

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**NORTHERN NEW ENGLAND )  
CARPENTERS PENSION PLAN AND )  
TRUST, )**

***Petitioner* )**

**v. )**

***Docket No. 02-180-P-H***

**H. P. CUMMINGS CONSTRUCTION )  
COMPANY, )**

***Respondent* )**

***RECOMMENDED DECISION ON MOTIONS TO CONFIRM, VACATE AND/OR MODIFY  
ARBITRATION AWARD***

The petitioner, Northern New England Carpenters Pension Plan and Trust (the “Trust”), brings this action seeking vacation or modification of the award rendered in an arbitration conducted pursuant to the Multiemployer Pension Plan Amendments Act (“MPPAA”), identified as American Arbitration Association Case No. 11 621 01182 01. The respondent, H. P. Cummings Construction Company (“Cummings”), asks the court to confirm and enforce the award. I recommend that the court confirm and enforce the award.

**I. Factual Background**

The arbitration at issue involved two days of hearings, stipulated facts and a series of exhibits. Joint Stipulation (Docket No. 4) at 1; Stipulated Record Before the Arbitrator (“Record”) (Docket Nos. 8 & 9). The parties do not dispute most of the relevant facts.

The Trust is a collectively bargained, jointly trustee, multiemployer employee pension benefit plan and employee benefit plan. Stipulations of Fact, *In the Matter of Labor Arbitration H.P. Cummings Construction Company and Northern New England Carpenters Pension Plan*, AAA Case No. 11-621-0118201 (Item C, Vol. I, Record) (“Stipulations”), ¶ 1. It is to be operated and administered in accordance with the terms of the Employee Retirement Income Security Act of 1974 (“ERISA”). *Id.* Cummings is a general construction contractor with employees in the building and construction trades industry; it has headquarters in Ware, Massachusetts and works on construction projects throughout northern New England. *Id.* ¶ 2. By letter dated May 31, 2001 the Trust served a demand for payment of withdrawal liability on Cummings. *Id.* ¶ 3. The stated amount of the withdrawal liability was \$752,558, subsequently corrected to \$747,158. *Id.* On or about June 12, 2001 Cummings requested review of the withdrawal liability determination. *Id.* ¶ 4.

For approximately 50 years, Cummings had a collective bargaining relationship in the state of Maine with the Northern New England District Council of Carpenters (“District Council” or “Council”), its local affiliates and various local laborers’ unions. *Id.* ¶ 5. Cummings performs construction projects primarily for institutional clients such as colleges and hospitals in Maine, central and northern New Hampshire and Vermont. *Id.* ¶ 6. Cummings has not signed area collective bargaining agreements with local carpenters’ unions in New Hampshire and Vermont but has executed individual project agreements with such unions on a job-by-job basis. *Id.* ¶ 7. In Maine, Cummings had employed approximately 25-50 carpenters, most of whom were career employees of the company. *Id.* ¶ 8. In Maine, Cummings signed letter agreements with the District Council that incorporated by reference the wage and fringe benefit provisions of the area collective bargaining agreement and also set forth a number of specific separate provisions. *Id.* ¶ 9. Cummings made pension contributions to the Trust from 1976 through the fall of 2000. *Id.* ¶ 10.

On November 28, 1984 Cummings entered into a multiemployer agreement with the District Council. *Id.* ¶ 11. On September 10, 1985 Cummings and the Council agreed to extend that agreement until April 30, 1986 for projects in Maine. *Id.* ¶ 12. On June 25, 1986 Cummings and the Council agreed to extend the agreement through April 30, 1988. *Id.* ¶ 13. On June 27, 1988 Cummings agreed to become a signatory to the Northern New England District Council of Carpenters Agreement for the State of Maine and the Addendum for Commercial and Residential Work. *Id.* ¶ 14. On August 3, 1990 Cummings again entered into this Agreement. *Id.* ¶ 15. These agreements were supplemented by specific letter conditions. *Id.*

On May 1, 1991 Cummings agreed to become a signatory to a multiemployer labor agreement encompassing the state of Maine between the District Council and six named construction contractors which was to expire by its terms on April 30, 1992. *Id.* ¶ 16. This agreement was also supplemented by specific letter conditions. *Id.* This agreement included an “evergreen” clause, which provided that it would continue in effect from year to year after the stated expiration date unless and until notice of intent to terminate was given at least 60 days prior to an expiration date. *Id.* ¶ 17. During the period from 1992 through 1998 Cummings did not give such notice of intent, changes in wages and fringe benefit rates were negotiated by the District Council and Cummings paid the increased rates. *Id.* ¶ 18. By letter dated February 26, 1998 Cummings gave the District Council notice that it intended to terminate the 1991-92 Agreement, among other agreements with the carpenters union. *Id.* ¶ 19.

