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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

PETER J. ELLIS, Trustee,)	
<u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 81-0771-A
)	
WILLIAMS ENTERPRISES, INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION

The plaintiffs, Peter J. Ellis, Jack R. Clapsaddle, and Arnold Parreco, are trustees of the Operating Engineers Trust Fund of Washington, D.C. (Welfare Fund), the Operating Engineers Local 77 Pension Trust Fund (Pension Fund), and the Operating Engineers Skill Improvement and Joint Apprenticeship Training Committee (Apprenticeship Fund).^{1/} On August 5, 1981, these trustees filed suit against Williams Enterprises, Inc. (Williams), to recover certain delinquent contributions owed by Williams to the trustees' funds. This action arises under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (1976 & Supp. IV 1980), and the Labor-Management Relations Act, 29 U.S.C. §§ 141-187 (1976). The court bases its jurisdiction on 29 U.S.C. § 1132(f) (1976).

On November 9, 1981, the plaintiffs filed a motion for summary judgment. See Fed. R. Civ. P. 56(a). In this motion, the trustees seek to recover the following amounts from Williams: (1) delinquent contributions of \$2,074.20 for the Pension Fund, \$2,074.20 for the Welfare Fund, and \$414.84 for the Apprenticeship Fund; (2) \$1,700.00 for the cost of the audit; (3) statutory interest under 29 U.S.C. § 1132(g)(2)(B) (Supp. IV 1980); (4) a penalty under 29 U.S.C. § 1132(g)(2)(C)

^{1/}Ellis and Clapsaddle are trustees of the Operating Engineers Trust Fund of Washington, D.C., and the Operating Engineers Local 77 Pension Trust Fund. Parreco and Clapsaddle are trustees of the Operating Engineers Skill Improvement and Joint Apprenticeship Training Committee.

in the amount of the statutory interest; (5) reasonable attorney's fees and costs under 29 U.S.C. § 1132(g)(2)(D); and (6) liquidated damages on delinquent contributions already paid into the funds by Williams.

Williams admits that it owes the delinquent contributions listed as the first item above. It also admits liability for the portion of the audit cost allocable to the Pension and Apprenticeship Funds. The parties agree that \$900 of the audit cost is attributable to these two funds. Williams denies liability for the other amounts sought by the trustees.

The defendant's liability for the remaining \$800 of audit costs, the double statutory interest, and the attorney's fees depends on whether the recent amendment to section 1132(g) has retrospective effect. See Multi-Employer Pension Plan Amendments Act of 1980, Pub. L. No. 94-364, § 306(b), 94 Stat. 1208. The agreements with the three funds do not obligate Williams to pay any of these amounts. The amendment to section 1132(g), however, permits the trustees to recover these items. See id. Williams, nonetheless, argues that the new section 1132(g) should not apply, because the parties entered into the funding agreements before the enactment of the amending law on September 26, 1980. See id. The trustees, on the other hand, contend that the amended version should have retrospective effect. The court holds that the new section 1132(g) governs in this case for the reasons stated in Central States, Southeast and Southwest Areas Pension Fund v. Alco Express Co., 522 F. Supp. 919 (E.D. Mich. 1981).

The new section 1132(g) clearly requires Williams to pay double statutory interest. See 29 U.S.C. § 1132(g)(2)(B)-(C) (Supp. IV. 1980). It also mandates the award of reasonable attorney's fees and costs. See id. § 1132(D). The court will not set these amounts at this time. It hopes that the parties can agree on a figure for these items. If the parties are unable to do so, they should submit briefs outlining their computations for the court within twenty days of the date of this order.

The court also will exercise its equitable powers under section 1132(g)(2)(E) to award the trustees the portion of the audit cost attributable to the Welfare Fund. This award is necessary to make the plaintiffs whole. The court, therefore, orders that Williams reimburse the trustees for the remaining \$800 in audit costs.

The final item requested by the trustees is 10% liquidated damages on delinquent contributions already paid by Williams into the funds. The plaintiffs base this claim on the liquidated damages provisions contained in the agreements governing the contributions. Williams argues that these provisions constitute a penalty. The clauses, therefore, would be void as against public policy.

A liquidated damages provision is an illegal penalty unless it meets two conditions. First, the harm caused by breach must be difficult to estimate accurately. See United Order of American Bricklayers and Stone Masons Union No. 21 v. Thorleif Larsen & Son, Inc., 519 F.2d 331, 332 (7th Cir. 1975). Second, the amount fixed by the provision must be a reasonable forecast of actual damages. See id. The first condition is present in this case by agreement of the parties. See 1979-1981 Agreement Between the Construction Contractors Council and the International Union of Operating Engineers Local No. 77, art. XX, § 3(d). See also 519 F.2d at 335-36. The court, however, cannot determine whether the provisions in question meet the second requirement, because the court does not have sufficient facts before it. The court cannot grant or deny summary judgment on this matter until the parties submit affidavits comparing the amount of liquidated damages with the amount of actual damages anticipated at the time of contracting. Finally, the court notes that the plaintiffs' motive for enforcing the liquidated damages provisions is irrelevant to the penalty issue.

United States District Judge

Date: _____