

# **EXHIBIT “G”**

**AMERICAN ARBITRATION ASSOCIATION  
LABOR ARBITRATION TRIBUNAL**

In the Matter of the Arbitration Between:  
**US AIRLINE PILOTS ASSOCIATION**

and

Impartial Determination:  
**Non-Member Union Fees**  
AAA 11 673 00118 11

**DUES CHALLENGERS**

Before M. David Vaughn, Arbitrator

**OPINION AND AWARD**

This proceeding takes place pursuant to Federal law and the US Airline Pilots Association's ("USAPA"'s or the "Association"'s) Agency Fee Policy to resolve challenges to the amount of the agency fee that the Association charged to dues objectors ("Dues Challenger"'s or "Dues Objector"'s) who are included in the bargaining unit represented by the Association but who are not members of USAPA (collectively, the Association and Dues Challengers are the "Parties" to the proceeding) in its fiscal year from April 1, 2009, through March 31, 2010. Pursuant to the Association's procedure and from a list of arbitrators provided by the American Arbitration Association ("AAA"), which administered the case, I was selected to hear and decide the dispute.

A hearing was convened in Charlotte, North Carolina, on March 17, 2011, at which the Association was represented by Stanley J. Silverstone, Esq., and the only Dues Challenger to appear was Captain Laurence A. (Chip) Munn, who participated by speaker phone. In the proceeding, the Parties were each afforded full opportunity to present witnesses and documents and to cross-examine witnesses and challenge documents offered by the other. For the Association testified Captain (and Association Secretary-Treasurer) Rob Streble and Certified Public Accountant ("CPA") Keith Hendrix. Captain Munn did not testify but cross-examined witnesses. All witnesses were sworn but not sequestered.

Arbitrator Exhibits ("Arb. Ex. \_\_\_") 1-2, Association Exhibits ("Assn. Ex. \_\_\_") 1-21, Challenger Exhibits ("Ch. Ex. \_\_\_") 1-3 and

McKee<sup>1</sup> Exhibits ("McK. Ex. \_\_\_") 1-3 were offered and received into the record. A court reporter was present at the hearing; by agreement of the Parties, the verbatim transcript (page references to which are designated "Tr. \_\_\_") which she caused to be prepared constitutes the official record.<sup>2</sup> At the conclusion of the hearing the evidentiary record was completed. The Association and Captain Munn each submitted written post-hearing briefs. Upon receipt of both briefs on April 22, 2011, and an e-mail dated May 8, 2011, from Captain Munn containing additional documentation, the record of proceeding was closed. At the requests of Captain Munn and of the Association, and without objection by either to the request of the other, the evidentiary record was reopened and additional material was offered and received into the record. On May 12, 2011, upon receipt of the materials, the record reclosed.

The Parties stipulated that the dispute is properly before me, ready for decision. This Opinion and Award is based on the record and considers the arguments of the Parties. It interprets and applies the Agreement, federal and USAPA's Agency Fee Policy.

#### **ISSUES FOR DETERMINATION**

The Parties agreed that the issues for determination are:

What shall be the agency fee for the period beginning April 1, 2009, through March 31, 2010, to be paid by

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<sup>1</sup>By a letter submitted by e-mail on March 1, 2011 (McK. Ex. 1), First Officer Steven P. McKee indicated that he wished to join with Captain Munn in his 2008 and 2009 challenges to the Association's Agency Fee determinations. By a letter dated March 2, 2011 (*Id.*), the Association objected to First Officer McKee's inclusion as a Fee Challenger. It objected to the 2008 challenge because Arbitrator Daniel F. Brent issued an Award with respect to the period April 18, 2008, through March 31, 2009, on May 3, 2010. (Assn. Ex. 3) With respect to Captain Munn's challenge for the period April 1, 2009, through March 31, 2010, the Association contended that First Officer McKee did not file a challenge timely - by no later than November 29, 2010 - and that his name does not appear on the list of Fee Challengers that was submitted on December 20, 2010.

<sup>2</sup>Captain Munn was provided with a copy of the transcript to prepare his post-hearing brief.

bargaining unit employees who elected not to join the US Airline Pilots Association?

## **FACTUAL BACKGROUND AND FINDINGS**

### **The Parties**

On September 27, 2005, US Airways Group, Inc., the airline's parent company, completed the acquisition of America West Holdings Corporation, parent of America West Airlines. On April 18, 2008, USAPA was certified by the National Mediation Board to represent pilots employed by the merged US Airways, Inc. ("Company"). As such, it became the successor union to collective bargaining agreements between US Airways and the Airline Pilots Association ("ALPA") under both the pre-merger US Airways ("East") and pre-merger America West Airlines, Inc. ("West"). Pilots for the merged US Airways continue to operate under the two prior agreements; negotiations for a single collective bargaining agreement are in progress. (Tr. 27-28)

### **Union Structure**

The Association's governing body is the Board of Pilot Representatives ("BPR"), which is composed of representatives from each of the Company's domiciles.<sup>3</sup> Each of the domiciles is represented by between one and three domicile officers, depending on the number of members in each domicile. In addition, USAPA has four national officers: President, Vice President, Executive Vice President and Secretary-Treasurer.<sup>4</sup> (Tr. 30-31)

### **Union Membership**

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<sup>3</sup>At the beginning of Fiscal Year ("FY") 2009-10, the Company had seven domiciles - Boston, LaGuardia, Philadelphia, Washington, D.C., Charlotte, Phoenix and Las Vegas. However, by the end of FY 2009-10, three of those domiciles - Boston, LaGuardia and Las Vegas - had been closed by the Company.

