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COMMENTS SUBMITTED BY THE PENSION RIGHTS CENTER IN OPPOSITION TO THE APPLICATION OF THE AMERICAN FEDERATION OF MUSICIANS & EMPLOYERS' PENSION FUND TO REDUCE THE PENSIONS OF RETIRED MUSICIANS UNDER MPPRA. TREAS-DO-2020-0005-001

The Pension Rights Center ("PRC"), a 44-year-old nonprofit consumer organization, writes on behalf of, and at the request of, the retired musicians listed below. These musicians are representative of a group of 180 retirees who will forever lose 40 percent of their pensions if the Treasury Department permits the proposed cutback scheme filed by the Trustees of the American Federation of Musicians & Employers' Pension Fund (AMF-EPF) to move forward. There are also those who have signed these comments that are part of a larger group of nearly 800 retirees who will lose between 20-40%. Many of these retirees have already filed personal comments that describe the certain financial ruin that each will suffer if the proposal moves forward. They are the best advocates for their individual cases: our comments will highlight the procedural and substantive defects in the AMF-EPF Application as well as this comment process. In doing so, we note that the "record" filed by the Trustees and posted on the MPRA website is incomplete and some key financial information is outdated. These comments will therefore cite information from other sources, including internal plan documents brought to light in litigation now pending in the United States District Court for the Southern District of New York. (*Snitzer v The Board of Trustees of the American Federation of Musicians and Employers' Pension Fund et al.*, Case 1:2017-cv-05361), as well as more current financial and actuarial information drawn from the AFM plan's 2018 Form 5500.

As a threshold matter, we submit that the AFM plan's application illustrates that the comment procedures set forth in the Treasury rules are inadequate, both facially and as applied to the AFM application. The statute requires the Treasury to apply a multipart test to determine whether a cutback scheme may be licitly applied. However, the factors are quite subjective—what is an "equitable" distribution of benefit reductions? How much discrepancy is allowed? Is the discrepancy measured on a dollar or percentage basis? The Treasury Department has issued no public guidance that outlines how the Department evaluates each factor. Moreover, as courts have repeatedly, and colorfully, observed, a multifactor test that has no directional weights provides no objective standard against which the validity of an action can be tested. (See *Exacto Spring Corporation v. Commissioner of Internal Revenue*, 196 F.3d 833 (7th Cir. 1999).) There is no way retirees—or the PRC—can effectively challenge the merits of the proposal because Treasury has not articulated what boundaries, if any, cabin the Trustees.

Moreover, some relevant information is not in the public record. We know from documents disclosed in the SDNY litigation that the Trustees not only failed to develop, but flatly refused to consider, alternative, more egalitarian proposals that would have allocated smaller benefit cuts over a larger group of participants. Why? Likewise, Treasury Department staff met and conferred with the Trustees' professional advisors and gave them generalized guidance concerning the application. We in no way suggest that Treasury staff acted improperly—the Department offers such counseling to any plan that anticipates filing a cutback application—but fairness suggests that the substance of those discussions needs to be disclosed to affected

parties. Under the same rubric, Treasury says it will base its final decision on a "second round" of document filings and discussions that take place *after* the comment period is closed. The PRC and other commenters cannot interrogate and test a record that does not yet exist.

For all these reasons, we urge Treasury to place all "post comment" materials received from the Trustees on the MPRA website and allow a supplemental round of comments to the complete record. The comment period may be brief, but it is essential. A Treasury ruling based on the present defective record will deprive the retirees of their Due Process right to a "meaningful opportunity" to contest the deprivation of their earned, and statutorily-protected, benefits. The retirees, moreover, are not the only ones at risk. As shown below, there is reason to believe that the assumed investment returns, demographic data and contribution forecasts in the application are unreliable, some risibly so. The Trustees ill-conceived proposal may easily backfire, hasten insolvency, and increase losses to the PBGC's exiguous financial reserves.

We next consider whether the substance of the proposal complies with the statutory requirements. We submit that it does not.

First, the cutbacks are inequitable and lack a rational basis. The statute bids the Trustees to distribute the pain of benefit reductions fairly and as evenly as possible over the entire population of eligible plan participants. The Trustees claim that they fulfilled this requirement because the "average monthly benefit" for retirees fell from $1,088 to $942 a month, a modest reduction (Application, p. 124). But averages are deceiving. The Trustees in fact elected to achieve their near-term cash flow savings by singling out a disfavored class of retirees—those who had taken partially subsidized early retirement benefits—and saddling them with an outsized share of benefit cuts. There are 50,000 participants in the Plan, and about 29,000 of them were at risk for benefit cuts. The group of 180 "40 percent targets" is a mere .035 percent of plan participants, and less than one half of one percent of the at-risk group, but this group was arbitrarily saddled with 10 to 15 percent of the total benefit cuts.

