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Fax number:	212-566-6769	*Phone #:*
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Date:	March 8, 2004	

FROM:	
Sender:	**Rosemary Wilkes, Supervisory Investigator**
Telephone number:	(212) 336-3771
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MESSAGE: Re: US Air/APA Charges

See attached position statement and follow-up response to the above.

Rebuttal due on or before March 22, 2004.

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Rosemary Wilkes
Enforcement Supervisor
Phone (212) 336-3771
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March 8, 2004

Via Facsimile and Regular Mail

Michael S. Haber
225 Broadway, 39th Floor
New York, NY 10007

Re: Charge No. 160-2004-00257 et al.
Charges against US Air & the Airline Pilots Association (ALPA)

Dear Mr. Haber:

Enclosed are the two responses we received in response to our requests for answers to the charges brought by your clients against US Air and the Airline Pilots Association. After reviewing the information and discussing it among ourselves, we ask that you review them and provide a rebuttal on behalf of your clients by March 22, 2004.

In addition, after reviewing these responses, if it is your position that US Air and/or the ALPA could have done something differently, that is, established a plan with a less discriminatory effect on your clients, within the constraints that existed because of the involvement of the Pension Benefit Guaranty Corporation and the Bankruptcy Court, please explain to us what they could have done. It appears to us that respondents, by expanding the FAE (final average earnings) window beyond the 36-month period to any 36 months within the 10-year period, attempted to minimize the effect the changes would have on those pilots age 57-60, as compared to the other pilots.

Finally, the copies we are providing to you have been sanitized of any information that would specifically identify any pilot.

If you have any questions, please give me a call on 212. 336-3771.

Sincerely,

Rosemary Wilkes
Enforcement Supervisor

O'MELVENY & MYERS LLP

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BY FEDERAL EXPRESS

Ms. Rosemary Wilkes
Supervisory Investigator
Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, NY 10004

Re: ***Age Discrimination Charges Against US Airways, Inc.***

Dear Ms. Wilkes:

We submit this position statement on behalf of US Airways, Inc. ("US Airways" or the "Company") in response to the Charges of Discrimination filed with the Equal Employment Opportunity Commission (the "EEOC") by 102 current or former US Airways pilots whose names and charge numbers are appended hereto at Exhibit A (the "Charging Pilots"). The Charging Pilots each raise identical claims that a defined contribution pension plan for pilots of US Airways, adopted in March 2003 while the Company was in bankruptcy (the "DC Plan"), discriminates on the basis of age.[1] The Charging Pilots allege that the DC Plan has a disparate impact on pilots between 57 and 60 years of age because, although they receive the highest available percentages of their salaries allocated to their DC Plan accounts, these pilots purportedly receive lesser benefits than younger pilots, and must take a greater percentage of their benefits from the non-qualified part of the DC Plan than the tax-qualified part. They allege claims against both US Airways and the Air Line Pilots Association, International ("ALPA"), the collective bargaining representative of the US Airways pilots.

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[1] This position statement and the exhibits attached hereto are to be used solely by the EEOC in its investigation of the pending charges. All information contained in US Airways' response is confidential and should not be released to any outside party and/or entity without the written consent of US Airways. Pursuant to our previous discussion, US Airways will address herein only the broad legal issues raised by the charges. US Airways will later, if necessary, respond as to any additional factual questions the EEOC may have, and any defenses it has with regard to individual claims (including the timeliness of the some of the individual charges). US Airways also reserves all legal defenses it may have under the United States Bankruptcy Code and the Plan of Reorganization approved by the United States Bankruptcy Court for the Eastern District of Virginia on March 18, 2003.

As set forth more fully below, the Charging Pilots' allegations are without merit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (the "ADEA"), for several reasons. First, US Airways submits that no disparate impact claim is cognizable under the ADEA, and even if such a claim were generally available the theory cannot be pursued on behalf of a small subset of the protected class. Second, even if such a claim were cognizable, the DC Plan does not discriminate against older pilots. To the contrary, the DC Plan provides a much larger benefit – both as a percentage of salary, and in total dollars – to the Charging Pilots than to younger pilots. Finally, the allocation between qualified and non-qualified plans is mandated by law and unavoidable.

Factual Background

A. US Airways' Restructuring and Bankruptcy.

US Airways is the seventh largest airline in the United States with approximately 29,000 full time and part time employees, including approximately 3,400 active pilots. In 1999, as the result of competitive pressures and rising labor costs, the Company's profitability began to significantly erode. By 2001, as the result of an economic recession and the terrorist attacks of September 11, the Company was suffering enormous losses. US Airways lost roughly $1.5 billion during 2001 – $787 million during the fourth quarter alone – and $435 million in the first quarter of 2002.[2]

In May 2002, US Airways initiated a restructuring plan that sought to address the Company's financial difficulties by renegotiating its labor agreements and taking other action to reduce operating costs by approximately $1.2 billion a year, increasing revenue by approximately $600 million a year, and obtaining approval for a $1 billion loan package from the Air Transportation Stabilization Board (the "ATSB"). On July 10, 2002, the ATSB conditionally granted US Airways' loan application, subject to a number of prerequisites, including achieving the labor cost reductions set forth in US Airways' business plan.

Although US Airways ultimately was able to reach restructuring agreements with its unions that produced a total of $850 million in annual labor cost reductions, it was unable to stave off bankruptcy because of dwindling cash reserves. Accordingly, on August 11, 2002, US Airways filed a voluntary petition for relief 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.

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[2] The factual background of this matter was addressed in large part in the March 7, 2003 Memorandum Opinion of the United States Bankruptcy Court for the Eastern District of Virginia, conditionally approving termination of the US Airways pilots' defined benefit pension plan, and permitting entry of a new defined contribution plan for the pilots of US Airways (hereinafter "Mem. Op." or "Memorandum Opinion"). A copy of the Memorandum Opinion is appended hereto at Exhibit B.

