IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

PSF INDUSTRIES, INC., Plaintiff, v. BOILERMAKERS-BLACKSMITH NATIONAL PENSION TRUST, Defendant.	)	Case No. 20-CV-6143-FJG

ORDER

Currently pending before the Court is Boilermakers-Blacksmith National Pension Trust ("Fund's") Motion for Judgment on the Pleadings (Doc. # 17); PSF Industries, Inc. ("PSF's") Cross Motion for Judgment on the Pleadings (Doc. # 22); National Association of Construction Boilermaker Employees and The Association of Union Constructor's Motion for Leave to File Amicus Curiae Brief (Doc. # 26) and the Fund's Motion for Leave to File Sur-Reply Suggestions (Doc. # 35).

I. BACKGROUND

PSF is an industrial contractor offering custom fabrication, erection, and maintenance of boilers, pressure vessels, heat exchangers, stacks, digesters, tanks and other types of industrial equipment. Stip. ¶ 3[1] PSF employed "Shop Employees" and "Field Employees" Id. at ¶ 4,6. Shop employees engaged in manufacturing and fabrication at PSF's plant, and were usually permanent PSF employees. Id. at ¶4-5.

[1] The facts presented in this section are taken from the stipulations reached by the parties in the arbitration proceeding. (Doc. # 15-8).

Field Employees worked at the locations of PSF's customers, installing or repairing equipment or storage tanks. Id. at 5-6. These employees performed tasks which included welding, burning or layout work. Id. The Field Employees were often temporary employees hired out of union halls. Id. at ¶ 7. PSF entered into multiple collective bargaining agreements with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Union. PSF ceased operations in the fall of 2017 and stopped contributing to the Fund. Id. at ¶ 19. The Fund assessed withdrawal liability in the amount of $16,551,038. Id. at 21. PSF made a Request for Review to the Fund, contending if fell within the exemption for the building and construction industry. Stip. ¶ 23-24. The Fund denied the Request for Review. Stip. ¶ 25. PSF then demanded arbitration. Stip. ¶ 26. On July 11, 2020, the Arbitrator granted the Fund's Motion for Summary Judgment and denied PSF's Motion for Summary Judgment. On September 4, 2020, PSF withdrew all remaining challenges to the Fund's withdrawal liability assessment. The Arbitrator issued his Final Award upholding the Fund's determinations.

On October 2, 2020, PSF filed suit against the Fund seeking to vacate the arbitration award that sustained an assessment of $16,551,038 in withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Under the MPPAA when an employer ceases operations and withdraws from a multiemployer pension plan, the employer faces "withdrawal liability." Withdrawal liability is defined as "the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets.'" Gen. Elec. Co. v. Boilermaker-Blacksmith Nat. Pension Trust, No. 19-2780-EFM-GEB, 2020 WL 2113209, *1 (D.Kan. May 4, 2020)(quoting Pension

Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 725 (1984)). "[W]ithdrawal liability essentially forces employers to continue making payments on behalf of fully vested workers so that, even though the company is no longer a going concern, its fully vested workers will receive the benefits they earned there." Central States Pension Fund v. Nitehawk Express, Inc., 223 F.3d 483, 486 (7th Cir. 2000). As the Court in Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. CPC Logistics, Inc., 698 F.3d 346,347 (7th Cir. 2012), noted, withdrawal liability is "an exit price equal to [the employer's] pro rata share of the pension plan's funding shortfall." A withdrawal occurs "when an employer (1) permanently ceases to have an obligation to contribute to the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. §1383(a). This provision applies to most employers, but Congress created a special withdrawal scheme for employers in the building and construction industry. It is commonly referred to as the "construction industry exemption." It imposes withdrawal liability on employers in this industry only if

§ 1383 Complete Withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –
(1) permanently ceases to have an obligation to contribute under the plan, or
(2) permanently ceases all covered operations under the plan.

