

Hearing Date: November 16, 2005 @ 12:30 p.m.

Bruce H. Simon (BS2597)
Manlio Di Preta (MD 9316)
Robin H. Gise (RG5592)
COHEN, WEISS AND SIMON LLP
330 West 42nd Street, 25th Floor
New York, New York 10036-6976
(212) 563-4100

Attorneys for Air Line Pilots
Association, International

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:)	
)	Chapter 11
DELTA AIR LINES, INC., <i>et al.</i> ,)	
)	
Debtors.)	05-17923 (PCB)
)	(Jointly Administered)

AIR LINE PILOTS ASSOCIATION’S RESPONSE TO THE DP3 INC.’S, RETIRED PILOTS’
AND RETIRED CAPTAIN JIM DEAN JOHNSON’S OBJECTIONS AND TO THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS’ RESPONSE TO DEBTOR’S MOTION TO
REJECT THE ALPA COLLECTIVE BARGAINING AGREEMENT

The Air Line Pilots Association (“ALPA”), by their counsel, Cohen, Weiss and Simon LLP, hereby responds to (1) the Objection, dated November 9, 2005, raised by DP3 Inc. d/b/a Delta Pilots’ Pension Preservation Organization (“DP3, Inc.”), and the Retired Pilots,¹ (2) the Objection, also dated November 9, 2005, raised by Retired Captain Jim Dean Johnson (DP3, Inc., the Retired Pilots and Johnson are collectively referred to as the “Retirees”) and (3) the Response of the Official Committee of Unsecured Creditors (“Committee”), to Delta Air Lines,

¹ DP3 Inc. and retired pilots James H. Gray, James Haigh, Reuben Black, William Wirth, James Bomar, Ronald Stowe, Evan Gost, Richard Colby and Donald Mairose filed one of the objections to the Debtor’s motion. The second objection was filed by retired Captain Jim Dean Johnson.

Inc.'s ("Debtor" or "Delta") motion to reject the ALPA collective bargaining agreement as follows:

1. ALPA has been the certified collective bargaining representative of the active Delta pilots since 1940. Since that time, ALPA and Delta have been parties to collective bargaining agreements (currently known as the Pilot Working Agreement) establishing the pilots' wages and working conditions. ALPA's representational status and Delta's obligation to bargain exclusively with ALPA are rooted in the Railway Labor Act, 45 U.S.C. §151 *et seq.* ("RLA"), the federal labor law applicable to air carriers. An employer subject to the RLA can *only* negotiate with pilots' chosen bargaining representative over matters that are the subject of collective bargaining. *See, e.g., Virginian Ry. Co. v. System Fed'n No. 40, et al.*, 300 U.S. 515, 548 (1937) (holding that the RLA "imposes the affirmative duty [on carriers] to treat only with the true [bargaining] representative, and hence the negative duty to treat with no other"); *see also Int'l Ass'n of Machinists and Aerospace Workers v. Northeast Airlines*, 536 F.2d 975 (1st Cir. 1976). Pension benefits are a mandatory subject of bargaining. *See, e.g., Elgin, J. & E. Ry. Co. v. Brotherhood of R. R. Trainmen*, 302 F.2d 540, 543-44 (7th Cir. 1962).²

2. DP3, Inc. is an organization of retired pilots and is not a collective bargaining representative within the meaning of the RLA. Nor are the Retired Pilots, Johnson or the Committee collective bargaining representatives within the meaning of the RLA. Delta's duty to bargain extends to ALPA and only to ALPA. If Delta were to seek to alter the pension benefits provided under the Pilot Working Agreement, it must bargain with ALPA.

² A union's right to bargain over the terms of a collective agreement is not limited even though the union does not represent retirees for purposes of collective bargaining. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, 182, n.20 (1971) (union is not required "to take into account [unrepresented retirees'] interests in making bona fide economic decisions in behalf of those whom it does represent").