<sup>4</sup>In December 2009 the Executive Vice President resigned. Thus, between December 2009 and March 31, 2010, the Association had three serving national officers. (Tr. 46-47)

The Railway Labor Act ("RLA"), 45 U.S.C. § 152 (General duties), Eleventh (Union security agreements; check-off), permits a union to negotiate a union security clause in a collective bargaining agreement requiring all employees - members and non-members - to support financially the union elected as the exclusive bargaining agent. The RLA does not require actual union membership, only that employees "share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." *IAM v. Street*, 367 U.S. 740, 764 (1961).

Pursuant to § 152, Eleventh, of the RLA and Section 29 of both the East and West pre-merger agreements, bargaining unit members are required to maintain Association "membership" as a "condition of continued employment." (Assn. Exs. 10-11) To fulfill this obligation, bargaining unit pilots must either join USAPA or pay an agency shop fee in lieu of dues to the Union.

Non-members who pay an agency shop fee, however, are not required to pay *all* expenses incurred by a union. Rather, pursuant to *Chicago Teachers Union v. Hudson* ("*Hudson*"), 475 U.S. 292 (1986) (Assn. Ex. 2), unions are required to follow a procedure that protects them from being compelled to subsidize political or ideological activities "not germane" to the collective bargaining process. *Hudson* does not establish a specific procedure to provide these protections. However, it does require that the union provide "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges [are] pending."

#### **Germane vs. Non-Germane Expenses**

USAPA prepared a Special-Purpose Schedule of Germane and Non-Germane Expenses for the year ended March 31, 2010 ("Schedule") to determine the appropriate agency fee for non-members. (Arb. Exs. 2

and 13) Each expense was classified as all germane, all non-germane or a mixture of germane and non-germane. Note 2 defined germane expenses as

those expenses incurred by the Association for representational activities. Representational activities are those duties that the Association performs as a representative of the pilots in dealing with their employer, including collective bargaining, contract administration, grievance adjustment, and other activities germane to the collective bargaining process.

It provided a long list of specific expenses that qualified as germane under this definition. Note 2 also stated that non-germane expenses included:

- Expenses for electoral politics and political campaigns . . .
- Contributions and support to charitable organizations.
- Expenses for public advertising and communications not technically "germane" to the Association's role as collective bargaining representative . . .
- Expenses for dealings with regulatory agencies and Congress over aviation and safety issues not considered "germane" . . .
- Expenses of "members only" insurance programs and benefits.
- Portions of Association overhead, administrative and operating expenses attributable to non-germane activities.

When expenses contain both germane and non-germane components but it is practically difficult to identify specifically and track the non-germane portion, the Association applied a percentage allocation of non-germane expense. For the year ended March 31, 2010, the allocation was 4.54%, which was applied to all categories of expenses that had, or could have had, a mixture of germane and non-germane expenses. (Tr. 37)

The Schedule of Germane and Non-Germane Expenses, including its allocation percentage, was audited by Certified Public Accountant ("CPA") Elliott Davis. By a letter to the BPR dated September 14, 2010, Mr. Davis stated that the allocation contained in the Schedule was found to be reasonable:

In our opinion, the special-purpose schedule . . . presents fairly, in all material respects, the germane and non-germane expenses of the Association for the year ended March 31, 2010, on the basis of accounting described in Note 1.

### **Agency Fee Policy**

On September 28, 2010, the BPR passed a resolution approving an Agency Fee Policy dated September 30, 2010. (Assn. Exs. 2 and 12; Tr. 34-35) The Agency Fee Policy explained its purpose: to avoid "free riders" - those bargaining unit members who receive the benefit of Association representation without paying for it - and to allow non-member objectors to challenge its calculation of the annual germane percentage. The objection procedure required non-member pilots who wished to become an objector to provide written notice to USAPA no later than 30 days after the date the Association publishes its Statement of Germane and Non-Germane Expenses, known as the "Open Objection Period." In addition, it stated:

[T]he percentage properly classified as "chargeable" for the period from April 1, 2009 through March 31, 2010 is 94.3 percent, and the agency fee payable by Objectors during fiscal year 2010-2011 shall be rounded down to 92 percent of the full dues rate payable by USAPA members to ensure that all non-germane expenses have been properly included in the calculation.

The Agency Fee Policy stated that objectors may "challenge" the validity of the verified "germane" percentage calculation during the 30-day Open Objection Period and that all properly filed Challenges will be consolidated for submission to an impartial,

neutral arbitrator. A detailed description of the arbitration proceeding, the rights of the parties and so on was also provided.