(b) Building and Construction industry

(1) Notwithstanding subsection (a), in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or
(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

The issue in this case is whether PSF qualifies for the Building and Construction Industry exemption. On July 11, 2020, the Arbitrator held that PSF did not qualify for the exemption and PSF's cessation of operations triggered withdrawal liability to the Fund. PSF is requesting that the Court vacate the arbitrator's award.

II. STANDARD

The parties state that under the MPPAA's unique statutory scheme for judicial review of arbitration awards in withdrawal cases, the Court is limited to reviewing the arbitrator's determinations and deciding whether "to enforce, vacate, or modify the arbitrator's award." 29 U.S.C. § 1401. The parties agree that the Arbitrator's legal conclusions are reviewed *de novo*. Union Asphalts & Roadoils, Inc. v. Mo-Kan Teamsters Pension Fund, 857 F.2d 1230, 1233 (8th Cir. 1988)(quoting 29 U.S.C. §1401(b)(2)).

III. DISCUSSION

A. Arbitrator's Decision

The Arbitrator found that Section 4203(b)(1)(A) was ambiguous in a number of

respects. The Arbitrator found that the primary area of disagreement between the parties concerned whether Section 4203(b)(1)(A) focuses on "headcount" or on "contribution base units"("CBUs")[2] in determining whether substantially all employees the employer has an obligation to contribute to the fund "perform work in the building and construction industry." The Arbitrator noted that additional areas of dispute related to: 1) the period(s) of time that are relevant to the determination that Section 4203(b)(1)(A) has or has not been met; and 2) how those employees who performed both building and construction industry work and non-building and construction industry work in the same time period being measured were to be counted. The Arbitrator noted that the parties stipulated that "substantially all" means 85% or above. The Arbitrator stated:

> I am unpersuaded that Section 4203(b)(1)(A) mandates rigid counting of employees, ignoring evidence of the patterns of their employment and how the broader employment of individuals who perform building and construction work compares with the total employment of individuals by the employer in the pertinent time periods. . . .Stated differently, the choice in this case is not a binary one. Rather the statue requires that a reasonable method be used to determine whether substantially all of the employees for whom the employer was obligated to contribute to the fund were performing building and construction work and permits an examination of all of the facts that are relevant to making that determination including, in appropriate cases, giving weight to CBU history as a proxy for employee head count during the relevant time periods.

(Arbitrator's Decision, Doc. 1-1, p. 33-34). The Arbitrator then addressed the question of time periods to be examined and an analysis of the data for those time periods. The Arbitrator noted, [t]he Parties in this case both focused, however, in their Stipulations and in the filings for Summary Judgement upon the ten years preceding the year of withdrawal (2007 – 2016) and the year of withdrawal itself. The Arbitrator stated, "[t]he

[2] CBUs are units with respect to which an employer has an obligation to contribute to a multiemployer pension plan. In this case, they are employee hours.

reasons that they mutually selected that time period is not clear, but there is no reason to believe that the use of this 10-year period is inappropriate or will result in a different finding relative to the application of Section 4203(b)(1)(A) than the longer 20-year period." Id. at 37. The Arbitrator stated that he "will use data that the Parties jointly stipulated to and focused upon and assume that it is an appropriate representative period for purposes of determining whether Section 4203(b) is or is not applicable." Id. at p. 37. The Arbitrator concluded:

> I find that all of the employee headcount data may be considered, but that the weight to be given to pieces of that data (including the time period(s) that will be given the most consideration in the Section 4203(b)(1)(A) analysis) depend on the particulars of the case, with appropriate consideration given to the reasons that the building and construction industry exemption was made part of the law and the overall purpose of the statute to adequately protect the contribution base of multiemployer plans and to have withdrawing employers pay their fair share of the unfunded vested benefit liabilities of the fund as of the end of the plan year preceding withdrawal.

Id. at 38. The Arbitrator stated that in the instant case, he was persuaded that the monthly data provides a more accurate indicator of whether "substantially all of the employees" for whom the Employer was obligated to make contributions were performing building and construction industry work." Id. The Arbitrator concluded:

> [e]xamination of the data in this case supports a finding that the Section 4203(b)(1)(A) predicate for application of the building and construction industry exemption has not been met. If one examines the number of monthly snapshots in the 10-year period preceding the year of withdrawal, the Field employee headcount as a percentage of total employee headcount exceeded 85% in only 24 of the 120 months (20%) and 6 of those months took place in the period January through July 2007 and another 7 of those months took place in the early parts of 2008 and 2009.

