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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

In re)	Chapter 11 Cases
)	
US AIRWAYS GROUP, INC. <u>et al.</u> ,)	Case No. 04-13819 (SSM)
)	
Debtors.)	Hon. Stephen S. Mitchell
)	
)	Jointly Administered

**OBJECTION OF THE ASSOCIATION OF FLIGHT
ATTENDANTS-CWA, AFL-CIO TO THE DEBTORS'
MOTION FOR AN ORDER APPROVING AND
AUTHORIZING A TRANSACTION RETENTION PROGRAM**

The Association of Flight Attendants-CWA ("AFA") objects to the Debtors' Motion For An Order Approving And Authorizing A Transaction Retention Program ("the Motion"). Having obtained judicial approval for its efforts to slash unionized employees' wages and benefits, eliminate retiree health benefits, and to terminate its pension plans under the guise that salaried and management personnel would "share the pain" with the unionized

workers,¹ it is preposterous and inequitable for the Debtors' to now seek approval for this unjustified management windfall. The Motion should be denied.

FACTUAL BACKGROUND

1. The AFA is the certified collective bargaining representative of over 8,000 active and furloughed US Airways' flight attendants. The AFA also represents the flight attendants of Debtor Piedmont Airlines, Debtor PSA Airlines, and MidAtlantic Airways (a division of US Airways).

2. Prior to US Airways' first bankruptcy filing, the AFA in July 2002 negotiated a significant concessionary agreement which resulted in over 8% wage cuts and other substantial concessions, including increased health care costs to employees. That agreement saved the company \$76 million per year, approximately 16% of total flight attendant expenses in 2002.

3. In December 2002, during the pendency of the earlier bankruptcy petition, US Airways sought additional concessions from flight attendants and other labor groups. AFA again stepped up to the challenge and reached an agreement which saved the company an additional \$20 million per year, another approximately 5% of total flight attendant expenses.

4. In April 2004, after the company's earlier Plan of Reorganization was confirmed, former CEO Dave Siegel left the company with a \$4.5 million severance payment. One month later, in

¹ Debtors' Application To Reject Certain Collective Bargaining Agreements, at 46.

May 2004, US Airways presented AFA with a third proposed concessionary agreement as part of its latest "Transformation Plan." US Airways sought approximately \$116 million in additional annual savings from flight attendants alone, including the termination of the AFA's pension plan.

5. While negotiations over the Transformation Plan were underway, US Airways in September 2004 delivered to AFA a totally new proposal for six-month "interim" amendments to the mainline collective bargaining agreement, which sought an across-the-board 23% pay cut. When AFA did not immediately agree to this draconian change, US Airways sought emergency relief under § 1113(e) of the Bankruptcy Code.

6. Evidence at the 1113(e) hearing established that while the Debtors' were seeking 23% pay cuts from unionized flight attendants, thousands of salaried and management personnel were being treated in a markedly different fashion. A significant proportion of these employees were subjected to only a 5% pay reduction, on the heels of a nearly commensurate pre-bankruptcy pay increase. The evidence also established that, while demanding a 23% pay cut from flight attendants, US Airways' CEO had taken no reduction in pay and did not intend to take any such reduction. Indeed, to this date, Mr. Lakefield has not taken a reduction in his salary.

7. This Court, on October 15, 2004, issued an order authorizing US Airways to reduce flight attendant and certain other

employees' wages by 21%, for a four-month interim period ending in February, 2004.

8. Thereafter, US Airways submitted a "Section 1113(c) Proposal" to the AFA proposing a wide variety of long-term contractual changes to the existing AFA-US Airways agreement. Among other things, the company's proposal called for an immediate 15% pay reduction, the elimination of scheduled pay increases and lump sum payments, the elimination of the Flight Attendant Defined Benefit Plan and the elimination of company payments for retiree health benefits. The Company's proposal also called for elimination or modification of numerous pay factors for flight attendants, such as longevity pay and bereavement leave pay.

9. In addition, to these economic items, the company's proposal called for numerous revisions to flight attendant work rules, including sharp decreases in vacation days and vacation pay.