By a memorandum dated September 30, 2010 (Arb. Ex. 2), USAPA provided all Company pilots with a Notice to Agency Fee Payers ("Notice"), a copy of its Agency Fee Policy and the Report on the Schedule of Germane vs. Non-Germane Expenses for the year ended March 31, 2010. Captain Streble testified that these three documents were posted on the Association's website on October 13, 2010, and were mailed to all USAPA-represented pilots on or about October 18, 2010. (Tr. 35)

### **Challenges**

The instant proceeding is the second arbitration initiated by USAPA as a result of challenges to its *Hudson* obligations. The prior arbitration, involving 446 Dues Challengers, was held on February 10, 2010, before Daniel F. Brent. In his award dated May 3, 2010, Arbitrator Brent upheld USAPA's agency fee of 95.8% of the full membership dues rate for the period ending March 31, 2009. (Assn. Ex. 3)

The Association initiated the instant arbitration pursuant to AAA's Rules for Impartial Determination of Union Fees. (Arb. Ex. 1) Of the Challengers identified by AAA in an e-mail dated March 9, 2011 (Arb. Ex. 3; Tr. 7-8), to the Association's agency fee determination, only Captain Munn (Ch. Ex. 1) participated directly in the hearing. Captain Stephen E. Rowe (Ch. Ex. 2) and First Officer Stephen L. Boveri had communication with AAA concerning their Challenger status. Two late-filed challenges were rejected by USAPA. The first was submitted in February 2011 by a bargaining unit member named Yaris; when his challenge was rejected, he became a USAPA member. (Tr. 40) The second was submitted by First Officer McKee, *supra*.

I find the issue to be properly before me, ready for decision. This Opinion and Award is based on consideration of the record and

the arguments of the Parties. It interprets and applies the Agreement, Policy, statute and case law.

### **POSITIONS OF THE PARTIES**

The positions of the Parties are set forth at the hearing and in their post-hearing briefs. They are briefly summarized as follows:

**The Association** argues that it complied with its *Hudson* obligations. It maintains that it adequately explained the basis for the fee, provided a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker and created an escrow for the amounts reasonably in dispute while such challenges are pending. USAPA contends, in addition, that it correctly categorized its expenses as germane or non-germane.

USAPA further argues that it adequately disclosed the major categories of its expenses and the schedule was verified by an independent auditor. The Association asserts that, by examining its bank records and by testing all expenses over approximately \$32,000 and a reasonable sample of those expenses under that materiality limit, the auditors confirmed that the expenditures which it claims it made for both germane and non-germane expenses were actually made for those expenses. It points out that the conduct of the audit for the year ending March 31, 2010, was identical to last year's audit and that Arbitrator Brent concluded, in considering last year's audit, that its methodology was consistent with customary professional practices.

The Association further argues that, with respect to reasonably prompt opportunity to challenge the amount of the fee, its Notice to Agency Fee Payers, Agency Fee Policy and independent auditors' Report on the Schedule of Germane vs. Non-Germane Expenses for the Year Ended March 31, 2010, were posted on its website on October 13, 2010, and were mailed to *all* USAPA-represented pilots on or about October 18, 2010. It maintains that

objectors were permitted to file challenges after the publication of the independent auditors' report and that the AAA selected me as the impartial decisionmaker to hear the challenge. USAPA contends that the Agency Fee Policy requires it to deposit 50% of each challenger's agency fee into a separate, interest-bearing bank account, *i.e.*, an escrow account, and that it has, therefore, complied with all of the *Hudson* requirements.

USAPA further argues that the legal standard for determining if expenses are correctly categorized as germane or non-germane is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."<sup>5</sup> It asserts that all of the expenses determined to be germane follow this standard.

The Association further argues that the expenses of the Board of Pilot Representatives ("BPR"), its governing body, the Officers and Committees were all correctly categorized. It maintains that all BPR expenses - mostly flight pay loss<sup>6</sup> - were categorized as germane because they were incurred for the purpose of performing the duties of an exclusive representative on labor-management issues. USAPA contends that a portion of the expenses of its four

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<sup>5</sup>*Ellis v. Railway Clerks ("Ellis")*, 466 U.S. 435, 448 (1984). Under this standard,

objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

<sup>6</sup>An expense that arises from the Union requesting that the Company remove a pilot from the flight schedule in order for that pilot to perform Union functions. US Airways bills the Association on a monthly basis for flight pay loss. The bills identify those pilots who have been removed from their trips for Union business. (Tr. 44-45)

national officers<sup>7</sup> - including flight loss pay, travel, lodging and communication expenses - were allocated as non-germane because there *may* be non-germane activities that cannot be tracked specifically but which need to be estimated in determining the germane percentage. It asserts that the non-germane allocation for the officers' expenses favors the dues objectors because the flight loss pay of the President is totally paid by the company at no cost to the Association and the Secretary-Treasurer's job duties are virtually entirely germane but points out that a portion of their expenses is allocated as non-germane. (Tr. 48-50)

USAPA further argues that all of the expenses of most of its committees were correctly categorized as germane.<sup>8</sup> It maintains that the six other committees - Communications, Grievance, Furlough, Government Affairs, Aeromedical and Bereavement Committees - range from partially to totally non-germane, based on their activities. The Association contends that the activities of the Government Affairs and Bereavement Committees are entirely non-germane and that the portion of Aeromedical Committee expenses in the form of medical benefit insurance available to members only is non-germane. It asserts that it applied the 4.54% allocation to the Communications, Grievance and Furlough Committees because some of its work applied to members only and some applied to all pilots and that the Aeromedical Committee includes a portion of non-germane expense in the form of medical benefit insurance available to members only.

