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M E M O R A N D U M

TO: APFA Board of Directors

FROM: Mady Gilson
APFA General Counsel

DATE: November 18, 2014

RE: The CLA, the NPA and the Interest Arbitration

APFA has asked for our opinion on a number of assertions challenging the validity of the Conditional Labor Agreement ("CLA"), the Negotiations Protocol Agreement ("NPA") and the upcoming interest arbitration. Here are some simple answers to the assertions challenging the validity of the CLA followed by some explanations.

1. The CLA is enforceable – the fact that the CLA was negotiated with a non-employer does not make it null and void.

2. The CLA did not require membership ratification.

3. The NPA is legally binding – not optional.

4. The APFA Board of Directors cannot rescind or renege on the NPA regardless of the Company's current position on prefunding match. Under the Railway Act, that dispute has to be handled through the grievance arbitration process; Company's position on prefunding will likely be decided in a separate arbitration. APFA has no legal right to renege on the NPA based on that dispute.

5. The Arbitrators' Joint Collective Bargaining Agreement award will be binding and valid.

The premises of most of these claims are that the CLA and the NPA are invalid or should have been ratified by the membership. This memo addresses these claims in summary fashion and is not intended to be a full explanation of our opinions on the various subjects. As we now explain, those premises are incorrect. Therefore, the contract that results from the interest arbitration will be valid.

1. **Is the CLA unenforceable because it was negotiated with US Airways when US Airways was not the employer of APFA-represented Flight Attendants?**

No. The fact that the CLA was negotiated with US Airways management before the merger was consummated and therefore was not an agreement between APFA and the employer with which it had a bargaining relationship is of no legal significance. The CLA was only to come into effect if US Airways was successful in achieving a merger with American Airlines and US Airways management – who negotiated the CLA – became the management team at the merged carrier. A similar event occurred when Carl Ichan was attempting a hostile takeover of TWA. Ichan and ALPA negotiated the terms of an agreement that was to become effective only if Ichan succeeded in acquiring the airline. Ichan did succeed, the agreement became effective and various pilots sued, challenging the legitimacy of the agreement. The U.S. Court of Appeals for the 9th Circuit flatly rejected plaintiffs' claim, stating: "It would undercut the stated purpose of the RLA — to avoid interruption to transportation service — to say that ALPA was banned from resolving potential disputes *in advance* with a likely employer." *See, for example, Barthelemy v. ALPA*, 897 F.2d 999, 1008 (9th Cir.1990).

2. **Did the CLA require Membership ratification?**

No. Under normal circumstances, an agreement such as the CLA would be sent to the membership for ratification. However, the CLA was reached in circumstances that were far from normal.

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It is our opinion that APFA also acted properly in not sending the CLA out for ratification. We reach this conclusion for two reasons. First, the CLA was negotiated under unique and extremely time-sensitive circumstances. American was in bankruptcy, and the Board determined that the best interests of the Flight Attendants would be served by a merger with US Airways inside of bankruptcy. US Airways would not pursue the merger unless it quickly forged with APFA (and APA and TWU) a path to labor cost certainty and a mechanism to ensure labor peace. Importantly, the CLA was to govern only during a bridge period beginning with the approval of the Plan of Reorganization and ending with the achievement of a new collective bargaining agreement. As time was of the essence, the CLA was reached quickly. Recognizing all these circumstances, the APFA Board of Directors unanimously passed a resolution endorsing and supporting the CLA (including the interest arbitration provision), without finding a Constitutional requirement that the CLA be sent to the membership for ratification. Based on the circumstances, the Board was acting well within its authority to interpret that Constitution and to act to protect and promote the interests of the membership. Article III, Section 3.A and Section 3.L(22). *See also, Lindsay v. Association of Professional Flight Attendants*, 581 F.3d 47 (2d Cir. 2009), *cert. denied,* 561 U.S. 1038 (2009).

Second, in presenting the LBFO to the membership for ratification months later, APFA made clear to the membership that the CLA – the terms of which were widely disseminated

during the LBFO ratification process – was entwined with the LBFO: if members ratified the LBFO and the merger occurred, the CLA (including the interest arbitration provision) would go into effect. Thus, the ratification of the LBFO of necessity included approval of the CLA. Therefore, while it is correct that when the merger was consummated the CLA replaced the LBFO without a further ratification vote, no such vote was required.

3. **Did the NPA require Membership ratification?**

No. The NPA did not require membership ratification for the same reasons that the negotiating procedures in the CLA did not require ratification. The NPA was nothing more than a procedural agreement implementing the bargaining structure created in the CLA. It was the kind of agreement APFA leadership typically makes in connection with negotiations. It did not alter any terms and conditions of employment, but based on the CLA, described how those terms and conditions of employment would be negotiated. And by its terms, any tentative agreement reached in the negotiation process under the NPA was subject to membership ratification. Moreover, the NPA made it clear – as did the materials widely distributed to the membership during the TA ratification process – that failure to ratify would result in interest arbitration. Thus, when the membership voted on the TA they were likewise opting for the next step of the negotiating process – interest arbitration.

4. **Did the Company's refusal to refund their contribution to prefunding as provided in the LBFO give APFA the right to unilaterally "cancel" the CLA/NPA?**

No. The NPA is a binding contract entered into by APFA, AFA, US Airways and American Airlines. It is a fundamental principle of contract law that one party cannot simply decide it no longer wants to be bound by the contract. Nor can the APFA Board of Directors unilaterally rescind or terminate it. If APFA were to fail to fulfill its obligations under the NPA, it would be breaching that contract and subjecting itself to liability.

APFA's claim that the Company breached the LBFO by declining to provide the promised prefunding match is a typical "minor dispute" under the Railway Labor Act concerning the interpretation of a provision of a labor agreement. The sole mechanism for resolving that dispute is through the contractual grievance process. APFA has invoked that process by filing a Presidential Grievance. Although there is no apparent connection between this minor dispute under the LBFO and the NPA, even if there were, APFA has no legal right to renege on the NPA based on that dispute.

5. **Will the Arbitrators' Joint Collective Bargaining Agreement award be binding and valid?**

Yes. The arbitration process was created in the CLA and implemented in the NPA. Because both of those documents are binding and valid, the award that results from the interest arbitration will be binding and valid.

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For these reasons, it is our opinion that the CLA, the NPA and their provision for an interest arbitration process are valid and binding, and no membership ratification was required.

Any Flight Attendants who might file a lawsuit seeking to invalidate the CLA and the interest arbitration process, the NPA or the interest arbitration award would face what are, in our opinion, insurmountable legal hurdles under the governing federal law principles. In addition to those set out in above, by way of example they will have waited years to file suit, despite the fact that beginning in April 2012 at every step leading up to today's situation - from the negotiations of the CLA, to the Section 1113 process, to the LBFO ratification, to the implementation of the CLA, to the signing of the Agreement on Bargaining and Representation and the NPA, to the implementation of the NPA, to the ensuing 150 day negotiations period, Tentative Agreement and its rejection, APFA has been clear that a single collective bargaining agreement for LUS and LAA Flight Attendants would ultimately be determined in arbitration if no Tentative Agreement was reached, or if one was reached by not ratified.

Moreover, during their delay, Flights Attendants who might file a lawsuit will have reaped the economic benefits of the merger generally and of the CLA specifically, both of which were direct consequences of APFA's actions. Under all of these circumstances, we believe that it extraordinarily unlikely that a court would invalidate an award of the interest arbitration panel issued pursuant to the CLA and the NPA.