10. A central issue in the ensuing Section 1113(c) proceedings was the question of whether the company's proposal to the unionized employees was "fair and equitable." See 11 U.S.C. § 1113(b)(1)(A). The Debtors argued that the pay cuts and severe benefit reductions for the flight attendants and other unionized employees were fair because salaried and management personnel were going to "share the pain." Debtors' Application To Reject Certain Collective Bargaining Agreements, at 46. The Debtors represented to this Court and to their employees that they

have not singled out the bargaining unit employees or retirees to bear this financial burden.... [T]he Debtors have already reduced the wages and benefits for

management and non-labor employees as far as the market will bear.

Id. at 91. Specifically, the Debtors claimed that they were "implementing a program of management cost savings of approximately \$56 million annually," id. at 45, and that it would therefore be "inequitabl[e]" to not impose proportional reductions on flight attendants and other unionized employees. Id. at 91.²

11. Relying on this commitment of shared sacrifice, the AFA undertook intensive negotiations with the Debtors during the 1113(c) process, and ultimately entered into a new collective bargaining agreement which was ratified by the AFA's members on January 5, 2005, and which was approved by this Court.

12. That collective bargaining agreement was projected by the Debtors to produce \$94 million annually in cost savings through, inter alia, a 9% reduction in pay rates; the elimination of certain pay premiums; an increase in flying hours; and a reduction in medical benefits for future retirees. See Mot. Approve Collective Bargaining Agreement with AFA, filed January 6, 2005, ¶¶ 16-19. On January 11, 2005, this Court approved that agreement. Order, Jan. 11, 2005.

13. In addition to approving that agreement, this Court also entered an Order, over the AFA's objection, terminating the flight attendants' defined benefit pension plan.

² Of the alleged \$56 million in targeted savings, up to \$15 million was projected to come from simply not filling vacant positions. Transcript, Oct. 12, 2004, at 218-19 (Dave Davis).

14. On May 9, 2005, just months after obtaining the relief described above under the pretense that salaried and management employees were "sharing the pain" to the tune of \$56 million per year, US Airways announced a plan to pay severances and bonuses to those same employees of up to \$55 million. See Motion at 13-15 (estimating cost).

15. This self-styled "Transaction Retention Plan" (which is more aptly titled a "Management Retention Plan" and will be referred to herein as the "Retention Plan") has the following basic components:

16. **Contracts For Top Officers.** The Debtors first propose entering into new employment contracts, or assuming existing executory contracts, with their top officers. This aspect of the Retention Plan, if approved, would provide the CEO, and all Vice Presidents (including Executive and Senior Vice Presidents) with employment contracts continuing lucrative severance clauses. Mr. Lakefield, if severed from the company following a change of control, would be entitled to the following payments:

- 300% of his base salary plus his "target Annual Bonus;" and
- 300% of 125% of his base salary; and
- Two years of family health coverage.

Mot. Exh. 3 at 11.

17. Based on Mr. Lakefield's \$425,000 salary, and using that number as his "target annual bonus," this contract, if assumed, would guarantee Mr. Lakefield a \$2.55 million severance benefit,

plus two years of health insurance thereafter. (This from the company which has touted its elimination of retiree health benefits for hourly wage earners as a major step towards success.)

18. In addition to Mr. Lakefield, the Retention Plan calls for new employment contracts, or the assumption of existing executory contracts, for every single Executive Vice President, Senior Vice President and Vice President of US Airways, as well as the Presidents of affiliates PSA and Piedmont Airlines. Executive and Senior Vice Presidents would be entitled to severance of 200% of their pre-concession base pay plus their "Annual Target Bonus;" and Vice Presidents would obtain a severance payment of 100% of base pay plus their Bonus. All told, these employment contracts for officers would expose the estate to up to \$18 million in severance payments to officers whose services, by definition, will no longer be required.

19. There is no mitigation provision for these severance payments, which would be paid in lump sums regardless of any follow-up employment found by those individuals.

