

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TRUSTEES OF THE NEW YORK CITY :
DISTRICT COUNCIL OF CARPENTERS :
PENSION FUND, et al., :
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Petitioners, :
:
v. :
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DGN CONSTRUCTION CORP., :
:
Respondent. :
:
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17 Civ. 1659 (LGS)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Petitioners Trustees of the New York City District Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, and Apprenticeship, Journeyman Retraining, Educational and Industry Fund; Trustees of the New York City Carpenters Relief and Charity Fund; the New York City and Vicinity Carpenters Labor Management Corporation (collectively, the “Funds”) and the New York City District Council of Carpenters (the “Union”) petition to confirm an October 10, 2016, arbitration award (the “Award”) rendered in their favor. Respondent DGN Construction Corporation (“DGN”) does not oppose the petition. For the reasons set forth below, Petitioners’ motion to confirm the Award is granted.

I. BACKGROUND

The following uncontested facts are taken from the Award, evidence submitted to the arbitrator and evidence submitted in support of the petition.

In January 2008, the Union entered into a collective bargaining agreement (“CBA”) with DGN. The CBA requires DGN to remit benefit contributions to the Funds. If requested by the Funds, the CBA mandates that DGN furnish its books and payroll records for an audit to ensure

compliance with the required benefit contributions. If DGN fails to furnish its books and payroll records after a request by the Funds, the CBA allows the Funds to “determine the estimated amount of the employer’s delinquent contributions based on the assumption that the employer’s weekly hours subject to contributions for each week of the requested audit period are the highest number of average hours reported per week for any period of four consecutive weeks during the audit period.”

The Funds attempted to conduct an audit for the period from January 1, 2009, through February 26, 2016, but DGN refused to furnish its books and payroll records. DGN’s failure to furnish its books and payroll records caused the Funds to conduct an estimated audit, which found that DGN had failed to remit contributions in the principal amount of \$858,128.04.

The CBA allows either party to seek arbitration in the event of a dispute concerning payments to the Funds. The CBA further allows an independent arbitrator to “fashion an appropriate remedy including, but not limited to monetary damages.” If the arbitrator renders an award in favor of the Funds, the arbitrator is empowered to require DGN to pay the amount of unpaid contributions, interest on the contributions, liquidated damages and reasonable attorneys’ fees and costs. The arbitrator’s award “shall be wholly enforceable in any court of competent jurisdiction.”

On July 1, 2016, Petitioners filed a Notice of Intention to Arbitrate with the independent arbitrator. On July 13, 2016, the arbitrator issued a Notice of Hearing to DGN for October 6, 2016. DGN did not appear at the scheduled arbitration hearing. On October 10, 2016, having considered the CBA, a summary report of the estimated audit and the uncontroverted testimony of Petitioners, impartial arbitrator Roger E. Maher issued a written opinion finding that DGN had violated the CBA by not allowing the Funds to examine its books and records. Under the powers

granted to him by the CBA, the arbitrator ordered DGN to pay \$1,222,439.71, plus interest to accrue at a rate of 5.5% from the date of the Award.

On March 6, 2017, Petitioners commenced this action to confirm the Award. Petitioners served DGN with a petition to confirm on March 9, 2017. DGN has not appeared in this action and did not respond to the petition.

II. DISCUSSION

A. Confirmation of the Award

“Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1994), provides federal courts with jurisdiction over petitions brought to confirm labor arbitration awards.” *Local 802, Associated Musicians v. Parker Meridien Hotel*, 145 F.3d 85, 88 (2d Cir. 1998); *accord Trs. for Mason Tenders Dist. Council Welfare Fund, Pension Fund, Annuity Fund, & Training Program Fund v. Super, LLC*, No. 16 Civ. 6387, 2017 WL 2703572, at *2 (S.D.N.Y. June 22, 2017). “[G]enerally a district court should treat an unanswered . . . petition to confirm . . . as an unopposed motion for summary judgment.” *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006).

Though a summary judgment standard is applied to confirmation proceedings, a “federal court’s review of labor arbitration awards is narrowly circumscribed and highly deferential -- indeed, among the most deferential in the law.” *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 532 (2d Cir. 2016). “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *United Bhd. Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 275 (2d Cir. 2015) (alteration in original). “It is the arbitrator’s construction of the contract and

assessment of the facts that are dispositive, ‘however good, bad, or ugly.’” *Nat’l Football League*, 820 F.3d at 536 (quoting *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013)). The Award should be confirmed as long as it “draws its essence from the collective bargaining agreement and is not merely the arbitrator’s own brand of industrial justice.” *Id.* at 537 (citations omitted).