With respect to Pension Committee expenditures, the Association argues that it properly determined all of the

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<sup>7</sup>President, Vice President, Executive Vice President and Secretary-Treasurer, except that, due to the resignation of the Executive Vice President in December 2009, there were only three national officers from late December 2009 through March 31, 2010.

<sup>8</sup>These committees include the Negotiating Advisory, Retirement and Insurance, Merger, Safety and Training, Scheduling, Ballot, AD HOC, Dues and Pension Committees as well as Other Committees, including the Jumpseat, Critical Incident Response Program, Family and Medical Leave Act, Hotel Inspection, Security, Strike, Accident Investigation, Scope and Appeal Board Committees.

Committee's expenses to be germane. It maintains that, until March 31, 2003, the pre-merger US Airways pilots had a defined benefit pension plan pursuant to Section 28 of the US Airways-ALPA collective bargaining agreement. It contends that the Plan was terminated in US Airways' bankruptcy and was taken over by the PBGC, resulting in significant benefit reductions payable to covered pilots.

USAPA maintains that the Pension Investigation Committee ("PIC") was formed to investigate transactions that had occurred prior to the termination of the Plan, the resulting information was presented to the BPR, the BPR retained legal counsel and the Association filed a lawsuit against the PBGC. It asserts that it treats the expenses of the Pension Investigation Committee and the lawsuit as germane because they relate to the enforcement of a contractual benefit and the lawsuit seeks relief on behalf of all pilots who were covered by the Defined Benefit Plan that was taken over by the PBGC, including members and non-members who were vested in the Plan at the time of termination. The Association points out that the Pension Investigation Committee and the lawsuit against PBGC are funded by assessments to each covered pilot vested under the plan.

The Association further argues that Captain Munn's objections to inclusion of the Pension Investigation Committee's expenses as germane - that the expenses are not related to negotiation of the contract, the administration and enforcement of agreements or any other germane expense categories - are without merit. Although USAPA acknowledges that it is suing a government agency (PBGC) instead of the company over the termination of the pension plan, it maintains that the expenses of the PIC and the lawsuit are related to enforcement of Section 28 of the pre-merger US Airways (East) collective bargaining agreement. It contends that, as the representative of the East Pilots, it has chosen to investigate the termination of that contractual benefit, the lawsuit seeks an order empowering a special trustee to investigate "the potential claims that may be brought on the Plan's behalf against the Plan's former trustees . . ." and "to pursue such actions as are appropriate to

seek to remedy the Plan's former trustees' breaches of fiduciary duty. . . ." (Assn. Ex. 17)

USAPA further argues that Captain Munn's questions regarding the procedure for approval of the PIC assessment and the billing of the assessment (done separately or in combination with dues billing) are not relevant to the instant proceeding. It asserts that the instant case seeks only to determine whether its expenses for the year ended March 31, 2010, were germane or non-germane. Finally, the Association maintains that Captain Munn's allegation - that one of the objectives of the PIC assessment is "to use the funds collected from the assessment to support USAPA initiated legislation on Capitol Hill" - is incorrect. Citing Captain Streble's testimony, it contends that there was no legislative effort in the fiscal year ended March 31, 2010,<sup>9</sup> and the PIC assessment deals solely with the litigation against the PBGC. (Tr. 61-62)

The Association further argues that it applied the 4.54% non-germane allocation to many of the General and Administrative Expenses because most of those categories could *potentially* include non-germane activities that are difficult, if not impossible, to track specifically.<sup>10</sup> It asserts that, essentially, the only

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<sup>9</sup>The Association acknowledges that, in the current fiscal year (not at issue in the instant proceeding), it has made legislative efforts to amend ERISA. (Tr. 61) Captain Streble testified that, in the current fiscal year, expenses relating to the legislative efforts by PIC members have been included in the Government Affairs Committee, which are considered completely non-germane. (Tr. 61)

<sup>10</sup>The 4.54% non-germane allocation represents the entire portion of non-germane expenses for Interest, Taxes and Licenses, Office Staff Payroll, Office and Equipment Rent, Technology, Banking Fees, Vehicles and Depreciation Expense. A combination of identified non-germane expenses and the 4.54% non-germane allocation is included for the following expenses: Insurance (including member aeromedical insurance), Office Supplies and Expenses, Press Releases and Videotapes and Other expenses, including expenses of BPR meetings and membership (cost of which is totally non-germane) in the Coalition of Airline Pilots Association, a group of independent pilot unions. Since Medical Furlough Expense is a benefit for furloughed pilots that is funded by an assessment on members, it is all considered a germane expense. Advertising expenses consisted of a \$100 credit from a prior period.

General and Administrative Expenses in dispute are litigation expenses, including under the category of Legal and Professional expenses.

