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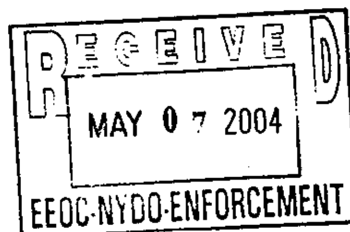

Rosemary Wilkes
Supervisory Investigator
Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10003

Re: Age Discrimination Charges against the Air Line Pilots Association

Dear Ms. Wilkes:

We submit this position statement on behalf of the Air Line Pilots Association, International ("ALPA") in response to charges of age discrimination filed with the Equal Employment Opportunity Commission (the "EEOC") by current and former pilots (the "Charging Pilots") employed by US Airways, Inc. ("US Airways" or the "Company"). We appended the names and charge numbers of the Charging Pilots as Exhibit A to our letter to the EEOC dated January 23, 2004.[1]

ALPA is the collective bargaining representative of the US Airways pilots. The Charging Pilots allege that a defined contribution pension plan (the "DC Plan") adopted by US Airways and ALPA in March 2003 while US Airways was in bankruptcy discriminates on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (the "ADEA"). Specifically, the Charging Pilots allege that the DC Plan has a disparate impact

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[1] ALPA submits this position statement for use solely by the EEOC in its investigation of the pending charges. All information contained herein is confidential and should not be released to any outside person and/or entity without ALPA's written consent.

on pilots between the ages of 57 and 60 because, they claim, pilots in that age group may receive lesser benefits than younger pilots under the DC Plan.

ALPA maintains its position that the charges lack merit under the ADEA because (1) the DC Plan does not discriminate against older pilots but provides a larger contribution to older pilots than to younger pilots, both as a percentage of salary and in total dollars; (2) disparate impact claims are not cognizable under the ADEA, and even if they were, such claims cannot be raised by a subset of the protected class; (3) the allocation of benefits between the qualified and non-qualified portions of the DC Plan is mandated by law and unavoidable. As detailed below, ALPA took appropriate actions to preserve the pilots' defined benefit plan (the "DB Plan") and, when the Bankruptcy Court ruled that termination of the DB Plan was necessary to prevent the liquidation of US Airways, ALPA took appropriate actions to negotiate for a successor defined contribution plan to provide the maximum available benefits to pilots affected by the termination of the defined benefit plan.

BACKGROUND

In the spring of 2002, US Airways was in a dire financial situation. It responded in part by replacing its management team and, after a period of study, that new management team approached the unions seeking substantial concessions. After several months of negotiation, ALPA's leaders agreed to changes in the pilots' collective bargaining agreement that would save the Company nearly $3 billion over the life of the agreement. Most of the savings came straight from pilots' paychecks: under the new agreement, pay for individual pilots was reduced by twenty-five to thirty-five percent.

Notwithstanding those concessions, on August 11, 2002, US Airways filed for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §101, *et seq.* ("Chapter 11"), in the United States Bankruptcy Court for the Eastern District of Virginia. On the same day, the Federal Air Transportation Stabilization Board (the "ATSB") gave conditional approval for a loan guarantee of approximately $1 billion. The loan was based on a seven-year business plan submitted by US Airways which, in turn, was based on the contract concessions the pilots had agreed to accept.

At the time of its Chapter 11 filing, US Airways maintained a DB Plan for pilots, which was designed to provide participants with a fixed benefit upon retirement, calculated based on salary and years of service with the employer. The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), requires an employer to satisfy minimum funding

requirements for a defined benefit plan – requirements that vary with such factors as interest rates and investment returns. The original contract concessions accepted by the pilots did not alter the terms of the DB Plan. After the bankruptcy filing, however, reduced stock market returns and low interest rates led to a substantial increase in the future minimum funding requirements. In November 2002, US Airways approached the Pension Benefit Guaranty Corporation ("PBGC") to request permission to terminate the DB plan and then restore it under PBGC's "restoration funding" rules. Under PBGC guidelines, restoration funding permits an employer that is restoring a previously terminated pension plan to amortize plan liabilities over a longer period of time than required under normal ERISA funding rules. If permitted, this would have enabled US Airways to reduce the minimum funding requirement for the DB Plan from $1.6 billion to $850 million over seven years. ALPA supported US Airways' efforts.

