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'Timely disclosure' at center of AA flap

By William Hoffman / Staff Writer

GREATER METROPLEX — Whether the attempt by AMR Corp. executives to pay themselves retention bonuses and secure their pensions from the ravages of bankruptcy rises to the level of a corporate-governance scandal is likely to be decided by regulatory agencies or in a shareholders' lawsuit.

"I don't know if this is something that Congress should revisit or even will," said Jim Hunter Birch, partner in the labor and employment section at Hughes & Luce L.L.P., one of many local law firms that works for American in Dallas. "I do know that (AMR unit) American (Airlines) believes it acted within the letter and even the spirit of Sarbanes-Oxley."

Sarbanes-Oxley is the corporate governance reform signed July 30, 2002, by President Bush.

The Securities and Exchange Commission, charged by Congress with implementing and enforcing Sarbanes-Oxley, declined comment on whether AMR was being investigated for violations of the law, according to spokesman John Heine, in Washington, D.C.

The law was prompted by accounting scandals and management shenanigans at Enron, Arthur Andersen and other publicly traded companies. Among many other things, the law calls for timely disclosure of financial information important to shareholders.

Questions about the corporate behavior of Fort Worth-based AMR arose shortly after its three unions ratified $1.8 billion in annual wage and other concessions April 14.

Hours after the votes were counted, AMR filed its annual 10K report with the SEC — which it delayed during labor negotiations — revealing the existence of a retention bonus plan for the company's top seven executives and a $41 million pension trust fund designed to protect executives' retirement money from bankruptcy.

Though AMR stood by its pension trust fund, then-AMR CEO Donald J. Carty and the other six senior AMR executives on April 18 gave up the retention bonuses that would have been worth up to twice their base salaries if they stayed until January 2005.

But employees and labor leaders said the damage to labor-management relations had already been done.

The bad news continued April 22, when The Wall Street Journal reported having asked American Airlines officials more than a week before the filing whether the company had such compensation plans. According to the newspaper, company officials answered, "No."

Carty resigned April 24 amid continued anger over the compensation plans. Gerard Arpey, AMR's president and chief operating officer, was named president and CEO, while director Edward A. Brennan became chairman.

Rogge Dunn, partner at Dallas business and employment litigation firm Clouse Dunn Hirsch L.L.P., said AMR's Sarbanes-Oxley exposure will rest on the determination of whether executives disclosed their plans in a timely manner.

The retention plan was formulated in March 2002 and the pension trust was funded in October 2002, according to published reports, but neither was disclosed to shareholders, AMR's labor unions or the SEC until April 15.

"I can't really pass judgment on (AMR) without going through the facts with a fine-toothed comb," Dunn said. He added that additional federal legislation to address any AMR corporate governance issues should be unnecessary: "I would think (Sarbanes-Oxley) covers it now."

Alan Bromberg, a professor of corporate and securities law at the Dedman School of Law at Southern Methodist University in Dallas, explained that with Sarbanes-Oxley, "Congress for the first time indicated that breach of fiduciary duty is a broader concept."

Fiduciary duty "is essentially a fairness concept," he explained, encompassing board members' and senior executives' responsibility to the corporation and its shareholders.

Bromberg said there are a couple of ways that AMR could run afoul of Sarbanes-Oxley.

Executives must forfeit compensation from any period for which a company has restated its earnings in filings required by the SEC, Bromberg said. Though AMR has not restated its earnings, Bromberg noted forfeited compensation would include executive bonuses, stock options and retirement benefits for any restatement period.

Charles D. MarLett, corporate secretary for AMR Corp., said to his knowledge in nearly 20 years with the company, AMR has never restated its earnings.

Bromberg said Sarbanes-Oxley also requires both inside and outside legal counsel to report violations of law and breaches of fiduciary duty by corporate executives to a company's general counsel, the audit committee and the board of directors.

It's unclear whether delaying announcement of the executives' bonus retention plan and bankruptcy-protected pension trust fund constituted a breach of fiduciary duty.

"I would not be surprised if there were litigation over this," Bromberg said, "assuming there's enough money to sue over inside AMR, or from the insiders who benefited from these pensions."

MarLett noted that AMR ranked above average in a Nov. 7, 2002, survey of S&P 500 companies' corporate governance practices conducted by GovernanceMetrics International, an accountability ratings company in New York City.

Birch said, "Whether (the bonuses and pension trust) are a good idea, I'll leave for other people to decide."

He said the executives' supplemental pension had existed since 1985, but had been funded from operating revenues. In October 2002 executives set up a trust fund to pay the pension through investments instead, thus freeing up operating revenues, he said.

Birch defended AMR's request for a 15-day extension of its SEC annual report filing deadline. "If they had filed the 10K on (March 31), it would've been so up in the air no one would've known which direction the company was going to go," he said.

Responding to a reporter's question, Birch added, "Were we gaming the SEC? I don't think that's the case."

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