3. Section 1113 of the Bankruptcy Code does not alter the parties' collective bargaining relationship or representation obligations. Section 1113 provides only for an authorized representative "of the employees" covered by the agreement with whom the debtor must engage in bargaining prior to seeking rejection of the agreement. Prior to filing a motion to reject a collective bargaining agreement, the statute requires that a debtor in possession shall "make a proposal to the authorized representative of the employees covered by such agreement," provide such representative with relevant information necessary to evaluate the proposal, and meet and confer with such representative in an attempt to reach a consensual modification of the agreement. *See* 11 U.S.C. §§1113(b)(1)(A), (B); (b)(2).

4. By filing objections and a response to the Debtor's motion to reject the collective bargaining agreement, the Retirees and the Committee are improperly attempting to inject themselves into the Section 1113 process even though they are not authorized representatives of the employees as required by Section 1113, 11 U.S.C. § 1113.

5. In *In re UAL Corp., Appeals of Independent Fiduciary Services, Inc.* ("*IFS*"), 408 F.3d 847 (7th Cir. 2005), a copy of which is attached hereto as Exhibit A, the independent fiduciary of United Air Line's ("United") pension plans claimed that it was entitled to participate in a Section 1113 hearing concerning United's attempt to reject certain collective bargaining agreements. The fiduciary claimed that it was an "interested party" under Section 1113(d) of the Bankruptcy Code, 11 U.S.C. §1113(d) ("interested parties may appear and be heard" at a Section 1113 hearing), as it had a "particular concern that United and its unions may reach a compromise that would affect the pensions of workers already retired." 408 F.3d at 849. The bankruptcy court rejected the fiduciary's position and the Seventh Circuit affirmed.

6. The Court's reasoning in *IFS* made plain that retirees, such as the Retirees in the instant case, have no right to participate in collective bargaining negotiations, including negotiations to amend an existing agreement; it is only the parties to the contract that may participate. "Labor and management are free to change their agreements without any complaint by individual workers or *pensioners* – or for that matter by other third-party beneficiaries." 408 F.3d at 851 (emphasis added).

7. Further, no party other than the debtor and the union may participate in the Section 1113 process because, the Court reasoned, the Section 1113(d) term "interested party," as it is "most naturally read," means a "party to the collective bargaining agreement" or a "guarantor of that contract." *Id.* (rejecting fiduciary's argument that "interested party" includes "any person with a financial stake in the employer's performance of the [CBA]").

8. Hence, the Section 1113 process includes only the debtor and union, not anyone, such as the Retirees or the Committee, who are not parties to the CBA and "whose consent would be unnecessary to a voluntary change in the [collective bargaining] agreement." *Id.*

9. Further, in *IFS*, the Court pointed out that Section 1113 proceedings would become "unmanageable" if they were opened to anyone who claimed an interest in the collective bargaining agreement, *id.*, as it would mean that "every employee *individually* would have to be notified and allowed to participate . . . every retiree would receive separate notice and an opportunity to be heard." *Id.* (emphasis in original).

10. Similarly, in another bankruptcy case, a request by a retired pilots' organization to be appointed as authorized representative in a Section 1113 proceeding was squarely rejected. In the *United Airlines* case a group of retired pilots sought the right to

participate in Section 1113 negotiations commenced by United. The bankruptcy court decisively rejected the retirees' request, ruling that Section 1113 made no provision for an authorized representative other than the collective bargaining representative:

Two matters before the court this morning . . . the first is a motion [by the United Retired Pilots Benefit Protection Association] to be appointed as section 1113 representative. If I'm not mistaken, there's no such thing. Section 1114 calls for the appointment of an authorized representative for retirees who are not being represented by their union in connection with the change in retiree medical benefits. But there's no such parallel provision in section 1113.

* * * *

There's no requirement now for the debtor to be negotiating with the retired pilots. The matter in dispute right now is a collective bargaining agreement. The parties to the collective bargaining agreement are the debtor and the union. So as far as negotiations are concerned, those are the only two parties that are appropriate.

In re United Airlines, Inc., No. 20-48191, Transcript, December 14, 2004, p.2, 3 (a copy of the Transcript and Ruling is attached as Exhibit B).