Also in November 2002, in response to the risk of liquidation resulting from reductions in revenue, US Airways requested additional labor cost reductions from its unions. Specifically, US Airways sought additional concessions from the pilots valued at $179 million, and the right to terminate the DB Plan even without approval for restoration finding. The Company claimed – and eventually demonstrated to ALPA and the other employee unions – that without the demanded cost reductions, (1) the ATSB would not give final approval to the $1 billion loan guarantee that it had conditionally approved; and (2) without that loan guarantee, US Airways would shut down. As a result, ALPA agreed to additional salary cuts and altered work rules, and it also agreed to reduce DB plan benefits attributable to future service. But ALPA did not agree to the Company's demand to terminate the DB Plan in the absence of a mechanism for restoration funding. Instead, ALPA maintained a position opposed to termination of the DB Plan – despite the Company's argument that if it would not be able to emerge from bankruptcy if required to maintain the DB Plan.

As a result of ALPA's steadfast opposition to termination of the DB Plan, in December 2002, US Airways provided a letter to ALPA in which the Company agreed that if the pilots' DB Plan were terminated, US Airways would negotiate with ALPA for a defined contribution plan ("DC Plan") that resembled, in the aggregate, the benefits that pilots would have earned under the DB Plan, as amended in the bankruptcy restructuring. The Company's commitment had limits, however, because the Company could not agree to pay more than it would have paid under its proposal to the PBGC for restoration funding (about $120 million annually). In addition, any new DC Plan would have to meet requirements imposed by the Internal Revenue Code on the amount of employer contributions to tax-qualified plans, and rules imposed by the PBGC barring "abusive follow-on" plans. The Internal Revenue Code states that annual contributions to the tax-qualified portion of a defined contribution plan cannot exceed $40,000 or 100 percent of pay for any employee, so any contributions in excess of these limits would have to be made to a non-qualified plan. PBGC rules against abusive follow-on plans

prevent employers whose plans have been terminated and taken over by the PBGC from establishing new plans that, taken in conjunction with the insured benefit provided by PBGC, replace the benefits lost when a plan is terminated. According to the PBGC, these kinds of plans improperly shift liability from the employer to PBGC, the insurer. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 641-42 (1990).

In January 2003, the PBGC advised US Airways that it did not have authority to approve the restoration funding plan US Airways had proposed, and US Airways so advised ALPA. ALPA then lobbied Congress to grant PBGC the authority to approve the restoration funding plan and thereby preserve the DB Plan, but ALPA's lobbying efforts were unsuccessful.

Thereafter, also in January 2003, US Airways filed a motion with the Bankruptcy Court seeking a distress termination of the DB Plan, with a proposed termination date of March 31, 2003. US Airways' motion stated that without termination of the DB Plan, it would not be able to obtain the ATSB loan and other financing necessary for it to emerge from Chapter 11. The motion indicated that US Airways intended to terminate the DB Plan upon approval of the Bankruptcy Court with or without approval of ALPA. The motion further requested the Bankruptcy Court's approval of US Airways' plan to adopt a DC Plan with an annual cost of $122 million to replace the DB Plan.

On February 3, 2003, ALPA filed a grievance to contest US Airways' plan to terminate the DB Plan, and on February 14, 2003, ALPA filed an objection in the Bankruptcy Court to US Airways' motion to terminate the DB Plan and to the proposed defined contribution plan. After four days of hearings, the Bankruptcy Court ruled, in a Memorandum Opinion dated March 7, 2003, that the Company's proposed termination of the DB Plan met the legal requirements under ERISA for a distress termination. The Bankruptcy Court in effect determined that, without termination of the DB Plan, the Company would be unable to pay its debts and remain in business. The Bankruptcy Court would not, however, rule that the termination of the DB Plan was authorized by the pilots' collective bargaining agreement nor approve the defined contribution plan proposed by US Airways; instead, the court ruled that the form of any replacement plan would have to be negotiated in the collective bargaining process. Although the Court left ALPA with the theoretical right to pursue a grievance over termination of the DB Plan, it also recognized that the Company's financial circumstances left ALPA with no real choice except to agree to termination of the DB Plan and seek, through negotiations, the best DC Plan possible in the circumstances.

