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October 29, 2013

Testimony on

**“Strengthening the Multiemployer Pension System:
How Will Proposed Reforms Affect Employers,
Workers and Retirees?”**

House Committee on Education and the Workforce

**Subcommittee on Health, Employment, Labor, and
Pensions**

Submitted by

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**Statement of Thomas C. Nyhan, Executive Director and General Counsel,
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Before the Subcommittee on Health, Education, Labor and Pensions,
Committee on Education and the Workforce, United States House of Representatives
October 29, 2013**

Chairman Roe, Ranking Member Andrews and other Members of the Subcommittee, I would like to thank you for this opportunity to testify at this hearing on “Strengthening the Multiemployer Pension System: How Will Proposed Reforms Affect Employers, Workers, and Retirees?”. My name is Thomas Nyhan and I am the Executive Director and General Counsel of the Central States, Southeast and Southwest Areas Pension Fund (the “Pension Fund”). I will talk to you today about how the deregulation of the trucking industry and the economic turmoil of the past decade have affected the Pension Fund. I will also address how Congress needs to act now to either provide the Pension Benefit Guaranty Corporation (“PBGC”) the resources it needs to meet its commitments or to provide additional tools to the Pension Fund so it can solve its own problems. Action now is essential to protect the pensions of hundreds of thousands of participants in the Pension Fund, as well as the tens of thousands of jobs of those Americans employed by businesses that contribute to the Pension Fund.

Overview of Central States Pension Fund

Multiemployer pension plans are pension plans funded by a number of contributing employers. They are administered by joint boards that include an equal number of employee and employer representatives, and are maintained through collective bargaining agreements between employers and unions.

The Pension Fund is one of the largest multiemployer pension plans in the country, providing (as of September 30, 2013) coverage to 410,000 participants across the country, including approximately 70,000 active employees, and approximately 340,000 retirees, survivors and deferred vested participants. The Pension Fund’s participants are located throughout much of the United States, but predominantly in 35 states in the Midwest and South.

The Pension Fund paid approximately \$2.8 billion in benefits in 2012. The average benefit payment is just over \$15,000 per year. These benefits and Social Security are the primary sources of retirement income for our participants. Since its inception, the Pension Fund has paid almost \$60 billion in retirement benefits to its participants and beneficiaries. The Pension Fund’s Trustees also administer a large, growing and financially secure multiemployer health and welfare fund, the Central States Health Fund (the “Health Fund”).

Approximately 1,800 employers contribute to the Pension Fund. Nine out of 10 of these employers are small businesses with fewer than 50 employees. Although these employers are in a variety of industries, including trucking/freight; car haul; tank haul; warehouse; food processing distribution (including grocery, dairy, bakery, brewery and soft drinks) and building and construction, historically there has been a heavy concentration of employers in the trucking industry.

Operations of the Pension Fund

In 1978, the management and operation of the Pension Fund was restructured as a result of a consent decree entered into with the Department of Labor (“DOL”). Since then, the Pension Fund has operated under U.S. District Court and DOL supervision.

Under the consent decree, after vetting by the DOL, the U.S. District Court appoints an independent special counsel to the Pension Fund. The Independent Special Counsel has unrestricted access to the Pension Fund’s records, attends meetings of the Pension Fund’s Board of Trustees and submits quarterly reports to the Court and to the DOL concerning the Pension Fund’s activities. In addition, the Pension Fund’s investments are managed by major financial institutions initially screened by the DOL and approved by the U.S. District Court. These financial institutions have *exclusive* management and control of the Pension Fund’s investments. A named fiduciary, currently Northern Trust, has exclusive control over selection and oversight of active investment managers. The Pension Fund’s passively managed investment accounts are currently managed by the Bank of New York Mellon, which has also been vetted by the DOL and approved by the U.S. District Court.