Id. at p. 41. The Arbitrator stated:

> Monthly data is not required, in my view, in all cases by the language of Section 4203(b) and any number of other reasonable intervals to examine "snapshots" might be possible. The record in this case contains only two

> views- annual and monthly- in addition to the ability to make aggregate period calculations for CBU data. For reasons noted, I find that the monthly data is likely to portray a more accurate snapshot of headcount percentage of the Employer's covered operations than annual data, for purposes of ascertaining whether "substantially all" of the employees in covered operations performed building and construction industry work, particularly when the monthly data is reviewed over a representative time period and examined in terms of the average percentages for that monthly data, by year and over the entire period, and in terms of the frequency that those monthly data snapshots show that the "substantially all" standard has been met or exceeded.

Id. at p. 42.

B. Parties' Arguments

1. Fund's Position

The Fund states that it is *not* challenging the Arbitrator's decision to adopt and apply a headcount method, and the primary legal question for the Court to resolve is whether the statutory language required the Arbitrator to analyze the headcount data on a particular basis over the stipulated period. The Fund states that the Arbitrator correctly held that Section 1383(b)(1)(A) - unlike other provisions of the MPPAA – does not mandate a rigid formula requiring a cumulative analysis that must be applied in all cases and did not commit legal error in refusing to create a bright line test.

The Fund also argues that the Arbitrator also properly considered and weighed the evidence in considering CBU history when deciding whether to apply the headcount method on a monthly or annual basis. The Fund states that the Arbitrator had only two options to choose from – monthly employee data and annual employee data. The Fund states that the Arbitrator made no mistake in concluding that the monthly headcount data was a more accurate indicator of whether PSF's withdrawal was likely to harm the Fund. The Fund states that there is no basis on which to disturb that factual finding. The Fund states that the Court should therefore affirm the Arbitrator's decision which denied

PSF the Exemption.

2. PSF's Position

PSF states that the Arbitrator's legal determinations were erroneous and under the MPAA's plain text, the word "employees" actually means "employees" not CBUs. PSF notes that the Arbitrator initially agreed with this position, but then disagreed that the statute would require use of a headcount method in all cases and that CBUs could be considered as "evidence" relevant to applying the headcount method. PSF states that the use of CBUs as "evidence" relevant to headcount or as a "proxy" for headcount, lacks any basis in the statutory text.

With regard to the second issue: which employees should be considered when applying the "substantially all" threshold, PSF states that the Arbitrator erred in adopting the novel approach advocated by the Fund and taking monthly "snapshots" of PSF's employees and evaluating whether at those moments in time "substantially all" of the employees were working in the building and construction industry. PSF argues that the statute requires taking "all the employees with respect to whom the employer has an obligation to contribute under the plan" and then assessing whether "substantially all" of them are building-and-construction employees." PSF states that the Arbitrator should create a list of all the employees with respect to whom the employer has an obligation to contribute under the plan. If substantially all of the employees on the list are building-and-construction workers, the exemption applies. PSF states that the Arbitrator's test where he first applied a totality of the facts test to decide whether to look at aggregate employee counts or instead at snapshots measured each year, month or some other interval depends on unspecified facts and is not a fair interpretation of the statute and instead is a replacement of the statutory text with a vaguely defined approach. PSF

argues that the Court should vacate the Arbitrator's decision and order a new hearing.