B. US Airways' Need for Additional Cost Reductions.

During the fall of 2002, it became clear that the renegotiation of US Airways' labor agreements and other cost reductions implemented by US Airways in Chapter 11 would not be sufficient for the Company to obtain the ATSB loan and exit financing necessary to emerege from bankruptcy (and avoid liquidation). There were two principal reasons for this. First, while the entire U.S. airline industry had forecast an increase in revenues during the fall of 2002 – a year after the events of September 11 – the actual results fell far short for both US Airways and the industry. As a result, US Airways was forced to reduce the revenue forecasts from those in its original business plan. Second, the Company learned that as a result of a substantial decline in the stock market and historically low interest rates, the minimum funding requirements under the Company's pension plans were substantially greater than anticipated over the seven-year period covered by its business plan.

As a result of these events, US Airways took several steps to further restructure its labor costs. First, on November 22, 2002, the Company approached the Pension Benefit Guaranty Corporation ("PBGC") with a request for permission to adopt "restoration funding" for its pilots' defined benefit pension plan. Under the PBGC's regulations, when a previously terminated pension plan is restored, the employer is entitled to amortize plan liabilities to be paid over a longer period of time than normal funding rules. Thus, US Airways asked the PBGC if it could employ the restoration funding rules by terminating, and then immediately restoring, its pilots' pension plan. The practical effect of restoration funding would have been to cut in half the Company's required cash contributions to its pilots' defined benefit plan during the seven-year period of its ATSB loan, from $1.6 billion to approximately $850 million. See Mem. Op. at 6.

Second, in late November 2002 the Company asked its unions for – and eventually received – an additional $200 million per year in labor cost reductions, including $101 million from ALPA, and an additional $78 million in pilot pension plan savings. During these negotiations, US Airways told ALPA that if the PBGC did not approve restoration funding, the Company would likely need to terminate the pilots' defined benefit pension plan because the Company would not be able to obtain the ATSB loan and exit financing it needed with such a large pension obligation on its books. In response, ALPA demanded as a condition of any further negotiations that the Company agree to implement a defined contribution plan for pilots if the defined benefit plan were terminated. See Mem. Op. at 5-7.

As a result of these discussions, on December 13, 2002, US Airways provided ALPA with a confidential letter in which the Company promised that if the pilots' defined benefit plan were terminated, the Company would institute an alternative retirement plan with benefits "that resemble, in the aggregate, the benefits pilots would have earned" under the defined benefit plan following the termination of that plan. The letter further provided that (1) the new plan would take the form of a defined contribution plan; (2) the new plan would have to be designed so that it was not objectionable to the PBGC or the IRS; and (3) that "the Company's cash cost in providing the alternate pilot retirement benefit plan . . . may in no event exceed" the cost that the Company would incur under its proposal to the PBGC for restoration funding – i.e., roughly

$850 million over seven years. A copy of the December 13, 2002 letter is appended hereto at Exhibit C; see also Mem. Op. at 7..

The second condition in the letter – that the new plan would have to be designed so that it would not be objectionable to the PBGC – was a reference to the PBGC's policy that prohibits an employer from implementing an abusive follow-on retirement plan following termination of a pension plan covering the same employees. See Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 641-42 (1990) (describing PBGC policy on "abusive" plans). The reason for this policy, according to the PBGC, is that "[w]ithout a follow-on policy, firms in severe financial distress could terminate their pension plans, transfer the obligations to the PBGC, and set up follow-on plans that build on PBGC's guaranteed benefits to substantially replicate the old benefits. Participants might not object if their combined benefits were substantially the same as under the old plan, and companies would have far lower pension costs going forward. The result could be a flood of additional losses for the PBGC."[3]

C. Termination of the Pilots' Defined Benefit Plan.

In January 2003, after the PBGC informed US Airways that it did not believe it had legal authority to authorize restoration funding, the Company and ALPA went jointly to Congress to seek a legislative solution.[4] That effort failed, however, on January 22, 2003, when the U.S. Senate defeated an amendment to an omnibus appropriations bill that would have given the PBGC authority to authorize a restoration funding plan. After these failed efforts to save the pilots' defined benefit plan, on January 30, 2003, US Airways filed a motion with the Bankruptcy Court seeking to terminate the defined benefit plan on the basis that the Company could not obtain the ATSB loan and exit financing necessary to emerge from Chapter 11 unless the plan was terminated. In this motion, US Airways also asked the Bankruptcy Court to approve the Company's adoption of a defined contribution plan for pilots in conformance with its December 13, 2002 letter, with an estimated annual cost of $122 million. See Mem. Op. at 8.

On February 11, 2003, the ATSB announced its renewed conditional approval of US Airways' $900 million loan guarantee for exit financing based on the Company's revised business plan. The approval, however, was subject to the express condition that "a resolution of [the Company's] pension funding issue" be approved by the PBGC and, if necessary, the

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[3] See http://www.pbgc.gov/news/press_releases/2003/pr03_30.htm

[4] The parties also attempted to achieve alternative, and less drastic, solutions to the pension funding issue. While the parties considered a freeze of future benefit accruals under the defined benefit plan, it would not have provided adequate cost savings to meet the seven-year business plan because more of the minimum funding obligation under the defined benefit plan was attributable to past service and other cost items that would remain unaffected by a freeze. US Airways and ALPA also made efforts to obtain pension plan funding deferments from the IRS. Such funding "waivers" postpone required payments into a plan and increases contributions in later years of the emergence business plan. Three years of IRS funding waivers, however, would have increased US Airways' minimum funding obligations by $140 million during the projection period. US Airways and ALPA attempted to persuade the IRS to interpret its waiver authority to avoid this problem, but the IRS indicated that it could not grant "alternative" funding waivers adequate to make the minimum funding requirements affordable.