Funded Status and History

In 1980, there was one retiree or inactive employee for every four active employees in the Pension Fund. Today, that ratio has been completely reversed – now there are nearly five retirees and inactive employees for each active employee. A major reason for this dramatic shift has been the increased competition and reduced margins in the trucking industry that followed on the heels of trucking deregulation in 1980. Of the 50 largest employers that participated in the Central States Pension Fund in 1980, only 4 remain in business today. More than 600 trucking companies that contributed to the Pension Fund have gone bankrupt since 1980 and literally thousands of others have gone out of business without filing formal bankruptcy. Also in 1980, Congress passed the Multiemployer Pension Plan Amendments Act of 1980, adding withdrawal liability obligations to employers that stop making contributions to an underfunded multiemployer pension plan. Because employers are fearful of incurring withdrawal liability, the Pension Fund has not been able to attract many new employers to replace the ones that failed.

As result of these trends, roughly 50 cents of every dollar the Pension Fund now pays in benefits goes to retirees who were employed by an employer that went out of business without meeting its funding obligations. This means that the Pension Fund is acting as the primary insurer of the unfunded pensions of employers that have gone out of business. It also means that the remaining employers in the Pension Fund are responsible for funding the pensions of their defunct competitors’ employees – or the pensions of retirees from a completely different industry.

The cost of funding these orphan benefits has grown to unaffordable levels. As an example, trucking industry employer contribution rates under the National Master Freight Agreement have increased from \$170 per week in 2003 to over \$340 per week today (nearly \$8.50 per hour in a 40 hour week). Approximately half of this weekly contribution is required to fund the benefits of retirees whose employer went out of business without meeting its funding obligations. Other contributing employers have been subjected to similar increases. Requiring

additional contribution rate increases (beyond those already established by the Pension Fund) would carry a grave risk of driving additional contributing employers out of business, thus renewing the cycle of employer bankruptcies, defaults on the employers' obligations to pay their share of the Pension Fund's unfunded benefits and the creation of additional liabilities left at the Pension Fund's doorstep.

Because of the increasing number of retirees and decreasing number of active employees, the Central States Pension Fund's benefit payments to retirees have exceeded employer contributions in every year since 1984. In 2012, the Pension Fund paid approximately \$2.8 billion in benefits while receiving regular employer contributions and withdrawal liability payments of approximately \$700 million. This left an "operating deficit" of \$2.1 billion that must be funded by investment returns.

Investment returns, however, are unlikely to provide the level of financial support needed for ongoing benefit payments because of two perfect storms that occurred between 2000 and 2010.

2000-2002 Bear Market

Following deregulation, and prior to 2000, investment returns exceeded expected returns and the Central States Pension Fund's asset base grew despite paying annual benefits to retirees that exceeded annual contributions. But, during the declines in the financial markets from 2000 through 2002, the Pension Fund investments lost money, and asset values declined. This had a dual effect on the Pension Fund of not only reducing assets through market losses, but also requiring the Pension Fund to use principal, instead of investment returns, to pay the benefits of pensioners. This depleted the asset base on which the Pension Fund could earn returns.

The financial problems caused by investment losses experienced during this period and the need to pay benefits out of principal were compounded by a significant decrease in covered employees due to employers going out of business. With the bankruptcy proceedings of Consolidated Freightways and Fleming Foods in 2003 and their failure to pay more than \$403 million in withdrawal liability, the unfunded liabilities of the Pension Fund increased.

These bankruptcies illustrate the role the Pension Fund has played as an insurer of pensions owed to the employees of now defunct employers. For example, at the time of its bankruptcy, Consolidated Freightways participated in two defined benefit plans, one for its unionized employees covered by the Central States Pension Fund and another "single-employer" plan for its other employees. When it went out of business in 2002, the PBGC assumed responsibility for Consolidated Freightways' single-employer plan, which was underfunded by \$276 million. By contrast, when Consolidated Freightways liquidated and withdrew from the Central States Pension Fund, the Pension Fund and its remaining employers assumed responsibility for \$319 million in unfunded vested benefits owed to rank and file employees.

Faced with these investment and contribution losses in the early 2000s, the Pension Fund took aggressive action to deal with underfunding. The Pension Fund froze "early out" benefits and cut the rate of future pension accruals in half. Beginning in 2005, the Trustees mandated contribution rate increases of approximately 8% per year. In addition, participants covered under

the major national contracts had monies that had been earmarked for other areas reallocated to the Pension Fund from 2004 through 2007. As a result of these measures, the Fund increased its income by several hundred-million dollars a year by the end of 2007 and reduced its projected liabilities. As of January 1, 2008, the Pension Fund's actuaries projected that the Fund would be fully funded by 2029, assuming normal investment returns.

