UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

QUALITY AUTOMOTIVE SERVICES, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 12-1503
	)	
PENSION BENEFIT GUARANTY CORPORATION,	)	Judge Ellen S. Huvelle
	)	
Defendant.	)	
	)	

DEFENDANT PENSION BENEFIT GUARANTY CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Defendant Pension Benefit Guaranty Corporation ("PBGC") moves for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in favor of PBGC on Plaintiff's Complaint. PBGC states the following in support of its motion:

1. There are no issues of material fact; and
2. PBGC is entitled to judgment as a matter of law on Plaintiff's Complaint for the reasons set forth in the accompanying Memorandum in Support of Defendant Pension Benefit Guaranty Corporation's Motion for Summary Judgment.

PBGC requests that the Court grant PBGC's motion for summary judgment on Plaintiff's Complaint in its entirety.

Date: April 12, 2013
Washington, D.C.

Respectfully submitted,

PENSION BENEFIT GUARANTY CORPROATION

By: /s/ Beth A. Bangert
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MEMORANDUM IN SUPPORT OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Dated: April 12, 2013
Washington, D.C.

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PRELIMINARY STATMENT

Under Title IV of the Employee Retirement Income Security Act ("ERISA"), an employer that ceases to have an obligation to contribute to a multiemployer pension plan incurs a complete withdrawal.[1] If the plan is underfunded at that time, the employer owes withdrawal liability.[2] A limited exception to this rule exists for Plans that receive substantially all of their contributions from employers engaged in the trucking industry ("trucking plan exception"). Under the trucking plan exception, an employer that no longer has an obligation to contribute has not withdrawn so long as the plan's contribution base has not been substantially damaged by the cessation of its employers' contribution obligations ("employers' cessations") in the aggregate.[3] The Pension Benefit Guaranty Corporation ("PBGC") determines whether a plan has suffered substantial damage to its contribution base.[4]

The Freight Drivers and Helpers Local No. 557 Pension Fund (the "Fund") is a significantly underfunded multiemployer pension plan. Its contribution base units ("CBUs")[5], active participants and assets have been steadily declining for more than ten years while its unfunded vested benefits ("UVBs") and contribution rates have been steadily increasing. Under these facts, PBGC determined that the Fund's contribution base had been substantially damaged by employers' cessations and, therefore, the trucking plan exception was inapplicable. Was PBGC's determination that an increasingly underfunded multiemployer pension plan with

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[1] 29 U.S.C. § 1383(a)(1).

[2] 29 U.S.C. § 1381.

[3] 29 U.S.C. § 1383(d).

[4] *Id.*

[5] Measured in hours worked.

deteriorating CBUs was substantially damaged by its employers' cessations arbitrary and capricious?

STATUTORY BACKGROUND

PBGC is the federal agency established by Title IV of ERISA to administer the insurance program that backstops the nation's private sector defined benefit pension plans.[6] The pension insurance program acts as a safety net for American workers. PBGC guarantees the pension benefits of nearly 43 million participants in more than 25,500 pension plans and is the trustee of more than 4,447 failed pension plans.[7] PBGC's multiemployer program protects about 10.37 million workers in about 1,450 pension plans.[8] For its 2012 fiscal year, PBGC reported a deficit of more than $34.3 billion, of which $5.2 billion is attributed to the multiemployer program.[9] In its 2012 fiscal year alone, PBGC paid $95 million in financial assistance to 49 multiemployer plans that covered nearly 51,000 participants.[10] PBGC is self-financed, and obtains its revenues exclusively from five sources: (i) premiums paid by plans or employers sponsoring ongoing plans; (ii) investment income; (iii) the assets in terminated plans; (iv) recoveries, if any, from employers whose underfunded plans have terminated; and (v) termination premiums imposed by

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[6] 29 U.S.C. §§ 1301-1461; *see generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990).

[7] *See* PBGC 2012 Annual Report, http://www.pbgc.gov/documents/2012-annual-report.pdf, at 7, 22.

[8] *Id.* at 2, 33.

[9] *Id.* at 2, 32.