In a letter dated March 20, 1998 Cummings wrote to the New England Regional Council of Carpenters (“Regional Council”), successor to the District Council, with regard to termination dates. *Id.* ¶ 20. The letter also invited the Regional Council to “sit down to attempt to negotiate a successor agreement.” *Id.* By letter dated October 1, 1998 Cummings advised the Regional Council that it would continue to pay the wages and benefits called for in the Maine collective bargaining agreement,

stating further that “[t]hese payments, however, are not to be considered as an indication that we have become signatory or otherwise contractually committed to any agreement, pending the results of our ongoing discussions.” *Id.* ¶21. Meetings between Cummings and the Regional Council in an attempt to negotiate a labor agreement occurred through 1999 and early into 2000. *Id.* ¶22. A series of letter agreements were exchanged between Cummings and the Regional Council extending the relationship. *Id.* ¶23. The last extension date referred to in these letters was in April 2000. *Id.*

On or about March 16, 2000 the Regional Council filed a petition with the National Labor Relations Board seeking an election to obtain certification as the representative of Cummings’ employees in two separate bargaining units, one for the state of Maine and one for New Hampshire and Vermont. *Id.* ¶26. Following elections, the Regional Council was certified as the exclusive representative of Cummings’ Maine employees on June 21, 2000 and of its employees in New Hampshire and Vermont on August 3, 2000. *Id.*

Cummings and the Regional Council held a negotiation session on October 2, 2000. *Id.* ¶27. On October 4, 2000 counsel for the Regional Council informed counsel for Cummings that the Regional Council would not provide manpower to Cummings after November 6, 2000. *Id.* ¶28. Further negotiation sessions were held in October and November 2000. *Id.* ¶¶29-34. During the pendency of the NLRB election proceedings and negotiations in the fall of 2000 Cummings continued to pay the wages and benefits set by the area labor agreement negotiated by the Regional Council and multiemployer construction contractor groups. *Id.* ¶35. It continued to make contributions to benefit funds, including the Trust, as called for by the area labor agreement. *Id.* It continued to deduct dues assessments from employees’ wages and remit those dues to the Regional Council. *Id.* Cummings’ last contribution report reflected payments to the Trust through mid-November 2000. *Id.* ¶37.

By letter dated November 22, 2000 the Regional Council advised the Trust that Cummings and the Regional Council “have no longer agreed to extend the terms of the previous agreement they were working under” and that “all work that was performed after November 19, 2000 by H. P. Cummings employees will be considered non-union work.” *Id.* ¶ 43. By letter dated February 23, 2001 to Cummings the Regional Council disclaimed any further interest in representing Cummings’ employees. *Id.* ¶ 44. In February 2001 Cummings and the Regional Council agreed that there would be no further negotiations. *Id.* ¶ 45. Cummings has continued to perform construction projects in the state of Maine as it has in the past and has utilized carpentry employees performing the same or similar work as that performed by employees working within the jurisdiction of the prior agreements between Cummings and the Regional Council. *Id.* ¶ 46.

The Trust determined that Cummings had withdrawn on or about November 19, 2000 and assessed the withdrawal liability already mentioned. Opinion and Award, *In the Matter of the Arbitration Between H. P. Cummings Construction Company and Northern New England Carpenters Pension Fund*, AAA Case No. 11 621 01182 01 (attached to Application to Vacate or Modify Arbitration Award (Docket No. 1)) (“Award”), at 2. Cummings subsequently filed a demand for arbitration. *Id.*

The agreements signed by Cummings for its Maine work were contracts under section 8(f) of the National Labor Relations Act, which permits unions and employers in the construction industry to enter into “prehire” agreements. *Id.* at 3. Once a section 8(f) agreement expires, an employer is not obligated to maintain the prevailing wages and benefits until an impasse in bargaining is reached. *Id.* Different, job-by-job agreements covered Cummings’ work in New Hampshire and Vermont. *Id.* at 4-5.

Cummings' chief executive officer stated that Cummings continued to make contributions to the Trust because the union and the company had had a long relationship and the company did not want to break the continuity of that relationship and disrupt the pensions of its employees while there was hope that the parties could reach an agreement. *Id.* at 12.

An actuary for the Trust notified Cummings on December 8, 2000 that its withdrawal liability, calculated on a withdrawal date of November 19, 2000 and including contributions for employees in Maine, New Hampshire and Vermont, was \$752,558. *Id.* at 13. Cummings took the position that its withdrawal liability was incurred in a prior plan year. *Id.* at 14. The actuary was not aware that Cummings' employees worked in three states under different agreements. *Id.* at 16.