USAPA further argues that it incurred legal expenses for four lawsuits, that is, *Addington*, RICO, *Breeger*, "Flow-Through" litigation. It maintains that *Addington* and *Breeger* both alleged that USAPA breached its duty of fair representation ("DFR"). The Association contends that, in *Ellis*, the U.S. Supreme Court held that expenses incurred in defending DFR litigation are germane. It points out that Arbitrator Brent agreed with this conclusion in the prior year's arbitration.

With respect to the RICO litigation, *i.e.*, *USAPA v. AWAPPA*,<sup>11</sup> the Association argues that the actions of the Defendants who were involved in that litigation was intended to impose burdensome costs on USAPA and to attempt to impair its ability to perform its function as collective bargaining representative. It asserts, therefore, that the expenses incurred in prosecuting an action to stop the Defendants' conduct were germane. USAPA maintains that the Supreme Court, in *Ellis*, held that the expenses of litigation having a connection to the bargaining unit are chargeable to objecting employees<sup>12</sup> and that Arbitrator Brent, in last year's Award, also supported its contention.<sup>13</sup> It contends that, since the Defendants' actions had the potential to impact its ability to deliver services to and represent the bargaining unit, its action against AWAPPA was related to the bargaining unit.

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<sup>11</sup>*US Airline Pilots Association v. AWAPPA, LLC*, W.D.N.C. Case No. 08-246 (U. Ex. 18).

<sup>12</sup>See also *Lehnert v. Ferris Faculty Assoc. et al.*, 500 U.S. 507, 528 (1991), holding that "[w]hen unrelated to an objecting employee's unit, such [litigation] activities are not germane to the union's duties as exclusive bargaining representative."

<sup>13</sup>Expenses incurred to pursue this litigation constituted germane expenditures "to assure the ability of the Union to service the bargaining unit, including USAPA members and non-members alike." (U. Ex. 3, p. 14)

USAPA further argues that, contrary to Captain Munn's allegation, the U.S. Court of Appeals did not find that the RICO lawsuit was frivolous. It asserts that the district court dismissed the complaint for failure to state a federal claim and, thus, lacked subject-matter jurisdiction. It maintains that the Court of Appeals affirmed without any finding that the action was frivolous. Although the Association acknowledges that Arbitrator Brent commented that, "[i]f somebody were to file a frivolous lawsuit motion and prevail, then perhaps the fee payers could say that it was an unjustified expenditure and they shouldn't be charged for it" (Brent Arbitration, Tr. 140), it contends that there has *never* been a ruling that the RICO action was frivolous and there is no basis to argue that the RICO litigation expenses were unjustified.

Finally, the Association argues that the Flow-Through litigation - an action filed by the Air Line Pilots Association against several airlines and USAPA - claimed violations of the Railway Labor Act and breach of contract regarding the right of Piedmont and PSA pilots to "flow through" to new-hire US Airways pilot positions. It asserts that the expenses arising from this litigation were germane and that Captain Munn, and the other challengers, do not dispute the germaneness of those expenditures.

For all of these reasons, USAPA urges that its agency fee calculation of 92% of the full membership dues rate for dues objectors for the period from April 1, 2009, through March 31, 2010, be affirmed and that it be permitted to release the escrow funds.

**The Challengers** argue, through Captain Munn, that the Association incorrectly calculated germane and non-germane expenses. They maintain that PIC expenses were incorrectly allocated as germane and that the Association failed to communicate the Agency Fee Policy in a timely manner that prevented Challengers, or potential challengers, from properly evaluating the validity of the PIC assessment. The Challengers contend, in

addition, that the Legal and Administrative expenses associated with the RICO lawsuit and the *Addington* DFR case, as well as certain Communications expenses, were improperly allocated as germane.

As to the allocation of PIC expenses, the Challengers argue that the PIC investigation and attendant legal action against the PBGC was initiated to answer lingering questions surrounding the distressed termination of the pre-merger East pilots' defined benefit pension plan and to promote federal legislation to amend Title IV of ERISA. They assert that the substantial legal fees incurred are for issues and allegations involving a government-sponsored pension that does not apply to all represented USAPA pilots but only applies to East pilots. The Challengers maintain that these expenses are not germane expenses because they are not related to any existing contractual provision (US Airways has no defined benefit plan), have nothing to do with negotiation, administration or enforcement of any collective bargaining agreement, practices and working conditions, and have nothing to do with the Association's governance, management or institutional existence.

The Challengers further complain that non-members are not permitted full access to the USAPA website and do not receive e-mail notification from USAPA. They contend that, except for information provided by other members, they are unable to readily evaluate on an on-going basis key issues. Challenger Munn asserts that he did not receive the BPR Resolution approving the Agency Fee Policy by U.S. Postal Service and it is not available to non-members on the USAPA website.

The Challengers further argue that the Agency Fee Policy procedure for filing a Notice of Objection is clear. They maintain that a non-member pilot who wishes to become an objector must provide written notice to USAPA postmarked no later than 30 days after the Association publishes its statement of germane and non-germane expenses. They contend that the Association published this

statement September 30, 2010 and that potential objectors needed to file by October 30, 2010, which, therefore, only gave potential objectors only about four days to respond.<sup>14</sup> They assert that the Association's procedure failed to meet its *Hudson* obligations.