[10] *Id.* at 10.

the Deficit Reduction Act of 2005 [and made permanent by the Pension Protection Act of 2006].[11]

The insurance programs for single employer plans and multiemployer plans differ.[12] A multiemployer plan, by definition, is a plan to which more than one employer is required to contribute.[13] When a participating employer ceases to have an obligation to contribute to a multiemployer plan, that employer incurs a complete withdrawal.[14] If the plan is underfunded at that time, the employer owes withdrawal liability.[15]

There are a few limited exceptions to this rule, such as for employers' cessations that occur as the result of asset sales satisfying certain criteria or—under a different set of rules—withdrawals from plans that receive contributions substantially from employers engaged in the construction industry, entertainment industry or trucking industry.[16] The trucking plan exception applies to a plan to which employers engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry, make substantially all of the required contributions.[17]

Under the trucking plan exception, an employer that no longer has an obligation to contribute (an "exiting employer") has not withdrawn unless the plan's contribution base has

[11] *Id.* at iv.

[12] *See generally* 29 U.S.C §§ 1082, 1322, 1322a, 1341, 1341a, 1348, 1361, 1362, 1426, 1431, 1441.

[13] 29 U.S.C. § 1301(a)(4).

[14] 29 U.S.C. § 1383(a)(1).

[15] 29 U.S.C. §§ 1381, 1391.

[16] 29 U.S.C. §§ 1383(b)-(d), 1384.

[17] 29 U.S.C. § 1383(d)(2).

been substantially damaged by the cessation of its employers' contribution obligations ("employers' cessations") in the aggregate, or the employer fails to provide a bond or escrow for half of the employer's withdrawal liability.[18] Even if the employer provides the requisite bond, it may nonetheless incur a complete withdrawal if PBGC determines at any time within 60 months after the employer's cessation that the plan has been substantially damaged by the aggregate effect of the employers' cessations.[19] This latter point bears emphasis. PBGC does not consider an employer's cessation in isolation. The statute requires PBGC to consider the employer's cessation "together with any cessations by other employers."[20]

This is consistent with Congress's logic in implementing the trucking plan exception. As explained by Senator Durenberger, Congress recognized that while the contribution base of a trucking-industry plan would "almost always" be protected, once substantial damage has occurred, the contribution base is vulnerable:

> … the contribution base of a plan in the trucking industry *almost always* will be protected because motor freight volume is relatively constant. (Emphasis added). When one employer leaves a plan, affected employers [sic] will almost always be reemployed by another employer who takes his place. . . .
>
> Because of these unique circumstances in the motor carrier industry, a withdrawal occurs under this section if an employer ceases all covered operations under the plan and either PBGC determined that the plan has suffered substantial damage as a result of such withdrawal, or the employer fails to furnish a bond in the amount of 50 percent of the employer's withdrawal liability. Thereafter, PBGC has 5 years to determine if the

[18] 29 U.S.C. § 1383(d)(3).

[19] 29 U.S.C. § 1383(d)(4).

[20] *Id.*

> employer's withdrawal, together with any other withdrawals, has damaged the plan's contribution base. . . .[21]

It is at that point—when the plan's contribution base has so eroded that the plan's solvency is compromised—that the trucking plan exception no longer applies when a withdrawal occurs.

ERISA does not, however, define what constitutes "substantial damage."[22] Rather, Congress expressly delegated to PBGC the function of determining whether a plan's contribution base has suffered substantial damage.[23] Since the Multiemployer Pension Plan Amendments Act ("MPPAA") was enacted in 1980, PBGC has consistently considered the same factors in the four requests for substantial damage determinations it has made.[24] These factors are (A) declines in the plan's contribution base, (B) declines in the plan's contribution base attributable to

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[21] Statement of Senator Durenberger, S. 11671, 126 Cong. Rec. 23286-87 (Aug. 26, 1980). Senator Durenburger's remarks have been deemed not to contribute to the legislative history of MPPAA when his comments were inserted into the congressional record after debate, as indicated by a "•". *E.g., Continental Can Co., Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund,* 916 F.2d 1154, 1157 (7th Cir. 1990). However, Senator Durenberger's comments that are quoted here should not be so discounted, as they are not marked with the telltale "•".

[22] 29 U.S.C. § 1383(d).

[23] *Id*.