3. Amicus Curiae Brief

The Association of Union Contractors ("TAUC") and the National Association of Construction Boilermaker Employers ("NACBE") filed a Motion requesting leave to file an Amicus Curiae brief. TAUC is the only multi-trade, all union contractor association in the United States. Its membership is comprised of more than 1,800 construction companies that utilize union labor for their construction and maintenance jobs. NACBE has 70 member companies that have collective bargaining relationships with the International Brotherhood of Boilermakers union. Both of these organizations have member companies that make contributions to the Fund on behalf of their employees and many other multiemployer pension plans. These organizations submit that the Court should consider their Amicus brief because the Court's decision regarding the building-and-construction industry exemption will have a profound impact on their memberships. Additionally, they state that they have a unique perspective and insight on how the Arbitrator's construction and application of the exemption will impact the industry as a whole. The Court agrees and finds that the Amicus Brief will provide valuable and helpful information to the Court. Accordingly, the Court hereby **GRANTS** the Motion of the TAUC and NACBE to File an Amicus Curiae brief (Doc. # 26).

In their Amicus brief, TAUC and NACBE state that the Arbitrator's decision addressed two issues: 1) whether the BCE exemption requires a headcount in determining whether "substantially all of the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry," or whether it allows instead for the evaluation of the CBUs in making this determination and 2) what timeframe should be examined when

determining whether this element of the BCI exemption has been met. With regard to the first issue, TAUC and NACBE state that the Arbitrator's ruling that he was free to use CBUs as a "proxy" in making the "substantially all" determination was error and contradicts the laws of statutory construction. They state that the Arbitrator's decision to adopt a "totality of relevant factors" test to determine whether to employ a headcount method creates uncertainty for BCI employers and if this decision is upheld, employers will have no clear standard by which to assess the liabilities they are undertaking when hiring union labor. With regard to the second issue, TAUC and NACBE state that the Arbitrator chose a novel and unnecessarily complex approach. TAUC and NACBE state that even if the Arbitrator was trying to eliminate the "skew" from BCI work, Congress was fully aware of the transient nature of building and construction industry employment and identified it as one of the reasons for the exemption when adopting the headcount standard. They argue that the Arbitrator's decision ignores the seasonal and cyclical nature of boilermaker work which fluctuates based on the time of year and the demand for construction of large boiler systems and new power plants. TAUC and NACBE state that the Arbitrator's indeterminate multifactor test where "the weight given to pieces of that data" including "the time period(s)" at issue will "depend on the particulars of the case" makes it impossible for an employer to determine in advance the circumstances in which the exemption might apply. TAUC and NACBE state that because boilermakers operating in a construction plant are largely seasonal workers, the creation of "monthly snapshots" and then comparing those on a monthly basis to the number of non-BCI employees creates an arbitrary and artificial test that will be difficult if not impossible to meet.

C. Court's Decision

1. Headcount Method vs. CBU Method

The Arbitrator found that the headcount method applied in this case, but stated that he was unpersuaded that the statute "mandates rigid counting of employees, ignoring evidence of the patterns of their employment and how the broader employment of individuals who perform building and construction work compares with the total employment of individuals by the employer in the pertinent time periods." (Arbitration Decision, Doc. 1-1, p. 33). The Arbitrator stated that the statute requires a "reasonable method" to determine whether substantially all of the employees for whom the employer was obligated to contribute to the fund were performing building and construction work. He noted that this might in certain cases require giving weight to CBU history as a proxy for employee head count during the relevant time periods. Id. at 33-34.

In Ely v. Bd. of Trustees of Pace Indus. Union - Mgmt. Pension Fund, No. 3:18-CV-00315-CWD, 2020 WL 7038540 (D. Idaho Nov. 30, 2020), the court stated:

> Other principles the Court must keep in mind are the principles of statutory construction, especially in the context of ERISA. First, "in 'every case involving construction of a statute,' the 'starting point ... is the language itself.' " Thole v. U. S. Bank N.A, —— U.S. ——, 140 S. Ct. 1615, 1623, 207 L. Ed. 2d 85 (2020) (THOMAS, J., Concurring (citing Varity, 516 U.S. at 528, 116 S.Ct. 1065, THOMAS, J., dissenting). And second, under ERISA, the Court's approach to statutory interpretation is "measured and restrained." WestRock RKT Co. v. Pace Industry Union-Management Pension Fund, 856 F.3d 1320, 1325 (11th Cir. 2017) (citing Gulf Life Ins. Co. v. Arnold, 809 F.2d 1520, 1524 (11th Cir. 1987) ("[C]ivil actions under ERISA are limited only to those parties and actions Congress specifically enumerated....")).

