PROTECTING EMPLOYEES IN AIRLINE BANKRUPTCIES

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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PROTECTING EMPLOYEES IN AIRLINE BANKRUPTCIES

WEDNESDAY, DECEMBER 16, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:33 p.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen and Franks.

Staff Present: (Majority) James Park, Counsel; Adam Russell, Professional Staff Member; and (Minority) Zachary Somers, Counsel.

Mr. COHEN. This hearing of the Committee on the Judiciary Subcommittee on Commercial and Administrative Law will now come to order.

Without objection, the Chair will be authorized to declare a recess to the hearing. I now recognize myself for a short statement.

The past 9 years have been particularly difficult ones for employees of the Nation's major airlines. Of the eight largest U.S.-based airlines in 2001, five have since filed for bankruptcy. That is TWA of Howard Hughes fame, United Airlines, US Airways, Delta Airlines, and Northwest Airlines, with US Airways filing for bankruptcy twice in that time period.

These are and were some of the Nation's oldest and most respected air carriers, those that were part of the original cohort of companies that established commercial aviation as a viable and ultimately indispensable industry. I remember Fly Eastern and all those other airlines that no longer exist, Republic, et cetera, et cetera. Their success, in turn, was based on the dedication and commitment of talented and hardworking pilots, flight attendants, mechanics, customer service agents, baggage handlers, dispatchers, and other employees.

In some of these airline bankruptcy cases, the airline initially used Section 1113 of the Bankruptcy Code to change existing wage rates, work rules, and other terms of collective bargaining agreements, to the detriment of workers. For example, US Airways successfully petitioned the bankruptcy court to reject collective bargaining agreements with several of its labor unions during its second trip to bankruptcy, the first time an airline was able to successfully reject a labor contract in bankruptcy in 23 years.

Similarly, United Airlines successfully convinced the bankruptcy court to terminate its collective bargaining agreements with new, harsher terms implemented in their place. United pilots, for example, took a 30 percent pay cut, less job security, harsher work rules, and a terminated pension plan.

Ironically, Congress enacted Section 1113 to ensure that corporations would not use the bankruptcy process strategically to get out of their obligations under collective bargaining agreements. More specifically, Section 1113 was enacted in response to a Supreme Court decision that effectively allowed a business to reject the terms of a collective bargaining agreement unilaterally. Section 1113 imposed specific conditions for rejection of a collective bargaining agreement in bankruptcy.

Notwithstanding congressional intent, the experience of the previous decades suggest that the Section 1113 process is not working as intended, at least in the context of airline bankruptcies. We will hear about some proposals to fix these problems from some of our witnesses today.

Employees covered under Title I of the Railway Labor Act are exempt from the procedures established by Section 1113, which covers railroad workers and rail carriers. Section 1113, however, does not extend this exemption to those covered under Title II of the act, namely air carriers and their employees. Yet, in most cases, rail workers and air companies are similarly situated under the Railway Labor Act for similar situations and logical reasons.

Some have suggested the existing exclusion of those covered by Title I of the RLA from the Section 1113 process could be extended to airlines and their employees, thereby requiring that any changes to the terms of collective bargaining agreements be done under the arguably more worker-friendly procedures outlined in Section 6 of the Railway Labor Act. They have also suggested amending Section 365 of the Bankruptcy Code to ensure that airlines are not able to effectively reject a collective bargaining agreement unilaterally.

Protecting the rights of all labor unions is paramount. Last Congress, I cosponsored Chairman Conyers's bill, H.R. 3652, the "Protecting Employees and Retirees in Business Bankruptcies Act of 2007," which would have made broader changes to the Bankruptcy Code to help protect workers in the airline and other industries. I intend to cosponsor that important legislation again once it is introduced, as we need a reform of bankruptcy laws.

I am confident that our panel of witnesses can sharply define the contours of the problem and help craft meaningful solutions. I thank them for being here and for their testimony. And I thank the witnesses for appearing today and look forward to their testimony.

I will now recognize my colleague, Mr. Franks, for an opening statement.

Mr. Franks?

Mr. FRANKS. Well, thank you, Mr. Chairman.

And I also want to thank the witnesses for coming to be with us today. I know it is always a trip, and I am grateful that you are here.

And, you know, in all deference to the rest of you, it is not unusual, I know, for someone to recognize especially Captain Sullenberger, who is certainly a true American hero.

We all owe you, Captain Sullenberger, a debt of gratitude, the Nation does, for saving the precious lives of so many on US Airways Flight 1549 this year.

And I am glad he is a US Airways pilot. I fly on that one a lot, and I hope they are all like him.

Mr. Chairman, bankruptcy law is often, really, about striking a proper balance between competing interests. The competition in bankruptcy between labor contracts and a successful airline reorganization has made modifying collective bargaining agreements one of the most difficult issues in an airline bankruptcy.

And I know that rejecting collective bargaining agreements and reducing employees' wages and benefits is not something that airlines take lightly, nor do I. However, many airlines have been so constrained by unaffordable labor costs and union work rules that, without relief, sometimes reorganization would have been impossible. Now, this is why Section 1113 of the Bankruptcy Code reasonably attempts to balance the rights of unionized employees with the bankrupt company's ability to eliminate labor contracts.

Collective bargaining agreements can only be rejected if rejection is, quote, "necessary to permit reorganization of the debtor," unquote. Now, that is not true with nonunion employees; they can just be told the situation. "And rejection can only occur after the parties have met to try to reach an agreement on modification." As you know, this has, Mr. Chairman, been something that, in many cases, there are several meetings, again, not afforded to workers that are not unionized.

Some would like to make it more difficult for distressed airlines to reject collective bargaining agreements. But if airlines are forced to liquidate because labor costs cannot be reduced, employees will lose their jobs anyway and retirees, of course, will lose their benefits.

I guess I use the example of US Airways again. It was the first—I think it entered bankruptcy in August of 2002, and, by mid-2004, management determined that a further realignment of its costs was unavoidable. US Airways entered into a second bankruptcy in September 2004, where it sought to rid itself of historical costs that made the carrier less competitive at the lower fare structures that had become the industry norm.

During the second bankruptcy and as a result of steps taken to achieve a more competitive cost structure, US Airways was able to attract a merger partner. As it emerged from bankruptcy in the fourth quarter of 2005, US Airways was acquired by the former America West Airlines.

Through the bankruptcy proceedings, US Airways was lawfully relieved of its pre-bankruptcy pension obligations. This was a very difficult and painful step which unquestionably impacted employees in a profound way. However, had US Airways not been relieved of pension obligations through bankruptcy, it is highly unlikely that America West Airlines would have sought to merge with US Airways in the first place. The America West-US Airways merger ensured that the jobs of many thousands of former US Airways employees were preserved. It saved the airline, and, of course, if it hadn't, I may have had to ride a bicycle back and forth to Washington.

So the fundamental question we should ask ourselves is this: Do we want to make it impossible for airlines to reject their collective bargaining agreements, forcing them to liquidate, or do we want to allow them to make the cuts under the bankruptcy laws necessary for their reorganization?

Mr. Chairman, the Bankruptcy Code currently attempts to strike a proper balance between distressed airlines and their labor unions. This balance allows the airline to make the necessary changes to its cost structure and obtain the financing it needs to successfully reorganize, saving jobs and preserving retirement benefits.

And I look so forward to the witnesses' testimony and yield back. Thank you, Mr. Chairman.

Mr. COHEN. I thank the gentleman for his statement.

And I would now like to welcome the witnesses. I thank each of you for participating in today's hearing.

Without objection, your written statements will be placed in the record, and we would ask you limit your oral remarks to 5 minutes. We have a lighting system that starts with green, goes for 4 minutes. When it gets to the last minute, it is yellow. And when it is red, Beulah does the buzzer and we are supposed to be finished.

Subcommittee Members, after all questions are asked, will have 5 minutes also to ask questions.

Our first witness is Captain Chesley B. Sullenberger, III. Captain Sullenberger is an airline pilot and safety expert. And, as Mr. Franks mentioned, he rose to fame this year when he saved US Airways Flight 1549 and saved 155 people in quite a heroic action.

But regardless of his action and his heroism that is recognized as truly being an American hero, he would lose his pension if his airline decided to go into bankruptcy, and he wouldn't lose it if he was running a train. I would like him to explain that to us.

He has been an international speaker on airline safety and has helped develop new protocols for airline safety. He is the author of "Highest Duty," a memoir of his life and the events surrounding Flight 1549.

Thank you, Captain Sullenberger, for your service and for being willing to testify. And I would like to ask you to start.

TESTIMONY OF CHESLEY B. SULLENBERGER, III, CAPTAIN, US AIRWAYS FLIGHT 1549

Mr. SULLENBERGER. Chairman Cohen, Ranking Member Franks, thank you for your wonderful introduction and your kind words.

But, before I begin, let me point out to the Committee that I am not the only one in this room today who had a hand in the remarkable events of January 15th, 2009. Just behind me to my left is my first officer, Jeffrey Skiles, also of US Airways, who has my eternal gratitude for his skill and his courage.

Mr. COHEN. Would Mr. Skiles stand?

Thank you, sir. I appreciate your being here. Thank you.

You would also lose your pension, I guess.

Mr. SKILES. I already lost it.

Mr. SULLENBERGER. It is my honor to appear before you today to provide testimony regarding an issue that is critical to airline employees across our Nation.

I realize that I have been asked here largely because of the events of January 15th, 2009, but what I have to say to you, the value of my testimony is what took place in the 30 years prior to that. Like my colleague next to me, Captain Arnie Gentile, I am a US Airways pilot, and I have personal knowledge about how airline bankruptcies affect airline employees based upon my 42 years of flying and my 30 years as a line pilot.

My pay was also drastically cut by 40 percent, and my contractual right to a retirement pension was stripped away, all under the veil of Bankruptcy Code provisions that are specific only to airline employees. Like me, thousands of our commercial pilots served our country in jet fighters or other cockpits of the armed services. We know what commitment is, and we know when commitments are broken. For professional pilots who had their retirement commitment broken in large part because they do not have the same rights during a business bankruptcy as every other organized employee in the United States, it is a basic and fundamental injustice that needs to be rectified.

Airline pilots do not live in a vacuum, and we clearly understand and are sympathetic to the fact that many Americans have recently experienced economic difficulties. But airline employees had been hit by an economic tsunami that dates back to 2001. One of the driving forces has been the discriminatory application of the Bankruptcy Code to this specific group of employees.

In all, over 100 airlines have filed for protection against their debtors since the late 1970's, the time of airline deregulation. Airline managements have shown a willingness to file bankruptcy and use their leverage to ravage airline collective bargaining agreements, resulting in lower wages, loss of pensions, and poor working conditions for airline employees.

I believe it is essential that our lawmakers realize the unintended consequences of exposing airline pilots during bankruptcy proceedings, which have directly led to working conditions that challenge even the most seasoned pilots. The rapidity and near unanimity with which the United States House of Representatives approved the "Airline Safety and Pilot Training Improvement Act of 2009" demonstrates the House's keen appreciation of the fact that our industry has reduced the margins above the regulatory minimums on which we have historically relied.

Pilot compensation was, for many years, comparable to what other professionals earned. That is no longer the case. At large carriers, many current airline pilot salaries are equal to 1989 to 1992 levels, levels from 20 years ago, without any adjustment for inflation. Given a wide variety of career choices, military-trained pilots and other young, ambitious, well-educated individuals must weigh the financial sacrifice associated with the airline piloting profession.

Because this profession isn't valued as much as it used to be because of the other choices available to those entering the workforce, hiring standards at many airlines have been lowered significantly from when I started. Even as recently as 2001, a well-managed regional airline requested 3,000 hours of flight experience and 1,000 hours in turbine-powered aircraft. That same airline today has dropped its requirements to 500 hours total. Other regional airlines

have hired pilots with less than 300 hours, requiring only 190 hours of experience, the FAA minimum.

In addition to compensation, pilot collective bargaining agreements have long provided margins developed over decades that pilots deemed necessary to ensure adequate rest and sufficient levels of training. In many cases, those contractual provisions no longer exist. Without the appropriate level of bankruptcy protection, these collective bargaining agreements will be in jeopardy of further erosion.

When my company offered pilots who had been laid off the chance to return to work, 60 percent refused. Members, as I testified to the House Aviation Subcommittee in February of this year, I attempt to speak accurately and plainly, so please do not think I exaggerate when I say that I do not know a single professional airline pilot who wants his or her children to follow in their footsteps.

It has been pointed out several times during testimony here today that airline employees stand alone in bankruptcy. We do not have the same rights under RLA that railroad employees do. And the absence of these rights has created a situation where airline employers may, as a practical matter, gut our wages, work rules, and pensions with near impunity.

Let me be clear. I am not advocating the elimination of bankruptcy laws. Certainly, bankruptcy laws have played an important role in American industry. But there is no basis for the discriminatory treatment of airline employees inside the bankruptcy process. It certainly was not the intention of the framers of the RLA.

Unfortunately, the current situation has created a tremendous disadvantage to airline employees. The result is the destruction of professions within the industry that are fundamental to the safe operation of our Nation's air transportation system.

Unlike all other organized labor, railroad and airline employees fall under the RLA. The logical solution is for airline employees to fall under Bankruptcy Code Section 1167, like their railroad counterparts. With airline employees under Section 1167, management and labor will better recognize each other's needs and a certain level of cooperation will ensue, creating a partnership that will serve both sides better into the future.

You can help us, honorable Members of Congress, to work together across party lines, end the inequity, and promote a better balance in the airline industry. We must keep the American commercial aviation industry safe and affordable for passengers and financially viable for all stakeholders, including those who work in the industry day to day.

Accordingly, I ask the Members of Congress for the fair treatment of airline employees inside a business bankruptcy and strongly suggest this could be accomplished by having airline employees fall under Bankruptcy Code 1167.

I thank you for the opportunity to share my perspective with you today.

[The prepared statement of Mr. Sullenberger follows:]

PREPARED STATEMENT OF CHESLEY B. SULLENBERGER, III

STATEMENT OF

CAPTAIN CHESLEY B. SULLENBERGER III
CAPTAIN, US AIRWAYS FLIGHT 1549

BEFORE THE SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES
DECEMBER 16, 2009

TREATMENT OF AIRLINE EMPLOYEES IN A BUSINESS BANKRUPTCY

Captain Chesley B. Sullenberger III
660 Market Street, Fifth Floor
San Francisco, CA 94104

Chairman Cohen, Chairman Conyers, Ranking Members Smith and Franks, and other members of the Committee, it is my honor to appear before you today to provide testimony regarding an issue that is critical to airline employees across our nation.

Like my colleague, Captain Arnie Gentile, I am a US Airways pilot and have personal knowledge about how airline bankruptcies affect airline employees. My pay was also drastically cut by 40% and my contractual entitlement to a retirement pension was stripped away, all under the veil of Bankruptcy Code provisions that are specific to airline employees.

Like me, thousands of our commercial pilots served our country in jet fighters and other cockpits of the armed services. We know what commitment is and we know when commitments are broken. For professional pilots to have their retirement commitment broken – in large part because they do not have the same rights during a business bankruptcy as every other organized employee in the United States – is an injustice that needs to be rectified.

Airline pilots do not live in a vacuum, and we understand fully and are sympathetic to the fact that many Americans have recently experienced economic difficulties. But airline employees have been hit by an economic tsunami that dates back to 2001. One of the driving forces has been the discriminatory application of the Bankruptcy Code to this specific group of employees.

In all, over 100 airlines have filed for protection against their debtors since the late 1970's, the time of airline de-regulation. Airline managements have shown a willingness to file bankruptcy and use their leverage to ravage airline collective bargaining agreements, resulting in lower wages, loss of pensions, and poor working conditions for airline employees.

I believe it is essential that our lawmakers realize the unintended consequences of exposing airline pilots during bankruptcy proceedings, which have directly led to working conditions that challenge even the most seasoned pilots. The rapidity and near-unanimity with which the United States House of Representatives approved the "Airline Safety and Pilot Training Improvement Act of 2009" demonstrate the House's keen appreciation of the fact that our industry has reduced the margins above the regulatory minimums on which we historically have relied.

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Because this profession isn't valued as much as it used to be, because of the other choices available to those entering the workforce, hiring standards at many airlines have been lowered significantly from when I started. Even as recently as 2001, a well managed regional airline requested 3,000 hours of flight experience and 1,000 hours in turbine powered aircraft. That same airline today has dropped its requirements to 500 hours total. Other regional airlines have hired pilots with less than 300 hours, requiring only 190 hours of experience, the FAA minimum.

In addition to compensation, pilot collective bargaining agreements have long provided margins developed over decades that pilots deemed necessary to ensure adequate rest and sufficient levels of training. In many cases, those provisions no longer exist. Without the appropriate level of bankruptcy protection, these collective bargaining agreements will be in jeopardy of further erosion.

When my company offered pilots who had been laid off the chance to return to work, 60% refused. Members, as I testified to the House Aviation Subcommittee in February of this year, *I attempt to speak accurately and plainly, so please do not think I exaggerate when I say that I do not know a single professional airline pilot who wants his or her children to follow in their footsteps.*

It has been pointed out several times during testimony here today that airline employees stand alone in bankruptcy. We do not have the same rights under RLA that railroad employees do – and the absence of these rights has created a situation where airline employers may, as a practical matter, gut our wages, work rules, and pensions with impunity.

Let me be clear: I am not advocating the elimination of bankruptcy laws. Certainly, bankruptcy laws have played an important role in American industry. But there is no basis for the discriminatory treatment of airline employees inside the bankruptcy process. It certainly was not the intention of the framers of the RLA. Unfortunately, the current situation has created a tremendous disadvantage to airline employees. The result is the destruction of professions within the industry that are fundamental to the safe operation of our nation's air transportation system.

Unlike all other organized labor, railroad and airline employees fall under the RLA. The logical solution is for airline employees to fall under Bankruptcy Code section 1167, like their railroad counterparts. With airline employees under section 1167, management and labor will better recognize each other's needs and a certain level of cooperation will ensue creating a partnership that will serve both sides better into the future.

You can help us, honorable Members of Congress, to work together across party lines, end the inequity, and promote a better balance in the airline industry. We must keep the American commercial aviation industry safe and affordable for passengers, and financially viable for all stakeholders, including those who work in the industry day to day. Accordingly, I ask the members of Congress for the fair treatment of airline employees inside a business bankruptcy, and strongly suggest this could be accomplished by having airline employees fall under Bankruptcy Code 1167.

Thank you for the opportunity to share my perspective with you today.

Mr. COHEN. Thank you, Captain. And I appreciate your recognizing Mr. Skiles, as well.

Our second witness is Captain Arnold Gentile. Captain Gentile is a captain for US Airways and the government affairs chairman of the US Airline Pilots Association.

Prior to joining US Airways, he was the chief pilot for Corporate Air in Hartford and served as director of operations for Providence Airline Corporations and didn't play first base for the Orioles.

Thank you, Captain Gentile. And will you begin your testimony?

TESTIMONY OF ARNOLD D. GENTILE, CAPTAIN, US AIRLINE PILOTS ASSOCIATION

Mr. GENTILE. Good afternoon, Chairman Cohen, Ranking Member Franks, and other Members of the Committee. My name is Arnold Gentile, chairman of the Government Affairs Committee of the US Airline Pilots Association and a US Airways captain with over 38 years in aviation.

I am grateful for the opportunity to give testimony today concerning the protection of employees in airline bankruptcies. I am here to ask this body to put an end to a particular inequity concerning the application of Bankruptcy Code and its effect on a single industry employee group: airline employees.

It is not a question of the essence or merit of bankruptcy law, as we fully support the concept of permitting companies to restructure. Rather, it is a question of inequities in Bankruptcy Code application.

As a US Airways captain, I have witnessed the effects of this inequity. Our pilot group experienced two bankruptcies that took 40 to 60 percent of our salaries and terminated our pensions. The US Airways pensions, like all pensions, were earned by professionals year after year. They are now worth pennies on the dollar, and the burden of all remaining pension costs have been shifted to the PBGC and the American taxpayer.

Just between the recent US Airways and United Airline bankruptcies, over 183,000 pensions were lost. Our pilot group witnessed family uprooting, the selling of houses, divorce, and even suicide.

To add insult to injury, according to an October GAO report, US Airways pensions disappeared at a time when US Airways CEOs received over $120 million, plus collected over $40 million in stocks, plus collected over $30 million in reimbursements to pay for their income taxes. In addition, only 14 months to the day after the carrier exited bankruptcy, US Airways made an $8 billion bid for Delta Airlines and later raised that bid to $9.8 billion.

The early 1980's, 1990's, and the last 8 years were all marked by waves of airline bankruptcies—over 100 airlines, as Captain Sullenberger mentioned, since 1978, and 11 airline bankruptcies in 2008 alone. I point these facts out to demonstrate that airline corporations have comparatively easy access to the bankruptcy process and have shown a willingness to decimate airline collective bargaining agreements.

To understand and address the vulnerability of airline employees in bankruptcy, let's categorize all unionized labor into three groups. Group one: Railroad employees, covered by the RLA, fall under Bankruptcy Code 1167, where negotiations take place and the bankruptcy court nor the trustee may change the wages or working conditions of employees.

Group two is all other employees except for airline employees. They are covered by the National Labor Relations Act and fall under Bankruptcy Code 1113. These employees have the right to strike. Of course, this right is not one that anyone is in a rush to exercise; it is fully understood that it may potentially damage both the employer and the employees. Nevertheless, this right is the po-

tential for exercising this right that allows a union to temper the consequences of what is otherwise a very one-sided 1113 process.

And, finally, group three: airline employees. Like railroads, they are covered under the Railroad Labor Act. Due to some historical anomaly, they do not fall under Code 1167 but, rather, Bankruptcy Code 1113. The result is, only airline employees are subject to the corrosive 1113 process without any recourse, and they are the only employees covered by the RLA without any access to 1167 and the Section 6 negotiating process.

Airline employees have no means to temper employer's rapacity; thus, can be stripped of their contractual rights with impunity. This vulnerability has been exploited time and time again, with no indication that it will cease.

This was not the intent of the framers of the Railway Labor Act, who sought reciprocal rights in terms of changes in the status quo. And it was not the intent of the framers of 1113, who bestowed upon labor unions an ability to seek moderation of their employer's demands. This situation exists although the Supreme Court has held, in the context of bargaining under the Railway Labor Act, quote, "Only if both sides are equally restrained can the act's remedies work effectively," end quote.

The US Airline Pilots Association requests that Congress fix this inequity by treating all employees covered by the Railway Labor Act equally and subject to Bankruptcy Code 1167. What 1167 does is it makes us partners in the process and, in the long term, bolsters our companies' chances for success. Pilots, more than any other professional workgroup, have a culture inside our company and a vested interest in its success. Proposed language to treat all RLA-covered employees equally has been drafted and is attached to this testimony.

Thank you for allowing me the opportunity to share my perspective with this Committee. I will be happy to answer any questions. Thank you, sir.

[The prepared statement of Mr. Gentile follows:]

PREPARED STATEMENT OF ARNOLD D. GENTILE

STATEMENT OF

CAPTAIN ARNOLD D. GENTILE, GOVERNMENT AFFAIRS CHAIRMAN
US AIRLINE PILOTS ASSOCIATION

BEFORE

THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

DECEMBER 16, 2009

PROTECTING EMPLOYEES IN AIRLINE BANKRUPTCIES

Chairman Cohen, Chairman Conyers, Ranking Members Smith and Franks and other members of the committee, I am grateful for the opportunity to give testimony concerning the treatment of airline employees in a business bankruptcy. I am here to ask you to put an end to a particular inequity concerning the application of Bankruptcy Code and its effect on a single industry employee group – namely airline employees. It is not a question of the essence or merit of bankruptcy law as we fully support the concept of permitting companies to restructure; rather it is a question of inequities in Bankruptcy Code application.

As a US Airways Captain with over 26,000 flight hours spanning 38 years of flying, I have personally witnessed the effects of this inequity: I experienced two bankruptcies that took 50% of my salary and up to 60% of my co-workers' salaries, and my pension was terminated. The US Airways pensions, like all pensions, were earned at the negotiating table year after year. They are now worth pennies on the dollar, and the burden of all remaining pension costs have been shifted to the PBGC and the American taxpayer.

Just between the recent US Airways and United Airlines bankruptcies, 183,852 pensions were lost. At US Airways, the average age of the pilots was 51years old. Our pilot group witnessed family uprooting, the selling of houses, divorce and even suicide.

To add insult to injury, according to an October GOA report, the US Airways pensions disappeared at a time when:

- US Airways CEOs received over $120 million, plus
- US Airways CEOs collected over $40 million in stocks, plus
- US Airways CEOs collected another $30 million in reimbursement to pay their income taxes.

In addition, only fourteen months after the carrier exited bankruptcy on September 16, 2005, US Airways made an $8 billion bid for Delta Airlines on November 16, 2006. Later that bid was raised to $9.8 billion.

From 1938 to 2008, the entire airline industry's sum total net profit is negative $16 billion. The early 1980s, the early 1990s and the last eight years were all marked by a wave of airline bankruptcies. There have been over 100 airline bankruptcies since industry deregulation in 1978, and eleven airline bankruptcies in 2008 alone.

Given this track record in post de-regulation, we find it telling that Judge Feinberg of the United States Court of Appeals for the Second Circuit, while ruling on the question whether the Bankruptcy Act allows rejection of a collective bargaining agreement, stated in 1975, *"Although the Board cites a few cases to justify its fear that businesses will swarm into bankruptcy*

proceedings in order to free themselves of labor agreements; we doubt that many will attempt to do so." [1]

I point out these facts to demonstrate that airline corporations have comparatively "easy access" to the bankruptcy process and have shown a willingness to go there and decimate employee collective bargaining agreements. Bankruptcy has played a significant role in the systematic assault on the airline pilot profession. The discriminatory nature of Bankruptcy Code application has caused substantial frustration leading pilots to abandon the industry in droves.

This devastation to the airline pilot profession has raised important safety concerns, which prompted the House to recently pass the Airline Safety and Training Improvement Act by a vote of 409 to 11. During the hearings it came to light that the inexperienced First Officer involved in the Continental Connection tragedy in Buffalo, New York, was earning an annual salary of $16,200. Due to the mass abandonment of the profession by experienced pilots, coupled with entry-level wages that qualify pilots for food stamps, hiring standards have dropped to bare minimums. My friend and colleague, fellow US Airways Pilot Captain Chesley B. Sullenberger, III, testified in congressional hearings, *"I attempt to speak accurately and plainly, so please do not think I exaggerate when I say that I do not know a single professional airline pilot who wants his or her children to follow in their footsteps."*

To understand and address the discriminatory treatment of employees in the airline bankruptcy context, we will divide all unionized labor into three groups:

1. **Railroad employees** – fall under Bankruptcy Code 1167 [covered by the Railway Labor Act (RLA)]
2. **All other employees except railroad and airline** employees – fall under Bankruptcy Code 1113 [covered by National Labor Relations Act (NRLA)].
3. **Airline employees**, who are also covered under the Railway Labor Act – due to some historical anomaly DO NOT fall under Bankruptcy Code 1167, rather Bankruptcy Code 1113.

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[1] *Docket Nos. 74-1872, 74-2154, Nos. 581, 811 - September Term, 1974 US Court of Appeals for the Second Circuit*

Group 1:

For RLA-covered **railroad** employees only; Bankruptcy Code Section 1167 provides that neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act. A House Judiciary report stated that, "*the subject of railway labor is too delicate and has too long a history for this code to upset established relationships. The balance has been struck over the years. This provision continues that balance unchanged.*" [2]

The rationale for 1167 – the delicate nature of labor relations – is no less applicable to airline employees than it is to railroad employees. Nevertheless, RLA-covered airline labor is deprived of the benefits of 1167 and has been lumped in with NLRA employees – with one critical distinction.

Group 2:

NLRA employees have the right to strike in the event their contract is rejected; airline employees do not. Of course, no one is in a rush to exercise that right. It is fully understood that it may potentially damage both the employer and the employees. Nevertheless, it is the potential for exercising the right to strike that allows a union to temper the consequences of what is otherwise a very one-sided 1113 process.

Group3:

Airline Employees – not only are they denied the RLA benefits of 1167 – under the RLA, airline employees are denied the ability to use the potential threat of strike to moderate the effects of the Bankruptcy Code's Section 1113 process. The situation continues to exist although the Supreme Court has held in the larger context of collective bargaining under the Railway Labor Act: *"Only if both sides are equally restrained can the Act's remedies work effectively."*[3]

The fact is ONLY airline employees are subject to the coercive 1113 process without any recourse, without access to 1167, without a right to strike, without any means to temper the employer's rapacity. Thus, airline employees – and only airline employees – can be stripped of their contractual entitlements with impunity.

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[2] *Case Nos. ST91-83338, ST91-84604, ST91-84603 Chapter 11, 1993 US Bankruptcy Court for the Western District of Michigan, Northern Division.*

[3] *Detroit and Toledo Shoreline Railroad Co. v. United Transportation Union*, 396 U.S. 142, 155 (1969).

This was not the intent of the framers of the Railway Labor Act, who sought reciprocal rights in terms of changes in the status quo. It was not the intent of the framers of 1113, who bestowed upon labor unions an ability to seek moderation of their employers' demands by ensuring their right to strike. There is simply no reason or justification for this discriminatory treatment of a single industry's employees.

In the context of union elections, the National Mediation Board has come to recognize that certain rules that have been applied to RLA employees are an historical anomaly rather than a product of conscious policy-making. Thus, the NMB has published a proposed rule change that would allow RLA union elections to be determined by a majority of those who cast votes; the current rule automatically treats non-voters as having cast an anti-union vote. The NMB cogently explained there was no justifiable policy reason for treating railroad and airline employees differently from the entire population of other private industry employees.

Airlines were included under the RLA because they, along with railroads, were seen to be vital elements of the national transportation system and each was characterized by "delicate" labor relations. The relative importance of the airline industry to the national economy has soared while the railroad industry has stagnated – any legitimate policy rationale for excluding airline employees from the 1167 process disappeared a long time ago.

In summary, relative to the "fair treatment of Airline Employees in a Business Bankruptcy":

1) Railroad employees for well documented reasons are not subject to Bankruptcy Code Section 1113, where bankruptcy courts can reject collective bargaining agreements; rather, pursuant to Bankruptcy Code Section 1167, they are subject to the collective bargaining process mandated by Section 6 of the Railway Labor Act.

