STATEMENT OF

MARCUS C. MIGLIORE, MANAGING ATTORNEY

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

BEFORE

THE COMMERCIAL AND ADMINISTRATIVE LAW

SUBCOMMITTEE

OF

THE COMMITTEE ON THE JUDICIARY

US HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

JUNE 5, 2008

THE URGENT NEED FOR PASSAGE OF THE PROTECTING EMPLOYEES AND RETIREES IN BUSINESS BANKRUPTICIES ACT

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Good morning Madame Chairwoman and members of the Subcommittee. I am Marcus Migliore, Managing Attorney with the Air Line Pilots Association, International ("ALPA"). ALPA represents 55,000 professional pilots who fly for 40 airlines in the United States and Canada. On behalf of our members and the hundreds of thousands of other airline employees whose lives have been turned upside down by the machinations of the bankruptcy process, I want to thank you for the opportunity to testify today about how ALPA's experiences in the bankruptcy courts show why the proposed legislation before this body -- the Protecting Employees and Retirees in Business Bankruptcies Act -- is urgently needed to restore balance and basic fairness for workers under the Bankruptcy Code.

Section 1113 of the Bankruptcy Code sets forth the procedures 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 Section 1113's enactment in 1984, the Supreme Court ruled in NLRB v. Bildisco, 465 U.S 513 (1984) that an employer could walk away from a binding collective bargaining agreement after a bankruptcy filing without first making any showing of need to reject the terms of the agreement. In response, Congress, at the urging of ALPA and other unions, acted swiftly to establish procedures in the Bankruptcy Code -- the so-called 1113 process -- to protect the rights of employees to prevent such harsh and unfair results. The 1113 process requires labor and management to bargain in good faith over concessions sought by the debtor. Under Section 1113, only after failure to reach a consensual agreement through such good faith bargaining and a determination by the court that the concessions are truly necessary to the survival of the employer can management impose dictated terms on its employees.

However, instead of safeguarding employees, the 1113 process has been hijacked by employers and is now used as a 51-day countdown to threaten a court-assisted execution of the long-term wage and working condition achievements of airline and other employees. The one-sided nature of the pressure brought through the swift 1113 process by employers has led to cataclysmic results for airline and other employees. These same employers have also used the bankruptcy process to rubber stamp multi-million dollar payouts for the corporate executives

who led the carriers into these financial problems and who decimated the employees' working conditions.

Over the past seven years, the employee-protective purpose of Section 1113 has simply been gutted by bankruptcy and federal court judges overly sympathetic to debtor corporations. Airline managements, with the approval of the bankruptcy courts, have been able to easily achieve in case after case precisely the contract-destroying results that Congress originally sought to prevent in 1984. The courts have paid little heed to the mandates of Congress in Section 1113 to take into account the contract rights and personal financial security of employees called upon to sacrifice to help save their employers, essentially doing away with the required demonstration of the necessity of concessions limited in scope and time to those required to ensure the survival of the business.

Pilots and other employees of United, US Airways, Northwest, Delta, Comair and Mesaba have all seen their wages and working conditions slashed through the 1113 process, while corporate chieftains often received huge bonuses, blessed by the bankruptcy courts.

Just this year, ATA, Kitty Hawk Air Cargo, and Aloha pilots have been added to the growing list of airline employees caught in the vise of the bankruptcy process. Given the astronomical, continually rising price of jet fuel, and our weak economy, these airline employees almost certainly will not be the last to face this severe problem. There will very likely be more airline bankruptcies in the coming year, and the bill before you is therefore more relevant and important than ever.

Some of the most extreme examples of the one-sided nature of the current process are found in recent court decisions such as Northwest Airlines v. AFA, 483 F.3d 160 (2d Cir. 2007), a decision of the Second Circuit which allows management to reject with impunity binding

collective bargaining agreements and impose greatly reduced rates of pay and working conditions without having to face contractual breach damages from workers. At the same time, the court prohibited those employees from withdrawing their services under those agreements, as other parties facing such rejection are routinely allowed to do under bankruptcy law. The corrective legislation before this Subcommittee is urgently needed to restore the original intent and purpose of Section 1113 to ensure that the impact of the bankruptcy process on honest and innocent workers is balanced and fair.

Because the 1113 process has been significantly eroded and undermined in the courts, broad restorative legislation is necessary. This bill properly attempts to restore the employee-protective purpose of the Section 1113 process by: (1) tightening the standards governing what concessions management may fairly ask for in required, good-faith negotiations with the employees' representative prior to being able to seek to reject their contractual obligations to workers, so that a breach of a collective bargaining agreement can be permitted only when truly necessary, and only to provide the employer with no more than is truly necessary to ensure the competitive survival of the business for a limited period of time; (2) ensuring fair treatment and equitable sacrifices from ***both*** executives and workers in the bankruptcy process so as to prevent further outrageous abuse by corporate officers lining their own pockets while their employees disproportionally sacrifice to help save the company; and (3) making it clear that employees have the right to strike and seek contract damages in response to a breach of their collective bargaining agreements if a consensual agreement between the parties cannot be reached and the contract is rejected. These clarifications are all desperately needed to restore balance to the 1113 process and to help foster superior, mutually acceptable labor-management solutions to bankruptcy crises through collective bargaining.

I will now describe in greater detail a number of examples of what has gone wrong from ALPA's recent experiences in the administration of the 1113 process in the courts, and illustrate how the bill before you will bring to an end the abuse of employees which has flourished in the current environment.

I. The Reforms To 1113 In The Bill Are Necessary To Stop Bankruptcy Courts From Allowing Employers To Use The Bankruptcy Process As Leverage To Gut Labor Contracts On A Long-Term Basis Without Requiring Employers To Show That Such Lasting Concessions Are Necessary Or Proportionate.

The courts, egged on by opportunistic employers, have progressively undermined the "necessity" standard for granting employer relief in Section 1113. Congress adopted this standard in 1113 to ensure that only those changes in working conditions that are truly "necessary to permit the reorganization" of the employer would be permitted. In practice, these limits have all but been ignored by both employers and the bankruptcy courts. The bankruptcy process has been used as leverage to simply jam long-term and draconian wage and benefit cuts down employees' throats. These scorched-earth tactics of using the short 51-day period in the current 1113 procedures to force extraction of protracted, multi-year concessions that are not truly necessary or otherwise achievable in consensual bargaining have led to widespread tension and resentment among airline employees, creating lasting damage to labor relations in a labor-intensive industry critical to the national economy.

ALPA's experience has shown that circumstances where consensual solutions have been reached by the parties have led to far superior outcomes for airlines, their employees and the flying public. Congress needs to take steps to restore support for consensual negotiations in such circumstances and to rein in employers from overreaching in bankruptcy.

ALPA has even 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. This was the case in the bankruptcy of Hawaiian Airlines, where 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. This scheme by Hawaiian was an outrageous abuse of the process.

Similarly, in the Comair bankruptcy, pilots were forced into Section 1113 litigation because the operation was simply deemed *not profitable enough* to its corporate parent, Delta, while at the same time Delta proclaimed that it had plenty of money on hand as a justification to creditors for fighting a hostile takeover attempt by America West/US Airways.

In the case of Delta Airlines, even after many months of litigation before the bankruptcy court, management continued to demand extreme concessions. Only after the establishment of a special neutral mediation-arbitration tribunal, which took the matter out of the hands of the bankruptcy court and had the power to make a binding determination of the dispute if the parties did not reach agreement, did management finally reduce its demands and, in response to ALPA's demands, offer the pilots a bankruptcy claim and corporate notes in exchange for substantial concessions. After a consensual agreement was reached on this basis, the Company completed its successful reorganization and returned to profitability. Section 1113(i) of the bill attempts to build off this demonstrated success at encouraging consensual solutions and would allow the bankruptcy court to appoint, at the request of the authorized representative, an expert arbitration panel versed in the industry as an alternative to court proceedings in 1113, and whose rulings would have the same effect as those of the bankruptcy court. This system would lead to a superior outcome for everyone.

Additionally, testimony at the hearings on Comair's Section 1113 motion established that the Company's demands for a 22% pay cut 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 economic terms. In fact, in his decision granting Comair's Section 1113 motion, the judge failed to take into consideration the impact the Company's 1113 proposal would have on the pilot group and its families. 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, even if they were no longer actually required for the survival of the business. After the federal district court agreed with ALPA that such overreaching amounted to bad-faith conduct and an abuse of the bargaining process, and subsequent consensual negotiations, the Company finally agreed to a contract that, while definitely concessionary, provided a significantly smaller, shorter-term pay cut that did not prevent the Company from successfully reorganizing under a plan that is expected to provide close to a 100% recovery for all creditors.

All of these circumstances show that the 1113 process as currently interpreted and applied by the bankruptcy courts does not impose effective limits on the "necessity" of employer concession demands, is open to employer abuse and grants inappropriate leverage for employers to wrest long-term, unwarranted concessions from employees. These examples also clearly show

that consensual solutions to financial crises are superior to the imposed alternatives. The 1113 process today undercuts employees and undermines consensual, legitimate solutions to financial crises. Necessary modifications to that process must be enacted to correct these imbalances and foster superior consensual solutions. As we will explain, the bill before you does just that.

A. ***The Bill's Key Substantive 1113 Reforms***

Section 8 of the bill makes a number of necessary changes to Section 1113 to ensure that workers are not forced to make unnecessary, unfair and overly-lengthy concessions. It requires that specific provisions and requirements be followed in order for an employer to obtain relief from a collective bargaining agreement. It retains the general principle that labor cost relief should be limited to the minimum necessary and not be disproportionately burdensome. The information-related requirements of the current statute remain, but added are specific standards and time limits for concession requests in the 1113 process designed to foster good-faith negotiated solutions and counteract open-ended, long-term labor cost relief that under today's system can be "locked in" by employers for an unreasonable period that well outlasts any justifiable need.

Subsection (b) of 1113 would be amended to require a clearly-defined, reasonable and time-limited "ask" for concessions on the part of the company, which must be made to the employees' authorized representative over a course of good-faith bargaining that must be at reasonable times over a reasonable period before the debtor may apply to the court to reject an agreement.

In addition to requiring good-faith bargaining as a prerequisite to seeking court rejection of a labor agreement, Subsection b(1) would require the concessions to be: (1) limited to achieve a total aggregate financial contribution for the affected labor group for a period of up to two

years after the effective date of the plan; (2) be no more than the minimal savings necessary to permit the debtor to exit bankruptcy such that the confirmation of the plan or reorganization is not likely to be followed by the debtor's liquidation; and (3) not overly burden the affected labor group in either the amount of savings sought from each group or the nature of the modifications, when compared to other constituent groups expected to maintain ongoing relationships with the debtor, including management personnel. In addition, Subsection (b)(2) would require that the proposal be based on the most complete and reliable relevant information available, which must be shared with the employees' representative.

The amendment to Section 1113(c) would tighten the standards for the court to approve the rejection of a collective bargaining agreement. As amended, Section 1113(c) provides that a debtor may file a motion seeking to reject a collective bargaining agreement if, after a period of good-faith negotiations, the debtor and the authorized representative have not reached agreement over mutually-satisfactory modifications and the parties are at an impasse.

Section 1113(c)(1) would further provide that a court may grant a rejection motion only if it finds that: (1) the debtor complied with the substantive requirements of Subsection 1113(b) (pertaining to the concession proposal for modification of the agreement); (2) the debtor has conferred in good faith with the authorized representative regarding such proposal and the parties were at an impasse; (3) the court has considered alternative proposals by the authorized representative and has determined that such proposals do not meet the substantive requirements for relief of up to two years duration, no more than is necessary for the employer to avoid liquidation and not be unduly burdensome compared to other stakeholders and management; and (4) further negotiations are not likely to produce a mutually satisfactory agreement. In addition, the court must first consider: (1) the effect of the proposed financial relief on the affected labor

group; (2) the debtor's ability to retain an experienced and qualified workforce; and (3) the effect of a strike in the event that the collective bargaining agreement is rejected.

Amended Section 1113(c)(2) would require bankruptcy judges, in making their burden and proportionality analyses, to also take into account recent concessions made by employees within 24 months of a rejection petition, and to aggregate these recent concessions with any new ones made or demanded by the employer.

B. *The Bill's Key Procedural 1113 Reforms*

Employees are currently severely disadvantaged by the 51-day countdown to the rejection of collectively-bargained rights which begins after a debtor files an 1113 rejection motion. The bill amends Section 1113(d)(1) to require the court to schedule a hearing on such motion on not less than 21 days notice, unless the parties agree to a shorter period, and the amendment also deletes section 1113(d)(2), which now requires the court to rule on such motion within 30 days. The amendment also specifies that only the debtor and the authorized representative may appear and be heard at the rejection hearing. All of these improvements, taken together, will help lessen the timeline panic that management as well as other creditors now take advantage of in the current highly compressed process, and help foster reasonable consensual solutions instead.

New Section 1113(h) would also ensure that workers are not locked into concessions that once struggling but now profitable companies no longer need. It allows an authorized employee representative, at any time after the court enters an order authorizing rejection or upon reaching an agreement providing mutually satisfactory contract modifications, to apply to the court for an order increasing wages or benefits or providing relief from working conditions, based on changed circumstances. The court must grant such request as long as the increase or other relief

is consistent with the standard set forth in Section 1113(b)(1)(B), pertaining to the minimal savings necessary to permit the debtor to exit bankruptcy without liquidating. New Section 1113(j) would allow for procedures for an employee representative to request that it be reimbursed for costs and fees associated with the 1113 process, after notice and hearing. This provision would, in our view, properly help incentivize employers to bargain in good faith for consensual solutions and motivate debtors to move quickly to reach negotiated solutions.

II. The Bill Also Will End The Current Double Standard Under Chapter 11: Deep Sacrifice For Workers, Huge Payouts For Those At The Top.

The bill also provides urgently needed modifications to ensure that economic relief sought from employees not be disproportionate to the treatment of executives and other groups. These changes are required to restore basic fairness and credibility to the 1113 process. The current system has led to outrageous unfairness, with workers absorbing huge, long-term cuts in pay, work rules, and retirement benefits while management executives have enjoyed huge payouts which appear to be nothing more than rewards that are directly tied to the level of pain they have inflicted on the employees. 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 rounds of Section 1113 litigation, and were locked into a nearly seven-year deeply concessionary agreement, saw the injustice of the United Board of Directors raising the pay of Chief Executive Glenn Tilton 40% just months later. This staggering increase is on top of stock grants to Mr. Tilton and other United executives worth 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 $1.6 million in salary and bonus payments last year. The revelation that he will also be rewarded with more than $26 million in stock-related compensation over the next few years under a court-

approved management equity plan further demonstrates the basic unfairness and abuse of the 1113 process.

- Pilots at Hawaiian Airlines faced demands for concessions despite a plan 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 bill properly requires the bankruptcy courts to ensure that concessions by employees are not disproportionate in light of the state of compensation provided to and concessions made by other employees and stakeholders during bankruptcy, including management. First, the bill applies a desperately needed "unfair burden" test in Section 1113(b)(1)(C) to determine whether the proposed modifications would overly burden the affected labor group compared to management or other stakeholders. This provision will help ensure that employees do not comparatively suffer while management, advisors and other are given large bonuses. Furthermore, Section 8(1) of the bill would amend Section 1113(c)(3) to require the court to presume that the debtor failed this undue burden test if the debtor implements a program of incentive pay, bonuses, or financial returns for insiders or the debtor's senior management during the pendency of the bankruptcy case, or within 6 months of the filing of the 1113 petition. ALPA believes that these provisions are absolutely necessary to stop any future court-assisted looting of employees by greedy executives and advisors so as to restore credibility and basic fairness -- airline and other executives must be reined in from massively profiting as a result of their employees' misery in the 1113 process.

III. The Bill Will Also End The Blatant Unfairness Of Airlines Being Allowed To Use 1113 To Avoid Binding Employee Obligations While Being Immunized From Employee Self-Help.

The last item I wish to highlight for the Subcommittee is what ALPA perceives as the most egregious of the many aspects of unfairness that exist in the court's administration of the current 1113 system. As I have explained, airlines have used the compressed timeline and largely unchecked judicial authority of the 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 employers have not stopped there, they have gone to the bankruptcy and federal courts and asked them to declare that (1) an 1113 rejection is not a compensable breach of contract for employees, and (2) employees do not have the right to respond to these fundamental breaches of labor agreements by withholding their services, as other creditors whose agreements are rejected can do.

Employers have succeeded with the courts on both counts, requiring broad restorative legislation. Three bankruptcy courts, two federal district courts, and the Second Circuit Court of Appeals have ruled that under Section 1113, airline employees can be forced to accept the utter destruction of their fundamental rates of pay and working conditions in binding agreements by the bankruptcy process, but may not strike in response. In fact, a split panel of the Second Circuit in the Northwest Airlines case could only justify 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 wholly at odds with settled bankruptcy doctrine, and one that would leave wronged employees with no recourse for a bankruptcy breach claim, as other creditors are allowed.

We believe that under a proper reading of the mutual, status quo requirements of the Railway Labor Act, the law that governs airline employees, workers have a right to strike after a bankruptcy court grants an employer motion to reject the status quo-defining collective bargaining agreement under Section 1113 and imposes new inferior rates of pay, benefits, job security and/or working conditions. Further, under the Norris–LaGuardia Act, 29 U.S.C. §101 *et seq*. (which was enacted in the 1930's to generally preclude injunctions against strikes after egregious abuse in railroad reorganization cases), bankruptcy judges and U.S. District Court judges do not have jurisdiction to issue injunctions against lawful strike activity when management has acted unilaterally to destroy the contractual status quo and tear up a binding labor contract outside of the elaborate negotiations and mediation process mandated by the status quo provisions of Section 6 of the Railway Labor Act, 45 U.S.C. §156.

Additionally, from a practical perspective, the willingness of the courts to enjoin a strike in response to management imposition of unilateral terms under Section 1113 has taken away any incentive for airlines to negotiate in good faith rather than dictate terms in bankruptcy. The current situation leaves employees powerless, chained to the railroad tracks as the 1113 Express bears down on them. Airline employees are being singled out unfairly by being denied the right to take self-help and withhold future services after their contract is rejected and in the absence of a consensual agreement, which is a right that every other party to a rejected contract has under the current bankruptcy code. For example, aircraft lessors are free to stop performance of their agreement and take back their aircraft from the debtor airline upon rejection of their lease, but airline employees are, in the view of the Second Circuit and other courts, required to continue to perform under penalty of contempt and under judicially-dictated terms even though their binding labor agreements are rejected.

Given this blatantly unfair treatment of workers today under 1113, it is therefore essential that any reform legislation explicitly conclude that a rejection of a binding labor agreement is a compensable breach of contract and also preserve the right of employees to strike after a Section 1113 contract rejection. This bill does that. By making it clear that a rejection is a breach of contract and that such a rejection can trigger a lawful responsive strike, the bill will end the situation where the courts unfairly single workers out and restore workers to the position that all other providers of services are in under the bankruptcy laws – ensuring that they can attempt to collect damages for the employer's breach of their agreement, and be allowed to withhold services if their contracts with the debtor are rejected. New section 1113(g) would therefore restate what had been well understood before the Northwest case -- that like rejection of other executory contracts in bankruptcy, the rejection of a collective bargaining agreement constitutes a breach of such agreement. It further provides that no claim for rejection damages may be limited by Section 502(b)(7). Section 1113(g) also establishes that an authorized representative may engage in economic self-help if the court grants a motion rejecting a collective bargaining agreement or the court authorizes interim changes pursuant to Section 1113(e) and that no provision of the Bankruptcy Code or of any Federal or State law may be construed to the contrary.

This provision is essential to restoring 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." Brotherhood of Trainmen v. Chicago R & I. R.R., 353 U.S. 30, 40 (1957). 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 possibility of a responsive strike.

In sum, while ALPA recognizes that substantial economic sacrifices may be necessary by employees during severe economic disturbances, and 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 and one-sided process that is used to destroy workers' lives. ALPA believes the bill is proper restorative legislation that is urgently needed to fix the misinterpretation and abuse of the 1113 process that has taken place in the last seven years. All of these proposed changes to Section 1113 are necessary to ensure that the sacrifices extracted from employees are truly fair, reasonable and necessary. The Congress must act to restore the original intent of this legislation and protect employees from unfair, dictated sacrifices made while the corporate chieftans reap huge payoffs.

Madame Chairwoman, I appreciate the opportunity to testify here today, and I would be happy to answer any questions you have.