 1986. 51 Fed. Reg. 22,585 (June 20, 1986).

The 1986 MPPAR charged a fee of \$650 per case. The 2013 MPPAR, by contrast, contains a Standard Fee Schedule and a Flexible Fee Schedule each of which has a nine-level range of fees that varies based on the amount of the claim. For the lowest level on the Standard Fee Schedule (claims from \$0 to \$10,000), there is an initial filing fee of \$775 and a final fee of \$200. The highest category (claims above \$10,000,000) has a base initial fee of \$12,800 plus .01% of the amount over \$10 million to a maximum of \$65,000 plus a final fee of \$6,000. While the Initial Filing Fees are lower under the Flexible Fee Schedule, the combined Initial Filing Fee and Proceed Fees are higher than the Initial Filing Fees alone under the Standard Fee Schedule. The amounts of the Final Fees are the same on both schedules.

Discussion

The PBGC regulations, in 29 C.F.R. § 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 §4221.10.” 29 C.F.R. § 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 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. Given the difficulties plans have with collection of withdrawal liability from employers that are themselves often financially insecure (which is typically what led them to decide to withdraw from the pension plan), it is not a small matter to the plans to have such a large chunk of the employer’s resources going to the AAA instead of to paying withdrawal liability owed to the pension plan¹.

¹ Thus, while there may be employers for which the substantially increased fees are “chicken feed,” as described by the court in *Cent. States, Se. & Sw. Areas Pension Fund v. Bulk Transp. Corp.*, No. 15-3208, 2016 WL 1719335, at *4 (7th Cir. Apr. 29, 2016), we do not think that is necessarily the case for all or most employers that have been assessed withdrawal liability.

In this regard, we note that, although the employer is required by statute to continue to make interim payments to the plan during the review and arbitration process -- see ERISA §§ 4219(c)(2), 4221(d) -- the total amount of a withdrawn employer's resources is often limited. Moreover, where an employer files for bankruptcy, the pre-petition withdrawal liability owed to a pension plan becomes an unsecured, non-priority claim, only a fraction (or none) of which is typically paid. See, e.g., *In re Marcal Paper Mills, Inc.*, 650 F.3d 311, 319 (3d Cir. 2011) (holding that post-petition withdrawal liability should be classified as an administrative expense in contrast to the treatment of pre-petition withdrawal liability as to which no priority would attach). The AAA should not put itself in the position of becoming a creditor of a bankrupt employer competing with the multiemployer pension plan for the division in bankruptcy of a limited estate.

The AAA states in its request for approval that withdrawal liability arbitrations “tend to be highly contentious, involve large dollar amounts, the parties engage in voluminous discovery, and there can be multiple preliminary calls as well as multiple days of evidentiary hearings, can be pending for long periods of time, involve bifurcated issues and extensive briefing.” The difference between the AAA fees and the arbitrators' fees is instructive in this regard. Arbitrators typically charge fees per day or per hour based on how much time they actually spend on a case. The AAA's fees, by contrast, increase based on the amount of withdrawal liability assessed, which would seem to be a poor proxy for how much AAA staff time the case is going to require. This is so because the most important function that the AAA serves is providing the parties with a (or occasionally more than one) panel of experienced arbitrators who are appropriately trained and screened to conduct this specialized type of arbitration. The AAA serves that 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, AAA has not justified the steeply graduated fee schedule.

Beyond the arbitrator selection stage, it's certainly possible that some larger cases will be more complex in terms of discovery, motions and hearings, but many of those stages are handled by the arbitrator him- or herself and require little if any involvement of the AAA other than perhaps facilitating the scheduling of conference calls. Moreover, in our experience, some cases, even ones with large assessment amounts, involve one or more discrete legal issues that get decided by the arbitrator on the basis of the parties' briefs and by reference to stipulated facts. In that type of case, the AAA's role beyond the initial provision of the arbitrator panel would be fairly minimal and would not justify the high fees charged under the 2013 Fee Schedule. Thus, the nature of the AAA's typically limited role does not seem to justify the 2013 Fee Schedule.

The AAA's application indicates that, “the 2013 fee schedule is the same schedule the AAA has applied to other arbitration caseloads that are similarly complex.” Indeed, there is nothing in the 2013 Fee Schedule that is specific to a withdrawal liability dispute. This is not a sign of substantial fairness to the parties, however, because most arbitrations are between entities that have agreed contractually to arbitrate disputes. In withdrawal liability disputes, by contrast, arbitration is mandated by statute. An employer that ceases to have an obligation to contribute to a multiemployer pension plan and is assessed withdrawal liability has no alternative means to challenge the fact or amount of the assessment other than through arbitration².

² This has already led to litigation by employers challenging the reasonableness of the AAA's fees, particularly in the context where the revised fees had not been approved by the PBGC. See, e.g., *Cent. States, Se. & Sw. Areas*

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.

Conclusion

The NCCMP notes that Congress included an arbitration requirement in MPPAA with the intent that such a requirement would enable disputes over withdrawal liability assessment to be resolved promptly, efficiently and inexpensively. Given that MPPAA created withdrawal liability This goal was consistent with MPPAA's purpose to address the need for additional funding for pension plans with unfunded vested benefit liability, the arbitration requirement was intended and, therefore, to avoid wasting pension plan assets in the process of assessing and collecting withdrawal liability. That purpose is not furthered by having a large amount of employer and plan resources consumed in filing fees paid to the AAA.

The NCCMP believes that the AAA should be permitted a reasonable increase in its fees, which have been in effect since 1986, but the NCCMP does not believe that the size of the fee increase in the 2013 Fee Schedule or the steeply graduated nature of that schedule is fair to all parties involved in the arbitration of a withdrawal liability dispute. Moreover, that the fee increases substantially on the basis of the amount of withdrawal liability assessed in a given case is not justified by the nature of the work the AAA does in these cases, the most important component of which is necessary and comparably resource-consuming regardless of the amount of withdrawal liability at issue.

Thank you for considering this important matter. Please feel free to contact us with any questions.

Respectfully Submitted,



Randy G. DeFrehn
Executive Director

Pension Fund v. Allega Concrete Corp., 772 F.3d 499, 501 (7th Cir. 2014) (finding that employer had failed to timely initiate arbitration under the 1986 MPPAR, which had received PBGC approval, such that the lack of PBGC approval for the 2013 Fee Schedule was not dispositive); compare Cent. States, Se. & Sw. Areas Pension Fund v. Bulk Transp. Corp., No. 15-3208, 2016 WL 1719335, at *3 (7th Cir. Apr. 29, 2016) (holding that the PBGC's approval of a new fee schedule is not required for the new fees to be charged by the AAA).