BEFORE THE AMERICAN AIRLINES, INC. - ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS SYSTEM BOARD OF ADJUSTMENT

RICHARD BLOCH, ARBITRATOR
LUCRETIA GUIA, COMPANY MEMBER
PAUL JONES, COMPANY MEMBER
ROBERT CLAYMAN, UNION MEMBER
MARCUS GLUTH, UNION MEMBER

In the Matter of Arbitration Between AMERICAN AIRLINES, INC. and the ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS	Grievance No. SS-32-2014-APFA-2 VEBA Prefunding

POST-HEARING BRIEF OF AMERICAN AIRLINES, INC.

Robert A. Siegel
Chris A. Hollinger
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA
(213) 430-6000

Attorneys for American Airlines, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

PRELIMINARY STATEMENT

The Association of Professional Flight Attendants ("APFA") asserts in this grievance that active flight attendants should receive approximately $49 million in "prefunding" contributions that American Airlines, Inc. ("American" or the "Company") set aside in a trust to pay some portion of the cost of medical benefits for retired flight attendants. Under the express terms of the American-APFA collective bargaining agreement, however, the active flight attendants' entitlement to these Company "matching contributions" is contingent "on the successful resolution of the Section 1114 process." Because that contingency manifestly has not been satisfied, the flight attendants are not entitled to the Company's matching contributions, and the APFA's grievance should be denied.

In 2012, while in Chapter 11 bankruptcy, American informed the APFA and its other unions that it required a 20 percent across-the-board reduction in its labor costs (a total of $1.25 billion per year, of which $230 million per year was allocable to the flight attendant work group) in order successfully to restructure and emerge from bankruptcy. American also informed each of its unions that it no longer intended to subsidize retiree medical benefits for either current or future retirees. The APFA-represented flight attendants had been contributing their own money to a trust to prefund a portion of the cost of their post-retirement medical benefits. American therefore proposed and the APFA agreed that, upon elimination of retiree medical benefits for active flight attendants, American would return those flight attendants' own prefunding contributions plus investment earnings. However, the Company only was willing to distribute to the

active flight attendants the corresponding Company matching contributions "on the successful resolution of the Section 1114 process." In other words, the Company would disburse the matching contributions to active flight attendants only if the Company was able to eliminate its obligation to fund medical benefits for current retirees.

The Company agreed to distribute the matching contributions to active flight attendants only if it no longer had an obligation to pay medical costs for current retirees because it would be "no skin off the Company's back" to pay the matching contributions to active employees. In any other circumstance, however, the Company's payment of the matching contributions to active flight attendants would have effectively reduced the flight attendant labor cost savings of 20 percent that the parties negotiated in bankruptcy. It would be entirely irrational – and unfair – for the Company to have to pay $49 million to active flight attendants without achieving an offsetting $49 million in savings, particularly when all other employee groups were required to meet their own 20 percent savings target.

The record is clear that the Company has obtained literally no relief from its current retiree medical obligations through the bankruptcy process. The Company filed an Adversary Proceeding against the Section 1114 Retiree Committee seeking a declaratory judgment that the current retirees' benefits were not vested under the health plan documents, but the Bankruptcy Court denied that motion, finding that the collective bargaining agreement, and not the health plan documents, was controlling. The APFA argues, however, that the "Section 1114 process" contingency referenced in the collective bargaining agreement required the Company to file a different pleading in the Bankruptcy

Court – a Motion to Modify retiree medical benefits – and because the Company did not do so, it waived the contingency stated in the collective bargaining agreement. And as a result, says the APFA, the Company now owes the active flight attendants $49 million. The APFA's argument is baseless and must be rejected.

First, the language of the collective bargaining agreement does not require that the Company must specifically file a Motion to Modify under Section 1114 in order to preserve the "successful resolution" contingency. The APFA could have bargained for such language, but it did not. Second, the APFA cannot point to any bargaining history in support of its argument about the relevant contract language. The only evidence in the record regarding the bargaining history is testimony that American told the APFA that it would distribute the matching contributions only if it was successful in "this whole 1114 thing" – testimony that is completely consistent with the Company's decision to pursue the Adversary Proceeding instead of a Motion to Modify. Third, by the time the APFA agreed to submit the language at issue to a membership ratification vote, the Company had already filed an Adversary Proceeding against the Section 1114 Retiree Committee – a proceeding the APFA described in its own publications as part of the "Section 1114 process."

The Company's decision to file a Section 1114 Adversary Proceeding, and not to file a Motion to Modify, was reasonable and fulfilled any obligation the Company may have had to attempt to reach a successful resolution of the Section 1114 process. The Company was not successful in its attempts, in large part due to the APFA's opposition as a member of the Section 1114 Retiree Committee, and the Company was therefore

unable to reach a "successful resolution of the Section 1114 process." Accordingly, the Company has no obligation to distribute the matching contributions to active flight attendants, and the APFA's grievance must be denied.

ISSUE PRESENTED

Did the Company violate the current agreements between the APFA and American Airlines, including specifically: paragraph 6 of the MOU dated December 31, 2012; the "Retiree Health" provisions of the CLA; Article 35.C and the side letter agreement to Article 35 of the Collective Bargaining Agreement ("CBA") dated September 12, 2012 and any related Articles of the CBA; and Attachment G to the Last Best Final Offer ("LBFO") dated July 19, 2012? (Tr. 664:12-14.)

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

A. American's Last Best and Final Offer ("LBFO") to the APFA (July 19, 2012, updated July 27, 2012): Article 35 (Jt. Ex. 25.)

Attachment G - Retiree Medical & Life -- Flight Attendants

*** * ***

> 4. A participant who currently prefunds for retiree medical will be refunded the employee's prefunding account (which reflects investment experience).
>
> 5. ***Contingent on the successful resolution of the Section 1114 process***, as soon as practicable ***after termination of*** the Trust Agreement for the Group Life and Health Benefits Plan for Employees of Participating AMR Corporation Subsidiaries (Union Employees), the Company prefunding contributions for each participating active employee, and investment earnings attributable thereto, will be distributed to the employee (subject to applicable tax withholdings), excluding employees who have already received refunds of their employee prefunding accounts. (Emphasis added.)

B. American-APFA CBA (September 12, 2012): Article 35 (Jt. Ex. 30.)

C. RETIREE HEALTH CARE

Retiree Medical Coverage for Flight Attendants Retiring On or After November 1, 2012

1. Notwithstanding any other collective bargaining agreement provisions, and all other agreements, past practices, and arbitration awards between the parties, the Company is not required to maintain, fund, or provide for retiree medical or retiree life insurance benefits.

2. Effective October 31, 2012, the retiree medical prefunding program will be discontinued for Flight Attendants who retire on or after November 1, 2012. Flight Attendants who are prefunding as of October 31, 2012 will be refunded their prefunding contributions (to the extent not already refunded) plus investment experience within 120 days.

3. Retiree Medical Coverage For Flight Attendants Ages 55 through 64 Who Retire On or After November 1, 2012. Flight Attendants retiring on or after age 55 and through age 64 will have access to a Company-sponsored retiree medical option. Retiree contribution rates for this coverage will be 100% of projected annual expenses (which includes administrative expenses) using data, assumptions, and methodologies for calculating future retiree healthcare costs. For the remainder of 2012, the Company will offer the pre-65 plan design (which includes a provider network) offered to management retirees. Although it is the Company's intention to continue to make available access to medical coverage for retirees from age 55 through age 64, the Company reserves the right to modify, amend, or terminate the Retiree Medical Plan at any time.

4. Retiree Medical Coverage For Flight Attendants Age 65 and Older Who Retire On or After November 1, 2012. Retiree Medical Coverage shall cease when the retired Flight Attendant attains age 65. Retirees age 65 and over will be offered access to purchase, at the retiree's expense, a guaranteed issue Medicare supplement plan through a third party administrator, to the extent available.

C. American-APFA CBA (September 12, 2012): Article 35 Side Letter (Jt. Ex. 30.)

"Employee and Company Prefunding Contributions"

Dear Laura [Glading],

During the restructuring agreement negotiations, the parties agreed that upon implementation of the changes to the Retiree medical plan program an active employee who currently prefunds for retiree medical will be refunded the employee's prefunding account (which reflects investment experience), excluding employees who have already received employee prefunding refunds.