Apparently, no attempt was made to tailor cuts to address individual circumstances of the early retirees. A violin player with a $25,000 pension may suffer the same 40% cutback as the cellist who got $80,000. The artist with 40 years of service who dared to retire one year early is thrown into the high-rate cutback pool, while a musician with much less service who retired at 65 has only a loss of less than 10%. Indeed, some of the early retirees have calculated that the dollar amount of the cutbacks exceeds the "subsidy" they allegedly enjoyed.

The Trustees' argument is that early retirees are fair game because (1) they have received more monthly checks than normal-age retirees and (2) they are better positioned to get gainful employment. This is a pretext at best. Congress plainly considered the number of past payments as an irrelevant factor because the statute exempts those over age 80 from cutbacks, and they have been receiving benefits longer than their counterparts. And it is irrational to assume the 180 early retirees can simply go back to work as musicians. They may have "retired early" but that was many years ago. Most are now in their upper sixties and seventies, and the individual comments demonstrate that their professional employment opportunities are close

to nil. The Trustees also forgot that under the Plan's unique benefit accrual formula, if a retiree somehow did obtain covered employment his/her benefit would increase, substantially diminishing the supposed cost savings.

Second, PRC submits that objective data confirms retiree complaints that the Trustees have failed their duty to restrain administrative costs. By way of example, the AFM Plan spent $21 million annually to run a plan with 50,000 participants that paid about $190 million in benefits to 13,600 retirees. Compare this with the Western Conference of Teamsters Pension Trust, which spends $108 million in costs for a plan with 580,000 participants and benefit payments of $2.8 billion to 175,000 participants in pay status. The WCT has a 3.8% ratio of expenses to benefit payments, versus the 10+% ratio of the AFM. The Trustees application fails to address these outsize administrative costs (indeed, it does not acknowledge the problem) and overlooks several obvious cost reductions. Among other things, a hiring freeze, a reduction in benefits and salaries for highly-compensated staff, modest, temporary reductions for rank and file employees, and cessation of legislative lobbying expenses should all be considered. In addition, money could be saved by trimming the size of the 8-8 member board of trustees to the 4-4 or 5-5 configuration typical of many Taft-Hartley Plans.

Third, we urge Treasury to give close and skeptical scrutiny to the Trustees' assertion that there are no practical steps that can be taken to increase contribution income. It may be true that external economic forces preclude an immediate increase in the rates assessed for symphony, Broadway and band appearances because employers and performers can dodge the increase by exiting the Plan. There are, however, several other potential sources of "new money." These include tapping additional income from internet streaming, seeking revenues from the growing rap and hip-hop segments of the industry, and numerous other sources identified in already filed comments.

We acknowledge that our proposed cuts and increases would not solve the AFM Plan's fiscal crisis. But such modest revenue increases and reduced expenses could reduce the outsize reductions imposed on the 180 early retirees.

Fourth, the Trustees have not shown that their scheme is feasible. Their actuary has generated reams of spreadsheets with both stochastic and deterministic models that purport to show that the Plan will remain (barely) solvent through 2046. The application further relies upon the MPRA rule that actuarial projections are entitled to deference and cannot be rejected absent "clear and convincing evidence." This is an exacting standard of review, which—in the words of a well-known case from the U.S. Court of Appeals for the Seventh Circuit— requires trustee reasoning to be sustained unless it triggers "a loud guffaw." (*Pokratz v Jones Dairy*, 771 F2d 206, 209 (7th Cir. 1985)(Posner, J.).

In 2010 the Plan actuary certified that benefit cuts and higher contribution rates in a newly-adopted "Rehabilitation Plan" would eventually bring the Plan out of "critical status" and avoid insolvency. For several years thereafter the actuary certified that the Plan was making "reasonable progress"—only to proffer an "Updated Plan" in 2016 and yet a third in 2018. At

the end of June 2018 the actuary was still busy certifying that as of April 1, 2018 the Plan was making "scheduled progress" under the ever-mutating Rehabilitation Plan. The AFM Plan was indeed "making progress" but not in the direction the actuary was predicting. In the 2018 fiscal year, the AFM Plan was only 36% funded on a current liability basis, and had a $26 million funding deficiency from the previous year, which ballooned to a $126 million deficiency for the 2018 year (and which is set to grow to over $250 million in the plan year that ends on March 31). If a guffaw is needed, the actuary's April 1, 2018 certification is a veritable howler.

When set beside objective evidence, moreover, it appears more likely than not that the anticipated investment gains that support the roseate financial projections in the application are virtually impossible for even the most adroit investor to obtain, and certainly cannot be achieved by the present Trustees. In 2017, the Trustees received an analysis of investment earnings over the previous decade. At the time when the Trustees and the plan actuary were assuming a 7.5% rate of return, the Plan actually realized an average:

(1) 10-year average of 3.2%
(2) 5-year average of 7.3%
(3) 3-year average of 4.5%.

