UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	
	:	Chapter 11
TRANS WORLD AIRLINES, Inc., *et al*	:	
	:	Case Number 01-0056 (PJW)
	:	
Debtors.	:	Jointly Administered
	:	**Hearing Date: 12/7/2001 at 10:30 a.m.**
	:	**Objection Deadline: 11/30/2001 at 4:00 p.m.**

UNITED STATES TRUSTEE'S OBJECTION TO JOINT MOTION OF DEBTORS AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PURSUANT TO 11 U.S.C. § 503(b)(1)(A) OR, ALTERNATIVELY 11 U.S.C. §§ 503(b)(3)(D) AND (b)(4), FOR ORDER APPROVING PAYMENT OF PROFESSIONAL FEES AND EXPENSES (D.I. TBD)[1/]

In support of his Objection to the Joint Motion of the Debtors and the International Association of Machinists and Aerospace Workers, AFL-CIO, Pursuant to 11 U.S.C. § 503(b)(1)(A) or, Alternatively 11 U.S.C. §§ 503(b)(3)(D) and (b)(4), for an Order Approving Payment of Professional Fees and Expenses (the "Motion"), Donald F. Walton, Acting United States Trustee for Region 3 ("UST"), by undersigned counsel, avers as follows:

1. This Court has jurisdiction to hear the above-referenced Objection.

2. Pursuant to 28 U.S.C. § 586, the UST is charged with overseeing the administration of Chapter 11 cases filed in this judicial district. This duty is part of the UST's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has "public interest standing" under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc.*

[1/] Although dated as of October 12, 2001 and accompanied by a Notice of Motion dated November 9, 2001, the subject Motion does not appear on the docket.

(In re Revco D.S., Inc.), 898 F.2d 498, 500 (6th Cir. 1990) (describing the UST as a "watchdog"). In connection therewith, the Executive Office for United States Trustees has adopted procedural guidelines (referred to herein as the "UST Guidelines") to be used in reviewing applications for compensation and reimbursement.

3. In furtherance of his case supervisory responsibilities, as well as pursuant to 11 U.S.C. § 307, the UST has standing to raise and be heard on issues of compensation and reimbursement of expenses.

I. The International Association of Machinists and Aerospace Workers, AFL-CIO, Did Not Incur Any Expenses Payable or Reimbursable Under 11 U.S.C. § 503(b).

4. In the Motion, TWA and the International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") jointly seek payment to IAM of the attorneys' fees and disbursements that IAM incurred in three discrete rounds of negotiations:

(a) Negotiation of modifications to the collective bargaining agreement between IAM and TWA (the "IAM CBA"), which TWA and IAM allege were a condition precedent to American Airlines' ("AA") closing of the asset purchase agreement between AA and TWA;

(b) Negotiation of a compromise of back pay claims held by certain IAM members; and

(c) Negotiation of a resolution of claims asserted by IAM, including a claim for rejection damages under the IAM CBA, which somehow "facilitated" a "global settlement" of the claims of other creditors.

5. The Motion asserts that IAM and its attorneys engaged in "expedited negotiations" for modification of the IAM CBA until April 6, 2001, when IAM and TWA executed agreements memorializing the changes to the IAM CBA.

6. IAM alleges that by negotiating the IAM CBA modifications, IAM provided benefits to TWA by enabling TWA to comply with a condition precedent to the asset purchase agreement between TWA and AA, and by preventing potential labor unrest which might have posed an obstacle to the sale. IAM claims that it also provided a benefit to AA because AA was able to acquire TWA's assets as a "turnkey operation" which included numerous employees who were members of IAM. IAM asserts that by helping AA to avoid the cost of training new employees, funds available for TWA's creditors were somehow increased.

7. From the inception of this case, it was made clear that the only alternative to a sale of TWA's assets to AA was an immediate liquidation of TWA, which would entail a substantial loss of asset value to the estate. More importantly, in such a liquidation, the 16,000 IAM members employed by TWA would lose their jobs, benefits and seniority.

8. IAM supported the sale to AA, and negotiated the modifications to the IAM CBA, for the express purpose of preserving the jobs, benefits and seniority of its members. Similarly, IAM negotiated a compromise of the back pay claims held by certain of its members to protect the interests of those members and accelerate final payment of the back pay claims, and negotiated the resolution of its other claims (including is claim for damages from rejection of the IAM CBA) in order to protect and maximize the interests and welfare of its members.