[24] *Request for Determination of Substantial Damage With Respect to the Cessation of the Obligation to Contribute by DeHart Motor Lines, Inc., and United News Transportation Co. to Trucking Employers of North Jersey Welfare Fund, Local 641,* 50 Fed. Reg. 36171 (Sept. 5, 1985); *Request for Determination of Substantial Damage With Respect to the Cessation of the Obligation to Contribute by Pioneer Paper Stock to Freight Drivers and Helpers Local Union No. 557 Pension Fund,* 52 Fed. Reg. 28881-02 (Aug. 4, 1987); *Request for Determination of Substantial Damage With Respect to the Cessation of the Obligation to Contribute by Kane Transfer Co. to the Freight Drivers and Helpers Local Union No. 557 Pension Fund,* 63 Fed. Reg. 1511-01 (Jan. 9, 1998); and *Request for Determination of Substantial Damage With Respect to the Cessation of the Obligation to Contribute by U.S.F. Red Star, Inc. to Freight Drivers and Helpers Local Union No. 557 Pension Fund* (May, 22, 2009).

employers whose obligations to contribute have ceased, (C) the collective impact of employers' cessations over the time period under consideration, and (D) the plan's overall financial condition as measured by changes in the average contribution rates, changes in total contributions, changes in unfunded vested benefits, changes in the market value of plan assets and the percentage of withdrawn employers paying withdrawal liability.

STATEMENT OF FACTS

The facts of this case are contained in PBGC's Administrative Record.[25] QAS was a trucking industry employer that operated for approximately three years in and around Baltimore, Maryland.[26] It was one of a series of employers that Total Distribution Services, Inc. ("TDSI") hired to operate a loading and unloading facility in Jessup, Maryland (the "Jessup Facility").[27] QAS signed a collective bargaining agreement with Freight Drivers and Helpers Local Union No. 557 ("Local 557") and began operating the Jessup Facility on August 1, 2005.[28] QAS employed roughly 60 employees, who were also Local 557 members, to work at the Jessup Facility.[29] QAS made contributions to the Fund based on the number of hours its employees

[25] The Administrative Record ("AR") has been filed with the court as docket entries 6-10 and 13.

[26] AR at 1, 5, 6, 10, 1438.

[27] AR at 1, 6, 1378-79, 1385.

[28] AR at 6, 1378, 1385.

[29] AR at 1, 6, 1379, 1385.

worked, as required under the Local 557 collective bargaining agreement.[30] QAS paid an average of $50,018.90 in monthly contributions to the Fund.[31]

Effective July 31, 2007, QAS ceased operations at the Jessup Facility and ceased to have an obligation to contribute to the Fund.[32] Effective August 1, 2007, Annapolis Junction Rail Solutions, Inc. ("AJRS") assumed operations at the Jessup Facility, signed a collective bargaining agreement with Local 557, hired employees who were also Local 557 members, and made contributions to the Fund as required by the Local 557 collective bargaining agreement.[33] While not relevant to PBGC's determination, PBGC does not dispute that AJRS employed an average of 61 Local 557 members per month or that AJRS's average monthly contribution to the Fund was $44,463.98.[34]

On December 3, 2009, the Fund assessed withdrawal liability against QAS and its controlled group in the amount of $2,045,014.[35] On September 30, 2011, QAS asked the PBGC to determine that its exit from the Fund had caused no substantial damage to the Fund's

[30] AR at 1, 6, 1378 ¶ 2, 1380.

[31] AR at 1380. QAS asserts that QAS's average monthly contributions were $48,392.00, citing AR at 805. Dkt. 15 at 8. However, based on QAS's own statement that it paid $1,200,423.57 in contributions divided over the 24 months it contributed, the correct amount of QAS's average monthly contribution was $50,017.65. AR at 1380.

[32] AR at 6, 1411, 1441, 1379 ¶ 5, 1385.

[33] AR at 1379 ¶ 11, 2084.

[34] AR 1379. This amount is less than the amount that QAS now asserts was AJRS's average monthly contribution, $47,882. Dkt. 15 at 8. However, it is based on AJRS's contribution history, which is part of the Administrative Record. *Infra*, text accompanying notes 85-92.

[35] AR at 6, 1380, 1438, 1474, 2081, 2083.

contribution base.[36] On January 27, 2012, the Fund asked the PBGC to determine that QAS's exit had caused substantial damage to the Fund's contribution base.[37] Its request included attachments showing, among other things, that from 2000 to 2010, the Fund's contribution base units had decreased from 2.1 million CBUs to 400,595 CBUs,[38] the Fund's contributing employers decreased from 19 to 7,[39] the number of active participants declined from 1,138 to 204,[40] the ratio of active participants to inactive participants increased from 2.5 inactive participants for every 1 active participant to 13.8 inactive participants for every 1 active participant.[41] Moreover, the cost of benefit accruals under the Fund tripled from 2004 to 2010.[42] The Fund has been in critical status since 2009 and could only forestall insolvency.[43]

On February 24, 2012, QAS sent PBGC its opposition to the Fund's request and on May 30, 2012, the Fund responded to QAS's opposition.[44] PBGC considered the documents the parties submitted.[45] On July 31, 2012, PBGC notified QAS of its determination that "Quality's cessation of covered operations on July 31, 2007, substantially damaged the contribution base of

[36] AR 1378-1382.