Cummings has not returned to any of the projects in New Hampshire and Vermont that it had previously worked on under project-specific labor agreements. *Id.*

The arbitrator held that Cummings withdrew from the Trust "at least partially" as of April 15, 2000 and ordered the Trust to recalculate its withdrawal liability based on that date, "excluding from the computation contributions made on behalf of employees covered by project labor agreements in Vermont and New Hampshire." *Id.* at 37. The parties agree that the calculation ordered by the arbitrator results in liability of \$216,600. Respondent's Brief to Confirm and Enforce Arbitration Award ("Cummings Brief") (Docket No. 6) at 2; Brief of Petitioner in Support of Application to Vacate or Modify Arbitration Award ("Trust Brief") (Docket No. 10) at 13.

## **II. Statutory Background**

The purpose of the MPPAA, which is part of ERISA, is "to guarantee that 'if a worker has been promised a defined pension benefit upon retirement . . . he actually will receive it.'" *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720 (1984) (citation omitted). *See generally* 29 U.S.C. § 1001a. The MPPAA accordingly provides that an employer withdrawing from a

multiemployer pension plan is required to pay that share of the plan's unfunded vested liabilities attributable to that employer's participation. 29 U.S.C. § 1381(a). A withdrawal may be partial or complete. 29 U.S.C. §§ 1383(b) (defining complete withdrawal for the building and construction industry), 1385 (defining partial withdrawal). The plan must notify a withdrawing employer of the amount of its liability within a set time. 29 U.S.C. § 1399. Any dispute concerning the determination of this amount must be resolved through arbitration at which any determination made by a plan sponsor "is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(1) & (a)(3)(A). Any party to the arbitration proceedings may bring an action in federal district court to enforce, vacate or modify the arbitrator's award. 29 U.S.C. § 1401(b)(2). In any such court proceeding "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c).

In this circuit,

[j]udicial review of the arbitrator's decision is extremely narrow and exceedingly deferential. An arbitrator's award must be enforced if it is in any way plausible, even if [the court] think[s] he committed serious error. A court may only vacate an arbitrator's award in very rare circumstances, such as where there was misconduct by the arbitrator, where the arbitrator exceeded the scope of his arbitral authority, or when the award was made in manifest disregard of the law.

*Wonderland Greyhound Park, Inc. v. Autotote Sys., Inc.*, 274 F.3d 34, 35 (1st Cir. 2001) (internal punctuation and citations omitted); *accord, JCI Communications, Inc. v. International Bhd. of Elec. Workers*, \_\_\_ F.3d \_\_\_, Dec. No. 02-2220 (1st Cir. Mar. 31, 2003), at 11. The parties in the instant case agree that the date of Cummings' withdrawal from the plan and the exclusion of contributions for work done in New Hampshire and Vermont are the issues determined by the arbitrator that are now before the court. Trust Brief at 2; Cummings Brief at 1-2. They disagree on the question whether these are

findings of fact or conclusions of law, which affects the applicable standard of review, since the court must, in accordance with section 1401, presume that an arbitrator's findings of fact are correct. Trust Brief at 15-17; Cummings Brief at 14-17. Determination of the date of withdrawal is a mixed question of fact and law. *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 630 (1993). As I will discuss in more detail later in this recommended decision, I conclude that determination of the second disputed issue is also a mixed question of law and fact. Such questions are reviewed under a clearly erroneous standard. *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1411 (7th Cir. 1989).

### **III. Discussion**

#### **A. Burden of Persuasion Before the Arbitrator**

The Trust first contends that the arbitrator failed to allocate the burden of persuasion properly to Cummings and that the award must be vacated for that reason alone. Trust Brief at 17-18. The Trust focuses on the arbitrator's statement that "the burden of proof regarding legal issues does not fall more heavily on the Employer than on the Fund." Award at 25. That statement is immediately preceded by an observation that "the presumption of correctness of plan determinations only applies to issues of fact." *Id.* Both statements are correct. 29 U.S.C. § 1401(a)(3); *Concrete Pipe*, 508 U.S. at 621. It is not at all clear from the arbitrator's decision that he considered the issue of the correct withdrawal date to be solely one of law and failed to accord the Trust's determination on that issue appropriate deference, as the Trust contends. Contrary to the Trust's argument, Trust Brief at 17, the Supreme Court did not hold in *Concrete Pipe* that "the burden of proof or persuasion rests with the employer challenging the plan sponsor's withdrawal liability determination," at least insofar as that determination includes a date of withdrawal. To the contrary, the Supreme Court held in *Concrete*