9. The Motion seeks payment of $485,854.87 to IAM under 11 U.S.C. § 503(b)(1)(A) or alternatively, under 11 U.S.C. § 503(b)(3)(D) and (b)(4). That proposed payment comprises the following amounts:

(a) $157,019.00 as compensation for services rendered and $6,505.18 for reimbursement of expenses incurred by IAM's bankruptcy attorneys, Lowenstein Sandler PC, during the period from February 1, 2001 to September 30, 2001;

(b) $236,333.75 as compensation for services rendered and $19,936.78 for reimbursement of expenses incurred by IAM's labor attorneys, Guerrieri, Edmond & Clayman, P.C., for the period from January 10, 2001 to August 31, 2001; and

(c) $61,439.75 as compensation for services rendered and $4,620.41 for reimbursement of expenses incurred by IAM's employee benefits attorneys, Grotta, Glassman & Hoffman, P.A., during the period from January 22, 2001 to July 31, 2001.

10. In order to hold administrative expenses to a minimum and to maximize the value of an estate, Section 503(b) of the Bankruptcy Code is narrowly construed. *See, e.g., In re N.P. Min. Co., Inc.*, 963 F.2d 1449, 1454 (11th Cir. 1992); *In re Philadelphia Mortgage Trust,* 117 B.R. 820, 828 (Bankr. E.D. Pa. 1990).

11. An applicant seeking allowance of administrative expenses has the burden to establish entitlement to such an award pursuant to 11 U.S.C. § 503(b). *Lebron v Mechem Financial, Inc.*, 27 F.3d 937 (3d Cir. 1994); *In re Buckhead America Corp.*, 161 B.R. 11 (Bankr. D. Del. 1993). In *Lebron*, the United States Court of Appeals for the Third Circuit held that before an applicant may be reimbursed or compensated under 11 U.S.C. § 503, it must be shown that "the efforts of the applicant resulted in an actual and demonstrable benefit to the debtor's

estate and the creditors." *Lebron*, 27 F.3d at 944, *citing In Re Lister*, 846 F.2d 55, 57 (10th Cir. 1988). The *Lebron* court further stated:

> A creditor should be presumed to be acting in his or her own interest unless the court is able to find that his or her actions were *designed* to benefit others who would foreseeably be interested in the estate. In the absence of such a finding, there can be no award of expenses even though there may have been an incidental benefit to the chapter 11 estate.

Id. at 946 (emphasis added).

12. To be entitled to allowance as an administrative expense under any of 11 U.S.C. §§ 503(b)(1)(A), 503(b)(3) or 503(b)(4), the tasks performed must transcend the creditor's own self interest and be performed for the benefit of the estate. If the claimant was acting to protect its own interests, the expense was not incurred to preserve the estate under 11 U.S.C. § 503(b)(1)(A) even if the estate received a benefit from the claimant's actions. *Matter of Dayhuff*, 185 B.R. 971, 975 (Bankr. N.D. Ga. 1995)(*citing Lebron, supra*); *In re Williams*, 165 B.R. 840, 841-42 (Bankr. M.D. Tenn. 1993); *Buckhead America, supra*, 161 B.R. at 15, 16; *Wolf Creek Collieries Co. v. GEX Kentucky, Inc.*, 127 B.R. 374, 379-80 (N.D. Oh. 1991)(*collecting cases and citing, inter alia, In re Philadelphia Mortgage Trust, supra)*; *In re Moore*, 109 B.R. 777, 783-84 (Bankr. E.D. Tenn. 1989); *In re SMB Holdings, Inc.*, 77 B.R. 29, 32 (Bankr. W.D. Pa. 1987). Similarly, if the claimant was acting to protect its own interests, the expense was not incurred in making a substantial contribution in the case under 11 U.S.C. § 503(b)(3) or (b)(4), even if the estate benefitted from the claimant's actions. *Lebron, supra*, 27 F.3d at 946; *Buckhead America, supra*, 161 B.R. at 15, 16; *Wolf Creek Collieries, supra*, 127 B.R. at 380.

13. Although the Motion is couched in terms suggesting that IAM acted primarily out of concern for the well-being of TWA's estate and that IAM received only incidental benefits,

IAM's motives were not so pure. IAM did not undertake to preserve the estate for the benefit of all creditors and parties in interest or to contribute to the case; IAM acted instead to preserve as many as possible of the 16,000 TWA jobs held by IAM members, to facilitate and accelerate collection of back pay payments to its members, and to resolve consensually its other claims against the estate rather than risk adverse results through litigation. Thus, IAM had pressing, independent interests in each round of negotiations. Self-interest motivated IAM's activities, which were narrowly tailored to protect the interests of IAM members, and any benefit to the estate was only incidental.

14. Because IAM acted in pursuit of self-interest, its associated expenses do not qualify for administrative priority under 11 U.S.C. § 503(b). *Lebron, supra*, 27 F.3d at 946; *Matter of Dayhuff, supra*, 185 B.R. at 975, *citing Lebron, supra.*; *Buckhead America, supra*, 161 B.R. at 16; *In re Sound Radio, Inc.*,145 B.R. 193, 209 (Bankr. D. N.J. 1992).

15. If IAM's legal fees and costs of renegotiating the IAM CBA are payable out of the estate as an administrative priority expense, then any non-debtor who renegotiates an executory contract with a debtor would be entitled to shift its legal fees and costs to the estate, since renegotiation almost always benefits the estate by improving the debtor's end of the bargain. 11 U.S.C. § 503(b) would be stripped of its meaning, as it would be immaterial that the non-debtor party acted out of self-interest to retain some of the contract's economic benefit rather than lose all of it. Such fee shifting is flatly contrary to 11 U.S.C. § 503(b) and the myriad case law narrowly construing it.

16. By the same token, if IAM's legal fees and costs of negotiating resolution of its members' back pay claims and settlement of its own claims are recoverable as an administrative

priority expense, then any creditor who settles a claim would be entitled to shift its legal fees and costs to the estate, since a negotiated settlement almost always benefits the estate by reducing litigation costs and removing the risk of a higher claim amount being allowed after litigation. 11 U.S.C. § 503(b) would be stripped of its meaning, as it would be immaterial that the non-debtor party acted out of self-interest either to retain some of the contract's economic benefit rather than lose all of it. Again, such fee shifting is repugnant to 11 U.S.C. § 503(b) and the case law holding that it is to be narrowly construed.

17. Finally, the UST notes an allegation in the Motion that:

> IAM diligently worked as a member of the Committee [official committee of unsecured creditors], which the United States Trustee, in connection with approving and appointing the Committee on January 18, 2001, found to be beneficial to the Debtors, their estate and creditors.

This allegation is inappropriate and misplaced for at least three reasons:

(a) The UST's appointment of IAM to the official committee of unsecured creditors in no way constitutes a finding that IAM's membership on the Committee is, would be or even might be "beneficial to the Debtors, their estate and creditors." While the appointment of an official committee of unsecured creditors is beneficial to the estate and therefore mandated under 11 U.S.C. § 1102(a), the appointment of an individual member of that committee reflects only that the member appears to meet the statutory criteria for appointment. Any inference of a "finding" by the UST is unfounded.

(b) Even assuming *arguendo* that IAM has served diligently on the Committee to represent the interests of all unsecured creditors, Committee members are appointed with the expectation that they will perform meritoriously in representing the interests of

their entire constituency – all unsecured creditors. When they do so, they are only doing the job they were appointed to perform. Anything less would be a breach of their fiduciary duty to their constituents.

(c) The Motion is not a motion for payment of committee member fees under 11 U.S.C. § 503(b)(3)(F), which is the exclusive provision of Section 503 addressing expenses incurred by members of a committee appointed under 11 U.S.C. § 1102. The Motion instead seeks payment under 11 U.S.C. § 503(b)(1)(A) or, alternatively, 11 U.S.C. §§ 503(b)(3)(D) and (b)(4). Simply stated, the quality of IAM's service on the Committee is not relevant to the instant Motion.

II. The Application Does Not Comply with Applicable Third Circuit Law, the Rules of the Bankruptcy Court of the District of Delaware and the UST Guidelines.

18. Even if any portion of the expenses that IAM seeks to recover were somehow incurred primarily to preserve the estate or to make a substantial contribution in the case, the Motion is improper in form and does not conform to the Rules of the Bankruptcy Court or UST Guidelines.

19. To the extent the Motion seeks reimbursement pursuant to 11 U.S.C. §503(b)(3) or (b)(4), it must comply with Local Rule 2016-2 of this Court.

20. To substantiate the fees and expenses of IAM's three law firms, separate "applications" for compensation for services rendered and reimbursement of expenses incurred are annexed to the Motion on behalf of Lowenstein Sandler PC (the "Lowenstein Application"), Guerrieri, Edmond & Clayman, P.C. (the "Guerrieri Application") and Grotta, Glassman & Hoffman, P.A. (the "Grotta Application").

21. The Motion discusses IAM's alleged preservation of the estate and/or its alleged substantial contribution to the case, and purports to seek payment only in the context of negotiating modifications to the IAM CBA, negotiating claims held by IAM members (the back pay claims) and negotiating claims held directly by IAM (*e.g.,* IAM's claim for damages from rejection of the IAM CBA). Nonetheless, the Applications do not encompass, and the Motion does not seek, payment only for legal fees and costs in connection with such negotiations. Rather, the Applications reflect charges for, and the Motion seeks payment of, fees for all of the legal services that Lowenstein Sandler rendered from February 1, 2001 through September 30, 2001; that Guerrieri, Edmond & Clayman rendered from January 10, 2001 to August 31, 2001; and that Grotta, Glassman & Hoffman rendered from January 22, 2001 to July 31, 2001. The Applications also seek reimbursement of all costs incurred by each of those law firms in connection with any and every aspect of the Applicants' representation of IAM during those periods.[2/] It would appear that IAM believes that if it provided *any* benefit to the estate, it is entitled to compensation and reimbursement for *all* of its legal fees and expenses in these cases.

22. In fact, the Applications annexed to the Motion reflect all services and expenses of IAM's three law firms during the periods described in the preceding paragraph, without any attempt to differentiate whether particular time entries and the fees and expenses related thereto were incurred for the specific benefit of the estate as opposed to the benefit of IAM.

[2/] Although each Application seeks compensation for services broader in scope than the services described in the Motion, only the Motion is before the Court for consideration. The Applications are attached only as exhibits to the Motion and have not been filed with the Court as separate applications for compensation.

23. IAM's submission of an undifferentiated mass of time entries and expenses, and its attempt to recover all of its legal fees and costs under 11 U.S.C. § 503(b) without regard to whether they were incurred to advance the estate's interests or IAM's self-interest and without regard to whether they actually provided a benefit to the estate, reflects an absence of good faith.

24. IAM has essentially presented a "haystack" of legal invoices and demanded that anyone who objects to payment of the full amount requested by IAM must find the "needle" of legal fees and expenses which might be appropriately payable as administrative expenses under 11 U.S.C. § 503(b). IAM must bear the burden of proof on its request for administrative priority payment, and it is inappropriate for IAM to shift to others the burden of combing through the time entries and expenses of IAM's counsel to look for compensable items. If IAM is unable or unwilling to meet its burden of showing specifically which of its legal fees and expenses are entitled to payment under 11 U.S.C. § 503(b), the Motion should be denied in its entirety.

25. The Lowenstein Application contains no explanation of the 33.9% increase in Sharon Levine's hourly billing rate, from $295 to $395, effective July 1, 2001. Given the magnitude of the rate increase, the Court should examine it for reasonableness if, indeed, any of the services described in the Lowenstein Application are compensable.

26. The Guerrieri Application does not comply with Del.Bankr.LR 2016-2(d)(ii) and (d)(ix) as it contains numerous entries that are vague; they do not include the subject discussed during telephone conversations, conferences, or in letters, thus precluding effective review for reasonableness or potential benefit to the estate.

27. The Guerrieri Application and the Grotta Application do not comply with Del.Bankr.LR 2016-2(d)(viii) as they contain entries for what appears to be non-working travel

time on numerous dates, billed at the attorneys' full rate. The reviewer cannot determine the amount of time spent traveling because the entries lump travel time with time spent on other tasks.

28. The Guerrieri Application and the Grotta Application do not comply with Del.Bankr.LR 2016-2(d)(vii), as they contain a significant number of time entries that are lumped together.

29. The Guerrieri Application and the Grotta Application do not comply with Del.Bankr.LR 2016-2(d)(iv), which requires billing in one-tenth of an hour increments, as they contain numerous time entries that are billed in increments of one-quarter of an hour or more.

30. The Guerrieri Application (which also seeks reimbursement of fees and costs of its local counsel, Duane, Morris & Heckscher) and the Grotta Application do not comply with Del.Bankr.LR 2016-2(e)(iii) as they seek reimbursement of expenses for facsimile transmissions and internal photocopying, but do not identify the rates charged.

31. Many of the services described in the Applications are duplicative of tasks performed by individual members of the Official Committee of Unsecured Creditors, counsel for the Creditors' Committee (who is well-qualified and has been diligent and zealous in representing the Creditors' Committee) or other professionals retained by the Creditors' Committee with the approval of the Court. Such services, being duplicative, were of no benefit to the estate and are not compensable by the estate.

32. The UST leaves IAM to its burden of proof on the merits and reserves his discovery rights.

WHEREFORE, the Acting United States Trustee respectfully requests that this Court deny the Motion in its entirety.

Respectfully submitted,

DONALD F. WALTON
ACTING UNITED STATES TRUSTEE, REGION 3

Dated: November 30, 2001

BY: /s/ Mark S. Kenney

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