

DNI SUPPORT REQUESTED FOR AIR AMERICA RETIREMENT BENEFIT LEGISLATION

Note: The views expressed herein are solely those of the author, Gary B. Bisson, a former Air America Assistant Legal Counsel in Taipei and Bangkok. Although I am a member, they are not intended to reflect Air America Association's views on this legislation, nor any Senate or House staff. The material herein is largely based on author's Letter to the Editor, published in the AFIO Weekly Intelligence Notes #21-09, dated June 9, 2009.

On October 28, the President signed P.L. 111-84, the "National Defense Authorization Act for FY 2010." Section 1057 of the Act is intended to be the first step to granting Federal retirement benefits to the remaining Air America U.S. national employees or their surviving spouses. The Section requires the Director of National Intelligence to submit a report to Congress, within 180 days of enactment, on the advisability of providing such benefits for services when Air America or an associated company was owned or controlled by the U.S. Government.

According to the recent CIA publication, "Air America: Upholding the Airmen's Bond," distributed at the recent University of Texas Dallas Symposium Acknowledging and Commemorating Air America Rescue Efforts During the Vietnam War, the ownership periods involved are from July 10, 1950, when CAT Incorporated was organized under laws of the State of Delaware, through May 11, 1975, when all operations ceased except for corporate windup.¹ Air America was formally dissolved in 1977.

As chronicled in the recent CIA publication cited above, Air America was a corporation "owned and controlled by the U.S. government," a so-called "proprietary corporation" authorized under Presidential authority, and owned and operated (through its holding companies) by the Central Intelligence Agency to support government operations during the Cold War, mainly in the Far East. This support included flights conducted in numerous countries such as Vietnam and Korea, beginning in 1950 and continuing through the 1970s. The company employed several hundred U.S. citizens, primarily pilots, and at least 86 were killed in action while operating aircraft for the government.

Historical Basis for Federal Retirement Credit

As noted by Senator Reid in a "Dear Colleague" letter seeking co-sponsorship of S. 1126 of the 111th Congress, which later was superseded by Section 1057, employees of

¹CAT Incorporated's name was changed to Air America, Inc., on March 26, 1959. CAT Incorporated had been a subsidiary of a holding company, Airdale, Incorporated. Airdale's name was changed to the Pacific Corporation.

government-owned corporations are Federal employees and as such Air America employees were entitled to retirement benefits under the Civil Service Retirement System in effect in the 1950-1975 period. Additionally, under prior Civil Service Commission administrative case law governing the period in question, to be considered a Federal Employee for purposes of entitlement to retirement and other benefits one must have been (1) engaged in the performance of a Federal function under authority of an Act of Congress or an Executive Order; (2) appointed or employed by a Federal officer; and (3) under the supervision and direction of a Federal officer. Bisson, *Statutory Limitations on Contracts for Services of Government Agencies*, Brooklyn Law Review. Vol. 34, Number 2. (Winter 1968) at p. 212-213. See also *Jankovic v. U.S.*, 384 F. Supplement 1355 (DDC 1974).

Air America's operations were conducted by the CIA in strictest secrecy and government ownership of the company was never acknowledged in this period and was not publically known. Only a select number of company employees were aware of their employer because access to this knowledge required a top secret clearance. Thus, Air America was not included in the list of Government corporations in 31 U.S.C. 9101. Historically, Executive Branch employees were engaged either by means of formal appointments or by individual (personal) services contracts with a government agency or corporation. Air America personnel could not be formally appointed or directly contracted by the Agency as this would require revealing the CIA ownership. Such employees were hired under individual personal services contracts with Air America and its associated companies.

Air America Employee Retirement Claims Litigation

In the 1970s and 1980s, some Air America employees sought retirement credit through individual claims with OPM, the Merit Systems Protection Board, and ultimately through the U.S. Court of Appeals for the Federal Circuit, where they were joined and finally dismissed because they had no documents showing they had been "appointed" into the Civil Service. *Watts v. OPM*, 814 F.2nd 1576 (1987). The *Watts* case was preceded and controlled by similar holdings of the Federal Circuit, in *Horner v. Acosta*, 803 F.2nd 687 (1986), and the U.S. Court of Claims in *Baker v. U.S.*, 614 F.2d 263 (1980).