2008 Financial Markets Crisis

As the Subcommittee Members know, global financial markets plummeted again in 2008. The steep declines experienced by financial markets in 2008 directly impacted the Pension Fund's asset base. The Pension Fund incurred an investment loss of \$7.6 billion in 2008 and also paid out \$1.8 billion more in benefits than it received in contributions that year. As a result, the Pension Fund had to spend \$1.8 billion in principal just to pay benefits. The Pension Fund's net assets decreased by approximately \$9.4 billion in 2008, leaving the Pension Fund with assets of \$17.4 billion and a funded ratio of 48.5 percent.

Since 2008, the Pension Fund generally has experienced positive investment returns. From 2009-2012, the Pension Fund's average annual investment return was 13.8%, which helped offset the Pension Fund's approximately \$2 billion per year operating deficit over this period. As of October 24, 2013, the Pension Fund had net assets of nearly \$18.7 billion, a year to date net increase of \$918 million as the result of a 16.0% investment return to that date in 2013. Despite these recent gains, the Pension Fund's current funded percentage, using the market value of assets, is approximately 53%.

In 2008, when the multiemployer plan provisions of the Pension Protection Act of 2006 ("PPA") came into effect, the Pension Fund was certified to be in the PPA "critical zone," and therefore the Pension Fund adopted a "rehabilitation plan" as the PPA requires. Acting under the authority of the PPA, the Pension Fund increased the minimum retirement age to 57 for *new* retirees under its rehabilitation plan, and enacted rules eliminating the early retirement benefits for any active participants whose employers either (1) "bargain out" of participation in the Pension Fund during 2008 and subsequent years (or end their participation in the Pension Fund in a number of other ways), or (2) refuse to agree to the Pension Fund's "primary schedule" of contribution rate increases, which begins with an 8% annual contribution rate and increases for five years. However, all these benefit reduction measures are only applicable to participants in the Pension Fund who are in active employment and currently having contributions made to the Pension Fund on their behalf. The PPA expressly prohibits any reductions in benefits for participants who were already retired in 2008 – even though these retirees represent 85% of the Pension Fund's pension benefit obligations.

In addition, the Pension Fund has instituted measures designed to shore-up its contribution base and to retain currently contributing employers. For example, some employers leave the Pension Fund because they are concerned about *future growth* in their contingent obligations for statutory withdrawal liability. Therefore in 2011 the Pension Fund obtained approval from the PBGC to apply a "hybrid" withdrawal liability method to employers that are willing to pay their existing withdrawal liability. The employers can then continue to participate in and contribute to the Pension Fund on behalf of their workforce, but their future potential

withdrawal liability will be calculated in a way that generally limits an employer's liability to any underfunding generated by its own employees' participation in the Pension Fund. About 60 employers have so far paid or committed to pay in the aggregate approximately \$250 million to satisfy their current withdrawal liability while also promising to continue to contribute to the Pension Fund under this hybrid method program. This and other innovative measures are helpful in addressing funding issues and protecting contributing employers.

Assessing the Damage

Despite positive investment returns over the last several years and the many changes described above in benefits, contributions and withdrawal liability rules, the Pension Fund's financial position remains troubled. Unless the Pension Fund substantially reduces its liabilities, or receives a large infusion of assets, or both, the Pension Fund is projected to become insolvent within the next 10 to 15 years. The actual date of insolvency will depend primarily upon the Pension Fund's investment experience. And, as one of the largest multiemployer funds in the Nation, the impact of the Pension Fund's insolvency would be devastating to the Pension Fund's participants and their beneficiaries, whose benefits are at risk, and to contributing employers, the PBGC, and many other multiemployer plans—since many of the employers that currently contribute to the Pension Fund also do business in other geographic regions and contribute to other multiemployer plans.