*Pipe* that this question is one of both law and fact. 508 U.S. at 630. In that case, the Supreme Court held, where, as here, “there were virtually no contested factual determinations to which the arbitrator might have deferred,” *id.* at 631 — the parties’ dispute centers on the appropriate legal interpretation of undisputed facts — the determination of the date of withdrawal by the arbitrator did not involve a misapplication of the statutory presumption. *See also Quinn v. City of Boston*, \_\_\_ F.3d \_\_\_, Dec. No. 02-1727 (1st Cir. Mar. 27, 2003), at 35 (possible misallocation of burden of proof by factfinder purely academic when pertinent facts uncontradicted).

*Trustees of the Pressman Local 72 Indus. Pension Fund v. Judd & Detweiler, Inc.*, 736 F. Supp. 1351 (D. Md. 1988), the sole case cited by the Trust in support of its position, is not inconsistent with this view. In that case, the court determined that the arbitrator had not given the required presumption of correctness to the interest rate used by the trustees of the plan at issue in calculating the amount of the assessed withdrawal liability. That element of a mathematical calculation is quite different from the choice of date for withdrawal in accordance with statutory definitions.

In addition, as discussed in more detail below, were it necessary to consider this argument further, there is sufficient evidence in the record to support the arbitrator’s decision to reject the date chosen by the Trust, so that remand of the matter to the arbitrator on this basis would be an empty exercise.

The Trust is not entitled to relief on this basis.

### **B. Appropriate Withdrawal Date**

For the building and construction industry, an employer’s complete withdrawal from a multiemployer pension benefit plan occurs when the employer “ceases to have an obligation to contribute under the plan” and the employer “continues to perform work in the jurisdiction of the

collective bargaining agreement of the type for which contributions were previously required.” 29 U.S.C. § 1383(b)(2). The parties do not dispute that the relevant agreements in this case were not collective bargaining agreements but rather “§ 8(f) prehire contracts,” Award at 18, a term used to refer to agreements reached under 29 U.S.C. § 158(f), which allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the employer without the union having established majority status among the employer’s work force. *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-66 (1983).

The arbitrator summarized Cummings’ position as follows:

There were a number of possible withdrawal dates, all of which preceded May 1, 2000. The first was July 31, 1998, the date the parties agreed the 1991-1992 agreement, with its evergreen clause, was terminated. Both parties had previously sent timely notices of their desire to terminate that contract and negotiate a new one. The second was the fall of 1998, when the parties had met several times to bargain, but had reached impasse on three key issues. Third, it could be found the Company’s obligat[ion] to contribute ended on December 31, 1999, when the last of the acknowledged month-to-month extensions of their relationship expired. The final plausible withdrawal date was April 15, 2000, the final day to which the Company had proposed extending the existing relationship, and the Union had failed to respond. After that date, the Union concentrated on NLRB election proceedings, since it knew it had no other basis for holding the Company to contractual obligations.

Award at 18-19. The Trust took the position that the withdrawal date was in November 2000 when the union notified the Trust that the parties no longer had a contractual relationship. *Id.* at 21. The arbitrator held that Cummings provided timely and effective notice of termination of the 1991-1992 agreement in its February 26, 1998 letter and that no agreement was in effect as of August 1, 1998. *Id.* at 26-27. Thus, he concluded, Cummings had withdrawn from the plan with respect to employees covered by the Maine agreement. *Id.* at 27.

However, the arbitrator also concluded that Cummings’ October 1, 1998 letter in effect established a new § 8(f) agreement, one without a definite term, that could be terminated at any time

without notice. *Id.* at 27-28. This agreement continued, with month-to-month extensions, through Cummings' letter of March 7, 2000, which proposed an extension until April 15, 2000. *Id.* at 28. By failing to respond, the arbitrator held, the union accepted the proffered terms. *Id.* No agreement existed thereafter, and the union should have notified the Trust of this fact. *Id.* at 28-29.

The arbitrator also held that neither the doctrine of equitable estoppel nor that of adoption by conduct extended the agreements, or any obligation by Cummings to pay into the plan, after April 15, 2000. *Id.* at 29-31.