20. In addition to all of the above, in the event a change of control takes place, such as the announced America West merger, these employment contracts will all convert from "at will" contracts to contracts with two-year terms. See Mot. Exh. 6 (summary of contract changes).

21. **Severance Policy For Salaried Employees.** The second aspect of the Retention Plan creates a new Severance Policy for approximately 1,900 salaried and management employees including

managing directors. The changes are again linked to a potential change in control such as the America West transaction. Under this policy, any salaried employee below the officer level will be entitled to a minimum of 12 weeks of severance, and up to half a year's salary, in the event of a change on control. The 12-week minimum payment is available even to brand-new employees who have no history with the company.³

22. The total estimated cost of this severance policy is up to \$31 million.

23. **Discretionary Retention Program.** Finally, the Retention Plan's smallest component is a pool of \$5 million which may be expended by Mr. Lakefield for targeted retention payments to employees who he designates as "critical to achieving or implementing a Change of Control." Mot. Exh. 12, § III(A). The Debtors have not identified to this Court who those employees may turn out to be. The pool of eligible employees includes "All U.S.-based management employees ... below the level of officer." Id., § II.

ARGUMENT

24. The Motion should be denied. Allowing the Debtors to take back the savings which they claimed would come from salaried

³ The Debtors attempt to downplay the significance of this policy by claiming that it merely "clarif[ies]" existing policy to "remove any uncertainty that severance will be provided ... in connection with a change of control." Mot. 13. But this is no simple clarification -- existing policy specifically does not provide for severance in connection with a change of control. See Mot. Exh. 18, § 3(b); Exh. 19, at 3 ("Benefit Eligibility," Section (b)).

and management personnel as part of the labor concessions and § 1113 processes completed just months ago would be fundamentally unfair and improper. The Debtors' proposal does not satisfy the business judgment test applicable to this motion.

25. Section 363(b)(1) of the Bankruptcy Code provides that a debtor-in-possession, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). The purpose of the notice and hearing provision of Section 363(b)(1) is to subject non-ordinary course transactions to the scrutiny of creditors and the court.

26. When, as here, a debtor seeks under Section 363(b)(1) to implement a management or "key employee" retention program, the Court must "examine whether Debtors proposed Retention Plan is an exercise of Debtor's sound business judgment and is fair and reasonable, considering the facts and circumstances of Debtor as well as the Court's ability, if necessary, to tailor the Retention Plan to accomplish necessary goals." In re Georgetown Steel, 306 B.R. 549, 556 (Bankr. D.S.C. 2004); see also In re America West Airlines, Inc., 171 B.R. 674, 678 (Bankr. D. Ariz. 1994). The burden is on the debtor to demonstrate that a sound business judgment justifies the employee retention program and that the proposal is fair and reasonable. Id. The broad Retention Plan at issue here fails that test in these circumstances.

27. As a threshold matter, the Retention Plan should be rejected because it is not "fair and reasonable." "The union

employees should not have to bear the entire burden to preserve everyone's jobs," In re Pierce Terminal Warehouse, Inc., 133 B.R. 639, 648 (Bankr. Iowa 1991), and "[i]nequitable treatment of employee[s]" may be evidenced by excessive management compensation in relation to unionized workforce. In re The Lady H Coal Co., Inc., 193 B.R. 233, 242 (Bankr. S.D. W.Va. 1996).

28. As set forth above, the Debtors utilized the firm pledge of shared sacrifice by salaried and management personnel as a central component of their successful efforts to cut wages and benefits for active employees, to eliminate retiree health benefits and to terminate the pension plan of its unionized work force. The Debtors went so far as to argue that, in light of management's sacrifices, it would be "inequitable" for labor not to take commensurate reductions. Now, having just achieved those reductions by agreements and by Court order, the Debtors ask permission to take back essentially all that was allegedly given up -- up to \$55 million for officers, salaried and management employees; the amount of annual savings the company pledged to impose late last year. In other words, those management "savings" will all be given back to management. On its face, this concept is not fair and reasonable and should be rejected. The Motion should therefore be denied. In re Geneva Steel Co., 236 B.R. 770, 773 (Bankr. D. Utah 1999) (denying motion for key employee retention plan proposed by Debtors without first consulting with employee representatives, where "support and participation [of the union is]

equally critical to ... successful reorganization as the support and participation of the key employees.").

