UNITED STATES SENATE AND UNITED STATES HOUSE OF REPRESENTATIVES

JOINT SELECT COMMITTEE ON SOLVENCY OF MULTIEMPLOYER PENSION PLANS

HEARING ON HOW THE MULTIEMPLOYER PENSION SYSTEM AFFECTS STAKEHOLDERS

TESTIMONY SUBMITTED FOR THE RECORD BY

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Good morning. I'd like to begin by thanking the Committee Co-Chairs, Senators Hatch and Brown and all the members of the Committee for the opportunity to participate in today's hearing on How the Multiemployer Pension System Affects Stakeholders. My testimony and any answers I provide singularly reflect my own views and not the views of Morgan Lewis or any of its individual clients.

My name is Tim Lynch and I am the Senior Director of Morgan Lewis's Government Relations Practice Group. Of more relevance to today's hearing, I am a member of our Multiemployer Pension Working Group, a group that includes attorneys who have experience counseling both contributing employers and multiemployer pension plans in a wide range of industries, including trucking, construction, bakery, maritime, and supermarkets (retail and wholesale). It is because of that depth of experience we were asked by the U.S Chamber of Commerce to assist it in the preparation of two recent reports: *The Multiemployer Pension Plan Crisis: The History, Legislation and What's Next* and *The Multiemployer Pension Plan Crisis: Businesses and Jobs At Risk.* Hopefully I can provide a perspective on the impacts on stakeholders of the multiemployer pension system reflecting that experience.

I have been involved in the multiemployer pension plan issue since 1980. At that time, I was employed by one of the largest trucking companies in the United States, ANR Freight. ANR Freight was a Less-Than-Truckload (LTL) motor carrier that like all interstate trucking companies was heavily regulated by the Interstate Commerce Commission (ICC). That regulatory regime included deciding what trucking companies could charge, what customers they could serve, what routes they could travel and what services they could offer. In short, virtually every aspect of a trucking company's operations. That world was about to change dramatically by the passage of the Motor Carrier Act of 1980, the law that effectively deregulated the trucking industry. In 1980, the debate over the Motor Carrier Act was the all-consuming focus of the trucking industry.

ANR Freight was also a signatory company to the National Master Freight Agreement (NMFA), the collective bargaining agreement (CBA) between virtually the entire interstate trucking industry and the Teamsters Union. Because of that CAB, ANR Freight was also a contributing employer to all of the multiemployer pension plans under which it had operations. To this day, I vividly remember the phone call I received from the company's General Counsel asking what I knew about the Multiemployer Pension Plan Amendment Act of 1980 (MPPAA) and something called "withdrawal liability." I believe my response was along the lines of, "nothing and why should I?"

If the Motor Carrier Act of 1980 transformed the entire trucking industry, MPPAA dramatically impacted the unionized portion of the industry. Prior to 1980, 94 of the 100 largest freight hauling trucking companies in the United States were part of the NMFA. By the mid-1990s, that number was reduced to 6. For certain, some that reduction was due to consolidation but the overwhelming majority was as a result of bankruptcy. And since 1980, not a single mid- to large- size trucking company has entered the market with a CAB with the Teamsters Union to replace all those other trucking companies who exited the market. In other words, no new contributing employers to cover an ever-increasing number of beneficiaries.

In 1997 I went to work for the Motor Freight Carriers Association (MFCA) as President and CEO where I oversaw the labor negotiations between those remaining unionized trucking companies and the Teamsters under the NMFA. I survived two national negotiations in 1998 and 2003. During that time, one of the three largest trucking companies – Consolidated Freightways – closed its doors leaving thousands of employees without jobs and millions in uncollectable liabilities to the various Teamster pension funds. In the end, funds like Central States received less than 5 cents on the dollar from the CF bankruptcy.

As President of MFCA I thought I understood labor negotiations; what I didn't understand was the relationship between negotiating a wage and benefits package and the contribution rate to the various multiemployer pension funds. We did not simply pick a number and inform the funds, "this is what we're paying." The funds, primarily lead by Central States, in essence became a third party to the negotiations: "this is what we need" and we had to determine how to balance that with the wage and other benefits package. That situation is more pronounced today as funds move from green zone, to yellow zone, to red zone and into critical and declining status and the attendant need for rehabilitation plans.