Bankruptcy Court. A copy of the February 11, 2003 ATSB letter is appended hereto at Exhibit D.

On March 2, 2003, following four days of hearings and testimony both in favor of and opposed to termination of the defined benefit plan and entry into a defined contribution plan, the Bankruptcy Court issued an order approving termination of the defined benefit plan, subject to an arbitration between US Airways and ALPA to determine whether the December 13, 2002, letter constituted ALPA's approval of the termination. The Court also authorized the adoption of a defined contribution plan for US Airways' pilots so long as that plan did not cost the Company more than it would have paid under a restoration funding approach and was not objectionable to the IRS or PBGC. A copy of the Court's March 2, 2003 Order is appended hereto at Exhibit E; see also Mem. Op. at 19-25. On March 18, 2003, the Bankruptcy Court approved the Company's Plan of Reorganization subject to the condition, among others, that US Airways satisfy the conditions necessary to obtain the ATSB loan and exit financing.

D. Negotiation of the DC Plan.

Although ALPA initially contested the Company's right to terminate the defined benefit plan, it ultimately recognized that US Airways could not obtain the ATSB loan and exit financing, and thus would have to liquidate, unless ALPA agreed to termination of the pension plan. Following the Bankruptcy Court's March 2 ruling, therefore, ALPA entered into negotiations with US Airways over the terms of the defined contribution plan that would replace the terminated defined benefit plan.

The starting point for the parties' negotiations was the defined contribution plan design that US Airways developed in January 2003, the proposed framework of which had been reviewed and approved of by the PBGC. Under this plan design, the Company's contribution rate was determined individually for each active pilot. Subject to various assumptions and constraints, each active pilot's individual contribution rate was calculated so that it would produce at age 60 a lump sum equal to the difference between (1) the value at age 60 of the annuity the pilot was expected to receive from the PBGC under the terminated pension plan (plus benefits, if any, from two previously terminated retirement plans); and (2) the value at age 60 of a hypothetical defined benefit plan that would pay the pilot up to 50 percent (depending on years of service) of his or her estimated final average earnings ("FAE") during the 36 months immediately prior to retirement. Under this design, the pilot's estimated FAE was calculated using the wage rates that existed following the 2002 Restructuring Agreement with ALPA – not the much higher rates actually in effect before the July 1, 2002 effective date of that agreement. The Company's annual contributions to the plan as designed were to be capped at 50 percent of each individual pilot's salary. The estimated cost of this plan was consistent with the restoration funding cost limitation contained in the December 13 letter and the Bankruptcy Court's March 2 Order – approximately $850 million over seven years.

There were two reasons that Company contributions were limited to 50 percent of the pilot's annual salary. First, the Internal Revenue Code requires that a tax qualified plan include a limitation on Company contributions expressed either as a percentage of salary or absolute dollars. 26 U.S.C. § 415(c). Second, US Airways believed that a reasonable limit on

contributions was necessary to obtain approval of the plan by the PBGC because, without such a limitation, the PBGC would have viewed it as an "abusive follow-on plan" that "built on PBGC's guaranteed benefits to substantially replicate the old benefits." See Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 641-42 (1990). In fact, the PBGC, in a February 13, 2003, filing with the Bankruptcy Court, confirmed the Company's belief that even with a 50 percent cap on company contributions the proposed plan pushed the "outmost limit" of the PBGC's policy. It stated:

> At the request of the Debtors, PBGC recently reviewed the Debtors' concept for a new defined contribution plan that would cover pilots actively employed by [US Airways]. Upon review, PBGC informed the Debtors and ALPA that the agency could agree to the proposed framework presented by [US Airways] for the defined contribution plan, provided that the plan actually implemented does not differ materially from the concept reviewed by the agency. PBGC cautioned the Debtors that the concept reviewed by the agency was at the outmost limit of acceptability under the agency's policy against abusive follow-on plans.

(emphasis added). A copy of the PBGC's February 13, 2003 filing with the Bankruptcy Court is appended hereto at Exhibit F.

The bargaining between ALPA and US Airways in March 2003 resulted in two principal changes to the Company's design of the defined contribution plan found acceptable by the PBGC and the Bankruptcy Court. As explained below, both changes substantially increased the benefits for the oldest US Airways pilots at US Airways' expense without benefiting the "younger pilots."

First, the Company agreed to increase the limit on Company contributions from 50 percent of the pilot's annual earnings to 100 percent of the pilot's annual earnings. Because no pilots under age 56 were affected by the 50 percent cap, this change benefited only pilots aged 57 to 60.

Second, the Company agreed to ALPA's proposal to change the formula for determining a pilot's final average earnings, which is the formula that sets the pilot's "benefit goal" under the DC Plan. ALPA sought, and obtained, an expansion of the FAE window from the last 36 months of work prior to retirement (but in no event including pre-2003 wage rates) to a window that included the pilot's highest average earnings for any 36 consecutive calendar months during the 120 months immediately preceding the date of retirement the same formula that was in the defined benefit plan. The change in FAE formula did not benefit pilots under age 50 because, for such pilots, the FAE was based entirely on projected future earnings under which the highest 36 months and the last 36 months were the same. For the Charging Pilots, however, this change was enormously beneficial because it allowed the FAE to be based on pre-bankruptcy wages, and those wages were 32 to 42 percent higher than wages in effect following the bankruptcy. This change was doubly beneficial for those pilots close to retirement age who were displaced from captain positions to first officer positions, or from higher paying aircraft to lower paying aircraft, as the result of a significant reduction in the Company's aircraft fleet between December

2001 and December 2002, because it allowed them to use pre-bankruptcy wages earned in the higher paying positions to determine their FAE.[5]