Id. at *20.

Starting with the language of the statue itself, complete withdrawal occurs only if "substantially all of the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry." The

Arbitrator agreed that the language of the statute is clear in terms of its focus on "employees." He stated: "the language of the section is clear in its reference to employees and not to contributions or CBUs." (Arbitrator's Decision, Doc. 1-1, p. 29). The court agrees with the Arbitrator up to this point. However, the Arbitrator then seems to depart from the language of the statute and states "[w]hether a head count, without weighting or other adjustment, will provide a reasonable basis to determine whether the condition set forth in Section 4203(b)(1)(A) has been satisfied, will require that consideration be given to the totality of relevant facts, including consideration of the nature of both the particular building and construction industry covered operations in any given case and the non-building and construction industry operations for which contributions are made to the fund over time, as well as any relevant patterns that may exist to the covered operations of the employer." (Arbitrator's Decision, Doc. 1-1, p. 33). The Arbitrator concluded that the statute requires a "reasonable method be used to determine whether substantially all of the employees for whom the employer was obligated to contribute to the fund were performing building and construction work and permits an examination of all of the facts that are relevant to making that determination including, in appropriate cases, giving weight to CBU history as a proxy for employee head count during the relevant time periods." Id. at p. 33-34. The Court disagrees. The statue says nothing about weighting or making adjustments, considering other factors or using CBU history as a proxy for employee head count. The plain language of the statue states "substantially all the employees with respect to whom the employer has an obligation to contribute . . .." The parties have stipulated that the word "substantially" means 85% or more. Thus, the court finds that the Arbitrator was correct in determining that the headcount method is the appropriate method to use, but the Court finds that the

Arbitrator was incorrect in creating and applying a multi-factored reasonableness test to the statute. As the Court in Henrikson v. Choice Prod. USA, LLC, No. CV 16-1317 (MJD/LIB), 2017 WL 449591 (D. Minn. Feb. 2, 2017), noted, "[t]he Eighth Circuit has held, however, that '[w]here a congressional enactment is not ambiguous there is no need for 'indulging in uneasy statutory construction.'" Id. at *1 (quoting United States v. Butler, 541 F.2d 730, 733 (8th Cir. 1976)). Because the statute in this case is clear, the Court finds that the Arbitrator erred when he stated that that statute required consideration of factors other than the number of employees.

2. Relevant Timeframe

With regard to the relevant time frames, the Arbitrator stated that the first period of time is the overall period of time to determine whether or not "substantially all" employees in covered operations performed work in the building and construction industry. Second, the Arbitrator stated it was necessary to determine the intervals within that overall time period that will be examined – daily, weekly, monthly, annually, the multi-year period as a whole or some other period. The Arbitrator observed that the language of the statute contains no guidance regarding the time period that should be considered and the reported court and arbitration decisions that have considered the question all involved partial withdrawals, rather than the complete withdrawal at issue in this case. The Arbitrator noted that the parties both focused on a ten year period of time preceding the year of withdrawal (2007 – 2016) and the year of the withdrawal itself (2017), which was only a partial year due to the date that operations ceased. The Arbitrator noted that he would use the time period that the parties had stipulated to and focused upon and assumed that it was an appropriate representative period for purposes of determining whether the exemption was applicable.

The Arbitrator noted that ERISA was silent as to the time period that should be relevant to determining whether Section 4203(b)(1)(A) has been met in any given case. The Arbitrator found that "all of the employee headcount data may be considered, but that the weight to be given to pieces of that data (including the time period(s) that will be given the most consideration in the Section 4203(b)(1)(A) analysis) depend on the particulars of the case . . .." (Arbitrator's Decision, Doc. 1-1, p. 38). The Arbitrator found that "monthly data provides a more accurate indicator of whether substantially all of the employees for whom the Employer was obligated to make contributions were performing building and construction industry work." Id. The Arbitrator stated that the use of "aggregated or annual snapshots has a greater potential to skew the determination as to whether substantially all of the employees of the Employer on whose behalf contributions were made performed building and construction industry work in light of the transient and less than full-time nature of building and construction work . . .." Id. at 39.