Our Firm was an active participant during the Congressional debates over both the Pension Protection Act in 2006 and the Multiemployer Pension Reform Act of 2014. As the Committee has been told, PPA was the first attempt by Congress to address the looming multiemployer pension crisis. If I could pick one word to describe that effort it would be "transparency." Congress wanted more information on the financial status of the plans and introduced the concept of green, yellow and red zones to differentiate the healthy plans from the not-so-healthy plans.

The Multiemployer Pension Reform Act of 2014 recognized that more concrete steps needed to be taken to assist plans that were facing significant financial challenges. Congress gave plan trustees some powerful tools to address the funding crisis: the ability to adjust benefits; the ability to seek a partitioning of beneficiaries; assistance for facilitating plan mergers; and financial support. I'll refer to these collectively as MPRA applications.

MPRA was signed into law in December 2014 and plan trustees in critical and declining status immediately had to begin planning for how to utilize the new tools in the toolbox to address the funding crisis. I believe one of the great examples of a profile in courage is the action taken by nineteen plan trustees – management and labor – voting to submit a MPRA application knowing that approval would result in a benefit cut that was desperately needed to save the plans. For union trustees, this meant a cut for family members, friends, and work colleagues. For management trustees, this meant walking back from a promise made to employees who contributed over the years to the success of the company.

The Treasury website for tracking applications for benefit suspensions identifies the Central States Plan as being the first MPRA application filed on September 25, 2015. Technically true. The first "application" filed was by the Road Carriers Local 707 Pension Fund on December 14, 2014 (the enactment date of MPRA). Throughout Congressional consideration of the MPRA legislation, the Local 707 Fund – knowing it was facing insolvency within 3 years – was a strong supporter of all of the tools Congress was considering but particularly needed authorization to modify the benefit. The December Local 707 filing was in the form of a letter – I believe it was three sentences long – intended to dramatize the need for Treasury and PBGC to move expeditiously because time was not an ally. The Fund formally filed on March 15, 2016 and eventually was denied, the principle reason being the Fund could not demonstrate the proposed actions would allow the Fund to avoid insolvency. Unfortunately, the Local 707 Fund went insolvent in February 2017.

In his testimony before this Committee several weeks ago, PBGC Director Tom Reeder provided an explanation for why Treasury/PBGC rejected the Local 707 application. I'd like to add one additional point to Mr. Reeder's summary. The last request that Local 707 made to the PBGC was to seek help for what are referred to as the "protected classes." When Congress enacted MPRA and allowed for the benefit cuts, one of the stipulations was that there would be no benefit cuts for two categories of beneficiaries – those over 80 and those who were receiving a disability pension – and a third group of retirees between the ages of 75 and 80 who would have a sliding scale of reduced benefit. PBGC determined that relief was not possible under the provisions of MPRA and the retirees in those protected classes join all other Local 707 retirees at the PBGC guarantee. Or as Tom Reeder explained in his testimony, "(f)or nearly one-half of all 5,000 participants in the plan, the guarantee covers less than 50 percent of the benefits earned."

Central States filed its MPRA application on September 25, 2015 and received its rejection notification on May 6, 2016. A good argument can be made that MPRA was developed in large measure to assist Central States in avoiding insolvency. And without question, the language regarding "systemically important plans" (plans the PBGC projects would have payments exceeding $1 billion) was clearly developed because of Central States. And yet, Treasury rejected the Central States application because the "suspension fails to satisfy the statutory criteria for approval of benefit suspensions." As the Committee considers recommendations, it would be useful to understand exactly what "statutory criteria" the Central States application failed to meet. The Central States MPRA application used a 7.5% investment rate of return assumption. In rejecting the application Treasury deemed that assumption "not reasonable" and "significantly optimistic." It is worth noting that according to Central States filings, the 2016 rate of return was 8.52% and the 2017 rate of return was 12.74%. Unfortunately, the damage has been done: in 2016 and 2017 the Fund withdrew $2 million plus in both years from investment assets to fund the cash operating deficit.

The New York State Teamsters Conference Pension and Retirement Fund has a better ending but the process to obtain approval is nonetheless instructive. The New York Fund withdrew its initial application and refiled. Among the issues that the New York Fund had to deal with was what mortality table was appropriate for the calculation of the benefit modification. The correspondence on this was time-consuming and potentially pushed the Fund into a more precarious financial position. If the MPRA process is to work, the timeline needs to be addressed.