On March 21, 2003, ALPA and US Airways reached final agreement on Letter of Agreement 85, which allowed termination of the prior defined benefit plan and implementation of the DC Plan. The following are the key provisions of the new DC Plan:

- A fixed contribution percentage for each individual US Airways' pilot, based on a target balance of approximately $1 million, subject to certain caps, for an age 60 pilot with 30 years of service;[6]
- Final average earnings based on the 36 consecutive months in the 120 months immediately prior to reaching age 60 during which the pilot had the highest earnings on an annual basis;
- Contributions assumed to earn 8 percent annually;
- A targeted balance (based on age, years of service, and relative seniority) offset by estimated PBGC payments, projected Target Benefit Plan (a prior plan) value, Shuttle B plan account balances, and no further payments from prior non-qualified plan;
- Annual contributions capped at 100 percent of annual pay; and
- Contributions to qualified plan not to exceed 100 percent of pay or $40,000, whichever is less, as required by 26 U.S.C. § 415, with any excess amount to be paid into a non-qualified excess plan.

The estimated cost of the DC Plan was $138 million a year - $16 million more per year than the plan cost previously approved by the Bankruptcy Court. The two primary causes of this increase in annual cost were the change in the final average earnings window and the increase in the cap on annual contributions.

Following ratification of Letter of Agreement 85 by the ALPA Master Executive Council, the Company submitted the new DC Plan to the PBGC, and filed a motion with the Bankruptcy Court seeking authority to implement a new DC Plan that was $16 million a year more costly than originally approved by the Court. The PBGC reviewed the DC Plan for compliance with its prohibition against abusive follow-on plans in light of the modifications that rendered the DC Plan more generous and, on March 28, 2003, approved termination of the defined benefits plan, and did not object to entry into the defined contribution plan. A copy of the PBGC's March 28, 2003 press release announcing its determination is appended hereto at Exhibit G.

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[5] For example, roughly 1000 of the Company's 3400-plus active pilots in March 2003 had displaced from captains positions to first officer positions between December 2001 and December 2002. The hourly rate of a first officer is 68 percent of the captain rate on the same equipment.

[6] Federal Aviation Administration regulations require that all commercial airline captains and first officers are subject to a mandatory retirement age of 60. See 14 C.F.R. § 121.383(c).

On the same day, following PBGC approval, the Bankruptcy Court gave final approval of the DC Plan set forth in Letter of Agreement 85, including its $16 million a year cost increase. A copy of the Court's March 28, 2003 Order is appended hereto at Exhibit H. The court also gave final approval to US Airways' Plan of Reorganization, thereby permitting the Company to emerge from bankruptcy as planned on March 31, 2003, and close its exit financing arrangements, including final approval of the ATSB loan guarantee.

Upon termination, the PBGC became trustee of the pilots' defined benefit plan. As a result of the PBGC's trusteeship, pilots who participated in the defined benefit plan may experience a reduction in their benefits under that plan by operation of the statutory limits on the PBGC's guarantee. Those limits, however, operate less severely (if at all) in the case of participants, like the Charging Pilots, who were age-eligible for retirement at that time. See 29 U.S.C. § 1344(a)(3) (allocating underfunded plan's assets to benefits for retirees, and for retirement-eligible participants, prior to the benefits for other plan participants). Put more simply, the defined benefit plan's termination generally caused a smaller benefit loss for the Charging Pilots than it did for more junior pilots covered by that plan.

E. Calculation of a Pilot's Contribution Rate Under the DC Plan.

Effective March 31, 2003, new benefits were provided to US Airways pilots under the DC Plan. Like many defined contribution plans, the DC Plan allocates an amount to each participant's account based on a percentage of that participant's regular compensation. The Charging Pilots receive annual allocations at the highest percentage provided under the DC Plan – 100 percent. A large number of factors contributed to the ultimate determination of what percentage contribution would be made on behalf of each pilot in the DC Plan, including relative seniority, aircraft equipment flown, wages earned, time to retirement, and airline of origin. The benefits provided by the DC Plan, like the defined benefit plan, are based on the wages earned by each pilot and are additionally offset by PBGC payments and pension funds earned from other plans, such as the Shuttle B plan for pilots absorbed through acquisition of the Shuttle.

Under US Airways' collectively-bargained seniority system, pilots gain the ability to fly as captains on larger aircraft as they obtain more relative longevity at the Company. Pilots who have the seniority to fly larger equipment, and choose to do so, earn higher wages. Salary is also affected by the number of hours a pilot bids to fly according to his or her seniority. Accordingly, a pilot with 30 years of seniority will have the ability to earn a significantly higher salary than a pilot with 15 years of seniority who may only be able to hold a first officer position on a smaller aircraft. Therefore, a pilot with high seniority flying larger equipment more hours will have a larger salary, up to 100 percent of which may be contributed annually on his or her behalf to the DC Plan.

The DC Plan also is based on the best consecutive 36 months of earnings earned by the pilot over the ten years prior to retirement, which increased the benefit goal for some pilots appreciably over US Airways' early concept for the DC Plan. This 10-year window final average earnings formula has the most favorable effect on those pilots who have the greatest seniority and are nearing their mandatory retirement age. As noted above, pilots took

considerable wage reductions in their first concessionary agreement with US Airways in July 2002.

Discussion

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

a. The Disparate Impact Theory Is Not Viable Under the ADEA.

The Charging Pilots assert a disparate impact claim under the ADEA by alleging that "the DC Plan disparately affects only the oldest pilots," specifically pilots aged 57 to 59, and one pilot aged 55, and four aged 56.[7] The great weight of authority, however, is that the ADEA does not authorize a disparate impact claim.

