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Memorandum

TO: Board of Trustees
Industry and Local 338 Pension Fund

CC: Alicia Cochran
Kristen Barshinger
Mary Ann Dunleavy
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FROM: Elizabeth O'Leary

DATE: July 15, 2019

RE: Funding Policy Issues

I. Introduction

As you know, the Pension Protection Act of 2006 (PPA) provided plan fiduciaries of critical status plans (i.e., red zone plans) with tools to increase contribution rates. The two tools are (1) the requirement that plan fiduciaries implement employer surcharges within 30 days after an employer has been notified that the plan is in critical status and that the surcharge is in effect, and (2) the requirement that plan fiduciaries impose the default schedule under a fund's rehabilitation plan in the event that an acceptable schedule under the rehabilitation plan is not agreed to within 180 days after the expiration of a collective bargaining agreement (CBA).

As you consider the possibility that the Industry and Local 338 Pension Fund may emerge from critical status and return to the green zone, attention has turned to developing a more detailed and robust funding policy than existed prior to entering critical status and to questions regarding the Trustees' authority to enforce such a funding policy. In this memo, we review background information regarding historical efforts to mandate contribution requirements, pertinent Trust Agreement provisions, and next steps/discussion topics.

II. Background on Funding Policies and Contribution Requirements

ERISA Section 402(b)(1) requires every employee benefit plan "to provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter." The Plan's funding policy is summarily described in the Annual Funding Notice as follows:

> The funding policy of the Plan is that the Plan is funded by contributions made by employers pursuant to collective bargaining agreements with Teamster Union Locals 445, 687

and 317, the local unions that represent the Plan's participants.

As like many multiemployer funds, this Fund has historically operated in the context of the Board of Trustees having sole responsibility for determining benefit levels, and the bargaining parties determining contribution rates during negotiations, subject to input from the Trustees based on recommendations by the Fund's actuary regarding recommended contribution rates. While this framework is common in multiemployer plans, other frameworks exist, with CBAs sometimes mandating benefit levels and boards of trustees sometimes having authority to set contribution rates, and variations thereof. I am aware that some of you have experience with large funds with many contributing employers and participating local unions, and that those funds tend to have very centralized and detailed participation and contribution requirements which are enforced through written participation agreements or trust acceptances.

Prior to the changes required as a result of entering critical status, and the mandatory funding policy that was imposed following critical status via the requirement to have a rehabilitation plan, the Trustees would request that the bargaining parties negotiate specified rates recommended by the actuary and would periodically adopt benefit changes in response to changing conditions. For many years[1], I believe it is fair to say that the lack of uniformity in contribution rates was not viewed as a serious problem because the benefit formula was based on the contribution rate. This contrasts to plan designs where the benefit rate is not tied to the contribution rate (e.g., $40 for every year of pension credit regardless of contribution rate). For example, this Fund's benefit formula for work between July 1, 2010 and June 30, 2016 was $37.00 for each $1.00 of the applicable employer hourly contribution rate (with proportionate accruals for hourly contributions less than $1.00 hourly), multiplied by the total Pension Credits earned during that Plan Year. For the earlier period between July 1, 1997 and June 30, 2010, and provided a Participant worked in Covered Employment on or after July 1, 1999, then for each year of Pension Credit between July 1, 1997 and June 30, 2010, the benefit was $49.00 for each $1.00 of the applicable employer hourly contribution rate (with proportionate accruals for hourly contributions less than $1.00 hourly), multiplied by the total Pension Credits earned during that Plan Year. Since July 1, 2016, post-July 1 2016 accruals are calculated by taking 0.9% of employer contributions (excluding surcharges).