The Trust contends that “[t]here is no evidence whatsoever that H. P. Cummings sent a notice of termination of the labor agreement to the Regional Council on April 15, 2000, or in any manner indicated that it was not longer bound to the agreement.” Trust Brief at 25. Therefore, it concludes, the agreement did not terminate until the Regional Council “late in the year 2000 determined it would no longer agree to extend the 1991-92 Labor Agreement.” *Id.* at 26. The Trust cites the fact that Cummings “made pension contributions in the amount of \$68,162.09” between May and October 2000. *Id.* at 23. This argument does not suggest misconduct by the arbitrator or that he exceeded his authority, two of the three circumstances under which the First Circuit has stated that vacating an award is possible. *Wonderland*, 274 F.3d at 35. I will consider the argument in light of the third alternative, the possibility that the award was made in manifest disregard of the law, and the clearly-erroneous standard specific to review of MPPAA awards.

The first half of the Trust's argument sets up a straw man. Cummings did not contend, and the arbitrator did not find, that Cummings sent a notice of termination to the Regional Council on April 15, 2000. The second half of the argument misinterprets the evidence. The arbitrator made the following findings, all of which are fully supported by the undisputed factual record: (i) on February 26, 1998 the president of Cummings wrote to the senior agent for the District Council, referring to the expiration

date and evergreen clause of the 1991-1992 Agreement, and stated: “[W]e would ask you to consider this letter a notice of termination of that agreement as well as any other agreements between the parties. We wish to emphasize, however, that it is the desire of our company to continue our relationship, but on an updated defined basis so as to avoid any misunderstandings as to which of several agreements might be applicable to our organization and the specific scope of those agreements,” Award at 6; (ii) this letter “provided timely and effective notice of termination of the 1991-1992 agreement,” *id.* at 26; (iii) “[t]he Union later sent its own termination notice to all contractors . . .” *id.* at 26-27; (iv) the termination date of the 1991-1992 agreement was later agreed to be July 31, 1998, *id.* at 7, 26; (v) on October 1, 1998 the president of Cummings wrote to the assistant administrator of the Regional Council stating, in part: “As per our recent discussions, pending the efforts of the parties to resolve our Company’s contractual status with the Carpenters, we will continue to pay the increased current wages and benefits called for in the State of Maine Collective Bargaining Agreement . . . . These payments, however, are not to be considered as an indication that we have become signatory or otherwise contractually committed to any agreement . . . ,” *id.* at 7-8; (vi) “[t]hat . . . the Company continued to pay contract wages and benefits and send in contributions[] was a function of the parties’ good relationship, and the mutual desire and expectation that a new contract would be worked out. These contributions without a written agreement were not illegal . . .,” *id.* at 27; (vii) counsel for Cummings sent letters to Regional Council representatives extending the parties’ relationship a month at a time throughout 1999, to which the Regional Council did not respond, *id.* at 8-9; (viii) this limited arrangement in effect “established a new § 8(f) contract, one without a definite term, which could be terminated at any time without prior notice by either party,” *id.* at 28; (ix) on March 7, 2000 counsel for Cummings sent a letter to the executive officer of the Regional Council in which he stated that the company was having a meeting at the end of March

following which it would present a final proposal or terminate the relationship between the company and the union and that “it makes more sense to allow at least some extension of the relationship between the parties so that the company can meet and react to the situation . . . [ I]f extending the contract through April 15, 2000 presents a problem to you, I would ask you to contact me immediately,” *id.* at 10; (x) the union did not respond to this letter, *id.*; (xi) neither Cummings nor the union proposed a further extension of their § 8(f) agreement, *id.* at 28; (xii) since no contract was in effect after April 15, 2000 “it must be found that the Company withdrew during the plan year which ended April 30, 2000,” *id.* at 31. The continuation of payments into the Trust and otherwise in accordance with prevailing union rates does not constitute extension of the 1991-1992 agreement. *E.g., Firesheets v. A. G. Bldg. Specialists, Inc.*, 134 F.3d 729, 731-32 (5th Cir. 1998); *Bay Area Typographical Union, Union No. 21 v. Alameda Newspapers, Inc.*, 900 F.2d 197, 200 (9th Cir. 1990); *Procter & Gamble Indep. Union of Port Ivory, N.Y. v. Procter & Gamble Mfg. Co.*, 312 F.2d 181, 184 (2d Cir. 1962); *General Warehousemen & Employees Union Local No. 636 v. J. C. Penney Co.*, 484 F. Supp. 130, 134 (W.D. Pa. 1980).

The Trust also argues that Cummings’ payments into the plan were illegal under 29 U.S.C. § 186(a) if the 1991-1992 agreement had been terminated. Trust Brief at 24. It is not clear how such illegality would provide evidence that the agreement had not in fact been terminated but, in any event, the argument, which was rejected by the arbitrator, Award at 27, is incorrect as a matter of law. Section 186(a) does make unlawful certain payments by an employer to any representative of any of its employees or to any labor organization that represents or seeks to represent any of its employees, but this prohibition is not applicable “with respect to money . . . paid to a trust fund established by such representative[], for the sole and exclusive benefit of the employees . . . jointly with the employees of other employers making similar payments” provided that the basis on which such payments are made

is specified in a written agreement. 29 U.S.C. § 186(c)(5)(B). The Trust's argument on this point was rejected by the Ninth Circuit in *Alaska Trowel Trades Pension Fund v. Lopshire*, 103 F.3d 881, 883 (9th Cir. 1996), and I find its reasoning persuasive.