[37] AR 1-460.

[38] AR 1439, 1497, 1565. *See* AR 29-676, 1417-18.

[39] AR 858, 1016, 1321. *See* AR 1422-24.

[40] AR 1489, 1565. *See* AR 62, 261, 1413-14.

[41] AR 1439, 1489, 1557. *See* AR 62, 261, 1413-14.

[42] AR 1440, 1544, 1643.

[43] AR 1441, 1819, 1484, 1487.

[44] AR 1383, 1405.

[45] AR 1411, 1437.

the Fund" under 29 U.S.C. § 1383(d)(4).[46] PBGC explained that its determination "considers the impact of the cessation of contributions by both the employer under consideration and all other employers that have ceased contributing to the plan prior to the date PBGC's determination must be made."[47]

STANDARD OF REVIEW

As QAS acknowledges, a court's review of PBGC's informal administrative adjudication under the Administrative Procedure Act, 5 U.S.C. § 706, is deferential. "Courts are not to apply typical summary judgment standards."[48] In other words, in reviewing informal adjudication, courts do not consider whether there is a genuine issue of material fact. Instead, courts review only "whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."[49] The court "is not to substitute its judgment for that of the agency."[50] Its role is to determine whether the agency's action is arbitrary or capricious.[51]

Agency action is arbitrary or capricious

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[46] AR 2075.

[47] *Id*.

[48] *Sara Lee Corp. v. ABA Retirement Plan*, 671 F. Supp. 2d 88, 97 (D.D.C. 2009).

[49] *Sara Lee*, 671 F. Supp. 2d at 97 (quoting *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)) (internal quotations and citations omitted). This is consistent with Local Civil Rule 7(h)(2) of this District, which provides that when judicial review is based on an agency's administrative record, the parties' statements of facts must refer to that record. The accompanying Comment states that the Rule "recognizes that in cases where review is based on an administrative record the court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record."

[50] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto, Ins. Co.*, 463 U.S. 29, 43 (1983).

[51] *Menkes v. U.S. Dept. of Homeland Sec.*, 637 F.3d 319, 329 (D.C. Cir. 2011) (stating that the arbitrary and capricious standard applies to all APA review).

> . . .if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[52]

Agency action is also arbitrary or capricious if it is not "the product of reasoned decision-making."[53] Agency action is not the product of reasoned decision-making if "the agency's judgment was neither adequately explained in its decision nor supported by agency precedent."[54] However, an agency's failure to adequately explain its judgment in its decision does not invalidate its action, so long as sufficient contemporaneous explanations of the judgment are contained within the administrative record.[55] Courts generally limit their inquiry to whether the agency has "offered a rational explanation for its decision, whether its decision is based on consideration of the relevant factors, and whether the decision is adequately supported by the facts found."[56] "In other words, as long as an agency considers relevant factors and can articulate a 'rational connection between the facts and the choice made,' then its decision will be

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[52] *Fox v. Clinton*, 684 F.3d 67, 74 (D.C. Cir. 2012).

[53] *Fox*, 684 F.3d at 74-75.

[54] *Fox*, 684 F.3d at 75.

[55] *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 738, 739 (D.C. Cir. 2001).

[56] *Nat'l Ass'n of Gov't Employees, Local R5-136 v. FLRA*, 363 F.3d 468, 474-75 (D.C. Cir. 2004) (citing, *inter alia*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *see also N. Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 821 (D.C. Cir. 2007) (under arbitrary and capricious standard, agency conclusions "must be reasonable and reasonably explained"); *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996) ("to ensure that an agency's decision has not been arbitrary, we require the agency to have identified and explained the reasoned basis for its decision"). See also *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

upheld."[57] The D.C. Circuit has held that the deference applied under the arbitrary and capricious standard is closely akin to *Chevron* deference.[58]

Moreover, the D.C. Circuit has recognized, "[w]here an agency has acted in an area in which it has 'special expertise,' the court must be particularly deferential to its determinations," while examining the "thoroughness, validity, and consistency of [the] agency's reasoning."[59] The D.C. Circuit has made clear that during this review, the test is "only reasonableness, not perfection."[60]

PBGC's determinations involving interpretation of ERISA "are customarily entitled to *Chevron* deference."[61] It is well established that when statutory construction is at issue, *Chevron* "provides the appropriate legal lens through which to view the legality of [an agency] interpretation."[62] Using that lens, if Congress has not spoken directly to an issue, the court "must

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[57] *Id.* at 96-97 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[58] *See, e.g.*, *Shays v. FEC*, 528 F.3d 914, 924-25 (D.C. Cir. 2008); *Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000).