2) NLRA-governed labor unions, representing nearly all other organized private industry workers in the United States, are subject to 1113; however, a rejection of their collective bargaining agreement gives them the right to strike, a right which serves to temper employers' abuse of the 1113 process.

3) Airline employees have neither the benefit of Section1167 and the Section 6 negotiating process nor the ability to strike if their contract is rejected.

Airline employees stand alone, and this vulnerability has been exploited time and time again – with no indication that it will cease. The current situation has led to grave, unintended consequences, including the near obliteration of professional airline careers on which the public depends for safe air transportation. It is well past time to remedy the discriminatory treatment of airline employees and address the fact that they are stripped of their contractual rights with impunity.

The US Airline Pilots Association requests that Congress fix this discriminating inequity by treating all employees covered by the Railway Labor Act equally and subject to Bankruptcy Code 1167. Proposed language has been drafted and delivered to Congressman Cohen and is attached to this testimony.

Thank you for your kind attention and for the opportunity to share my perspective with this Committee. I will be happy to answer any questions.

Respectfully submitted,

Captain Arnie Gentile
Government Affairs Chairman, US Airline Pilots Association

Captain Arnold Gentile
December 16, 2009

RECOMMENDED AMENDMENTS TO 11 U.S.C §§ 365 & 1113

(New Language is Underscored)

11 U.S.C. § 1113(a) is amended as follows:

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section. Notwithstanding any provision in this section or any other section of U.S. Code Title 11, a debtor in possession or trustee of a debtor covered by title II of the Railway Labor Act may not assume or reject a collective agreement covered by such Act, and the wages or working conditions of employees covered by such collective agreement may only be changed or modified in accordance with Section 6 of such Act.

11 U.S.C. § 365(a) is amended as follows:

Except as provided in Sections 765and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. Notwithstanding any provision in this section, with respect to a debtor covered by title I or title II of the Railway Labor Act, neither the court nor the trustee may change the wages, or working conditions of employees of the debtor established by a collective agreement that is subject to such Act except in accordance with Section 6 of such Act.

Mr. COHEN. Thank you, Captain. I appreciate it.

The third witness is Captain Robert Coffman, director of government affairs for the Coalition of Airline Pilots Associations, a trade association representing over 28,000 pilots, including the pilots of American, Southwest, NetJets, United Parcel Service, and Teamsters Local 1224, formerly Airborne Express.

He is with American Airlines and has been since 1988, based in New York, Chicago, Dallas, presently in Miami—congratulations; international captain of the Boeing 767, 757 fleet. Before American, he was a physicist, employed by Hughes Aircraft Company as a systems analyst.

Thank you, Captain Coffman. And will you proceed with your testimony?

TESTIMONY OF ROBERT COFFMAN, CAPTAIN, DIRECTOR OF GOVERNMENT AFFAIRS, COALITION OF AIRLINE PILOTS ASSOCIATIONS

Mr. COFFMAN. Good afternoon, Chairman Cohen, Ranking Member Franks, Members of the Subcommittee. Thank you for the opportunity to testify today. I am Bob Coffman, director of government affairs for the Coalition of Airline Pilots Associations and a captain for American Airlines, as introduced.

CAPA is the largest airline pilot trade association in the world and represents more than 28,000 professional pilots from six unions, including the Allied Pilots Association, the Association of Shared Aircraft Pilots, the Independent Pilots Association, the Southwest Airlines Pilots Association, Teamsters Local 1224, and US Airlines Pilots Association.

On behalf of our members, I want to address the urgent need to correct an unfair difference in the way airline employees are treated in Chapter 11 bankruptcies from rail employees covered under Railway Labor Act. In bankruptcy filings, railroad labor contracts administered under the RLA cannot be unilaterally abrogated, while airline labor contracts under the RLA are subject to judicially approved abrogation.

This disparity in the Bankruptcy Code has resulted in numerous airline labor agreements being gutted in bankruptcy court, with only cursory attempts made to collectively bargain a concessionary contract with input from the affected labor group. As a direct result, there have been thousands of lost airline jobs and billions of dollars in lost wages, benefits, and pension cuts.

Bankruptcy has become a standard course of business for the airline industry, per the previous witness who testified to the large numbers and frequencies of bankruptcy within our industry. In fact, of the six legacy carriers, four have filed for bankruptcy since 2000. There have been more than 40 airline bankruptcies overall in this decade alone.

I am afraid that the process has become an economic opportunity rather than a final attempt to survive. It has become a way to negate a company's contracts, to the detriment of decades of collective bargaining history, including safety increments above the regulatory minimum. It has been called the new collective bargaining weapon to force extraction of concessions beyond those necessary for a successful reorganization.

In the railroad industry, management must negotiate with its workers during the bankruptcy process. The railroad industry is covered by a provision of the Bankruptcy Code, Section 1167, which mandates that management cannot reject railroad labor contracts during the bankruptcy process without following the provisions outlined in the Railway Labor Act. So, unlike airline managements,

railroad management cannot use Chapter 11 to unilaterally abrogate, reject labor contracts as part of the financial reorganization.

The courts have ruled, though, that Section 1167 does not apply to airlines, even though airlines are the only other industry covered by the Railway Labor Act. Therefore, airlines may reject their labor contracts in bankruptcy following the provisions specified in Section 1113(C) of the Bankruptcy Code.

Under Section 1113, airline management only needs to show that changes to a collective bargaining agreement are necessary for reorganization, and the legal burden is placed on labor to prove otherwise. And although Section 1113 does require an attempt to negotiate, the bar to satisfy this requirement falls far short of the formal process required under the RLA used in a railroad bankruptcy. Recent history shows airline managements have almost always been able to get court approval to reject those labor agreements.

Since 2002, the managements of nearly all major carriers, with the exception of Southwest Airlines, have used bankruptcy or the threat of bankruptcy to wrest enormously concessionary contracts from unions, a process that also included the determination of defined benefit pension plans. In fact, in early 2003, my airline, American Airlines, told its unions that it would declare bankruptcy on a specific date absent membership assent to highly concessionary changes to the contracts.

To add insult to injury, some airline managements have used bankruptcy or the threat of bankruptcy to enrich themselves. For example, a recent GAO study showed how, in years leading up to the termination of two underfunded airline pensions, executives received more than $175 million in compensation, an amount that is about the same order as the pension-funding shortfall. At the same time, these terminations have contributed undue additional stress on the Pension Benefit Guaranty Corporation.

Clearly, the capability to exploit this disparity in bankruptcy proceedings grants an airline management tremendously powerful advantage over its unions. The company can threaten the union to acquiesce to its demands or else. After bankruptcy is declared, it ceases to be a negotiation and, instead, becomes a unilateral imposition of threats and demands.

The delicate balance of power codified by the Railway Labor Act between a management and its employees simply evaporates. Management's ability to reject CBAs has essentially left unions with no choice but to cede substantial contractual benefits in the face of the potentially worse option of the wholesale rejection.

We, therefore, ask legislators give airline workers the same protection that railroad workers are currently afforded by aligning the relevant portions of the Bankruptcy Code. This legislative fix would mandate the use of the Railway Labor Act negotiating process before management could reject a collective bargaining agreement. CAPA, my organization, believes that a negotiated solution, rather than one that is imposed, is always in the best interests of all concerned.

Chairman Cohen, Ranking Member Franks, thank you for the opportunity to testify here. I look forward to your questions.

[The prepared statement of Mr. Coffman follows:]

PREPARED STATEMENT OF ROBERT COFFMAN

STATEMENT OF

CAPTAIN ROBERT COFFMAN, DIRECTOR OF GOVERNMENT AFFAIRS

COALITION OF AIRLINE PILOTS ASSOCIATIONS

BEFORE

THE COMMERCIAL AND ADMINISTRATIVE LAW

SUBCOMMITTEE

OF

THE COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

DECEMBER 3, 2009

CORRECTING A DISPARITY BETWEEN RAILROAD AND

AIRLINE EMPLYEES IN CHAPTER 11 BANKRUPTCY

Good morning, Chairman Cohen, Ranking Member Franks and members of the Subcommittee. Thank you for the opportunity to testify today. I am Robert Coffman, Director of Government Affairs for the Coalition of Airline Pilots Associations, and a captain for American Airlines. CAPA is the largest airline pilot trade association in the world and represents more than 28,000 professional pilots from six unions, including the Allied Pilots Association, the Association of Shared Aircraft Pilots, the Independent Pilots Association, the Southwest Airlines Pilots Association, the Teamsters Local 1224 and the US Airline Pilots Association.

On behalf of our members, I want to address the urgent need to correct an unfair difference in the way airline employees are treated in Chapter 11 bankruptcies from rail employees covered under the Railway Labor Act.

In bankruptcy filings, railroad labor contracts administered under the Railway Labor Act cannot be unilaterally abrogated, while airline labor contracts under the RLA are subject to judicial abrogation. This unintentional disparity in the Bankruptcy Code has resulted in numerous airline labor agreements being gutted in bankruptcy courts, with only cursory attempts made to collectively bargain a concessionary contract with input from the affected labor group.

As a direct result, there have been thousands of lost airline jobs and billions of dollars in lost wages, benefits and pension cuts.

Airline Bankruptcies: Necessity or Economic Opportunity?

Bankruptcy has become a standard course of business for the airline industry. Since industry deregulation in 1978, there have been more than 100 airline bankruptcies, with some airlines declaring bankruptcy more than once.

Of the six legacy carriers, four have filed for bankruptcy since 2000. There have been more than 40 airline bankruptcies overall in this decade alone.

The process has become an economic opportunity rather than a final attempt to survive. It's become a way to negate a company's contracts, to erase a union's hard-fought gains in pay and working conditions made over decades of collective bargaining.

It's been called the new collective bargaining weapon, a union-busting tool used to abuse workers and force extraction of concessions that are otherwise unachievable in consensual bargaining.

In the railroad industry, management must negotiate with its workers during the bankruptcy process. The railroad industry is covered by a provision of the Bankruptcy Code, § 1167, which mandates that management cannot reject railroad labor contracts during the bankruptcy process without following the provisions outlined in the RLA. So, unlike airline managements, railroad management cannot use Chapter 11 to reject labor contracts unilaterally as part of a financial reorganization.

The courts have ruled that § 1167 does not apply to airlines, even though it is the only other industry covered by the RLA. Therefore, airlines may reject their labor contracts in bankruptcy by following the provisions prescribed in § 1113 of the Bankruptcy Code.

Under § 1113, airline management only needs to show that changes to a CBA are necessary for a reorganization – and the legal burden is placed on labor to prove otherwise. [1]

And although § 1113 does require an attempt to negotiate, the bar to satisfy that requirement falls far short of the formal process required under the RLA, and the requirement to be met in a rail bankruptcy. Recent history shows that airline managements have almost always been able to get court approval to reject their labor agreements.

A Powerful Advantage

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[1] Mark C. Stephens, NOTE AND COMMENT: LOSING LIFT AND CREATING DRAG! THE EFFECT OF NATIONAL MEDIATION BOARD EXECUTION AND RAILWAY LABOR ACT COURT DECISIONS ON THE COLLECTIVE BARGAINING PROCESS IN THE AIRLINE INDUSTRY: A UNION PERSPECTIVE, 15 Tex. Wesleyan L. Rev. 141, 4 (2008).

Since 2002, the managements of nearly all major carriers with the exception of Southwest Airlines have used bankruptcy or the threat of bankruptcy to wrest enormously concessionary contracts from unions – a process that also included the termination of defined benefit pension plans.

To add insult to injury, these same airline managements have used bankruptcy or the threat of bankruptcy to enrich themselves. For example, a recent Government Accountability Office study showed how in the years leading up to the termination of two underfunded airline pension plans, executives received more than $175 million in compensation, an amount that was the same order of magnitude as the pension funding shortfall. This level of executive compensation requires a certain degree of underlying financial health, indicating that bankruptcy has sometimes been used as a tool of convenience, rather than as a last-ditch effort to survive.

For example, in early 2003, American Airlines told its unions that it would declare bankruptcy on a specific date absent membership assent to highly concessionary changes to their contracts. All three unions acquiesced rather than face the possibility of judicially approved rejection of the contracts as a result of § 1113.

US Airways, Delta, United, Northwest and Continental were also able to leverage labor concessions worth billions of dollars individually, and tens of billions industry-wide, simultaneously placing a precarious burden on the already stressed Pension Benefit Guaranty Corporation.

Clearly, the capability to exploit this disparity in bankruptcy proceedings grants an airline management a tremendously powerful advantage over its union. The company can threaten its union to acquiesce to its demands – or else. After bankruptcy is declared, it ceases to be a negotiation and instead becomes a unilateral imposition of threats and demands. The balance of negotiating power between a management and its employees simply evaporates.

Corrective Legislation Urgently Needed

Management's ability to reject CBAs as part of the bankruptcy process has been devastating for airline labor agreements. Unions have been essentially left with no choice but to negotiate

extremely concessionary agreements in the face of the potentially worse option of wholesale rejection of the CBA under § 1113. The mere threat of bankruptcy proceedings is generally enough to get labor unions to agree to extraordinarily concessionary deals, because the courts have demonstrated that they typically allow management to reject labor contracts without any counter-balancing prospect of labor self-help.

CAPA believes that corrective legislation is urgently needed to remedy this disparity and stop the abuse of the bankruptcy process that has resulted in devastating the careers and lives of thousands of airline workers over the years.

We therefore ask that legislators give airline workers the same protection that railroad workers are currently afforded by aligning the relevant portions Bankruptcy Code. This disparity, one that probably could have in times past been rectified with a simple technical correction act, has enabled airline management to void decades of collective bargaining. This legislative fix would mandate use of the RLA negotiating process before management could reject a collective bargaining agreement. CAPA believes that a negotiated solution – rather than one that is imposed – is always in the best interest of all concerned.

Chairman Cohen, Ranking Member Franks and members of the committee, thank you for the opportunity to testify here today. I am happy to answer any questions you have.

Mr. COHEN. Thank you, Captain.

Our next witness is Mr. Huebner. And Marshall Huebner is a partner in the law firm Davis Polk & Wardwell, co-head of the insolvency and restructuring group, who routinely represents financial institutions and companies in major restructurings and bankruptcies, and has advised on several of the largest, most complex patent matters that have been done; advised purchasers, compa-

nies, and boards of directors in many nonpublic distress matters; and provides risk management and bankruptcy advice on derivative products and other complex transactions which have almost put this country into bankruptcy.

Thank you, Mr. Huebner. Will you proceed with your testimony?

TESTIMONY OF MARSHALL S. HUEBNER, PARTNER, DAVIS POLK & WARDWELL, LLP

Mr. HUEBNER. Good afternoon, Mr. Chairman and Ranking Member. Thank you for inviting me here today. It is a singular honor.

Section 1113, for sure, presents unusually difficult issues. On the one hand, airline debtors are often fighting for their very lives, at severe disadvantage to newer market entrants and foreign competitors. On the other hand, the rights and needs of employees are core values of our great Nation.

I provided as part of my testimony a list of the more than 185 airline bankruptcies filed since 1978. Critically, 90 percent of them ended in liquidation. So while we must ensure fairness for employees who suffered, often greatly, at the 10 percent that are still flying, the deepest pain has been taken by those who lost 100 percent of their salaries, pensions, and benefits and are not here today testifying.

Thus, the changes I suggest materially enhance employee protections and recoveries without unduly risking the survival of their employers, against whom the odds are already frighteningly stacked.

I would make four suggestions today.

One, courts must consider in all 1113 cases management compensation, levels, sacrifices, and enhancements, not only in bankruptcy but in the year prior as well. A true flash point of anger at Chapter 11 is the not-infrequent mismatch between the lack of executive sacrifice and sacrifice farther down the pay scale.

To be clear, this does not mean that management must always take pay or benefit cuts. Sometimes management actually makes sacrifices, either before or during bankruptcy. But, as we all know all too well, management does not always lead by example. These abuses must be stopped, and everyone's compensation must be considered when 1113 relief is sought.

Two, a debtor's 1113 proposal should not extend more than 4 years past bankruptcy emergence. 1113 must not be used to impose inappropriately long concessionary agreements on unions. But a period shorter than 4 years would be dangerous and unwise, because a debtor's cost structure must be locked in long enough for it to procure exit financing and encourage counterparties that it has staying power.

Three, unions must get a damage claim for their members when their contracts are rejected under 1113. These claims can have very substantial value, and because they are often paid in equity, they provide meaningful upside when their employer's situation approves post-emergence. In Delta, for example, where I represented the company, in addition to $650 million in notes and a profit-sharing plan, the pilots got a $2.1 billion agreed claim, which amounted to 13 percent ownership of the reorganized company.

Four, courts must consider not only the proposals made by both sides as of the commencement of the proceedings, but also proposals made during the 1113 process. As everyone is agreeing, real negotiation is what we want, and encouraging the parties to negotiate all the way through is a shared goal.

But, while I feel very strongly that 1113 needs real revisions to protect American workers, I feel equally strongly that radical changes will not protect them. In fact, it will leave more of them with no jobs, pensions, or benefits. As noted above, the bankruptcy failure rate for the airlines is 90 percent. Making remedies and tools that they need more challenging or unavailable will only doom more airlines to liquidation.

Moreover, with due respect to the other witnesses, a debtor seeking 1113 relief already faces the most daunting procedural and substantive hurdles in the entire Bankruptcy Code. Given my limited time, I will not list the nine gates a debtor must currently clear to get 1113, but I live them and they are very real.

The unfortunate reality of insolvency is that companies cannot honor all their obligations. Many suffer: small businesses that may themselves close; individuals or pension funds who invested in the debtor's securities; airports and communities with empty terminals and no service at all because their leases have been rejected. But if every sympathetic counterparty could convince Congress to protect its contract or give its claim special priority, no company will survive Chapter 11, and the losses to all will be immeasurably greater.

Airline employees who suffered substantial cuts tell an absolutely compelling and sympathetic story, but employees who lost their jobs, pensions, and benefits entirely in the many airline liquidations—including ATA, Aloha, Eastern, Pan Am, Skybus, and about 150 more—have an untold story that is at least equally compelling.

Filing for Chapter 11 unfortunately cannot increase demand for one's product, nor allow a company to buy fuel or aircraft or pretzels below current market prices. Congress must consider meaningful changes to better protect America's rank and file, but it is imperative that changes not be implemented that threaten to take the frightening failure rate of U.S. restructurings yet higher, which will ultimately hurt the rank and file most of all.

Finally, Mr. Chairman and Ranking Member, one final thought for which I apologize in advance. I was stunned yesterday afternoon to read in Mr. Nagrotsky's statement that Frontier Airlines used the 1113 process to, and I quote, "obtain an order from the bankruptcy court authorizing it to permanently outsource the mechanics' work to El Salvador," close quote.

This is totally incorrect. This morning, I submitted a supplement that explains and documents with many of the actual documents attached what actually happened, which, in fact, is a great case study. It was unprecedentedly and amazingly protective of IBT's jobs and members and a good example of 1113 working exactly as Congress wanted it to. The parties met 17 more times after the process started and the judge forced a deal, and, ultimately, no outsourcing at all was allowed.

Thank you.

[The prepared statement of Mr. Huebner follows:]

PREPARED STATEMENT OF MARSHALL S. HUEBNER

STATEMENT OF

MARSHALL S. HUEBNER, PARTNER, DAVIS POLK & WARDWELL LLP

BEFORE

THE COMMERCIAL AND ADMINISTRATIVE LAW

SUBCOMMITTEE

OF

THE COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

DECEMBER 16, 2009

PROTECTING EMPLOYEES IN AIRLINE BANKRUPTCIES

Good afternoon, Mr. Chairman, Ranking Member, and honorable members of the Subcommittee. Thank you for inviting me to testify today. I am Marshall Huebner, co-chair of the insolvency and restructuring department at Davis Polk & Wardwell LLP. I have authored many articles on bankruptcy law as well as the forthcoming Oxford University Press treatise on Chapter 11 reorganization. Among other things, I was lead counsel to Delta Air Lines in its out-of-court restructuring and Chapter 11 proceedings, and advised Frontier Airlines and the Star Tribune in their Chapter 11 proceedings. I have also represented the lenders in several of the largest loans ever extended to Chapter 11 debtors, experience whose relevance I will address in a few moments. I would like to note that I am here today to provide the Subcommittee with what is hopefully useful information in my individual capacity, and I represent neither the views of Davis Polk & Wardwell as a firm, nor the views of any of its clients.

As the Subcommittee and my fellow witnesses know all too well, the topic of Chapter 11 in general, and sections 1113 and 1114 in particular, presents a very difficult set of issues and balances. On the one hand, debtors, especially those with substantial legacy liabilities, are frequently fighting for their very lives at a severe disadvantage to newer entrants in the industry and foreign competition, both of whom often have substantially lower costs. And debtors usually need all the help they can get. On the other hand, respect for the rights and needs of employees is also a core value of our great nation.

To help set the context for the hearing and these difficult issues, attached as Exhibit A is a chart that lists the approximately 185 U.S. airline bankruptcies since 1978. About 90% of them ended in liquidation. So while we must collectively figure out how to ensure fairness for employees who have suffered major salary and benefit cuts at the 10% that are still flying, the deepest pain has of course been taken by those who lost 100% of their salary, pensions and benefits. It is for that reason that the changes that I am suggesting enhance the protections for workers without unduly risking the survival of their employers, against whom the odds are frighteningly stacked. Frontier, for example, would not have survived in an even slightly less favorable legal system.

Those who lead and represent troubled companies have taken on a sacred trust to try to save them, and a critical part of that responsibility is to preserve, to the greatest extent possible, the jobs, wages, pensions and benefits of those who depend on and constitute the enterprise. For example, I'm very proud of the fact that my client Frontier Airlines is the only airline to have entered bankruptcy since January 2006 and avoided liquidation. I am equally proud of Delta, which worked out groundbreaking deals with its unions and retirees in Chapter 11, and also implemented the first ever broad-based equity grant to <u>all</u> employees upon emergence from Chapter 11.

While section 1113 works fairly well and achieves its intended goals much of the time, it does need some revisions. I will highlight four this afternoon:

(1) The courts should be expressly directed to consider, as part of all 1113 proceedings, management compensation, management sacrifices and any enhancements to management compensation made not only during the bankruptcy case, but during the year prior to the bankruptcy case as well. Perhaps the greatest flashpoint, often justifiably so, of anger and frustration with the bankruptcy system is the not infrequent mismatch between the lack of sacrifice in the executive suite and the sacrifice as one moves down the payscale. Bankruptcy courts should be directed to consider the comparative position and compensation of people at all levels of the company when considering section 1113 proposals. To be clear, this is not to say that in every case management must take pay cuts or lose this or that benefit. Sometimes, management has made substantial sacrifices prior to or during the bankruptcy or is underpaid compared to market and what is necessary for survival. This, for example, was true of the Delta, Frontier, and Star Tribune bankruptcy cases, where management led by example. That said, it certainly isn't always the case – each situation, who must or should accept adjustments differs. To stop and guard against abuses, however, courts must be obligated to consider the compensation of all, including management, as part of the fair and equitable component of section 1113.

(2) Debtors' section 1113 proposals should not be able to extend past four years from the effective date of emergence from Chapter 11. As someone who frequently represents lenders in Chapter 11, my experience is that a shorter period would be dangerous and unwise. It is critical that a debtor's cost structure be locked in long enough for it to procure exit financing and to encourage counterparties to do business with it. Too short a period of contract cost stability will likely result in one of two things: either the debtor will not be able to emerge at all because potential investors and lenders simply will not come to the table, or, if the debtor has to reopen negotiations while still recovering from the weakness and trauma that Chapter 11 invariably represents, it may well fail again. In some cases, however, 1113 has been used to impose inappropriately long term concessionary agreements on unions. I see no justification for this, and do not think it should be permitted.

(3) Unions, like all other counterparties whose contracts are rejected, deserve a claim in Chapter 11 cases for the damages that they suffer when section 1113 relief is awarded. To be clear, this change risks upsetting a negotiating dynamic that is often conducive to consensual agreements, because debtors currently have the ability to offer the union – as part of an agreed deal that avoids litigation -- a claim that often has very substantial value in the Chapter 11 case. Nonetheless, since section 1113 does represent rejection of a contract and, in all other contexts other than 1113, rejection gives rise to a damage claim, it is ultimately difficult to defend unions not getting compensated for their damages in the claim process. Moreover, this claim can have very substantial value, and, because it is often paid in equity, can provide real upside to union members if their employer's situation improves, without impacting cash flows and weakening the company. In Delta, for example, in addition to $650 million in notes and participation in a robust profit sharing plan, the pilots' union received a $2.1

billion agreed claim in connection with the consensual amendment of its collective bargaining agreement. That $2.1 billion claim translated to something like 13% of the equity of reorganized Delta. In other airline cases, union members owned an even greater percentage of the company at emergence.

(4) It is critical that courts be able to consider not only the proposal made by the company and the union as of the commencement of the hearing, but also any additional proposals made while the pleading cycle and even the hearing is going on. Bankruptcy judges not infrequently send signals as to their views regarding which side, and in many cases both sides, need to exhibit more flexibility and greater willingness to compromise in their negotiations. In at least one case in which I was involved, the company materially improved its offer to the union during the 1113 process under substantial pressure from the judge to do so. Ironically, on appeal, because the bankruptcy judge had ruled that the debtor's final offer was fair and equitable, but did not rule on the offer made several rounds earlier prior to the commencement of the proceedings, the District Court reversed. Because the goal of 1113 is and should be to force the parties to the table, and to encourage the debtor's continued negotiation and flexibility, the statute should be clarified so that there is no doubt that courts should weigh both sides' final proposals.

But, while I feel strongly that section 1113 does need revisions, I feel equally strongly that an **apparently** pro-union fundamental rewrite of the statute will not help workers in the end. It will only leave many more of them with no jobs, no pensions and no benefits.

First of all, there is the context. As noted above, the airline chapter 11 failure rate is already in the 90% range, which is shockingly high. And many informed observers, for very good reason, believe that making 1113 yet more challenging (or even unavailable) will doom yet more airlines to liquidation.

Moreover, a debtor seeking to address a collective bargaining agreement under section 1113 already faces the most daunting procedural and substantive hurdles in the Bankruptcy Code. Virtually every other contract of a Chapter 11 company can be rejected in the debtor's sole discretion. By contrast, when a debtor seeks to reject a collective bargaining agreement, it must: (1) make a proposal to the union; (2) base the proposal on the then-most complete and reliable information; (3) propose (only) modifications that are "necessary to permit reorganization"; (4) assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably; (5) provide the union with such relevant information as is necessary to evaluate the proposal; (6) between the time of the making of the proposal and the 1113 hearing, meet with the union at reasonable times to negotiate; (7) negotiate with the union in good faith to attempt to reach mutually satisfactory modifications of the agreement; (8) the union must refuse to accept the proposal without good cause; (9) the balance of the equities must clearly favor rejection of the agreement. Clearly, the 1113 system is designed to force the parties together in negotiation, and while there are certainly

some bad outcomes that have transpired that need to be addressed through appropriate statutory changes, in the vast majority of cases, good faith negotiation takes place. Indeed, in many cases most, and in some cases all, of a debtor's unions work out consensual amendments to the CBAs.[1]

I am aware that there are very strong views on the union side that the Railway Labor Act should not be interpreted to prevent unions from striking in the Chapter 11 section 1113 rejection context. With all due respect to those views, I believe that the right to strike should not be available to unions subsequent to 1113 rejection. Under the statute, the company can prevail only if its proposal contains only changes that are necessary to permit reorganization, the proposal is fair and equitable to all, the company has negotiated in good faith and provided full information, the union has rejected the proposal without good cause, and the balance of the equities clearly favors rejection. This is, properly applied, a very demanding set of standards that was enacted at the request of organized labor. Under the system put in place by Congress, the union is the party that is in the wrong if it loses a section 1113 fight, and it is difficult to see why that should change or override the RLA's important focus on protecting the public and the economy from disruption. Moreover, sanctioning the possibility that a union could stonewall or refuse to negotiate in good faith (or even refuse to negotiate at all), as sometimes happens, and then strike when the debtor prevails in a federal court, tilts the playing field far too strongly and unfairly, and introduces very perverse incentives.

The unfortunate reality of insolvency is that a company cannot honor all of its obligations and cannot pay all of its debts. Many constituencies suffer. Whether it is small businesses who may themselves go out of business because of the financial hit they have taken by virtue of the debtor's bankruptcy; individuals who invested in the debtor's stocks or bonds; pension funds that invested in the

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[1] Nor is it the case that the company always prevails. As Michael Bernstein noted last year before this Subcommittee during a legislative hearing on this same topic, due to the strict requirements of section 1113, many courts do in fact deny debtors' requests for relief. *See, e.g., In re Delta Air Lines (Comair),* 342 B.R. 685 (Bankr. S.D.N.Y. 2006) (debtor did not meet its fair and equitable burden); *In re Nat'l Forge Co.,* 279 B.R. 493 (Bankr. W.D. Pa. 2002) (debtor did not meet its burden of proving that the proposed modifications were fair and equitable); *In re U.S. Truck Co.,* 165 L.R.R.M. (BNA) 2521 (Bankr. E.D. Mich. 2000) (debtor failed to meet its burdens of proving the proposal to be necessary, fair and equitable); *In re Jefley, Inc.,* 219 B.R. 88 (Bankr. E.D. Pa. 1998) (court concluded "that the proposal, as presented, is not 'necessary' to the Debtor's reorganization; [and] does not treat the union workers 'fairly and equitably'"); *In re Liberty Cab & Limousine Co.,* 194 B.R. 770 (Bankr. E.D. Pa. 1996) (debtor's proposal was not fair and equitable); *In re Lady H Coal Co.,* 193 B.R. 233 (Bankr. S.D. W. Va. 1996) (debtor failed to treat all parties fairly and equitably and did not bargain in good faith); *In re Schauer Mfg. Corp.,* 145 B.R. 32 (Bankr. S.D. Ohio 1992) (debtor "has failed to show that the Proposal which it made to the Union makes 'necessary modifications . . . that are necessary to permit the reorganization of the debtor . . . .'"); *In re Sun Glo Coal Co.,* 144 B.R. 58 (Bankr. E.D. Ky. 1992) ("the debtors have failed to sufficiently quantify the results of such proposed changes to allow this Court to find that they are 'necessary' to the reorganization of the debtors.").

debtor's securities; airports and communities who find themselves with empty terminals or no service because their leases have been rejected; the losses are often massive. However, if each sympathetic counterparty were able to convince Congress to protect *its* contract or give *its* claim a priority, no company would survive Chapter 11, and the losses *to all* would be immeasurably greater. By way of example, it is commonly held in the bankruptcy bar and bench that the 2005 bankruptcy amendments, which shortened exclusivity and substantially limited a debtor's time to assume or reject certain real property contracts, directly caused or were a major contributor to the liquidation of many large retailers who might otherwise have been able to reorganize and keep their workers employed. Making 1113 yet substantially more onerous on struggling employers will likely have dire consequences. The employees of airlines who took substantial pay cuts and lost material pension rates certainly tell an absolutely compelling and sympathetic story. But the employees who lost their jobs entirely, as well as their pensions, health benefits, and incomes in the many airline liquidations, including ATA, Aloha, Eastern Airlines, Pan Am, TWA, Florida Coastal, and Skybus, present a story that is at least equally compelling.