In addition, the parties agreed that contingent on the successful resolution of the Section 1114 process, as soon as practicable after termination of the Trust Agreement for the Group Life and Health Benefits Plan for Employees of Participating AMR Corporation Subsidiaries (Union Employees), the Company prefunding contributions for each participating active employee, and investment earnings attributable thereto, will be distributed to the employee (subject to applicable tax withholdings and/or excise tax), excluding employees who have already received refunds of their employee prefunding accounts. The refund will be made to the employee following the successful conclusion of the 1114 process.

D. US Airways-APFA Conditional Labor Agreement ("CLA") (April 12, 2012) (Jt. Ex. 31.)

Retiree Health:

1. Eliminate current provisions.

2. For FAs on the AA seniority list as of the Plan Effective Date only – VEBA seeded with current balance of FA and AA contributions per Pre-funding provisions of CBA.

E. US Airways-APFA Memorandum of Understanding ("MOU") (December 31, 2012) (Jt. Ex. 32.)

* * *

6. As a result of the prior return by American of employee prefunding contributions pursuant to the New CBA [i.e., the September 12, 2012

> American-APFA CBA], the provisions in the CLA under Retiree Health, Paragraph 2 relating to a VEBA will not be implemented and are deemed void. It is the intent of the parties to maintain the Retiree Medical program provided for in the New CBA.

STATEMENT OF FACTS

A. Eliminating Its Retiree Medical Obligations Was A Critical Component Of American's Chapter 11 Restructuring Plan, And American So Advised The APFA.

For more than a decade after the turn of the century, American faced enormous financial challenges. The Company lost more than $10 billion due to the aftermath of the 2001 terrorist attacks, multiple natural disasters, dramatic fuel price increases, the overall decline in the global financial market, and decreased demand for air travel. (Union Ex. 21 at 4, 7.) Not surprisingly, then, on November 29, 2011, American filed for relief under Chapter 11 of the Bankruptcy Code in the Southern District of New York. (*Id.*; Jt. Ex. 73.)

The United States Trustee appointed the Unsecured Creditors Committee (the "UCC") for the American bankruptcy on December 5, 2011. (*See* 11 U.S.C. § 1102(a); Jt. Ex. 73.) The UCC was charged with "overseeing the kind of reorganization and any restructuring the Company was doing." (Tr. 238:10-12.) The APFA and other labor unions, including the Transport Workers Union ("TWU"), were among the creditors appointed to the UCC. (Tr. 239:9-14.) Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") was appointed to serve as the UCC's counsel. (Tr. 497:21-498:4.)

On March 23, 2012, the Bankruptcy Court directed the appointment of the "Committee of Retired Employees Pursuant to 11 U.S.C. § 1114" (the "Section 1114

Retiree Committee") to serve as the representative of retirees who were then receiving health and welfare benefits from the Company. (11 U.S.C. § 1114(b); Jt. Ex. 47.) On May 3, 2012, the Bankruptcy Court approved the recommendations of the United States Trustee with respect to the authorized representatives of the labor organization members of the Section 1114 Retiree Committee. (Jt. Exs. 54, 56, 73.) Laura Glading, President of the APFA, and Robert Gless, Deputy Director, Air Transport Division of the TWU, volunteered and were chosen to represent the APFA and TWU, respectively. (Tr. 281:12-21; Jt. Exs. 56, 73.) The Allied Pilots Association ("APA"), the collective bargaining representative of American's pilots, decided against trying to undertake representation of the retired pilots at the same it was negotiating on behalf of active pilots, and an individual was instead appointed to represent the interests of the pilot retirees on the Section 1114 Retiree Committee. (Tr. 283:12-284:7; Jt. Ex. 73.)

Pursuant to Section 1113 of the Bankruptcy Code, beginning in early 2012, the Company engaged each of its unions in negotiations for new collective bargaining agreements that would enable the Company to successfully restructure. (Tr. 240:17-241:1, 299:9-300:10, 628:16-629:17; Jt. Ex. 46.) As part of this process, the Company shared its business plan with the unions and told them that it would need to pursue motions under Section 1113 to reject its collective bargaining agreements unless it obtained adequate relief through negotiations. (Tr. 241:13-243:18, 248:15-19.)

During the week of February 1, 2012, Jeff Brundage, then American's Senior Vice President of Human Resources, gave a "big tent" presentation to all of the unions. (Tr. 242:16-243:18, 403:7-18; U. Ex. 21.) He explained in his presentation that the Company

faced serious financial difficulties and needed to achieve $1.25 billion per year in savings from active employees (Tr. 635:13-17; U. Ex. 21), a 20 percent reduction in costs for each work group, which, for APFA-represented flight attendants, amounted to $230 million per year in savings. (Tr. 241:5-7, 635:17-19; U. Ex. 21.) Consistent with the mandate of Section 1113 that "all creditors, the debtor and all of the affected parties are treated fairly and equitably" (11 U.S.C. § 1113(b)(1)(A)), the Company had a "very disciplined process" for ensuring that each work group's collective bargaining agreement modifications would generate the requisite level of savings. (Tr. 637:20-638:8.) For example, if the Company proposed a set of contract modifications that would generate $230 million in annual savings, and the APFA accepted the Company's proposal but wanted one improvement that would cost the Company a total of $49 million, the APFA would then have to agree to $49 million in cost reductions in addition to the concessions valued at $230 million. (*See* Tr. 642:16-21.)

Denise Lynn, American's Vice President of Employee Relations and later Senior Vice President of People, determined how the Company would try to achieve its Section 1113 cost-reduction goals, including how it would address retiree medical benefits. (Tr. 628:22-629:4.) The bottom line was that the Company wanted to "effectively eliminate any subsidy for retiree medical for active employees going forward" (Tr. 636:20-22.), and the unions were advised during the negotiations of the Company's goal. (Tr. 405:8-406:14; U. Ex. 27.) Although not a subject of bargaining in the Section 1113 process, the unions were also advised that the Company planned to try

to eliminate its obligation to pay the medical expenses of the already-retired employees as well. (Tr. 405:20-406:14.)

Following the "big tent" meeting on February 1, 2012, Mary Anderson, American's Managing Director of Health and Welfare, along with her team, relayed the Company's goals separately to each union by presenting "American Airlines: Healthcare Marketplace Trends," a slide deck that she and her staff had prepared. (Tr. 403:19-404:1; U. Ex. 27.) Ms. Anderson explained that retiree health care costs were one of the most burdensome expenses that the Company had on its books. (*See* Tr. 405:11; U. Ex. 27 at 17.) Retiree medical benefits accounted for $3.0 billion of the Company's overall liabilities and, in 2010, were a $178 million annual cash expense – significantly higher than any other airline's retiree medical liabilities and expenses. (U. Ex. 27 at 17-18.) Ms. Anderson noted in her presentation that JetBlue and AirTran, for example, did not provide any pre-65 retiree medical coverage, and that, while legacy carriers such as Continental offered retiree medical plans, the employees paid 100 percent of the costs and there was no employer subsidy. (Tr. 301:10-302:10; U. Ex. 27 at 18.) She told "the APFA's representatives" that the Company needed retiree medical "off [its] books" – as Ms. Anderson elaborated at the hearing, this meant the Company sought to have "no liability, no cash expense, [and] no accounting expense" for retiree medical for either active employees or current retirees. (Tr. 402:3-20.)

B. Because Flight Attendant Retiree Medical Benefits Were Being Provided Through A Prefunding Program, American Proposed To Eliminate That Program And Its Obligation To Pay For Retiree Medical Coverage.

American made its initial Section 1113 proposals to each of the unions on February 1, 2012. (*See* Tr. 403:3-5; Jt. Exs. 8, 73.) With respect to the APFA, the Company proposed that then-active flight attendants would have access to a Company-sponsored medical plan upon their retirement and prior to age 65, but those medical benefits would be 100 percent funded by retiree contributions. (Jt. Ex. 8.) The retiree medical prefunding program in which active flight attendants had been participating was to be eliminated. (*Id.*)

1. Prefunding Had Been Discontinued For Many Employee Groups Prior To American's Bankruptcy And, When This Happened, American Never Paid The Matching Contributions To Active Employees.