While each of these Funds had unique circumstances, the one constant is time. A delay – or worse a denial – simply puts more plans and the benefits of plan beneficiaries at risk. That was history but it holds true today: action is necessary sooner rather than later.

This Committee has received ample testimony on the financial position of the PBGC and its projected insolvency if several of the more financially distressed plans become insolvent. The only additional point I would like to make is that the PBGC is a federal agency and is charged with guaranteeing the benefits of multiemployer plan failures. The federal responsibility is already there; it's just a matter of time when the full impact of that responsibility kicks in. It's either later when the PBGC itself becomes insolvent or now, in the form of financial support. If it's later the choices will be even more difficult and costly to the federal government.

These are hard decisions but consider the hard decisions that workers, companies, and plan trustees are making today.

- A large contributing employer that is financially distressed informs all of the plans to which it contributes that it can no longer pay its contractual rate of contribution. It needs to significantly reduce its contribution in order to stay in business. The trustees can accept that knowing full well the lower contribution rate will negatively impact cash flow. Or they can reject the lower contribution, undoubtedly triggering a withdrawal and likely bankruptcy of the company. And thus no contributions coming from that company.
- A small contributing employer in the Central States Fund (nine out of ten contributing employers to Central States are small businesses with fewer than 50 employees) knows there are factors beyond his/her control (see above) that could trigger significant increases in his/her contribution rate (to meet the terms of the rehabilitation plan). Those increases likely make the company non-competitive or he/she can consider a path out of the Fund.
- Employees and their union are entering a new round of bargaining with their employer. They understand that any increases in the pension fund contribution likely will result in little or no pension benefit for them going forward. They would like to bargain for all new contributions going to a defined contribution fund. But they also know those contributions are needed to shore up the current defined benefit plan.

The current framework for evaluating the financial status of multiemployer plans utilizes five categories: (1) Not in Distress (green zone); (2) Endangered (yellow zone); (3) Seriously Endangered (orange zone); (4) Critical (red zone); and Critical and Declining (more extreme red zone). As the Committee begins to consider a course of action, it might be useful to contemplate what it hopes to accomplish with each of these zones and the plans that are in them. The temptation for green zone plans undoubtedly is to simply leave them alone and that very well could be the prudent course of action. But are there changes that could be made to help ensure these plans remain healthy?

For yellow and orange zone plans, the goal should be to provide as many tools as possible to plan trustees to avoid falling into the red zone. This could include the additional tool of hybrid plans outlined in the GROW Act legislation. Conversely, the Committee should be cautious about adopting procedural changes that while well intentioned, could have the adverse effect of pushing these plans into the red zone.

For the red zone plans (and most importantly those red zone plans deemed to be critical and declining) there is no avoiding the reality that they need an infusion of cash to remain solvent. As mentioned earlier, Central States achieved a 12.74% return in 2017 but it doesn't take a mathematician to calculate the benefit of a 12% return on $15 billion in assets versus $13 billion, or $11 billion. I would also urge the Committee to consult with Treasury and PBGC staff to review MPRA to determine what changes need to be made in the statute to make it more workable.

The Local 707 Plan needed a benefit cut, a merger partner, partitioning, and financial assistance – all of the tools provided under MPRA - in order to survive. It got none and is now insolvent. Only one MPRA application that included partitioning has been approved. And while there may have been informal discussions between Treasury/PBGC and plan applicants utilizing the MPRA provisions on facilitating mergers, that tool remains firmly in the bottom of the tool box.

The New York State Teamster Fund needed a benefit cut and while ultimately approved, it took almost one year to get that approval. Weeks, if not months, were spent debating issues like the appropriate mortality table to be used to calculate the benefit cut. One year may not seem like a long time but in the multiemployer world it's the difference between an asset base of $100 million versus something significantly less. Or the difference between survival and insolvency.

Central States needed a benefit cut but its application was rejected because in the view of Treasury it failed "to satisfy the statutory criteria for approval of benefit suspensions" and its proposed benefit suspensions "not reasonably estimated to allow the Plan to avoid insolvency." With that rejection, Central States is now headed toward insolvency.

In conclusion, these are not easy decisions and the options very limited. But time is not an ally and the choices get more difficult.

Thank you for allowing me to testify and I'm pleased to answer any questions the Committee members may have.