And the circumstances constraining negotiations for a replacement plan were substantial: (1) the Internal Revenue Code limits contributions to tax-qualified plans, (2) PBGC rules prevent abusive follow-on plans, and importantly (3) US Airways' was in a very precarious

financial condition. Against these constraints, ALPA addressed a Company proposal for a DC Plan that sought to provide retirement benefits to a pilot at age 60 in the form of a lump sum equal to the difference between the value at age 60 of the annuity the pilot was expected to receive from the PBGC under the terminated pension plan and the value at age 60 of a hypothetical defined benefit plan that would pay a pilot 50 percent of his or her estimated final average earnings ("FAE") during the 36 months immediately prior to retirement. A portion of the contributions would be made to a plan that was not tax-qualified (to meet Internal Revenue Code requirements), and the annual contributions would be capped at fifty percent of an individual's pay, which PBGC had stated was the outmost limit of what it would approve under its rules barring abusive follow-on plans. The total projected cost of $122 million annually was approximately equal to what the annual cost would have been for restoration funding of the DB Plan.

The Company's proposal was certainly not ideal. For example, pilots bore all investment risks, and the plan's projections assumed a high eight percent rate of return. In addition, older pilots would be limited in their ability to reach their target due to a combination of factors, including the federally mandated retirement age of 60, and the fact that contributions under the Company's proposal were limited to 50 percent of income.

ALPA sought to increase the chances that pilots would be able to maximize the benefits from a DC Plan. Specifically, ALPA pursued three improvements: (1) an increase in the contribution cap from 50 percent to 100 percent of a pilot's salary; (2) a change in the FAE calculation so that FAE be based on the highest average earnings for any consecutive 36 month period within the last ten years, thereby establishing a higher FAE on which the cap would be based because pre-bankruptcy salaries could be used in the calculation; and; (3) a reduction in the assumed rate of investment returns (a lower assumed rate of return would require greater employer contributions). Each of ALPA's proposals would increase the opportunities for older pilots to reach their benefit targets. For example, only the most senior pilots would require a contribution in excess of 50 percent of earnings to reach their target benefit, and only pilots within a few years of retirement would benefit from an FAE calculation that looks back to earnings prior to bankruptcy reductions.

On March 21, 2003, ALPA and the Company executed Letter of Agreement 85 ("LOA 85"), which finalized their agreement on the termination of the DB Plan and the implementation of the DC Plan. ALPA did not reach all of its goals. For example, it was unable to reach agreement reducing the assumed rate of return below eight percent. However, in exchange for its agreement to leave the assumed rate at eight percent, the Company agreed to increase the cap on annual contributions to 100 percent of pay, and the Company agreed to enhance the FAE in the manner proposed by ALPA. Both of these results achieved by ALPA

directly and particularly benefited older pilots. The estimated cost of the DC Plan under the terms agreed to in LOA 85 was approximately $138 million per year, about $16 million dollars more per year than the cost of the plan originally proposed by US Airways.

The DC Plan was adopted with the understanding that it was both the Company's and ALPA's hope to restore the DB Plan, which would require a solution to the PBGC's refusal to approve a follow-on plan that would retain benefits at the pre-termination level. To that end, LOA 85 provided that the Company would pursue a legislative and regulatory solution to the pension funding problem with the PBGC. ALPA also continued to lobby Congress and the PBGC in efforts to achieve a solution to the funding problem and restore the DB Plan.

The elected ALPA representatives for the US Airways pilots, the US Airways Master Executive Council, ratified LOA 85 in accordance with the ALPA Constitution and By-Laws. The agreement was then signed by the parties, and the new DC Plan was submitted to the Bankruptcy Court and PBGC for approval. On March 28, 2003, the PBGC approved the DC Plan, finding that the plan did not violate the PBGC's abusive follow-on prohibition. On the same day, the Bankruptcy Court also gave final approval to the DC Plan, despite the $16 million increase in its cost over the original plan that was proposed to the Bankruptcy Court. The Company subsequently obtained its exit financing, including the ATSB loan guarantee, and emerged from bankruptcy on March 31, 2003. Upon termination of the DB Plan, the PBGC became a trustee of the DB Plan, and the DC Plan went into effect on March 31, 2003.