11. The Retirees in arguing that they were improperly excluded from the negotiations rely heavily on *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir. 1986). See DP3's Objection, ¶¶ 13, 14; Johnson's Objection, ¶ 3. That case, however, is unavailing.

12. The case involved an attempt by the debtor to modify, or terminate payment of, collectively bargained retiree health obligations that occurred prior to the enactment of Section 1114 of the Bankruptcy Code, 11U.S.C. § 1114. The *Century Brass* court addressed a union's refusal to negotiate to change retiree health benefits the union asserted were vested for life. See *Century Brass*, 795 F. 2d at 269. Congress thereafter enacted Section 1114, which provides for alternative representation where a labor organization declines to serve as the retirees' authorized representative (allowing for a retiree committee). Section 1114 also expressly requires the debtor to timely pay retiree health benefits unless and until modified

pursuant to the procedures established by the statute. *See* 11 U.S.C. §1114(e). *Century Brass* is therefore no longer useful authority as Congress has determined that the processes under Section 1114 are applicable to retiree health and life insurance, but not to pension benefits. *See In re United Airlines, Inc.*, December 14, 2004 Transcript, attached hereto as Exhibit B (rejecting retirees' request for authorized representative status based upon *Century Brass* and ruling on the basis of the provisions of Section 1113 and Section 1114 of the Bankruptcy Code).

13. Section 1114, which governs the modification of retiree health and life insurance benefits provided to union-represented and non-represented retirees, sets forth express rules for the identification of authorized representatives with whom the debtor would engage.³ Under Section 1114, the labor organization shall be the authorized representative of those persons receiving retiree benefits covered by a collective bargaining agreement. The statute also provides that the labor organization may decline to serve in that capacity, in which case the court appoints a committee of retirees to serve as the authorized representative. A committee of retirees is also the statutorily designated authorized representative for persons whose benefits are not covered by a collective bargaining agreement. 11 U.S.C. §1114(c), (d).

15. Accordingly, the Retirees' and Committee's filing of objections and responses to the Debtor's motion to reject the collective bargaining agreement under Section 1113 of the Bankruptcy Code flatly contradict ALPA's authority as exclusive collective bargaining representative and the provisions of Sections 1113 and 1114.

³ For purposes of Section 1114, "retiree benefits" means "payments . . . for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor" prior to the bankruptcy filing. 11 U.S.C. § 1114(a). The pension contributions and non-qualified pension benefit payments do not constitute "retiree benefits" under Section 1114.

16. While the ALPA appreciates the Retirees support in this matter, it nonetheless must respectfully request that their objections be denied for the reasons set forth above.

WHEREFORE, and for the reasons set forth herein, this Court should deny the Retirees' Objections and the Committee's Response, strike them from the record, and instruct the Clerk of the Court to remove the Objections and the Response from the docket in these proceedings.

Dated: November 14, 2005
New York, New York

COHEN, WEISS and SIMON LLP

By: /s/ Bruce H. Simon

/s/ Robin H. Gise
Bruce H. Simon (BS2597)
Manlio Di Preta (9316)
Robin H. Gise (RG5592)
330 West 42nd Street, 25th Floor
New York, New York 10036-6976
(212) 563-4100

Attorneys for Air Line Pilots Association

Exhibit A

Westlaw

408 F.3d 847

Page 1

408 F.3d 847, 44 Bankr.Ct.Dec. 221, Bankr. L. Rep. P 80,289, 34 Employee Benefits Cas. 2761

(Cite as: 408 F.3d 847)

H

United States Court of Appeals,
Seventh Circuit.
In the Matter of: UAL CORPORATION, et al.,
Debtors-Appellees.
Appeals of: INDEPENDENT FIDUCIARY
SERVICES, INC.
No. 05-2061, 05-2093.

Argued May 9, 2005.
Decided May 9, 2005 [FN†].

FN† The appeal was resolved by summary order issued shortly after oral argument, with a notation that an opinion would follow.

Opinion Issued May 24, 2005.