The Trust next contends that, even if any agreement requiring Cummings to make contributions terminated on April 15, 2000, Cummings was nonetheless bound to continue its contributions until November 2000 by virtue of the doctrines of equitable estoppel and adoption by conduct. Trust Brief at 27-37. With respect to the second doctrine, the Trust's argument is less than clear; it apparently argues that Cummings adopted a continuation of the § 8(f) agreement beyond April 15, 2000 by continuing to pay into the pension plan after that date. *Id.* at 35. To the extent that this argument differs from that discussed above, it is without merit. The doctrine of adoption by conduct is not applicable to section 8(f) agreements. *Hawaii Carpenters' Trust Funds v. Henry*, 906 F.2d 1349, 1355 (9th Cir. 1990). *See also Carpenters Amended & Restated Health Benefit Fund v. Holleman Constr. Co.*, 751 F.2d 763, 770-71 (5th Cir. 1985). The arbitrator properly rejected this argument. Award at 29-30.

With respect to the doctrine of equitable estoppel the Trust makes two arguments: that the arbitrator erroneously equated the union and the Trust for purposes of applying the doctrine and that the elements of the doctrine are clearly made out by the evidence before the arbitrator. Trust Brief at 27-34, 36-37. It should be noted at the outset that the First Circuit has declined to decide whether an equitable estoppel claim is permitted under ERISA. *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 57-58 (1st Cir. 2001). Assuming *arguendo* that the First Circuit would choose to allow such a claim in the context of this case, the Trust nevertheless fails to meet the standard for vacating the arbitrator's award.

The Trust offers no evidence and cites no authority to support its argument that this award must be vacated on the basis of equitable estoppel because the union's knowledge may not be imputed

to the Trust for this purpose.<sup>1</sup> Cummings responds that the knowledge of Bruce King, the union representative to whom the February 26, 1998 letter terminating the 1991-1992 agreement was sent, may be imputed to the Trust because King was on the board of trustees of the Trust at that time. Respondent's Brief in Opposition to Application to Vacate or Modify Arbitration Award ("Cummings Opposition") (Docket No. 12) at 16. *See also* Award at 17. Imputation of this knowledge to the Trust through King is appropriate under governing First Circuit precedent. *E.g., United States v. Josleyn*, 206 F.3d 144, 159 (1st Cir. 2000). The lack of any evidence of a similar basis for imputing to the Trust knowledge of the series of month-to-month extensions of the terms of the § 8(f) agreement after 1998, and Cummings' failure to address this period in its opposition, is troubling. However, it is apparent from the record that the usual practice in the industry was for the Trust to be informed by the union of the termination of an agreement giving rise to an obligation to contribute to the Trust. Typical contract language did not require employers to notify the Trust of their intent to terminate such agreements. Hearing Transcript, Vol. 2, at 100 (Exh. B, Record (Vol. I) at Bates 89). Under the circumstances, allowing the Trust to invoke an equitable doctrine would itself be inequitable, because, on this record, Cummings had no duty to notify the Trust that it had withdrawn; only the union, whose members are the beneficiaries of the Trust, would have done that. Equity is not available to the Trust in this instance. The Trust cannot be allowed to benefit in equity from its own willful blindness.<sup>2</sup>

In addition, the arbitrator did not err in concluding that the elements of equitable estoppel were not established in this case in any event. Award at 29-31. If estoppel were available in this ERISA

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<sup>1</sup> *Cf. Lewis v. Young & Perkins Coal Co.*, 190 F. Supp. 838, 840-41 (W.D. Ky. 1960), and *Central States Southeast & Southwest Areas Pension Fund*, 472 F. Supp. 1243, 1246 (E.D. Mich. 1979), cited by the Trust, Trust Brief at 33-34, in which the courts treated the unions and the trustees of the unions' retirement trust or pension plan as one for purposes of application of equitable estoppel.