American's prefunding program began in 1989, when the Company and the TWU entered into collective bargaining agreements which required active employees, who wanted to be eligible for Company-provided medical benefits upon their retirement, to "prefund" a small portion of the cost of their future retiree medical benefits through paycheck deductions; the active employees' prefunding contributions were held in a voluntary employees' beneficiary association ("VEBA") trust. (Jt. Ex. 37.) The Company later expanded the prefunding program unilaterally, to include management, support staff, and the non-union agents, representatives, and planners ("ARPs"). (Tr. 397:4-9.) And in the 2001 collective bargaining agreement, the APFA agreed to flight attendant participation in retiree medical prefunding as well. (Jt. Ex. 35.)

Under the prefunding program, when an employee retired, that employee's own prefunding contributions (as well as the Company's corresponding matching contributions, once applicable), plus investment earnings, were put into "draw-down" status. (Tr. 394:3-9.) This meant that, for each of the first ten years after the employee retired, ten percent of the funds would become available to the Company to pay for a portion of the cost of retiree medical benefits. (*Id.*) These drawn-down funds were not, however, specifically allocated to pay for the retiree medical claims of the particular employee who had made the prefunding contributions; rather, the funds were used to help pay for the retiree medical benefits of the relevant work group as a whole, e.g., former TWU- or APFA-represented retirees. (*See* Tr. 395:4-396:6.) Thus, for instance, even if a TWU retiree had no medical expenses in a particular year, the drawn-down ten percent of his/her prefunding contributions would be used to defray some of the cost of the medical benefits of other TWU retirees. (Tr. 395:14-20.)

Trust documents governed the various prefunding VEBAs, and generally required that the trustee manage and invest the monies in the trusts. (Jt. Exs. 38-40, 42-43.) For the TWU-represented work groups, for example, each individual employee's own prefunding contributions were commingled and invested together in a single trust account with the other TWU-represented employees' prefunding contributions. (*See* Tr. 393:13-19, 394:10-18.) No employee had an individual account within the trust. (*Id.*) The trust administrator, however, kept track of each participant's own prefunding contributions and the investment earnings attributable thereto. (Tr. 393:16-19, 394:16-18.) In other words, "[t]he money isn't physically segregated into 15,000 or 30,000 different accounts. It sits

in a master trust. It is invested together. The notional account is like a recordkeeping or a bookkeeping entry, where we keep track of the money on a set of books." (Tr. 394:10-18.) This notional recordkeeping on a participant-by-participant basis ensured that the Company knew how much money in the trust account was to be put into a draw-down status in each of the ten years following an employee's retirement. (Tr. 394:16-395:3.)

In 1992, a "Company match" – i.e., an amount equal to each employee's individual contributions – began to be added to the prefunding trusts. (Jt. Ex. 39.) The Company's matching contributions were held in separate accounts within the trusts and, like the individual employee contributions, were recorded notionally for each of the participants. (*Id.*) The Company matching contributions were a funding mechanism to cover a small portion of the actual costs of the retiree medical benefits. (Tr. 389:15-18.) But unlike employer matching contributions made to an employee's 401(k), the American employees who participated in prefunding never had a right to the Company matching contributions associated with their own individual contributions – the Company's matching contributions were never the "employee's money." (Tr. 389:7-18.) Accordingly, in the case of an APFA-represented flight attendant's death, termination, or resignation, his/her own prefunding contributions were refunded but the associated Company matching contributions were retained in the trust to help pay for the medical benefits of retired flight attendants. (Tr. 389:21-392:6; Jt. Ex. 35.)

By the time American filed for bankruptcy in November 2011, the Company had already discontinued the prefunding program for management, support staff, and the ARPs, and it also had reached agreements with the TWU to remove two groups of active

employees from the prefunding program. (Tr. 397:14-400:11.) In each instance, the Company returned the active employee's individual prefunding contributions along with the income earned from investments. (*Id.*) The corresponding Company matching contributions were always retained in the applicable trust. (*Id.*) The matching contributions were used by the Company to defray some of the costs of the medical expenses of already-retired employees from the relevant work group. (*Id.*; *see also* Tr. 399:7-400:5, 614:11-615:8, 618:17-619:8, 633:17-634:18.)

The flight attendants had likewise received only their own contributions, but not the Company match, when an earlier prefunding program was terminated. During the 1993 flight attendant strike, American had implemented prefunding for the flight attendants, and, for those who participated, the Company made a matching contribution to a VEBA trust. (*See* Tr. 607:2-13, 608:14-17; U. Ex. 19 at 26.) When the interest arbitration panel created to determine the terms of the new collective bargaining agreement subsequently directed that the flight attendant prefunding program be discontinued, the Company returned the flight attendants' own contributions. (Tr. 615:5-8; U. Ex. 19 at 26.) The Company matching contributions, however, remained in the trust and were used to pay for the medical benefits of flight attendant retirees. (Tr. 614:18-615:4; U. Ex. 19 at 26.)

2. APFA Accepts American's Proposal To Eliminate The Flight Attendant Prefunding Program And American's Obligation To Fund Retiree Medical Benefits – With Any Payment Of The Company Matching Contributions To Active Flight Attendants "Contingent On The Successful Resolution Of The Section 1114 Process."

Under its initial Section 1113 proposal, presented to the APFA on February 1, 2012, the Company was to refund the individual prefunding contributions, plus investment experience, made by active flight attendants who had been participating in the prefunding program. (Jt. Ex. 8.) In keeping with its consistent past practice when discontinuing prefunding for groups of active employees (discussed in Section B.1, above), active flight attendants were not to receive the Company matching contributions associated with their own prefunding contributions; rather, the matching contributions were to remain in the VEBA trust.

The APFA responded on March 13, 2012 by proposing that the Company transfer "funds from [the] current VEBA [i.e., the flight attendant prefunding trust] contributed by ***and on behalf of*** active APFA-represented Flight Attendants" to a new VEBA that would have covered the "Retiree Medical Benefits of the Current Active FA's." (Jt. Ex. 9 (emphasis added).) Under that proposal, the Company would have transferred into the new VEBA both the active flight attendants' own prefunding contributions and the matching contributions the Company had made. (Tr. 302:19-303:13.) The Company matching contributions would not have been available to defray the cost of the medical benefits of already-retired flight attendants. (*See id.*) The APFA also proposed that the Company fund the new VEBA at the level of $50 per employee per month, adjusted by an inflation factor of five percent per year. (Tr. 303:14-304:6.)

On March 21, 2012, the Company responded with the same retiree medical proposal as its initial proposal – again proposing to refund the active flight attendants' prefunding contributions, while retaining the matching contributions in the flight attendant trust. (Jt. Ex. 11.) Thereafter, the APFA also re-asserted its initial proposal – seeking the transfer of both the active flight attendants' own prefunding contributions and the corresponding Company matching contributions to a new VEBA, as well as continued Company funding of the new VEBA at the rate of $50 per flight attendant per month. (Jt. Ex. 14.)

Then, on July 3, 2012, the Company proposed the language at issue in this case:

> ***Contingent on the successful resolution of the Section 1114 process***, as soon as practicable ***after termination*** of the Trust Agreement for the Group Life and Health Benefits Plan for Employees of Participating AMR Corporation Subsidiaries (Union Employees), ***the Company prefunding contributions for each participating active employee***, and investment earnings attributable thereto, ***will be distributed to the employee*** (subject to applicable tax withholdings), excluding employees who have already received refunds of their employee prefunding accounts.[1]

(Jt. Ex. 16 (emphasis added).) This Company proposal, as APFA President Laura Glading admitted, was ***"lifted"*** from the new collective bargaining agreements that the Company had reached with the TWU during the Section 1113 process. (Tr. 259:5-15 (emphasis added).) The relevant contract language never changed between the time it

---

[1] The language at the end of the Company proposal – namely, "excluding employees who have already received refunds of their employee prefunding accounts" – was included in error. (Tr. 482:6-15.) It inadvertently was carried over from the American-TWU agreements which had been recently negotiated. The clause referred to TWU-represented work groups who had previously been removed from the prefunding program outside of the Section 1113 process – a circumstance not applicable to the flight attendants. (*Id.*) Neither the APFA nor the Company noticed this error, and the language remains in the parties' final agreement.

was proposed by the Company and when it was ratified by the APFA's membership. (Tr. 307:16-308:3.) And even though both Ms. Glading and Mr. Trautman testified at the hearing, the APFA offered no evidence to suggest that, before the APFA had agreed to the contingency language, it ever tried to discern – from either the Company or directly from the TWU – the meaning of the contract language which had been "lifted" by the Company from its agreements with the TWU.[2] (*See* Tr. 262:7-17, 307:16-308:3.)