Air America's U.S. national employees were employed under the authority of a Federal Officer, engaged in the performance of a Federal function, the prosecution of the War in South East Asia, and under the supervision and control of a Federal Officer, ultimately George A. Doole, Air America's Managing Director, then a Super Grade employee of the CIA. The *Watts* case actually conceded this to be the case. However, the *Baker* and *Acosta* cases (five and 11 years after Air America services were performed) added an additional legal criterion to the case law definition of credited Federal employment, namely that these individuals be formally appointed in the civil service.

In 1985, OPM revised its Federal Personnel Manual (FPM) to state that individual service contracts would not be recognized for retirement credit purposes. The OPM revision was

made retroactive, thus preventing U.S. Government contract employees from receiving retirement credit for services performed prior to that change. This OPM action was criticized by Congress when it gave retirement credit to a number of contract employees of the U.S. Navy and others affected by the *Acosta* and *Baker* cases through legislation somewhat similar to what Air America employees are now seeking. In connection with this action, which was taken in Public Law 100-238, House Report 100-374 stated:

“While OPM’s action may be appropriate as a matter of law [a point which this author disputes], individuals who performed service prior to this policy change should be able to rely on published OPM instructions and prior administrative actions granting credit for such service. OPM’s actions in denying this credit have been extremely unfair, particularly in view of the apparent inconsistent administration of the policy in the early 1980’s and the fact that it took four more years from the time OPM began denying retirement credit until it changed its publicly available instructions.” (p. 25).

Similar legislation granted retirement benefits to several CIA proprietary corporations such as Radio Free Europe, Radio Liberty, and Radio Free Asia. Their legal status as government corporations was identical to that of Air America.

O.S.S. Proprietary Corporations Credited Service

Confirming the statement Senator Reid made in his “Dear Colleague” letter, following World War II, employees of O.S.S. proprietary corporations, with no formal civil service appointments, were granted civil service credit for their wartime services. There is a record to this effect in the National Archives. This information was presented to the U.S. Court of Appeals for the Federal Circuit, and apparently ignored, in a joined case to the *Watts* case, *Hickler vs. OPM*.

The Legislative Remedy

Without any other remedy available to them, Air America employees are thus compelled to seek relief through legislation. The ultimate goal of Air America Retirement Benefit Legislation - from the author’s personal and historical view - is remedial in nature: correcting judicial and administrative mistakes by the Federal Circuit and OPM. The company was not listed as a Government corporation in 31 U.S.C. 9101 because its ownership was guarded by its top secret status. For the same reason, its employees could not have directly received individual personal services contracts or appointments with the CIA. Their U.S. Government service was totally performed during a period when Civil Service Commission administrative case law and regulations on credited service for Federal retirement purposes did not require a formal appointment document. The injustice here is compounded when it is realized that of the estimated 508 employees, or their widows, who have been denied benefits, 86 of them were killed while flying in support of

CIA and DOD operations, beginning with flights over Communist China, Korea and Dien Bien Phu in the early 1950s through the end of the Vietnam War. As memorialized in the famous photograph by Hubert Van Es, the last UH-1 helicopter rescuing personnel in 1975 from the Saigon apartment rooftop of the CIA Station Chief's building were operated by these same Air America pilots.

Section 1057 of the National Defense Authorization Act requires a report to be filed by the Director of National Intelligence on the advisability of providing Air America retirement benefits. The report is to take into consideration certain required elements including the opinions of the Director of Central Intelligence on any matters provided in the report which his Agency considers appropriate. Your support and the support of the DCI and other Intelligence officials is particularly needed so that a favorable and prompt report is presented to the Congress. Even with a favorable report, further legislation is required to actually provide retirement benefits to the affected beneficiaries.