[59] *Sara Lee v. ABA Retirement Plan*, 512 F. Supp. 2d 32, 37 (D.D.C. 2007) (internal quotations and citations omitted); *accord Zuni Public School Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007) ("the matter at issue – i.e., the calculation method for determining whether a state aid program 'equalizes expenditures' – is the kind of highly technical, specialized interstitial matter that Congress often does not decide itself, but delegates to specialized agencies to decide").

[60] *Kennecott Greens Creek Min. Co. v. MSHA*, 476 F.3d 946, 954 (D.C. Cir. 2007).

[61] *Davis v. PBGC*, 596 F.Supp.2d 1, 2-3 (D.D.C. 2008) (citing *Beck v. Pace Int'l Union*, 551 U.S. 96 (2007); *PBGC v. LTV Corp.*, 496 U.S. 633, 648 (1990); *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989)), *aff'd*, 571 F.3d at 1293 (applying *Chevron*, 467 U.S at 842-43)).

[62] *Calif. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 (D.C. Cir. 2008) (citation omitted).

defer to the agency's interpretation as long as it is reasonable."[63] Congress entrusted the PBGC to implement the PBGC's interpretation of the provisions it administers, and the Supreme Court has granted deference to PBGC's interpretations of Title IV of ERISA, stating, "[w]e have traditionally deferred to the PBGC when interpreting ERISA, for 'to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA would be to embar[k] upon a voyage without a compass." [64]

Therefore, on questions of a statute's construction, the court must first "question whether Congress has directly spoken to the precise question at issue, and if it has not, then proceed to evaluate whether the agency's [interpretation] is based on a permissible construction of the statute."[65] If a statute is silent or ambiguous on an issue, however, the agency's interpretation is entitled to deference.[66] In that case, the question for the reviewing court is whether the agency's interpretation is based on a "permissible construction of the statute."[67]

As courts in this circuit have held, factors that weigh in favor of maximum deference include the interstitial nature of the legal question, the related expertise of the agency, the

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[63] *Id. See Chevron*, 467 U.S. at 843; *accord PBGC v. LTV Corp*., 496 U.S. at 648; *Firestone Tire & Rubber Co. v. PBGC*, 701 F. Supp. 836, 839 (D.D.C. 1988).

[64] *Beck v. Pace Int'l Union*, 551 U.S. 96, 104 (2007) (quoting *Mead Corp. v. Tilley*, 490 U.S. at 722, 725-26).

[65] *Davis*, 596 F. Supp.2d at 3.

[66] *Chevron*, 467 U.S. at 843.

[67] *Id.*

importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time.[68]

PBGC is entitled to maximum deference on the interpretive questions in this case because of the complexity of administrating Title IV of ERISA and the careful consideration that PBGC has given to its interpretation. As discussed in more detail below, PBGC has considered the issue before this Court—the circumstances in which the cessation of an employer's obligation to contribute to a plan results in substantial damage to a plan under the trucking exception — several times since its enactment in 1980.[69]

Accordingly, this Court should uphold PBGC's interpretation of the statute and its determination in this case.

ARGUMENT

PBGC seeks to have this court uphold its determination that QAS's withdrawal along with all other withdrawals caused substantial damage to the Fund's contribution base. PBGC concluded that at the time of QAS's cessation, the Fund had been substantially damaged as it is a significantly underfunded multiemployer plan, with decreasing CBUs and increasing UVBs. And PBGC's written determination provided a reasonable explanation for this finding that was supported by the administrative record. Accordingly, PBGC's determination that QAS's withdrawal along with all other withdrawals caused substantial damage to the Fund is not arbitrary or capricious. And the Court should therefore uphold PBGC's determination and grant its motion for summary judgment.

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[68] *Fox v. Clinton*, 684 F.3d 67, 77 (D.C. Cir. 2012) (citing *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). *See also United States v. Mead Corp.*, 533 U.S. at 227 (2001)).