The Challengers further argue that the PIC assessment violated the Association's Constitution and By-Laws because "assessments may be levied on all active members under the sole authority of the BPR . . ." and must be ratified by a "majority of the votes cast by the members voting on the question." They maintain that assessments may not be levied on non-members, that there is a distinction between "active members" and "active pilots" and that Captain Streble's intimation that "active member" includes "active pilot" is without merit. The Challengers contend that USAPA goes to great lengths to distinguish and differentiate between members and non-members, including reduced services, restricted access to information and delayed communications. They assert that the Association obviously has a very clear understanding of what constitutes an active member, a member and a non-member, pointing out that assessments are levied on "active members" with the actual vote of "members" to include those on leave. They maintain that USAPA ignored its Constitutional mandate by including non-members in the assessment although they were not permitted to vote, included member West pilots in the vote although they have had and will have no involvement of any kind either pre- or post-merger and excluded West pilots from the assessment because they were not involved.

The Challengers further argue that to remove this challenge from consideration, as suggested by Association Counsel, defies common sense. They contend that this assessment does not satisfy germane expense requirements and would have not have been levied on non-members had the Association complied with its constitution and

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<sup>14</sup>In fact, the Notice and Agency Fee Policy were *dated* September 30, 2010, but were not mailed, along with the audited Schedule of Germane and Non-Germane Expenses, until October 18, 2010. Thus, potential objectors needed to file by November 17, 2010, and the Association permitted objections that were filed even later.

By-Laws. They assert that the intent of the BPR does not matter, since they are bound by the Constitution and By-Laws and that, if such language required an amendment to include non-members, there are appropriate procedures in place to amend them.

The Challengers further argue that the Legal and Administrative expenses associated with the RICO lawsuit are not properly categorized as germane. They maintain that the Association's actions were not taken in good faith and were politically motivated to "shut down" a dissident group of pilots and to serve this group of pilots as an example to the 1,800 other West pilots. They contend that, as a lawsuit motivated by the intent merely to harass, delay or embarrass the opposition, expenses for this lawsuit are not germane.

The Challengers argue that the expenses related to the Association defending the *Addington* DFR lawsuit should also be categorized as non-germane. They assert that the District Court found that USAPA had breached its duty by misleading the "East" pilots about its power to improve their seniority prospects at the expense of the "West" pilots, the jury unanimously found in favor of the "West" plaintiffs and the Court ordered the Association to "immediately and in good faith make all reasonable efforts to negotiate and implement a single collective bargaining agreement with US Airways . . ." The Challengers maintain that the Ninth Circuit Court of Appeals did not refute the findings of the District Court or the jury but merely concluded that the DFR claim against USAPA was not "ripe" for adjudication. They contend that the Association will continue to escalate its legal expenses - and do nothing to meet the expectation of the Ninth Circuit - if legal costs associated with the *Addington* case continue to be recognized as germane.

Finally, the Challengers argue that non-members receive little or no communication regarding USAPA activities and have extremely limited access to the USAPA website. They assert, citing Captain Streble's testimony (Tr. 51), that the Communications Committee is

responsible for the USAPA website and all communications from the company. Captain Munn maintains that, since the Communications Committee spends the majority of its time with *member* communication activities, and non-members are specifically excluded, the majority of the Communications Committee's expenses should not be considered germane.

The Challengers urge, therefore, that I order USAPA to disclose the exact amount of all monies involved in its four challenges and direct it to refund to all objectors and challengers the percentage of dues classified as non-germane and, for the PIC, 100% of the assessment paid. They urge, in addition, that, since the non-germane percentage of Communications Committee expenses is substantially larger than the amount the Association proposed, I order a more thorough examination and justification for those expenses and that I order USAPA to classify the costs of any future DFR litigation in the seniority integration of East and West pilots as a non-germane expense. Finally, they urge that I order the Association's alleged discrimination against non-members by denying access to the USAPA website, constitution and By-laws, the Union Operating Manual, committee updates and financial reports to be formally tested against its obligations under *Hudson*.

#### **DISCUSSION AND ANALYSIS**

It was the burden of the Association to prove, by a preponderance of the evidence, that the agency fee for the period from April 1, 2009, through March 31, 2010, to be paid by bargaining unit employees who elected not to join USAPA should be 92% of the full membership dues rate. In essence, the Challengers contend that USAPA failed to provide timely notice to non-members of their right to file objections and challenges and that it failed to properly categorize Pension Investigation Committee expenses, RICO and *Addington* lawsuit expenses and certain Communications expenses as germane. For the reasons which follow, I am persuaded that the Association met its burden and properly determined the agency fee for non-members.

## Procedural Challenges

It is undisputed that *Hudson* establishes the procedural requirements for a labor organization's collection of agency fees. The Association contends that it met each of *Hudson's* requirements; Captain Munn contends that it did not.

*Hudson* does not require that non-members have full information concerning all aspects of a union's operations. Rather, *Hudson* merely requires that non-members receive "an adequate explanation of the basis for the [agency] fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Nor does *Hudson* require that non-members receive an exhaustive and detailed list of all of the union's expenditures. It only requires "adequate disclosure," which "surely would include the major categories of expenses, as well as verification by an independent auditor."