Report Element Considerations

Subsection (b)(2) of Section 1057 lists various elements to be included in the Director of National Intelligence's advisory report, including: retirement benefits previously granted to Air America employees; employee contributions made; and an assessment of the difference between the retirement benefits received and what would have been received, if such employment were credited as Federal Service for purposes of Federal retirement benefits. Subsection (b)(2)(D)(ii) additionally provides that if further legislative action is deemed advisable, a proposal for such action and an assessment of its costs must also be included.

The Air America Retirement Plan vs. U.S. Government Retirement Plans

Air America established an Air America Retirement Plan. Commencing in 1970, as a member of the Air America legal staff, I participated in the plan until I left Air America on September 30, 1974 to join the USAID General Counsel's Office. I had six and a half years of service and received in all two lump sum payments, rather than an annuity, totaling \$11,805.68, and representing 100% of my and Air America's contributions into the plan.

I then worked 20 years for USAID, retiring from the Senior Foreign Service in 1994, with 26 years of recognized U.S. Government Service. My Air America employment, if credited as U.S. Government service, would increase my Foreign Service Retirement annuity by 13%. In 16 months at my current monthly annuity rate, I would exceed the Air America lump sum payment. There is simply no true equivalency when comparing the Air America retirement lump sum plan to existing Federal retirement annuity plans.

Legislative Proposal and Cost Assessment

As noted, if you approve further legislative action granting Federal retirement benefits for Air America service, a legislative proposal and cost assessment are to be submitted in the report.

Senator Reid has previously drafted quite adequate legislation to this effect on October 4, 2005 in Senate Amendment 2007 to H.R. 2863 of the 109th Congress, the Department of Defense Emergency Supplemental Appropriations Act (attached). This could serve as an excellent starting point for any Director of National Intelligence legislative proposal. That Amendment would have granted retirement benefits under the Civil Service Retirement and Disability System (CSRDS) for employees (or their surviving spouses) who had at least five years of Federal civilian service, including Air America service, without the requirement for such individuals to make deposits into the fund. Individuals currently receiving Federal retirement benefits could apply to OPM to have their annuities re-computed based on their years of Air America credited service.

With respect to costs for legislation such as S.A. 2007, it may be useful to note that CSRDS is funded by matching employer/employee contributions. The match is currently based on an employee contribution of 7 ½ % of his/her salary. In 1976, when Air America was being dissolved, the Church Committee noted that it had up to \$25 million in assets which would be returned to the Treasury (Church Committee Report, Book I: Foreign and Military Intelligence [1976] at p. 239). The late Lindsey Herd, the last Air America Comptroller, personally advised me that prior to Air America's corporate dissolution in 1977, he deposited an Air America check for \$20 million into the U.S. Treasury. A portion of the remaining Air America assets, I have been advised, were retained by the CIA to cover contingent liabilities related to Air America operations, and that some were used by the Agency to share (along with E-Systems, Inc.) in the cost of settling *Air-Sea Forwarders, Inc. vs. Air Asia*, litigation which was discussed at length in the National Law Journal, March 2, 1992 issue (Vol 14, No. 26). In his 2005 book "Twilight Warriors - Covert Air Operations Against the USSR," published by the U.S. Naval Institute, at p. 288, Curtis Peebles states that the sale of Air America assets actually returned \$23 million to the U.S. Treasury.

The \$23 million deposited in the Treasury, mostly in the late 1970's, was far in excess of the sum required to cover all required contributions for eligible U.S. personnel, plus the Agency's matching contribution, had they been considered eligible at that time their Air America Services were being performed. Actuarially, CSRDS is an adequately funded Federal Retirement system. Over time, the matching contribution formula is sufficient to cover all withdrawals from the system, including any withdrawals for Air America benefits, particularly if CSRDS is given credit for the \$23 million Air America deposited in the Treasury. It is our understanding that the Congressional Budget Office has estimated the cost of this legislation to the CIA to be between \$500,000 to \$1 million if costed on the basis of the Agency funding the employees and the Agency's required matching contributions. This is the basis for all other Federal retirement benefits to be financed.