Finally, I would like to address one topic that may be on the minds of some of the committee members: the courts' interpretation of the standard of "necessary to permit the reorganization of the debtor" under section 1113(b)(1)(A). The overwhelming majority of the courts across the country to have considered the issue have held that "necessary to permit the reorganization of the debtor" means necessary for the long term health and survival of the debtor, not merely necessary to avoid immediate liquidation in the short run.[2] In contrast, a very early case decided in 1986 held it to mean "necessary to avoid liquidation."[3] It quickly became apparent, however, that this was neither a

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[2] *See, e.g., United Food & Commercial Workers Union v. Family Snacks, Inc.* (*In re Family Snacks, Inc.*), 257 B.R. 884, 896-97 (B.A.P. 8th Cir. 2001); *In re Maxwell Newspapers, Inc.*, 981 F.2d 85 (2nd Cir. 1992); *In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 892-93 (10th Cir. 1990); *In re Royal Composing Room, Inc.*, 848 F.2d 345 (2nd Cir. 1988); *Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82, 89–90 (2d Cir. 1987) (holding that "'necessary' should not be equated with 'essential' or bare minimum. . . . [rather] the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."); *In re Appletree Mkts, Inc.*, 155 B.R. 431, 441 (S.D. Tex. 1993); *In re Mesaba Aviation Inc.*, 350 B.R. 192 (Bankr. D. Minn. 2006); *In re Northwest Airlines Corp.*, 346 B.R. 307 (Bankr. S.D.N.Y. 2006); *In re Delta Air Lines*, 342 B.R. 685 (Bankr. S.D.N.Y. 2006); *In re Horsehead Indus., Inc.*, 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003); *In re Valley Steel Prods. Co., Inc.*, 142 B.R. 337 (Bankr. E.D. Mo. 1992); *International Union etc. Local 1431 v. Gatke Corp.*, 151 B.R. 211 (N.D. Ind. 1991); *In re Indiana Grocery Co., Inc.*, 136 B.R. 182 (Bankr. S.D. Ind. 1990); *In re Express Freight Lines, Inc.*, 119 B.R. 1006 (Bankr. E.D. Wis. 1990); *In re Big Sky Transp. Co.*, 104 B.R. 333, 335 (Bankr. D. Mont. 1989); *In re Texas Sheet Metals, Inc.*, 90 B.R. 260, 265 (Bankr. S.D. Tex. 1988); *In re Walway Co.*, 69 B.R. 967 (Bankr. E.D. Mich. 1987); *In re Amherst Sparkle Market, Inc.*, 75 B.R. 847, 851 (Bankr. N.D. Ohio 1987); *In re Allied Delivery System Co.*, 49 B.R. 700 (Bankr. N.D. Ohio 1985).

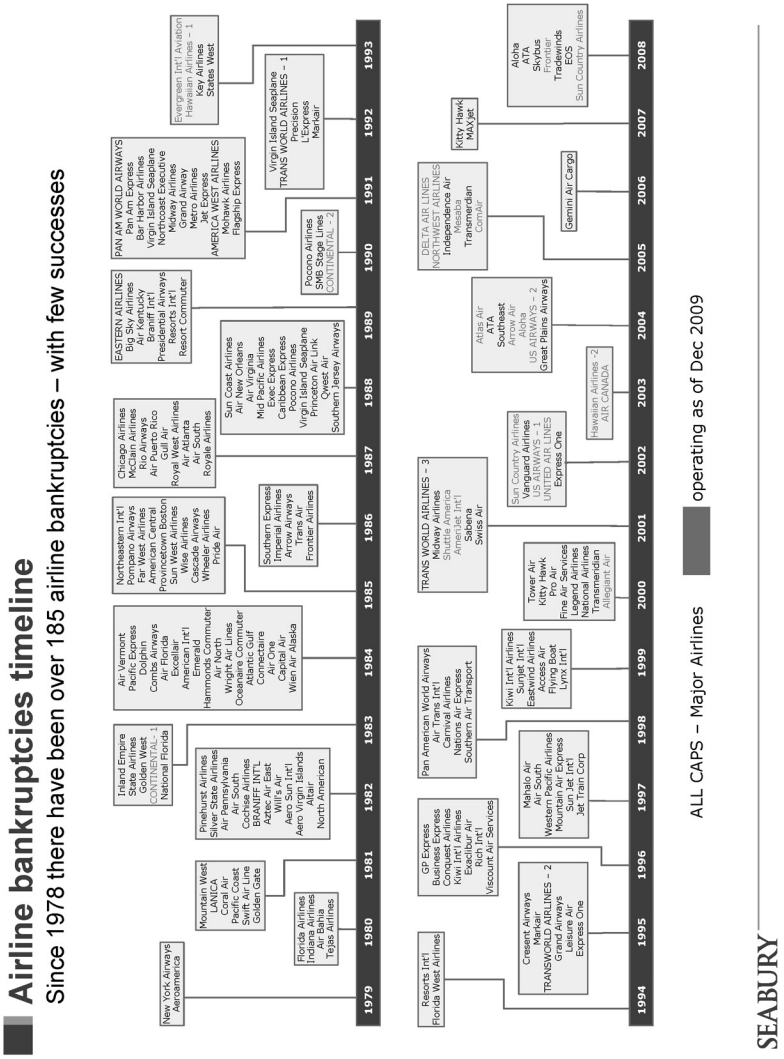
[3] *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1088 (3d Cir. 1986).

workable nor the correct interpretation of the standard, and almost no other courts have followed it in the last 23 years for at least two valid reasons. One, it would merge the "necessary to permit the reorganization of the debtor" test under section 1113(b)(1)(A) with the statute's emergency interim relief standard under section 1113(e), articulated by Congress as "essential to the continuation of the debtor's business." This cannot have been Congress' intent, since a higher bar must clearly be met by companies seeking emergency interim relief. Second, it will cause more airline liquidations. If the relief available to the debtor is limited to merely avoiding short-term liquidation, and not to creating viable and financeable business plans, it is all but certain that the airline failure rate will not be 90% – it will be 95% or 98%. They simply will not get financing.

Filing for Chapter 11 relief cannot increase demand for one's product, nor can bankruptcy lower the price of fuel or allow a company to buy fuel or airplanes or pretzels below current market prices. Therefore, it is an unfortunate but enduring reality that the relatively small number of costs that are potentially adjustable, including labor and benefits, will have to continue to be an area where debtors struggling to avoid liquidation have to be able to seek savings in order to survive Chapter 11 and emerge on the other side. And section 1113, properly applied, already contains a set of strict procedural and substantive hurdles that go a very long way towards striking the right balance. But there are at least four changes Congress should consider better to protect the American worker, while not making it materially less likely their employers will survive: (1) mandatory consideration of executive compensation in the 1113 process (better to ensure fairness); (2) a limitation on debtors' 1113 proposals to 4 years from their emergence date (so that bankruptcy cannot be used to force unduly long concessionary agreements onto unions); (3) a mandatory damage claim arising out of 1113 rejections (which will often provide equity participation and "upside" for employees); and (4) mandatory consideration of the good faith bargaining and proposals made by both sides until the Court has actually ruled on the 1113 issues presented to it.

Thank you for giving me the opportunity to testify before you today.

Exhibit A



Mr. COHEN. Thank you, Mr. Huebner. I appreciate your coming back here on Mr. Nagrotsky. We like a little Jane Curtin/Dan Akroyd every so often.

Our fifth witness is Robert Roach, Jr. Mr. Roach started in the International Association of Machinists as a ramp serviceman for TWA and a member of Local Lodge 1056 in New York.

He has been a union representative since 1979, holding numerous worker advocate positions. He became a member of the IAM

Executive Council as General Vice President of the Transportation Department, June 1, 1999, and most recently reelected in 2009. He oversees and coordinates 150 collective bargaining agreements covering U.S. rail and air carriers, foreign flag airlines, and airline service companies.

Thank you, Mr. Roach. You are on.

TESTIMONY OF ROBERT ROACH, JR., GENERAL VICE PRESIDENT OF TRANSPORTATION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

Mr. ROACH. Thank you, Chairman Cohen and Ranking Member Franks, for this opportunity to speak to you today. As stated, my name is Robert Roach, Jr., general vice president of the Machinists Union, and I am here appearing on behalf of International President R. Thomas Buffenbarger.

The IAM is among the Nation's largest industrial trade unions, representing nearly 700,000 active and retired members under more than 5,000 contracts in transportation, aerospace, shipbuilding, defense-related industries, including more than 100,000 U.S. airline workers, making us the largest airline union in North America.

I am speaking to you today both as a union representative as well as a former employee of TWA with extensive bankruptcy experience, having been their lead spokesman for all airline bankruptcies since 9/11. I endured three airline bankruptcies at TWA as an employee, and today, after 30 years as a TWA employee, I receive a monthly pension from the Pension Benefit Guaranty Corporation of a mere $212 per month.

While Chapter 11 bankruptcy can be a lifeline for struggling companies, unfortunately the law allows management to use that line to choke employees and retirees. Current bankruptcy law eliminates any incentive for a company to engage in good-faith bargaining. Under the unfair corporate advantage, employees have suffered greatly. I have some examples.

At United Airlines, workers gave up jobs, endured wage cuts, and could not prevent United from refusing to fund their pensions, leading to plan terminations. Retirees saw their fixed incomes decrease and their cost of health care increase. In total, IAM members were forced to sacrifice more than $4.6 billion for United Airlines, while the CEO received total compensation the first year of United Airline's bankruptcy of $39.7 million.

And US Airways, the first bankruptcy in 2002, IAM members agreed to two rounds of contract concessions, totaling $276 million per year, or $1.8 billion over 6.5 years. US Airways CEO David Siegel was rewarded with $1.45 million a year as the airline exited the first bankruptcy and another $9 million in 2003, the year in between the two airline bankruptcies. It should be noted that the second airline bankruptcy was planned prior to US Airways exiting the first bankruptcy to get a Federal guarantee backing for a loan.

After filing for bankruptcy the second time, the mechanics' wages were cut by more than 15 percent. Management and salaried employees were reduced only by 5 percent. In this bankruptcy, Siegel's successor, Bruce Lakefield, orchestrated massive benefit and job

cuts for front-line employees but refused to accept any wage cuts for himself.

On Northwest Airlines, members saw their pension plans frozen and took an 11.5 percent pay cut as a result of management's bankruptcy. With me here today are two Northwest Airlines employees, John Ketelstein and Ken McNair, who are now suffering under the bankruptcy contract that was forced down their throats. In contrast, Northwest Airlines CEO Doug Steenland was granted $26 million in stock upon the carrier's 2007 exit from bankruptcy, plus a cash salary that year of over $500,000.

In major airline bankruptcies, much of the financial sacrifices to save the companies were diverted into the pockets of people responsible for the company's failure. This is not acceptable to me or the people I represent, and I hope it is not acceptable to the Members of this Committee.

While airline employees have been hit hard by the impacts of bankruptcy, they are certainly not alone. Auto, steel, banking, newspaper, cable TV, trucking companies are among more than a hundred publicly traded companies that seek Chapter 11 bankruptcy protection each year. Bankruptcies are not restricted to just one sector of our country, and neither should bankruptcy reform.

The Machinists Union believes that there is an immediate need for bankruptcy reform that should apply to all private-sector workers covered by collective bargaining agreements. Companies should not be able to use the Bankruptcy Code to eliminate decades of collective bargaining gains when there is no justifiable reason other than corporate greed.

Court rulings should be overturned to allow airline workers the right to engage in self-help if the bankruptcy court terminates a bargaining agreement. And good-faith bargaining can only be achieved when there is a level playing field, and today bankrupt companies hold all the cards.

If employees are forced to sacrifice in order to restructure their bankrupt employer, bankruptcy laws should require everyone from the break room to the board room to share their pain. Executive bonuses, stock grants, and other compensation enhancements proposed during bankruptcy must be strictly limited.

IAM believes that companies should be required to pay into pension plans as benefits are earned. Additionally, the PBGC should have financial resources available to guarantee all vested benefits promised in a pension plan without reduction or maximums. Pension plan defaults in the steel, airline, and other industries helped the PBGC move from a surplus of $7.7 billion at the end of fiscal year 2001 to a deficit of $33.5 billion today. Congress must make bankruptcy a less attractive mechanism to dump pension obligations onto the PBGC.

The Machinists Union supports comprehensive reform that would protect all our Nation's workers and require shared sacrifice among all stakeholders. We are prepared to work with this Committee on such legislation.

I look forward to your questions. Thank you.

[The prepared statement of Mr. Roach follows:]

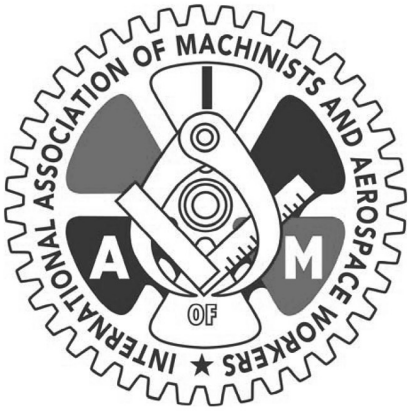
PREPARED STATEMENT OF ROBERT ROACH, JR.

Testimony of Robert Roach, Jr.

General Vice President of Transportation

International Association of Machinists

and Aerospace Workers



Before The

House Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

"Protecting Employees in Airline Bankruptcies"

December 16, 2009

Testimony of Robert Roach, Jr.
General Vice President of Transportation
International Association of Machinists and Aerospace Workers
Before The
House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
"Protecting Employees in Airline Bankruptcies"
December 16, 2009

Thank you, Chairman Conyers, Subcommittee Chairman Cohen, and members of this Committee for the opportunity to speak to you today. My name is Robert Roach, Jr., General Vice President of Transportation for the International Association of Machinists and Aerospace Workers (IAM). I am appearing at the request of International President R. Thomas Buffenbarger. The IAM is among the nation's largest industrial trade unions, representing nearly 700,000 active and retired members under more than 5,000 contracts in transportation, aerospace, shipbuilding and defense-related industries, including more than 100,000 U.S. airline workers, making the IAM the largest airline union in North America.

I am speaking to you today as both a union representative with extensive bankruptcy experience and a retired airline employee who has personally felt the effects of airline bankruptcies.

I endured three airline bankruptcies as a TWA employee. My coworkers and I suffered repeated pay and benefit cuts. My pension and the pensions of 36,300 other participants were terminated in 2001. Today, after 30 years as a TWA employee, I receive a monthly pension from the Pension Benefit Guaranty Corporation (PBGC) of a

mere $212.00. I know firsthand that bankruptcy is painful; but I also know the pain is not shared by all.

While Chapter 11 bankruptcy can be a lifeline for struggling companies, unfortunately the law allows management to use that line to choke employees and retirees. Under current bankruptcy law, if a company seeks to modify labor agreements and a union does not comply, the company can ask a judge to abrogate their contracts. This erases any incentive a company has to engage in good-faith bargaining. Recent court rulings also prevent airline employees from engaging in self-help if their contract is extinguished by the bankruptcy court. It is the equivalent of someone pointing a gun to your head, saying if you do not voluntarily turn over some of your money they will forcibly take it all, and there is nothing that can be done to stop them. Under this unfair corporate advantage, employees have suffered greatly. I have some examples.

Immediately after its Chapter 11 filing, United Airlines asked a bankruptcy judge to impose 14% "emergency" pay cuts on IAM members. The judge complied. More long-term cuts in pay and benefits cost IAM members $460 million a year (or $2.644 billion over the life of the agreement). United then took steps to cut health benefits for existing retirees and filed a motion in court to ask a judge to impose cuts if agreements could not be reached with the retirees' representatives. This heartless move cost fixed-income retirees $50 million a year.

In the summer of 2004 United ceased funding its pension plans, the first in a series of steps which ultimately led to their termination by the PBGC.

In January 2005, United once again sought and received "emergency" pay cuts from the bankruptcy court - this time it was 11%. Six months later IAM members gave up another $176 million a year to save United. Savings attributable to the termination of IAM member's pensions saved United an additional $217 million a year.

In total, IAM members were forced to sacrifice more than $4.6 billion for United Airlines.

In US Airways' first bankruptcy in 2002, IAM members agreed to two rounds of contract concessions totaling $276 million per year, or $1.8 billion over 6 1/2 years. Pay was cut by an average of 7.5%. Employees also experienced drastic increases in their contributions for healthcare coverage, which had the effect of reducing take-home pay even further.

Immediately after filing for bankruptcy for the second time in as many years, US Airways management petitioned the court to impose "emergency" pay cuts of 23% for all union-represented employees. The bankruptcy court reduced the amount to a still-staggering 21% cut in pay. Eventually, US Airways' mechanics saw their pay cut by an average of 15%. Management and salaried employees' pay was reduced by only 5% to 10%.

Our Northwest Airlines members saw their pension plans frozen, and took 11.5% pay cuts as a result of management's bankruptcy. This story has been repeated throughout the airline industry.

And how did the executives who steered their airlines into bankruptcy fare in the process? They were rewarded for failure.

US Airways CEO David Siegel was rewarded with $1.45 million the year his airline exited its first bankruptcy and another $9 million in 2003, the year in between the airline's two bankruptcies. Siegel's successor, Bruce Lakefield, orchestrated massive pay, benefit and job cuts for front-line employees during the airline's second bankruptcy - but he refused to accept a wage cut for himself.

Northwest CEO Doug Steenland was granted $26.6 million in stock upon the carrier's 2007 exit from bankruptcy, plus a cash salary that year of over $500,000.

In 2006, on the day after emerging from the longest bankruptcy in airline history, United Airlines CEO Glenn Tilton was rewarded with $20 million in stock and options. During the first month out of bankruptcy he was granted additional stock and options valued at $18 million. Tilton also had a base salary of $687,000 and bonuses totaling $839,000 that year. Finally, he had $210,000 of "other compensation" including a car & driver and reimbursement of taxes. Tilton's total compensation in the first year after United's

bankruptcy was $39.7 million.

In these major airline bankruptcies, much of the financial sacrifices employees made to save their company were diverted into the pockets of the people responsible for the company's failure. That is not acceptable to me or the people I represent, and I hope it is not acceptable to the members of this Committee.

While airline employees have been hard-hit by the impacts of bankruptcy, they are certainly not alone. Auto, steel, banking, newspaper, cable television, and trucking companies are among the more than 100 publicly-traded companies that seek Chapter 11 bankruptcy protection each year. Bankruptcies are not restricted to just one sector of our country, and neither should bankruptcy reform. That is why the Machinists Union believes there is an immediate need for bankruptcy reform that should apply to all private sector workers covered by collective bargaining agreements.

Bankruptcy law should be amended to ensure employers engage in good-faith bargaining when seeking contract modifications. Companies should no longer be able to use the bankruptcy code to eliminate decades of collective bargaining gains when there is no justifiable reason other than corporate greed. Additionally, recent court rulings should be overturned to allow airline workers the right to engage in self help if the bankruptcy court terminates their collective bargaining agreement. Good-faith bargaining can only be achieved when there is a level playing field, and today bankrupt

companies hold all the cards. The right to self-help ensures that the bargaining parties understand the consequences of failing to reach a negotiated agreement.

If employees are called upon to sacrifice in order to resurrect their bankrupt employer, bankruptcy law must require that everyone from the break room to the board room shares the pain. Executive bonuses, stock grants, and other compensation enhancements proposed during a bankruptcy must be strictly limited. Bonuses paid to executives after emerging from bankruptcy must be reviewed by the court and take into account the amount of pain inflicted upon employees during and following bankruptcy. Employees cannot be asked to sacrifice wages, pensions, healthcare and jobs in order to line the pockets of the same people who bankrupted the company in the first place.

The IAM believes companies should be required to pay into pension funds as benefits are earned. An employee accepts lower immediate wages based on an employers' promise of a pension. Employers should not be allowed to abuse bankruptcy laws to break the pension promises workers count on to live in retirement with dignity. Additionally, the PBGC should have the financial resources available to guarantee all of the vested benefits promised in a pension plan without reduction or maximums.

The pension troubles in the airline and steel industries were caused by employers taking advantage of loose pension funding requirements and using equity in pension plans to defer actual cash contribution on behalf of employees. When the stock market tanked, so did the pension plans. Pension defaults in the steel, airline and other industries

helped the PBGC move from a surplus of $7.7 billion at the end of fiscal year 2001 to a deficit of $33.5 billion today.

Currently, the PBGC has no power in bankruptcy to force companies to make required pension contributions. A company can simply refuse to pay and force the PBGC to initiate a pension termination to prevent a plan from accruing further pension liabilities. Congress must make bankruptcy a less attractive mechanism to dump pension obligations on the PBGC. The PBGC needs to have the ability to enforce pension funding rules on a level basis – whether or not a plan sponsor is in bankruptcy.

The Machinists Union supports comprehensive bankruptcy reform that will protect all our nation's workers and require shared sacrifice among all stakeholders. We are prepared to work with this committee on such legislation.

I look forward to your questions.

Mr. COHEN. Thank you, Mr. Roach. I appreciate your testimony.

As you see, we have 15 minutes to vote, and then we are going to have to conclude, I believe, because these are the last votes of the day.

The final witness is Steve Nagrotsky, deputy director of Teamsters Airline Division in D.C., representing 43,000 members. For 27 years, he has represented flight crew members in collective bargaining negotiations and contract enforcements.

Thank you, Mr. Nagrotsky. And will you proceed with your testimony?

TESTIMONY OF STEPHEN NAGROTSKY, DEPUTY DIRECTOR, AIRLINE DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. NAGROTSKY. Good afternoon, Chairman Cohen, Ranking Member Franks. I am Stephen Nagrotsky, deputy director of the Airline Division of the International Brotherhood of Teamsters, which is the largest transportation union in the country.

As a lawyer, I have represented cockpit crew members for the past 27 years in collective bargaining negotiations. On behalf of more than 1.4 million men and women Teamster members, and especially on behalf of more than 43,000 Airline Division members, I am honored to have this opportunity to share our views on the needed changes to the Bankruptcy Code regarding air carrier bankruptcy.

The United States airline industry has been in financial turmoil since the fall of 2000, when the decline in the technology industry caused a precipitous drop in business travel demand. September 11th worsened the industry's financial troubles due to significant losses resulting from the temporary shutdown of the Nation's airspace and passenger apprehension about flying following the attacks.

Congress sought to alleviate the airline industry financial crisis after September 11, when it passed the "Air Transportation Safety and System Stabilization Act," which provided $5 billion in direct emergency assistance and grants. Congress also authorized the Department of Transportation to reimburse air carriers for increases in their insurance premiums and provided billions of dollars of additional dollars for loan guarantees.

Following record-high fuel prices earlier this year and the crash of the Nation's financial markets, the airline industry is projected to lose between $5 billion and $6 billion this year. Despite passenger capacity reductions and recent cuts in fuel costs, the turbulent economic markets may continue to wreak havoc upon the industry. Indeed, although Congress has provided significant public assistance to the airline industry over the last several years, it may have to provide even more next year.

In its deliberations, Congress should consider and further examine the fact that, since the industry received generous taxpayer grants and loans, it has largely terminated the defined benefit pension plans covering its employees. A number of large carriers have relied upon United States Bankruptcy Code Section 1113 to reject collective bargaining agreements in order to slash their employees' wages and terminate their pension plans. While shedding their

funding obligations, these airlines shifted their liabilities to the Pension Benefit Guaranty Corporation and to United States taxpayers and caused huge reductions in the affected employees' retirement benefits.

Additionally, these carriers have increasingly outsourced critical, highly skilled airline maintenance jobs to foreign repair stations. According to the DOT Inspector General's September 30, 2008, report on the outsourcing of aircraft maintenance, airlines have more than doubled the amount of repairs and heavy maintenance work they outsourced, from 34 percent in 2003 to 71 percent in 2007. The increased foreign outsourcing has contributed significantly to the dramatic loss of jobs in the United States airline industry.

Several carriers have relied upon Bankruptcy Code Section 1113 in order to accomplish their foreign outsourcing objectives. For example, Frontier Airlines, a low-cost carrier based in Denver, Colorado, petitioned the United States Bankruptcy Court to reject its collective bargaining agreement covering its aircraft mechanics so that it may permanently outsource its Denver-based heavy-check maintenance operations to a company located in El Salvador.

Faced with the prospect of losing their jobs entirely or slashing their wages to below-market rates, the mechanics agreed to slash their wages. But Frontier still was not satisfied. Frontier used the Section 1113 process to exact even greater wage concessions from the mechanics and to obtain an order from the bankruptcy court authorizing it to permanently outsource the mechanics' work to El Salvador.

I hold to our characterization of what occurred in the bankruptcy court and will supplement our written statement with any additional material to establish that the bankruptcy judge, simply put, allowed outsourcing of U.S. Teamster mechanics' jobs.

Our objective is to participate constructively in a long-overdue dialogue to address and solve the financial and structural problems that plague the airline industry. Any such dialogue is significantly impaired because provisions of the Bankruptcy Code have been used by the carriers to slash, cut, and dump their employees' wages and benefits.

In order to prevent the further abuse of the Bankruptcy Code, we recommend that airline carriers covered by Title II of the Railway Labor Act be treated the same as their counterparts in the railroad industry. Rail carriers are covered by Title I of the RLA and are exempted from Bankruptcy Code Sections 1113 and 365. Accordingly, we recommend that air carriers likewise be exempted from the provisions of Section 1113 and 365. We have provided in our written testimony the amended language we suggest for Sections 1113 and 365.

Thank you for this opportunity to share the views of the IBT with this distinguished Subcommittee.

[The prepared statement of Mr. Nagrotsky follows:]

PREPARED STATEMENT OF STEPHEN NAGROTSKY

International Brotherhood of Teamsters

Testimony Before The

U.S. House of Representatives

Committee on the Judiciary

Subcommittee on Commercial and Administrative Law

"Protecting Employees in Airline Bankruptcies"

December 16, 2009

Submitted by
Stephen Nagrotsky, Deputy Director
Airline Division

International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624- 6800

PROBLEM DEFINED
AIR CARRIERS' ABUSE OF THE BANKRUPTCY CODE
TO TERMINATE EMPLOYEES' PENSIONS AND OUTSOURCE THEIR JOBS

The United States airline industry has been in a relatively constant – and very publicly visible -- state of financial turmoil since the fall of 2000, when the decline in the technology industry caused a precipitous decline in business travel demand. The September 11, 2001 terrorist attacks greatly exacerbated the industry's financial troubles, as airlines incurred significant losses resulting from the temporary shutdown of the nation's airspace and passengers' apprehension about flying following the attacks.

Congress sought to alleviate the airline industry financial crisis shortly after the September 11 attacks, when it passed the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001). Through that statute, Congress provided $5 billion in direct emergency assistance/grants to compensate air carriers for their losses stemming from the attacks. Congress also authorized the Department of Transportation to reimburse air carriers for increases in their insurance premiums and provided billions of additional dollars for loan guarantees.

Nevertheless, in the wake of record high fuel prices earlier this year and the Depression-era crash of the nation's financial markets, the airline industry appears still to be in economic distress, and is projected to lose $5.2 billion this year. Despite passenger capacity reductions and recent cuts in fuel costs, the turbulent economic markets may continue to wreak havoc upon the industry. Indeed, although Congress has provided significant public assistance to the airline industry over the last several years, it may have to provide even more next year.

In its deliberations, however, Congress should consider certain disturbing events and trends over the last several years that could further destabilize the industry if they continue unabated. Congress should, for example, consider and further examine the airline industry's use of years-old net operating losses to paper over its more recent years' profits, thereby avoiding in large part the payment of taxes.

Additionally, Congress should consider and further examine the fact that since it received generous taxpayer grants and stabilization loans, the industry has largely terminated the defined benefit pension plans covering its employees. In several highly publicized instances, large carriers such as United Airlines relied upon United States Bankruptcy Code Section 1113 to reject their collective bargaining agreements in order to slash their employees' wages and terminate their pension plans. While using the Bankruptcy Code to walk away from their pension plan funding obligations, these airlines shifted their liabilities to the Pension Benefit Guarantee Corporation and the United States taxpayers and caused huge reductions in the affected employees' retirement benefits.

Furthermore, many of the carriers that received United States Government grants ands stabilization loans in 2001 have, since that time, increasingly outsourced critical, highly skilled airline maintenance jobs to foreign repair stations. Indeed, according to the DOT Inspector General's September 30, 2008 report on the outsourcing of aircraft maintenance, airlines have more than doubled the amount of repairs and heavy maintenance work they outsource, from 34% in 2003 to 71% in 2007. The increased foreign outsourcing of these and other airline jobs has contributed significantly to the dramatic loss of jobs in the United States airline industry.

As has been the case with respect to the termination of their defined benefit pension plans, several carriers have relied upon Bankruptcy Code Section 1113 in order to accomplish their foreign outsourcing objectives. Frontier Airlines, a low-cost carrier based in Denver, Colorado is a recent example. Despite its already competitive labor costs, Frontier petitioned a United States Bankruptcy court in New York City to reject its collective bargaining agreement covering its aircraft mechanics so that it may permanently outsource its Denver-based heavy-check maintenance operations to a company located in El Salvador. Faced with the prospect of losing their jobs entirely or slashing their wages to below-market rates, the mechanics agreed to slash their wages. But Frontier still was not satisfied. Frontier used the Section 1113 process to exact even

greater wage concessions from the mechanics and to obtain an order from the Bankruptcy Court authorizing it to permanently outsource the mechanics' work to El Salvador.