In fact, the Company's offer to pay the matching contributions to active employees, contingent on the successful resolution of the Section 1114 process, had been added as a sweetener in the TWU negotiations to help move those deals "across the finish line." (Tr. 642:1-5.) That "sweetener" marked the first time in the history of the Company that there was even a possibility that active employees might receive Company matching contributions in connection with their removal from a prefunding program. (Tr. 642:10-21.) In all such prior occasions, including two then-recent situations involving TWU-represented work groups as well as the flight attendants' own prior experience, the Company matching contributions were retained in the relevant trust account to help defray the Company's costs of providing medical benefits to retirees from that work group. (Tr. 397:14-400:11.) Without the sweetener, if the Company eliminated all of its

---

[2] The APFA has argued that, because the contingency language was agreed to by the Company and the TWU "before [the Company] ever filed the adversary complaint," the APFA should not have been expected, "in the midst of the chaos" surrounding its Section 1113 negotiations, to propose changes to the contingency language once the Adversary Proceeding had been filed. (Tr. 100: 2-16.) This argument ignores the fact that the APFA proposed numerous other changes to American's retiree medical proposal over a period of approximately three weeks after the Adversary Proceeding had been filed. (Jt. Exs. 16-24.) The APFA's argument also assumes, without any support in the record, that the term "Section 1114 process," as negotiated with the TWU, did not include an Adversarial Proceeding against the Section 1114 Retiree Committee over the vested status of retiree medical benefits.

retiree medical obligations, the Company could have chosen to distribute the matching contributions evenly between current retirees and active employees or, for that matter, all of the matching contributions could have been given to the retirees, without running afoul of the requirement that the matching contributions not be used for the Company's own benefit.[3] (Tr. 659:7-660:5.) But in order to secure consensual agreements with the TWU and thereby avoid having to go to Bankruptcy Court seeking rejection of the collective bargaining agreements under Section 1113, American committed that, upon the satisfaction of the appropriate conditions, it would pay out all of the matching contributions to active TWU-represented employees. (Tr. 641:11-643:6.) And the Company made that same proposal to the APFA for the same reasons. (Tr. 644:4-11.)

The Company was willing to make that commitment on one condition: its obligation to pay for the medical benefits of already-retired employees had to be eliminated – in the words of its July 3, 2012 proposal, "contingent on the successful resolution of the Section 1114 process." (Tr. 643:2-643:6.) The reason the Company was willing to make a commitment to distribute the matching contributions to active employees if the condition regarding retirees were satisfied – ***but only if*** the condition

---

[3] According to the 1992 American-TWU Memorandum of Understanding, "The Trust Agreement and the Trust which holds Plan assets is established for the exclusive benefit of TWU-represented active employees and retired employees who were represented by the TWU at the time of retirement." (Jt. Ex. 39 at ¶ 1.) This meant that, "[i]n the event of Trust termination…[e]mployer contributions and investment earnings attributable thereto in the Retiree Prefunded Benefits Program Account [would] be used for the exclusive benefit of participating employees and retirees." (*Id.* at ¶ 9.) In other words, the matching contributions, including in the circumstance of trust termination, could have been used for the benefit of "Participants" in the trust, both active TWU-represented employees ***and*** retired TWU-represented employees. (Tr. 659:19-660:7.)

were satisfied – is grounded in the requirements of the Bankruptcy Code and the cost-reduction imperatives of the Company's reorganization.

Once the Company matching contributions were placed into the relevant trust, those funds could ***only*** be used to defray the cost of retiree medical expenses for current or future retirees in the relevant work group. (Tr. 644:14-19.) The funds could not, for example, be used to buy new airplanes or satisfy Company debts. (*See id.*) The trust documents forbid that. (Tr. 644:14-645:3; *see also* Jt. Ex. 43 at 2.6 ("Except as provided herein, no portion of the principal or the income of the Trust Fund shall revert to or be recoverable by the Company or any Employer or ever be used for or diverted to any purpose other than for the exclusive benefit of Participants in the Plan"); Jt. Ex. 43 at 10.1 ("[N]o instrument of termination or amendment shall authorize…any part of the corpus or income of the Trust Fund to be used for or diverted to purposes other than for the exclusive benefit of such Participants and their beneficiaries.").) So, if the Company were relieved of the obligation to pay for the medical benefits of existing retirees (and it no longer had any obligation to subsidize the future retiree medical benefits of then-active employees), it would be "no skin off the Company's back" to pay the matching contributions to active employees. (*See* Tr. 643:2-13, 645:4-6.) The Company's only options for disposition of the matching contributions would have been to distribute the money to retired employees or to active employees.

But if the Company still had to pay for the medical benefits of already-retired employees, as was the case at the time the Company made its July 3, 2012 proposal and is still the case today, it would definitely be "skin off the Company's back" to distribute

the matching contributions to active employees. Those funds are used to help defray some of the cost of providing medical benefits to current retirees. (Tr. 642:10-15.) By way of example, if the Company had $100 million in medical claims from retired flight attendants, it would satisfy those claims by using the $49 million of matching contributions in the flight attendant trust and paying the remaining $51 million from its general assets. (*See* Tr. 650:5-21.) If the Company no longer had access to the $49 million in the trust because it had given that money to active flight attendants, the Company would have to pay the entire $100 million in retiree medical claims from its general assets. (*See* Tr. 651:1-6.) This would mean that the Company, in effect, would have to pay a total of $149 million (i.e., the $49 million in prior matching contributions which it had given away to active flight attendants plus the $100 million from general assets to pay the retiree medical claims) to satisfy $100 million of medical claims from retired flight attendants. (*See id.*) The Company's flight attendant labor costs would ***increase*** by $49 million relative to the pre-bankruptcy state-of-affairs, and the Company would have required the APFA to come up with $49 million in additional cost reductions to satisfy its 20 percent cost-reduction target under the Section 1113 "fair and equitable" standard. (Tr. 642:10-21.) Yet the Company did not do so, and the reason is obvious: the Company was to distribute the matching contributions to active flight attendants only if the obligation to subsidize current retirees' health care was eliminated.

Despite requesting certain modifications to "Attachment G, Retiree Medical" in subsequent negotiations (*see* Jt. Exs. 16-24), the APFA never proposed to change the language at issue in this case: "[c]ontingent on the successful resolution of the

Section 1114 process." (Jt. Exs. 16-24.) Nor is there any evidence that, prior to the time that the APFA accepted the Company's contingency language, the APFA ever asked questions of the Company or sought clarification as to the meaning of the language. (Tr. 425:8-426:22.) Indeed, it was not until ***after*** the APFA had already agreed to the language in question that Robert Clayman, APFA's counsel and a regular member of its negotiating committee, asked Ms. Anderson about the meaning of "[c]ontingent on successful resolution of the 1114 process." (*Id.*) Ms. Anderson testified that she recalled Mr. Clayman asking this question because she remembered thinking, "[W]hy is he asking this now?," and "[I]t's a little late for him to be asking what does this mean because they had already agreed to the language." (Tr. 426:15-22.) Ms. Anderson testified further, and without contradiction, that she told Mr. Clayman, as she had said many times in the past, that the Company would only distribute the matching contributions after relieving itself of retiree medical liability. (Tr. 420:7-12, 426:4-12.)