[69] *See supra*, n.24.

A. PBGC's Determination was Based on a Reasonable Interpretation of the Statute and Administrative Record

1. The Fund's Contribution Base was Already Substantially Damaged at the time of QAS's Withdrawal

On May 22, 2009, PBGC determined that the Fund's contribution base had been substantially damaged by the withdrawal of U.S.F. Red Star, Inc. ("Red Star") in May 2004.[70] PBGC specifically found that because the decrease in CBUs individually caused by Red Star's cessation, along with other employer cessations, occurred when the Fund's general financial condition was compromised, the Fund's contribution base was substantially damaged.[71] From that point forward, the trucking plan exception would not apply to all subsequent cessations from the Fund, including QAS's cessation, unless the Fund recovered. The Fund has not recovered.

2. PBGC's Consideration of the Fund's Financial Condition at the time of QAS's Cessation was Reasonable

QAS ceased contributing to the Fund effective July 31, 2007. And by letter dated July 31, 2012 to the Fund, PBGC determined that QAS's cessation, together with all other cessations, caused substantial damage to the Fund's contribution base.[72] PBGC viewed the reduction in CBUs caused by the cessation of QAS and other employers in the context of the Fund's compromised financial condition, finding that the Fund's contribution base had deteriorated even further since PBGC's Red Star determination in 2009.[73]

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[70] AR-1443-49.

[71] *Id*.

[72] AR-2075-76.

[73] *Id. See also* AR-1411-23; AR 1437-42.

QAS argues that PBGC impermissibly relied on the Fund's overall financial condition in making its determination.[74] But it is only when a reduction in CBUs is considered in the context of a plan's financial condition that it can be determined whether substantial damage has occurred.

Had Congress intended PBGC to focus on CBUs alone in determining substantial damage, it would have instead based the test on whether there was a substantial reduction in the number of CBUs. But the statute does not. That is because a reduction in CBUs is not always detrimental to a plan's contribution base. For example, if a plan is fully funded but half of its contributing employers cease contributing (CBUs are reduced by 50%), the plan is not substantially damaged if all past service liabilities are funded and the current contribution base supports future benefits. Conversely, if a plan, like the Fund, is significantly underfunded and is using current contributions to fund past and future benefit accruals, any decline in CBUs could be substantial. For both plans, CBUs declined. But that fact is meaningless unless the plan's financial position is also considered. Undoubtedly, if the facts were reversed and QAS had been a 50% contributor but the plan was still fully funded QAS would be arguing that PBGC should consider whether the plan was underfunded in making its substantial damage determination.

Here, the Fund's CBUs, active participants, and assets have been steadily declining for more than 10 years while UVBs and contribution rates have been steadily increasing.[75] Although the Fund has adopted measures to forestall insolvency, insolvency is a likely

[74] QAS's Motion for Summary Judgment, pp. 22-24.

[75] AR-1439-42.

outcome.[76] By any measure, it is clear that the Fund's financial condition was dire at the time of QAS's cessation and the Fund could not sustain any further reductions to its contribution base.

3. QAS's Successor's Contribution Obligation is Irrelevant to QAS's Cessation and does not Result in a Windfall to the Fund

QAS mistakenly claims that its cessation caused no harm to the Fund because Annapolis Rail Junction Solutions, Inc. ("AJRS") took over the same work as QAS, at the same facility, employed the same employees, and had essentially the same contribution obligation to the Fund as QAS.[77] But once the trucking plan exception no longer applies, factors involving a successor employer's contribution obligation are relevant only in determining withdrawal liability in the context of a sale of assets under 29 U.S.C. § 1382. That provision has no application here.

QAS further argues that the Fund would experience a "windfall" if it is allowed to recover withdrawal liability from QAS while collecting contributions from AJRS on behalf of most of QAS's former employees.[78] Under that reasoning, there would be no withdrawal liability owed to any plan when one employer is replaced by another. And the sale of assets exception under 29 U.S.C § 1382 would be rendered meaningless. QAS's withdrawal liability, however, is mandated under 29 U.S.C. § 1383(d)(4), and the sale of assets exception under 29 U.S.C § 1382 was inapplicable.[79]

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[76] The Fund is expected to be insolvent in 2024. *See* AR-1441.

[77] QAS's Motion for Summary Judgment, pp. 20-22.

[78] *Id*. at pp. 20-24.