1. THE DC PLAN DOES NOT DISCRIMINATE AGAINST OLDER PILOTS.

The DC Plan, as adopted by LOA 85, allocates contributions to a participant's retirement plan based on a percentage of the participant's compensation, factoring in an offset by PBGC payments under the terminated DB Plan and other plans that were previously absorbed by US Airways. Pilots' compensation is based on a collectively bargained seniority system in which pilots with more seniority have a greater opportunity to fly as captains on larger aircraft for which higher wages are paid. Pilots' compensation is also affected by the number of hours a pilot bids to fly, which may also be influenced by pilots' exercise of their seniority in the bidding process. Because pilots with greater seniority likely have a greater income, the Company provides a larger contribution on behalf of such pilots under the DC Plan, up to 100 percent of the salary earned by such pilots. Thus, older pilots, who generally have greater seniority, receive larger actual dollar amounts contributed to their accounts. Their contributions are further enhanced by the requirement, under the DC Plan, that the FAE is based on the highest consecutive 36 month period of income received within the last 10 years. Pilots with greater seniority would have earned a higher salary within the 10-year window and therefore would have

a higher FAE on which the employer's contributions are based. In effect, the DC Plan favors older pilots.

2. The Charging Pilots Cannot Raise a Claim of Disparate Impact Discrimination Based on Age.

Even if the Charging Pilots had raised a disparate impact claim in their charges, and they did not, the great weight of authority is the ADEA does not authorize disparate impact claims. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993), the Supreme Court held that taking an adverse employment action based on a factor other than age does not violate the ADEA even if the factor in question is correlated with age. While the Court did not directly rule on whether a disparate impact claim could be pursued, the Court strongly implies that such a claim is not available. *Id.* at 610-11.

Since *Hazen Paper*, a number of circuits have taken the Court's lead, holding that disparate impact claims are not viable under the ADEA. *See, e.g., Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003); *Bishop v. Peppertree Resorts, LTD.*, 212 F. Supp. 2d 518, 523 (W.D.N.C. 2002) aff'd 2003 U.S. App. LEXIS 4482 (4th Cir. 2003); *Adams v. Fla. Power Corp.*, 255 F.3d 1322 (11th Cir. 2001); *Mullin v. Raytheon* Co., 164 F.3d 696, 701 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1077 (7th Cir. 1994).

Because there is no cause of action for a disparate impact claim under the ADEA, as recognized by numerous courts of appeal, and strongly implied by the Supreme Court, the Charging Pilots' claims should be dismissed.

Furthermore, even courts of appeal that have held that a disparate impact theory of liability is generally available under the ADEA have held that a small subset of the protected class, such as the group of 57 to 59 year old Charging Pilots, cannot pursue a disparate impact claim. Both the Second and Eighth Circuits have found that to state a claim for disparate impact under the ADEA, plaintiffs must "allege a disparate impact on the entire protected group, *ie.*, workers aged 40 and over." *Criley V. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2nd Cir. 1997)(per curiam); *EEOC v. McDonnell Douglas Corp.*, 191 F3d 948, 950-51 (8th Cir. 1999). As the Eighth Circuit noted, "if [subgroup] claims were cognizable under the statute, a plaintiff could bring a disparate-impact claim despite the fact that the statistical evidence indicated that an employer's RIF criteria had a very favorable impact upon the entire protected group of employees aged 40 and older, compared to those employees outside the protected group." *McDonnell Douglas*, 191 F.3d at 950-51. In the present case, the Charging Pilots do not, and cannot, state a claim under the ADEA for disparate impact.

3. The Limitation on Contributions into the Qualified Portion of the Pilots' DC Plan is Mandated by Law and Unavoidable.

ERISA funding limitations contained at 26 U.S.C. § 415(c), provide that, as to defined contribution plans, annual contributions and other additions with respect to a participant may not be greater that the lesser of $40,000, or 100 percent of the participant's compensation. Accordingly, because US Airways' pilots generally earn greater than $40,000 per year, no contribution made on behalf of a pilot into the qualified portion of the DC Plan may exceed $40,000. Thus, even if US Airways had no cap on the amount it contributed on behalf of its pilots into the DC Plan, if US Airways' contribution were greater than $40,000, that excess contribution would have been attributed to the non-qualified portion of the plan, with its associated taxes in the year of retirement. These consequences are a matter of law and completely unavoidable in the implementation of the DC Plan.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in US Airways' January 23, 2004 letter to the EEOC, ALPA requests that the charges of discrimination be found without merit and dismissed.

Should you require any additional information or have any further questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

James L. Linsey

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