The APFA put out the Company's Last, Best, and Final Offer ("LBFO"), which contained the language at issue in this case, for a ratification vote on July 19, 2012, and the APFA's membership ratified the LBFO on August 19, 2012. (Jt. Exs. 25, 73.) The language in the side letter to Article 35 regarding the Company's potential distribution of matching contributions to active flight attendants is fully consistent with the explanation Ms. Anderson provided to Mr. Clayman:

> [T]he parties agreed that contingent on the successful resolution of the Section 1114 process, as soon as practicable after termination of the Trust Agreement for the Group Life and Health Benefits Plan for Employees of Participating AMR Corporation Subsidiaries (Union Employees), the Company prefunding contributions for each participating active employee, and investment

> earnings attributable thereto, will be distributed to the employee (subject to applicable tax withholdings and/or excise tax), excluding employees who have already received refunds of their employee prefunding accounts. The refund will be made to the employee following the successful conclusion of the 1114 process.[4]

(Jt. Ex. 30.)

C. The Section 1114 Process, The APFA's Opposition To The Company's Retiree Medical Objectives, And The Company's Total Failure To Achieve Any Reductions In Its Costs For Retired Flight Attendants' Medical Benefits.

The Section 1114 process governs whether and how a Company in bankruptcy can modify health and welfare benefits for its already-retired employees. (11 U.S.C. § 1114; Jt. Ex. 47.) The Section 1114 process is, generally speaking, separate and distinct from the Section 1113 process discussed above. (Tr. 498:17-499:13, 629:18-630:2.) In the Section 1114 process, negotiations and/or litigation regarding modifications to retiree benefits are conducted between the debtor and a retiree committee. Unless they choose to be involved, unions do not represent retirees in the Section 1114 process and owe no duty of fair representation to them – in the American bankruptcy, both the APFA and the TWU chose to be members of the Section 1114 Retiree Committee (whereas the APA did not). (Tr. 281:12-21, 283:12-16; Jt. Exs. 55-56.) In both the Section 1113 and 1114 processes in the American bankruptcy, however, the Company had the same goal:

---

[4] The language referencing "the Trust Agreement for the Group Life and Health Benefits Plan for Employees of Participating AMR Corporation Subsidiaries (Union Employees)" was included in error when the Company carried over the language from its agreements with the TWU. (*See* Tr. 259:5-15, 482:6-15, 644:4-7.) The correct name of the flight attendant trust is the "Trust Agreement for the Group Life and Health Benefits Plan for Employees of Participating AMR Corporation Subsidiaries Represented by the Association of Professional Flight Attendants." That trust has not been terminated; it continues to hold the prefunding contributions of current flight attendant retirees (i.e., those flight attendants who retired before November 1, 2012), as well as the Company's matching contributions corresponding to both active and retired flight attendants. (Tr. 400:18-401:11; Jt. Ex. 43.)

relieving itself of retiree medical obligations by getting retiree medical benefits "off the books" – for both active employees and current retirees. (*See* Tr. 402:21-403:2.)

In order to accomplish its goal in the Section 1114 process of eliminating its obligations for medical benefits for current retirees, the Company initially considered the filing of a Section 1114 Motion to Modify benefits with the Bankruptcy Court ("Motion to Modify").[5] (Tr. 508:7-12.) To prevail on a Motion to Modify, the Company would have needed to prove that its desired modifications, i.e., the 100 percent elimination of its retiree medical subsidy, were ***necessary*** to permit the Company's reorganization in bankruptcy and that the affected parties were treated fairly and equitably. (11 U.S.C. § 1114(g) (court shall grant a Motion to Modify if it finds: "(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f); (2) the authorized representative of the retirees has refused to accept such proposal without good cause; and (3) such modification is ***necessary*** to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities.") (emphasis added).)

However, Skadden, the UCC's counsel, and Groom Law Group ("Groom"), the Company's benefits counsel, soon came to the conclusion that it was premature to file a Motion to Modify. (*See* Tr. 508:13-509:6, 511:4-11.) They did not believe that the retirees' medical benefits were vested and, because the benefits were not vested, they did

---

[5] For this reason, American filed several documents in the Bankruptcy Court in early April 2012 indicating that "in a separate motion under Section 1114 of the Code, American will ask the Court for permission to eliminate company-paid retiree medical benefits for former employees who retired prior to Petition Date." (*See, e.g.*, U. Ex. 23; Tr. 268: 3-18.)

not qualify as "rights" within the protection of Section 1114. (Tr. 535:1-14; *see also* 11 U.S.C. § 1114(b)(2) ("Committees of retired employees…shall have the power to enforce the ***rights*** of persons under this title as they relate to retiree benefits.") (emphasis added).) And if the retiree medical benefits were not vested, the Company could make modifications to those benefits (including elimination of the financial subsidy) without making any changes to the rights of retirees that would require Bankruptcy Court approval under Section 1114's "necessity" standard. (Tr. 502:9-16.) This was the view of the UCC (which included the APFA among its members), as early as March of 2012. (Tr. 237:22-238:1; *see also* Jt. Ex. 53 at ¶ 5 ("[T]he present scope of any Section 1114 Committee should be limited to examining the threshold issue – whether the Debtors' OPEB [i.e., Other Post-Employment Benefits] for any group of its retirees have not yet vested or are otherwise terminable at will.").)

So, on July 6, 2012, thirteen days before the APFA sent out the Company's LBFO for ratification with the "Section 1114 process" contingency, the Company filed a declaratory-judgment complaint in the Bankruptcy Court against the Section 1114 Retiree Committee seeking a ruling that the Company's retirees had no vested rights to health and welfare benefits (the "Section 1114 Adversary Proceeding").[6] (Jt. Ex. 57.) And a short while later, on August 15, 2012, the Company filed a motion for partial summary

---

[6] The Company filed the Section 1114 Adversary Proceeding against the Section 1114 Retiree Committee because the Company's goal was to confirm that the retirees had no rights under Section 1114. (Tr. 502:9-16.) Section 1114 provided the opportunity for the Company to reach all of the retirees in one fell swoop; otherwise, the Company would have needed to locate and join tens of thousands of retirees in a lawsuit, which would have been "chaos." (Tr. 504:10-14.)

judgment seeking a ruling on the vested-rights issue. (Jt. Ex. 61.) At the time, Groom expected that the Company would file a Motion to Modify only if the Bankruptcy Court ruled against the Company in the Section 1114 Adversary Proceeding.[7] (*See* Tr. 525:4-13.)

The UCC strongly supported the Company's decision to file the Section 1114 Adversary Proceeding. (Tr. 513:7-19.) This would be the first, and, based on the Company's view of the applicable law, the only, step that would be necessary to prevail in the Section 1114 process.[8] (Tr. 570:10-571:10.) Winning the Section 1114 Adversary Proceeding would have allowed the Company to avoid paying the $1.6 billion claim to the retirees, and it would have avoided share dilution for the unsecured creditors. (Tr. 329:20-330:5, 513:7-13; U. Ex. 8.) The UCC, including the APFA, would have benefited from both of these outcomes. (Tr. 510:17-20, 510:22.)

---

[7] Although it was technically possible for the Company to have filed both the Section 1114 Adversary Proceeding and a Motion to Modify at the same time, doing so would have sent mixed signals to the Bankruptcy Court, because the premise of the Adversary Proceeding was that the Company had a pre-existing right to change or eliminate non-vested retiree medical benefits, whereas the premise of a Motion to Modify, in the Company's view of the applicable law, was that the Company needed the Bankruptcy Court's permission to eliminate the vested rights of the retirees. (Tr. 597:13-598:12.)