At this point, the Pension Fund's options are very limited. It is extremely unlikely that the Pension Fund will grow its way out of insolvency through outsized investment returns. Currently, the Fund's actuaries project that the Fund would need to earn at least 12% a year, *each and every year*, to avoid insolvency. This is not a realistic investment return assumption.

The Pension Fund also does not currently have the necessary tools to solve the problem. Because the PPA prohibits benefits reductions with respect to participants who retired prior to 2008, the great majority of the Pension Fund's actuarial liabilities are off limits. Moreover, the Pension Fund's actuaries project that any further reductions in the benefits of active employees (while continuing to exempt the pre-2008 retirees from the benefit adjustment process) would not have a meaningful impact on plan funding and likely would accelerate insolvency. In the existing legal landscape, we simply do not have the tools to manage the problem ourselves.

In addition, as described above, the Pension Fund also has already doubled employer contribution rates under the National Master Freight Agreement since 2003. Further increases of this magnitude are unsustainable. In any event, even if it were feasible to maintain an annual eight percent contribution rate increase in perpetuity that would serve to postpone insolvency *by only two months*. And, of course, a plan merger is not an option given the Pension Fund's financial condition and the lack of a viable and willing merger partner.

In short, the Pension Fund has reached a point where it requires legislative action to avoid insolvency.

Multiemployer Plan Partition

In the 111th Congress, the Pension Fund actively supported legislation (H.R. 3936; S. 3157; the “Create Jobs and Save Benefits Act of 2010”) that would have updated the PBGC's current authority to “partition” a multiemployer plan – *i.e.*, to remove from the plan pension liabilities that were earned with failed employers that have gone through formal bankruptcy proceedings – and thereby provided a mechanism by which the Pension Fund could have avoided insolvency. Under the legislation, the Pension Fund and a very limited number of other multiemployer plans that met strict requirements could have elected a “Qualified Partition” under which the responsibility for the vested benefits of participants earned with employers that filed for bankruptcy or otherwise went out of business, together with a share of plan assets, would be transferred to a separate plan backed by the PBGC. During those legislative efforts we highlighted the fact that strictly controlled partitions would allow plans like the Pension Fund to avoid insolvency and the PBGC to better protect the benefit payments of *all* participants. Such an approach also would have protected thousands of employers – most of them small employers – and preserved tens of thousands of jobs. By preventing plan failures that would undermine the entire multiemployer program, it also would have protected other multiemployer plans and the PBGC.

Unfortunately, this legislation was not enacted and has not been reintroduced in the current Congress.

Qualified partition or any other meaningful assumption of liability or infusion of assets by PBGC would require that Congress fund the PBGC. This is because, in 2012, the PBGC Multiemployer Program had only \$1.8 billion in assets but had booked more than \$7 billion in liabilities, a deficit of \$5.2 billion. And the PBGC's \$7 billion in booked liabilities does not include the Pension Fund's approximately *\$17 billion* in unfunded liabilities. Earlier this year, the PBGC and the Government Accountability Office (GAO) released separate reports indicating that there is a substantial risk that PBGC's Multiemployer Program Insurance Fund will be exhausted within the next ten years – *prior* to any projected insolvency of the Pension Fund.

For decades, federal regulations have required the Pension Fund to provide plan participants summary plan descriptions stating in plain English: “Your pension benefits under this multiemployer plan are insured by the Pension Benefit Guaranty Corporation (PBGC), a federal insurance agency.” And, Central States has paid \$60 million in premiums to the PBGC. Nevertheless, 410,000 hardworking Americans covered by the Pension Fund face the following stark and tragic reality: even though participants were told repeatedly that their benefits were guaranteed by PBGC, and even though Central States paid for that insurance, their pension checks could be eliminated entirely if the Pension Fund becomes insolvent.

NCCMP Commission Proposal for Plans in Critical and Declining Status

While funding the PBGC and strengthening its partition authority has been our preferred solution, the Pension Fund is realistic about the current appetite in Washington for this type of action. Put simply, the only remaining option to avoid insolvency and secure the future of the Pension Fund is to provide the Pension Fund with the tools it needs to solve its own problems.

For this reason, the Pension Fund supports the NCCMP Commission's proposal on deeply troubled multiemployer plans.