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,. noting that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." 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) (differing legislative purposes of the ADEA and Title VII and other factors led the court to hold that disparate impact theory of liability is not cognizable under the ADEA); Bishop v. Peppertree Resorts, LTD., 212 F. Supp. 2d 518, 523 (W.D.N.C. 2002) (ADEA claims are "no longer viable"), aff'd 2003 U.S. App. LEXIS 4482 (4th Cir. 2003); Adams v. Fla. Power Corp., 255 F.3d 1322 (11th Cir. 2001) (in holding that no ADEA disparate impact theory claims may be brought, finding that "the history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in Griggs relied on to find a cause of action for disparate impact"); Mullin v. Raytheon Co., 164 F.3d 696, 701 (1st Cir. 1999) ("the inescapable implication of [the Court's] statements [in Hazen] is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA"); 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) ("[Hazen's] discussion makes clear that the ADEA prevents employers from using age as a criterion for employment decisions. On the other hand, decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited"); see also Hyman v. First Union Corp., 980 F. Supp. 38 (D.D.C. Cir. 1997) (claim of liability based on a disparate impact theory is not cognizable under the ADEA); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1048 (6th Cir. 1998) (in light of Hazen, there is now "'considerable doubt as to whether a claim

[7] There is nothing in the Charging Pilots' charges that indicates an intent to raise a disparate treatment cause of action under the ADEA, nor would there be any factual support for such an argument.

of age discrimination may exist under a disparate-impact theory'"); DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995) ("in the wake of Hazen, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA").

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 in full.

b. Even if a Disparate Impact Claim Could Survive, Subgroups of the Protected Class Cannot Raise a Viable Disparate Impact Claim Under the ADEA.

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, *i.e.*, workers aged 40 and over." Criley v. Delta Air Lines, Inc., 119 F.3d 102, 105 (2d Cir. 1997) (per curiam); EEOC v. McDonnell Douglas Corp., 191 F.3d 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.

These cases are particularly apt in the present circumstances. In Criley, pilots aged 55 and over claimed that Delta's hiring plan, which required that pilots be qualified to fly certain aircraft to be hired, had a disparate impact on them because they did not have the proper training on those aircraft. However, because the hiring plan did not have a disparate impact on the entire group of pilots aged 40 and over, since 94.1 percent of the pilots hired by Delta were 40 or older, the disparate impact claim was rejected. Id.; see also Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1373 (2d Cir. 1989).

Here, the Charging Pilots similarly allege a disparate impact on a small subgroup of pilots in the protected class. Indeed, while the Charging Pilots allege that 96 percent of active pilots at US Airways will not be adversely impacted by implementation of the DC Plan, approximately 99 percent of pilots employed by US Airways are aged 40 or over[8], the overwhelming majority of whom, according to the Charging Pilots' own theory, are not adversely affected on the basis of age by the DC Plan. Indeed, the Charging Pilots allege that one pilot aged 55, and four aged 56 are adversely affected, but ignore that approximately 400 active US Airways pilots aged 55 and 56 are not alleged to have been adversely affected on the basis of age by the DC Plan. They are not, in fact, adversely impacted due to their years of

[8] This number includes all pilots on US Airways' pilot system seniority list who were not on furlough as of March 31, 2003.

service, lower wages or other factors that lead to lower benefit goal amounts or greater offsets. In such circumstances, it is clear that a disparate impact claim cannot be maintained.

2. The ADEA Explicitly Permits Employers to Maintain a Defined Contribution Formula of the Type Contained in the DC Plan.

a. US Airways Incurs The Greatest Cost for Its Oldest Pilots in Observing the Terms of the DC Plan.

Section 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i), provides that it is not a violation of the ADEA to observe the terms of a bona fide employee benefit plan under which the payments made or costs incurred for older workers are at least as high as the payments made or costs incurred for younger workers, even though an older worker may thereby receive a lesser amount of benefit than a younger worker. See also 29 C.F.R. § 1625.10. The DC Plan clearly meets this safe harbor provision of the ADEA and therefore is not prohibited by the Act.[9]

Pursuant to the DC Plan, US Airways must contribute on behalf of each pilot a certain percentage of the pilot's present annual earnings, based on many factors, including years of service, time to retirement, relative seniority and airline of origin, subject to an annual cap on contributions of 100 percent of salary. As explained above, subject to a variety of constraints, the percentage of salary contribution made on behalf of each active pilot is calculated to reach a so-called "benefit goal" level. The benefit goal level is based on the projected amount the pilot would have received had the defined benefit plan continued (using the earlier higher rate of pay for determining FAE), minus payments expected to be made to the pilot by the PBGC, from the old Target Benefit Plan, and from the old Shuttle B Plan.

For instance, US Airways will contribute, on average, an amount equal to 15 percent of a 37-year old pilot's salary who has 16 years of service to his or her defined contribution account. A 47-year old with 16 years of service will receive, on average, an amount equal to 23 percent of his or her salary in annual contributions. A 57-year old pilot with 16 years of service will receive an 80 percent annual contribution on average, based on final average earnings that include pre-bankruptcy wage rates. Thus, US Airways incurs a much higher annual cost for the 57-year old pilot than for the 37-year old pilot, and the 57-year old pilot receives a much higher annual benefit. The Charging Pilots' claim that the 37-year old pilot will receive a greater

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[9] "A 'bona fide employee benefit plan' is one in which substantial benefits are paid to employees who are covered by it." Raskin v. Wyatt Co., 125 F.3d 55 (2d Cir. 1997); see also 29 C.F.R. § 1625.10(b) ("A plan is considered 'bona fide' if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan."). The defined contribution plan has been presented to all pilots in the form of Letter of Agreement 85 and the qualified portion is available to all pilots in final form as a plan document, both of which clearly describe the substantial benefits to be paid pilots upon retirement. Letter of Agreement 85 is appended hereto at Exhibit I, and the Retirement Savings Plan for Pilots of US Airways, Inc., effective April 1, 2003, is appended hereto at Exhibit J. Moreover, US Airways "observes the terms of the plan" in every fashion, including the 100 percent annual cap on contributions, which is described both in Letter of Agreement 85 and in the plan document at Section 5.2(a).

benefit at retirement than the 57-year old simply ignores the fact that the 37-year old would have 20 years more service under the DC Plan. Because US Airways' annual contributions on behalf of the pilot are significantly greater than that made on behalf of the 37-year old pilot, the DC Plan clearly complies with ADEA, 29 U.S.C. § 623(f)(2)(B)(i).

b. The ADEA Permits Employers to Place a Ceiling on Allocations on Behalf of Each Employee When Not Based on Age.