PSF argues that the Arbitrator's approach has no basis in the statutory text and has never been adopted by any arbitrator or court since the MPPAA was enacted. PSF argues that the statute reads: "all the employees with respect to whom the employer has an obligation to contribute under the plan." PSF argues the Arbitrator should create a list of all the employees with respect to whom PSF has an obligation to contribute and if substantially all of the employees are building and construction workers, then the exemption applies. PSF also argues that its approach aligns with congressional intent, noting that numerous courts recognized that the exemption was enacted specifically due to the transient nature of construction work. See Ceco Concret Constr., LLC v. Centennial State Carpenters Pension Tr., 821 F.3d 1250, 1254 (10th Cir. 2016);

Carpenters Pension Trust Fund for N. Cal. v. Underground Constr. Co., 31 F.3d 776, 778 (9th Cir. 1994). PSF states that the temporary nature of this work and the need for the exemption was recognized in the Congressional history cited by the Arbitrator. (Arbitrator's Decision, Doc. 1-1, pp. 6-7). This was also recognized by the court in Raytheon Co. v. Central States, No. 89 C 861, 89 C 1010, 1989 WL 117919 (N.D.Ill. Sept. 27, 1989). The Court in that case stated:

> While much of ERISA may not be a model of legislative clarity, this provision [29 U.S.C. § 1383(b)(1)] speaks with relative simplicity. To impose a regime based on CBUs or on counting employees for each year they work is to read into the statute material that is clearly inconsistent with the plain language. Congress used CBUs and complex averaging methods when it felt such measures were necessary. The computation of the "high base year' is but one of many examples. Thus, regardless of how good an idea the Pension Fund's alternative approaches may be, they have absolutely no support in the statutory language and must therefore be rejected.
> . . .
> Congress was well aware of the transient nature of construction work when it enacted the special construction industry rules. See e.g., H.R. Rep. No. 869, 96th Cong., 2d Sess. 75, *reprinted in* 1980 U.S.Code Cong. & Admin. News 2918, 2943 ("An individual employee [in the construction industry] will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate from year to year."). Thus, Congress quite apparently meant to incorporate this transientness of construction workers into its characterization test for construction employers. To "normalize" the figures by altering the numbers to "account" for this transientness completely distorts the test as provided.

Id. at *6.

The Fund argues that PSF waived this argument because it failed to present it to the Arbitrator. However, as PSF points out in its Reply Suggestions, it made these arguments before the arbitrator, stating that it "would qualify for the exception on a headcount basis measured either annually or cumulatively over a period of years." (Doc. 34-1, p. 11). PSF stated that it argued for the cumulative approach: "The Raytheon case suggests that the number of Shop vs. Field employees should be counted cumulatively

over the 10 years, so that each employee is counted only once." Id. at 7. Thus, the Court finds that PSF did not waive the argument that the statute requires a cumulative approach.

The Fund argues that if a cumulative headcount standard is applied, it is unclear over what time period the employees should be counted? The Fund states that if the Court is inclined to consider this issue under PSF's reading of the statute, a ten year period of time is inappropriate. The Fund notes that other questions arise if the cumulative headcount method is applied, such as how employees who performed both construction and non-construction work should be counted? PSF argues in reply that the Arbitrator should create a list of all the employees with respect to whom the employer has an obligation to contribute under the plan. If the Fund argues that it owes liability going back ten years, then this is the period of time that should be used. With regard to the classification questions for employees who worked in both types of jobs, PSF states that the Arbitrator will have to classify employees as either building and construction workers or not. PSF argues that any employees who performed building and construction work should count for the exemption, even if they performed other types of work at different times. PSF argues that if the Court agrees that the Arbitrator's statutory interpretation is incorrect, the Court should remand the case to Arbitrator to apply the correct test.