I am convinced that USAPA met each of its *Hudson* obligations. The Schedule which it prepared disclosed the major categories of expenses, distinguished germane and non-germane expenses for each category and was verified by an independent auditor. The role of an independent auditor is not to determine whether particular expenditures represent the most wise or clever use of a union's limited funds. The auditor's role merely "is to verify that a union . . . did in fact expend the amounts claimed for the various categories of activities, both chargeable and nonchargeable."<sup>15</sup> Thus, CPA Davis examined all expenditures over approximately \$32,000, a reasonable sample of expenditures below that amount and the Association's bank records. He confirmed that the expenditures which the Association claimed it made for certain expenses were in fact made for those expenses. In the prior year's audit, Arbitrator Brent concluded that "[t]he auditors' methodology is

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<sup>15</sup>*Gwirtz v. Ohio Education Association*, 887 F.2d 678, 683 (6<sup>th</sup> Cir. 1989), cert. denied, 494 U.S. 1080 (1990).

consistent with the professional practices customarily utilized in agency fee cases." I note that this year's audit was conducted by the same auditors and used the same methodology.

I am also persuaded that USAPA provided a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker. The latter is demonstrated by the fact that the Association brought the instant proceeding under AAA's Rules for Impartial Determination of Union Fees. The former is demonstrated by the fact that no objector or challenger was rejected until on or about February 1, 2011, more than three months after such objections and challenges were due under the Agency Fee Policy.

It is undisputed that the Association's Notice was dated September 30, 2010. However, I am not persuaded by Captain Munn's contention that, since he did not receive the requisite documents until approximately October 26, 2010, he only had four days - to study and understand the basis for the assessment, to evaluate the merits of a fee challenge and to file his objections - prior to the expiration of the 30-day period on October 30, 2010. The Association demonstrated, and I am persuaded, that USAPA actually mailed the Notice, the Agency Fee Policy and the audited Schedule to the entire pilot bargaining unit on or about October 18, 2010. Thus, potential objectors had until the middle of November 2010 to post their objections. Captain Munn did so timely, as did Captain Rowe and First Officer Boveri. In any case, no challenger was rejected until February 1, 2011. Captain Munn, who protests the Notice period, submitted a challenge which was accepted; he was afforded full opportunity to participate, which he did.

I am also not persuaded by Captain Munn's contention that he did not receive a copy of the BPR Resolution approving the Association's Agency Fee Policy by mail and, as a non-member, could not access it on the Association website. *Hudson* does not require and there is nothing in the record to indicate that the USAPA was otherwise required to provide non-members with a copy of such a

resolution. Again I note that Captain Munn received and responded to notice of his right to challenge the Association's allocation.

Finally, it is undisputed that USAPA created an escrow for the amounts reasonably in dispute. None of the Dues Challengers alleged violations of the Association's obligations regarding the escrow amount.

The remainder of Captain Munn's contentions concerning USAPA's alleged procedural violations are beyond the scope of an agency fee determination. He contends, for example, that, since non-members are not permitted full access to the USAPA website, do not receive e-mail notifications, and do not have access to the Constitution and By-laws, the Union Operating Manual or news and committee updates, they cannot properly evaluate key issues. I have no authority to consider such complaints and, even if they are true, I have no authority to remedy them. As explained, *supra*, *Hudson* does not require that non-members have full information concerning all aspects of a union's operations, but only provides certain limited procedural guarantees. If Captain Munn believes such information about the inner workings of the Association is critical to him, he should, perhaps, reconsider his decision to be a non-member or, in the alternative, pursue relief in a forum with jurisdiction.

### **Committee Expenses**

#### Communications Committee

The Audit of USAPA's Schedule of Germane and Non-Germane Expenses concluded that the allocation of Communications Committee expenses - \$321,489 as germane and \$14,586 as non-germane - was fair. Captain Munn contends - based on the fact that non-members receive little to no communication regarding Association activities and have limited access to the Association website - that it is grossly disproportionate. However, his conclusion - that the Communications Committee spends the majority of its time on *member*

communications activities and, therefore, the majority of these expenses are not germane - is without merit.

Captain Munn's argument presumes that "germane" expenses are synonymous with expenses directly beneficial to non-members. That, however, is not the applicable legal standard. Under *Ellis*, the test for determining whether expenses are "germane" is

whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

I am persuaded, therefore, that the germane and non-germane Communications Committee expenses were properly allocated.

#### Pension Committee

The Audit of USAPA's Schedule of Germane and Non-Germane Expenses concluded that the allocation of Pension Committee expenses - \$104,432 all germane - was fair. Captain Munn contends - based on the fact that these expenses were generated by an investigation and legal action against the PBGC - that these expenditures do not conform to the definition of germane costs. However, his conclusion is without merit.