Background: After Chapter 11 debtor-airline proposed to terminate its pension plans and transfer residual obligations to the Pension Benefit Guaranty Corporation, entity that had been selected as plans' independent fiduciary sought to participate in hearing concerning whether debtor could reject two of its collective bargaining agreements (CBAs). The United States Bankruptcy Court for the Northern District of Illinois ruled that independent fiduciary was not an "interested party" that could appear and be heard at such hearing, and fiduciary appealed. The District Court, John W. Darrah, J., 2005 WL 782707, affirmed, and fiduciary appealed.

Holdings: The Court of Appeals, Easterbrook, Circuit Judge, held that:

- (1) bankruptcy court's ruling was not equivalent to the denial of intervention, for purposes of appellate jurisdiction;
- (2) bankruptcy court's ruling was appealable as a "collateral order"; and
- (3) addressing an issue of apparent first impression for the federal appellate courts, term "interested

party," as used in the section of the Bankruptcy Code governing rejection of CBAs, refers to parties to the CBA or a guarantor of that contract, and so fiduciary was not entitled to participate in the hearing.

Affirmed.

West Headnotes

[1] Bankruptcy  **3768**

51k3768 Most Cited Cases

Bankruptcy court's decision denying a motion to intervene as of right is appealable immediately because it finally concludes the putative intervenor's rights.

[2] Bankruptcy  **3768**

51k3768 Most Cited Cases

Appeal from a bankruptcy court's order denying intervention is the only way to become a party and, thus, must precede decision on the merits.

[3] Bankruptcy  **3768**

51k3768 Most Cited Cases

Bankruptcy court's ruling, that independent fiduciary selected to administer Chapter 11 debtor-airline's pension plans was not an "interested party" that could appear and be heard at a hearing concerning rejection of the debtor's collective bargaining agreements (CBAs), was not equivalent to the denial of intervention, for purposes of appellate jurisdiction. Bankr.Code, 11 U.S.C.A. § 1113(d)(1).

[4] Bankruptcy  **2156**

51k2156 Most Cited Cases

Proceeding under the section of the Bankruptcy Code governing rejection of collective bargaining agreements (CBAs) is a "contested matter" within the bankruptcy judge's core jurisdiction, rather than an adversary proceeding. Bankr.Code, 11 U.S.C.A. § 1113; 28 U.S.C.A. § 157(b).

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

(Cite as: 408 F.3d 847)

[5] Bankruptcy ↻3768

51k3768 Most Cited Cases

Bankruptcy court's ruling, that independent fiduciary selected to administer Chapter 11 debtor-airline's pension plans was not an "interested party" that could appear and be heard at a hearing concerning rejection of the debtor's collective bargaining agreements (CBAs), was appealable as a "collateral order"; dispute was important, not subject to reconsideration in the trial court, distinct from the merits, and, under the circumstances, unreviewable as a practical matter later. Bankr.Code, 11 U.S.C.A. § 1113(d)(1).

[6] Bankruptcy ↻3768

51k3768 Most Cited Cases

Unlike the disposition of an adversary proceeding, which is appealable on the same terms as the final resolution of separate litigation, an order resolving a contested matter within the core proceeding is appealable only if equivalent to the disposition of a stand-alone suit.

[7] Bankruptcy ↻3117

51k3117 Most Cited Cases

Term "interested party," as used in the section of the Bankruptcy Code governing rejection of collective bargaining agreements (CBAs), refers to parties to the CBA or a guarantor of that contract, and so independent fiduciary selected to administer Chapter 11 debtor-airline's pension plans was not an "interested party" that could appear and be heard at a hearing concerning rejection of the debtor's CBAs. Bankr.Code, 11 U.S.C.A. § 1113(d)(1).

[8] Bankruptcy ↻3113

51k3113 Most Cited Cases

What labor and management may do voluntarily, the bankruptcy court may accomplish in a proceeding under the section of the Bankruptcy Code governing rejection of collective bargaining agreements (CBAs). Bankr.Code, 11 U.S.C.A. § 1113.

*849 Filiberto Agusti (argued), Steptoe & Johnson, Washington, DC, Plaintiff-Appellant.

David R. Seligman (argued), Chad J. Husnick, Kirkland & Ellis, Chicago, IL, for Debtor-Appellee.

Before POSNER, EASTERBROOK, and EVANS, Circuit Judges.

EASTERBROOK, Circuit Judge.

When United Airlines proposed to terminate its pension plans and transfer residual obligations to the Pension Benefit Guaranty Corporation, questions about the appropriateness of its remaining as fiduciary of those plans were resolved by replacing United in that role with Independent Fiduciary Services, Inc. (IFS). As part of this switch, IFS acknowledged that its capacity would be administrative only--to ensure collection of all sums due, and their correct distribution under the plans' terms, but not to take any position on whether those terms should be altered. That is consistent with the understanding that deciding how much financial security to offer employees is an entrepreneurial rather than a fiduciary function. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996).

Notwithstanding this limit on the scope of its engagement, IFS sought to participate in a hearing under 11 U.S.C. § 1113 at which the bankruptcy court would consider whether United can reject two of its collective bargaining agreements. Subsection 1113(d)(1) provides that "[a]ll interested parties may appear and be heard at such hearing", and IFS contends that it is an "interested party" because rejection of an agreement may affect United's pension obligations or the priority that legally required minimum pension funding after the plans' termination will receive in the bankruptcy. One of United's goals in the § 1113 proceeding is obtaining the court's approval to terminate pension plans over the unions' opposition. IFS wants to oppose rejection; it expresses particular concern that United and its unions may reach a compromise that would affect the pensions of workers already retired. The bankruptcy judge ruled that IFS is not an "interested party" under § 1113(d)(1), the district judge affirmed, and IFS immediately appealed.

[1][2][3][4] Appellate jurisdiction is the initial

408 F.3d 847

Page 3

408 F.3d 847, 44 Bankr.Ct.Dec. 221, Bankr. L. Rep. P 80,289, 34 Employee Benefits Cas. 2761

(Cite as: 408 F.3d 847)

question. IFS treats the bankruptcy judge's order as a denial of intervention. A decision denying a motion to intervene as of right is appealable immediately because it finally concludes the putative intervenor's rights, for only a party may appeal from the ultimate decision. An appeal from the order denying intervention is the only way to *become* a party and thus must precede decision on the merits. See, e.g., *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967). That principle does not fit this situation, however, because IFS already is a party to United's bankruptcy proceeding. If United's proposal to reject the collective bargaining agreement initiated an adversary action, with a separate set of parties, then the fit would be better. But it did not; a proceeding under § 1113 is a "contested matter" within the bankruptcy judge's core jurisdiction rather than an adversary proceeding. 28 U.S.C. § 157(b). No appellate opinion holds that a bankruptcy judge's decision whether a given participant *850 in the proceedings is an "interested party" under § 1113 is equivalent to the denial of intervention; indeed, as far as we can tell this is the first time any dispute about either substance or procedure under § 1113(d)(1) has reached a court of appeals.

[5] This leads IFS to contend that a dispute about its participation is appealable as a "collateral order" under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), because it is important, not subject to reconsideration in the trial court, distinct from the merits, and unreviewable as a practical matter later. The first three ingredients of the *Cohen* formula are established here, but the fourth is in doubt. If the bankruptcy judge erred in concluding that IFS is not an "interested party" under § 1113(d), that at least in principle could be addressed on appeal from the final decision. The Supreme Court insists that the normal costs of litigation (including the costs of re-trying cases infected by error), and the normal chariness of appellate courts asked to reverse for mistakes that may well prove to be harmless, do not justify immediate review of procedural steps said to be erroneous. See, e.g., *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376-77, 107

S.Ct. 1177, 94 L.Ed.2d 389 (1987); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989).