In or around 2009, the Trustees requested that the bargaining parties negotiate special supplemental contributions that would not count for benefit accrual and instead would be solely applied to improve the Plan's funded status. Because of

[1] I began serving as Fund Co-Counsel in or around August of 2001 while employed at another law firm. I have served as Fund Co-Counsel and then Fund Counsel since that time other than a period of approximately 15 months between 2011 and 2012. As a result, my observations and recollections cover that time period. Interestingly, when I first began working on Fund matters, the pressing issue facing the Board of Trustees was whether to increase benefits or offer employers a "contribution holiday" in light of the Fund's excellent funded status at that time.

different CBA expiration dates and long delays in negotiating the terms of expired CBAs, the special supplemental contribution feature of the Plan – while proactive and well-intentioned – became problematic. Specifically, bargaining parties who timely negotiated CBAs with the recommended special supplemental contributions (and the participants working under those CBAs) wound up having a disproportionate amount of the total employer contribution applied to improving the Fund's financial health (rather than to benefit accruals) than did bargaining parties who delayed (sometimes for years) in negotiating CBAs with the recommended contribution rates. This discrepancy was addressed with the July 1, 2016 Plan Amendment eliminating special supplemental contributions and changing to a flat percentage of contributions accrual rate.

At around the time that delays in renegotiating CBAs arose, the Trustees considered their authority to impose recommended contribution rates on bargaining parties. In the absence of certain legally mandated contributions, such as PPA surcharges or rehabilitation plan rates, fiduciaries' authority with respect to contribution rates is determined based on the governing plan documents, including CBAs and Trust documents. As you are likely very familiar based on your experience with other benefit plans, CBA and trust provisions can vary greatly among plans, with some funds having very strict employer contribution and other participation requirements whereas other funds provide the bargaining parties with discretion over contribution rates.

We outline below the pertinent Trust Agreement provisions which have not changed in many years. After reviewing meeting minutes from the time of these discussions in or around 2008, it appears that at that time I advised that the Trustees' authority to impose contribution rates on the bargaining parties was at best questionable under the current Trust Agreement language which made clear that an employer's contribution rate was set by the CBA and which did not authorize the Trustees to unilaterally set contribution increases. Meeting minutes reflect that the Trustees had reviewed draft Trust Agreement amendments in 2008 which expressly authorized the Trustees to increase contribution rates if needed. For instance, the minutes of the Board of Trustees' meeting held on June 26, 2008 includes the following report:

> Ms. O'Leary reported that she had prepared, for purposes of discussion, draft amendments to the Trust Agreements that expressly authorize the Trustees to increase contribution rates if necessary to preserve the financial soundness of the Funds and she circulated the draft amendments. After review of the draft amendments and discussion, it was agreed that no action with respect to the draft amendments would be taken at this time.

Although not stated in the above-quoted minutes, it is my recollection that I advised that the Trustees' authority to impose contribution rates on the bargaining

parties given the existing Trust Agreement language stating that an employer's contribution obligation was set by the CBA was subject to challenge. I believe that the outcome of these discussions was that contribution rate disparities would be addressed by continuing to trying to impress upon the bargaining parties the importance in obtaining the rates recommended by the Fund's actuary and, if necessary, by exercising the Trustees' power to amend benefits.

I recall that, at around the time of these discussions, the Trustees also considered requiring all Contributing Employers to execute a participation agreement that would unequivocally authorize the Trustees to set contribution rates, thereby eliminating any potential challenges to the Trustees' authority to amend the Trust Agreement to authorize the Trustees to impose specified contribution rates. My recollection is that the consensus was that it was unlikely that an employer would delegate such authority to the Board Trustees at that point in time given that the employers had participated in the Fund for many decades without such a requirement.

III. Trust Agreement Provisions

The pertinent Trust Agreement provisions are as follows:

1. Article I, Section 4. Employer Contributions; Contributions. The terms "Employer Contributions" or "contributions" as used herein shall mean payments by Employers to the Trust Fund required pursuant to Collective Bargaining Agreements or as a result of a duty under applicable labor-management relations law and shall include, when specified in this Agreement, withdrawal liability payments required to be made under the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA").