OBJECTIVE

Our objective is to participate constructively in a long-overdue dialog seeking comprehensive solution to the financial and structural problems that plague the airline industry. Any such dialog is significantly impaired under the existing provisions Bankruptcy Code, however, because the Code has been used by the carriers to slash, cut and dump their employees' wages and benefits. In order to prevent the further abuse of the Bankruptcy Code, we recommend that airline carriers covered by title II of the Railway Labor Act (RLA) be treated the same as their counterparts in the railroad industry. Rail carriers are covered by title I of the RLA and are exempted from Bankruptcy Code Sections 1113 and 365. Accordingly, we recommend that air carriers likewise be exempted from the provisions of Sections 1113 and 365. Both of these statutory provisions have been used by carriers to reject collective bargaining agreements in order to outsource skilled and highly critical jobs overseas and to terminate their employees' defined benefit pensions. The continued abuse of these statutory provisions serves only to further destabilize the industry. Accordingly, we recommend the following amendments to the Bankruptcy Code:

RECOMMENDED AMENDMENTS

11 U.S.C. § 1113(a) is amended as follows:

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section. Notwithstanding any provision in this section or any other section of U.S. Code Title 11, a debtor in possession or trustee of a debtor covered by title II of the Railway Labor Act

may not assume or reject a collective agreement covered by such Act, and the wages or working conditions of employees covered by such collective agreement may only be changed or modified in accordance with section 6 of such Act.

11 U.S.C. § 365(a) is amended as follows:

Except as provided in sections 765and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. Notwithstanding any provision in this section, with respect to a debtor covered by title I or title II of the Railway Labor Act, neither the court nor the trustee may change the wages, or working conditions of employees of the debtor established by a collective agreement that is subject to such Act except in accordance with section 6 of such Act.

Mr. COHEN. Thank, Mr. Nagrotsky.

We are going to limit our questions to 3 minutes; we can also do written ones, because we do have to vote.

Let me ask you a panel question real quick. Anybody know the reason or a good social reason why the railroad workers should be treated differently than the airline workers?

Mr. Huebner?

Mr. HUEBNER. Mr. Chairman, I think the answer is that the subchapter 4 of Chapter 11, which is where 1167 is, provides for an integrated set of rules that govern a highly regulated industry that was never deregulated.

And so, because railroads are governed by all sorts of things as they enter Chapter 11, like the mandatory appointment of a trustee selected by the Department of Justice and numerous other technical rules which all went by the wayside in 1978 when 1113 was enacted in 1984-1985 in response to Bildisco, only railroads were kept to the side, which, by the way, was intentional. 1113, as you may remember, was actually asked for by organized labor.

And so the answer is, railroads are totally different because they have been heavily regulated forever. And, therefore, on the rare occasion when railroads go into bankruptcy, they are governed by a completely——

Mr. COHEN. Let me ask you this. Mr. Crandall of American Airlines, past, said that maybe airlines need to be reregulated. What would you be in favor of reregulation and then change the labor laws concurrently so they would be equitable?

Mr. HUEBNER. Chairman Cohen, whether or not airlines should be reregulated is a question that I don't think I could responsibly answer. I think it is beyond my skill set.

But what I do know is that cherry-picking——

Mr. COHEN. I am going to take as a given that it is your skill set. That is a given. So what do you think it should be, they should be reregulated or not?

Mr. HUEBNER. If 1167 is going to apply, then lots of other things that I imagine no union member in the country would like to apply to airlines would also have to fairly apply.

Mr. COHEN. Anybody else have an idea about why this came about or why the distinction should continue? Does anybody disagree with what Mr. Huebner said?

Mr. Nagrotsky, you ought to disagree.

Mr. NAGROTSKY. I certainly would disagree, Chairman Cohen.

First of all, I think that, as an industry, apart from price setting, the airline industry is incredibly heavily regulated, with respect to safety, with respect to training, with respect to all kinds of issues. So I disagree with the characterization that, because airlines are not as regulated as railroads, that there is a distinction there.

Mr. COHEN. So you think the fact that neither one can strike, they are both under the Railway Labor Act, they are both essential to the economic vitality of our country, that they should be treated equally as far as the bankruptcy goes, too?

Mr. NAGROTSKY. Yes. I mean, they provide modes of transportation as well as shipping the goods of this country from place to place. I mean, they serve equivalent functions in terms of the criti-

cality to the economy. And, therefore, they should be treated identically.

Mr. COHEN. Captain Sullenberger, you have experienced a bankruptcy in the past?

Mr. SULLENBERGER. Two bankruptcies at US Airways.

Mr. COHEN. Tell us what losses you incurred as a result of those bankruptcies and how that affected the morale of the pilots.

Mr. SULLENBERGER. It has greatly affected the morale of the pilots.

US Airways has 33,000-plus dedicated employees who, in spite of our experiences, keep our passengers safe every day. It requires a great deal of concentration and dedication to compartmentalize and keep focused on what is at hand with all the distressing distractions that we have lived under for many years.

I personally have lost 40 percent of my pay. My first officer, in January, Jeffrey Skiles, because he had been a captain before, in addition to the pay cuts, had to go from the left seat to the right seat with a staff reduction, has lost 60 percent of his pay. Our pensions were terminated. We are working longer days, more days per month.

As Captain Coffman alluded to, the bankruptcy processes allowed airline managements to essentially go on a fishing expedition and to gut contracts in every area, even things that had little or no economic importance. It was a life-changing event for everyone in the industry and all their families. And that is true not just for the pilots but for every airline employee.

Mr. COHEN. Thank you, Captain.

I want to thank the other witnesses.

I am going to yield to Mr. Franks, because we do have to do—Mr. Franks, questions?

Mr. FRANKS. Thank you, Mr. Chairman.

And thank, again, all of you for coming. I hope you have a wonderful Christmas season.

And let me just quickly—I was, kind of, fascinated by the one instance where some of the jobs were ostensibly outsourced to El Salvador. I would be interested if both Mr. Nagrotsky and Mr. Huebner might be willing to respond to the Committee later in writing as to give us the real picture on that, because I don't know what it is.

In the meantime, let me just ask this one question. Mr. Huebner, I will ask it to you.

Other witnesses have suggested that Congress should extend Section 1167 to cover airline unions in bankruptcy. Would such a change to the Bankruptcy Code, in your opinion, make it more likely or less likely that airlines could successfully reorganize?

Mr. HUEBNER. Sure. Thank you for the question.

You know, as you heard in my testimony and as you will see in greater length in my written statement, I think that very real pro-employee changes to 1113 are needed. But importing 1167 would not change the playing field; it would obliterate the playing field.

Just so that Congress understands, that would mean that debtors have no rights and no tools. It is as if they are not in bankruptcy at all. The only thing they could do is ask the unions, won't you please agree to change your contract? And if under the RLA

the contract had 3 years left to run, even though you are in bankruptcy and dying, if the union didn't want to voluntarily give you changes, you couldn't get any.

To be clear, the RLA is an incredibly time-consuming process. I think Captain Coffman is at American Airlines. I imagine he will validate that they have been going for 3 years now waiting under the RLA process to try to reach agreement on a contract, and they still can't.

I represent lenders not infrequently, although I obviously represented Delta and Frontier. I can tell you, having represented the lenders in many of the largest bankruptcy loans ever done, airlines will not get financing in Chapter 11 and they will die if they have an uncertain period months or years before they are allowed to change the status quo and address their labor laws.

There is a reason so many airlines go into bankruptcy, and it is not because it is fun and it is easy; it is because many of them fail, 90 percent out of 185. Railroads are radically different, because there is one set of track and someone has to run on that track. The skies are not like that. And, as I said before, it is not just the timing, it is that the special railroad provisions are incredibly complex. You can't pluck one of them out that you like and say, "We will take just that one" and ignore the system.

But, again, given the time, I think that may be enough elaboration on the question.

Mr. FRANKS. Thank you, Mr. Chairman. And I am going to yield back.

Thank you all.

Mr. COHEN. Thank you, Mr. Franks.

I would like to thank all the witnesses for their testimony today.

Without objection, the Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses.

And there will be some questions we will be submitting to you, because we have to get up there to vote. We would ask you to respond as promptly as possible. They will be part of the record.

The record will remain open for 5 legislative days for the submission of any other additional material Mr. Roach or whoever would like to submit.

I thank everyone for their time and patience.

This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 3:28 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Statement of Judiciary Committee Ranking Member Lamar Smith
Subcommittee on Commercial and Administrative Law
Hearing on Protecting Employees in Airline Bankruptcies
Wednesday, December 16, 2009
(Final)

Let me also recognize Captain Sullenberger for the heroism he demonstrated earlier this year. His successful, emergency landing of U.S. Airways Flight 1549 saved the lives of all of those on board.

Captain Sullenberger showed up for work, did his job to the best of his abilities, and pulled off an incredible feat.

The topic of today's hearing is protecting employees in airline bankruptcies. Undoubtedly, airline employees have had to take cuts to wages and benefits in recent years as their employers have attempted to successfully reorganize. As tough as these cuts may have been, even tougher would have been the liquidation of the airline itself.

The list of defunct U.S. airlines is far longer than that of those that have successfully reorganized in bankruptcy. For every Delta Air Lines that has been able to reorganize, there is an Eastern Air Lines that has not.

Some on the other side of the aisle and at the witness table would like to strengthen the hand of organized labor in chapter 11 reorganizations. They would like to make it harder to reject collective bargaining agreements and would place further limits on executive compensation.

Chapter 11 strikes the proper balance between many competing interests, including those of labor and the failing firm.

Further changes sought in this area will only make it more difficult for airlines to reorganize their cost structure, to find lenders willing to give them the money needed to reorganize, and to retain the top talent necessary for successful reorganization.

No doubt that any time an airline rejects a collective bargaining agreement—cutting wages and benefits—airline employees and their families face hardships

But reorganization requires giving airlines and other corporate debtors the tools they need to survive, such as the ability to cut wages to market levels. Or the authority to give top level talent the compensation required to get them to come aboard a failing company and get it up and running again.

Just as planes need highly skilled pilots, like Captain Sullenberger, at the helm when trouble strikes, so too do corporations when faced with insolvency.

Let's not throw off the carefully crafted balance that chapter 11 contains and make it more difficult for airlines and other companies to successfully reorganize.

I look forward to the witnesses' testimony and yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Thank you, Mr. Chairman, for holding this important hearing on protecting employees in airline bankruptcies.

Today we will explore whether the Bankruptcy Code should be amended to make it easier to preserve collective bargaining agreements.

Because of the record high fuel prices and the recession, the airline industry has suffered from economic distress. This is especially true when it comes to airline employees.

It has been alleged that airline carriers have relied upon Section 1113, and other provisions, of the Bankruptcy Code to reject their collective bargaining agreements in order to slash their employees' wages, terminate their pension plans, and even outsource their jobs.

If it is true that airlines are abusing Section 1113, and other provisions, of the Bankruptcy Code, then Congress should act and seriously consider amending the Bankruptcy Code so that airline carriers, like rail carriers, are exempted from Section 1113 and other similar provisions.

Millions of Americans traveled on airplanes last year. I, like many of my colleagues, travel by plane to commute between my district and the Capitol. Our airline employees work hard to safely get us to and from our destinations everyday. We should make sure that they are treated fairly by ensuring that airline employers engage in good-faith bargaining when seeking contract modifications.

I thank the Chairman for holding this hearing today.

SUPPLEMENTAL PREPARED STATEMENT SUBMITTED BY MARSHALL S. HUEBNER, PARTNER, DAVIS POLK & WARDWELL, LLP

SUPPLEMENTAL STATEMENT OF

MARSHALL S. HUEBNER, PARTNER, DAVIS POLK & WARDWELL LLP

BEFORE

THE COMMERCIAL AND ADMINISTRATIVE LAW

SUBCOMMITTEE

OF

THE COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

DECEMBER 16, 2009

PROTECTING EMPLOYEES IN AIRLINE BANKRUPTCIES

"Frontier used the Section 1113 process to . . . obtain an order from the Bankruptcy Court authorizing it to permanently outsource the mechanics' work to El Salvador."

– Stephen Nagrotsky, Deputy Director, Airline Division, International Brotherhood of Teamsters

Fact	**Source**
Frontier's initial proposal contemplated outsourcing only because its fleet had been substantially reduced.	Nov. 14, 2008 Order, Ex. B [Bankruptcy Court Decision], at pp. 16-19.
Frontier's concern was that if it merely furloughed heavy maintenance mechanics during periods when there was no work for them, Frontier would not be able to keep its aircraft flying because the mechanics would not return when needed.	Nov. 14, 2008 Order, Ex. B [Bankruptcy Court Decision], at pp. 24.
The Bankruptcy Court did not approve Frontier's initial proposal.	Nov. 14, 2008 Order, Ex. B [Bankruptcy Court Decision], at p. 24.
At the Bankruptcy Court's insistence, Frontier and the IBT met seventeen times between the date of the initial proposal and the Bankruptcy Court's order authorizing Frontier to reject the contract.	Nov. 14, 2008 Order, Ex. B [Bankruptcy Court Decision], at p. 22.
The Bankruptcy Court's decision was predicated on saving union jobs. Frontier's final proposal allowed outsourcing only as a true last resort after Frontier 1) hired additional heavy maintenance mechanics, 2) supplemented staffing with a standby list of additional non-IBT heavy maintenance mechanics, 3) further supplemented staffing with heavy maintenance mechanics from local independent contract companies, and only then 4) heavy maintenance was still delayed and planes were stuck in the hangar because there were not enough IBT employees available to work on them.	Nov. 14, 2008 Order, Ex. A [Final Proposal], at pp. 1-14; Nov. 14, 2008 Order, Ex. B [Bankruptcy Court Decision], at p. 26-27.
During the appeals process, Frontier and the IBT agreed on a new contract that was approved by the Bankruptcy Court. The agreed contract does *not* allow for outsourcing under any circumstances.	Aug. 6, 2009 Letter of Agreement 09-01, as approved by so-ordered stipulation Aug. 26, 2009.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
	Chapter 11 Case No.
FRONTIER AIRLINES HOLDINGS, INC., et al.,	**08-11298 (RDD)**
	(Jointly Administered)
Debtors.	

ORDER GRANTING FRONTIER AIRLINES, INC.'S MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENTS WITH TEAMSTERS AIRLINE DIVISION PURSUANT TO 11 U.S.C. § 1113

Upon the motion (the "**Motion**")[1] of Frontier Airlines, Inc. ("**Frontier**," the "**Company**," or "**Debtor**"), pursuant to section 1113(c) of the Bankruptcy Code, seeking authority to reject the collective bargaining agreements ("**CBAs**") between Frontier and the Teamsters Airline Division of the International Brotherhood of Teamsters ("**IBT**") relating to Frontier's (1) aircraft technicians, ground service equipment technicians and tool room attendants and (2) material specialists; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 1334 and the Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.); and consideration of the Motion and the requested relief being a core proceeding the Bankruptcy Court can determine pursuant to 28 U.S.C. § 157(b); and venue being proper

[1] Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in the Motion.

before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided in accordance with the Case Management Order, and it appearing that no other or further notice need be provided; and the Court having reviewed the Motion, the Objection filed by the IBT and all other filings and submissions related to the Motion; and the Court having held an evidentiary hearing related to the Motion, at which testimony was taken; and upon all of the filings, submissions, exhibits and proceedings made to and had before the Court; and after due deliberation and sufficient cause appearing therefor for the reasons stated by the Court in its ruling, attached as Exhibit B hereto, which amends and supercedes the Court's bench ruling delivered at the conclusion of the hearing on October 31, 2008, it is hereby

ORDERED that the relief requested in the Motion, as modified by Frontier's Sixth Revised Proposal to the IBT, as the same was modified on the record on October 31, 2008, which record is incorporated by reference into this Order (such proposal, as modified on the record, being attached hereto as Exhibit A and referred to herein as the "**Final Proposal**"), is hereby granted; and it is further

ORDERED that, pursuant to section 1113(c) of the Bankruptcy Code, Frontier is hereby authorized to reject the CBAs, which are hereby rejected effective October 31, 2008, and Frontier is authorized to implement, and perform under, the terms of the Final Proposal, effective November 1, 2008, and to take any and all actions that may be reasonably necessary or appropriate to effectuate the same and perform all obligations contemplated under the Final Proposal; and it is further

ORDERED that nothing in this Order shall constitute, or be deemed to constitute, an assumption under section 365 or any other section of the Bankruptcy Code of, or a

post-petition re-affirmation of, the CBAs or any other agreement. Nothing in this Order shall alter the order or priority of any claim under the Bankruptcy Code or shall convert any pre-petition or unsecured claim into a priority claim, secured claim, post-petition claim or administrative expense claim; and it is further

ORDERED that, except as set forth in the Final Proposal, this Court shall retain jurisdiction over all matters arising from or related to this Order; and it is further

ORDERED that the effect of this Order shall survive the conversion, dismissal and/or closing of these chapter 11 cases, appointment of a trustee herein, confirmation of a plan of reorganization and/or the substantive consolidation of these chapter 11 cases with any other case or cases; and it is further

ORDERED that this Order shall be binding on any subsequent chapter 11 or chapter 7 trustee that may be appointed or elected in this chapter 11 case or any succeeding chapter 7 case.

Dated: New York, New York
November 14, 2008

/s/ Robert D. Drain
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

FRONTIER AIRLINES, INC. SIXTH REVISED PROPOSAL TO LOCAL 961 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT) AS MODIFIED ON THE RECORD IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ON OCTOBER 31, 2008

Agreements Subject to Proposal

The Company proposes to amend certain terms of the Agreement between Frontier Airlines and Teamsters Airline Division for Aircraft Technicians, Ground Service Equipment Technicians and Tool Room Attendants dated July 27, 2005 to July 26, 2008 (as extended by the Interim Agreement) (the "**Maintenance Agreement**"); and the Agreement between Frontier Airlines, Inc. and Teamsters Airline Division for Material Specialists dated September 27, 2007 to September 26, 2011 (the "**Material Specialists Agreement**").

The Agreement between Frontier Airlines and Teamsters Airline Division for Aircraft Appearance Agents (the "**Appearance Agents**") and Maintenance Cleaners (the "**Maintenance Cleaners**"), dated September 16, 2005 to September 16, 2015 (the "**Appearance Agent Agreement**") will be addressed through a separate document.

I. Maintenance Agreement and Material Specialists Agreement

The Company proposes the following modifications to both the Maintenance Agreement and the Material Specialists Agreement.

A. C-Check Leave Program

The parties acknowledge that the circumstances associated with staffing C-Check/heavy maintenance events are unique. These events include all routine and non-routine C-Check intervals, all structural inspections and all 'bill of work' items associated with any heavy maintenance event. Therefore, the parties agree to the following modification of the Collective Bargaining Agreement to provide the Company with the necessary flexibility and relief from the existing provisions of the Agreement and in order to allow the Company to place on leave and to recall from leave C-Check and other affected employees in recognition of the unique issues associated with staffing C-Check.

1. **Gap Periods**. C-Check "gap periods" are defined as any period of time, regardless of length, during which an aircraft is not available in Denver as projected by the most currently available AMES-generated schedule and/or where heavy maintenance related work is not required on an aircraft.

2. **System Re-Bid**. The parties agree to conduct an initial system re-bid to be completed no later than December 1, 2008 (the parties agree to follow

the semi-annual re-bid process set forth in Article 10, §11 unless the parties agree in writing to conduct a more frequent system re-bid).

a. In the system re-bid, all system positions will be subject to bidding by seniority in accordance with the Collective Bargaining Agreement and General Maintenance Manual ("GMM").

b. The Company shall establish prior to the system re-bid the number of positions in shops not subject to C-Check gap period by November 24, 2008. When referred to herein, "shops" shall be defined as Battery/Component, Sheet Metal, Composite, Paint, Machine, Welding and Upholstery.

c. After any system re-bid, a mechanic remaining in the C-Check bid area may not bump to Line Maintenance or shops during any gap period. However, if Line Maintenance or shops staffing falls below budgeted headcount and open vacancies are created in Line Maintenance or shops, any qualified mechanic may bid the position at that time.

d. Except for the initial re-bid and each semi-annual bid thereafter, no mechanic is eligible to bump another mechanic in the shops listed above or any other shop area as a result of the occurrence of a gap period in C-Check.

e. The Company agrees to provide by electronic mail/e-mail to each maintenance employee's Frontier e-mail address a notice of the first and last day of gap periods covered by the C-Check Leave Program no earlier than forty-eight (48) hours prior to the particular gap period.

f. During the initial re-bid, and any bid thereafter, no mechanic is eligible to bump into the machine shop, welding shop, composite shop or the upholstery lead position without the Company's review and approval of the mechanics qualifications to ensure that the qualifications meet the standards set forth in the GMM (as the GMM is revised from time to time).

3. **C-Check Schedule**. The C-Check schedule, including all gap periods, shall be as established by the AMES Software generated by the Company. Employees who experience a loss of maintenance work, as a result of the occurrence of a gap period, will be eligible to participate in the C-Check Leave Program as well as be eligible for benefits as set forth in paragraph 5.

a. Beginning January 2009, the Company agrees to provide the Union, no later than the 15th day of the preceding month, a list of employees who will not have work in C-Check for any gap period(s) during the following month and the dates on which the employees must return to work in C-Check after the conclusion of a gap period(s). The Company will provide the list of employees for the December 2008 gap period as soon as practicable following the System Re-Bid under subsection 2 above.

b. The Company further agrees to post this notice next to the main time clock, and will also make copies available to employees in break areas. This notice will include the date or dates on which the gap period(s) begin and end.

c. The parties agree that these beginning and ending dates may be modified as the result of any updates to the AMES schedule or due to unforeseen circumstances.

d. The Company will provide the Union with notice of any changes in the AMES schedule within 48 hours of the Company having any reasonable knowledge of any changes.

4. **Notice of Intent to Return**. All employees affected by any gap period and who are on C-Check leave, shall notify the Company via voicemail to a dedicated call-in line of their intent to return to work in C-Check. This call-in process must be completed no later than five days and no more than eight days prior to the end of a gap period. Failure of any employee to call-in shall result in the termination of the employee's employment with the Company. Further, any failure to return to work at the end of any gap period shall result in the immediate termination of employment.

a. The Company shall retain recordings of voicemail messages left by returning mechanics for at least 45 calendar days from the last day of the end of a gap period.

b. Prior to the fifth day before the end of a gap period, the Company agrees to meet with the Union to verify the mechanics who have contacted the Company to state their intent to return from leave. A C-Check supervisor together with a union representative shall attempt to call at least two times any employee on leave from whom the Company has not received a voicemail message to determine his intent to return from leave.

c. If an employee states his intent to return but is unable to return at the end of a gap period due to unforeseen circumstances (e.g., sick leave, FMLA leave, missed flight), the employee shall notify the

Company of his/her absence. If an employee fails to immediately notify the Company of such absence, the employee shall be subject to disciplinary procedures as set forth in the Agreement.

d. During a C-Check event which shall be defined as "all non-routine C-Check intervals, all structural inspections and all 'bill of work' items associated with any heavy maintenance event", Line Mechanics who are on a day off may volunteer to work shifts on C-Check at straight time, unless the Company has not exceeded 4% overtime, in which case the Company must first offer the work as overtime to C-Check employees.

5. **C-Check Leave Benefits**. Mechanics placed on the C-Check Leave Program are not subject to the furlough and recall provisions of Article 9 or any related provisions of the Agreement. Mechanics who elect to participate in the C-Check Leave Program will be placed on a Leave of Absence with the following benefits:

a. Employees currently enrolled in the Company Medical Plan will retain their current medical benefits. Employees must continue to pay the employee contribution of the medical plan while on leave. Failure to do so could lead to discontinuation of their medical benefits. Medical Plan is defined as medical, dental, vision, life and health care flexible spending account coverage.

b. Employees will continue to accrue seniority while on the C-Check Leave Program.

c. Employees will retain accrued vacation and sick leave while on the C-Check Leave Program.

d. Employees will not accrue vacation or sick leave while on the C-Check Leave Program.

e. Employees have the option to use accrued vacation and perfect attendance day awards for pay purposes while on the C-Check Leave Program; however, employees may not use accrued sick leave even if the employee began sick leave before the beginning of any gap period.

f. Employees will continue to retain space available pass privileges on the Company route system in accordance with the Company Pass policy.

g. Employees will not have jump seat privileges while on the C-Check Leave Program.

h. Employees on the C-Check Leave Program shall be considered job-attached.

i. Employees returning to the Maintenance Department from the C-Check Leave Program shall receive an additional buddy pass for every 30 days on the C-Check Leave Program (30 days accumulative).

j. The parties shall treat hangar/C-Check as a hybrid bid area so as to enable the Company, in its discretion, to utilize C-Check employees to perform available work in line maintenance during any gap period.

k. The parties further agree not to schedule overtime shifts in advance of a gap period in Denver if any maintenance employees are on C-Check leave.

l. The Company may, in its discretion, in-source special projects which can be performed in Denver during gap periods provided that facilities, tooling/equipment are available. For the avoidance of doubt, the Company shall not be required to in-source any such projects.

B. Supplementation of C-Check Staffing

The parties agree to establish additional protocols in an effort to address the possibility that, despite the initiatives listed above and the IBT's representations during the 1113 proceedings, employees placed on the C-Check Leave Program may not return to work at the conclusion of gap periods. The purpose of these protocols, which involve supplementation of C-Check staffing by hiring outside workers, is to provide the Company with a timely and cost-effective ability to continue to perform C-Check in-house using IBT-represented employees – which the Company is willing to do as long as the necessary number of C-Check employees remain employed by Frontier. If, despite the initiatives listed above and notwithstanding the implementation of these supplementation protocols, should a number of IBT-represented mechanics leave the Company, there will be relatively few IBT-represented jobs to preserve, and the Company will have the right, under the circumstances set forth below, to permanently outsource C-Check.

The protocols to supplement C-Check staffing involve the use of "Casual Workers" and "Contract Maintenance Workers" as defined herein. The Company agrees to establish a pool of Casual Workers and to first draw from this pool to supplement C-Check staffing if sufficient IBT-represented employees do not return to work after a gap period ends. The Company will also establish a relationship with a company that provides Contract Maintenance Workers, and agrees, subject to the limitations set forth below, to draw on these workers in the event that a sufficient number of Casual Workers are not available to fill a shortfall.

1. **Casual Worker Pool**. The parties agree to establish a pool of Casual Workers to supplement the C-Check staffing levels in Section C of this Agreement. The Company will work with the Union to fill and maintain a pool of 15 Casual Workers. The Company will determine, in its discretion and subject to the qualifications set forth herein, which Casual Workers to include in the pool. Casual Workers, as defined below, will be placed on an "on call" list, pre-trained, qualified and cleared to work when C-Check work is available due to a shortage of Company employees.

   a. Casual Worker is an individual who is "at-will" and is not on the Company seniority list, and who is not serving a probationary period.

   b. Casual Workers will be paid only for the period of available work.

   c. Casual Workers are not covered by or subject to the Collective Bargaining Agreement, except as established herein.

   d. Casual Worker will only perform C-Check-related work; i.e., the Company may not use Casual Workers for Line Maintenance-related work (either line or shops.) Vacancies in Line Maintenance or other positions not subject to C-Check leave (including out stations) due to the C-Check schedule will be filled in accordance with Article 13 and 9.

   e. The Company will establish casual work schedules as soon as practicable in advance of a C-Check event. The Company and Union will meet as needed to adjust any changes in the schedules.

   f. All Casual Workers must possess his/her own hand tools of sufficient quantity and type to permit them to perform work on an Airbus aircraft. Special tooling to perform Airbus maintenance will be provided by the Company. The Company agrees to provide required policies and procedures to all Casual Workers.

   g. The Company assumes the responsibility for performing all appropriate background checks including FAA/DOT mandated drug and alcohol screening.

   h. Casual Workers are not eligible to participate in the Company health insurance program or otherwise participate in any other benefits offered by the Company to regular full time or part time employees.

   i. The Company agrees to compensate Casual Workers at the starting wage rate established by the parties for mechanics as set forth in this

Agreement. Further, Casual Workers are not eligible for any step increases called for in this Agreement.

Qualifications. To be eligible for the Casual Worker pool, an individual must meet the following minimum qualifications:

a. Possess a current Airframe and Power plant (A&P) mechanics license.

b. Successful completion of the Airbus Systems Training and documentation evidencing such completion. The Casual Worker is responsible for obtaining and paying for this training.

Consideration for Employment. For any permanent openings/vacancies created by attrition of C-Check employees following recall of employees from leave (e.g., attrition among C-Check), the Company shall, consistent with its current hiring standards for IBT-employees, offer these available position(s) to Casual Workers. Any Casual Workers hired by the Company in permanent positions shall be subject to all terms of the Collective Bargaining Agreement as new-hire employees and their seniority date as a regular employee will be established as of that date of hire.

a. Casual Workers hired by the Company in permanent positions shall be subject to all terms of the Collective Bargaining Agreement as new-hire employees and their seniority date as a regular employee will be established as of that date of hire.

Maintaining the Pool. Because it is expected that Casual Workers, when on-call and not working for the Company, are likely to seek employment elsewhere, the Company will ***attempt*** to periodically replenish the pool by taking the following steps:

a. During the first week of each calendar quarter, the Company will attempt to contact (via phone) the 15 workers currently in the pool for the purpose of ascertaining whether the Casual Workers wish to remain in the pool.

b. If any of the Casual Workers no longer wishes to remain in the pool, or if the Company is unable to contact any of them, the Company will:

(1) post notice of the vacancy on the Company's intranet site;

(2) post an advertisement on www.careerbuilder.com, where the Company posts other available job positions and;

(3) send an email message to all Company IBT-represented employees and Casual Workers informing them that vacancies exist in the Casual Worker pool and asking them to recommend additional qualified casual workers.

c. Other than these steps, the Company shall have no obligation to replenish or maintain the pool of Casual Workers, even if these steps do not result in the replenishment of the pool to any specific level.