I am persuaded that, contrary to Captain Munn's contentions, the Pension Committee's expenses are germane. The expenses related to the PIC are related to enforcement of a contractual benefit, *i.e.*, Section 29, and the lawsuit seeks relief on behalf of "all pilots who were covered by the Defined Benefit Plan that was taken over by the PBGC," including members and non-members who were

vested in the Plan at the time of termination, but not including those not vested under that Plan. In addition, except for Captain Munn's allegation, there is nothing in the record to support the claim that Pension Committee funds were used for legislative efforts to amend ERISA. In fact, Captain Streble acknowledged that legislative efforts have been used in the current fiscal year - not 2009-2010 - and that any such expenses relating to that legislative effort will be included in the Government Affairs Committee and will be considered completely non-germane.

Finally, I find beyond my jurisdiction - and reach no conclusion with respect to - Captain Munn's contention that the procedure used to approve the PIC assessment was inconsistent with USAPA's Constitution and By-Laws. The question at issue in the instant proceeding is whether the Pension Committee's expenses were germane or non-germane. There is no correlation established between the assessment and PIC Committee, or other, expenses and, perforce, no correlation established between those assessments and non-germane expenses. Under AAA Rules, I am not authorized to consider Captain Munn's on-going concerns related to the PIC assessments as a function of the Association's By-Laws.

### **General and Administrative Expenses**

With the exception of the considerable litigation expenses reflected in the category of Legal and Professional Expenses, the Challengers do not dispute USAPA's allocations of germane and non-germane expenses for General and Administrative expenses. During 2009-2010, the Association incurred legal expenses for four lawsuits. Captain Munn challenges the expenses related to prosecuting the RICO lawsuit and defending the *Addington* DFR lawsuit. With respect to the former, he contends that it was not taken in good faith and was politically motivated to "shut down" a dissident group of pilots and to serve as an example to other pilots. He contends that the RICO lawsuit was motivated by the intent merely to harass, delay or embarrass the opposition and points out that the District Court dismissed it "with prejudice."

With respect to the latter, he contends that a jury unanimously found in favor of the plaintiffs and is doing nothing to meet the expectations of the Ninth Circuit. I am not persuaded that either contention negates the allocation of these expenses as germane.

The record makes clear that Captain Munn believes USAPA wasted a lot of money by pursuing the RICO lawsuit and defending the DFR lawsuit. However, the purpose of the RICO lawsuit was to stop the defendants from engaging in allegedly unlawful activity which could impose burdensome costs on the Association and impair its ability to perform its function as collective bargaining representative. Although litigation activities that are unrelated to an objecting employee's bargaining unit are non-germane, under *Ellis*, the expenses of litigation having a connection to the bargaining unit are chargeable to objecting employees. I note that Arbitrator Brent found:

The large expenses incurred to pursue litigation to defend the Union against actions allegedly taken by the entity known as AWAPPA and some of the pilots allied with AWAPPA constituted a germane expenditure of Union funds reasonably construed by USAPA as necessary to assure the ability of the Union to service the bargaining unit, including USAPA members and non-members alike. The size of this expenditure does not disqualify it as a germane exercise of the Union's right to protect itself [U. Ex. 3, p. 14)

I also note that the Court of Appeals for the Fourth Circuit affirmed the District Court's decision to dismiss the complaint "for failure to state a federal claim and thus lack of subject-matter jurisdiction." It did not find the claim to be frivolous and left the door open for the Association to pursue its claims in state court.

With respect to *Addington*, where the plaintiffs alleged that the Association breached its duty of fair representation, the Supreme Court, in *Ellis*, held that expenses incurred in defense of DFR litigation are germane. I am persuaded that the *Addington* case

arose from within the bargaining unit and, therefore, expenses arising from it are germane.

I note that, at the time of the prior arbitration, the *Addington* plaintiffs had prevailed at trial and the Association's appeal to the Ninth Circuit Court of Appeals was pending. Arbitrator Brent ruled that Captain Munn's challenge to these litigation expenses was premature because the case was still pending. However, since then, the Association prevailed in its appeal to the Ninth Circuit (Assn. Ex. 4), the U.S. Supreme Court denied plaintiffs' application for *certiorari* (Assn. Ex. 5) and the case is now over.

Disagreement over the appropriateness of litigation and the costs thereof is close to universal; however, such differing assessments do not render them non-germane. For the reasons stated, I am persuaded that the germane and non-germane Legal and Professional expenses were properly allocated.

### **Conclusion**

The arguments raised by Captain Munn have been considered as raised. For reasons set forth above, I find that the Association's calculation of germane and non-germane expenses upon which its calculation of the agency fee was predicated was accurate and fully justified. The agency fee calculation of 92% for objectors is appropriate. The Award so reflects.

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**A W A R D**

I affirm 92.0% of the full membership dues rate as the appropriate agency fee to be paid by bargaining unit employees who elected not to join the USAPA for the interval from April 1, 2009, through March 31, 2010.

The Union may release from escrow the funds necessary to permit the Association to receive all of the agency fees to which it is entitled pursuant to this Award.

Jurisdiction over the dispute is retained for a period of 60 calendar days from the date of issuance of the Award for the limited purposes of resolving disputes resulting from implementation of the terms of the Award.

Dated this 16<sup>th</sup> day of June, 2011, at Clarksville, Maryland.

  
M. David Vaughn  
Arbitrator