[79] *See Cent'l States Se. and Sw. Areas Pension Fund v. Bellmont Trucking Co., Inc*., 788 F.2d 428, 434 (7th Cir. 1986) (holding that a fund was not unjustly enriched if withdrawal liability is mandated by a valid statute).

4. PBGC's QAS Decision is Distinct from Prior Decisions only in that the Fund's Contribution Base was Already Substantially Damaged when QAS Ceased Contributing

QAS argues that PBGC adopted a "cumulative only" approach that was in conflict with prior PBGC decisions in analyzing QAS's cessation. Specifically, Quality argues that PBGC did not consider the effect of QAS's cessation on the Fund's contribution base but instead considered the cumulative effect of other employer cessations to the exclusion of QAS.[80] But PBGC's "cumulative only" analysis was required by 29 U.S.C. § 1383(d)(4).

Since MPPAA was enacted, PBGC has responded to four requests for substantial damage findings, [81] finding substantial damage in two of those cases. Of those two, one involved the Fund. But none of PBGC's prior decisions involved a determination after PBGC had found that the contribution base of the plan in question had already been substantially damaged prior to the exiting employer's cessation. PBGC's decision regarding QAS's cessation is unique in that regard.

Relevant to that decision, PBGC determined in 2009 that the individual cessation of Red Star, considered together with cessations of other employers, resulted in substantial damage to the Fund. PBGC is compelled by 29 U.S.C. § 1383(d)(4) to consider subsequent employer

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[80] QAS's Motion for Summary Judgment, p. 17.

[81] Determination of Substantial Damage with Respect to Cessation of Contributions by DeHart Motor Lines, Inc., and United News Transportation Co. to Trucking Employees of North Jersey Welfare Fund, Local 641, 50 Fed. Reg. 36171 (Sept. 5, 1985) ("DeHart"); Request for Determination of Substantial Damage with Respect to Cessation of Contributions by Pioneer Paper Stock to Freight Drivers and Helpers Local 557 Pension Fund, 52 Fed. Reg. 28881 (Aug. 4, 1987) ("Pioneer Paper Stock"); Request for Determination of Substantial Damage With Respect to the Cessation of the Obligation to Contribute by Kane Transfer Co. to the Freight Drivers and Helpers Local Union No. 557, 63 Fed. Reg. 1511 (Jan. 9, 1998) ("Kane"); Freight Drivers and Helpers Local Union No, 557 Pension Plan request for Substantial Damage Determination Relating to Red Star, Inc., AR-1443-49 (May 22, 2009) (unpublished) ("Red Star").

cessations in the aggregate when determining whether the Fund's contribution base had been substantially damaged by an individual employer's cessation. Because the Fund's financial health has continued to deteriorate since 2009, the trucking exception does not apply to cessations following Red Star's cessation. This will continue to be true unless the Fund's condition improves. Because QAS ceased contributing to the Fund after Red Star's withdrawal, and because the Fund's condition has not improved, QAS's cessation was a withdrawal and it owes withdrawal liability.

QAS also incorrectly claims that PBGC deviated from prior precedent in lengthening the time period for considering the impact of other employers' cessations from the Fund.[82] The statute does not limit the time period in which PBGC considers the effect of other cessations in determining its effect on the plan's contribution base. As a practical matter, 29 U.S.C. § 1383(d)(4) restricts PBGC's determination of substantial damage to 60 months after the date of an employer's contribution cessation. That is the end date. But nothing in the statute dictates the start date of PBGC's review period. Because the issue in these determinations is the impact of employer cessations on a plan, PBGC has consistently considered any and all cessations in making its determination.[83] And PBGC did the same in its determination regarding QAS's cessation.[84]

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[82] QAS's Motion for Summary Judgment, p. 18.

[83] DeHart, 50 Fed. Reg. 36171 ("because the issue in these determinations is the impact of the section 4203(d) trucking rule on the Fund, the PBGC has concentrated particularly on the period beginning on September 26, 1980, the effective date of MPPAA"); Pioneer Paper Stock, 52 Fed. Reg. 28881 ("because the issue in these determinations is the impact of the section 4203(d) trucking rule on the Plan, the PBGC has concentrated particularly on the period beginning on September 26, 1980, the effective date of MPPAA"); Kane, 63 Fed. Reg. 1511, 1512 ("[O]ver the 1980-1995 period, the contribution base of the fund … fell by 60%."); Red Star, AR-1446 ("[I]n this case, PBGC has reviewed data from the period before Red Star's cessation through the end of 2008"). Regarding PBGC's determination in QAS, *see* AR-1412 ("[T]he number of