[8] The APFA suggests that, in light of the Third Circuit's decision in *In re Visteon Corp.*, 612 F.3d 210 (3d Cir. 2010), the Company would have to satisfy the Section 1114(g) "necessary" standard before it could eliminate the subsidy for retiree medical benefits, even if the Bankruptcy Court ruled that those benefits were not vested. The American bankruptcy, however, was filed in the Second Circuit, and the Company did not believe that *Visteon* would be applicable. (*See* 570:4-6, 571:5-12.) The Company believed that, if the Bankruptcy Court ruled in its favor in the Section 1114 Adversary Proceeding, the Company could then have eliminated the subsidy for retiree medical benefits without any further action in the bankruptcy case or, at most, upon the filing of a motion under Section 363 of the Bankruptcy Code. (Tr. 573:2-574:20.) That motion would have been a mere formality, as the standard for the Bankruptcy Court's approval of proposed debtor actions reflected great deference to the business judgment of the Company. (*Id.*)

At the time it filed the Section 1114 Adversary Proceeding and motion for partial summary judgment, which was vigorously opposed by the APFA as a member of the Section 1114 Retiree Committee, the Company expected to receive a ruling by the end of 2012 at the latest. (Tr. 523:22-524:3.) But due to the length of the Bankruptcy Court's deliberations, the Company did not receive a ruling until April 18, 2014, 21 months after it had filed its complaint in the Adversary Proceeding. (*See* Tr. 523:22; Jt. Ex. 70.) In the meantime, the Company tried to negotiate a resolution with the Section 1114 Retiree Committee, but the discussions were unfruitful. (Tr. 517:11-521:17.)

While waiting for a ruling on its motion for partial summary judgment in the Section 1114 Adversary Proceeding, the Company continued to prepare the Motion to Modify that was to be filed in the event of an unfavorable ruling from the Bankruptcy Court. (Tr. 525:4-8.) By late 2012, however, the Company and its advisors began to form the conclusion that, regardless of what happened with the Section 1114 Adversary Proceeding, a Motion to Modify would be unsuccessful. (Tr. 525:9-15.) As a potential merger with US Airways became increasingly likely and American's reorganization was restoring it to profitability, elimination of American's retiree medical liabilities seemed no longer "***necessary*** to permit the reorganization of the debtor." (Tr. 528:8-14, 531:4-13; 11 U.S.C. § 1114(g).) Indeed, the APFA itself had advised its membership that the Company could not succeed on a Motion to Modify. (*See* Co. Ex. 3 (July 17, 2012 APFA hotline informing flight attendants that it did not think the Company could meet the "necessity" showing required for a Motion to Modify).) And by early 2013, when the

merger with US Airways was announced, a Motion to Modify had virtually no chance of success at all. (Tr. 536:8-18; Jt. Ex. 73.)

Moreover, as stock analysts reported at the time, it would have been irresponsible for American to file a Motion to Modify in order to "reject OPEB [i.e., retiree medical liabilities] and create a $1bn+ claim at a 90%+ recovery when the carrying cost is likely <$100mm or a drag of no more than $500 mm." (U. Ex. 29.) As Edward Meehan, the Company's lead Section 1114 counsel from Groom, testified, prevailing on a Motion to Modify would not have eliminated the Company's retiree medical obligations, but instead would have ***accelerated*** the payment of those liabilities. (Tr. 543:7-14.) Prevailing on a Motion to Modify would have created an unsecured $1.6 billion claim that would have to be paid up-front in connection with the Company's emergence from bankruptcy, rather than being spread out over the lives of the current retirees. (Tr. 529:10-13; U. Ex. 8.) The $1.6 billion retiree medical liability would still be "on the books," it simply would have been converted from one form of obligation to another. And, as Mr. Meehan explained, that would not have been a "successful resolution" – quite the contrary, it would have been a catastrophic result for shareholders, including the APFA:

> And the reason I said ***financially disastrous***, the financial advisor was clear. The Company is better off if you do not file 1114 and win. The Company is better off if you just continue to pay under the current arrangement. Because when you trigger a bankruptcy claim, it has to be satisfied. And it's basically that you are now accelerating any obligation you may have.

(Tr. 529:2-9 (emphasis added).) Under the circumstances, the Company quite reasonably elected not to proceed with a futile and counter-productive Motion to Modify.

With American's emergence from bankruptcy on December 9, 2013 (Jt. Ex. 73), a Motion to Modify is no longer even possible. (*See* 11 U.S.C. § 1114(g).) The Bankruptcy Court did not issue a ruling on the partial summary judgment motion in the Adversary Proceeding until April 18, 2014. (Tr. 526:17-21; Jt. Ex. 70.) In that opinion, the court rejected the Company's argument that the vested-rights issue should be decided by the terms of the health plan documents alone, and instead ruled that the collective bargaining agreements also must be considered. And the court held that the collective bargaining agreement between American and the Allied Pilots Association, which the APFA had adopted in 1995 via a "me too" clause, "suggested that the benefits [would] remain in effect indefinitely." The court also relied on contract provisions which, according to the Court, promised that American would "take no action, at any time, by way of notice, negotiations or otherwise, to diminish the pay or the retirement benefit programs in effect" and that "no changes shall be made to the retiree medical plan for retired or disabled pilots." (Jt. Ex. 70 at 26-32.) Although the Section 1114 Adversary Proceeding is still pending, as a practical matter the court's ruling forecloses any relief for the Company.[9] (Tr. 589:13-16.)

Meanwhile, the Company continues to pay approximately $13.5 million per year for the retiree medical costs of flight attendants who retired before November 1, 2012. (Tr. 401:15-19.)

---

[9] By opposing the Company's motion for partial summary judgment in the Section 1114 Adversary Proceeding and successfully persuading the Bankruptcy Court that the collective bargaining agreements had to be considered in deciding the vested-rights question, the Section 1114 Retiree Committee (including the APFA) effectively precluded the Company from eliminating its subsidy for current flight attendant retirees' medical benefits.

D. APFA's Grievance.

The APFA filed the instant Presidential Grievance on June 25, 2014. (Jt. Ex. 1.) The Company denied the grievance on July 15, 2014. (Jt. Ex. 2.) The APFA submitted the grievance to the System Board of Adjustment on August 4, 2014. (Jt. Ex. 3.)

E. 2012 US Airways-APFA Conditional Labor Agreement And The Subsequent Memorandum Of Understanding Between US Airways And The APFA.

On April 12, 2012, while American was still in bankruptcy but before it had reached a new collective bargaining agreement with the APFA, US Airways and the APFA entered into a Conditional Labor Agreement ("CLA") which set forth certain flight attendant terms and conditions of employment in the event of a merger between US Airways and American. (Jt. Ex. 31.) The CLA's provisions regarding retiree medical benefits would have provided for the establishment of a new VEBA for then-active American flight attendants in the event of a US Airways/American merger and the new VEBA would have been funded in part with American's matching contributions from the pre-existing flight attendant trust. (*See* Jt. Ex. 31 ("For FAs on the AA seniority list as of the Plan Effective Date only – VEBA seeded with current balance of FA and AA contributions").) American, however, was not involved with the CLA negotiations and it was not a signatory to that agreement. (Tr. 250:22-252:19; Jt. Ex. 31.) Moreover, those particular provisions of the CLA did not survive.

On September 12, 2012, the Bankruptcy Court approved the new American-APFA collective bargaining agreement, which provided for the discontinuance of the retiree medical prefunding program for then-active flight attendants and a return of each flight

attendant's own prefunding contributions. (Jt. Exs. 30, 73.) Thereafter, on December 31, 2012, the parties executed a letter of agreement, which has been referred to as a Memorandum of Understanding ("MOU"), to "clarify and acknowledge their understandings and intent with respect to how the New CBA and CLA [were] intended to modify or leave unchanged various provisions of either agreement in the event the Proposed Merger occurr[ed]." (Jt. Ex. 32.) The MOU states, with respect to retiree medical benefits: "As a result of the prior return by American of employee prefunding contributions pursuant to the New CBA, the provisions in the CLA under Retiree Health, Paragraph 2 relating to a VEBA ***will not be implemented and are deemed void***. It is the intent of the parties to maintain the Retiree Medical program provided for in the New CBA." (*Id.* at ¶ 6 (emphasis added).)

ARGUMENT

I. The APFA's Grievance Should Be Denied Because There Has Not Been A "Successful Resolution Of The Section 1114 Process."

A. The Company Was Unsuccessful In Its Efforts To Eliminate Its Obligation To Provide Medical Benefits For Flight Attendants Who Retired Before November 1, 2012.