After briefing was complete, the Fund requested leave to file a Sur-Reply to address what it asserted were erroneous assertions from PSF's Reply Suggestions. PSF states that if the Court grants the Fund's Motion for a Sur-Reply, it should be allowed to file a response. The Court will **GRANT** the Fund's Motion for Leave to File Sur-Reply Suggestions (Doc. # 35) and will also allow PSF to file a Response to the

Sur-Reply. The Court reviewed and considered both pleadings. The Fund states that PSF its Reply Suggestions asserted for the first time that the Fund cannot argue that a ten year period of time should not be used because it stipulated to factual data over a ten year period. The Fund states that as part of their stipulations, the parties did not agree that a ten year period is required as a matter of law, even though they stipulated to other legal issues, such as the meanings of the terms "substantially all" ""Headcount Method" and "CBUs Method." Additionally, the Fund argues that a ten year period should also not be utilized because PSF owes withdrawal liability for its former employees beyond the ten years preceding its withdrawal. The Fund states that its actuary calculated PSF's withdrawal liability based on PSF's contribution history dating back to 2002. The Fund notes that the actuary clarified that he omitted the years prior to 2002 because there "was no withdrawal liability component." This was because prior to 2002, the Fund was fully funded, so there was no withdrawal liability to assess and thus no basis to include those years in the calculation. The Fund also argues that PSF's Arbitration Brief contradicts its argument in its Reply Suggestions regarding the proper method for counting employees who do both shop and field work.

PSF states in response to the Fund's Sur-Reply that the whether the Fund used ten years' worth of data or fifteen years' worth of data is irrelevant to the legal issue before the Court. PSF notes that the sole question is whether the Arbitrator should apply the "substantially all" threshold to monthly snapshots of the employee pool or instead to a cumulative list of all building-and-construction industry workers. If the Arbitrator's interpretation was incorrect, the Court should vacate and remand, so that the Arbitrator can resolve the case under the correct legal standard and there is no need for the Court to decide whether it was proper to use ten years or fifteen years'

worth of data. PSF also argues that the Fund waived this argument in the arbitration and in this litigation. PSF argues that even supposing the Fund is correct that it used fifteen years, instead of ten years, this would harm, not help the Fund because the use of longer periods of time increases the percentage of Field Employees versus Shop Employees. With regard to the issue of classification of employees, PSF states that the Arbitrator did not classify any employee and instead reserved disputes over classification for a later stage. PSF states that any ambiguity over classification would exist regardless of whether the Arbitrator used cumulative figures or monthly snapshots.

After reviewing the parties' extensive and very thorough briefing on these issues, as well as the Amicus Brief, the Court finds that the Arbitrator's decision in this case must be **REVERSED in PART** and this case must be remanded to the Arbitrator for a new hearing. As discussed above, the Court finds that even though the Arbitrator correctly determined that a headcount method should be used when determining whether the exception applied, he erred in his determination that the statute allowed him to devise a "reasonable method" and in certain cases to use CBUs as a proxy for employee head count. The Arbitrator also erred in deciding that he could consider monthly "snapshots" of employee data over a ten year period. The Arbitrator stated that the reasons that the parties had selected the ten year time frame were not clear. In their briefing the parties have argued that a longer period of time may be more appropriate to consider. Additionally, as the parties noted there are other questions regarding classification of employees that the Arbitrator did not initially reach. The Arbitrator should examine these issues upon remand as well.

IV. CONCLUSION

Accordingly, for the reasons stated above, the Court hereby **GRANTS** PSF's

Motion for Judgment on the Pleadings (Doc. # 22) and **DENIES** the Fund's Motion for Judgment on the Pleadings (Doc. # 17). The Court also **GRANTS** the National Association of Construction Boilermaker Employees and The Association of Union Contractor's Motion for Leave to File an Amicus Curiae Brief (Doc. # 26) and **GRANTS** the Fund's Motion for Leave to File Sur-Reply Suggestions and PSF's Request to File a Response to the Fund's Sur-Reply (Doc. # 35).

Date: September 30, 2021
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge