In the Matter of the Arbitration Between

UNITED AIRLINES, INC.

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Board No. 2012-08
Gr. No. 2012-U-11-14R *et al*
Profit Sharing

Hearings held May 21 and 22, 2012

Before the System Board of Adjustment
Richard I. Bloch, Esq., Chair
Jennifer Coyne, Company Appointed Member
Chuck Vanderheiden, Company Appointed Member
Joseph Pedata, Association Appointed Member
Fred Greene, Association Appointed Member

APPEARANCES

For the Association
David Dean, Esq.
Steven K. Hoffman, Esq.

For the Company
Tom Jerman, Esq.

OPINION

Facts

United Airlines (hereinafter "United" or "Company"[1]) filed for bankruptcy in 2002. In December of that year, United filed a motion, under Section 1113 of

[1] The term "Company" will also refer to "United Continental Holdings," or "UCH," the successor holding company to UAL Corp. The name change occurred on the date of the merger agreement

the Bankruptcy Code, to reject the existing Collective Bargaining Agreement with the Air Line Pilots Association ("ALPA"). However, during the time the 1113 motion was pending, the parties were able to resolve that issue by negotiating modifications to the labor agreement in the form of concessions -- reductions in wages, benefits and work rules -- amounting to some $1.4 billion annually. Additionally, the parties agreed to terminate the existing Defined Benefit pension plans.

The dispute in this case centers over United's decision to allow Continental Air Line (occasionally "CAL") pilots to participate in a Profit Sharing Plan ("PSP") originally negotiated between ALPA and United in 2003 and included in the 2003 United/ALPA Collective Bargaining Agreement. Shortly after executing that document, the Company returned to ALPA requesting additional concessions, including additional wage and work rule adjustments. In return for terminating the pension plan and securing $191 million in additional annual savings, the Company proposed a Profit Sharing Plan, to be described in greater detail below, that would include "[a]ll domestic employees of UAL Corp. or United Airlines, Inc. (including all pilots) who have completed one year of service..."[2]

The document codifying the parties' agreement as to this second round of concessions, Letter of Agreement 05-02 ("LOA 05-02") of the Bankruptcy Exit

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in October of 2010. The terms "sub-CO" and "sub-UA" will also appear, from time to time, referring to the formerly separate CAL and UA pilot groups.

[2] Presser Ex. 4 at Stamp 020848.

Agreement, was executed January 31, 2005.[3] Among other things, LOA 05-02 required that any Plan implementing documentation be "reasonably acceptable to the Association".

The UAL Corp. board adopted the PSP document, effective January 1, 2006. The document was published as an exhibit to the Company's 2006 Form 10K.[4]

The announcement of a merger between United and Continental in May 2010 inspired the formation of a four-party Transition and Process Agreement (hereinafter "TPA") tasked with establishing administrative guidelines for the two carriers and their respective pilot labor agreements during the time preceding negotiation and execution of a Joint Collective Bargaining Agreement ("JCBA"). Negotiations for the JCBA began in August of 2010.

Prior to 2010, the CAL Pilots had participated in a Continental Profit Sharing Plan, but by 2010, that participation right had terminated.[5] The four parties signatory to the TPA modified the Continental labor agreement in order to provide, in the TPA, that Continental pilots would participate in the 2010 Continental Plan. They also agreed that, for calendar year 2010 only, Continental profits would be the sole source of funding for the Continental Profit Sharing

[3] Jt. Ex. 2, Co. Ex's. 4-31.
[4] Jt. Ex. 5.
[5] Tr. at 385.

Plan and would not be commingled with the profits that were the basis of the UAL Corp. Profit Sharing Plan.[6]

Three months later, on January 1, 2011, the Company amended the United Plan document (2011 PSP document) by, among other things, making profit sharing available to all domestic employees, including Continental employees, but with the caveat that those employees' eligibility was contingent on their having a profit sharing provision in their respective labor agreements. At the time, Continental pilots' contract had no provision for profit sharing. The JCBA negotiators intended to incorporate such a plan, but had not at that point agreed on its terms. Toward the end of 2011, with no success in negotiating a plan, the parties discussed the prospect of extending the TPA, but they could not agree on that, either.

Following the unsuccessful attempt to deal with the profit sharing issue for Continental pilots, the Company and CAL Master Executive Council ("MEC") executed their own agreement on December 30, 2011, whereby profit sharing benefits were extended to Continental pilots in return for the CAL MEC's dismissing an unrelated grievance. That action inspired two grievances[7], ALPA

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[6] Tr. at 385-388. UAL Corp. modified the 2006 PSP document, reflecting the parties' agreement that Continental's 2010 financial performance would not impact the UAL Corp. PSP for 2010. See Jt. Ex. 7.

[7] The first complaint came before a special System Board in January of 2013, the Association contending that the Company violated Section 4-A of the TPA by failing to secure the ALPA President's signature on the agreement providing for profit sharing. The System Board sustained the Association's grievance, finding that "the company violated the TPA by entering into the Profit sharing Agreement in question" and remanding the matter to the parties "for their consideration

contending in both that the Company erred in extending PSP benefits to sub-CO pilots.

Issue

1. Whether the grievance is timely under Section 17-A of the United Pilots Agreement.
2. Whether UCH violated Letter 05-02, Exhibit C, and Section 3-L-2 of the Agreement by adopting a profit sharing plan for 2011 under which both sub-UA and sub-CO employees (instead of only sub-UA employees) participated.
3. Whether the Company violated Section 3-L-1-k of the labor agreement by failing to supply information requested by ALPA.

ALPA Position

The Association says the Company violated CBA Section 3-L and LOA 05-02 by extending profit sharing for 2011 to sub-CO pilots in February of 2012. According to both LOA 05-02 and the Labor Agreement, (referred to by the parties and herein, occasionally, as the "2003 CBA Rewrite," or "CBA") employees eligible to participate in the PSP are limited to "[a]ll domestic employees of UAL Corp. or United Airlines, Inc. (including all pilots) who have completed one year of service as of December 31st of the year for which Pre-Tax Earnings are being measured." The "eligibility" term, says the Association, makes no mention of employees of any other affiliate or subsidiary of UAL Corp. or United. The Profit Sharing Plan, therefore, was open solely to employees of

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of appropriate remedy." (*United Continental Holdings et al and Air Line Pilots Association*, Section 4-A Profit sharing grievance, June 18, 2013.)

United and the direct employees of UAL Corp., if any. The violation, says ALPA, served to dilute United pilots' agreed share of the profit sharing pool: The pre-tax earnings of the holding company should have been shared only among the employee groups that made sacrifices during the United bankruptcy.

Additionally, ALPA claims that, notwithstanding the Company's contractual obligation to "provide any information requested by the Association to audit calculation of UAL's performance...under the profit sharing program..." the Company refused to supply information concerning, among other things, the calculation of "Considered Earnings" of eligible employees or of unorganized employee groups.

Company Position

The Company maintains ALPA's grievance is untimely, inasmuch as it was not filed within 180 days after ALPA became aware that UCH had adopted a single PSP for all employees of UCH subsidiaries for 2011. ALPA should not be allowed to pursue an untimely grievance, particularly after UCH has already distributed $245 million in profit sharing payments to United and Continental employees.

On the merits, the Company says inclusion of the Continental subsidiary's profit and employees in the 2011 Profit Sharing Plan for UCH was consistent with the terms of Letter 05-02, bargaining history, and the parties' past practice of including UAL subsidiaries in the Profit Sharing Program. The Company denies

any violation concerning information requests, and asks, therefore, that the grievance be denied.

Relevant Contract and Other Provisions

2003 Collective Bargaining Agreement

Section 17-A: Non-Disciplinary Grievances
Any pilot or group of pilots, including probationary pilots, covered by this Agreement who have a grievance concerning any action of the Company affecting them, except matters involving discipline or discharge, shall have such grievance considered in accordance with the following procedures provided such grievance is filed within one hundred and eighty (180) days after the pilot(s) reasonably would have had knowledge of the facts upon which the grievance is based. This does not preclude claims for adjustment arising out of bookkeeping errors beyond one hundred and eighty (180) days.

2003 Collective Bargaining Agreement

3-M-2 Profit Sharing Program

3-M-2-a All pilots will participate in a pre-tax profit sharing program with respect to calendar years beginning in 2005.

3-M-2-b Pre-tax Profit is consolidated UAL pre-tax earnings as calculated under U.S. generally accepted accounting principles and reported in regulatory filings but excluding (i) unusual, special or extraordinary charges or (ii) charges with respect to grant or exercise of employee equity or options or (iii) charges with respect to payments under this profit sharing program.

3-M-2-c The Annual Profit Sharing Pool is 15% of the excess of (i) annual Pretax Profit over (ii) the Annual Plan Threshold, but in no event more than the Pool Cap.

3-M-2-d The Annual Plan Threshold is the product of (i) net UAL revenues and (ii) the following percentages (which represent net pretax profit margins):

2005	8%
2006	10%
2007	10%
2008	10%
2009	10%

3-M-2-e The Pool Cap is 8% of Wages of all participating employees.

3-M-2-f The pilots' share of the Annual Profit Sharing Pool is 43.5% of the Pool.

3-M-2-g The Association will determine the manner in which the pilots' share of the Annual Profit Sharing Pool is distributed among individual pilots.

3-M-2-h Profit Sharing payments will be made on May 1.

3-M-2-i Profit Sharing payments will be paid to the pilot, subject to applicable 401(k) deferral election, withholding and taxes.

3-M-1 Performance Incentive Program

3-M-1-a All United pilots will participate in an annual incentive program that aligns the interests of management and other domestic employees.

3-M-1-b Prior to each calendar year beginning with 2004, the Compensation Committee of the UAL Corporation Board of Directors ("BOD") will establish a performance incentive formula (the "Annual Incentive Formula") that will provide a "Threshold" or minimum incentive payment, a "Target" or average incentive payment and a "Maximum" incentive payment for senior management, other management, pilots and other domestic employees.

3-M-1-c The Annual Incentive Formula will be based on the following performance measures as reasonably weighted by the Compensation Committee. Each business unit (e.g., United Airlines, ULS) may have its own incentive plan measures. For example: financial performance (e.g.

EBITDAR margin, pre-tax margin), operational performance (e.g., on-time performance), customer satisfaction (e.g., intent to repurchase), employee engagement, safety performance (e.g., lost time injuries) and reasonably comparable measures as adopted by the Committee.

3-M-1-k The Company will provide any information requested by the Association to audit calculation of UAL's performance under the incentive plan and under the profit sharing program below. Any disputes over incentive payment and profit sharing calculations will be subject to the expedited arbitration procedures stated in Section 1-J.

Letter of Agreement 05-02

...19. Amendments; Waiver. This Letter of Agreement may be amended, modified, superseded or canceled and any of its provisions may be waived only by a written instrument executed by all parties or, in the case of a waiver, by the party waiving compliance. Except as otherwise expressly provided in paragraph 16 above with respect to the delivery of a notice of termination, the failure of any party at any time to require performance of any provision of this Letter of Agreement shall not affect the right of that party at a later time to enforce the same or a different provision. No waiver by any party of a right under this Letter of Agreement shall be deemed or construed as a further or continuing waiver of any such right with respect to the same or a different provision of this Letter of Agreement.

...Exhibit C
Profit Sharing

Effective Date of Profit Sharing Plan As of January 1, 2005 (so that the first year covered by the profit sharing plan shall be calendar year 2005).

Profit Sharing Pool In the event that the Company has more than $10 million in Pre-Tax Earnings in the relevant calendar year, 7.5% of Pre-Tax Earnings in 2005 and 2006 and 15% of Pre-Tax Earnings in each calendar year thereafter.

Pre-Tax Earnings UAL consolidated net income as determined in accordance with GAAP, but excluding (i) consolidated federal, state and local income tax expense (or credit); (ii) unusual, special, or non-recurring charges, (iii) charges with respect to the grant, exercise or vesting of

equity, securities or options granted to UAL and United employees, and (iv) expense associated with the profit sharing contributions.

Eligibility All domestic employees of UAL Corp. or United Airlines, Inc. (including all pilots) who have completed one year of service as of December 31st of the year for which Pre-Tax Earnings are being measured.

Allocation For each eligible employee, a pro rata share of the Profit Sharing Pool for each calendar year based on the ratio of the employee's Considered Earnings for the year to the aggregate amount of Considered Earnings for all eligible employees that year.

Considered Earnings As currently defined in the Company's Success Sharing Plan (i.e., base pay, overtime, holiday pay, longevity pay, sick pay, vacation pay, shift differential, premiums, pre-tax contributions to a 401(k) plan, pre-tax medical plan contributions, and flexible spending account contributions but not expense reimbursement, incentive or profit sharing payments, imputed income or other similar awards or allowances).

Payment Date By no later than April 30th of the following year.

Distribution In cash, subject to 401(k) deferrals.

Relationship to Other Programs Incremental to the Success Sharing Plan; in lieu of the existing profit sharing plan described in Section 3-M-2 of the 2003 Pilot Agreement.

Documentation Implementing documentation reasonably acceptable to the Association.

Duration Continuing unless and until terminated in a future pilot collective bargaining agreement.

2003 CBA Rewrite

3-L-2 Profit Sharing Program

3-L-2-a Eligibility – All domestic employees of UAL Corp. or United Airlines Inc. (including all pilots) who have completed one year of service as of December 31st of the year for which Pre-Tax Earnings are being measured.

3-L-2-b Pre-Tax Earnings: UAL consolidated net income as determined in accordance with GAAP, but excluding (i) consolidated federal, state and local income tax expense (or credit); (ii) unusual, special, or non-recurring charges, (iii) charges with respect to the grant, exercise or vesting of equity, securities or options granted UAL and United employees, and (iv) expense associated with the profit sharing contributions.

3-L-2-c Profit Sharing Pool – In the event that the Company has more than $10 million in Pre-Tax Earnings in the relevant calendar year, 7.5% of Pre-Tax Earnings in 2005 and 2006 and 15% of Pre-Tax Earnings in each calendar year thereafter.

3-L-2-d Relationship to Other Programs – Incremental to the Success Sharing Plan.

3-L-2-e Allocation – For each eligible employee, a pro rata share of the profit Sharing Pool for each calendar year based on the ratio of the employee's Considered Earnings for the year to the aggregate amount of Considered Earnings for all eligible employees that year.

3-L-2-f Payment Date – profit Sharing payments will be made by no later than April 30th of the following year.

3-L-2-g Distribution – Profit Sharing payments will be paid to the pilot in cash, subject to applicable 401(k) deferral election, withholding and taxes.

3-L-2-h Considered Earnings – As currently defined in the Company's Success Sharing Plan (i.e., base pay, overtime, holiday pay, longevity pay, sick pay, vacation pay, shift differential, premiums, pre-tax contributions to a 401(k) plan, pre-tax medical plan contributions, and flexible spending account contributions but not expense reimbursement, incentive or profit sharing payments, imputed income or other similar awards or allowances).

...3-L-1-k The Company will provide any information requested by the Association to audit calculation of UAL's performance under the incentive plan and under the profit sharing program below. Any disputes over incentive payment and profit sharing calculations will be subject to the expedited arbitration procedures stated in Section 1-J.

2006 Profit Sharing Plan

§ I.A. *General.* In connection with the reorganization under Chapter 11 of the United States Bankruptcy Code of UAL Corporation (the "Company") and its Affiliates (collectively "United"), United employees have agreed to reductions in pay and benefits as well as work rule changes designed to reduce costs and improve the Company's financial position. The purpose of this Success Sharing Program—Profit Sharing Plan (the "Plan") is to align the interests of United employees with the Company's financial goals by awarding all Qualified Employees eligible to receive an allocation for an Award Year with a defined share of the Company's profits if the Company's Pre-Tax Profit exceeds the Annual Plan Threshold for a fiscal year.

...§ I.F. *International Employees.* The Company does not intend to extend participation in the Plan to International Employees.

§ 1.G. *Affiliate.* "Affiliate" means each entity, corporate or otherwise, in which the Company, directly or indirectly, owns or controls a greater than 80% interest.

Company. "Company" means UAL Corporation.

Employer. "Employer" means the Company and each Affiliate which is identified in Appendix A as may be revised from time to time by the Company.

Qualified Employee. "Qualified Employee" means all employees of the Employer who during an Award Year are classified as regular full-time or regular part-time employees, but shall exclude the following:

1. Collective Bargaining Employees who are covered by a collective bargaining agreement which does not expressly provide for coverage under a profit sharing bonus plan such as the Plan; and
2. International Employees.

§ II.A. *Eligibility.* All Qualified Employees are eligible to participate under the Plan.

§ III.A. *Bonus Pool.* After the end of each Award Year, if the company's Pre-Tax Profit exceeds the specified Annual Plan Threshold for that year, a Bonus Pool will be established in an aggregate amount equal to the

following percentage of the Company's Pre-Tax Profit for the specified Award Year.

Year	Percentage
2006	7.5%
2007 and thereafter	15.0%

§ III.B. *Allocation of Bonus Pool.* Once the Bonus Pool (established under Paragraph III.A) is determined for an Award Year, each Qualified Employee who: (1) is a member of the ALPA Employee Group, the AMFA Employee Group, the IAM Employee Group, the Engineering Group, the Flight Dispatcher Employee Group, the Management and Salaried Group, the Meteorologist Employee Group, or the AFA Group; and (2) has completed a Year of Service as of December 31 of the Award Year is entitled to an Award equal to such portion of the Bonus Pool that is in the same proportion as his or her wages for the Award Year bears to the total Wages for the Award Year of all Qualified Employees who are eligible to receive an Award payment for the Award Year under this Paragraph III.B. Awards for Qualified Employees who are in the IAM Mileage Plus Employee Group are described in Appendix C.

§ VI.C. *Conflict.* Notwithstanding anything to the contrary in the Plan, the Plan Rules or Plan administration, the Employer's obligations to Collective Bargaining Employees shall be governed by the applicable collective bargaining agreements and any conflict between the terms of the Plan, the Plan Rules or Plan administration and the applicable bargaining agreements with respect to Collective Bargaining Employees shall be resolved in favor of the Employer's obligations under the applicable collective bargaining agreements.

Appendix A
Participating Affiliates

Name	Commencing	Ending
United Air Lines, Inc.	1/1/06	
Mileage Plus, Inc.	1/1/06	

...Appendix C
Special Award Provisions

C-1 Purpose and Application. The purpose of this Appendix C to the UAL Corporation Success Sharing Program—Profit Sharing Plan is to

modify and supplement the provisions of the Plan as they relate to Qualified Employees who are in the IAM Mileage Plus Employee Group.

C-2 Annual Plan Threshold. The purposes of this Appendix C, the Annual Plan Threshold means 10% of the Company's Net UAL Revenue for the specified Award Year, where "Net UAL Revenue" means the Company's consolidated Operating Revenues less "Regional affiliates" expense, both as determined under U.S. generally accepted accounting principles and reported in regulatory filings.

C-3 Bonus Pool. For purposes of this Appendix C, after the end of each Award year, to the extent that the Company's Pre-Tax Profit exceeds the specified Annual Plan Threshold under Section C-2 for that Year, a Bonus Pool will be established in an aggregate amount equal to fifteen percent 915%) of the Company's Pre-Tax Profit that is in excess of the Annual Plan Threshold for that Award year, but not in excess of an amount equal to eight percent (8%) of the aggregate Wages of all Qualified Employees eligible to receive payment of an Award for such Award Year under this Appendix C. The IAM Mileage Plus Employee Group will be allocated 1.178625% of the Bonus Pool, and the Qualified Employees in the IAM Mileage Plus Employee Group will receive an allocation of the Bonus Pool as determined by the IAM 141.

Transition and Process Agreement

3-A. Suspension of a separate negotiations and mediation. Subject to Sections 2-K and 3-B, the Parties will suspend their present negotiations under the RLA for new separate collective bargaining agreements, and United and APA will jointly request the NMB to administratively close the current mediation between them.

4-A. Collective bargaining agreements. The Continental CBA and United CBA will remain in effect for the respective Airlines and Pilot groups in accordance with the RLA except as modified by this Transition and Process Agreement or by the JCBA, or except as an Airline Party or Airline Parties and ALA otherwise agree with respect to their particular CBA. Until the effective date of the CBA, each of Continental and United will continue to operate under their respective Pilot CBAs as modified b this Transition and Process Agreement and by other agreements that may be entered into by ALPA and one or more Airline Parties with respect to their particular CBA.

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Section 8
Continental Profit Sharing

Continental Pilots will participate in the Continental Profit Sharing Plan adopted on February 17, 2010, in accordance with the terms of that Plan, for calendar 2010.

2011 Profit Sharing Plan

...*Conflict*. Notwithstanding anything to the contrary in the Plan, the Plan Rules or Plan administration, the Employer's obligations to any employees covered by collective bargaining agreements shall be governed by the applicable terms of such agreements, and any conflict between the terms of the Plan, the Plan Rules or Plan administration and the applicable collective bargaining agreements with respect to such employees shall be resolved in favor of the Employer's obligations under the applicable collective bargaining agreements.

Analysis

Time Limits

The parties to this Labor Agreement have adopted time limits, in Section 17-A, within which protests to non-disciplinary Company actions must be filed:

> Any pilot or group of pilots...covered by this Agreement who have a grievance concerning any action of the Company affecting them, except matters concerning discipline or discharge, shall have such grievance considered...provided such grievance is filed within one hundred and eighty (180) days after the pilot(s) reasonably would have had knowledge of the facts upon which the grievance is based.[8]

The Union's protest in this case surrounds the Company's "disburse[ment] [of] profit sharing on or about February 14, 2012, contrary to the negotiated terms

[8] 2003 CBA Rewrite §17-A. Joint Ex. 4, at 177.

and established past practice of the United Pilots Collective Bargaining Agreement."[9] The February 2012 date, says ALPA, is the critical starting line for measuring the time limits. The Company, for its part, contends the clock started earlier: It directs the Board's attention to the February 17, 2011 adoption of the PSP for calendar year 2011, one in which Continental employees, among others, would participate. The new plan, adopted unilaterally by the Company, was referenced in UCH's 10K on February 22, 2011.[10] Moreover, United issued a Skynet on March 3, 2011, clearly noting that Continental employees would participate in the Plan. The Bulletin published by UCH that day announced that "U.S. payroll co-workers, both represented and non-represented, who are employed by the United and Continental subsidiaries...will participate in the new United's Profit-Sharing Plan beginning in 2011."[11] On March 4, 2011, ALPA published a Master Executive Counsel Update that expressly acknowledged United's announcement the previous day.[12] Under the circumstances, says the Company, ALPA can hardly claim ignorance of the Company's plan to include sub-CO employees. ALPA protested neither the 2011 adoption nor

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[9] System Board Ex. 2, at 3.

[10] Co. Motion, at 2. See also Joint Ex. 9.

[11] Co. Ex. 37 at 3.

[12] Co. Ex. 38. The Company suggests that, via the update, ALPA somehow endorsed the concept that Continental pilots could participate, notwithstanding the absence of a contractual PSP:

> ALPA not only failed to file a grievance, it did the exact opposite, informing its members that the Company's announcement that sub-CO employees were eligible for profit-sharing was nothing more than a "reiteration" of Letter 05-02 and Section 3-L-2 of the Agreement. (Co. brief, at 30.)

From the record, however, we conclude that that advisory simply sought to ensure the Company's announcement was regarded not as a gesture of Company beneficence, but rather as the product of contractual necessity. The communication in no way dealt with or endorsed actions that were subsequently protested in 2012.

announcement of the Plan to include sub-CO pilots. The Company says it should have: The actions taken in 2011, it contends, amounted to notice to the Union that required a grievance within the bargained time limits if a complaint were to be considered timely. Thus, the Company maintains, the grievance should have been filed within 180 days after March 3, 2011.

The contractual test of whether, in 2011, ALPA pilots "reasonably would have had knowledge" of the facts underlying the grievance[13] requires a careful examination of all surrounding facts. To be sure, it is not inconceivable that the Company's announcement of its plan to cover not only United but also the newly-merged Continental employees could have raised the specter that Continental pilots would be eligible to receive disbursements, arguably contrary to the "conflict" provision of the 2011 PSP document. That provision makes clear the Plan was not to be applied in a manner conflicting with the bargained terms of the CBA, which limited disbursements to employees with an existing Plan. As will be discussed, however, under the specific circumstances surrounding these parties at the time, one cannot conclude that reasonable knowledge of critical facts should be imputed to ALPA at the time. First, the Company's announcement of its intent to share profits was made well in advance of anyone's knowledge as to whether profits would exist at all. Moreover, Continental pilots had no contractual rights to participate in profit sharing at the time: The definition of "Qualified Employee," under the 2006 Profit Sharing Plan, explicitly

[13] See Section 17-A, *supra*, p.7.

excluded "Collective Bargaining Employees who are covered by a collective bargaining agreement which does not expressly provide for coverage under a profit sharing bonus plan such as the Plan..."[14] Surely, the Company's announcement of the comprehensive coverage of CAL "employees" did not, in and of itself, seal the deal with respect to pilots.

The Company directs the Board's attention to Delta Airlines Inc., [15] wherein the System Board of Adjustment found the grievance untimely: The "critical act" in that case, said the Board, was the carrier's adoption of a policy in dispute, not its subsequent application. The issue in the Delta dispute surrounded reimbursements to pilots for financial losses incurred while performing authorized Association business. Certain contractual changes to vacation bidding procedures led to talks between the Company and the Union as to the impact of those changes on ALPA officials' vacation banks. There were no relevant discussions of the matter during 1990 negotiations and, following 1991 meetings on the subject, the Company suggested that ALPA get back to it with a proposal on how to deal with existing issues. However, ALPA made no proposals following that meeting. In 1992, the Association inquired again as to the payments it was seeking, but the Company emphatically responded there had been no agreement on a mutually satisfactory resolution and the Company declined to make the payments being sought. Vacation bank payments were

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[14] See p. 11, *supra*.
[15] 103 AAR 0014 (1999).

made in 1992, 1993 and 1994, but at no time did the Company adopt the suggestion that affected Pilots on ALPA business would somehow be covered under the new system.[16] The Association first grieved in August of 1994, ALPA contending, among other things, that the failure to grant the payments at issue constituted a "continuing grievance". Noting that, in every case, the specific circumstances will control, the Board found that the critical "act" occurred, and the timeliness clock began to run, on April 6, 1992, when the Company issued its unequivocal written response that it would not cover the pilots at issue. There was no cause, the Board said, to challenge the ALPA witnesses' assertions that they somehow believed the issue to still be open, but it found no support in the record for any such assumptions. The Company had been continuously operating in a manner fully consistent with its unequivocal denial of the payments in the years following its original denial. Under the circumstances, the Board found the Association's failure to file within 120 days after the Company's written notice to be grounds for finding the matter untimely.

The current case differs dramatically. In this case, the March 3, 2011 announcement that the PSP would be extended to Continental "*employees*" came at a time when, even were the Company to do so, sub-CO *pilots* would be ineligible, there being no existing profit-sharing plan for them at the time. As noted above, at the time the Company announced it would cover "all employees," both parties fully expected and intended that Continental pilots would ultimately

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[16] Opinion, p. 7.

(but not then) be covered. There were no facts at the time that would have suggested the necessity of adversary actions at that time. Indeed, during the JCBA negotiations in December of 2011, the Company offered to extend profit sharing to Continental pilots in exchange for the United pilots receiving furlough protection.[17] That proposal, however, was rejected by the United pilot negotiators, consistent with their belief that UCH would be hiring during 2012. Significantly, during the JCBA bargaining, both parties fully intended that Continental pilots would, in fact, be covered by a profit-sharing plan, because they then believed their negotiating efforts would be successful on that point.

The record is also characterized by a general lack of specific bilateral discussions at the time as to the overall scope and application of the PSP, a fact that underlies ALPA's current claim that the Company never sought confirmation from ALPA that the Plan was "reasonably acceptable" to the Union.

The precise extent of the Company's contractual obligation to ensure the PSP was, in the words of the LOA 05-02[18] "reasonably acceptable to the Union" is not fully clear. Whether this understanding anticipated notice, discussions, bargaining or some other mechanism is not apparent either from the language itself or from the record in this case. Surely, however, *some* sort of meeting of the minds was expected in drafting those words[19], and one can conclude that neither

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[17] Tr. at p. 483.
[18] *Supra*, at 10.
[19]. Witness Stephen Presser testifies about inserting the phrase "implementing documentation acceptable to the Association." With respect to that phrase, Presser says:

the original unilateral announcement of intentions by the Company nor the subsequent 10K publication satisfied the contractual mandate of securing some indication of reasonable acceptability to the Union. Nor, for the same reasons above, may the Union's general silence prior to filing its grievance be construed as acceptance.

In the overall, therefore, it may not be said the announcement of the Plan itself, in early 2011, should have been considered a red flag requiring ALPA's immediate protest, from a contractual standpoint. When considered together with the fact there were, at the time, neither profits nor disbursements and that, in any event, both parties intended that CAL pilots *would* be covered by the Plan,

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> We actually left it open to the Company as to whether they were going to a formal profit sharing plan or not. There was no requirement that they needed to have one. We wanted to make sure that we were going to implement this—this term sheet in the pilot collective bargaining agreement so we wanted to make sure that implementation was acceptable to the Association.
>
> I believe [the phrase] turns out to be, in the final draft, ["]reasonably acceptable to the Association["], and otherwise we left it open. But it was our understanding, in proposing this language, my understanding was that if the Company actually intended to, you know, formally actually implement this profit sharing one-page term sheet in something like a plan document, they would do so for [sic] the normal process of discussion and negotiation with the Air Line Pilots Association." (Tr., at 193-194.)

That there was discussion of the need to solicit ALPA's endorsement is clear enough from the fact the Company added to "acceptable" the adjective "reasonably". It is difficult to infer that, by this l modification, the parties intended the Plan need only be "somewhat" or "relatively" acceptable. It is more likely the change was intended to make clear that, whatever the discussion or negotiation process, the Plan would have to pass muster with ALPA, but with the proviso that the Association's acceptance could not be unreasonably withheld.

there is no reason to conclude that March of 2011 should be the contractually significant starting line date for purposes of Section 17.

The Company also argues, however, that ALPA should not be allowed to pursue the grievance after UCH already distributed $245 million in profit-sharing payments to United and Continental employees. Had ALPA objected earlier, says United, the Company would have had options for dealing with those concerns: "The Company was prejudiced by ALPA's unreasonably long delay, which is all the more reason to dismiss ALPA untimely grievance."[20] It is unclear, however, how such disbursement prejudiced the Company, particularly when participation by Continental pilots and receipt of profit-sharing funds was the intended goal of all negotiating parties, as indicated above.

In February of 2012, at the time the Company actually disbursed funds to Continental pilots, the negotiating landscape had changed dramatically. Efforts to achieve a JCBA had proven fruitless, thereby scuttling the parties' efforts to include the sub-CO pilots in a PSP, as discussed above. At that point, the Company took the unilateral action here at issue, an act that clearly required a timely response, which was done via ALPA's filings of March 5 and April 6, 2012.[21] Based on these observations, the finding is that the Union's grievance in 2012, well within the 180-day limit, was timely.

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[20] Co. brief, p. 32.
[21] System Board Exs. 1 and 2.

The Merits

Resolution of the dispute surrounding the scope of the PSP requires an examination of the origins of the Plan and the bargained contract supporting it. Central to the inquiry is the question of employee eligibility for Plan benefits, a matter described in words, that raise, but do not clearly settle, the question of whether pilots other than United's should be considered as covered by the Plan. LOA 05-02 and the 2003 CBA Rewrite both define the community of employees eligible to participate in profit sharing:

> ELIGIBILITY: All domestic employees of UAL Corp. or United Airlines, Inc. (including all pilots) who have completed one year of service as of December 31st of the year for which Pre-Tax Earnings are measured.

The language at issue is troublesome, as will be noted. Each side directs the Board's attention to portions of the provision that, they claim, support their respective positions. The Company says the reference to "all domestic employees of UAL Corp." must necessarily include all employees of that holding company's subsidiaries and affiliates, a conclusion that is unavoidable when one recognizes that UAL Corp., (now UCH) has no employees of its own. Why, the Company asks, would the drafters have included UAL Corp. employees other than to encompass subsequent employees - such as Continental pilots? It discounts the reference to domestic United employees "(including all pilots)" as loose drafting and mere surplusage.

ALPA, for its part, asks why the drafters should have felt constrained to explicitly recognize "United Air Lines, Inc. (including all pilots)" if listing UAL

Corp. would have sufficed? The answer, it says, is that the language fully reflects the underlying intent of the bargainers to recognize and respond to the substantial sacrifices made by United employees during concession bargaining, chief among them, the pilots.

The question before this Board is one of contract interpretation, the charge being to reconstruct, to the best of our ability, the intention that underlay the agreement of the bargaining parties. To be sure, there is a certain opacity to the bargained language – the respective interpretations urged by these parties are by no means frivolous. However, viewing the language in the light of the testimonial and documentary evidence surrounding its origins makes clear the intent of the contracting parties to direct the contested PSP benefit to United employees, including pilots, with no provision to cover sub-CO pilots, whose employer was not, at the time, even a gleam in eyes of the corporate parent-to-be. For the reasons that follow, these observations warrant the finding that the Company violated the Collective Bargaining Agreement.

The language of the eligibility provision explicitly references one UAL Corp. subsidiary (United) and one bargaining unit (pilots) within that sub. In suggesting that the field of eligible employees be expanded to include sub-CO pilots, the Company observes that employees of wholly-owned subsidiaries (of, for example, Ford Motor Company) frequently refer to themselves, in casual conversation, as Ford employees despite the fact they are technically employed by the sub, not the parent holding company. The argument is not frivolous but begs

the question as to why the highly sophisticated bargainers and drafters in this case would have felt the need to reference just *one* of the UAL Corp. subsidiaries (United) and, moreover, why they would have found it appropriate to highlight *one* bargaining unit (pilots) in the one named subsidiary. If one is to ascribe meaning to all bargained terms and avoid the assumption that words are to be ignored as mere surplusage, the most compelling conclusion is that the reference to UAL Corp. was an effort to be as (encompassing) as possible under the circumstances and that the explicit inclusion of the single named subsidiary and the single named bargaining unit may ultimately be seen as reflecting the parties' intention to exclude institutions and employee groups outside the United Air Lines corporate community, as then constituted.

The bargaining history in this case is both clear and unrebutted. In the final analysis, it firmly supports the conclusion that the bargainers intended the Profit Sharing Plan benefit to respond to the massive concessions granted by United Airline employees in response to the Company's urgent and repeated demands. As indicated above, early in 2003, the United MEC and the Company convened in an attempt to negotiate a resolution of the Company's 1113 Bankruptcy petition. According to the evidence, virtually every aspect of the pilot labor agreement was on the table. Those negotiations led to pilot concessions amounting to some $1.2 billion annually. Testifying for the Union, lead negotiator Presser observed that, considering the overall impact of the wage cuts, taken together with more stringent work rules concessions, the cuts amounted to

an average loss of pilot take-home pay between 45 and 48 percent.[22] In return, the pilots demanded benefits that included a profit sharing plan. The full range of economic adjustments were incorporated into the 2003 CBA.[23] Among other things, the parties agreed that shared profits would be based on the "consolidated UAL pre-tax earnings"—the earnings of United's holding company (then UAL Corp., subsequently United Continental Holdings (UCH)). Thus, the profit pool, to the extent it existed, would include funds from UAL subsidiaries and affiliates, as well as from United Air Lines itself. As contemplated, all United employment groups would participate in the program and receive shares of the profit sharing pool. The United pilots' share was 43.5 percent, a number, according to the record, derived from the fact the pilots had given that percentage of the total wage concessions by all United Air Lines employees.[24] Following ratification by the United pilots' Master Executive Counsel and approval by the bankruptcy court,[25] issues over the then existing 1113 motion before the bankruptcy court were resolved.[26] These steps, however, did not settle the economic troubles for the Company, and it was necessary for it to again approach the labor unions for additional concessions, as discussed earlier in this Opinion.[27]

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[22] Tr., at 145-47.
[23] Joint Ex. 1A.
[24] Tr. 162-165.
[25] *Id*, at 165.
[26] Tr. 166.
[27] *Id*, at 168.

The parties began to discuss new concessions in earnest during the summer of 2004. One major element on the table, in October of that year, was the termination of the existing defined benefit pension plan.[28] In November, the Company submitted proposed modifications to the 2003 Pilots' agreement that focused substantially on the pension plan termination and a profit sharing proposal based on a profit sharing pool of 15 percent of United's pre-tax earnings, to be allocated pro rata among "all regular full-time and part-time employees who have completed one year of service as of December 31 of the year in which pre-tax earnings are being measured."[29] According to the Company's proposal, coverage would encompass "Each eligible employee and all employee groups of the Company."[30] Stephen Presser testified as to his understanding that the employees at issue were all United workers who were being subjected to the concessions—all employees of "the Company" at the time.[31] The witness testified to his observation, as a first-line negotiator, that the parties were focused on the United employees -- it was they who had forfeited such substantial parts of their wage and benefit packages.[32]

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[28] See Presser Ex. 1, which outlines the concept of certain revisions to the existing profit sharing program that had been negotiated in 2003, as well as certain other contract modifications. See Presser Ex. 1, p. 2 *et seq.*

[29] Company Proposal, submitted as Presser Ex. 2, p. 4.

[30] Id., p.3.

[31] Tr. 180.

[32] Stated the witness:

> ...The document actually says what "the Company" refers to. "The company" refers to United Airlines, Inc. ... We were not [talking about any employees of another company]....this was a traumatic collective bargaining negotiation, and the profit sharing program was a very small salve on a very large wound, and that was the wound suffered

The resulting profit sharing plan modified the method of allocating the pre-tax profit sharing pool.[33] The pool to be made available to eligible employees was comprised of "UAL Corporation consolidated net income," a concept that remained unchanged from the original language in the 2003 Collective Bargaining Agreement.[34]

In December of 2004, ALPA transmitted a draft Letter of Agreement -- Letter 05-01[35] -- that contained language significant to the current dispute. That document was described by witness Presser as "the first sort of contract language or Letter of Agreement language draft that the ALPA working group, of which I was a part, put together for transmission for Jake Brace and others at United Airlines that expressed what we started out with as a concept document and then what we sort of evolved into a transaction framework document."[36] In describing eligibility, the drafters referenced "all domestic employees of UAL Corp. or United Air Lines, Inc. (including all pilots) who have completed one year of service as of December 31st of the year for which pre-tax earnings are being measured.[37]

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by those employees of united Air Lines who were being asked to give up their pensions program...." Tr. 181-182.

[33] Each employee would receive a pro rata share based on that employee's share of "considered earnings" as related to all United Air Line's employees.

[34] See Tr. pgs. 183-185, and Presser Ex. 2, p. 4.

[35] See Presser Ex. 4.

[36] Tr. at 186-187.

[37] *Id.* See the first unlettered exhibit attached to the draft, at UALHM 020848.

Presser testifies the Company did not, during those discussions, request that employees of any other subsidiary be included in the agreement under discussion.[38]

> "It wouldn't have made any sense..at the time. We were actually talking about a very specific group of employees who took very steep and drastic concessions to their labor contract. ...I have heard a lot of—I've seen some Power Points, I've heard a lot of conversation, there was no misunderstanding and no sort of difference of opinion as to which group of employees we were talking about."

The 2006 PSP

The revised Profit Sharing Plan was ultimately adopted, effective January 1, 2006[39] covering, according to its Appendix A, United Air Lines, Inc. and Mileage Plus Inc..[40] That document defined a "Qualified Employee" as all employees of "the Employer", but explicitly excluded international employees and, significant to this case, "Collective bargaining employees who are covered by a collective bargaining agreement which does not expressly provide for coverage under a profit sharing bonus plan such as the Plan..." The term "Employer", as used in the Plan, was defined as meaning "the Company [the Plan defines "Company" as UAL Corporation] and each Affiliate which is identified in

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[38] Tr. at 192.

[39] See Joint Ex. 5.

[40] According to the record, the UAL Corp. had numerous affiliates but only these two were covered. Tr. at 589-591. MPI employees, represented by the International Association of Machinists, participated in a separate bonus pool from that in which United employees participated. Moreover, the MPI employees did not participate in the second round of bargaining (See Tr., at 580, 593. 720). These facts underscore ALPA's point that the benefits of the Plan were intended to be directed to those who sacrificed by means of the extensive concessions – the employees of United.

Appendix A as may be revised from time to time by the Company." Thus, the Company-drafted Plan[41] does suggest the possibility of expanding the roster of Affiliates to be included under the Plan coverage. However, the Plan also incorporates, under Article VI(C), a "Conflict" clause that specifically subordinates the Plan to the collectively bargained labor agreement.[42] Thus, the controlling document remains the CBA, and Letter 05-02, incorporated by reference therein. Exhibit C's "eligibility" definition, therefore, remains central, and dispositive, to this dispute. The implementing language is not happily drafted, for the reasons discussed herein. But the unrebutted testimony and evidence in this case strongly underscores ALPA's contention that the negotiating parties intended, at the time, to be responsive to the needs of the United Air Lines employees who had taken profound hits in the concessionary bargaining. For the reasons set forth herein, we are persuaded that the Plan here at issue was not intended to include sub-CO pilots, absent mutual agreement of the parties.

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[41] The record includes the testimony of ALPA counsel Robert Nichols, confirming that ALPA had never been approached by the Company to ascertain if the PSP implementing document was "reasonably acceptable" to the Association. Tr., at 374.

[42] Article VI(C) states as follows:

> Conflict. Notwithstanding anything to the contrary in the Plan, the Plan Rules or Plan administration, the Employer's obligations to Collective Bargaining Employees shall be governed by the applicable collective bargaining agreements, and any conflict between the terms of the Plan, the Plan Rules or Plan administration and the applicable bargaining agreements with respect to Collective Bargaining Employees shall be resolved in favor of the Employer's obligations under the applicable collective bargaining agreements.

In accordance with the request of the Association[43] the grievances will be granted and the matter is hereby remanded to the parties for consideration of appropriate remedy.[44]

AWARD

The grievances are granted. The matter is remanded to the parties for their consideration of appropriate remedy. The Board will retain jurisdiction on that issue.

Richard I. Bloch, Chair

Joseph Pedata, Association-Appointed Member

Fred Greene, Association-Appointed Member

Jennifer Coyne, Company-Appointed Member

Chuck Vanderheiden, Company-Appointed Member

January 5, 2015

[43] ALPA Post Hearing Reply brief, p. 23.

[44] This case is unique in several respects. An earlier case, Case No. (4L), arose from ALPA's claim that the Company's actions in unilaterally implementing a Profit Sharing Plan for Continental pilots violated provisions of the Transition Process Agreement (TPA). Because those same facts underlay the Union's contention that the Company's actions *also* violated the CBA, the parties opted to brief the cases simultaneously, in each case requesting that the Board remand the matter to allow the parties to agree on a remedy, but retaining jurisdiction in the event they could not. In Case (4L), the Board concluded the Company had violated the TPA. The parties were unable to reach consensus on an appropriate remedy and, accordingly, returned to arbitration on that issue. On March 3, 2014, the Board ruled that the Union's request for a cash remedy lacked merit. Among other things, the Board found that no evidence that any monies "saved" by the Company, had it not funded the PSP, would necessarily have been made available for additional cash benefits to United pilots, who already were entitled to the PSP benefit.

CONCURRENCE OF THE ASSOCIATION BOARD MEMBERS

In their lengthy and highly charged dissent, the Company Board Members repeat a series of arguments previously made by the Company subsequent to the hearing in this case—but rejected by the Majority Decision. They also add an entirely new "frustration of purpose" argument not previously enunciated (*see* Dissent at 4 n.2) and argue on the basis of the damages ruling in the related Transition and Process Agreement ("TPA") arbitration while ignoring the decision on the merits in that case. Dissent at 2.[1] As the Dissent makes abundantly clear in its opening paragraph, it is based entirely on the twin notion, set out in bold type, that, from the Company's perspective, the Majority Decision is "illogical" and "fundamentally unfair," not to the Company, but to the "sub-Continental employees," who will suffer no possible detriment in the wake of the Decision at issue. Dissent at 1.

Notwithstanding its heat, the Dissent provides no light with which to undermine the Decision on the merits because the Dissenters concede, as they must, that that portion of the Decision is based on and draws its essence from the pertinent contractual provisions—namely, Letter of Agreement ("LOA") 05-02 and Section 3-L of the 2003 United Airlines collective bargaining agreement—and the bargaining history that led to those agreements. Indeed, while the Dissent vociferously argues that the Decision's interpretation of the pertinent contract's profit sharing participation "eligibility" provision is incorrect, it does not challenge the notion that interpretation of that provision is central to this case. And while it disagrees with the Decision's

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[1] While the Dissenters point to the TPA Arbitrator's decision not to award a monetary remedy in the TPA Arbitration, they somehow overlook the fact that the Arbitrator in that case found that the Company violated the TPA by entering into an eleventh hour agreement purporting to provide participation by the Continental pilots in the United-Continental Holdings ("UCH") profit sharing plan in 2012.

reliance on the bargaining history presented at the hearing to aid in the interpretation of the key provision, it can point to no contractual bargaining history to challenge that reliance; it cannot do so because during the hearing the Company chose not to present any bargaining history.

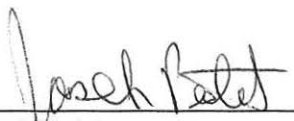
By the same token, although the Dissent argues that subsequent unilaterally generated and adopted Company profit sharing plan documents in 2006 and 2011 somehow modified the critical contractual provisions relating to profit sharing, they do not and cannot establish that the effectiveness of those modifications can stand in the face of the Plans' own "Conflict" clauses or the requirement in Paragraph 19 of LOA 05-02 (which the Dissent entirely ignores) that any modification of the LOA can be achieved "only by a written instrument executed by all parties" (*see* Decision at 10, quoting Paragraph 19), or the requirement of Exhibit C to the LOA requiring that implementing documentation for the profit sharing plan be "reasonably acceptable to the Association." Decision at 10, quoting Exhibit C.

Similarly, in its attack on the Decision's conclusion on the timeliness question, the Dissent neither can nor does contend that the Decision ignores the events in February and March 2011 on which the Company based its untimeliness claim. And the Dissent ignores entirely the fact that the Decision based its ruling on this question on the application of the contractual language requiring that timeliness be based on a consideration of whether those events "reasonably would have" given the Association "knowledge of the facts upon which the grievance is based." *See* Decision at 7, 16, citing CBA § 17-A. Again, while the Dissenters clearly disagree with the Decision's conclusion on the question and on the Neutral's analysis distinguishing his own prior decision involving a timeliness question at a different airline and an

entirely different set of facts, they cannot and do not contend that the Decision ignored either pertinent facts or the governing contract in reaching that conclusion.[2]

In view of the above, we the Association Board Members concur with the Majority Decision.

Fred Greene
Association-Appointed Member



Joseph Pedata
Association-Appointed Member

Dated: January 16, 2015

[2] By contrast, the Dissent itself ignores critical facts indicative of the numerous warnings the Association gave in late 2011 and early 2012 with respect to the legality of a profit sharing distribution including Continental employees, warnings issued well before the Company made the distribution and which the Company chose to ignore. *See* ALPA Morse Exh. 8 (Dec. 31, 2011, protest of agreement with CO pilots as CBA violation); ALPA Heppner Exh. 13 (Jan. 6, 2012, letter triggering TPA grievance process over agreement, copying the Company).

DISSENT OF THE COMPANY BOARD MEMBERS

We respectfully dissent from the majority's decision on both the merits and timeliness of the Association's grievance.

Nowhere does the majority openly acknowledge that its interpretation of Letter 05-02, Exhibit C and Section 3-L to preclude participation in the 2011 profit sharing plan by employees of UAL/UCH subsidiaries other than United Air Lines, Inc. mean that the profit earned by UCH subsidiary Continental Airlines, Inc. during 2011 through the efforts of sub-Continental employees would be allocated entirely to sub-United employees. To articulate that outcome makes it obvious that the majority opinion is both ***logically unsupportable*** given the inclusion of Continental's operations in determining the profit sharing pool and ***fundamentally unfair to sub-Continental employees***.

The majority's interpretation is also (1) unsupported by any bargaining history showing that United and ALPA had a mutual understanding as to how the profit sharing plan would be applied in the event of a merger with another airline; (2) inconsistent with ALPA's 2004 proposals for Letter 05-02, Exhibit C, which provided that the plan would cover "UAL employees" without making any distinction between those employed directly by UAL (no one) and those employed by subsidiaries of UAL (everyone else); (3) contrary to the express terms of formal UAL profit sharing plans adopted in 2004 (***before*** the parties reached agreement on increasing the profit sharing calculation in Letter 05-02), 2006, 2010 (when the 2006 plan was amended to exclude Continental profit and employees from the profit sharing calculation for United employees for the Fourth Quarter of 2010) and 2011 (which combined the profit and employees of United

and Continental in calculating profit sharing for 2011), all plans that were adopted by the UAL/UCH Board with full knowledge of the United MEC chair and ALPA counsel; (4) contrary to the unrebutted expert testimony that in drafting employee benefit plans employees of subsidiaries will be included absent an unmistakable intent to exclude them; and (5) contrary to UAL's past practice of (a) including employees of UAL subsidiaries under all of UAL's benefit plans; and (b) excluding sub-Continental income in calculating profit sharing for United employees under the 2006 PSP in the Fourth Quarter of 2010.

The majority asserts at the outset that "[t]he dispute in this case centers over United's decision to allow Continental Air Line . . . pilots to participate" in the 2011 PSP. Majority Op. at 2. If that were, in fact, the Association's claim, it would be both meritless and moot. It would be meritless because the United subsidiary had no role in executing the disputed agreement with the CAL MEC on December 30, 2011, and, in any event, under the 2011 PSP, the participation of the sub-Continental pilots had ***no impact*** on the profit sharing payable to sub-United pilots because the money otherwise would have been retained by the Company. It would be moot because the only possible basis for the Association's objection to the UCH/Continental agreement with the CAL MEC was the four-party Transition and Process Agreement ("TPA") signed in 2010, and that dispute has already been resolved by Chairman Bloch, who held that "the Union's request for a cash remedy lacked merit" because "[a]mong other things, the Board found that no evidence that any monies 'saved' by the Company, had it not funded the PSP, would necessarily have been made available for additional cash benefits to United pilots, who already were entitled to the PSP benefit." Majority Op. at 31 n.44.

The present grievance, by its terms, challenges the ***calculation*** of profit sharing for ***sub-United employees*** "by adopting a profit sharing plan for 2011 under which both sub-UA and sub-CO employees (instead of only sub-UA employees) participated." *See* Majority Op. at 5 (Statement of Issue No. 2). More specifically, the Association contends that the term "eligibility," which is defined in Letter 05-02, Exhibit C and Section 3-L as "[a]ll domestic employees of UAL Corp. or United Airlines, Inc. (including all pilots)," should be interpreted to include only sub-United employees, not sub-Continental employees, because the definition does not explicitly include employees of subsidiaries of UAL or United. At the same time, the Association at least implicitly argues that the term "Pre-Tax Earnings," which is defined in Letter 05-02, Exhibit C and Section 3-L as "UAL consolidated net income" (subject to various exceptions) should be interpreted to mean "***UCH*** consolidated net income" because UCH is the corporate successor to UAL. "UCH consolidated net income" includes all of the profit attributable to sub-Continental's operations.

In short, the present grievance is not dependent in any way on the UCH/Continental agreement with the Continental MEC to provide profit sharing to CAL pilots.[1] Rather, ALPA contends that under Letter 05-02, Exhibit C, and Section 3-L, all of the profit attributable to the efforts of all sub-Continental employees should be distributed solely to sub-United employees. Even if one credits the testimony of ALPA negotiator Stephen Presser that the purpose of the 2006 PSP was to compensate

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[1] While we do not see any ambiguity in the claims under Letter 05-02, Exhibit C, and Section 3-L that the Association seeks to pursue in the present case, if the Chairman nonetheless believes that this grievance challenges the agreement between UCH/Continental and the CAL MEC on December 30, 2011, the proper resolution would be to dismiss the grievance as moot in light of the Chairman's decision on the TPA grievance.

United Air Lines employees who made concessions in 2005 to keep United alive by providing them with a share of United's profits, there was no direct connection between the value of contract concessions and the amount of profit sharing. Indeed, new hire employees at the United subsidiary were fully entitled to profit sharing even though they did not make any contract concessions. More importantly, however, that rationale does not justify allocating the profits produced by the sub-Continental employees in 2011 solely to sub-United employees. Labor arbitrators frequently must apply contract language to circumstances not anticipated by the parties, and must determine the presumed intent of the parties in such circumstances. Here, the majority adopts an interpretation of the parties' agreement that is so illogical and creates such an unfair outcome, that no reasonable person could believe that was the parties' intent.[2]

As articulated above, the majority's conclusion that the definition of "eligibility" under the profit sharing provisions of Letter 05-02 and Section 3-L of the CBA precluded participation of sub-Continental employees also ignores critical elements of the contract language, the bargaining history and the relevant circumstances under which UCH adopted the 2011 PSP:

- The majority fails to acknowledge that the fundamental question in this case is how to implement a profit sharing plan after United merged with Continental – a subject on which there both sides agree there was no discussion during negotiation of Letter 05-02. ALPA argues that the definition of the profit

[2] Under the doctrine of frustration of purpose, one could conclude that the merger of United and Continental altered the underlying facts on which Letter 05-02, Exhibit C was premised to such an extent that "UAL consolidated net income" could not be interpreted to mean "UCH consolidated net income" even though UCH was the corporate successor to UAL, and that the profits of the Continental subsidiary should have been excluded in calculating profit sharing for United employees. In fact, this was done in the Fourth Quarter of 2010 without objection by ALPA. Neither ALPA nor any other union, however, has ever taken the position that there should have been two profit sharing pools in 2011, the first full year following the merger, presumably because the unions did not know if that approach would be more or less favorable than a single pool and in many cases, the same union represented employees of both carriers and would want to avoid taking a position that one group should receive more than the other.

sharing pool –15 percent of "***UAL*** consolidated net income" – must mean 15 percent of "***UCH*** consolidated net income" because UCH was the corporate successor to UAL, but that sub-Continental employees cannot participate in the plan, there was plainly ***no agreement*** on such an absurd and unfair application of the PSP in the context of a corporate merger.

- In examining the bargaining history, the majority ignores that ALPA's initial proposals for a profit sharing plan used the phrase "UAL employees," necessarily meaning all employees of UAL subsidiaries. It also fails to recognize that ALPA negotiator Presser's testimony that he drafted the phrase "employees of UAL or United" to ensure that the profit sharing plan would cover a handful of senior executives who he mistakenly believed to be employed by UAL is so utterly incredible that it calls his entire testimony into question.

- After reviewing the bargaining history, the majority concluded that the parties' intent was to define eligibility "as encompassing as possible under the circumstances." Majority Op. at 27. While that conclusion is correct, it is inconsistent with the majority's ultimate holding that "employees of UAL or United" did not include employees of subsidiaries of UAL.

- In discussing the evidence of past practice, the majority asserts that employees of MPI, Inc., a subsidiary of UAL, participated in their own profit sharing plan and not the 2011 PSP. Majority Op. at 30 n.4. In fact, employees of MPI were clearly covered by the 2004 Success Sharing Plan, the 2006 PSP and the 2011 PSP. While the IAM-represented employees of MPI had a different benefit formula in the 2011 PSP, the salaried and management employees of MPI participated in the 2006 and 2011 PSPs on exactly the same basis as United pilots. Tr. 580-81, 584, 593-94.

- The majority fails to recognize that the term "eligibility" is used in Letter 05-02, Exhibit C, in conjunction with the definition of "allocation" to determine each employees' pro rata share of the profit sharing pool – that is, the wages of each "eligible" employee as a percentage of the wages of all "eligible" employees of UAL/UCH or their subsidiaries. That is completely different than the restriction in the plan documents on making profit sharing payments to organized employees unless the applicable collective bargaining agreement provided for such payments – a restriction that was not negotiated with ALPA but appeared in the 2006 PSP and 2011 PSPs, as well as many other UAL benefit plans to avoid any claim that the employer unilaterally granted benefits in violation of the Railway Labor Act, 45 U.S.C. §151 *et seq*.

- Contrary to the majority's apparent understanding, the Continental pilots were clearly ***eligible*** employees under the 2011 PSP for purposes of determining each employee's allocation of the profit sharing pool, and anyone who read the plan when it was published in February 2011 would have been aware of this fact. The only predicate to payment of profit sharing benefits to the CAL

pilots was the requirement of an agreement between Continental and ALPA allowing such payments, and there was nothing in the 2011 PSP that prohibited the CAL MEC or any other union from reaching such an agreement during negotiations in 2011.

- For the same reason, the payment or non-payment of profit sharing to Continental pilots had no effect on the payments to United pilots or any other employee group. The majority's repeated assertion that the sub-Continental pilots had not properly negotiated participation in the 2011 UCH PSP, purportedly making them ineligible to participate in profit sharing for 2011, demonstrates that the majority fails to understand this critical distinction.

- The majority also ignores the testimony of Brian Belisle, the highly experienced employee benefits attorney who drafted the 2011 PSP and most other UAL benefit plans during this period. He testified that as a matter of practice employee benefit plans were always drafted to cover employees of subsidiaries unless the plan very specifically excluded them. Notably, ALPA failed to call the United MEC's own employee benefits attorney, Russell Woody, to rebut that testimony or to explain his involvement in drafting the United benefit plans.

- The majority appears to have been colored by its conclusion that the Company did not formally provide ALPA with a copy of the 2011 PSP and ask for its consent. Putting aside that the provision requiring that implementing language be reasonably acceptable to ALPA was eliminated from Section 3-L in the 2007 Rewrite,[3] the majority's views ignore the relevant circumstances. The Company included in the 2011 PSP all of the terms required by the United labor agreements and believed that adopting a single plan for employees of both subsidiaries fully complied with its legal obligations. Nonetheless, the Company provided the 2011 PSP to MEC Chair Wendy Morse and several ALPA attorneys and financial advisors ***before*** adoption by the UCH Board, published the full plan in its SEC reports shortly after its adoption, and described the 2011 plan at some length to all employees on March 3, 2011 – ten months before the end of the year to which it applied and almost a year before any payments would be made, with confidence that any union that objected to the terms would make its objections known. Thus, the suggestion that the Company improperly failed to consult with ALPA is baseless.

On the issue of timeliness, the majority decision is equally flawed. The majority purports to adhere to the Chairman's decision in *Delta Airlines, Inc.*, 03 AAR 0014

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[3] The majority seeks to emphasize the importance of this sentence in the parties' agreement by asserting that United had insisted that it say "reasonably acceptable." Majority Op. at 21 n.19. In fact, ALPA added the word "reasonably" to its own draft language, without any request by United. *See* Co. Ex. 51.

(1999), holding that the time in which to file a grievance begins to run when the employer adopts a policy that violates the collective bargaining agreement, not at a later date on which the employer applies the disputed policy. Majority Op. 18-21. That principle would appear to fit the facts of the present case perfectly because the UCH Board of Directors (on which the United MEC Chairman sat) adopted the United-Continental Holdings Profit Sharing Plan ("PSP") in February 2011 and merely applied the PSP, as written, in February 2012. The majority declines to apply this principle, however, on the ground that the current case "differs dramatically" from the *Delta* decision in which the "critical act" was "the carrier's adoption of a policy in dispute, not its subsequent application." Majority Op. at 18. As reflected in the majority's own statement of the issue – "[w]hether UCH violated Letter 05-02, Exhibit C, and Section 3-L-2 of the Agreement ***by adopting*** a profit sharing plan for 2011 under which both sub-UA and sub-CO employees (instead of only sub-UA employees) participated" – the "critical act" in this case was also adoption of the policy in dispute. *See* Majority Op. at 5.

The 2011 PSP was adopted by the UCH Board of Directors in February 2011 and the amount of the profit sharing provided to sub-United pilots resulted solely from application of the terms announced a year earlier to year-end calculations of wages paid and profits earned by the Company. The majority's conclusion that "the March 3, 2011 announcement that the PSP would be extended to Continental 'employees' came at a time when, even were the Company to do so, sub-CO pilots would be ineligible, there being no existing profit-sharing plan for them at the time," Majority Op. at 20, reflects a material misunderstanding of the facts recited above, as does its assertion that "[t]here

were no facts at the time that would have suggested the necessity of adversary actions at that time." *Id.* In fact, the 2011 PSP explicitly provided that sub-Continental pilots (and all other Continental employees) were ***eligible*** under the plan, meaning that the wages of such employees would be included in the denominator in determining any particular employee group's allocation of the profit sharing pool, but that no profit sharing would be paid to any organized employee group unless the union had an agreement with the Company authorizing the payment. *See* Jt. Ex. 9 at 3. In other words, eligibility and entitlement were different concepts, and for organized employee groups the right to actual payments from that pool required existence of a collective bargaining agreement authorizing the payments at the time the payments were made – the same rule that applied to sub-United employees in both the 2006 and 2011 PSPs.

Insofar as the majority believes the 2011 PSP required that the necessary union agreement be in place when the 2011 PSP was adopted, that is simply incorrect. This was not a negotiated term of the PSP, but a rule unilaterally adopted by the Company in drafting the plan. Moreover, one of the reasons for publication of the PSP in early March 2011 was to encourage the Continental unions to reach agreements before the end of the year. Indeed, the only basis for the United MEC to object to the December 30, 2011 agreement between UCH/Continental and the CAL was the absence of the ALPA president's signature on that document – not the timing of the agreement. The validity of the agreement between UCH/Continental and the CAL MEC to provide profit sharing to the sub-Continental pilots would not be relevant under the United-ALPA agreement in any event because the requirement of an agreement was not part of Letter 05-02, Exhibit C, or Section 3-L, and payment of profit sharing to sub-Continental

pilots even in the absence of a valid agreement would have had no impact on the amount payable to sub-United pilots. Rather, the allocation for United pilots, like all other UCH employees, was based on a fixed formula (wages of sub-United pilots as a percentage of wages of all UCH employees times the profit sharing pool determined for 2011) that did not take into account whether any other employee group negotiated participation. Additionally, it was the Company, not other employee groups, who benefited if payments were not made to one of the sub-Continental employee groups.

Similarly, insofar as the majority's conclusion that there were no facts that suggested "the necessity of adversary actions" means (as the majority decision mentions elsewhere) that no one knew in March 2011 whether there would be any profits to share for 2011, that type of analysis would completely eliminate the distinction between adoption of a policy and application of that policy. Even when the policy is crystal clear, there are always facts that will not be known until the policy is applied to a specific situation; that is the essence of the distinction between adoption and application of a policy. Here, there is no dispute that the UCH Board of Directors (which included United MEC Chair Wendy Morse) adopted the 2011 PSP in February 2011, that it was published as part of an SEC report in February 2011, that it was described in a notice to all employees on March 3, 2011, and that the United MEC was aware of the plan terms because it published a commentary about the 2011 PSP on March 4, 2011. Likewise, there is no dispute that under the express plan terms of the 2011 PSP, all sub-United and sub-Continental employees would participate in the combined profit of the two carriers subject only to the requirement that each organized employee group have an agreement providing for such participation, and the proportion of the combined UCH

profits payable to sub-United employees would be reduced by the wages paid to sub-Continental employees. Accordingly, if "UCH violated Letter 05-02, Exhibit C, and Section 3-L-2 of the Agreement by adopting a profit sharing plan for 2011 under which both sub-UA and sub-CO employees (instead of only sub-UA employees) participated," Majority Op. at 5 (Issue No. 2), ALPA knew full well it had done so by March 3, 2011, at the very latest. Both the 2011 PSP and the Company's announcements made clear that sub-Continental employees would be eligible to participate in a profit sharing pool that included the profits of both carriers, and that is exactly what they seek to challenge in this case. The grievance, therefore, is untimely.

The evidence also failed to establish that the reasons suggested by the majority were, in fact, the reasons the Association failed to file a grievance in 2011. To the contrary, the evidence suggested that ALPA did not file a grievance because it did not believe that the 2011 PSP violated its agreement with United:

- If the Association's interpretation of the profit sharing provisions of Letter 05-02 and Section 3-L of the CBA were correct, the Company would have been obligated to include profits attributable to the Continental subsidiary when it calculated profit sharing for sub-United employees for the Fourth Quarter of 2010, the first quarter following the merger. The Company did not do so, however, and noted that fact in a letter to United MEC Chair Wendy Morse. The Association did not grieve – or otherwise object – to the failure to include sub-Continental profits in profit sharing calculations for 2010, and cannot defend its failure to grieve the 2010 distribution on the basis that there might not be any profits in 2011.

- The Association did not simply fail to grieve the terms of the PSP announced to all employees on March 3, 2011, it published a notice to its members on March 4, 2011, stating that the PSP was in accordance with its existing contract. While the majority interprets the notice to mean only that the adoption of the PSP was not a gratuitous act, if ALPA actually believed that adopting a combined United-Continental profit sharing program violated its CBA, it would not have said so.

- The most relevant facts in determining whether the grievance was timely would be the testimony of the individuals who actually made the decision not

to file in March 2011. None of the Association officials involved in that decision, however, provided such an explanation. MEC Chair Morse testified that she did not consider whether or not to file a grievance because that was the job of the MEC Grievance Chair, Tr. 366-402, and (in an unmistakable signal that his testimony would be adverse) ALPA did not call the former MEC Grievance Chair, Gerald Shoofs, to explain his decision.

- More significantly, however, United MEC Coordinator and attorney Robert Nichols testified that he would have been aware of the terms of the 2011 PSP when they were submitted to the UCH Board of Directors for approval in February 2011 and that he did not believe that any such submissions during his tenure violated the CBA, a statement that necessarily meant he did not believe that the 2011 PSP violated the contract. Tr. 390-91; 402-04 (describing UAL/UCH Board practice of providing documents to ALPA professionals before Board meetings); 406 ("I can't remember an instance in which there was something that we felt violated the collective bargaining agreement so that we raised it with the board."). Given Mr. Nichols' multiple roles in (1) advising Stephen Presser on negotiations of Letter 05-02; (2) handling an arbitration during 2008 over the drafting and interpretation of the 2006 PSP; (3) advising the MEC Chair on matters before the UAL or UCH Board of Directors; and (4) advising the MEC and its officers on any matters related to the collective bargaining agreement, the testimony of Mr. Nichols completely undermined ALPA's case. Yet, the majority does not even cite it.

- The provision in the PSP cited by the majority to the effect that the terms of any collective bargaining agreement would supersede the PSP appear ***only*** in the PSP, not Letter 05-02 or Section 3-L. Thus, ALPA could not have failed to file a grievance in reliance on this provision unless it was also aware of the other terms of the 2011 PSP, including the provisions that sub-Continental employees were considered eligible employees under the PSP.

- The decision of new MEC Chair Jay Heppner and new Grievance Chair Todd Insler, who took office on January 1, 2012, to wait until after UCH had distributed profit sharing checks in February 2012 was plainly designed to preclude UCH from negotiating or arbitrating any dispute before it distributed $245 million. The majority's assertion that "[i]t is unclear . . . how such disbursement prejudiced the Company, particularly when participation by Continental pilots and receipt of profit-sharing funds was the intended goal of all negotiating parties," Majority Op. at 22, ignores that ALPA seeks a financial remedy in this case that would require the Company to pay to United pilots the amount that was paid to Continental pilots without any ability to recoup that money from the Continental employees. If ALPA had raised the issue before payment was made, the Company could and would have ensured that no payments were made until the question of who was entitled to profit sharing was clearly and finally resolved.

For the foregoing reasons, we dissent.

/s/
Jennifer Coyne
Company-Appointed Member

/s/
Chuck Vanderheiden
Company-Appointed Member