The Charging Pilots allege that US Airways should be required (i) to violate or amend the terms of the DC Plan negotiated with ALPA and approved by the PBGC and the Bankruptcy Court, and (ii) to contribute the full amount necessary to achieve the benefit goal in the one year of service the 59-year old pilot has remaining prior to mandatory retirement. This contribution, which could be equal to several hundred percent of the pilot's annual income or more, as explained above, is simply not required by the ADEA.

Section 4(i)(2) of the ADEA, 29 U.S.C. § 623(i)(2), provides that the employer may observe a provision of an employee pension benefit plan "to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides . . ." The 100 percent cap on employer contributions to the DC Plan is a reasonable limitation on the allocation made by the Company to each pilot regardless of age. See 29 U.S.C. § 623(i)(2); see also 29 U.S.C. § 623(f)(1) ("It shall not be unlawful . . . to take any action . . . where the differentiation is based on reasonable factors other than age . . . ."). It was made clear to the Company early in its talks with the PBGC on pension plan termination (after the Company had exhausted all other options) that the PBGC would only approve a replacement plan that took the form of a defined contribution plan that was not abusive. Indeed, the PBGC cautioned the Company and ALPA that a defined contribution plan with a 50 percent cap on contributions was the "outmost limit of acceptability under the agency's policy against abusive follow on plans." Accordingly, during negotiations with ALPA for the defined contribution plan, the Company recognized that it would be unlikely to avoid a PBGC abusiveness challenge to the plan without a reasonable cap on annual contributions.

A cap such as that found in the DC Plan is also expressly contemplated by Proposed IRS Regulation § 1.411(b)-2(d)(1), and found to be fully lawful and unrelated to the attainment of age: "A reduction in a participant's rate of allocation is not indirectly because of the attainment of any age in violation of section 411(b)(2) solely because of a positive correlation between attainment of any age and a reduction in the rate of allocation. Thus, a defined contribution plan does not fail to satisfy the minimum vesting standards of section 411(a) solely because the plan limits the total amount of employer contributions and forfeitures that may be allocated to a participant's account (for a particular plan year or for the participant's total years of credited service under the plan) . . . ." Proposed IRS Regulation § 1.411(b)-2(d)(1); cf. McDonnell Douglas, 191 F.3d at 951 ("employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination") (citing Hanebrink v. Brown Shoe Co., 110 F.3d 644, 647 (8th Cir. 1997) and Hazen, 507 U.S. at 611).

Because the cap on employer contributions to the DC Plan is a reasonable limitation not based on age, the Charging Pilots cannot make out a claim of discrimination under the ADEA.

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 than 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.[10] Accordingly, the only way US Airways could have avoided providing its oldest pilots with lesser amounts in their non-qualified plans would have been to continue the defined benefit plan, which, as demonstrated above, was an impossibility in light of the Company's perilous financial condition and need for PBGC approval of the plan.

Conclusion

For all of the foregoing reasons, US Airways requests that the instant charges of discrimination be found to be without merit.

If you have any further questions or require any additional information, please do not hesitate to call.

Very truly yours,

Tom A. Jerman
of O'MELVENY & MYERS LLP

[10] ALPA obtained in bargaining a commitment that US Airways would guarantee an eight percent rate of growth on each plan participant's non-qualified plan account. No such guarantee applies to a pilot's qualified plan account.

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February 24, 2004

VIA FACSIMILE AND FEDERAL EXPRESS

Rosemary Wilkes
Supervisory Investigator
U.S. Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, NY 10004-2112

Re: *Age Discrimination Charges Against US Airways, Inc.*

Dear Ms. Wilkes:

This letter is in response to your letter of February 9, 2004, requesting answers to the following list of questions with regard to the Retirement Savings Plan for Pilots of US Airways, Inc. (the "DC Plan").[1]

1. ***State whether pilots must work a minimum length of time for a pilot to obtain the target balance, and what is that length of time?***

It is difficult to answer this question directly because the phrase "target balance" is not used in the DC Plan, nor does the plan provide that the participants will ever reach any particular balance. The DC plan requires only that US Airways allocate a specific percentage of each pilot's salary to pilots' individual retirement accounts, and provides procedures for investment of those balances (or, in some circumstances, a fixed investment income). Therefore, under the literal terms of the DC Plan, there is no minimum length of time necessary to obtain a target balance because there is no target balance under the plan.

On the other hand, "target balance" was a theoretical construct used in the creation of the DC Plan, in combination with various other factors and assumptions, to generate the individual contribution rates that are set forth in the DC Plan. Under this construct, in determining the

[1] US Airways believes that all relevant documents responsive to the EEOC's questions were provided as exhibits to the Company's January 23, 2004 position statement. This letter and the exhibit attached hereto, like US Airways' position statement, are to be used solely by the EEOC in its investigation of the pending charges. All information contained in US Airways' response is confidential and should not be released to any outside party and/or entity without the written consent of US Airways.

contribution rate necessary to achieve a pilot's "target balance," it was assumed that every pilot would work from the date of implementation of the DC Plan until mandatory retirement at age 60. Therefore, under the theoretical construct by which the contribution rates were determined, all pilots must work to at least age 60 to obtain the target balance. Although the terms of the DC Plan do not consider length of service, one might assert that that the design of the DC Plan requires every pilot to work age 60 to "obtain" the target balance, and the "minimum length of time for a pilot to obtain the target balance" is the date between adoption of the DC Plan on April 1, 2003, and the individual pilot's 60th birthday.