2. Article II, Section 4. Employer Contributions; Contributions. The Trustees shall promptly agree upon and formulate a Pension Plan which shall contain the provisions, regulations and conditions of the pension program herein contemplated, including, but not limited to those relating to eligibility of Participants, retirement age and other items required to carry out the intent and purposes of the pension program and any and all matters relating thereto, which the Trustees may deem appropriate for the determination of retirement benefits and the administration of the pension program. . . . The Trustees may amend such Plan from time to time. . . .

3. Article IV, Section 4(a). The Trustees are hereby empowered . . . To establish the terms and conditions upon which retirement benefits shall be provided, including but not limited to eligibility of Participants and the amount, nature and form of benefits, whether provided directly from the Fund, by insurance or otherwise as the

Trustees shall in their discretion determine, subject to the terms of the Collective Bargaining Agreements.

4. Article IV, Section 4(p). The Trustees are hereby empowered . . . To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

5. Article IV, Section 6. The Trustees shall promulgate such requirements for the participation of new Employers in this Agreement and Declaration of Trust and such other rules and regulations as may, in their discretion, be needed proper and necessary for the sound and efficient administration of the Trust, provided that such requirements, rules and regulations are not inconsistent with this Agreement and Declaration of Trust and the Collective Bargaining Agreements.

6. Article IV, Section 12. The Trustees are hereby empowered to do all acts whether or not expressly authorized herein, which the Trustees may deem necessary to accomplish the general objectives of maintaining the Pension Plan solely in the interests of the Participants and beneficiaries; and (b) defraying reasonably expenses of administering the Plan. . . .

7. Article VI, Section 1. Each and every Employer shall pay to the Trustees the contributions required by the Employer's Collective Bargaining Agreement.

8. Article VIII, Section 1(a)(i). An Employer shall cease to be an Employer under this Agreement and Declaration of Trust whenever any Employer Contribution or other payment required to be made by such Employer to or for the account of the Trust Fund shall not be made when due.."

Pre-critical status CBAs occasionally had re-opener provisions in the event the actuary had made a recommendation of a different rate.

IV. Next Steps/Discussion Topics

The contribution requirements that have applied while the Plan is in critical status have provided clarity in contribution requirements which did not exist prior to entering critical status. Recognizing your interest in maintaining the current ability to require contribution levels post-emergence from critical status, one indirect option to achieve that goal which has always been within your authority would be to establish a rule which states that, if the recommended contribution rate is not agreed to, the benefit accruals of the affected employees will be reduced to a rate determined by

the Trustees for the non-compliant period, subject to the 15-day advance notice requirement under ERISA Section 204(h). Whether a rule like this would have the intended effect of compliance with the specified contribution rate remains to be seen. Another option would be to re-visit whether to insist that employers sign a participation agreement binding them to contribution requirements set by the Trustees.

In the event that the Plan is able to emerge from critical status, the Trustees will have accomplished an extraordinary achievement. It may be that effective and timely communication about the contribution requirements necessary to achieve the Trustees' goals going forward – e.g., attain 100% funding within X number of years or maintain a positive credit balance each of the next number of years, etc. – combined with the fact that all of the bargaining parties are represented on the Board of Trustees through either the Union Trustees or the Employer Trustees, or both (in the case of Hood or L.P. Transportation) may facilitate compliance with the Trustees' funding policy.

In short, it remains the case that, upon emergence from critical status, neither the pertinent documents nor ERISA provide a basis for the Trustees to mandate a particular contribution requirement going forward. However, the Trustees can respond to a refusal to comply with the contribution requirements of their funding policy by reducing future benefit accrual, as discussed above. The Trustees could also amend the Trust Agreement, subject to the risk that such amendment could be challenged but also recognizing that such challenge may never materialize. With only 6 contributing employers remaining in the Plan following next month's withdrawal of the College of New Rochelle, there is a risk that some employers may view emergence from critical status as an opportunity to consider exiting the Plan particularly given the withdrawal of 2 employers in 2019.