The NCCMP Commission's "Solutions Not Bailouts" proposal for "Critical and Declining Status" Plans would allow the Pension Fund's trustees and bargaining parties to provide long-term retirement security at adjusted levels to all of our participants and beneficiaries. Under the proposal, deeply troubled plans are defined as plans projected to become insolvent within 20 years, or within 15 years if the ratio of retired to active participants is less than or equal to 2:1. The proposal would provide deeply troubled plans with the ability to suspend any type of benefits for participants as long as a number of important protections for participants are in place. Under the proposal, even after trustee action, benefits would have to be at least 10 percent *above* the PBGC guarantee level, and any benefit suspensions would have to be distributed equitably across *all* populations of participants. Importantly, benefits could only be suspended if the suspension would allow the plan to avoid insolvency and if the plan sponsor had taken all other reasonable measures to forestall insolvency. The plan sponsor would have to obtain the approval of the PBGC before implementing the suspensions. The proposal also would limit the ability of the plan to make future benefits increases without first restoring the value of suspended retiree benefits.

In evaluating the NCCMP proposal, it is important to remember that it is not a question of benefit suspensions if the proposal is enacted versus no benefits cuts if it is not enacted. If the Pension Fund goes insolvent, participant's benefits *will* be cut across the board, and given the lack of funding of the PBGC, it is likely that the benefits will be reduced far below the PBGC guaranty or eliminated in their entirety. In contrast, the NCCMP proposal would allow plans facing insolvency to preserve the maximum possible benefits for the maximum number of participants over the long term. In fact, the Fund's actuaries project that the Pension Fund would pay participants and beneficiaries \$72 billion in benefits over the next 50 years if the NCCMP proposal is enacted as compared to \$28 billion in benefits if the Fund goes insolvent.

Conclusion

The continued solvency of the Central States Pension Fund requires increased assets, reduced liabilities, or some combination of the two. Because the PBGC plainly does not have the resources needed to pay benefits at the PBGC guarantee levels and meet its obligations to the workers and retirees participating in the Central States Pension Fund, Congress must act *now* to preserve, to the maximum extent possible, the pensions of participants in deeply troubled pension plans.

Multiemployer plans like the Central States Pension Fund need enhanced tools to reduce liabilities so as to avoid insolvency and continue to provide secure retirement benefits far into the future. Congress and the Administration should enact legislation that includes the NCCMP proposal to permit plans that are facing imminent insolvency to suspend benefits. Such an approach would preserve the maximum possible benefits for participants in plans facing insolvency, allowing them to maintain benefits far above what they would otherwise receive under existing law. While these benefit suspensions are not to be undertaken lightly, they reflect

the economic realities, while still preserving the benefits of retirees to the greatest extent possible.

We know that others argue that benefit suspensions must be avoided at all costs by appropriating new revenue through taxes or premium increases. We sympathize with that view because our preferred solution has always been an approach that would generate additional revenue to alleviate the funding shortfalls, as evidenced by our vigorous support of legislative proposals for the last several years. And if such legislation were ever enacted we would take full advantage of it to maintain or restore full benefits of our participants. But as stewards of the Pension Fund focused on protecting its participants and beneficiaries, we must be realistic about the current appetite in Washington, D.C. for this type of action. The truth of the matter is there is no funding source anywhere on the horizon to deal with shortfalls of this magnitude and time is running out to craft a solution. In light of that reality, we believe it is our obligation to find a way to preserve a measure of retirement security for all of our participants. That solution requires that we remedy the funding shortfall ourselves while there is still time to take action.

Doing nothing, at this juncture, would result in the worst possible outcome. Without timely intervention, workers in the most deeply troubled plans are at risk of seeing the benefits they have earned drastically reduced or even eliminated entirely. The NCCMP Commission's proposal on deeply troubled plans would provide the Fund's trustees and bargaining parties the tools needed to avoid insolvency and thereby stave off the drastic cuts that would otherwise occur automatically.

We strongly urge Congress to take action on the NCCMP Commission's proposal in the near future.

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Thank you for this opportunity to address the Subcommittee. I will be happy to answer any questions that the Subcommittee Members may have.