These results place the AFM Plan in the *bottom* 1st , 9th, and 13th percentile of a group of peer Taft-Hartley pension plans. More recent investment performance remains disappointing: the accountants' report attached to the most recent Form 5500 shows that the Plan earned less than $60 million (net of expenses) on $1.87 billion of assets for an anemic 3.2% rate of return. By year-end, plan assets decreased by over $71 million, to $1.803 billion. This 4% decline was the consequence of a portfolio where 85% of plan assets were placed in equities, hedge funds, REITs, and offshore holdings and other exotic vehicles that are supposed to achieve extraordinary rates of return in return for greatly enhanced risks. The Plan was stuck with meager 3.2% rates of return. It is small wonder that the judge presiding in the SDNY litigation commented that the trust investments are "extremely risky" and "illiquid."

With this background in mind, consider the likelihood that the proposed benefit cutback scheme will keep the plan solvent through 2046. In the Central States Plan MPRA ruling and reemphasized in the advice offered in the 2017 conference with the Academy of Actuaries, the Treasury Department stressed the importance of "realistic" actuarial assumptions. Among other things, the application must allow for investment losses in the key initial years of cutbacks, with the resulting diminishment of investable plan assets. The Department has further cautioned that an application must "take into account" the possibility that the combination of reduced benefit accruals and increased contribution rates will adversely affect the demographics of new entrants.

The investment returns embedded in the several Projections (see Exhibit 6.05 of the Application) turns this advice on its head. In 2019, for example, Projection (3) posits a $125 million gain for a 6.9% return on $1.787 billion in assets. The projected gains remain above 6.5% until 2030, when they rise to over 7.2%, and they remain high until a wind-down era when

plan is projected to have a level of investable assets that covers fewer than 2 years of benefit payments. We acknowledge that these rates are related to the results of the Horizon survey on asset returns, which the Treasury has generally endorsed for want of a better measure. But past experience shows that the AFM Plan is an outlier that consistently underperforms it peers.

In addition, the AFM plan faces a unique challenge in preserving its contribution base. In most plans, if an employer stops or sharply reduces contributory work, whether from business closure or "going nonunion", it will owe the plan a substantial sum of "withdrawal liability" to cover unfunded vested benefits. The AFM Plan, however, operates under a special "entertainment industry" rule (see ERISA section 4203) that allows a company to diminish or cease covered activity without penalty, and liability attaches only if the employer operates as a nonunion operation. For a number of technical reasons acknowledged by the Trustees, they are unable to obtain any meaningful recovery from withdrawn employers who have consulted competent legal counsel. The Application nevertheless assumes that the employers and active workers will remain loyal, even though the employers will pay high contributions and the workers will get low accruals, and face the risk that their benefits will be even lower if the Plan goes insolvent and requires PBGC assistance.

For all of these reasons, PRC recommends that Treasury should either deny the Application or allow the Trustees to withdraw the Application, thereby allowing them a second chance to submit a feasible plan that accounts for the flaws noted in the hundreds of posted comments. If, however, Treasury is inclined to approve the application, we submit that the Plan has no realistic hope of executing this complicated scheme unless the present Trustees are removed and replaced with qualified professionals. Poor investment performance is only one aspect of the mismanagement that has brought the AFM Plan to the brink of collapse. The Trustees have withheld information about the true state of the plan for years, on advice, incredible as it seems, of plan legal counsel, and when they did speak, they lied. As late as 2015, participants were assured that their benefits were safe and not subject to MPRA because the Plan would be solvent until 2046. They now read that the Trustees say that the Plan will be solvent in 2046 only if retiree benefits are subject to an actuarial guillotine, while administrative expenses, salaries and those all-important trustee emoluments and "educational trips" to Florida and Las Vegas are left intact.

Respectfully submitted,

Terrence M. Deneen
Michael S. Gordon Fellow
Pension Rights Center

On behalf of:

Mike Brignardello, age 70 years old
Retired bass player, TN
AFM-EPF plan member for 41 years

Robbie Buchanan, age 69
Retired piano player/arranger, CA
AFM-EPF plan member for 54 years

Dennis Dreith, age 71 years
Retired woodwinds player, conductor, CA
AFM-EPF plan member for 50 years

Domenic Genova, age 70
Retired bass player, CA
AFM-EPF plan member for 50 years

Steve Gibson, age 68
Retired guitar player, TN
AFM-EPF plan member for 12 years

Robbie Kondor, age 65
Retired pianist/arranger, NY
AFM-EPF plan member for 40 years

Ross Konikoff, age 69
Retired trumpet player, NY
AFM-EPF plan member for 46 years

Jeffrey Mironov, age 70
Retired guitarist, NY
AFM-EPF plan member for 46 years

Steve Nathan, age 68
Retired piano player, TN
AFM-EPF plan member for 42 years

John Robinson, age 65
Retired drummer, CA
AFM-EPF plan member for 47 years

Jay Rosen, age 72
Retired violinist, CA
AFM-EPF plan member for 54 Years

David Spinozza, age 70
Retired guitarist and arranger, CT
AFM-EPF plan member for 54 years

Martin Stoner, age 70
Retired violinist, NY
AFM-EPF plan member for 32 years

Neil Stubenhaus, age 66
Retired bass player, CA
AFM-EPF plan member for 45 years