<sup>2</sup> In addition, having been notified through King that the 1991-1992 agreement was terminated, the Trust should have sought an explanation for the continued contributions by Cummings, as it did in 1991 with respect to Cummings' employees in New Hampshire and Vermont. Award at 5.

case, the elements would presumably be the same as those identified by courts that have allowed such claims. The Ninth Circuit describes the elements as follows:

(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

*Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821 (9th Cir. 1992).<sup>3</sup> In this case, there is no evidence in the record that would allow the arbitrator or any reasonable factfinder to conclude that Cummings knew that the Trust had not been informed of the termination of the 1991-1992 agreement. Indeed, as previously discussed, Cummings had reason to believe that the Trust would have been so informed. Since the first element of the definition cannot be satisfied, the Trust may not invoke the doctrine. In addition, the evidence strongly suggests that the Trust was not in fact ignorant of the fact that the 1991-1992 agreement had in fact been terminated, making it unlikely that the second and third elements of the doctrine could be established.

The Trust has not shown that the arbitrator's conclusion concerning the applicable withdrawal date was clearly erroneous, nor has it shown that the award was made in manifest disregard of the law with respect to the withdrawal date. The petition to vacate should be denied on this issue.

### **B. Vermont and New Hampshire Projects**

The Trust contends that the arbitrator erred in holding that contributions based on Vermont and New Hampshire project agreements should be excluded from the calculation of Cummings' withdrawal liability. Trust Brief at 37-41. In discussing this issue, the arbitrator quoted the MPPAA definition of partial withdrawal, but did not decide whether Cummings had made a complete or a partial withdrawal with respect to its work in Vermont and New Hampshire. Award at 34. The Trust

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<sup>3</sup> The First Circuit applies a similar standard in non-ERISA cases. *E.g.*, *Phelps v. Federal Emergency Mgmt. Agency*, 785 F.2d 13, 16 (1st Cir. 1986).

contends that the withdrawal as to this work was complete, offering in support an opinion of the general counsel of the Pension Benefit Guaranty Corporation obtained four months after this action was filed, Letter dated December 20, 2002 from James J. Keightley to Vivian C. Folk (Exh. A to Trust Brief) (“PBGC letter”), and that whether or not the withdrawal was complete, 29 U.S.C. § 1381 requires that the Vermont and New Hampshire contributions be included in the withdrawal liability calculation for Cummings, Trust Brief at 38-41. Given the latter argument, the time and effort devoted by the parties to the question whether this court should consider the PBGC letter is remarkable.<sup>4</sup>

The Trust contends that the interpretation of the facts of this case presented by counsel for the PBGC is “entitled to great deference.” Trust Brief at 39-40. Cummings responds that no deference is due under the circumstances and that in any event it is not admissible because it is not part of the stipulated record. Cummings Opposition at 23-25. Since the letter is not offered as evidence but rather as legal authority, the latter argument is without merit. I note that agency opinion letters in general are not treated with “great deference” by the courts, *e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), and that the letter in this case, unlike those in the case law cited by the Trust, Trust Brief at 40 & Petitioner’s Reply Brief (Docket No. 14) at 3-4,<sup>5</sup> does not appear to represent a ruling, interpretation or opinion of the administrator of the PBGC, Petitioner’s Reply Brief at 4, but is rather an opinion of that agency’s general counsel solicited by the Trust and based on the Trust’s version of the facts of this case. Like the letter at issue in *Association of Int’l Auto. Mfrs., Inc. v. Commissioner, Massachusetts Dep’t of Env’tl. Prot.*, 208 F.3d 1, 5-6 (1st Cir. 2000), this letter does

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<sup>4</sup> Given the date of the PBGC letter, the following paragraph from that letter is also remarkable: “As you know, section 4221 provides that disputes between a plan sponsor and an employer on issues concerning withdrawal liability are to be resolved through arbitration and, if necessary, in the courts. PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions or disputes.” PBGC letter at 2. Such interjection appears to be precisely what is being attempted in this case.

<sup>5</sup> In each of the cases cited by the Trust, the PBGC was itself a party and the “interpretation” of MPPAA to which deference was given was a ruling of the PBGC that was the matter at issue in the case. *Belland v. Pension Benefit Guar. Corp.*, 726 F.2d 839, 843 (D.C. Cir. 1984); *United Steelworkers of Am., AFL-CIO v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); (continued on next page)

not command any particular deference from the courts. In any event, as the Trust itself states, whether Cummings' withdrawal was "complete" as to New Hampshire and Vermont does not affect its contention that the contributions in those states should have been included in the withdrawal liability computation. Accordingly, I will not consider the letter further.