Here, there are no genuine issues of material fact. The petition is uncontested; the evidence before the arbitrator supports the finding that DGN failed to remit benefit contributions to the Funds in the amount that the arbitrator determined; and the Award draws its essence from the CBA, which requires DGN to make benefit contributions, provides for arbitration where contributions are not made and empowers the arbitrator to award money damages and interest. *See Nat’l Football League*, 820 F.3d at 537; *see also Trs. for the Mason Tenders Dist. Council Welfare Fund v. DCM Grp., LLC*, No. 13 Civ. 1925, 2017 WL 384690, at *4 (S.D.N.Y. Jan. 25, 2017) (confirming arbitration award brought under LMRA § 301 where defendant did not oppose petition and record supported arbitrator’s findings). Consequently, Petitioners are entitled to confirmation of the Award.

B. Attorneys’ Fees and Costs

Petitioners also request payment of attorneys’ fees and costs in the amount of \$370.00. “Section 301 of the [LMRA] does not provide for attorney[s’] fees in actions to confirm and enforce an arbitrator’s award.” *Int’l Chem. Workers Union (AFL-CIO), Local No. 227 v. BASF Wyandotte Corp.*, 774 F.2d 43, 47 (2d Cir. 1985). However, a court may award fees and costs in an LMRA case pursuant to its equitable powers. *See Odeon Capital Grp. LLC v. Ackerman*, --- F.3d ----, 2017 WL 3091560, at *5 (2d Cir. July 21, 2017). “As applied to suits for the confirmation and enforcement of arbitration awards, . . . when a challenger refuses to abide by an

arbitrator's decision without justification, attorney's fees and costs may properly be awarded." See *Int'l Chem. Workers Union*, 774 F.2d at 47 (quotation marks omitted); accord *N.Y.C. Dist. Council of Carpenters v. New England Constr. Co.*, No. 16 Civ. 6608, 2017 WL 1967743, at *4 (S.D.N.Y. May 11, 2017).

Here, DGN signed a CBA that provided for arbitration, failed to participate in the arbitration proceeding after notice of both the hearing and its delinquency, failed to satisfy the Award and failed to oppose the instant petition. In so doing, DGN has failed to justify its refusal to abide by the arbitrator's decision. Petitioners are therefore entitled to reasonable attorneys' fees and costs. See, e.g., *Trs. of the N.Y.C. Dist. Council of Carpenters Pension Fund v. Coastal Env'tl. Grp., Inc.*, No. 16 Civ. 6004, 2016 WL 7335672, at *3-4 (S.D.N.Y. Dec. 16, 2016) (awarding fees and costs where employer agreed to arbitration, but failed to appear at the hearing, satisfy the award or oppose a petition to confirm the award).

Petitioners are also entitled to reasonable attorneys' fees under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, which provides that the "prevailing party in an action to recover unpaid contributions to a benefit fund is entitled to an award of reasonable attorneys' fees and costs." *Odeon Capital Grp.*, 2017 WL 3091560, at *6 (implicitly holding that an action to confirm an arbitration award compelling ERISA payments is considered an action to recover unpaid contributions).

In support of their request for fees, Petitioners submit contemporaneous timesheets and background information about the attorneys who worked on the case. Petitioners spent a total of two hours on the petition, at a rate of \$300 per hour for "Of Counsel" attorneys and \$100 per hour for legal assistants. Petitioners also spent \$70 in service fees. On review of the contemporaneous time records and background information, the amounts requested are

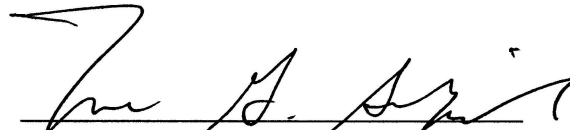
reasonable. *See, e.g., Trs. of the N.Y.C. Dist. Council of Carpenters Pension Fund*, 2016 WL 7335672, at *3–4. Petitioners’ request for fees and costs is granted.

III. CONCLUSION

For the foregoing reasons, the petition for confirmation of the Award is GRANTED. Petitioners are awarded \$1,222,439.71, plus prejudgment interest at a rate of 5.5% per annum from October, 10, 2016, through the date of judgment in this action. Petitioners are further awarded \$370.00 in attorneys’ fees and costs.

The Clerk of Court is respectfully directed to enter judgment in favor of Petitioners and close this case.

Dated: July 27, 2017
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE