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BEFORE

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THE URGENT NEED TO ENACT THE PROTECTING EMPLOYEES AND RETIREES IN BUSINESS BANKRUPTCIES ACT OF 2010

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Good morning, Mister Chairman and members of the Subcommittee. I am Captain John Prater, President of the Air Line Pilots Association, International. ALPA is the largest pilots union in the world, representing nearly 53,000 professional pilots who fly for 38 airlines in the United States and Canada. On behalf of our members, I want to thank you for the opportunity to testify today about the urgent need to enact the Protecting Employees and Retirees in Business Bankruptcies Act of 2010. This comprehensive bill would greatly improve protections for employees when their employers file bankruptcy cases. In my testimony today, I will focus primarily on the proposed changes to section 1113 of the Bankruptcy Code, which governs labor agreements in bankruptcy. The amendments would restore balance and basic fairness to the

Section 1113 process where an employer seeks to reject a labor agreement under Chapter 11 of the Bankruptcy Code.

In the aftermath of the events of Sept. 11, 2001, ALPA and other labor unions faced continuous efforts by airlines to use the bankruptcy process as a razor-sharp tool to strip away working conditions and living standards that were built over decades of collective bargaining. Airline workers have borne far more than their fair share of the pain to save their airlines, as massive pay cuts, lost pensions and other deep concessions clearly attest. Section 1113 of the code has been applied by the bankruptcy courts, at management's instigation, in a manner far removed from the original intent of these provisions. The 1113 process has not been the mechanism of last resort to save a failing business, but instead has often been used by employers as a business model to gain long-term economic advantage by unfairly gutting the wages and working conditions of airline and other employees. Instead of protecting employees, as the 1113 process was meant to do when it was enacted in 1984, it has been repeatedly used by employers as a means to severely tilt the playing field in management's favor, to the detriment of the legitimate economic security of airline workers and their families. Indeed, many of these same employers also used the current bankruptcy law to rubber stamp multimillion dollar bonuses and other rewards for the corporate executives who perpetrate these abuses on workers, the same kind of unconscionable excess on the part of corporate leadership that has rightly been the subject of severe criticism in the recent financial meltdown.

After 9/11, many airline managements used the 1113 procedures to not only gut employee wages and working conditions; they also exploited the bankruptcy process to cut staff to the bone. Both of these factors have combined to make piloting a far less desirable job than it

used to be, contributing to increased pilot frustration, attrition and turnover at a number of airlines. Added to the understandable employee frustration and anger, these additional, related problems make the implications of failing to restore balance to the bankruptcy process more serious than just failing to end the immorality of this situation. The current imbalance has created a poisoned environment that has greatly undermined labor relations and employee good will in the airline industry, which are critical to the efficient operation of our essential national air transportation system.

ALPA has seen that airline managements' successful efforts through Section 1113 to turn the clock back decades on workers' pay, rights and benefits have far exceeded any legitimate shared economic sacrifices that might have been necessary for the economic survival of the airlines. For example, a typical pilot at United Airlines endured two rounds of concessions that included an initial 30 percent pay cut, a second pay cut of 12 percent, harsher work rules, less job security, and a terminated pension plan. Thousands of United pilots were furloughed, and in 2009, the remaining pilots recaptured only 1.5% of their lost wages. Additionally, over the past three years, more than 1,400 United pilots who originally lost their jobs were recalled and then furloughed a second time, and this does not count the thousands who suffered job demotions. The remaining pilots are not scheduled to receive any additional pay increases, either this year or for the foreseeable future, while they struggle to negotiate a new contract past the amendable date of the bankruptcy contract. As harsh a reality as that is, imagine that United pilot's disbelief and outrage upon learning that the airline's CEO received a total compensation package worth over $40 million after exiting bankruptcy. Further compounding the anger and resentment is the fact that under the changes in job security provisions that the United pilots were forced to accept in the bankruptcy, the Company is now attempting to outsource significant

trans-Atlantic and perhaps other international flying to foreign carriers. The dilution in bankruptcy of the United pilots' job security guarantees has also led to the loss of nearly one-third of United's total domestic flying. The contrast of many unionized airline employees losing up to half of their pay, work rules, and the majority of their decades-old pension benefits, and as we now see, perhaps even their jobs to foreign pilots, as a result of bankruptcy concessions, while outrageous executive compensation and benefits programs are approved for airline managers, is alone more than enough to show that the current Section 1113 process is unbalanced, grossly abused, and in need of urgent reform.

Similar horror stories exist among the thousands of pilots flying for other airlines, as managers departed the scene with golden parachutes, leaving behind employees who now struggle mightily to take care of their families while delivering millions of their passengers safely day after day. Distressing tales of employee suffering wrought by the 1113 process are all too familiar throughout the industry.

As the Subcommittee knows, the Section 1113 procedures are the mechanism by which employers can seek judicial permission to reject and thereby breach collectively bargained obligations to their employees and impose in their place dictated pay and working conditions. This Section 1113 process was originally intended to prevent employers from using the Chapter 11 process as an "escape hatch" to simply wipe away with a bankruptcy filing the binding, long- and hard-fought pay and working condition achievements of workers secured by their collective bargaining agreements.

Prior to its enactment, in 1984 the Supreme Court ruled in the ***Bildisco*** case that an employer could walk away from binding collective bargaining agreements after a bankruptcy

filing without first making any showing of necessity as to the need to reject the terms of the agreement. In response, the Congress, at the urging of ALPA and other unions, acted swiftly to establish procedures that sought to protect the rights of employees in bankruptcy to prevent such results. The so-called 1113 process was inserted into the bankruptcy code to require a stringent showing of necessity for proposed modifications to labor agreements and further proof that, prior to seeking the court's intervention, the employer engaged in good-faith bargaining with a labor union in order to obtain necessary concessions. Failing such a consensual agreement, a company could impose dictated terms and conditions on its employees after the court process only if those concessions were determined by the court to be truly necessary to its survival.

Since that time, the employee-protective purpose of Section 1113 has been turned on its head by the bankruptcy courts and subverted by employers to achieve precisely the contract-destroying, worker-bashing results that Congress originally sought to prevent. ALPA has seen the requirements of Section 1113 repeatedly ignored or misapplied, without due regard for the financial security interests of airline employees and their families. The most extreme examples of the one-sided nature of the current process are in recent court decisions which allow management to reject binding collective bargaining agreements and impose working conditions with impunity, holding that such rejection is not considered a breach of contract in the case of a labor agreement, even though, for all other contract parties, rejection by a debtor is considered a breach, entitling that party to a claim for rejection damages and excusing the aggrieved party from further performing under the rejected contract. In sharp contrast to the way other bankruptcy stakeholders are treated, unionized airline employees were therefore dealt two devastating blows in these court decisions: they put into question whether their union could seek damages claims for a breach of their labor agreement and prohibited the employees from

withdrawing their services under those rejected agreements. Airline employees have therefore been unfairly discriminated against and singled out in a way that puts them at a severe disadvantage in a way that no other creditors have been by these rulings. These flawed court decisions alone justify Congressional action. This corrective legislation is urgently needed to restore the original intent and purpose of these Section 1113 provisions, and to restore balance and basic fairness to the bankruptcy process as it impacts honest workers called upon to sacrifice to help save their employers.

ALPA believes that the proposed legislation appropriately overhauls the Section 1113 process by: (1) returning to their original intent the standards governing when management can unilaterally reject its contractual obligations to workers, so that a breach of a collective bargaining agreement can be permitted only when truly essential; (2) prohibiting the employer from singling out employees for cuts in pay and benefits and seeking a host of contract changes that, while the employer may find desirable or convenient to seek while in bankruptcy, are not truly essential to the company's ability to emerge from bankruptcy; (3) ensuring that, when an employer seeks concessions from its employees, the company's executives are not reaping the rewards of bonuses and other excessive compensation packages, lining their own pockets while their employees disproportionally sacrifice to help save the company; and (4) making it clear that, if a consensual agreement between the parties cannot be reached, employers breach collective bargaining agreements if they reject them in bankruptcy and that employees have the right to seek damages and strike in response to such breach. This latter clarification in particular is desperately needed in light of the recent distorting court cases I have mentioned so as to restore the incentive for management to negotiate in good faith with unions in the 1113 process

and thereby enhance the prospects for reaching a superior, mutually acceptable labor-management solution to the company's financial problems.

All of these changes are urgently needed to restore some semblance of a level playing field in collective bargaining between workers and management, and to deter employers from ever again using the bankruptcy process as a business strategy to extort wisdespread, unjustified and abusive concessions from workers. These reforms will, in our view, also help fulfill the purpose and ensure the success of Chapter 11 in our industry by increasing the long-term chance of successful reorganizations of airlines by promoting rather than weakening the collective bargaining process and limiting excessive management compensation packages, thereby strengthening the relationship between management and labor rather than continuing to destroy it, as the current 1113 process does today. By doing so, these critical reforms will help restore battered employee morale and trust, and make labor a more effective partner in rebuilding the long-term financial health of airlines, which so heavily depend upon the goodwill of their employees to successfully serve the traveling public.

I will now describe a number of additional examples which show what has gone wrong with the current administration of the 1113 process, both in the corporate boardrooms and in the courts, and illustrate why such legislation is so urgently needed to correct the employer abuse which has flourished unchecked in the current environment.

I. The Bankruptcy Courts Have Allowed Employers To Use The Section 1113 Process As Leverage To Gut Labor Contracts Without Requiring Employers To Show That The Concessions Are Necessary Or Fair.

The courts, egged on by opportunistic employers, have progressively undermined the "necessity" standard for granting employer relief in Section 1113. As I have alluded to, this

standard was intended to be applied strictly and to allow only essential changes in wages and working conditions that are truly "necessary to permit the reorganization" of the employer. "Necessary" unfortunately has come to mean "desirable to management," and this has turned the bankruptcy process into a tool to leverage draconian wage and benefit cuts. These scorched-earth tactics of using the 1113 procedures to extract concessions that are not truly necessary for the company's survival or otherwise achievable in consensual bargaining have led to widespread tension and resentment among employees, creating lasting damage to labor relations.

ALPA's experience has shown that circumstances where consensual solutions reached by the parties in a process guided by labor relations professionals have led to far superior outcomes for airlines, their pilots, and the flying public than forced and distorted negotiations or imposition of terms under the auspices of a bankruptcy court. Congress needs to pass this legislation to level the playing field and restore support for truly consensual negotiations in such circumstances. Both employers and the bankruptcy courts need to be reined in to ensure that the numerous recent abuses of the 1113 process are never repeated.

In fact, ALPA has seen profitable airlines use Section 1113 as a bargaining lever to wrest employee concessions to either facilitate a sale or other transaction or just to improve the competitive position or profitability of the carrier. In the case of the bankruptcy of Hawaiian Airlines, pilots faced a Section 1113 motion by a *profitable* company after having made pre-petition concessions demanded to avoid a Chapter 11 filing. All this after management approved a self-tender of the airline's stock at a substantial premium to market value *following* September 11 and *before* the bankruptcy filing. Hawaiian is still profitable today and, just weeks ago, some

four and a half years after the 2005 bankruptcy concessions, finally reached a new consensual agreement with ALPA that appropriately recognizes the pilots' sacrifices.

In the case of Delta Air Lines, even after many months of litigation before the bankruptcy court, management continued to demand drastic concessions. Only after the parties agreed to a special arbitration process before a panel of industry experts, which took the matter out of the hands of a bankruptcy court that was not familiar with the industry, did management finally sufficiently reduce its extreme demands and, in response to ALPA's demands, offer the pilots an appropriate bankruptcy claim in exchange for their substantial concessions. After a consensual agreement was reached on this basis, the Company completed its successful reorganization, returned to profitability, eventually merged with Northwest Airlines, and, as everyone knows, the new Delta is now the largest airline in the world.

ALPA believes that the bargaining agreement resolution at Delta, which took place largely outside of the bankruptcy court process, shows that bankruptcy courts with judges focused solely on the debtor's concerns are not the best place to resolve differences between labor and management. The best place to do that is at the bargaining table, and ALPA believes this legislation will promote superior collectively-bargained solutions.

The warped pressures of the bankruptcy process were also clearly exposed in the Comair bankruptcy. There, pilots were forced by management into Section 1113 litigation because the operation was simply deemed *not profitable enough* to the corporate parent, Delta.

Under the diluted "necessity" standard, the Company was emboldened to make demands for a 22% pay cut that would qualify some full-time pilots for federal welfare assistance. In response to testimony from a pilot whose family would qualify for federal food stamps were he to work full-time under the Company's demands, the bankruptcy judge indicated that he would not be persuaded by these facts of employee hardship and suffering, because he viewed the issue purely in terms of the purported "need" for relief for the debtor. The impact the Company's 1113 proposal would have on the pilot group and its families was irrelevant in the court's view. A concessionary agreement was only reached after the airline effectively moderated its demands by offering the pilots meaningful "upside" benefits.

In the case of Mesaba Aviation, the bankruptcy court approved as "necessary" a wage cut of almost 20% that would have lasted for 6 years, within a structure that did not envision any reversal or mitigation of the cuts during that lengthy period. After the district court agreed with ALPA that such overreaching amounted to bad-faith conduct and an abuse of the bargaining process, ALPA still had to accept a concessionary agreement even though the Company reorganized under a plan that provided a 100% recovery for all creditors, including interest. Again, ALPA believes that the warped necessity standard effectively puts a gun in management's hands in concessionary negotiations. Again, we submit that the best way to reach a sustainable future for a carrier is through the collective bargaining process, not the bankruptcy courts, and the legislation before you, by limiting employer abuse and providing incentives for management to negotiate in good faith in the Section 1113 process, does that.

As this review shows beyond doubt, the current 1113 process has repeatedly failed to fulfill Congress's purpose – protecting employees from those employers that view Chapter 11 as

a way to simply rid itself of collectively bargained pay, pension and working condition obligations. Because Section 1113 does not currently impose effective limits on the scope of employer concession demands, it is prone to management abuse and grants inappropriate leverage for employers to often extract unwarranted concessions from employees. Simply put, an employer can now easily use the current 1113 process to magnify the severe duress employees are already under during Chapter 11 – just the opposite of what Congress intended. These examples also show that consensual solutions to financial crises are always superior to the imposed alternatives. The current 1113 process undermines consensual, legitimate solutions to financial crises. The necessary modifications to that process that are contained in this bill correct these imbalances and support superior consensual solutions.

The legislation before you would ensure, for example, that an employer would not be permitted to initiate the 1113 process seeking court permission to reject a collective bargaining agreement unless there has been good-faith bargaining over proposed modifications to the agreement for a reasonable period of time, and until the company can further show that negotiations are not likely to produce agreement. The legislation also sets more specific limits on the scope of concessions that can be extracted from a particular labor group, and requires the company to present a plan of workforce and non-workforce cost savings, including savings in management personnel costs, if it seeks cost cuts from a particular labor group. The legislation would, by adopting tighter necessity standards for rejection, also help prevent the abuse of employers "locking in" long-term drastic concessions which go beyond what is needed for recovery in the short term, such as occurred at United and other airlines, where labor concessions were left in place long after the exit from bankruptcy while other stakeholders had received their recoveries and moved on. The legislation also appropriately requires the bankruptcy court to

consider whether alternative proposals from the union would be sufficient to permit successful reorganization. Additionally, the bankruptcy court would be required under the legislation to consider the effect of the proposed cuts on the workforce, the employer's ability to retain a qualified workforce, and the effect on the enterprise's overall labor relations if there was a rejection of a binding collective bargaining agreement. All of these changes are essential to ensure that the sacrifices extracted from employees are truly fair, proportionate, and necessary, and to end employers' abuses of the current 1113 process.

II. The Legislation Would Also Prevent the Continuation of the Current Double Standard Under Chapter 11: Deep Sacrifice For Workers, Huge Payouts For Those At The Top.

Just as important, the legislation would require that the economic relief sought from employees not be disproportionate in kind or amount, or in comparison to the treatment of executives. This legislation would therefore require the court to consider whether corporate executives are being asked to sacrifice as well in a proportional manner, so that employees and their families are not shouldering the burden unfairly. These changes are urgently needed to restore basic fairness and credibility to the 1113 process. The current system has led to outrageous unfairness, with workers absorbing at the same time huge, long-term cuts in pay, work rules, and health and retirement benefits, while management executives have enjoyed huge payouts that appear to be nothing more than rewards that are directly tied to the level of pain they have inflicted on the employees. These are the same kind of executive abuses that have outraged the public during the recent financial meltdown and bailouts. For example:

- Pilots at United Airlines, who took concessions of 40% or more in pay, lost numerous important work rules, had their defined benefit pension plan terminated in multiple Section 1113-induced concessions, and many of whom lost their jobs outright because of furloughs, were locked into a nearly seven-year deeply concessionary agreement, but saw the injustice of the United Board raising the total compensation

package of Chief Executive Glenn Tilton by 40% in the year following the company's emergence from bankruptcy. This staggering increase included stock grants to Mr. Tilton and other United executives worth at the time in excess of $20 million, as well as stock options worth millions more, made as part of United's plan of reorganization.

- Northwest Airlines' pilots were also forced to accept huge wage cuts of nearly 40%, as well as accept numerous rollbacks to their quality of life by losing key protective working conditions. By contrast, the CEO was rewarded with an immediate $1.6 million in salary and bonus payments. The revelation that he was also rewarded with more than $26 million in stock-related compensation under a court-approved management equity plan further demonstrates the basic unfairness and abuse of the 1113 process.

There are egregious flaws in a 1113 process that today permits employers to revoke their agreements with employees, slashing paychecks and essential benefits to the bone, in some cases below the poverty line, on the basis of alleged necessity, and then to turn around and reward executives with multi-million dollar paydays. The legislation therefore also includes reforms that would require that compensation paid to corporate officers and directors be subject to much more stringent oversight by the court as part of the employer's emergence from bankruptcy. The court would be required to determine that proposed executive compensation is not excessive or disproportionate in light of concessions made by employees during bankruptcy.

These reforms would also appropriately provide especially careful review of requests for employee concessions in Section 1113 proceedings if the employer has implemented an executive compensation program either during bankruptcy or within six months prior to bankruptcy. If such a program has been implemented, a presumption would be created that the employer has not met the requirement that the proposed cuts not overly and disproportionately burden the affected employee group. These changes are urgently needed to stop any future court-assisted looting of employees by greedy executives of the type that has already occurred.

III. More Unfairness: Deep Concessions Are Extracted From Employees, While Other Stakeholders Suffer Few Or No Adverse Consequences.

The legislation before you is also needed to level the playing field because employees have also suffered extreme unfairness at the hands of the 1113 process compared to other stakeholders and participants in the bankruptcy process. For example:

- Pilots at Hawaiian Airlines and Mesaba faced demands for concessions despite plans of reorganization that paid unsecured creditors in full.

- Professional advisors, banks, economic experts, financial managers and executives who participate in the Section 1113 process on behalf of airlines do not share in the sacrifices. Instead they earn lucrative fees and even "success" bonuses with the approval of the bankruptcy court, while the workers' pay, work rules and pensions are allowed to be gutted.

The legislation would appropriately require the bankruptcy court to conclude, before it can allow an employer to reject a collective bargaining agreement, that the forms of economic relief sought from employees not be disproportionate in type or amount to the treatment of other stakeholder groups. This is not the case today, and represents a basic flaw of the current system needing urgent correction.

IV. Even More Unfairness: Airlines Use Section 1113 To Avoid Binding Obligations To Employees, But Have Convinced Some Courts That The Bankruptcy Laws Immunize Them From Facing Any Employee Self-Help Or Breach Damages Claims In Response.

The last item that I wish to bring to the Subcommittee's attention is what I perceive to be the most egregious of the many aspects of unfairness that exists in the current administration of the Section 1113 system that I have highlighted today. As I have explained, airlines have used the Section 1113 process as leverage to obtain what they could never obtain in consensual bargaining – deep, lasting and unfair changes to avoid the binding commitments that they made

to their employees in collective bargaining agreements, but that has not been enough for them. They have gone to the bankruptcy and federal courts and asked them to declare that airline employees do not have the right to respond to these unilateral, fundamental breaches of their collective bargaining agreements by pursuing bankruptcy claims for breach of agreements – like any other creditor -- or by withholding services, as common sense, fairness and the basic tenets of labor law dictate. In fact, two bankruptcy courts, a federal district court and the Second Circuit Court of Appeals, have ruled that airline employees can be forced to accept the utter destruction of their fundamental rates of pay and working conditions in binding collective bargaining agreements, but cannot withhold their services in response. Without any basis in the statute, these decisions unjustly discriminate against, and single out, airline employees – as all other creditors are allowed to withdraw their services or refuse to continue to provide goods or services to the debtor when the debtor rejects a contract.

A split panel of the Second Circuit Court of Appeals vastly magnified the damage to workers by justifying this highly inequitable result with the fiction that management is not actually breaching a collective bargaining agreement when it obtains judicial permission to reject a labor contract through the Section 1113 process, a notion also wholly at odds with settled bankruptcy doctrine and completely inconsistent with Section 1113. Thus only employees under collective bargaining agreements are left without a claim if their contract is rejected in bankruptcy. This aspect of the court's decision vastly compounds the imbalance that has come to exist under Section 1113. This outrageous situation puts at grave risk, if not precludes outright, the few inadequate claims that employees have been able to obtain to date in exchange for negotiating concessionary agreements under the threat of contract rejection.

The willingness of the courts to enjoin a strike and effectively preclude a breach claim by employees in response to management imposition of unilateral terms under Section 1113 has effectively taken away any incentive for airlines to negotiate rather than dictate terms in bankruptcy. Airline employees have a right under the Railway Labor Act to strike after a bankruptcy court grants a motion to reject a collective bargaining agreement under Section 1113 and management imposes new inferior rates of pay, benefits, job security and/or working conditions. We believe that under the Norris–LaGuardia Act (which was enacted in the 1930s to bar injunctions against strikes) bankruptcy judges and U.S. District Court judges do not have jurisdiction to issue injunctions against such strike activity when management has acted to change the status quo and tear up a binding labor contract outside of the established labor law negotiations process.

It is essential that the right of airline employees to strike after a Section 1113 contract rejection be preserved, and this legislation does precisely that. If the rule were otherwise, as some courts have concluded, management would be allowed to impose conditions without having to face the prospect of a strike – and possibly not even a rejection breach damages claim. Such blatant inequity allows management free rein to impose conditions without any check on the kind of overreach and abuse that has occurred to date. This legislation is needed to restore the economic balance contemplated in the anti-strike injunction mandates of Congress in the Norris-LaGuardia Act, which the Supreme Court found "was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining." Balance will be restored and management will be forced to act responsibly and fairly in bankruptcy towards its employees ***only if*** it is faced with the real possibilities of a responsive strike and a significant damages claim.

V. These Urgently Needed Reforms Will Promote Superior Collectively-Bargained Solutions to Financial Crises And Help Restore A Mutually Respectful Labor-Management Relationship, Increasing The Likelihood of Successful, Long-Term Reorganization.

In sum, while ALPA recognizes that substantial economic sacrifices are sometimes inevitable where employers face severe economic disturbances, and our union in fact has repeatedly acted in a leadership role to help many airlines survive the ravages of the post 9/11 environment, management and the courts have moved the 1113 process far from its original intent to protect workers. Today, it is an extreme, one-sided process that often destroys the lives of workers and their families and creates deep and lasting scars in labor-management relations in a customer-service industry heavily dependent upon employee morale. ALPA believes that this corrective legislation is urgently needed to fix the misinterpretation and abuse of the 1113 process that has snowballed in the last decade. The Congress must act to restore Section 1113's original intent to protect employees from unfair, dictated sacrifices of the type that have been recently forced upon them while the corporate chieftans reap huge payoffs.

By enacting these reforms to promote rather than undercut collectively-bargained solutions to financial crises, and to ensure basic fairness by limiting excessive executive compensation and clarifying that employees may seek breach damage claims or withdraw their services if their binding working agreements are rescinded, Congress will help fulfill Chapter 11's purpose to successfully reorganize debtors on a long-term basis by restoring a sustained relationship of mutual trust and shared sacrifice between workers and their employers. Only if this critical relationship is returned to one of respectful, equitable partnership rather than one-

sided abuse, as exists today, will carriers' long-term health truly be assured for the benefit of the traveling public.

Mister Chairman, I appreciate the opportunity to testify here today, and I would be happy to answer any questions the Subcommittee may have.