Exhausting the Pool. If all 15 Casual Workers are utilized and/or unavailable for any reason, and there is still a need for additional labor to fill a shortfall of IBT mechanics who have not returned to work after a gap period, the Company will have no further obligations with respect to finding additional Casual Workers, and the Company will attempt to fill the remaining shortfall with Contract Maintenance Workers, as detailed below.

2. **Contract Maintenance Workers.** If all 15 Casual Workers are utilized and/or unavailable for any reason, and there is still a need for additional workers after a gap period ends, the Company will attempt to fill a shortfall in C-Check maintenance with Contract Maintenance Workers. A Contract Maintenance Worker is a qualified individual obtained by the Company from a third- party firm to provide maintenance services in C-Check on a temporary basis.

a. Contract Maintenance Workers shall have no rights under the parties' Collective Bargaining Agreement and will not be an employee of the Company.

b. Contract Maintenance Workers shall be required to possess the same minimum qualifications as Casual Workers, as set forth above.

c. Contract Maintenance Workers will work only in the Company's C-Check operation.

d. Contract Maintenance Workers shall be scheduled to work in shifts that conform to Article 10, Hours of Service.

e. Contract Maintenance Workers are not eligible to work planned/scheduled overtime unless all the overtime has first been offered to the Company's maintenance employees (including Casual Workers.)

f. Contract Maintenance Workers will wear either uniform or insignia that designate them as contract workers.

g. Openings in maintenance by attrition will be filled first in accordance with Article 13 and 9.

h. The Company has received quotes for all-in hourly rates from STS Aviation of $31.25 ($34.40 for structures qualified); Smart Aviation of $35.00; and Plane Techs of $35.00. All of these quotes include travel costs, per diem and any other expenses. Accordingly, the Company shall be required to use Contract Maintenance Workers only if qualified workers can be found for an all-in rate of $40 per hour (including travel costs, per diem and any other expenses) or less. If the Company is unable to find a third-party firm that will supply Contract Maintenance Workers for $40 per hour or less, the obligation to use Contract Maintenance Workers shall end.

3. **Limit of Casual and Contract Maintenance Workers.** The parties recognize that the Company has substantial and legitimate concerns with respect to the number of outside workers it is required to retain to fill shortfalls among IBT mechanics. In theory, the number of available Contract Maintenance Workers is unlimited; all IBT mechanics could leave Frontier and be replaced with Contract Maintenance Workers. At the same time, inasmuch as the IBT has indicated that the vast majority of its existing members will return after gap periods and the purpose of this Agreement is to preserve mechanics' jobs, that purpose is no longer served if IBT mechanics have resigned and the Company is artificially filling the shortfall with outside workers. Accordingly, the parties specifically agree that if at any time during the term of this Agreement the combined use of Casual and/or Contract Maintenance Workers is equal to or greater than 25 individuals (exclusive of those used to reach the staffing level of 129), the Company may permanently subcontract heavy maintenance events going forward as set forth in Section D, below.

C. Contingency Planning

The parties recognize that the Company must plan for the possibility that the above three measures – (1) providing a C-Check Leave Program to allow Frontier employees to return to work in C-Check at the end of any gap period; (2) establishing a pool of Casual Workers to supplement staffing in the event sufficient numbers of IBT mechanics fail to return; and (3) providing for the use of Contract Maintenance Workers to further supplement staffing shortages – may not resolve the C-Check issue if large numbers of IBT mechanics nonetheless fail to return to work. Accordingly, the parties have established a "points system" to objectively determine whether the agreed-upon measures are working effectively, and to determine the tipping point after which the Company can fairly be said to have exhausted cost-effective attempts to preserve IBT mechanic jobs and at which time it is within the Company's discretion to outsource events C-Check (heavy maintenance events as defined in Section D.4 herein)(as set forth in Section D, below).

1. Timing of C-Check Completion

The parties recognize the Company's need to establish a C-Check schedule that maintains a set number of days in which a specified C-Check event must be completed. The parties agree subject to the exceptions detailed below, the specified number of days in which a C-Check must be completed are as follows:

C-1: 5
C-2: 6
C-3: 7
C4-S/1: 22
C-5: 5
C-6: 6
C-7: 7
C8/S2: 22

Should the C-Check not be completed in the specified time, absent any extensions, the parties agree that such events shall accrue points as follows:

C-Check Completion Time Period:

0 to .5 day over schedule – 0 points

.51 day to 1 day – 1 point

More than 1 day – 2 points

The parties agree that the set number of days in which C-Checks must be completed may be extended for any of the following reasons:

- Non-availability or a shortage of parts, including as a result of the robbing of parts from an aircraft in C-check.
- Unforeseen/additional non-routine work, including engineering orders and engineering authorizations
- Weather/Acts of God
- An operational decision by the Company that delays completion of the C-check event
- Accidental damage to aircraft

The parties agree to discuss and attempt to resolve any delay in the above schedule. However, the decision as to whether the C-Check event may be extended and for what length of time, or whether a delay is excused, is within the Company's discretion, subject to the dispute resolution procedure that is available to the IBT, as set forth in subsection 5 below.

2. C-Check Staffing Levels

Since the Company filed for Chapter 11 reorganization on April 10, 2008, there has been steady attrition among maintenance workers. The attrition rate has resulted in a current C-Check workforce as of October 28, 2008 of 115 maintenance workers (see chart below), and the Company has not hired additional employees to replace those who have left given the pendency of this 1113 proceeding.

Department	Budgeted	Actual	Difference
Mechanics	81	74	7
Quality Control	7	5	2
Production Control	3	3	0
Tool Room Attendants	7	7	0
Cleaners	6	5	1
Material Specialists	2	2	0
Shops	23	19	4
Total	**129**	**115**	

While the Company agrees to supplement C-Check staffing through the use of the Casual Worker and Contract Maintenance Worker pools in Section B above, the parties further agree that there is a minimum staffing level of Company employees required to timely, efficiently and safely complete all C-Checks events. In addition, inasmuch as the purpose of this Agreement is to preserve IBT mechanics' jobs, it is appropriate to establish a tipping point after which the number of IBT mechanic resignations gives rise to the Company's ability to permanently outsource. Therefore, the parties agree to establish staffing minimums of Company maintenance employees, exclusive of Casual Workers or Contract Maintenance Workers for C-Check personnel, and, if those staffing minimums are not met, points will be assessed according to the schedule below. Since there are currently 115 IBT-represented C-Check employees at the

Company, 115 employees will be used as the baseline for calculating the assessment of points. Even though the Company intends to retain 14 additional workers so that 129 individuals are available to perform C-Checks, those 14 additional workers will not count towards these point assessments. The schedule for point assessments with respect to staffing is as follows:

115 - 110 Fully Staffed – 0 points

109 - 102 Low staffing – 1 point

101 - 91 Critical staffing – 2 points

If the Company is unable to staff C-Check with a minimum of 91 IBT mechanics, the 25 individual limit for Casual/Contract Maintenance Workers will have been reached and the Company may permanently subcontract heavy maintenance events going forward, as described below.

The Company agrees to a baseline staffing level of 129 mechanics assigned to work in C-Check by December 1, 2008. The Company will attempt to hire up to a staffing level of 129 mechanics by December 1, 2008. To the extent the Company is unable to hire up to the 129 employee level by December 1, 2008, the Company may utilize Casual Workers and/or Contract Maintenance Workers to reach the baseline 129 worker staffing level. However, the use of Casual Workers and/or Contract Maintenance Workers initially assigned to C-Check to meet this baseline staffing level will not be included in the determination as to whether outsourcing will be permitted as set forth in the following paragraph.

As noted above, 115 Company employees will be used as the baseline for calculating the assessment of points. If at any time during the term of this Agreement, the use of Casual Workers and/or Contract Maintenance Workers – other than those who may have been used to meet the staffing level of 129 by December 1, 2008 as set forth above – is equal to or greater than 25 individuals (exclusive of those used to reach the staffing level of 129, i.e., if only 90 or fewer IBT mechanics remain), the Company may permanently subcontract heavy maintenance events going forward as set forth in Section D (the Company's proposed amendments to Article 2 of the Collective Bargaining Agreement, "Scope of Agreement"), without the need to accumulate a particular number of points.

The Company will not use Casual Workers or Contract Maintenance Workers as a substitute for hiring for attrition. The Company also agrees it will continue to seek to hire permanent workers to fill vacancies in C-check up to the 129 worker staffing level by taking the following steps when positions become available:

(1) post notice of the vacancy on the Company's intranet site;

(2) post an advertisement on www.careerbuilder.com, where the Company posts other available job positions and;

(3) send an email message to all Company IBT-represented employees and Casual

Workers informing them that vacancies exist and asking them to recommend additional qualified mechanics.

Other than these steps, the Company shall have no obligation to attempt to recruit to fill vacancies, even if these steps do not result in the attainment of any specific level of staffing.

3. Overtime

The Company agrees to use up to 3% overtime in order to complete a scheduled C-Check in the specified time. Use of overtime in excess of 4% per C-Check event shall result in one (1) point for any single C-Check event. The amount of overtime which is allowed or will not lead to point assessment may be extended for any of the following reasons:

- Unforeseen/additional non-routine work, including engineering orders and engineering authorizations
- An operational decision by the Company that increases the amount of overtime assigned on a C-Check

4. Points

Accumulation of points for completion time, staffing levels, or overtime in any rolling 6-month or 12-month period shall result in the application of Section D as follows:

0-6 months	5 points
0-12 months	8 points

Example:

Plane in C Check

	Result	Points
Days Over Schedule	1 day	1
Frontier Staffing	98	2
Overtime	< 4%	0
Total		3

5. Dispute Resolution

Any dispute regarding the triggering of Section D, or the exercise of the Company's discretion regarding the awarding of points or hiring decisions arising out of these amendments to the Maintenance Agreement and the Material Specialists Agreement shall be resolved pursuant to the minor dispute resolution provision of the Railway Labor Act as currently set forth in these agreements. To prevail upon any grievance of the Company's discretion with respect to

either the Company's determination that the Union has accumulated a point or any of the Company's hiring decisions, as set forth in the amendments above, the grievant must show that the Company exercised its discretion unreasonably.

D. Article 2: Scope of Agreement

1. No proposed modifications to Sections 1 and 2.

2. The first paragraph of Section 3 shall be deleted in its entirety and replaced with the following:

"The parties agree that the Company may subcontract work as follows:"

3. No proposed modifications to subparagraphs a, b, c and d of Section 3.

4. Sub-paragraph "e" shall be added to Section 3, which shall state as follows:

"The Company may, in its sole discretion, permanently subcontract all or part of its heavy maintenance events which shall include all routine and non-routine C-check intervals, all structural inspections and all 'bill of work' items associated with any heavy maintenance event." This provision is not intended to apply to Line Maintenance.

5. The last two unlettered paragraphs of Section 3 shall be deleted in their entirety and replaced with the following:

"If the Company has the need for contracting out any additional work not already provided for by sub-paragraphs a, b, c, d and e above, the Company will notify the Union in writing as soon as possible. The written notice shall contain a brief explanation for the reason the work needs to be subcontracted out to a third party.

If the Union believes the Company has violated this section 3 of Article 2, it shall notify the Company of its belief no later than five (5) business days after learning of the Company's alleged violation. The Union shall state in writing, and with specificity, the factual allegations setting forth any alleged violation of this section. The Company and the Union shall proceed to resolve the issue through the provisions of Articles 16 and 17 of this Agreement, up to and including final and binding arbitration. This limitation period is jurisdictional and may not be extended absent a written agreement between the parties specifically extending the limitation period."

E. Article 25: Wage Rates

1. The wage rates published in Section 1 shall be permanently reduced by 10%. In addition, the following benefit reductions will apply:

a. No personal holiday for each year

b. Maintenance employees to select four holidays per year to give up (holiday not to be in a gap period)
c. Reduce accrual of vacation by 42 hours annually

2. Employees at final step of wage scale as of November 22, 2008 shall receive a 1% annual cost of living adjustment on their anniversary date.

3. All "License Premium Rates" and all "Position Premium Rates" published in Section 2 shall be permanently reduced by 10%. The "Shift and Line Premium Rates" shall remain unchanged.

4. These concessions are equivalent to a 13.95% wage reduction.

5. If, at any point during the term of this Agreement, the provisions of Section I(D) are applied by the Company (subcontracting of heavy maintenance events) the wage rates set forth herein revert to a 10% reduction in total wages or equivalent.

F. Limited Waiver of Section 1113

The Company agrees that during its currently pending chapter 11 cases, it will not seek further relief under section 1113 of the Bankruptcy Code with respect to the Maintenance Agreement and the Material Specialists Agreement unless the Company's financial performance or liquidity materially deteriorate as compared to the amounts forecasted for same in the Seabury Group Business Plan for Frontier Airlines Version 4.2, published August 4, 2008, a static copy of which was designated as Exhibit IBT-S-1 during this 1113 proceeding.

G. Term of Agreements

1. The Company proposes that the above modifications to the Maintenance Agreement and to the Material Specialists Agreement shall replace and supersede all other existing Collective Bargaining Agreements and the Interim Agreement.

2. The Company further proposes that these modifications, and all other existing terms of the Maintenance and Material Specialists Agreements shall be in effect from October 31, 2008 up to and including October 31, 2011, at which time they shall become amendable pursuant to the Railway Labor Act.

II. Profit Sharing Plan

Frontier will seek subsequent court approval for a post-emergence profit sharing plan that would include eligible IBT members and that would be applicable so long as Frontier emerges from chapter 11 as a stand-alone entity. Such plan would have the following or substantially similar terms:

1. Participation for all eligible employees in a Profit Sharing Pool of 10% of Pre-Tax Earnings (ex special items) on Pre-Tax Earnings up to $10MM, and 15% on the

portion of Pre-Tax Earnings above $10MM earned during each fiscal year through FY 2012.

2. Distributions would be accomplished no later than the end of each July for the previous fiscal year's Profit Sharing Pool.

3. To be eligible to take part in the Profit Sharing Pool for a given fiscal year, an employee:

    a. must be employed by the Company on the last day of the fiscal year for which the profit sharing applies, and

    b. must have been employed by the Company for at least one full year of service as of the last day of the fiscal year for which the profit sharing applies.

4. Duration to the end of the calendar year 2012.

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1 **Exhibit B**

2

3 I have before me a motion by the debtor, Frontier Airlines,
4 under Section 1113 of the Bankruptcy Code for authority to
5 reject its collective bargaining agreements with three groups
6 of its employees, all of whom are represented as their
7 bargaining agent by the Teamsters Airline Division of the
8 International Brotherhood of Teamsters. The three groups are
9 the aircraft appearance agents and maintenance cleaners; the
10 aircraft technicians, ground service technicians and tool room
11 attendants, often referred to as the mechanics; and the
12 material specialists.
13 The focus of most of the disagreement between the IBT
14 and Frontier has pertained to Frontier's proposals regarding
15 the mechanics and, in particular, a proposal to outsource to an
16 outside contractor so-called "C-check" maintenance that is
17 currently conducted by a group of, at this point, given
18 attrition in the company, 115 IBT employees, although both
19 sides agree that the proper number to have available for such
20 work is not 115 individuals, but 129.
21 The standard by which the court should review a motion
22 such as this under Section 1113 is by this point fairly clear.
23 One begins, of course, with the words of the statute itself,
24 which provides that the debtor in possession may assume or
25 reject, in this case reject, a collective bargaining agreement

1 only if it does the following:
2 First, subsequent to the filing of a Chapter 11
3 petition and prior to filing an application seeking rejection
4 of the collective bargaining agreement, the debtor in
5 possession shall make a proposal to the authorized
6 representative of the employees covered by the agreement, based
7 on the most complete and reliable information available at the
8 time of such proposal, that provides for those necessary
9 modifications of the employees' benefits and protections that
10 are necessary to permit the reorganization of the debtor and
11 assures that all creditors, the debtor, and all of the affected
12 parties are treated fairly and equitably; and, in addition, the
13 debtor must provide, subject to confidentiality restraints set
14 forth in Section 1113(d)(3), the representative of the
15 employees with such relevant information as is necessary to
16 evaluate the proposal.
17 The statute then provides, in Section 1113(b)(2), that
18 during the period beginning on the date the proposal that I
19 just described is made, and ending on the date of the hearing
20 on the debtor in possession's motion, the debtor in possession
21 shall meet at reasonable times with the authorized
22 representative to confer in good faith in attempting to reach
23 mutually satisfactory modifications of the agreement.
24 Then, in Section 1113(c), the statute provides that
25 the court shall approve an application for rejection of a

1 collective bargaining agreement only if the court finds that,
2 one, the debtor-in-possession has, prior to the hearing, made a
3 proposal that fulfills the requirements of Subsection (b)(1),
4 which I have already summarized; two, the authorized
5 representative of the employees has refused to accept such
6 proposal without good cause; and, three, the balance of the
7 equities clearly favors rejection of the agreement.
8 The courts have, therefore, noted that Section 1113
9 identifies a series of procedural and substantive requirements
10 that the debtor employer must satisfy before rejection will be
11 permitted. First, Section 1113(b) focuses on three elements:
12 The content of the proposal; the relevant information; and the
13 ensuing negotiations. At a minimum, the proposal must contain
14 "necessary" modifications that are "fair and equitable."
15 "[T]he necessity requirement places on the debtor the
16 burden of proving that its proposal is made in good faith, and
17 that it contains necessary, but not absolutely minimal, changes
18 that will enable the debtor to complete the reorganization
19 process successfully." Truck Driver's Local 807, International
20 Brotherhood of Teamsters v. Carey Transportation, Inc., 816
21 F.2d 82, 90 (2d Cir. 1987); see also In re Horsehead
22 Industries, Inc., 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003).
23 The courts in the Second Circuit have made it clear
24 that, with regard to "necessity," the debtor's proposal need
25 not be limited to the bare bones relief that is required to

1 keep it going, as if on life support. That is, in determining
2 "necessity," the proposal must be viewed as a whole and not
3 piecemeal, and the court should focus on the particular context
4 to determine what is necessary to enable the reorganization
5 process to be concluded successfully with a feasible Chapter 11
6 plan. In re Horsehead Industries, 300 B.R. at 584 (citing In
7 re Royal Composing Room, Inc., 848 F.2d 345, 350 (2d Cir.
8 1988), cert. denied, 489 U.S. 1078 (1989)).
9 The "fair and equitable" requirement forces the debtor
10 to spread the hurt. The burden of saving the debtor, or
11 enabling its reorganization, must be borne by shared sacrifice
12 to a similar degree, taking into account the particular,
13 competitive, marketplace positions of every constituency. See
14 Carey Transportation, Inc., 816 F.2d at 90, as well as In re
15 Century Brass Products, Inc. v. International Union United
16 Automobile, Aerospace and Agricultural Implement Workers (In re
17 Century Brass Products, Inc.), 795 F.2d 265, 273 (2d Cir.
18 1986), cert. denied, 479 U.S. 949 (1986).
19 The requirements for the court's approval of rejection
20 that are set forth in Section 1113(c), to the extent they don't
21 already flow through incorporation of what I have just
22 discussed with regard to Section 1113(b), deal with "good
23 cause" and balancing of the equities. The "without good cause"
24 requirement in Subparagraph 1113(c)(2) fosters the goals of
25 good faith negotiations and voluntary, consensual

1 modifications. It induces the debtor to propose only those
2 modifications necessary to a successful reorganization while
3 protecting the debtor against the union's refusal to accept its
4 proposals without a good reason. Thus, where the union rejects
5 a proposal that is necessary, fair and equitable, if it fails
6 to adequately explain and justify the reasons for its
7 opposition, the debtor has passed the Section 1113(c)(2)
8 hurdle. On the other hand, if the union makes counter-
9 proposals that meet its needs while preserving the savings
10 required by the debtor, its rejection of the debtor's proposal
11 will be with good cause under Section 1113(c)(2), and the
12 debtor's proposed rejection of the agreement will not be
13 approved by the court. Again, see In re Horsehead Industries,
14 300 B.R. at 584, quoting and citing, among other cases, In re
15 Maxwell Newspapers, Inc., 981 F.2d 85, 90 (2d Cir. 1992), and
16 Carey Transportation, 816 F.2d at 92.
17 And then, finally, the last element of the 1113(c)
18 test, which involves balancing the equities, essentially tracks
19 the logic of the Supreme Court's first holding in the Bildisco
20 case, NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). See In
21 re Century Brass, 795 F.2d at 273. Consistent with Bildisco's
22 analysis, courts have identified a number of factors that
23 enable the bankruptcy court to assess the balance of the
24 equities under Section 1113(c)(3), including the likelihood and
25 consequences of liquidation if rejection is not permitted, the

likely reduction in the value of creditors' claims if the collective bargaining agreement remains in force, the likelihood and consequences of a strike if the collective bargaining agreement is voided, the possibility and likely effect of any employee claims for breach of contract if rejection is approved, the cost spreading abilities of the various parties taking into account the number of employees covered and how various employees' wages and benefits compare to those of others in the industry, and the good or bad faith of the parties. See generally Carey Transportation, Inc., 816 F.2d at 93.

The courts in the Second Circuit have emphasized the importance of the policy that runs throughout Section 1113: to foster negotiations. Citing the legislative history, the Second Circuit has stated that "[T]he entire thrust of § 1113 is to ensure that well-informed and good faith negotiations occur in the marketplace, not as part of the judicial process." In re Maxwell Newspapers Inc., 981 F.2d at 90. In other words, "What 'good cause' means [in Section 1113(c)] is difficult to answer in the abstract apart from the moorings of a given case. A more constructive, and perhaps more answerable inquiry is why the term is in the statute. We think good cause serves as an incentive to the debtor trying to have its labor contract modified to propose in good faith only those changes necessary to its successful reorganization, while protecting it from the

union's refusal to accept the changes without a good reason." Id. "It is ultimately that safeguard that ensures that employers do not use Chapter 11 as medicine to rid themselves of corporate indigestion, or as a means simply to break a union, without tying the changes sought to the purpose of Section 1113, which is, in the context of fostering good faith negotiations, to try to enable the successful reorganization of the debtor." Id. at 89 (quoting In re Century Brass, 795 F.2d at 272).

In re Century Brass makes the same point with regard to pragmatically fostered negotiations being the primary aim of Section 1113(b), citing the legislative history, wherein Senator Thurmond noted, "Bargaining in good faith is not intended to import labor law into the bankruptcy forum. Rather, the intent is for these provisions to be interpreted in a workable manner," as well as Senator Packwood's statement that Section 1113 "places the primary focus on the private collective bargaining process and not on the courts." In re Century Brass, 795 F.2d at 273.

When interpreting, again, the "good cause" requirements of Section 1113(c)(2), the Second Circuit has held that although the Court should look at the debtors' proposal as a package, the union is not always necessarily bound by the particular elements chosen by the debtor. "If the debtor proposes an element objectionable to the union, the union has

1 two options under § 1113. It can argue that the part of the
2 proposal it cannot accept was included by the employer in bad
3 faith, in an effort to stalemate negotiations and allow it to
4 obtain outright rejection rather than a negotiated compromise.
5 If the union can make such a showing, the debtor would not be
6 entitled to reject the labor contract under Carey
7 Transportation, 816 F.2d at 90. . . . Alternatively, the union
8 can negotiate with the debtor." In re Royal Composing Room,
9 Inc., 848 F.2d at 348-49.
10 The negotiation focus of Section 1113 also is
11 highlighted by In re Delta Air Lines, 342 B.R. 685 (Bankr.
12 S.D.N.Y. 2006), in which the debtor had so bound itself prior
13 to entering into negotiations with other agreements that
14 rendered its proposal to the union non-negotiable that the
15 Court found that the debtor had not complied with the
16 requirements of Section 1113 to negotiate in good faith and had
17 improperly limited the court's review functions under Section
18 1113. See also G & C Foundry Co., Ltd, No. 06-30601 (Bankr.
19 N.D. Ohio 2006), an unpublished decision by Bankruptcy Judge
20 Whipple from the Northern District of Ohio dated July 19th,
21 2006, which was attached to the IBT's pleadings.
22 In sum, therefor, Section 1113 is structured to
23 maximize the likelihood that, even where the parties do not
24 agree on modifications of the CBA, the court will authorize
25 rejection and a modification proposal is imposed only after,

1 and in light of, the parties' bargaining. See In re Northwest
2 Airlines Corp., 483 F.3d 160, 180 (2d Cir. 2007) (Jacobs, C.J.,
3 concurring) ("An order pursuant to § 1113 is thus implicitly
4 the product of negotiations (successful or unsuccessful).").
5 Two other aspects of the Section 1113 standard are
6 worth discussing. The first is, what is the "proposal" in
7 Section 1113(c)(1) that the court is supposed to focus on? The
8 statute, in Subsection (b)(1), contemplates an *initial* proposal
9 that is made to the union before the motion for relief under
10 1113, and then Subsection 1113(b)(2) requires that the parties
11 negotiate in good faith, beginning on the date of the making of
12 that proposal, and ending on the date of the hearing provided
13 for in Subsection 1113(d)(1). Subsection (d)(1) specifies
14 parameters for when that hearing should take place and, later,
15 the statute provides an outside date when the Court must rule
16 on the debtor's request to reject (or the debtor may terminate
17 or alter the CBA pending such ruling), referring to the
18 "commencement" of the hearing. 11 U.S.C. § 1113(d)(2).
19 However, Subsections 1113(b)(2) and (c)(1), which pertain to
20 the proposal the court is to consider, simply refer to "the
21 hearing."
22 Clearly, given the good-faith negotiation requirement,
23 Congress did not intend the Court to focus solely on the
24 *initial* proposal to be made by the debtor prior to the filing
25 of the application. I believe it is also clear in the Second

1 Circuit, and the better view under the statute's plain meaning
2 and purpose, that if the parties are, in fact, continuing to
3 bargain in good faith during the course of the hearing, the
4 court should consider the ultimate proposal made by the debtor,
5 which may be made during the course of the hearing, or before
6 the hearing's conclusion, and not insert the word
7 "commencement" into Subsection 1113(c)(1) with regard to which
8 proposal should be evaluated. Congress knew how to focus the
9 court on the "commencement" of the hearing, as it did in
10 Subsections (d)(1) and (d)(2); it didn't do so when it referred
11 to the debtor's proposal in Subsection (c)(1).
12 This is the position taken in 7 Collier on Bankruptcy
13 ¶ 1113.04[1][a] (15th ed. 2008), as well as the position of the
14 Second Circuit in the In re Maxwell Newspapers case, where the
15 court considered a proposal made after the hearing, while the
16 matter was on appeal. 981 F.2d at 88, 91-2. It is also the
17 approach taken by Judge Gropper in In re Northwest Airlines
18 Corp., 346 B.R. 307, 316-18 (Bankr. S.D.N.Y. 2006), and,
19 implicitly, the position of the court in In re Mesaba Aviation,
20 350 B.R. 435 (D. Minn. 2006), when it remanded the matter for
21 further proceedings to deal with the limited aspects of the
22 debtor's proposal that the district court found objectionable.
23 As Collier states, "The overall requirement of 'good
24 faith' bargaining by the trustee and [the lack of] 'good cause'
25 for the union's refusal of a proposal allows the court ample

1 opportunity to review the entire bargaining process without
2 adopting a fixed rule on which proposals may be considered.
3 This is consistent with the intent of section 1113 to put the
4 burden on the parties to continue bargaining so that the union
5 and the employer can have as much opportunity as reasonably
6 possible to resolve their dispute without court intervention."
7 7 Collier on Bankruptcy ¶ 1113.04[1][a] (15th ed. 2008) at
8 1113-26-27.
9 The other area that I believe requires further
10 elucidation is the requirement in Section 1113(b) to provide
11 the union with relevant information necessary to evaluate the
12 proposal. Again, I believe that the court must make an inquiry
13 based on the particular facts at hand. As Collier notes at ¶
14 1113.04[2], courts have generally held that the breadth and
15 depth of the requisite information will vary with the
16 circumstances, but that adequate information should include the
17 most meaningful financial and statistical information
18 available, such as cost analyses for the proposed modifications
19 and financial statements for the debtor's business. Further,
20 Collier notes that in considering whether the debtor has
21 provided the requisite information, the court is not limited to
22 information the debtor has conveyed to the union subsequent to
23 filing a petition and prior to filing a motion seeking
24 rejection. Because the primary purpose of the statute is to
25 encourage the parties to negotiate and to facilitate

1 voluntarily modifications, it does not matter that the
2 information was provided pre-petition, for example, so long as
3 sufficient information has been provided. 7 Collier on
4 Bankruptcy ¶ 1113.04[2] at 1113-27-28.
5 That being said, it is clear that under the statute
6 the debtor has the burden throughout the process to provide the
7 union with all relevant and necessary information, including at
8 the very start of the process, and that the failure to do so
9 may not only trigger a problem under Section 1113(b)(1), but
10 also in respect of Section 1113's good-faith bargaining
11 requirement.
12 The courts have addressed the information requirement,
13 as they should, in the light of the particular context. There
14 are decisions faulting the debtor for failing to provide
15 sufficient information where the debtor was looking for
16 specific concessions to meet a specific target but did not
17 provide information to enable the union to assess whether the
18 concessions sought were, in fact, adequately tied to the
19 targeted savings or necessary for a successful reorganization.
20 See In re Schauer Manufacturing Corp., 145 B.R. 32, 35 (Bankr.
21 S.D. Ohio 1992); In re George Cindrich General Contracting,
22 Inc., 130 B.R. 20, 23-24 (Bankr. W.D. Pa. 1991); see also In re
23 Fiberglass Industries, Inc., 49 B.R. 202, 207 (Bankr. N.D.N.Y.
24 1985).
25 A somewhat different approach was taken in In re

1 Mesaba Airlines, in which the court initially ruled that the
2 debtor had not provided sufficient information -- in
3 particular, that it had failed to give the union access to an
4 active, or live or manipulatable, copy of its business plan --
5 but subsequently, after the debtor had corrected that failing,
6 the court found that the debtor had provided sufficient
7 information to meet the requirements of Section 1113(b). See
8 In re Mesaba Airlines, 350 B.R. at 446-47, 454-55.
9 There also have been a number of decisions in which
10 the debtor was in such dire straits that, as long as it turned
11 over what information it had, it did not have to explain, in
12 particular, the goal it was seeking because, in essence, it was
13 seeking whatever it could achieve to improve its financial
14 condition. In these cases, the courts have instead focused on
15 whether the debtor provided sufficient information for the
16 union to determine whether, in fact, the debtor was
17 experiencing the dire financial straits that it claimed it was
18 experiencing, or not, and whether there were alternatives
19 available to the savings that the debtor was proposing to
20 achieve by its rejection proposal. See In re Carey
21 Transportation, 50 B.R. 203, 208-09 (Bankr. S.D.N.Y. 1985),
22 aff'd, 816 F.2d 82 (2d Cir. 1987); In re Allied Delivery System
23 Co., 49 B.R. 700, 703 (Bankr. N.D. Ohio); see also In re Salt
24 Creek Freightways, 47 B.R. 835, 839 (Bankr. D. Wyo. 1985).
25 Again, I have viewed all of these requirements,