It must be emphasized, however, that the concept of a "target balance" is only theoretical. In practice, there is no assurance that any pilot's account balance under the DC Plan will ever reach the "target balance," even if the pilot works until age 60. On the other hand, some pilots might achieve account balances that exceed the "target benefit." The variables that could affect the pilot's actual account balance at age 60 include the following:

- Whether the DC Plan remains in effect under its existing terms until the time of the pilot's retirement;
- Whether the pilot actually works for US Airways until age 60 (which could depend on both the pilot and the long-term viability of US Airways);
- The pilot's earnings in the ten years prior to the date of the pilot's retirement. The pilot's earnings will depend, in turn, on the following:
    - The contractual wage rates in effect during that ten year window;
    - The pilot's relative seniority during the same period; and
    - The number and size of aircraft flown by US Airways during the same period;
- The actual investment results of each pilot's account, which will depend, in turn, on the following:
    - The extent to which the pilot's DC Plan balances are subject to a guaranteed eight percent return under the terms of the plan; and, if not,
    - The overall performance of the stock and bond markets during the period between April 1, 2003 (the date the DC Plan went into effect), and the pilot's retirement date; and
    - The pilot's individual investment choices.

As explained in US Airways' position statement, there are a very small number of pilots between ages 57 and 59 where the annual contribution ceiling of 100 percent of salary under the DC Plan will limit the *theoretical* ability of the pilot to obtain the "target balance." Even in

those cases, however, the theoretical *inability* of the pilot to reach the "target balance" is no more certain than the theoretical *ability* of other pilots to reach the balance. For example, the increase in the S&P 500 since the plan went into effect on April 1, 2003, has been approximately 33 percent to date, compared to the *annual* return of eight percent assumed in determining a pilot's "target balance." It is possible, therefore, that a pilot who invested in an S&P 500 index fund (or some of the investments that have done even better during this period) would have reached or exceeded the "target balance" upon retirement at age 60 even though the contributions to the plan were capped at 100 percent.

2. ***Under FAA regulations pilots must retire upon turning age 60. If due to mandatory retirement a pilot cannot work the minimum length of time to obtain the target balance, what is the effect on the pilot's retirement benefit?***

I believe that the answer set forth above also answers this question. As previously explained, there is no "target balance" under the terms of the DC Plan, and, therefore, there is no "minimum length of time to obtain the target balance" nor any way of knowing whether a pilot will, in fact, obtain any particular balance by the mandatory retirement age.

a. ***For example, assume two pilots who, except for the amount of time spent as a Captain, have identical work histories. Pilot A, age 54, has 15 years of experience as a Captain. Pilot B, age 59, has 20 years of experience as a Captain. Assuming that their salaries are the same, if both pilots retire at age 60, what will the difference in their retirement benefit be?***

Unfortunately, it is not possible to identify any US Airways pilots with identical work histories because a pilot's position is determined by a seniority-based bidding system. The pilot's seniority in this context means the pilot's *seniority number*; no two pilots can have the same seniority number, and, therefore, no two pilots can have identical work histories. The difference between a pilot's seniority, as determined by years of employment, and a pilot's seniority number, is significant. When an airline is hiring pilots, it will typically fill a training class of 20 or 30 pilots on the same day; although all of the pilots in the class will have the sa[me] date of hire, they will be assigned seniority numbers based on some other factor.[2] A difference of 20 or 30 places on the seniority roster can make a large difference in salary if it makes the difference between holding a captain's position or a first officer's position.

This phenomena becomes even more dramatic when looking at pilots hired in different time periods because pilot hiring tends to be very cyclical depending on the nation's economy. To use the most recent example, US Airways did not hire any pilots between 1991 and 1998, and then hired roughly 1000 pilots in little over a year. Thus, of the 5600 pilots currently on the seniority list, the last pilot hired in 1991 and the first pilot hired in 1998, are only one seniority number apart whereas the first pilot hired in 1998, and the last pilot hired in 1999, are 1000

[2] In this circumstance, seniority numbers are assigned at US Airways on the basis of age; other carriers may use other methods.

places apart. Thus, comparing two pilots based on years of experience, particularly when the pilots were hired during different time periods, result in dramatically different work histories.

As a result of these factors, one cannot apply the DC Plan benefit formulae in a purely hypothetical fashion. Instead, it is necessary to identify actual pilots, with actual seniority numbers and compensation histories, to determine the pilots' benefits under the plan. Therefore, in response to your question we have attempted to identify two pilots who closely fit your assumptions (except that, to simplify the analysis, we have used years as a pilot instead of years as a captain).

We should also emphasize that the "retirement benefit" for the two pilots consists of at least three different components: (1) a monthly annuity from the PBGC under the terminated defined benefit plan; (2) an annual contribution to the pilot's defined contribution account based on a percentage of the pilot's wages; (3) earnings on the pilot's DC Plan contributions; and (4) for some pilots, an existing balance under defined contribution plans no longer in effect. Because the different components are payable in different ways over different time periods, and because the time periods are different depending on the pilot's retirement age, we have computed each benefit to a lump sum at age 60, and then converted that amount to the "present value" of April 1, 2003, when the DC Plan went into effect.

With these caveats in mind, the pilot who was closest to 59 years old, and 20 years of service, as of April 1, 2003, when the plan when into effect was Employee No. . The pilot who was closest to 54 years old, and 15 years of service, as of April 1, 2003, was Employee No . The chart attached as Exhibit 1 shows their respective benefits under the DC Plan and indicates that the 59 year old pilot will achieve a higher total retirement benefit than the 54 year old pilot. We must emphasize that these pilots are not necessarily representative of other pilots in their age group; they are simply two pilots who were closest in age and years of service to your hypothetical.