The Company attempted to obtain, but did not achieve, a successful resolution of the Section 1114 process. Although the Company's goal – made clear to the APFA at the outset of the negotiations in 2012 – was to "effectively eliminate any subsidy for retiree medical," for both active and retired employees, the Company today continues to pay more than 90 percent of the cost of medical benefits for flight attendants who retired before November 1, 2012. (Tr. 379:22-380:2, 405:8-406:20; U. Ex. 27.) This amounts to

approximately $13.5 million per year in medical expenses for retired flight attendants. (Tr. 401:19.)

With respect to already-retired flight attendants, the Company was able to achieve literally no cost reductions in retiree medical benefits. Accordingly, while the Article 35 Side Letter does not itself contain a definition of "successful," and in that regard could be said to be ambiguous, the Board of Adjustment need not concern itself with formulating a precise definition – because whatever a "successful" resolution might mean, it cannot possibly mean achieving zero savings. (*See, generally*, Kenneth May, Elkouri & Elkouri, How Arbitration Works 9-41 - 9-42 (7th ed. 2012) ("Elkouri") ("When one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally plausible, would lead to just and reasonable results, the latter interpretation will be used.").)

1. The APFA Knew, In Substance, Of The Company's Understanding That A "Successful Resolution Of The Section 1114 Process" Referred To An Elimination Of The Company's Obligations For Retiree Medical Benefits.

The evidence of the parties' discussions during the negotiations in 2012, as well as the context in which those negotiations took place, provides further support for the common-sense conclusion that a "successful resolution of the Section 1114 process" refers to the elimination of the Company's obligation to subsidize flight attendant retiree medical benefits. (*See* Elkouri at 9-26, 9-33 (extrinsic evidence, including bargaining history and the purpose of a disputed provision, may be considered when interpreting ambiguous contract language).)

The undisputed evidence demonstrates that the APFA knew, early in American's bankruptcy, that it was very important for the Company to eliminate its retiree medical liabilities through the Section 1113 and Section 1114 processes for then-active and already-retired flight attendants, respectively. On February 1, 2012, the Company convened a "big tent" presentation for all of the unions, including the APFA and the TWU, in which the Company described the changes that were needed in the area of retiree medical. (Tr. 403:7-18.) Then, over the next week, Ms. Anderson and Tricia Herschell, American's Managing Director of Human Resources, did "deep dives" with each of the unions, in which they further elaborated on what those changes would entail. (Tr. 403:19-404:7.) In short, they explained that the Company needed to extricate itself from the $3.0 billion in overall liability and $178 million in annual cash expense for retiree medical benefits. (U. Ex. 27 at 17-18.)

Ms. Anderson also reiterated to the APFA several times throughout the negotiation process that the only way the Company would give the matching contributions to active flight attendants would be if the Company was able to "get[] the retiree medical obligation removed for the existing retirees." (Tr. 420:7-12.) She testified further, and without contradiction, that she personally told Mr. Clayman, the APFA's counsel, that the Company would return the matching contributions to active flight attendants ***only if*** it was successful in relieving itself of retiree medical liability. (Tr. 426:6-12.) (For a more detailed description of the parties' negotiations/discussions, *see* Statement of Facts, Section B.2, above.)

At the hearing, counsel for the APFA asked both Ms. Glading and Mr. Trautman, the APFA's only bargaining history witnesses, the same question using the same, very precise language: "During the LBFO negotiations, did the Company ever say that successful resolution of the Section 1114 process required the total elimination of retiree health obligations?" (Tr. 262:6-10, 308:10-14.) Both witnesses denied that the Company had made that particular statement, but the Company never purported to have used these precise words. (Tr. 419:8-11.) Rather, as Ms. Anderson testified, she continually said that the Company needed to get retiree medical "off [its] books," which meant "no liability, no cash expense, [and] no accounting expense" for retiree medical benefits. (Tr. 402:13-20, 419:13-17.) The APFA offered no rebuttal witness after hearing Ms. Anderson's testimony, and utterly failed to rebut the Company's evidence about what the Company said at the bargaining table. In fact, Ms. Glading and Mr. Trautman both testified that they knew the Company wanted to rid itself of retiree medical expenses. (*See* Tr. 243:14-244:19, 300:1-13, 301:12-302:10; *see also* U. Ex. 21 at 49 ("The elimination of debt and the termination of retiree benefits are critical to attaining a competitive cost structure.").)

Moreover (as explained in more detail at pages 17-20, above), the Company was only willing to distribute the matching contributions to active flight attendants if the condition regarding the elimination of its obligation to pay for the medical benefits of already-retired employees were satisfied, because, under that circumstance – and only that circumstance – there would be "no skin off the Company's back" to pay the matching contributions to active employees. (Tr. 642:10-21.) Since the Company must

still pay for the medical benefits of current flight attendant retirees, distributing the Company's matching contributions to active flight attendants would have the effect of greatly increasing the Company's flight attendant labor costs. The matching contributions could otherwise be used to defray some of the cost of providing medical benefits to current retirees. If the APFA were to prevail on its grievance in this matter, the Company would have to make up the shortfall with additional expenditures from its general assets. (Tr. 642:10-15.) If such a result had been contemplated by the parties during the negotiations in 2012, the Company would have required the APFA to come up with offsetting cost reductions to satisfy the APFA's 20 percent savings target. (Tr. 642:16-21.) The fact that the Company did not do so is further evidence that both parties understood that the matching contributions would be paid to active flight attendants only if it would not have an adverse impact on the Company's costs. (*See* Tr. 643:2-13.) The APFA's current position, namely, that the cost reductions from the modifications in its 2012 collective bargaining agreement should now be $49 million less than the original target, is completely antithetical to the manifest intentions of parties who were engaged in negotiations pursuant to Section 1113's "fair and equitable" standard – a standard that required all work groups to generate the same 20 percent cost reduction.

2. Past Practice Supports The Company's Definition Of "Successful Resolution."

The parties' past practice is significant when determining the meaning of ambiguous language. (*See* Elkouri at 9-32 ("One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is that of the relevant

custom or past practice of the parties.").) Prior to its negotiations with the APFA in 2012, the Company had ended the retiree medical prefunding programs for the following employee groups: (1) the APFA-represented flight attendants with respect to a prior prefunding program; (2) two units of TWU-represented employees; (3) management; (4) support staff; and (5) ARPs. (Tr. 397:14-400:11.) Following the termination of their respective prefunding programs, employees in each of these groups who had been participating in prefunding received a refund of their own contributions plus the investment earnings attributable thereto. (*Id.*) But the Company's corresponding matching contributions had never been distributed to any active employees. (*Id.*) Instead, the Company matching contributions had been retained in the applicable trust account to cover some of the cost of medical benefits for retirees from the relevant work group. (*Id.*)

This past practice could be no surprise to the APFA, given that flight attendants themselves had experienced it. Following an interest arbitration board's decision in 1995 not to accept the prefunding program that had been imposed by American during a strike in 1993, the Company returned the flight attendants' own prefunding contributions but kept the matching contributions to help pay for the medical benefits of then-retired flight attendants. (Tr. 614:11-615:8.) No objection was ever made to American's handling of the matching contributions.

In light of this consistent past practice, the APFA surely realized that it would indeed be a special circumstance to obtain the Company matching contributions for the benefit of active employees when, in the past, the Company consistently had retained

those contributions to help pay for current retirees' medical costs. The only way to interpret the "successful resolution" contingency in a manner consistent with American's past practice is to hold that the Company's obligation to distribute the matching contributions is only triggered if the Company no longer has an obligation to pay current retirees' medical benefits and thus no longer has any use for the matching contributions it had set aside for that purpose.