1 including the information requirement, in the unique context of
2 this debtor's Chapter 11 case. Let me turn to that context
3 now.
4 It is clear to me that the debtor has provided
5 sufficient information to the IBT during the course of the
6 negotiations, including in connection with its initial
7 proposal, to enable the union to test and confirm the
8 fundamental premise underlying the proposals, which is that
9 presently Frontier is in very serious financial difficulty and
10 needs whatever financial concessions it can in good faith
11 obtain from its employees, including those represented by the
12 IBT, as well as to enable the IBT to test whether alternatives
13 to the cost savings supposedly inherent in the debtor's
14 proposals, that are more acceptable to the union and at least
15 as beneficial to the debtor, are available.
16 The debtor provided a copy of its business plan, as
17 well as a backup explanation of its financial condition, as
18 evidenced by Trial Exhibit 1, at its initial meeting with the
19 IBT regarding its opening proposal. During the course of the
20 negotiations, following the filing of the Section 1113
21 application, the debtor also made available to the union,
22 without interference or restriction, an active or manipulatable
23 copy of the business plan, and I believe the debtor and its
24 professionals focusing on this matter have been duly responsive
25 to questions by the union with regard to all aspects of the

1 business plan (including how to manipulate the assumptions
2 underlying the projections), and with regard to the debtor's
3 financial predicament. The adequacy of the debtor's provision
4 of information is also confirmed by the astute questions and
5 critiques developed over the course of the negotiations,
6 including during the hearing, by the IBT, as well as the
7 debtor's and the Court's adoption of many of the union's
8 points.
9 The dire nature of the debtor's financial condition
10 was also laid out both in the testimony of the debtor's
11 witnesses and in the trial exhibits, including in the initial
12 declaration of Christopher Collins, Frontier's COO. The debtor
13 entered Chapter 11 with a relatively weak cash position at the
14 same time that it is facing a very challenging operational
15 environment, with serious competition from both a low-cost
16 competitor, Southwest Airlines, and a traditional, well-
17 established competitor with an extensive route system, United
18 Airlines, each of which have a clear interest in competing
19 with, and beating out, the debtor in the debtor's primary
20 venue, Denver.
21 The debtor also has faced, over the course of the last
22 year, very serious increases in fuel costs, which, although
23 alleviated somewhat dramatically over the past two months,
24 continue to be highly unpredictable. (The recent decline in
25 fuel costs is, at best, a mixed blessing for the debtor, as it

1 appears to be more tied to the current economic downturn --
2 which also reasonably leads one to project a significant
3 reduction in customers -- than to any other explanation.)
4 Those fuel costs have put enormous pressure on the debtor's
5 cash position and, in addition to the competition that the
6 debtor is facing, have resulted in very significant losses
7 since the commencement of the Chapter 11 case.
8 The debtor had a net loss of $60.3 million in fiscal
9 year 2008, and a net loss of $57.7 million in the three months
10 ended June 30, 2008. It has continued to operate over the
11 course of the Chapter 11 case at a loss, although it made a
12 small profit in August. During the Chapter 11 case, the debtor
13 has also successfully implemented its decision to reduce the
14 size of its fleet; and that will result shortly in a twenty
15 percent capacity reduction. Its current viability has been
16 sustained in large part by one-time transactions related to
17 this fleet reduction.
18 The debtor has been able to borrow, notwithstanding
19 the extremely difficult credit environment that we currently
20 face, under a relatively modest DIP facility. That facility,
21 however, expires shortly. The DIP facility, plus the debtor's
22 cannibalization of excess aircraft, has resulted in a
23 relatively modest cash cushion, but it is clear to me from the
24 debtor's disclosed projected sources and uses of cash that the
25 company will have a dangerously low cash level if it is not

1 able, by the first quarter of 2009, to attract an exit lender
2 and/or investor to enable it to emerge from Chapter 11.
3 Frontier has, accordingly, undertaken, in connection
4 or in conjunction with its fleet reduction, significant expense
5 cuts throughout the organization. The business plan under
6 which the debtor is seeking exit financing and/or a new
7 investor calls for expense cuts, as outlined in the declaration
8 of Edward Christie, the debtor's CFO, of approximately $110
9 million. To achieve that result, the debtor is looking to
10 implement employee-related and other cuts, across the board, as
11 detailed in Paragraph 9 of Mr. Christie's declaration, which
12 Frontier is generally achieving, in the amount of slightly
13 under $20 million in marketing and distribution; $15.9 million
14 from overhead, primarily associated with IT, customer service,
15 facilities and catering; $3.2 million in cuts involving other
16 facilities, especially from a restructuring of lease space at
17 Denver International Airport; and $37.1 million in cuts in
18 connection with rightsizing, i.e., reductions in force in light
19 of the twenty-percent capacity reduction.
20 And then, on top of those rightsizing staff cuts, the
21 debtor's business plan is premised on labor cost reductions,
22 applied to union and non-union and executive workers alike, in
23 the amount of $21 million (originally this amount was proposed
24 to be $34.5 million, but the debtor concluded that the
25 percentage reduction amounts needed to reach this figure,

1 including from the IBT, were too high to be achievable). These
2 cuts in the aggregate, along with the debtor's projected
3 revenue enhancements, which are aggressive, are reasonably
4 required to achieve a feasible three-year business plan that
5 will prevent the debtor from running unviably low on cash and,
6 it is reasonably hoped, will attract an exit lender or
7 investor.
8 Generally speaking, I accept the testimony that the
9 revised projected labor-related cuts are being achieved across
10 the board, as a result of Frontier's agreements with pilots,
11 flight attendants and other union and non-union employees, and
12 that when one takes into account both rightsizing and wage and
13 benefit adjustments, the percentage burden on the various
14 constituencies, including the IBT, under the debtor's most
15 recent proposal, will be roughly the same, in the twenty-five
16 to thirty percent rage.
17 More particularly, with regard to the IBT, the
18 company's recently implemented capacity reduction has led to,
19 of course, fewer airplanes to maintain, and in particular,
20 fewer C-check maintenance procedures to perform. Generally,
21 with 129 IBT employees engaged in C-check maintenance, Frontier
22 has been able to utilize heavy maintenance employees between
23 ninety-eight and a hundred percent of the time. And I believe
24 that currently, given that there are, because of attrition,
25 only roughly 115 of such employees, the debtor probably is at a

1 hundred percent utilization rate.
2 However, it is clear, given the reduced number of
3 aircraft, that for roughly the next three years there will be
4 significant gaps when there will not be any C-check maintenance
5 to perform. The total amount of utilization, it's therefore
6 projected, will go down from the current ninety-eight to a
7 hundred percent range, to seventy-eight percent, with a
8 significant number of gaps where no C-check maintenance is
9 being performed, of between four and forty days. In total,
10 such gaps are projected to comprise about one quarter of the
11 annual working days for the next three years.
12 These two facts, i.e., the reduced need for C-check
13 maintenance and the debtor's need to achieve the maximum cost
14 savings across the board, including from the IBT, led the
15 debtor to introduce the truly controversial aspect of its
16 initial proposal, which was to outsource all of the heavy C-
17 check maintenance to a non-union supplier, probably offshore,
18 thereby eliminating approximately IBT 129 positions.
19 Such an outsourcing contract, I believe, could be
20 negotiated within a short time after rejection of the relevant
21 IBT agreements. It obviously cannot be finalized while the
22 collective bargaining agreements are in place, but I accept the
23 testimony and the documentary evidence that there is more than
24 one business that engages full time in outsourcing services
25 such as these; that other airlines, such as JetBlue, engage in
significant outsourcing of their heavy, C-check maintenance,

1 and that the debtor would be able to enter into such an
2 agreement relatively quickly, within the time frame that the
3 debtor has posited, to enable C-check to be done on an hourly
4 basis, thereby relieving Frontier of the problem of having a
5 number of employees who would be compensated on an annual basis
6 but would be working only approximately three-quarters of a
7 year over the next three years, given the reduction in the
8 debtor's fleet. I also find that the reasonably projected
9 savings from such an outsourcing agreement over the amounts
10 that Frontier pays under the current collective bargaining
11 agreements are significant, although they would not be as large
12 as the debtor has projected.
13 The debtor, therefore, proposed, in addition to wage
14 cuts for the IBT employees who were not going to be subject to
15 outsourcing, a proposal whose primary feature was the ability
16 to outsource the heavy C-check work. This proposal was
17 accompanied by significant information, as I said, showing the
18 debtor's financial distress and the need for whatever savings
19 could be achieved in connection with a very aggressive and lean
20 business plan required to give the debtor a reasonable chance
21 to emerge from Chapter 11.
22 The debtor did not provide, initially, a specific
23 target for the savings that it sought across the board; it
24 focused instead on an average amount or percentage of wage
25 cuts, as well as the obvious need to deal with the significant
reduction in capacity and, therefore, the projected under-

1 utilization of mechanics originally required for C-checks.
2 I believe, given the company's serious financial
3 predicament, in particular the debtor's reasonably projected
4 difficulty in obtaining exit financing, that absent the ability
5 to show truly pared-down expense projections and aggressive
6 revenue enhancements, especially in light of the debtor's
7 dangerously low near-term projected cash position, that such
8 information, as an initial matter, was sufficient.
9 The debtor followed up, as I said, moreover, with
10 additional information, including providing an active version,
11 or access to an active version, of the business plan; and I
12 believe, although the company may not have been as creative in
13 responding to the union's counterproposals as one would wish,
14 that the company has been appropriately forthcoming in sharing
15 information and responding to the IBT's information requests as
16 the issues raised by the debtor's proposal have been narrowed.
17 The union, as I believe would be obvious (and I expect
18 it was obvious to the company), reacted quite negatively to the
19 outsourcing proposal. This, again, is notwithstanding the fact
20 that the company proposed to eliminate not only the 129
21 mechanics, but also hundreds of other employees in other areas,
22 non-union employees and employees represented by other unions,
23 200 of whom have already been terminated, plus another 400
24 through other means, including voluntary departures and early-
25 out retirement programs, and that this across-the-board
downsizing process will be completed during the month of

1 November.
2 The IBT immediately began to explore whether there
3 were alternatives to the debtor's outsourcing proposal, and
4 that exploration, frankly, continued as an ongoing, iterative
5 process through the close of the hearing today. At the same
6 time, the debtor and the union met on numerous occasions, not
7 only to share information, but also to bargain. Leaving aside
8 the meetings that occurred after the close of the evidentiary
9 portion of the hearing which, to my count, numbered at least
10 five, there were twelve sessions between the date of the
11 initial proposal and the close of the Section 1113 hearing's
12 evidence.
13 The IBT raised a number of criticisms of the debtor's
14 initial and interim proposals, some of which I believe have
15 been shown, with additional information, not to be well taken
16 (although I believe that clearly the IBT's criticisms and
17 counterproposals were made in good faith). They included
18 arguments about the debtors's ability to use mechanics for
19 other purposes, such as changing the seat configuration of the
20 debtor's remaining aircraft, which I believe have since been
21 shown not to be practical in light of the time and cost
22 constraints that Frontier is facing. There were also
23 challenges by the IBT to the number of projected "gap periods,"
24 that is, the periods the debtor said there would be no need for
25 C-check. However, I conclude that while the debtor will have
some ability to manage or bunch gap periods, generally speaking

1 the debtor's projections of the underutilization of C-check
2 mechanics of about twenty-two to twenty-five percent are
3 accurate.
4 On the other hand, the IBT made valid criticisms of
5 Frontier's projected cost savings in respect of the outsourcing
6 proposal. The IBT challenged, with some validity, the debtor's
7 assumptions that it would need no additional spare parts for a
8 significant portion of the proposed outsourcing period and that
9 it would need far fewer spare parts than it currently uses for
10 the rest of the time. The IBT also raised serious issues as to
11 whether the debtor would be able to complete C-checks, and have
12 the planes back in service, during the time projected by the
13 debtor under the proposed outsourcing program. The IBT also
14 validly challenged the projected savings, in terms of worker
15 bumping rights and the like, that the company had built into
16 the projections, as well as the debtor's projection of
17 administrative personnel savings.
18 On the other hand, I believe that outsourcing at an
19 hourly rate consistent with the debtor's projections is
20 achievable, that such outsourcing has been and is currently
21 performed by comparable airlines, and that such outsourcing
22 would result in very significant savings for the debtor.
23 I nevertheless discounted the debtor's projected
24 savings in light of the union's criticisms, and, as a result of
25 that discount as well as the union's willingness (as an
alternative to outsourcing) to propose furloughs -- during

1 which wages would not be paid -- as well as proposing other
2 significant wage and benefit concessions, it appeared to me
3 that the IBT was continuing to negotiate in good faith and
4 raising legitimate issues as to whether the company could
5 achieve the same results that it was trying to achieve with
6 outsourcing through a proposal that would limit outsourcing to
7 a last resort.
8 The debtor endeavored to pursue this avenue of
9 negotiation, partially in light of the Court's guidance, and it
10 therefore made a second, third, fourth and fifth revision to
11 its initial proposal, all of which I believe have significantly
12 narrowed the differences between the two parties.
13 The debtor has throughout, however, been very
14 concerned, as it should be, that if, instead of having a fixed
15 and enforceable contract with an outsourcer for C-check
16 maintenance, it is relying on IBT members to return from
17 repeated furloughs in order to perform necessary maintenance on
18 its aircraft, it may find itself in a situation where not
19 enough workers have, in fact, returned from furlough and it
20 does not have the ability to maintain the aircraft and continue
21 to operate its business -- in essence, a life and death
22 problem.
23 Obviously, the IBT employees are free to quit or
24 simply not come back from a furlough. They're not bound to
25 continue to work and, consequently, the debtor has a legitimate
concern that they would not be there when it counts, in

1 requisite numbers, to perform C-checks in a timely fashion if
2 it relies solely on furloughing and less drastic fallbacks to
3 permanent outsourcing (such as hiring a pool of casual workers
4 and, if they are not sufficient, spot contract workers).
5 The union has persuaded me, and I believe it has
6 persuaded the debtor, as well, however, given the roots of the
7 mechanics in Denver and the health and other benefits that they
8 would continue to receive under a furlough-based program, as
9 well as, of course, the incentive of keeping their jobs in this
10 dark economy, that, with certain protections, a furlough-based
11 proposal will, in fact, enable the debtor to be confident that
12 its aircraft will be serviced on time, and, as importantly,
13 will give an exit lender or investor sufficient confidence that
14 the aircraft will be properly and timely maintained without
15 resort, except in the last instance, to outsourcing.
16 The debtor has also significantly reduced the "ask"
17 that it made of the union for wage concessions, which the
18 debtor believed, in addition to the union's furlough proposal,
19 would need to be made to approximate the projected savings from
20 outsourcing and, otherwise, to approximate the cuts other
21 employees are taking. The debtor had originally proposed, on
22 average for three years, approximately a seventeen-and-a-half
23 percent wage cut, in addition, of course, to the furlough cuts.
24 Given my view that the projected savings resulting from the
25 outsourcing proposal should be discounted for various factors,
including the debtors's over-aggressive assumption of when

1 aircraft would be returned to service after C-check and the
2 debtors's over-aggressive assumptions about use of spare parts
3 and other miscellaneous costs of the proposal, I concluded --
4 and I believe that the IBT tacitly acknowledged this in its
5 counter-proposals -- that the appropriate wage cut, in addition
6 to furlough-related savings, was, instead, in the thirteen-to-
7 fifteen-percent range, not the seventeen-and-a-half percent
8 that the company had made in its third amended proposal. The
9 debtor's final proposal posits a 13.95% wage cut, although the
10 debtor is prepared to shift a portion of the cut to non-wage
11 items (which the debtor and the IBT have largely quantified).
12 This is fair in light of the record and my findings regarding
13 the reasonably projected savings from the outsourcing
14 alternatives.
15 The debtor and the union also bargained over what
16 would trigger the ultimate fallback position to outsourcing
17 under a furlough proposal, and those discussions have led to
18 what I believe is a clear, good-faith and appropriately
19 protective final proposal by the company, a proposal that is
20 premised on every reasonable effort being made to avoid
21 outsourcing, and treats outsourcing of C-check maintenance only
22 as the ultimate, last alternative.
23 As set forth in this most recent, sixth proposal,
24 which I view as having been clarified and amended on the record
25 of this hearing this afternoon, the debtor has agreed that
before turning to outsourcing as its last resort, it will keep

1 a pool of so-called casual workers, who would be available if
2 the union does not have the requisite number of employees
3 available for C-check during any particular scheduled period,
4 and that if that pool drops below a certain level, it would
5 then have an obligation to look to additional contract workers
6 to fill the gap.
7 Again, the first and primary source for work under the
8 company's final proposal would continue to be the union, and in
9 addition to agreeing to endeavor to replace the fourteen
10 mechanics who have left, to get the number up to 129 again by
11 December 1st, the company would continue to look to fill slots
12 that had been emptied by union workers with full-time, IBT
13 workers -- looking to the casual pool and then the contract
14 workers only if there were not enough qualified people
15 available who wanted to work full time under the IBT collective
16 bargaining agreement. And then if there are insufficient
17 casual workers and contract workers, and only then, and only
18 subject to what I view as a reasonable and objective
19 measurement of understaffing and delay in completing C-check,
20 would the debtor resort to outsourcing.
21 The terms of this most recent proposal, I believe, are
22 now crystal clear as far as their outsourcing aspect, which has
23 been the parties' primary bone of contention throughout. I
24 also believe that as far as additional cost reductions are
25 concerned, the debtor has made clear today, on the record, that
while it is looking, and I would impose, a 13.95 percent

1 reduction, it is willing, particularly in light of the
2 constructive dialogue that it had this week with the IBT's
3 economists, to accept that 13.95 percent reduction not
4 necessarily entirely in the form of decreased wages, but in
5 other ways, as well, as the union had previously proposed.
6 The debtor's proposal, as laid out on the record this
7 afternoon, also, I believe, sufficiently protects the union
8 with regard to the debtor's exercise of its reasonable
9 discretion in calling a trigger event that would lead,
10 ultimately, to outsourcing if timely completion of C-checks
11 fail. First, the company has agreed to specify a number of
12 objective factors that would not lead to any point penalties
13 that, if sufficiently accumulated, would lead to outsourcing.
14 Second, the company has agreed to an appropriate
15 method for the union to contest the company's reasonable
16 exercise of its discretion in calling a trigger event or noting
17 an inability to hire, which would be determined like other
18 grievances pursuant to the collective bargaining agreement (as
19 opposed to having this Court handle such disputes, as was
20 originally proposed by the debtor).
21 The debtor also, I believe, has sufficiently addressed
22 the remaining points raised in Ms. Robbins's letter of October
23 30th in response to the company's fifth proposal. This leaves,
24 to my mind, three points which, as I understand, the IBT is
25 still holding firm on in refusing to accept and, therefore,
rejecting, the debtor's most recent proposal.

1 One of those points I'm not, frankly, even sure the
2 union is holding onto. It is a point that was not emphasized
3 in Ms. Robbins's letter, although obviously it's in the union's
4 counter-proposal, which is a right to a look-back or a re-do on
5 the concessions that the debtor has proposed, based on a to-be-
6 negotiated EBITDA measure. I believe, however, that the
7 uncertainty raised by such a "re-opener" for a company in these
8 dire straits would seriously jeopardize the ability of the
9 debtor to get exit financing or persuade an investor to fund a
10 Chapter 11 plan, and is not workable.
11 I note that the company has, however, included a
12 profit-sharing formula in its proposal, which I expect would
13 clearly provide for some potential upside for the union based
14 on the debtor's possible future success, although not as much
15 as the union would want. On the other hand, given all of the
16 constituencies in this case -- including the unsecured
17 creditors, who it appears will be taking very significant
18 reductions, and the other employees (and again, I believe the
19 evidence will show that in terms of both attrition, downsizing
20 and actual concessions, the other employees, both union and
21 non-union, are all experiencing reductions in the range of
22 roughly twenty-five to thirty percent, where they're in
23 comparable positions as far as replaceability and
24 competitiveness, with the IBT's members) -- that a further
25 right to an upside, beyond what the debtor has proposed, or a
re-opener, would not be appropriate.

1 Although this is not really addressed in Ms. Robbins's
2 letter, a few minutes ago the union also stated that the
3 debtor's proposal, which has a three-year duration, is properly
4 rejectable for good cause because it does not provide that upon
5 the expiration of that three year period there would be an
6 automatic snap-back to current terms. First, that disagreement
7 with the proposal is one that has not been pushed or even
8 actively argued for by the IBT until now. Moreover, what we
9 have discussed on the record today and what I believe is clear
10 is that the debtor's proposal would be in place for three
11 years, that it would not be for a longer time, and that upon
12 the expiry of that term, it's my view that the parties would
13 have their rights under non-bankruptcy law, which, if the
14 company was continuing to maintain or seek to maintain
15 employment terms that were, in light of the relevant facts at
16 that time, clearly inappropriate, the union would have
17 considerable freedom of action. (Other than providing that the
18 debtor's last proposal would apply for its three-year term, it
19 should be clear that I have not addressed -- nor have the
20 parties -- any obligations to be imposed on either of the
21 parties during that period outside of the terms of that
22 proposal. See generally In re Northwest Airlines, 483 F.3d at
23 174-75.).
24 It seems to me that, given the debtor's current
25 financial condition, predicting what would be a fair and
equitable arrangement between Frontier and the IBT at the end

1 of three years' time is truly looking through a glass darkly.
2 Given the debtor's current serious financial predicament, I
3 cannot reasonably foresee conditions at the end of three years'
4 time, and it would seem to me that anyone supervising or
5 evaluating collective bargaining three years from now would
6 recognize that fact and look very closely at the facts then at
7 hand as to whether the same conditions that exist today as far
8 as cash generation, CASM targets and the need for an extremely
9 lean cost structure exist, and whether the debtor's fleet
10 configuration remains the same, or not, and that at that time,
11 if the company was trying to hold onto employment terms that
12 were outdated, the union would appropriately be entitled to a
13 prompt change.
14 More than that, I believe, it would be hard for me to
15 say. Thus, just as it's extremely hard for me to predict what
16 this company will look like three years from now as far as the
17 company's being able to maintain the proposed terms for a
18 longer period, I think it would also be extremely hard to
19 predict whether it would be appropriate to have a snap-back to
20 current terms three years from now as the IBT has requested.
21 Rather, as I said, it would appear to me that those supervising
22 or evaluating the parties' future bargaining would acknowledge
23 that the picture today of events in 2011 was cloudy beyond the
24 reasonable prospect that, with the IBT's treatment and the
25 other aspects of the debtor's three year business plan in
place, the debtor will be able to emerge from Chapter 11.

1 Finally, it appears that the IBT may be rejecting the
2 debtor's proposal because that proposal still contemplates,
3 albeit as a last resort, the possibility of complete
4 outsourcing of C-check maintenance. Frankly, it's not entirely
5 clear to me, notwithstanding the company's assertion that the
6 union is insisting that there never be a fallback to
7 outsourcing, whether the IBT has really taken such a position.
8 Such an unequivocal position is not explicitly asserted in Ms.
9 Robbins's letter of October 30th. In fact, to the contrary,
10 her letter makes points and asks questions about the company's
11 proposal as if wanting to make the company's proposal work for
12 the union in terms of preserving union jobs in the first
13 instance in the light of outsourcing alternatives, rather than
14 taking a position that the union is simply going to draw a line
15 in the sand or perhaps bury its head in the sand as far as
16 Frontier's ultimate right to fall back on outsourcing if all
17 else fails. On the other hand, certain of Ms. Robbins's
18 remarks on the record this afternoon suggest that the IBT will
19 never agree to any proposal that contains an outsourcing
20 possibility.
21 I believe that if the union is indeed taking such a
22 position against the debtor ever being able to outsource, that
23 position would be a rejection without good cause. Under the
24 debtor's last proposal, as set forth on the record this
25 afternoon, it is clear to me that outsourcing is a true last
resort -- to be implemented only if, in fact, the company is

1 unable to retain sufficient union members to do the job and
2 also is unable to fill, on a stopgap basis, the hole with
3 casual workers and local contract workers.
4 Therefore, it seems to me that the outsourcing
5 alternative contained in the debtor's proposal is a last resort
6 provided for simply to protect the company from not being able
7 to maintain its aircraft in a way that would sustain the
8 business.
9 So, to the extent that it is the union's position that
10 there never could be outsourcing, or that there could not be
11 outsourcing under this proposal, i.e., that that aspect of the
12 proposal, that fourth tier of protection to the company, is
13 rejected by the IBT, I would find that such a position is not
14 supported by good cause. The debtor needs the fallback
15 protection in case, notwithstanding a very reasonable process
16 designed to keep the jobs with the IBT and in the United
17 States, reasonable objective criteria show that aircraft are
18 not being maintained reliably on time.
19 As I believe I've already noted, in terms of the
20 requirement that all parties be treated fairly and equitably,
21 the debtor's proposal succeeds in light of the testimony and
22 evidence with regard to the other savings and sacrifices that
23 the debtor is obtaining from other constituents, not only in
24 the labor area, but across the board, as well as the debtor
25 having set aggressive goals for income generation.
There is a final aspect of the union's counterproposal

1 that I have not addressed yet, because my focus is primarily
2 upon the debtors's proposal, as it must be under 1113(c). That
3 is, in the last section of the IBT's counterproposal, which has
4 continued pretty much the same throughout the bargaining
5 process, the union has proposed a number of contingencies or
6 conditions to the effectiveness of any agreement between the
7 parties modifying the CBAs. (These provisions appear in
8 Paragraph H in the exhibit to Ms. Robbins's October 30th
9 letter.) Most of those conditions are best justified, if at
10 all, as trying to ensure that the union does not get
11 embarrassed by what other parties might succeed in negotiating
12 with the debtor in comparison with what the IBT has been asked
13 to agree to.
14 The case law, I believe, is clear that the debtor is
15 not bound to accept all the counterproposals of a union, but,
16 rather, simply to negotiate over them in good faith. It is
17 true, I believe, that there have not been meaningful
18 negotiations over this very aspect of the union's proposal
19 until today -- the parties having focused instead primarily on
20 the wrenching and novel issue of outsourcing and whether there
21 can be a workable alternative to it -- but I believe, as
22 evidenced by Mr. Huebner's remarks this afternoon, that the
23 debtor's approach to these proposed contingencies or conditions
24 requested by the IBT is valid and in good faith. Were the
25 union to go beyond that approach and insist upon conditions to
the effectiveness of the agreement that would, in essence,

1 unduly bind the debtor's ability to react to changed
2 circumstances or to preclude negotiations in good faith with
3 other parties within the range of cuts that I've talked about,
4 the IBT I think would be going too far.
5 So I do not believe that the company has dealt with
6 these last points in a way that is inconsistent with Section
7 1113(c); rather, its focus is on not unduly tying its hands in
8 light of the possibility of material changes to the
9 circumstances that it faces as well as not limiting its ability
10 to negotiate in good faith and equitably with other
11 constituencies. Consequently, I believe that it is not
12 appropriate for me to impose these conditions on the debtor,
13 beyond the general parameters under which Mr. Huebner outlined
14 the debtor's willingness to accept them, particularly where it
15 does not seem to me, in light of the other remaining IBT
16 objections to the debtor's proposal that I have discussed
17 above, that the IBT would actually agree to the debtor's
18 proposal if the debtor further agreed to these IBT-proposed
19 conditions or contingencies.
20 So, in light of the foregoing, and, in particular, in
21 light of the last proposal by the debtor, which was made on the
22 record at this hearing, and only consistent with the imposition
23 of that proposal, I would authorize the debtor to reject the
24 IBT agreements with the exception of the appearance agents'
25 collective bargaining agreement (which I understand the parties
still want to continue to negotiate).

1 My view is that it is still valuable to the debtor to
2 reach consensus with its union workers, and I would like the
3 debtor to continue to try to achieve that consensus, but, based
4 upon its last proposal, the debtor has, I believe, carried its
5 burden under Section 1113 to reject the IBT agreements and
6 implement its last three year the proposal as it pertains to
7 the IBT employees, with the exception of the appearance agents.
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
FRONTIER AIRLINES HOLDINGS, INC., et al.,	**Chapter 11 Case No. 08-11298 (RDD)**
Debtors.	**(Jointly Administered)**

STIPULATION AND CONSENT ORDER UNDER BANKRUPTCY RULE 9019 BETWEEN FRONTIER AIRLINES, INC. AND THE TEAMSTERS AIRLINE DIVISION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

WHEREAS, Frontier Airlines, Inc. ("**Frontier**") and the Teamsters Airline Division of the International Brotherhood of Teamsters (the "**IBT**") are parties to a collective bargaining agreement with the Aircraft Technicians, Ground Service Equipment Technicians and Tool Room Attendants ("**Mechanics**") dated July 27, 2005 to July 26, 2008 (the "**Maintenance Agreement**"); and a collective bargaining agreement with the Material Specialists ("**Material Specialists**") dated September 27, 2007 to September 26, 2011 (the "**Material Specialists Agreement**"); which agreements set forth the rates of pay, rules and working conditions for Frontier's Mechanics and Material Specialists (such agreements collectively, the "**CBAs**").

WHEREAS, on May 24, 2008, the IBT and Frontier entered into an Interim Restructuring Relief Agreement (the "**Interim Restructuring Relief Agreement**")

providing for temporary wage concessions from IBT-represented employees, which agreement expired on September 27, 2008;

WHEREAS, on September 12, 2008, Frontier filed a motion and related documents under 11 U.S.C. § 1113 seeking to reject the CBAs (the "**1113 Proceeding**"). Thereafter, *inter alia*, the IBT objected to the relief requested.