29. The Motion should also be denied because the Retention Plan is overly broad. A typical and more appropriate type of employee retention program is targeted to employees who are demonstrably "essential." See, e.g., In re Montgomery Ward Holding Corp., 242 B. R. 147, 150 (D. Del. 1999); In re Interco, 128 B.R. 229, 233 (Bankr. E.D. Mo. 1991). The Debtors have made no such determination here. Rather, their Plan broadly includes all officers and all salaried and management personnel. Indeed, the only portion of the Plan which even purports to involve essential or "critical" employees leaves that determination to the Debtors' CEO in his unfettered discretion, after the Court approves the Retention Plan. This is not an appropriate approach in bankruptcy. As this Court held in the earlier US Airways' bankruptcy case, when rejecting a request for blanket advance authority in connection with aircraft rejection, "there is obviously no way by which the court can make a meaningful determination whether the debtors in possession have exercised sound business judgment in seeking to abandon a particular ... aircraft ... when the debtor has not yet selected which aircraft are to be abandoned.... [T]o simply give a ... debtor ... carte blanche to make that determination itself would be to abdicate the court's essential supervisory role over the reorganization process." In re US Airways Group, Inc., 287 B.R. 643, 646 (Bank. E.D. Va. 2002). The same principle applies here. The Motion should be denied.

30. Similarly, the Debtors' failure to link the Retention payments to any performance goals -- other than simply staying on the job -- warrants denial of the Motion. Courts ruling on similar motions look for a linkage between specific performance goals and the proposed payments as evidence of sound business judgment. See, e.g., In re Interco, 128 B.R. at 231 (retention plan bonus payments keyed to the achievement of set financial targets, with increased bonus payments for performance exceeding certain threshold amounts); In re Kmart, Case No. 02 B 02474 (Bankr. N.D. Ill. Jan. 22, 2002) (key employee retention program incorporating corporate annual performance plan, with increased bonuses for performance above threshold targets); In re Georgetown Steel, 306 B.R. 558 (upholding programs under the retention plan that "are primarily incentive based and are tied to certain accomplishments" relating to a successful reorganization of the company). Such an approach would be eminently sensible; there is no benefit to be gained by retaining supposedly "key" employees through the bankruptcy proceedings if their performance does not benefit the debtor. Unfortunately, that is exactly what the Debtors have proposed here.

31. The severance components of the Retention Plan also fail the test of fairness and reasonableness because they provide the substantial payouts of cash upon termination without any regard for mitigation. Courts have made clear that severance plans adopted in bankruptcy as part of an employee retention program should contain a mitigation provision reducing the severance amount to reflect

earnings from employment during the applicable severance period. In re Geneva Steel, 236 B.R. at 773-74 ("To be acceptable to this court, the severance plan must contain a mitigation provision that reduces the amount payable in the event the executive obtains other employment during the six or nine month reimbursement period."); In re Aerovox, 269 B.R. 74, 77 (Bankr. D. Mass. 2001) (approving employee retention plan with mitigation provision). To do otherwise would unnecessarily drain the estate of funds and provide senior executives "with a windfall," which is particularly inappropriate in the bankruptcy setting. In re Geneva Steel, 236 B.R. at 773. Such provisions are utterly absent here, making the Plan unreasonable. The Motion should be denied on this ground as well.

CONCLUSION

For the foregoing reasons, the AFA respectfully submits that the Motion should be denied.

Respectfully submitted,

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Dated: May 24, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 2005, the foregoing Objection Of The Association Of Flight Attendants-CWA, AFL-CIO To The Debtors' Motion For An Order Approving And Authorizing A Transaction Retention Program was served by electronic mail to the current 2002 Service List, pursuant to the Order Establishing Omnibus Hearing Dates And Authorizing Certain Electronic Notice, Case Management And Administrative Procedures.

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