And, for reasons already discussed, PBGC has consistently reviewed the financial condition of the plan in question when determining whether an employer's cessation has caused substantial damage.[85] PBGC applied that analysis in its decision involving QAS.[86]

B. PBGC Satisfactorily Articulated an Explanation for its QAS Decision

QAS claims that PBGC's decision in this matter is contrary to the Administrative Procedure Act, specifically, 5 U.S.C. § 555(e). That section requires an agency in an informal adjudication to provide a "brief statement of the grounds for denial."[87]

The D.C. Circuit has described the "brief statement" requirement as "minimal."[88] Agency explanations branded too brief by the D.C. Circuit are those limited to a single,

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contributing employer has dropped from 97 in 1980 to 7 in 2010. During that period the contribution base units … have declined from 5.5 million to less than 400,000").

[84] *See* AR-1412 ("[T]he number of contributing employer has dropped from 97 in 1980 to 7 in 2010. During that period the contribution base units … have declined from 5.5 million to less than 400,000").

[85] *See* DeHart, 50 Fed. Reg. 36171 ("The loss of contribution base units was accompanied by adverse financial circumstances…"); Pioneer Paper Stock, 52 Fed. Reg. 28881 ("In addition … the loss of contribution base units did not come at a time when the Plan's general financial condition was deteriorating"); Kane, 63 Fed. Reg. 1511, 1512 (" … the Fund has experienced a significant decline in contribution base units … and total contributions since 1980's, these declines must be considered in the context of the Fund's overall financial condition, which has been improving"); Red Star, AR-1446-49 (" … the damage to the Fund's contribution base occurred at a time when the Fund's general financial condition was not good, despite significant increases in the contribution rate and reduction in the benefit accrual rate"). Regarding PBGC's determination in QAS, *see* AR-2075 ("In its prior determinations, PBGC has also considered the plan's overall financial health and its benefit cost structure").

[86] *See* AR-2075 ("In its prior determinations, PBGC has also considered the plan's overall financial health and its benefit cost structure").

[87] 5 U.S.C § 555(e) states:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

conclusory sentence.[89] Though "brief" and "minimal," an agency must do more than "merely parrot"[90] statutory or regulatory language in its determination to demonstrate how the agency arrived at its decision.

It is clear from the face of PBGC's determination that PBGC offered more than a brief statement that parroted the statute. PBGC sufficiently articulated the rationale for its decision.[91] PBGC's determination listed the materials it reviewed, explained the statutory requirements, discussed its prior determinations under those requirements, and articulated the six reasons it found that QAS's cessation, along with other employers cessations, substantially damaged the Fund's contribution base.[92] Even if PBGC's decision is not the "model of analytic precision," it still can survive a challenge if the agency's path to its decision is discernible.[93] But if it is not, the usual remedy is a remand to the agency for additional investigation or explanation, not a granting of a motion for summary judgment.[94]

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[88] *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

[89] *Remmie v. Mabus*, No. 11-1261, 2012 U.S. Dist. LEXIS 147628 *22-3 (D.D.C. Oct. 15, 2012); *also see Butte County*, 613 F.3d at 195 ("Yet the entirety of Interior's response to Butte County was this: 'We are not inclined to revisit this decision now because the Office of the Solicitor reviewed this matter in 2003, and concurred in the NIGC's determination on March 14, 2003."); *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731 at 737 ("The letter says nothing other than that the 'Affidavit on Indigency you submitted in lieu of a cost bond is not adequately supported.' That is not a statement of reasoning, but of conclusion.") (citation omitted); *Roelofs v. Sec'y of the Air Force*, 628 F.2d 594 at 596 (agency "prepared no statement of findings and offered no explanation of its decision").

[90] *Remmie*, 2012 U.S. Dist. LEXIS 147628 *25-6.

[91] *See* PBGC's July 31, 2012 determination letter to the Fund, AR 2075-76.

[92] *Id*.

[93] *Dickson v. Sec'y of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995); see also *Int'l Longshoremen's Ass'n v. National Mediation Bd.*, 870 F.2d 733, 737 (D.C. Cir. 1989).

[94] *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

CONCLUSION

For the reasons set forth herein, the Court should defer to PBGC's determination and Grant PBGC's motion for summary judgment as PBGC's determination regarding QAS's cessation from the Fund was not arbitrary or capricious.

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Washington, D.C.

Respectfully submitted,

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