The arbitrator discussed the Vermont and New Hampshire contributions as follows:

The much more substantial question relates to the inclusion of the contributions for employees in Vermont and New Hampshire in the determination of the Company's withdrawal liability. The pension contribution obligation for the non-Maine employees arose under very different collective bargaining agreements than covered the bulk of the Company's carpenter workforce. In Vermont and New Hampshire, Union members were employed only under very narrowly drawn project labor agreements. The Union accepted these agreements, presumably because it was the best they could get, which were limited to specific projects at particular institutions. Once a project was completed the agreement expired, and the Company was under no on-going obligation to use Union labor, and make contributions, if it did work in that state, or even at the same institution on a different project.

The relevance of this for withdrawal liability purposes is that §1383(b)(2)(B) states a withdrawal occurs if an employer who ceases to have an obligation to contribute to the plan either continues to perform work "in the jurisdiction of the collective bargaining agreement," or resumes such work in the following five years. As was evident from the fact that in 1998, 1999, and early 2000, the Company would work non-union throughout New Hampshire and Vermont on any project not covered by a project labor agreement, the "jurisdiction of the collective bargaining agreement" only covered the work defined in the specific project labor agreements. Hence, the fact that the Company withdrew regarding its Maine employees at the point it no longer had an obligation to contribute under the Maine collective bargaining agreement, yet continued to perform work in Maine, did not mean it withdrew regarding the New Hampshire and Vermont employees.

The Fund cited some legislative history in which reference is made to withdrawal liability attaching if a construction employer continues to perform work within the "plan area." Under such a test, it would be proper to assess liability on the basis of all of the Company's employees, since the Company continues to perform work in New Hampshire and Vermont, although not on the projects covered by project labor agreements. This test

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*Connolly v. Pension Benefit Guar. Corp.*, 581 F.2d 729, 730-31 (9th Cir. 1978).

was not incorporated in the statute, however. Perhaps it was because the lawmakers assumed that the jurisdiction of the plan and the applicable collective bargaining agreement would be identical, and did not envision parties signing project labor agreements. It is not within the purview of a withdrawal liability arbitrator, however, to revise the statute to more fully protect fund assets, even if that would further the underlying purposes of MPPAA.

When Thomas calculated the Company's withdrawal liability, he followed his normal practice of counting all contributions made for any employees, no matter where the work occurred. He did not know at the time, however, that the employees in New Hampshire and Vermont were covered by different contracts than those in Maine. Thomas candidly acknowledged that had he been made aware of this fact, he would have sought legal advice.

Award at 32-34. The arbitrator ordered the Trust to "recalculate the Company's withdrawal liability based on [April 15, 2000], excluding from the computation contributions made on behalf of employees covered by project labor agreements in Vermont and New Hampshire." *Id.* at 37. I have quoted extensively from the award because the arbitrator's discussion and conclusion seem eminently reasonable interpretations of the applicable statutes. This question is clearly not one solely of fact. If it is a mixed question of fact and law, the arbitrator's reasoning is not clearly erroneous. If the question is solely one of law, a less likely scenario, the result of *de novo* review is the same. The "jurisdiction of the collective bargaining agreement" from which Cummings withdrew in this case was Maine. From all that appears in the record, the "jurisdiction" of the New Hampshire and Vermont agreements was a single project in each case, and each project has been completed. In statutory terms, there was nothing in New Hampshire and Vermont from which Cummings "withdrew."

The Trust has not met the standard for vacating or modifying the arbitration award with respect to the New Hampshire and Vermont. Its application should be denied.

### **C. Refund of Excess Contributions**

Cummings requests the court to rule that it is entitled to a refund of \$89,945.15, representing contributions it has made to the Trust in excess of its liability as determined by the arbitrator.

Cummings Brief at 34-35. The Trust responds, without citation to authority on point, that it is not within this court's jurisdiction to order refunds under the circumstances of this case. Brief of Petitioner in Opposition to Respondent's Brief to Confirm and Enforce Arbitration Award (Docket No. 11) at 15-16.

Once an arbitrator rules that an overpayment has been made, MPPAA regulations require the plan sponsor to refund the overpayment, with interest, in a lump sum. 29 C.F.R. § 4219.31(d). The Trust does not dispute the amount claimed by Cummings. Cummings has not made any request for an award of interest. Here, the calculation of the overpayment can easily be made based on the record before the court. Under these circumstances, remand to the arbitrator is unnecessary. *Local Union 1253, Int'l Bhd. of Elec. Workers, AFL-CO v. S/L Constr., Inc.*, 217 F.Supp.2d 125, 139 (D. Me. 2002). The court should order the requested refund.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the application to vacate or modify arbitration award be **DENIED** and that the award be confirmed and enforced, including an order that the petitioner refund to the respondent its overpayment in the amount of \$89,945.15.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 10th day of April 2003.

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David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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AND TRUST**

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V.

**Defendant**

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