3. ***If pilots must work a minimum length of time to obtain the target balance, why did US Air select a plan in which certain employees could not work a sufficient period of time to obtain the target balance?***

As explained above, the terms of the DC Plan provide only an annual contribution rate, and do not provide for a target balance. The reason US Airways did not select a plan in which each pilot would receive a specific benefit at the time of retirement, whether called a "target balance" or some other name, is that such a plan would constitute a "defined benefit" plan under the Employee Retirement Income Security Act ("ERISA") § 3(35), 29 U.S.C. § 1002(35).

As explained in the Company's January 23, 2004, statement of position, adoption of a defined benefit plan – particularly a plan that ensured that every pilot at retirement received a "target balance" based on the terminated defined benefit plan – would almost certainly have been challenged by the PBGC as an unlawful follow-on plan. This is because the PBGC would have viewed such a plan as one "that build[s] on PBGC's guaranteed benefits to substantially replicate the old benefits." See http://www.pbgc.gov/news/press_releases/2003/pr03_30.htm. Indeed,

after reviewing the Company's original design for the defined contribution plan – which included a much lower cap on Company contributions and dramatically limited the definition of final average earnings relative to the definition contained in the defined benefit plan, the PBGC informed the Company that the plan "was at the outmost limit of acceptability under the agency's policy against abusive follow-on plans."

In summary, while US Airways used the concept of a "target balance" as one factor in designing the contribution rates, it was necessary to incorporate other factors, including a cap on the contribution rates, to ensure that the plan would pass muster with the PBGC.

4. ***Without regard to whether the beneficiaries are pilots or not, does US Air maintain any retirement plans that are not qualified under 26 U.S.C. § 415(c)? If US Air does have unqualified plans, did Respondent consider allow pilots who could not make the target balance to participate in an unqualified plan? If US Air maintains an unqualified retirement plan for pilots, did US Air consider allowing pilots who could not make the target balance to participate in this unqualified plan in order to make up any benefits lost in the conversion?***

US Airways does maintain non-qualified plans, including the DC Plan itself. The DC Plan consists of two parts – a tax-qualified plan that covers all Company contributions to the limits allowed by Internal Revenue Code § 415, and a non-qualified plan that covers Company contributions that exceed Internal Revenue Code limits.

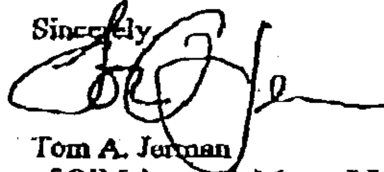
With regard to the second part of this question, it is unclear whether the contributions you have in mind would have been Company contributions or pilot contributions. If the former, the effect of providing for Company contributions "to make up any benefits lost in the conversion" would have to create an unlawful follow-on plan. If the latter, there would be no difference between allowing the pilot to contribute his or her own money to an "unqualified retirement plan," and the pilot investing that money in his or her own brokerage account. In both cases, the contributions would not be deductible from the pilot's income, and the income earned by the contributions would be taxable. A pilot is, of course, free to make such investments if he or she desires.

5. ***To the extent that the Air Line Pilots Association was involved in any of the decisions regarding the issue in question, please describe the extent of the involvement.***

The Association's involvement is described in pages 3 to 8 of the Company's January 23, 2004 position statement.

If you have any further questions, or require any further information, please feel free to contact me.

Sincerely,



Tom A. Jerman
of O'Melveny & Myers LLP

Attachment

EXHIBIT 1

Summary Pension Information

	58 Year Old	54 Year Old
Employee Information		
Employee Number		
Date of Birth		
Date of Hire	9/13/1982	8/1/199[illegible]
Years of Service as of 4/1/03	20.8	14.7
Seniority Number as of 4/1/03	1091	3878
Annual Salary as of 4/1/03	$148,191	$101,30[illegible]
Terminated DB Plan Information		
Final Average Earnings	$191,604	$123,5[illegible]
DB Plan Benefit Percentage		
(1.8% for first 25 years, 1% for next five)	38.9%	37.1%
Benefit Expressed as a		
Lump Sum (at Age 60)	$716,907	$441,4[illegible]3
Lump Sum (Present Valued to 4/1/03)	$863,462	$279,1[illegible]1
Benefits Under New DC Plan		
Company-paid DC Plan		
Company-paid DC Percentage	100%	21.4[illegible]
Average Annual Contributions	$150,186	$28,41[illegible]
Total Contributions (No Interest)	$150,185	$141,9[illegible]5
Company-paid DC Benefit expressed as a 1/		
Lump Sum (at Age 60, includes Interest)	$152,790	$177,[illegible]9
Lump Sum (Present Valued to 4/1/03)	$141,400	$112,4[illegible]9
PBGC Benefit expressed as a 2/		
Lump Sum (at Age 60)	$608,761	$263,5[illegible]9
Lump Sum (Present Valued to 4/1/03)	$563,379	$166,7[illegible]2
Grand Total Benefits Under PBGC and DC Plan		
Lump Sum (at Age 60, includes Interest)	$781,551	$441,4[illegible]8
Lump Sum (Present Valued to 4/1/03)	$704,770	$279,1[illegible]1

1/ The DC plan benefit is expressed as a lump sum because the DC plan will result in a lump sum upon retirement. To compare the annuity value of the DC lump sum with the PBGC lump sum, divide the lump sum by [illegible] to obtain the single life benefit or [illegible] to obtain the 50% joint & survivor benefit.

2/ The PBGC pays out its benefits in an annuity. For analytic purposes, the PBGC benefit has been converted to a lump sum based on the assumption that the benefit is payable as a 50% joint & survivor benefit, which is the presumptive form of benefit.