WHEREAS, hearings on the 1113 Proceeding commenced on October 3, 2008 and were continued on various dates thereafter.

WHEREAS, on November 14, 2008, this Court entered an order granting Frontier's motion for section 1113 relief (the "**1113 Order**").

WHEREAS, the IBT appealed the 1113 Order to the United States District Court for the Southern District of New York and, on July 20, 2009, the District Court vacated the 1113 Order and remanded the matter to this Court (the "**District Court Order**");

WHEREAS, Frontier appealed the District Court Order to the United States Court of Appeals for the Second Circuit and filed a motion for expedited appeal;

WHEREAS, on July 31, 2009, the Second Circuit granted Frontier's motion for expedited appeal and scheduled oral argument on the appeal for August 31, 2009;

WHEREAS, on August 6, 2009, after extensive arms'-length negotiations conducted by both principals and experienced counsel, Frontier and the IBT executed Letter of Agreement #09-01 to the CBAs, attached hereto as Exhibit A and incorporated herein by reference as if set forth herein ("**Letter of Agreement #09-01**"). Letter of Agreement #09-01, which was ratified by Frontier's Mechanics and Material Specialists on August 20, 2009, is intended to resolve the 1113 Proceeding in its entirety by providing for, among other amendments to the CBAs, long-term wage and benefit

reductions and a program through which IBT-represented workers can be placed on leave for periods during which certain heavy maintenance work is not required.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between Frontier and the IBT, and ordered by this Court, as follows:

1. The 1113 Proceeding is dismissed with prejudice, and Frontier has dismissed with prejudice its appeal filed in the United States Court of Appeals for the Second Circuit, Case No. 09-cv-00343-PKC.

2. Upon the Effective Date of Letter of Agreement #09-01, the IBT will have an allowed general non-priority unsecured claim under section 502 of the Bankruptcy Code in the amount of $7,102,488 (the "**IBT Claim**") that is not subject to reconsideration under section 502 of the Bankruptcy Code or otherwise, in respect of the concessions made by the IBT under this Agreement and the Interim Restructuring Relief Agreement. None of the IBT nor any of the Mechanics or Material Specialists or other employees that it represents nor any other party shall have any other claim or cause of action on account of Letter of Agreement #09-01 or the Interim Restructuring Relief Agreement. Any transfer of all or any part of the IBT Claim prior to Frontier's exit from bankruptcy may only be made in compliance with the Final Order Establishing Procedures and Approving Restrictions on Certain Transfers of Claims Against and Interests in the Debtors' Estates entered by this Court on June 3, 2008. IBT will have the sole authority and responsibility to determine the manner of allocation among its employees on account of the IBT Claim, including the allocation of any equity securities on account of the IBT Claim, provided that the allocation schedule or formula is delivered to Frontier no later than thirty (30) days prior to the date of distribution.

3. The Debtors have indicated that it is their present intention to assume the CBAs, as amended by Letter of Agreement #09-01, pursuant to the Debtors' Plan of Reorganization.

4. The settlement and compromise reflected in Letter of Agreement #09-01 and in this Stipulation and Order is in the best interest of the Debtors and their estates.

5. The 1113 Proceeding and Second Circuit appeal settled by Letter of Agreement #09-01 are (but for their resolution by Letter of Agreement #09-01 and this Stipulation and Order) exceedingly complex, with substantial expense, inconvenience and delay for the Debtors and their estates. Moreover, the settlement and compromise reflected in Letter of Agreement #09-01 and in this Stipulation and Order was extensively negotiated at arms'-length by competent and experienced counsel and is not the product of fraud or collusion.

6. Frontier's entry into Letter of Agreement #09-01 is hereby approved, and Frontier is authorized to perform under Letter of Agreement #09-01 and to take any and all actions that may be reasonably necessary or appropriate to perform all obligations contemplated thereunder.

7. Neither the entry of this Stipulation and Order nor Frontier's entry into Letter of Agreement #09-01 shall alter the order or priority of any claim under the Bankruptcy Code or convert any pre-petition or unsecured claim into a priority claim, secured claim, post-petition claim or administrative claim.

8. Notwithstanding the possible applicability of Bankruptcy Rules 7062, 9014 or otherwise, the terms and conditions of this Stipulation shall be immediately

effective and enforceable upon its entry. The Letter of Agreement #09-01 shall be effective as of August 20, 2009.

Dated: August 20, 2009

/s/Elliot Moskowitz
Elliot Moskowitz

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 450-6501

Counsel to the Debtors and Debtors in Possession

Dated: August 20, 2009

/s/ Marianne Goldstein Robbins
Marianne Goldstein Robbins

PREVIANT, GOLDBERG, UELMEN, GRATZ, MILLER & BRUEGGEMAN, S.C.
1555 North RiverCenter Dr. - Suite 202
P.O. Box 12993
Milwaukee, WI 53212

Counsel to Airline Division of the International Brotherhood of Teamsters

SO ORDERED:

/s/Robert .D. Drain
Hon. Robert D. Drain
United States Bankruptcy Judge

Dated: August 26, 2009
New York, New York

Letter of Agreement 09-01

Amendment of Maintenance Agreement and Material Specialists Agreement

August 6, 2009

The parties agree to amend certain terms of the Agreement between Frontier Airlines and the Teamsters Airline Division for Aircraft Technicians, Ground Service Equipment Technicians and Tool Room Attendants dated July 27, 2005 to July 26, 2008 (as extended by the Interim Agreement) (the "**Maintenance Agreement**"); and the Agreement between Frontier Airlines, Inc. and the Teamsters Airline Division for Material Specialists dated September 27, 2007 to September 26, 2011 (the "**Material Specialists Agreement**").

The parties agree to the following modifications to both the Maintenance Agreement and the Material Specialists Agreement (the "Amendment").

A. **C-Check Leave Program**

1 **Gap Periods**. C-Check "gap periods" are defined as any period of time, regardless of length, during which an aircraft is not available in Denver as projected by the most currently available AMES-generated schedule and/or where heavy maintenance related work is not required on an aircraft.

2. **System Re-Bid**. The parties agree to conduct an initial system re-bid to be completed no later than December 1, 2008 (the parties agree to follow the semi-annual re-bid process set forth in Article 10, §11 unless the parties agree in writing to conduct a more frequent system re-bid).

a. In the system re-bid, all system positions will be subject to bidding by seniority in accordance with the Collective Bargaining Agreement and General Maintenance Manual ("GMM").

b. The Company shall establish prior to the system re-bid the number of positions in shops not subject to C-Check gap periods by November 24, 2008. When referred to herein, "shops" shall be defined as Battery/Component, Sheet Metal, Composite, Paint, Machine, Welding and Upholstery.

c. After any system re-bid, a mechanic remaining in the C-Check bid area may not bump to Line Maintenance or shops during any gap period. However, if Line Maintenance or shops staffing falls below budgeted headcount and open vacancies are created in Line Maintenance or shops, any qualified mechanic may bid the position at that time.

d. Except for the initial re-bid and each semi-annual bid thereafter, no mechanic is eligible to bump another mechanic in the shops listed above or any other shop area as a result of the occurrence of a gap period in C-Check.

e. The Company agrees to provide by electronic mail/e-mail to each maintenance employee's Frontier e-mail address a notice of the first and last day of gap periods covered by

the C-Check Leave Program no earlier than forty-eight (48) hours prior to the particular gap period.

f. During the initial re-bid, and any bid thereafter, no mechanic is eligible to bump into the machine shop, welding shop, composite shop or the upholstery lead position without the Company's review and approval of the mechanics qualifications to ensure that the qualifications meet the standards set forth in the GMM (as the GMM is revised from time to time).

3. **C-Check Schedule**. The C-Check schedule, including all gap periods, shall be as established by the AMES Software generated by the Company. Employees who experience a loss of maintenance work, as a result of the occurrence of a gap period, will be eligible to participate in the C-Check Leave Program as well as be eligible for benefits as set forth in paragraph 5.

a. Beginning January 2009, the Company agrees to provide the Union, no later than the 15th day of the preceding month, a list of employees who will not have work in C-Check for any gap period(s) during the following month and the dates on which the employees must return to work in C-Check after the conclusion of a gap period(s). The Company will provide the list of employees for the December 2008 gap period as soon as practicable following the System Re-Bid under subsection 2 above.

b. The Company further agrees to post this notice next to the main time clock, and will also make copies available to employees in break areas. This notice will include the date or dates on which the gap period(s) begin and end.

c. The parties agree that these beginning and ending dates may be modified as the result of any updates to the AMES schedule or due to unforeseen circumstances.

d. The Company will provide the Union with notice of any changes in the AMES schedule within 48 hours of the Company having any reasonable knowledge of any changes.

4. **Notice of Intent to Return**. All employees affected by any gap period and who are on C-Check leave, shall notify the Company via voicemail to a dedicated call-in line of their intent to return to work in C-Check. This call-in process must be completed no later than five days and no more than eight days prior to the end of a gap period. Failure of any employee to call-in shall result in the termination of the employee's employment with the Company. Further, any failure to return to work at the end of any gap period shall result in the immediate termination of employment.

a. The Company shall retain recordings of voicemail messages left by returning mechanics for at least 45 calendar days from the last day of the end of a gap period.

b. Prior to the fifth day before the end of a gap period, the Company agrees to meet with the Union to verify the mechanics who have contacted the Company to state their intent to return from leave. A C-Check supervisor together with a union representative shall attempt to call at least two times any employee on leave from whom the Company has not received a voicemail

message to determine his intent to return from leave.

c. If an employee states his intent to return but is unable to return at the end of a gap period due to unforeseen circumstances (e.g., sick leave, FMLA leave, missed flight), the employee shall notify the Company of his/her absence. If an employee fails to immediately notify the Company of such absence, the employee shall be subject to disciplinary procedures as set forth in the Agreement.

d. During a C-Check event which shall be defined as "all non-routine C-Check intervals, all structural inspections and all 'bill of work' items associated with any heavy maintenance event", Line Mechanics who are on a day off may volunteer to work shifts on C-Check at straight time, unless the Company has not exceeded 4% overtime, in which case the Company must first offer the work as overtime to C-Check employees.

5. **C-Check Leave Benefits**. Mechanics placed on the C-Check Leave Program are not subject to the furlough and recall provisions of Article 9 or any related provisions of the Agreement. Mechanics who elect to participate in the C-Check Leave Program will be placed on a Leave of Absence with the following benefits:

a. Employees currently enrolled in the Company Medical Plan will retain their current medical benefits. Employees must continue to pay the employee contribution of the medical plan while on leave. Failure to do so could lead to discontinuation of their medical benefits. Medical Plan is defined as medical, dental, vision, life and health care flexible spending account coverage.

b. Employees will continue to accrue seniority while on the C-Check Leave Program.

c. Employees will retain accrued vacation and sick leave while on the C-Check Leave Program.

d. Employees will not accrue vacation or sick leave while on the C-Check Leave Program.

e. Employees have the option to use accrued vacation and perfect attendance day awards for pay purposes while on the C-Check Leave Program; however, employees may not use accrued sick leave even if the employee began sick leave before the beginning of any gap period.

f. Employees will continue to retain space available pass privileges on the Company route system in accordance with the Company Pass policy.

g. Employees will not have jump seat privileges while on the C-Check Leave Program.

h. Employees on the C-Check Leave Program shall be considered job-attached.

i. Employees returning to the Maintenance Department from the C-Check Leave Program shall receive an additional buddy pass for every 30 days on the C-Check Leave Program (30 days accumulative).

j. The parties shall treat hangar/C-Check as a hybrid bid area so as to enable the Company, in its discretion, to utilize C-Check employees to perform available work in line maintenance during any gap period.

k. The parties further agree not to schedule overtime shifts in advance of a gap period in Denver if any maintenance employees are on C-Check leave.

l. The Company may, in its discretion, in-source special projects which can be performed in Denver during gap periods provided that facilities, tooling/equipment are available. For the avoidance of doubt, the Company shall not be required to in-source any such projects.

B. Article 25: Wage Rates

1. Beginning October 31, 2008, the wage rates published in Section 1 shall be reduced by 10% and the following benefit reductions will apply:

a. No personal holiday for each year

b. Maintenance employees to select four holidays per year to give up (holiday not to be in a gap period)

c. Reduce accrual of vacation by 42 hours annually.

d. Employees at final step of wage scale as of November 22, 2008 shall receive a 1% annual cost of living adjustment on their anniversary date.

e. All "License Premium Rates" and all "Position Premium Rates" published in Section 2 shall be permanently reduced by 10%. The "Shift and Line Premium Rates" shall remain unchanged.

2. These concessions are equivalent to a 13.95% wage reduction.

3. Restoration of Wage Rates.

a. Commencing with the first paycheck following January 20, 2011and ending with the last paycheck before July 5, 2011, the reduction of Article 25, Section 1 wage rates for Maintenance Employees proposed in Section B.1 above shall decrease from a 10% reduction of CBA pay rates to a 7% reduction of CBA pay rates.

b. Commencing with the first paycheck following July 5, 2011 and ending with the last paycheck before January 20, 2012, the reduction of Article 25, Section 1 wage rates for Maintenance Employees proposed in Section B above shall decrease from a 7% reduction of CBA pay rates to a 4% reduction of CBA pay rates.

c. Commencing with the first paycheck following January 20, 2012, wage rates for all Maintenance Employees will be restored to the Hourly Rates as set forth in the CBA's.

d. All "License Premium Rates" and all "Position Premium Rates" published in Section 2 shall be restored at the same increments as wage rates described in 3.a. – c. above.

4. Restoration of Holiday Pay

a. Effective as of November 1, 2009, three (3) paid holidays will be restored for all eligible Maintenance Employees, subject to the terms of the Collective Bargaining Agreement.

b. Effective as of November 1, 2010, the remaining one (1) paid holiday will be restored for all eligible Maintenance Employees, subject to the terms of the Collective Bargaining Agreement.

c Effective as of November 1, 2010, the one (1) personal day will be restored for all eligible Maintenance Employees, subject to the terms of the Collective Bargaining Agreement. The parties further agree that, on a one-time only basis, Maintenance employees will be allowed up to and including December 31, 2011 in which to schedule and take their 2010 personal holiday. This one-time exception to the rule that personal days do not carry over from one calendar year to the next is being made because there would otherwise be insufficient time in 2010 in which personal days could be scheduled and taken by all Maintenance employees.

d. During the duration of any reduction in holidays for Maintenance Employees, the Union agrees that all employees must select for reduction holidays that are outside gap periods.

5. Restoration of Vacation Pay

a. Effective as of November 1, 2009, 25 hours of annual vacation accrual will be restored for all eligible Maintenance Employees, subject to the terms of the Collective Bargaining Agreement.

b. Effective as of November 1, 2010, the remaining 17 hours of annual vacation accrual will be restored for all eligible Maintenance Employees, subject to the terms of the Collective Bargaining Agreement.

C. <u>Moving Expenses if C-check Operation Relocated.</u>

In the event the Company relocates its C-check heavy maintenance operation (see paragraph A.4d defining C-check events) from DEN to a facility owned or controlled by Republic Air Holdings, or a subsidiary of Republic Air Holdings, the Company shall pay employees under the Material Specialist Agreement, who relocate to the new facility for the C-check operation $6,500 as moving expenses under Article 21.1 of the Material Specialist Agreement. For employees under the Maintenance Agreement, moving expenses to relocate to the new facility shall be paid per Article 21 of the Maintenance Agreement.

D. <u>Limited Waiver of Section 1113</u>

The Company agrees that during its currently pending chapter 11 cases, it will not seek

further relief under section 1113 of the Bankruptcy Code with respect to the Maintenance Agreement and the Material Specialists Agreement unless the Company's financial performance or liquidity materially deteriorate as compared to the amounts forecast in Business Plan 5.4a as defined in the June 22, 2009, Investment Agreement between Republic Airways Holdings, Inc. and Frontier Airlines Holdings, Inc, Frontier Airlines, Inc. and Lynx Aviation, Inc..

E. Unsecured Claim

Upon the Effective Date of this Agreement, IBT will have an allowed general non-priority unsecured claim under section 502 of the Bankruptcy Code in the Company's Bankruptcy Case in the amount of $7,102,488 (the "IBT Claim") that is not subject to reconsideration under section 502 of the Bankruptcy Code or otherwise, in respect of the concessions made by IBT under this Agreement and the Interim Restructuring Relief Agreement. None of IBT nor any of the Maintenance Employees that it represents nor any other party shall have any other claim or cause of action on account of this Agreement or the Interim Agreement. Any transfer of all or any part of the IBT Claim prior to the Company's exit from bankruptcy may only be made in compliance with the Final Order Establishing Procedures and Approving Restrictions on Certain Transfers of Claims Against and Interests in the Debtors' Estates entered by the Bankruptcy Court on June 3, 2008. IBT will have the sole authority and responsibility to determine the manner of allocation among Maintenance Employees on account of the IBT Claim, including the allocation of any equity securities on account of the IBT Claim, *provided* that the allocation schedule or formula is delivered to the Company no later than thirty (30) days prior to the date of distribution.

F. Term of Agreements

The parties agree that this amendment and all other existing terms of the Maintenance and Material Specialists Agreements as modified by this amendment shall be in effect from October 31, 2008 up to and including March 2, 2012, at which time they shall become amendable pursuant to the Railway Labor Act by notice of either party hereto at least ninety (90) calendar days prior to the date the parties may commence negotiations or a subsequent anniversary of such date, unless the parties agree otherwise.

G. Dismissal of Company Appeal

Upon ratification of this Agreement by the Maintenance Employee Group and the Material Specialist Employee Group, the Company shall dismiss with prejudice its appeal filed in the United States Court of Appeals for the Second Circuit, Case No. 09-cv-00343-PKC.

H. Communications

The IBT and the Company shall jointly agree on a press release announcing and describing this Amendment and, if ratified, the ratification thereof. Neither party will issue a press release or other public announcement, confirmation or statement that discusses the other party with respect to this Amendment or ratification process without the prior consent of the other party as to the content and timing of such press release or other public announcement, which approval may be granted or withheld in such party's sole discretion. With respect to this

Amendment and the ratification thereof, each party agrees not to make public comments, in writing or verbally, that expressly or impliedly disparage or defame the other party, or refer to the other party in a disdainful, scornful, irreverent, mean-spirited, or disrespectful manner. The Company consents to communications between the local unions, the IBT, and its members in the normal course of presenting this Amendment to the membership for explanation and ratification.

IN WITNESS WHEREOF, a duly authorized representative of each party hereby executes and delivers this Amendment as of the date first written above.

FRONTIER AIRLINES, INC.

By _____
Name: Chris Collins

Its: EVP and Chief Operating Officer

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

By _____
Name: Matthew Fazakas

Its: President and Principal Officer
Teamsters Local 961

RESPONSE TO POST-HEARING QUESTIONS FROM ARNOLD D. GENTILE, CAPTAIN, US AIRLINE PILOTS ASSOCIATION

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Protecting Employees in Airline Bankruptcies
December 16, 2009

Capt. Arnold Gentile, U.S. Airline Pilots Association

Questions from the Honorable Steve Cohen, Chairman

1. **If there are any additional points you wish to make—by way of elaborating upon your hearing testimony or responding to the testimony of other witnesses—please do so.**

Mr. Huebner made several points during the December 16th hearing that USAPA would like to clarify. On many occasions Mr. Huebner quoted a 90% failure rate for 185 bankruptcies filed from 1978 to 2009 to illustrate the dire needs of airline managements and the negative consequences of increased airline liquidations to both the Company and the employees.

Let's first address the 90% failure rate. After airline market de-regulation in 1978, many new under-capitalized entrepreneurs jumped into the aviation business. To be certain, the airline industry is very competitive, and in fact, scores of air operators such as Air Bahia, Tejas and Excellair did file for bankruptcy. However, when looking at major airlines back to 1978, there were 15 filed bankruptcies. All but three - in 32 years - have emerged as healthy operating carriers. Therefore a much different conclusion can be made.

USAPA would also like to address Mr. Huebner's stated concern for maintaining jobs for airline employees. He noted that if RLA covered airline employees were granted the right to negotiate in bankruptcy on a level field, which is under section 6 of the Railway Labor Act, many employees will have a 100% reduction in pay as their company liquidates. USAPA appreciates Mr. Huebner's concern for labor, but holds strongly to the belief that unions making up organized labor, are in the best position and most capable of protecting the interest of their members. Those purporting that airline managements should retain the current unabated power in the bankruptcy process so that employees will be protected and maintain their jobs are serving other interests at best and are hypocritical at worst.

Mr. Huebner stated that if every sympathetic party convinced congress to protect its contract with the debtor while inside bankruptcy, or convinces Congress to give its claim special priority; no company would ever survive bankruptcy.

USAPA believes that this statement leads to the heart of the debate. It is clear that through the actions of Congress and laws passed, it has already taken the position to differentiate collective bargaining agreements and pensions from other contracts. In fact, the intent of Bankruptcy Code 1113 was to create a healthy balance between management and labor as management restructures. The goals and intent of Congress however have proven to be illusory as the courts

have rendered Bankruptcy Code Section 1113 a hollow promise. The court's interpretation of bankruptcy laws and the 1113 process allows managements to choke employees and retirees and eliminates any incentive to engage in good faith bargaining as was intended.

Nowhere is this made more obvious than in the case between Northwest Airlines and the Association of Flight Attendants, decided by the US Court of Appeals For The Second Circuit, March 29, 2007. It was found by the Court: *1) Northwest's rejection of its CBA after obtaining court authorization to do so under 11 U.S.C. § 1113 abrogated (without breaching) the existing collective-bargaining agreement between the AFA and Northwest, which* ***[*170]*** *thereafter ceased to exist; (2) Northwest's abrogation of the CBA necessarily terminated the status quo created by that agreement, after which termination both the RLA's explicit status quo provisions and the implicit status quo requirement of Section 2 (First) ceased to apply; but (3) the AFA's proposed strike would, at present, violate the union's independent duty under the RLA to "exert every reasonable effort to make . . . [an] agreement[],"*

Questions from the Honorable Trent Franks, Ranking Member

1. **In Northwest's bankruptcy case in 2006, an airline expert testified that Northwest's total compensation per employee was 66% higher than low cost carriers' average employee compensation. How could Northwest (or any other airline) compete with low cost carriers, if Northwest, pre-bankruptcy, had to pay drastically higher employee compensation?**

A fair comparison of Northwest's labor costs cannot be made to LCCs, as one must compare companies that offer the same goods and services. Although Northwest competes domestically, Northwest and similar global flag carriers would naturally have higher labor costs than LCC's since their services include extensive long haul International global operations that have always paid a premium to employees operating those flights. There are no LCCs operating as US flag carriers. When comparing Northwest labor costs to the three other dominate Flag Carriers during the time period in question- American, United and Delta - Northwest's 2Q 2005 Labor CASM is only 16% higher (data based on Northwest submission to the court, 2005).

If Northwest Airlines was granted the rejection of their collective bargaining agreements based upon comparisons to LCCs, the financial health of the other US Flag Carriers would be in jeopardy, facilitating a race to the bottom; hardly the intent of US labor laws.

Further, mature work forces are a natural progression in any industry. As employees commit decades of service, they tend to earn more and acquire certain benefits above entry level employees at new corporations. The current solution to this issue in the airline industry is made available to managements under the law; allowing managements to use the bankruptcy process to slash wages (up to 60%) and terminate the pensions of their mature employees. In the airline industry, and only the airline industry, unions have nothing to temper management's demands.

2. **Is there more that unions can do to work with airlines before bankruptcy even becomes an issue to put in place collective bargaining agreements that make airlines more financially stable?**

USAPA understands the advantages when all parties contribute to their company's long term stability. Professional Airlines Pilots are unique in that they are married to their company as their relative seniority inside the company dictates their entire career, pay and working conditions. For example the average pilot at US Airways has worked for the Company 26 years; however in the last nine years, there have been seven CEO changes. The Pilot's goal is to work together with a management team that recognizes the company's true potential and values the contributions of its employees. This in itself provides a healthy, secure work place.

Union leaders and advisors can join with management at the table and reach agreement on important financial issues. There is always more that can be done by both parties, especially in areas of efficiency and safety, but it is most effective when accomplished in an environment of mutual trust and respect. The current imbalance inside the bankruptcy process actually works to deteriorate the environment making it nearly impossible to have collaborative efforts towards finding mutually agreed upon solutions. There simply is no incentive for management to engage in good faith bargaining.

This is the very reason why USAPA seeks to include language in Section 8 of the proposed 2007 Bankruptcy Bill - Rejection of Collective Bargaining Agreements. The goal is to create an environment that allows good faith negotiations and then building on cooperation that is so paramount to a long term successful restructuring.

3. **Knowing the severe cuts and underfunding that has occurred with defined-benefit pension plans, have any of your unions tried, at least for new employees, to make a switch to defined-contribution plans?**

USAPA has made a switch to a define-contribution plan although US Airways contributions are minimal as compared to the US Airways defined benefit plan.

3. **Much of the written testimony submitted by airline union witnesses for this hearing discusses problems with airline executive compensation, but besides limiting executive compensation, are there other costs that airlines are failing to cut that you believe they should be cutting before they turn to employee benefits?**

After a decade of scorch and burn, most of the cost cutting in the airline industry has already taken place. However, with improvements in labor relations there exists enormous potential in both cost and revenue. Airlines operate in a service industry, and although sometimes not quantifiable to a ledger, when employees pull together towards a common goal with a positive attitude and high morale, the company's road success is downhill.

Within the industry, it is easy to recognize the culture of the most successful airlines. Unfortunately, there are managements that focus on short term gains which cause different degrees of contention, particularly with long term employee groups such as pilots.

Whether in a thriving economy or in Bankruptcy Court proceedings, it is the collaboration of the parties that finds mutual solutions to secure long term financial stability. We ask the Members of Congress to create the necessary environment that permits this dialogue and assures the intent of Bankruptcy Code Section 1113.

Please see the suggested attached language as an example for allowing a collaborative environment in the bankruptcy process.

SEC. 8. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS.

11 U.S.C. § 365(a) is amended --
Except as provided in sections 765and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. Notwithstanding any provision in this section, with respect to a debtor covered by title I or title II of the Railway Labor Act, neither the court nor the trustee may change the wages, or working conditions of employees of the debtor established by a collective agreement that is subject to such Act except in accordance with section 6 of such Act.

Section 1113 of title 11, United States Code, is amended--

(1) by striking subsections (a) through (c) and inserting the following:

`(a) The debtor in possession, or the trustee if one has been appointed under this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may reject a collective bargaining agreement only in accordance with the provisions of this section. **Notwithstanding any provision in this section or any other section of U.S. Code Title 11, a debtor in possession or trustee of a debtor covered by title II of the Railway Labor Act may not assume or reject a collective agreement covered by such Act, and the wages or working conditions of employees covered by such collective agreement may only be changed or modified in accordance with section 6 of such Act.**

`(b)(1) Where a debtor in possession or trustee (hereinafter in this section referred to collectively as a `trustee') seeks rejection of a collective bargaining agreement, a motion seeking rejection shall not be filed unless the trustee has first met with the authorized representative (at reasonable times and for a reasonable period in light of the complexity of the case) to confer in good faith in attempting to reach mutually acceptable modifications of such agreement. Proposals by the trustee to modify the agreement shall be limited to modifications to the agreement that--

`(A) are designed to achieve a total aggregate financial contribution for the affected labor group for a period not to exceed 2 years after the effective date of the plan **after which time the pre-existing terms of the collective bargaining agreement shall be reinstated;**

`(B) shall be no more than the minimal savings necessary to permit the debtor to exit bankruptcy, such that confirmation of such plan is not likely to be followed by the liquidation of the debtor or any successor to the debtor; and

`(C) shall not overly burden the affected labor group, either in the amount of the savings sought from such group or the nature of the modifications, when compared to other constituent groups expected to maintain ongoing relationships with the debtor, including management personnel.

`(2) Proposals by the trustee under paragraph (1) shall be based upon the most complete and reliable information available. Information that is relevant for the negotiations shall be provided to the authorized representative.

`(c)(1) If, after a period of negotiations, the debtor and the authorized representative have not reached agreement over mutually satisfactory modifications and the parties are at an impasse, the debtor may file a motion seeking rejection of the collective bargaining agreement after notice and a hearing held pursuant to subsection (d). The court may grant a motion to reject a collective bargaining agreement only if the court finds that--

`(A) the debtor has, prior to such hearing, complied with the requirements of subsection (b) and has conferred in good faith with the authorized representative regarding such proposed modifications, and the parties were at an impasse;

`(B) the court has considered alternative proposals by the authorized representative and has determined that such proposals do not meet the requirements of subparagraphs (A) and (B) of subsection (b)(1);

`(C) further negotiations are not likely to produce a mutually satisfactory agreement; and

`(D) the court has considered--

`(i) the effect of the proposed financial relief on the affected labor group;

`(ii) the ability of the debtor to retain an experienced and qualified workforce; and

`(iii) the effect of a strike in the event of rejection of the collective bargaining agreement.

`(2) In reaching a decision under this subsection regarding whether modifications proposed by the debtor and the total aggregate savings meet the requirements of subsection (b), the court shall take into account--

`(A) the ongoing impact on the debtor of the debtor's relationship with all subsidiaries and affiliates, regardless of whether any such subsidiary or affiliate is domestic or

nondomestic, or whether any such subsidiary or affiliate is a debtor entity; and

`(B) whether the authorized representative agreed to provide financial relief to the debtor within the 24-month period prior to the date of the commencement of the case, and if so, shall consider the total value of such relief in evaluating the debtor's proposed modifications.

`(3) In reaching a decision under this subsection, where a debtor has implemented a program of incentive pay, bonuses, or other financial returns for insiders or senior management personnel during the bankruptcy, or has implemented such a program within 180 days before the date of the commencement of the case, the court shall presume that the debtor has failed to satisfy the requirements of subsection (b)(1)(C).';

(2) in subsection (d)--

(A) by striking `(d)' and all that follows through paragraph (2) and inserting the following:

`(d)(1) Upon the filing of a motion for rejection of a collective bargaining agreement, the court shall schedule a hearing to be held on not less than 21 days notice (unless the debtor and the authorized representative agree to a shorter time). Only the debtor and the authorized representative may appear and be heard at such hearing.'; and

(B) by redesignating paragraph (3) as paragraph (2);

(3) in subsection (f), by adding at the end the following: `Any payment required to be made under this section before the date on which a plan confirmed under section 1129 is effective has the status of an allowed administrative expense, as provided in section 503.'; and

(4) by adding at the end the following:

`(g) The rejection of a collective bargaining agreement constitutes a breach of such contract with the same effect as rejection of an executory contract pursuant to section 365(g). No claim for rejection damages shall be limited by section 502(b)(7). Economic self-help by an authorized representative shall be permitted upon a court order granting a motion to reject a collective bargaining agreement under subsection (c) or court-authorized interim changes under subsection (e), and no provision of this title or of any other Federal or State law shall be construed to the contrary.