3. Emergence From Bankruptcy, Without More, Cannot Be A "Successful Resolution Of The Section 1114 Process."

The APFA has posited that a "successful resolution of the Section 1114 process" merely means that which "gave [the Company] what [it] needed to exit bankruptcy." (Tr. 262:20; *see also* Co. Ex. 5 ("[I]t is APFA's position that exiting bankruptcy will successfully conclude the 1114").) This argument is meritless. While emerging from bankruptcy might well constitute a successful resolution of the Chapter 11 process, it is by no means a successful resolution of the Section 1114 process. No witness and no evidence even so much as hinted that exiting bankruptcy was discussed as somehow being tantamount to a "successful resolution of the Section 1114 process."[10] If the parties had intended "emergence from bankruptcy" to trigger an obligation for the Company to

[10] At the hearing, the APFA relied upon the Company's Fourth Amended Joint Chapter 11 Plan, approved by the Bankruptcy Court, which states: "To the extent that the Debtors…are unsuccessful in whole or in part in obtaining the relief requested in the Retiree Adversary Proceeding, any remaining vested benefits shall be treated in accordance with the provisions of section 1129(a)(13) of the Bankruptcy Code." (U. Ex. 33.) Factoring the contingency into its Chapter 11 Plan demonstrates that the Company and the APFA were both aware that retiree medical remained an open issue after American's emergence from bankruptcy, dependent on the outcome of the Section 1114 Adversary Proceeding. The APFA also put forth no evidence in support of its assertion that, by agreeing to language in the plan of reorganization regarding the status of Section 1114 and the Section 1114 Retiree Committee (*see* Tr. 168:9-170:1), the Company and the Committee agreed that the Section 1114 process had been successfully resolved. (Tr. 192:3-194:18.)

distribute the matching contributions to active flight attendants, specific language to that effect would have been used – as it was elsewhere in the LBFO when referring to contingencies that would occur upon "confirmation of a plan of reorganization" or to "post-emergence" occurrences. (*See* Jt. Ex. 25, Attachment I.)

B. The "Section 1114 Process" Is Not Limited To A Motion To Modify, But Also Includes The Adversary Proceeding.

1. The Company Was Not Obligated To File A Motion To Modify Under Section 1114.

The APFA has argued at length that the Adversary Proceeding filed by the Company was not a "Section 1114 process" within the meaning of the Article 35 Side Letter. (*See* Tr. 262:11-264:7, 308:6-9.) As will be discussed below (*see* Section B.2), the APFA's argument is nothing short of revisionist history. But even if the APFA were correct, that would not help its cause because there is nothing in the text or bargaining history of the Article 35 Side Letter to support the notion that American was obligated to file a Motion to Modify under Section 1114. To the contrary, the text of the side letter refers to the Section 1114 "process" – a manifestly broader term than Section 1114 "motion" – and the uncontroverted testimony regarding the bargaining history demonstrates that the Company made clear to the APFA that it needed to be rid of retiree medical obligations before there would be any distribution of matching contributions to active employees. There was no discussion of, ***or limitation on***, the procedure that might be used by the Company to achieve its goal. (*See* Tr. 420:7-12.) Ms. Anderson, who is not a lawyer, simply told the APFA that the Company would distribute the matching contributions to active flight attendants only if it was successful in "this whole 1114

thing."[11] (*Id.*) The APFA should not be heard to manufacture from whole cloth an implied obligation – not once communicated to the Company during negotiations – for the Company to make the futile gesture of filing a Motion to Modify which had no chance of success.

The APFA could have bargained for an express obligation on the Company's part to file a Motion to Modify under Section 1114, but it did not. If it had done so, and succeeded, the APFA then would have vigorously opposed the Company's Motion – just as it did as a member of the Section 1114 Retiree Committee in response to the Company's Section 1114 Adversary Proceeding. (Tr. 145:2-147:18, 526:3-9.) The Company would, in all likelihood, have lost the Motion (Tr. 532:20-21), and then there indisputably would have been no "successful resolution" and no claim by the active flight attendants to any of the Company's matching contributions. Thus, even if there had been an express or implied obligation to file a Motion to Modify, which there was not, such a Motion could not have led to a successful resolution of the Section 1114 process that would entitle the active flight attendants to the Company's matching contributions.

2. The APFA, Like American, Considered The Section 1114 Adversary Proceeding To Be Part Of The "Section 1114 Process."

After the Company filed the Adversary Proceeding, the APFA again and again indicated that it considered the Adversary Proceeding to be part of the "Section 1114 process." This course of conduct following agreement to the language in the LBFO is

---

[11] In fact, at the time the APFA agreed to submit the language at issue in this case for membership ratification, the Company had already filed the Section 1114 Adversary Proceeding. (Jt. Ex. 73.)

probative evidence of the APFA's understanding and intent. (*See* Elkouri 12-20 ("the parties' intent is most often manifested in their actions."); Margaret N. Kniffen, *Corbin on Contracts* (5th ed. 2015) § 24:16.)

On July 17, 2012, only eleven days after the Section 1114 Adversary Proceeding was filed, and while the APFA was still considering the "contingency" language American had proposed in the LBFO, the APFA published a Hotline that reported on "AA vs Retirees and the 1114 Process." (Co. Ex. 3.) The Hotline addressed the Company's filing of the Adversary Proceeding and described the APFA's belief that the Company could not meet the necessity showing required for a Motion to Modify under Section 1114. (*Id.*) The APFA surely would not have agreed only a few days later to submit the Company's "contingent on the successful resolution of the Section 1114 process" language to a membership ratification vote if it had not believed that the Adversary Proceeding was part of the "Section 1114 process," given that the APFA admitted in the same Hotline that it did not believe a Motion to Modify could succeed.

In its July 13, 2013 Hotline, nearly one year later, the APFA reiterated that it did not believe the Company could meet the necessity standard required for a Motion to Modify. (Co. Ex. 4.) In addition, when referencing the ongoing Adversary Proceeding, the APFA told its members that "[t]here is not much going on in the courtroom right now with the 1114 process" except that "[t]he Company has filed a motion for summary judgment in the ***1114 Adversarial Proceeding*** asking the bankruptcy court to conclude that the Company may make changes without first holding a trial." (*Id.* (emphasis added).)

Then on April 30, 2014, twelve days after the Bankruptcy Court denied the Company's motion for partial summary judgment in the Section 1114 Adversary Proceeding, the APFA's President, Laura Glading, wrote a letter to the Company asserting that the Company had to distribute the matching contributions to active Flight Attendants. (Jt. Ex. 5.) She explained, "With this matter [the Adversary Proceeding] decided, American should immediately distribute the pre-funding contributions it made on behalf of active Flight Attendants and those, who retired on or after November 1, 2012, to these individuals." (*Id.*) Yet, no one from the APFA wrote a similar letter when the Company emerged from bankruptcy. Even in the APFA's view, it was developments in the Adversary Proceeding that were the trigger for the Company's alleged obligation under the "Section 1114 process" contingency.

The APFA's communications are consistent with reality. The Adversary Proceeding ***is*** part of a "Section 1114 process" – it was a lawsuit filed against the Section 1114 Retiree Committee, its purpose was to determine whether the Company's retirees had "rights" protected under Section 1114(b)(2), and it was intended ultimately to result in an elimination of the Company's liability for retiree medical benefits.

CONCLUSION

The Company attempted to rid itself of retiree medical obligations during bankruptcy via the Section 1114 Adversary Proceeding. It considered in good faith, but decided against, filing a Motion to Modify under Section 1114 once it became clear that the chance of success for such a Motion was low, and even if the Motion had been granted, the resulting claim in bankruptcy would have caused more harm than good. (*See*

Tr. 529:2-20.) Despite its best efforts in the Section 1114 Adversary Proceeding, and confronted with opposition from the APFA as a member of the Section 1114 Retiree Committee at every turn, the Company was unable to eliminate its retiree medical obligations and, therefore, was unable to achieve a "successful resolution of the Section 1114 process." Accordingly, the Company is under no obligation to distribute the matching contributions to active flight attendants and the APFA's grievance should be denied.

Dated: August 24, 2015.

Respectfully submitted,

_____/s/_____
Robert A. Siegel
Chris A. Hollinger
O'MELVENY & MYERS LLP

Attorneys for American Airlines, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2015, a true and correct copy of the foregoing POST-HEARING BRIEF OF AMERICAN AIRLINES, INC. was sent via e-mail to:

Arbitrator Richard Bloch
4335 Cathedral Ave, NW
Washington, D.C. 20016

_____/s/_____
Chris A. Hollinger