`(h) At any time after the date on which an order is entered authorizing rejection, or where an agreement providing mutually satisfactory modifications has been entered into between the debtor and the authorized representative, at any time after such agreement has been entered into, the authorized representative may apply to

the court for an order seeking an increase in the level of wages or benefits, or relief from working conditions, based upon changed circumstances. The court shall grant the request so long as the increase or other relief is consistent with the standard set forth in subsection (b)(1)(B).

`(i) Upon request by the authorized representative, and where the court finds that the prospects for reaching a mutually satisfactory agreement would be aided by granting the request, the court may direct that a dispute under subsection (c) be heard and determined by a neutral panel of experienced labor arbitrators in lieu of a court proceeding under subsection (d). The decision of such panel shall have the same effect as a decision by the court. The court's decision directing the appointment of a neutral panel is not subject to appeal.

`(j) Upon request by the authorized representative, the debtor shall provide for the reasonable fees and costs incurred by the authorized representative under this section, after notice and a hearing.

`(k) If a plan to be confirmed under section 1129 provides for the liquidation of the debtor, whether by sale or cessation of all or part of the business, the trustee and the authorized representative shall confer regarding the effects of such liquidation on the affected labor group, in accordance with applicable nonbankruptcy law, and shall provide for the payment of all accrued obligations not assumed as part of a sale transaction, and for such other terms as may be agreed upon, in order to ensure an orderly transfer of assets or cessation of the business. Any such payments shall have the status of allowed administrative expenses under section 503.

`(l) A collective bargaining agreement that is assumed shall be assumed in accordance with section 365.'.

RESPONSE TO POST-HEARING QUESTIONS FROM ROBERT COFFMAN, CAPTAIN, DIRECTOR OF GOVERNMENT AFFAIRS, COALITION OF AIRLINE PILOTS ASSOCIATIONS

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Protecting Employees in Airline Bankruptcies
December 16, 2009

Capt. Bob Coffman, The Coalition of Airline Pilots Associations

Thank you for the opportunity to respond to these important questions. I welcome any follow on discussions and questions.

Questions from the Honorable Trent Franks, Ranking Member

1. **In Northwest's bankruptcy case in 2006, an airline expert testified that Northwest's total compensation per employee was 66% higher than low cost carriers' average employee compensation. How could Northwest (or any other airline) compete with low cost carriers, if Northwest, pre-bankruptcy, had to pay drastically higher employee compensation?**

Response: The Coalition of Airline Pilots Associations (CAPA) has both the pilots of American Airlines (represented by the Allied Pilots Association), a "legacy" carrier, and the pilots of Southwest Airlines (represented by the SouthWest Airline Pilots Association) the most successful of the "low cost carriers" (LCC's). A comparison of AA with SW is frequently cited to gain an insight into the difference in business models that answers this question. The following excerpts were provided by the Allied Pilots Association:

> *Noting that matching SWA cost "would be far too traumatic", effecting our advantage over SWA of revenue from premium passengers. The Flagship[1] actually states that AA needs to cut 4.0 billion to be competitive, saying that AMR had already cut $2.0 billion(Feb 2003).*

> *Today according to the Bev Goulet Wall Street[2] brief, Dec 2009, AMR annual cost cutting since before the concessions of 2003: $1.8 billion(employee concessions) + $4.2 billion(non-labor costs cut) = $6.0 billion.*

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[1] Flagship News, Vol 59, No 2, February 2003
[2] Beverly Goulet, AMR Vice President of Corporate Development and Treasurer, slide presentation NextGen Conference, Dec 2009

PILOT Costs:

Using SWA as LCC comparison today: (SWA Pilots are the highest paid passenger carrying pilots in the industry)

Today SWA pilots hourly pay rates are up to 27% higher than AA hourly pay rates and will reach up to 34% higher by 2011. In 2008, the latest full year DOT data available, SWA Pilot Salary Cost per

Available Seat Mile (Pilot Salary CASM) was 30% HIGHER than AA Pilot Salary CASM.

So at least in the SWA comparison, AMR management has admitted that it has reached a cost competitive position with SWA, balanced against AA premium passenger/network carrier desires and capabilities AND on a Pilot Salary CASM is 30% less costly than SWA.

To summarize, if a legacy carrier is offering a product that can not be differentiated from the LCC, than quite simply, costs should be comparable. That being said, the normal progression of the Railway Labor Act contemplates the capability to negotiate and eventually force such an evolution. The use of Ch 11 to circumvent the RLA process is what is called into question. Many would argue, and some testimony opined, that the RLA process would take too long and be too cumbersome to effect the magnitude change being sought. However, the RLA contains a mandatory Federal oversight of that process, through the National Mediation Board, with broad discretionary powers to assure the process is not excessively lengthy. From a public policy standpoint, it must be pointed out that typically LCC's are relatively young companies with employees who are on the bottom rungs of longevity based increasing pay scales. Salaries that increase with longevity and experience is a norm of many industries and government. The Ch 11 process has been used and may well continue to be used to "align" legacy costs with LCC costs, assuring that the 20 year plus veterans of the airline industry are periodically returned to first year pay. This is not the formula to attract the brightest and the best to the cockpits of US airliners.

2. Is there more that unions can do to work with airlines before bankruptcy even becomes an issue to put in place collective bargaining agreements that make airlines more financially stable?

Response: Both unions and management have and should utilize the tools available to them to have in place the collective bargaining agreement that meets their respective and mutual needs. Under the Railway Labor Act, negotiations to arrive at such agreements may be initiated by mutual consent of the parties at

any time. It is the current ease with which the Ch 11 process can be availed by airline managements to circumvent the RLA negotiation process that has negatively impacted the proclivity to enter those negotiations.

3. Knowing the severe cuts and underfunding that has occurred with defined-benefit pension plans, have any of your unions tried, at least for new employees, to make a switch to defined-contribution plans?

Response:

Certainly there is a shift away from traditional defined benefit (DB) plans to defined contribution (DC) plans (typically 401(k) plans). The Pension Committee and consultants of the Allied Pilots Association have studied this issue carefully. They have concluded that while DB plans do carry certain risks, when all the relevant factors are carefully weighed, that it is in the best interests of that pilot group to retain their DB plan.

This evaluation resulted in such a strongly held belief that defined benefit plans held significant advantages over defined contribution plans that both the APA and American Airlines management successfully lobbied the 109th Congress for successful passage of the Pension Protection Act of 2006, to assure the regulatory and fiscal viability of such plans for the foreseeable future.

A few notes on DB plans:

- Numerous studies have highlighted the inherent advantages of DB plans – it is unquestioned that they deliver a greater benefit at a lower cost.
- A DB plan shoulders both the investment and the longevity risk, in most DC plans the participant bears both these risks.
- Participant directed accounts (such as found in 401(k) plans) typically underperform the market by a significant amount, while paying higher fees.
- 401(k) plans were never intended to be a complete retirement vehicle, and there is concern within the financial planning industry about retirees from DC plans outliving their savings. The commercial annuities now available to DC plan participants are far more expensive than an annuity from a DB plan.

4. Much of the written testimony submitted by airline union witnesses for this hearing discusses problems with airline executive compensation, but besides limiting

executive compensation, are there other costs that airlines are failing to cut that you believe they should be cutting before they turn to employee benefits?

Response: Certainly an evaluation of the business model is in order that allowed the situation to deteriorate to such financial distress as to require a bankruptcy filing. One of the areas of concern is the current cost of capital, with viable airlines paying double digit interest rates on short term corporate securities issued in 2009. Additionally, the often repeated concerns about the predictability of fuel costs certainly drives both direct expenses and those monies used try to stabilize that cost (hedges) weighs heavily in the evaluation of financial viability.

RESPONSE TO POST-HEARING QUESTIONS FROM MARSHALL S. HUEBNER, PARTNER, DAVIS POLK & WARDWELL, LLP

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Protecting Employees in Airline Bankruptcies
December 16, 2009

Marshall S. Huebner, Davis Polk & Wardwell LLP

Questions from the Honorable Steve Cohen, Chairman

1. **If there are any additional points you wish to make—by way of elaborating upon your hearing testimony or responding to the testimony of other witnesses—please do so.**

Questions from the Honorable Trent Franks, Ranking Member

1. **Other witnesses have suggested that Congress should extend section 1167 to cover airline bankruptcies. Could you explain why such a change to the Bankruptcy Code would make it more or less likely that airlines could successfully reorganize in bankruptcy?**

   I believe that amending the Bankruptcy Code to apply section 1167 to airline bankruptcies would make it less likely that airlines could successfully reorganize in chapter 11. Under section 1113, debtors already face extremely demanding procedural and substantive hurdles to adjusting collective bargaining agreements that they can no longer afford. As noted in my testimony, the liquidation rate of airline bankruptcies stands at approximately 90%, even with section 1113 in its current form. Moreover, lifting but a single section from the complex and integrated railroad reorganization provisions has little to recommend it.

2. **From your experience as a bankruptcy practitioner and as counsel to Delta Air Lines and Frontier Airlines, do you believe that airlines are willingly filing for bankruptcy to, in a sense, game the system into allowing them to reject collective bargaining agreements?**

   Absolutely not. A bankruptcy filing represents tremendous risk, cost, pain and sacrifice for virtually all of the company's constituencies and for the company itself. No company *wants* to file for bankruptcy (which many don't survive). Delta, for example, worked around the clock and consummated a series of transactions that enabled it to avoid a chapter 11 filing in 2004. Frontier filed only because its credit card processor sent a letter under which it stated that it was about to change the terms of Frontier's processing contract in ways that Frontier could not have survived.

3. **In general, when an airline enters bankruptcy what costs and debts are available for restructuring that will actually represent a significant savings to the airline? Are labor costs prominent among these costs?**

Restructuring an airline to return it to viability is an elaborate and multi-faceted undertaking. Cost savings are often obtained from multiple sources, including equitizing debt, restructuring operations (including the fleet), renegotiating contracts whenever possible, and lowering costs of both unionized and non-unionized employees. Some costs (for example fuel and other commodities) often cannot be adjusted. While labor costs can be prominent among these cost savings, they are only part of the equation.

4. Section 1113 lays out a specific process for rejecting collective bargaining agreements. What happens to non-union employees in bankruptcy? Are they given less process than union employees?

Yes, non-union employees in bankruptcy are given less process (none, in fact) and materially less protection than union employees. Indeed, most non-union employees in bankruptcy can be terminated or have their wages (and many benefits) changed in the company's sole and absolute discretion.

5. In your experience, do debtors always gain immediate court approval when they submit a motion under section 1113 to reject a collective bargaining agreement?

No. In fact, due to the strict requirements of section 1113, many courts deny debtors' requests for relief, or grant relief only after extended proceedings and substantial additional negotiation. In footnote 1 of my written statement, I noted that, in testimony before this Subcommittee last year, Michael Bernstein cited several cases in which the bankruptcy court rejected the debtor's request for section 1113 relief. Those cases are: *In re Delta Air Lines (Comair),* 342 B.R. 685 (Bankr. S.D.N.Y. 2006) (debtor failed to confer in good faith); *In re Nat'l Forge Co.,* 279 B.R. 493 (Bankr. W.D. Pa. 2002) (debtor did not meet its burden of proving that the proposed modifications were fair and equitable); *In re U.S. Truck Co.,* 165 L.R.R.M. (BNA) 2521 (Bankr. E.D. Mich. 2000) (debtor failed to meet its burdens of proving the proposal to be necessary, fair and equitable); *In re Jefley, Inc.,* 219 B.R. 88 (Bankr. E.D. Pa. 1998) (court concluded "that the proposal, as presented, is not 'necessary' to the Debtor's reorganization; [and] does not treat the union workers 'fairly and equitably'"); *In re Liberty Cab & Limousine Co.,* 194 B.R. 770 (Bankr. E.D. Pa. 1996) (debtor's proposal was not fair and equitable); *In re Lady H Coal Co.,* 193 B.R. 233 (Bankr. S.D. W. Va. 1996) (debtor failed to treat all parties fairly and equitably and did not bargain in good faith); *In re Schauer Mfg. Corp.,* 145 B.R. 32 (Bankr. S.D. Ohio 1992) (debtor "has failed to show that the Proposal which it made to the Union makes 'necessary modifications . . . that are necessary to permit the reorganization of the debtor . . . .'"); *In re Sun Glo Coal Co.,* 144 B.R. 58 (Bankr. E.D. Ky. 1992) ("the debtors have failed to sufficiently quantify the results of such proposed changes to allow this Court to find that they are 'necessary' to the reorganization of the debtors.").

6. In Mr. Roach's written testimony he discusses the amount of compensation some airline executives have received. Leaving aside the questions of whether the amounts of executive compensation discussed by Mr. Roach were justified,

equitable, or even a good idea—as a general proposition, would decreasing the amount of executive compensation give an airline anywhere close to the cost savings that reducing employee and retiree benefits represent?

The answer to this question depends on the relative management, employee and retiree costs incurred or promised by the airline prior to the bankruptcy filing. In the majority of airline bankruptcy cases, the aggregate cost savings realized by restructuring collective bargaining agreements greatly exceeds the savings realized from restructuring management compensation. However, this disparity is more likely the result of the great difference in numbers of employees in each category. That said, fairness and equity are critical in this area – which is why my original testimony provides concrete suggestions that would better ensure fairness to all.

RESPONSE TO POST-HEARING QUESTIONS FROM ROBERT ROACH, JR., GENERAL VICE PRESIDENT OF TRANSPORTATION, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on Protecting Employees in Airline Bankruptcies
December 16, 2009

Robert Roach, Jr., International Association of Machinists and Aerospace Workers

Questions from the Honorable Steve Cohen, Chairman

1. **If there are any additional points you wish to make—by way of elaborating upon your hearing testimony or responding to the testimony of other witnesses—please do so.**

   Bankruptcy is not an airline industry-only problem. The IAM has members in a wide variety of industries, including auto, paper and manufacturing, who have been severely impacted by corporate bankruptcies in the past several years. Bankruptcy reform must be comprehensive and include all private sector industries. Comprehensive reform legislation that addresses the legitimate interests of affected employees throughout the private sector is the fairest approach, and one that will generate the most support from Congress and the labor movement.

   As I noted in my prepared remarks, overly generous management compensation programs and bonuses continue to be proposed and accepted by bankruptcy courts in cases across all sectors of the economy. Reforms that would sharply curtail management bonuses and other such programs are a part of needed changes to protect workers' and retirees' interests so that our bankruptcy system does not continue to be a haven for management excess at the expense of rank and file employees and retirees.

Questions from the Honorable Trent Franks, Ranking Member

1. **In Northwest's bankruptcy case in 2006, an airline expert testified that Northwest's total compensation per employee was 66% higher than low cost carriers' average employee compensation. How could Northwest (or any other airline) compete with low cost carriers, if Northwest, pre-bankruptcy, had to pay drastically higher employee compensation?**

   The Machinists Union represents workers at many airlines, including low-cost leader Southwest Airlines. In 2006 IAM-represented Customer Service Agents (CSAs) at Southwest Airlines made a top wage rate of $24.35 per hour. In contrast, IAM CSAs at Northwest Airlines made only $20.73 per hour at that time. CSAs at the most successful low-fare, low-cost airline earned 17.5% more than their counterparts at Northwest. Since then, the wages of Northwest workers were reduced as a result of bankruptcy while the

wages of Southwest CSAs have increased through IAM negotiations with the carrier. The same is true for other employees groups at Southwest, almost all of which are unionized. Southwest employees' benefits also lead the industry.

Some other low-cost carriers may pay employees less, but that is generally because those carriers themselves are young and their employees have yet to progress through the upper levels of their pay scales and their pension costs have not accrued.

2. **Is there more that unions can do to work with airlines before bankruptcy even becomes an issue to put in place collective bargaining agreements that make airlines more financially stable?**

There have been 185 airline bankruptcies since the deregulation of the industry. IAM collective bargaining agreements are not the reason any airline has ever entered bankruptcy. Regardless, when airlines have demonstrated true need, the IAM has worked with them to try and avoid bankruptcy. For example, IAM collective bargaining agreements were modified just a few months before United's bankruptcy to lower wages and allow the airline the flexibility it said it needed to avoid bankruptcy. The airline entered bankruptcy anyway. Similar negotiations took place before bankruptcies at TWA and US Airways.

The IAM is not in the business of putting companies out of business. We understand that if companies fail, our member will be out of work. We are not about to kill the goose that laid the golden egg.

3. **Knowing the severe cuts and underfunding that has occurred with defined-benefit pension plans, have any of your unions tried, at least for new employees, to make a switch to defined-contribution plans?**

The IAM has been very proactive in trying to preserve pension benefits for airline employees. As one example, the IAM approached United Airlines in 2000 and advised the airline that our analysis showed their company-sponsored pension plan was headed for an underfunding nightmare. We also proposed a solution – freeze the company-sponsored pension plan and transition our members into the IAM National Pension Plan (IAM NPP), a multi-employer pension plan that is much less susceptible to the financial fluctuations of a single company or the struggling airline industry. United Airlines rejected the IAM's overtures, which eventually led to our members' pension plan being terminated in bankruptcy in 2005 and ultimately being administered by the PBGC.

Because of the IAM's efforts, our United members today have the secure IAM NPP, but if United had accepted our proposed pension change in 2000, instead of during bankruptcy in 2005, our members would not have endured the losses incurred when the plan was taken over by the PBGC. Just as important, the PBGC would not have had to terminate the company-sponsored plans and assume their massive liabilities.

With respect to funding, the IAM NPP acts like a defined-contribution plan in that it requires employers to make a negotiated monthly contribution to the Plan on behalf of employees, but the NPP's benefits are known and insured by the PBGC. A 401(k) plan provides no known or guaranteed benefit, and employees' retirement benefits are vulnerable to each individual's investment ability and to market fluctuation and volatility. Our members who have endured bankruptcies at United, US Airways and Northwest Airlines today have the stability of the IAM NPP in addition to a 401(k) defined contribution plan.

3. **Much of the written testimony submitted by airline union witnesses for this hearing discusses problems with airline executive compensation, but besides limiting executive compensation, are there other costs that airlines are failing to cut that you believe they should be cutting before they turn to employee benefits?**

   Airlines should bring work that has been outsourced here and overseas (such as maintenance and call center work) back under their direct control which would lower costs, improve safety and provide for a more efficient operation. In the case of overseas outsourcing, bringing work back in-house would also have the added bonus of employing American workers.

Questions from the Honorable Zoe Lofgren

1. **I understand you support comprehensive bankruptcy reform such as the bill Mr. Conyers introduced in the last Congress. The independent airline pilot associations here today are advocating a simple fix that would protect employees in airline bankruptcies. What do you think is the best approach to help union employees both in the airline industry and in other economic sectors?**

   There is no simple fix to the complex problem of bankruptcy reform. As noted in my hearing testimony, airline employees are not alone in the hardships employees have had to bear as a result of their employers' bankruptcy cases. Many non-airline industries have made use of the same bankruptcy remedies used by the airlines to cause steep reductions in employees' pay and benefits, eliminate jobs and discontinue pension plan funding and retiree health benefits. In addition, the need for bankruptcy law reform in the airline and other industries goes beyond the requirement for additional protections for collective bargaining agreements.

   IAM has actively participated on behalf of IAM-represented employees (and retirees) in many bankruptcy cases outside the airline industry in which employers have sought to reject labor agreements under section 1113, terminate retiree health benefits under section 1114, and eliminate their pension funding obligations. Reform that addresses only the airline sector will leave millions of workers in the auto, paper, steel and other industrial and manufacturing sectors, to name but a few, without effective protection in cases where labor agreements are covered by the National Labor Relations Act rather than the Railway Labor Act (which governs airline employees).

Mr. Conyers' bill introduced in the last Congress, H.R. 3652, proposed a comprehensive set of reforms (including protections for labor agreements) which were intended to improve employees' recoveries and limit their losses in employer bankruptcies in all industries. This bill would provide protections comprehensively to private sector employees, and is not limited to the airline sector. A number of these reforms also would benefit employees who are not represented by a labor organization. For example, among other changes, H.R. 3652 would increase the wage priority, improve the treatment of severance pay in bankruptcy, add recoveries for defined benefit and defined contributions pension plan losses, and promote bankruptcy asset sales that protect jobs and benefits.

The comprehensive scope of H.R. 3652 recognizes that protections for employees and retirees have not been meaningfully addressed in bankruptcy legislation for over twenty years, a period during which businesses have increasingly used bankruptcy as a way to avoid fair collective bargaining to address complex business and financial problems. As corporate abuses of bankruptcy have grown, a wide range of protections for employees and retirees has become increasingly urgent. Comprehensive legislation is needed not only to protect labor agreements but also to address many other inadequacies that have grown more acute as bankruptcy has become an accepted business tool against legitimate employee interests.

RESPONSE TO POST-HEARING QUESTIONS FROM STEPHEN NAGROTSKY, DEPUTY DIRECTOR, AIRLINE DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Questions from the Honorable Steve Cohen, Chairman

1. If there are any additional points you wish to make – by way of elaborating upon your hearing testimony or responding to the testimony of other witnesses – please do so.

I wish to thank the Honorable Representative Steve Cohen, Chairman on Commercial and Administrative Law for inviting me to testify at the hearing convened by the Subcommittee on December 16, 2009. I appreciated the opportunity to present the views of the Airline Division of the International Brotherhood of Teamsters, which represents more than 50,000 workers, including pilots, flight attendants, mechanics, fleet service employees, customer service employees and other groups. In terms of additional comments, I would only wish to add that the need to reform the bankruptcy law to make it more fair to airline employees is undiminished. Airline bankruptcies have destroyed the pensions and retirement security of tens of thousands of loyal employees, has lead to drastic cuts in the standard of living of airline employees, and has resulted in a wave of outsourcing that harms Americans. The Airline Division urges the members of the Subcommittee to act with all due haste to correct the imbalance that has been created.

Questions from the Honorable Trent Franks, Ranking Member

1. In Northwest's bankruptcy case in 2006, an airline expert testified that Northwest's total compensation per employee was 66% higher than low cost carriers' average employee compensation. How could Northwest (or any other airline) compete with low cost carriers, if Northwest, pre-bankruptcy, had to pay drastically higher employee compensation?

I am not familiar with the figure Northwest Airline's expert quoted, although it seems to us that that the estimate of the difference between compensation levels at legacy and low-cost carriers is high. Much depends on how one defines low-cost carriers: do they include relatively well-established and well-paying carriers like AirTran and Southwest? Does it include express carriers?

Clearly, however, there are differences in compensation levels between low-cost carriers and legacy carriers. This does not necessitate a race to the bottom. Low-cost carriers are able to pay employees much less than their legacy rivals because they have far newer workforces who have not established seniority and are younger on average. Given time, of course, new and young workforces acquire seniority and age, increasing compensation costs and equalizing the playing field on the cost side.

But it also must be remembered that low-cost carriers and legacy carriers are competing with different products and operating structures. Low-cost carriers generally operate point-to-point networks, offer fewer choices in terms of aircraft types, schedules and accommodations and thus require fewer employees per available seat mile, which are all factors that allow them to lower cost. In contrast, legacy carriers with hub-and-spoke networks have an

advantage in attracting business travel and higher load factors. Their international lanes allow legacy carriers to increase the average flight length, further enhancing revenue. Legacy carriers often can do better in high-demand environments where they are better able to exploit opportunities to increase their load factors and revenue per passenger mile. Legacy carriers continue to exist and in some cases to thrive for a reason and it is not the case that, to survive, legacy carriers must reduce employee cost to the artificial levels of low-cost carriers. Legacy carriers are well-positioned to compete on the revenue side of the equation, and our members are an essential part of the advantage they offer.

2. Is there more that unions can do to work with airlines before bankruptcy even becomes an issue to put in place collective bargaining agreements that make airlines more financially stable?

Union members thrive when their employers thrive, and do poorly when employers do poorly. It is very much in our interests to make sure our employers are on sound financial footing. At the Teamsters, our mechanics and pilots are focused on suggesting and implementing safety improvements which ultimately benefit carriers, the flying public and our members. We are also focused on improvements to efficiency that benefit both our members and carriers – for example, our mechanics are frequently looking for ways to bring in aircraft repair work that can be accomplished more economically by our members. For example, at United Airlines, the carrier and union agreed to bring back in house work for Teamsters mechanics to add winglets to aircraft, which we could perform more economically than outside vendors. At Continental, the company "insourced" the addition of Direct TV units to aircraft, giving that work to our mechanics and preserving jobs in the process.

3. Knowing the severe cuts and underfunding that has occurred with defined-benefit pension plans, have any of your unions tried, at least for new employees, to make a switch to defined-contribution plans?

The destruction of many defined benefit plans is one of the worst legacies of the airline bankruptcies the industry has suffered through in recent years. It has imposed a terrible toll on airline employees, who saw the benefits and security they were promised and worked hard for vanish overnight. And it left the PGBC with the bulk of the enormous liabilities that entity – and ultimately the taxpayers – faces. In many cases, defined contribution plans have been implemented after defined benefit plans have been terminated in bankruptcy or otherwise frozen. But it is the view of the Teamsters Airline Division that prudently-funded and –managed defined benefit plans provide employees with far better protection for retirement than do defined contribution plans. The basic purpose of a retirement system is to provide a secure and predictable level of income for former employees after retirement. Defined benefit plans do this, but DC plans do not. No one knows how long they will live to enjoy their retirement, and it is frequently difficult to know what income levels will sustain an individual through the arc of their retirement years. Individuals with DB plans can know their income levels throughout their lifetimes and plan accordingly. Individuals with DC plans cannot, and those who were unable to make substantial contributions, or who fare poorly investing their funds, may well outlive their retirement savings.

4. Much of the written testimony submitted by airline union witnesses for this hearing discusses problems with airline executive compensation, but besides limiting

executive compensation, are they other cost that airlines are failing to cut that you believe they should turn to before they turn to employee benefits?

It is difficult to identify where airlines as a whole should make cuts before turning to employees for savings. As a general matter, however, carriers should recognize that, in most cases, their employees have suffered through years of drastic cuts and diminished career expectations, and should be obligated to look to improve efficiencies or develop cost-cutting strategies in all other areas before turning to employees for additional sacrifices.

Questions from the Honorable Judy Chu

1. As you know Chairman Conyers intends to reintroduce the Protecting Employees and Retirees in Business Bankruptcies Act from the last Congress. This bill has the virtue of protecting employees across all our economic sectors, but does not include the precise change to the bankruptcy laws you are supporting today. Do you believe the bill, as it was introduced last year, adequately protects airline employees?

With all due respect, the Protecting Employees and Retires in Business Bankruptcies Act is not presently adequate to protect airline employees. As the IBT has argued consistently, and as the bill recognizes in regard to rail employees, employees covered by the Railway Labor Act are in a special circumstance when it comes to bankruptcy. The Bankruptcy Code has recognized the "delicate balance" that exists in railroad labor relations but has failed to do so in the analogous airline context. Both industries are covered by the RLA, both are subject to the same conditions and negotiating process, and yet only railroads are exempt from 1113. Allowing airlines in bankruptcy to avoid the Railway Labor process – rail carriers must adhere to it – creates an unstable imbalance between carriers and their employees. There is also some court precedent holding the RLA-covered employees – unlike NLRA – covered employees – may strike if their collective bargain is voided during bankruptcy. While no-one wants to strike a company undergoing bankruptcy, the threat of unbalanced economic options available to carriers and labor in the present RLA context actually hinders the parties from finding a mutually agreeable solution. The only way to address the present unbalance, in our view, is to treat all RLA-covered carriers and employees in the same manner in the bankruptcy context. While the Protecting Employees and Retirees in Business Bankruptcies Act sponsored by Chairman Conyers in the last Congress is an improvement over the present law governing the treatment of collective bargaining agreements in bankruptcy, in the IBT's view it does not do enough to protect airline employees. We urge the members of Congress to amend the proposed Protecting Employees Act to treat rail and airline employees in the same manner during bankruptcies.

LETTER TO THE HONORABLE STEVE COHEN FROM BRENDAN M. KENNY, DIRECTOR, GOVERNMENT AFFAIRS DEPARTMENT, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

GOVERNMENT AFFAIRS DEPARTMENT
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
1625 MASSACHUSETTS AVENUE, N.W. ☐ WASHINGTON, DC 20036 ☐ 202-797-4033 ☐ FAX 202-797-4030

December 18, 2009

Honorable Steve Cohen, Chairman
Subcommittee on Commercial and Administrative Law
Committee on Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I write to you in response to recent testimony delivered before your subcommittee. During the hearing you held on December 16, 2009, entitled "Protecting Employees in Airline Bankruptcies," Mr. Bob Coffman of the Coalition of Airline Pilots Association (CAPA), misled the subcommittee in both his oral and written testimony. His claim in both instances that CAPA is the largest representative of airline pilots is false.

While CAPA claims to "represent" 28,000 pilots, the Air Line Pilots Association, International represents 53,250. CAPA is a loose knit group with no responsibility for or experience in protecting the rights of the pilots in bankruptcy, collective bargaining or any other inherently union functions at any particular airline. For over 75 years, ALPA has been recognized as the industry leader in representing the interests of pilots at the bargaining table, in the judicial system and before the Congress and the Executive branch. We are the largest pilot union in North America. I would ask that the record be corrected by including this letter.

In closing, we appreciate your statement of support for broad bankruptcy overhaul legislation. As you know, ALPA was a strong advocate of Chairman Conyer's bill, H.R. 3652, in the 110th Congress, having testified twice before the Judiciary Committee. We look forward to the introduction of comprehensive legislation in this Congress and we will work with you and the committee to obtain its enactment. Thank you for this opportunity to respond.

Sincerely,

Brendan M. Kenny, Director

bmk:sf