[6] Yet it is difficult to see when and how IFS could obtain appellate review from the final decision, because it is less than clear what the "final" decision would be. Unlike the disposition of an adversary proceeding, which is appealable on the same terms as the final resolution of separate litigation, an order resolving a contested matter within the core proceeding is appealable only if equivalent to the disposition of a stand-alone suit. See, e.g., *In re Morse Electric Co.*, 805 F.2d 262, 264-65 (7th Cir.1986). An order permitting a debtor to reject a collective bargaining agreement does not meet that description, because it leaves remedial questions unresolved. Rejection is equivalent to breach of contract outside bankruptcy: it converts an obligation to perform into an obligation to pay money for non-performance. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 530-31, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984). Valuation of the financial obligation may not be complete until the plan of reorganization, and IFS would face formidable hurdles in attempting to appeal from an order confirming the final plan.

Because a plan authorizes (and often requires) many persons to act in reliance on judicial assurance that they are safe in doing so, courts are exceedingly reluctant to upset a plan after it has taken effect. See *In re UNR Industries, Inc.*, 20 F.3d 766 (7th Cir.1994). As a practical matter review of a confirmed plan is possible only if it has been stayed pending appeal, and a stay is possible only if supported by a bond. IFS's role in this reorganization is too small to make a bond practical--it would have to secure the bond with its own assets rather than those of the pension funds, and the assets of a management company won't be up to the task. A substantial risk that the need to post a large bond would foreclose access to a decision on the merits led to review not only in *Cohen*, the original collateral-order opinion, but also in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). Even a party willing and able to post a bond may discover that

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

408 F.3d 847

Page 4

408 F.3d 847, 44 Bankr.Ct.Dec. 221, Bankr. L. Rep. P 80,289, 34 Employee Benefits Cas. 2761

(Cite as: 408 F.3d 847)

the court will not stay a final plan of reorganization, the benefits of which may depend on prompt implementation. United has made clear that it will do everything in its power to frustrate appellate review of IFS's contentions at any later time, if that review *851 could delay the resolution of the bankruptcy.

Now a flat rule that the difficulty or expense of blocking a confirmed plan of reorganization allows immediate appeal would as a practical matter abolish the final-decision rule in bankruptcy. It therefore could not be applied generally. Requiring litigants to bear some expense or risk in order to obtain appellate review helps to curtail the demand for order-by-order interlocutory decisions. See *Powers v. Chicago Transit Authority*, 846 F.2d 1139 (7th Cir.1988). But fiduciaries cannot be expected to put their own wealth on the line in order to protect the beneficiaries. This is why the Supreme Court held in *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918), that a client could appeal from an order requiring an attorney to disclose documents said to be privileged; the Court thought that it would be unwarranted to demand that the attorney, who served only as a fiduciary in holding the documents, put his own liberty or wealth at risk in order to set up an appellate decision. See also *Church of Scientology v. United States*, 506 U.S. 9, 18 n. 11, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992); *Burden-Meeks v. Welch*, 319 F.3d 897, 899-900 (7th Cir.2003). Cf. *United States v. Ryan*, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971) (clients must risk their own liberty or wealth to obtain interlocutory review). By analogy, a fiduciary such as IFS is entitled to a procedure that allows review without requiring it to stake its corporate existence to obtain an effective appeal later. We therefore have jurisdiction of IFS's appeal.

[7] The merits are easier. Although the Bankruptcy Code does not define the term "interested party," and no appellate decision has addressed its meaning, it is most naturally read to mean "party to the collective bargaining agreement" or a guarantor of that contract. IFS wants us to treat it as equivalent to the term "party in interest" under §

1109(b), on which see *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 284 (7th Cir.2002), and thus as including any person with a financial stake in the employer's performance of the collective bargaining agreement, but that would make § 1113 proceedings unmanageable. Section 1109(b) defines who is a party to the bankruptcy; the set of "interested parties" for particular purposes such as § 1113 must be its subset. Otherwise every employee *individually* would have to be notified and allowed to participate when the employer proposes to reject a collective bargaining agreement, though for every other purpose the union acts as the employees' representative; more, every retiree would receive separate notice and an opportunity to be heard; tax collectors, unsecured creditors that might gain if the debtor altered its obligations to labor--the list would go on and on.

[8] Labor and management are free to change their agreements without any complaint by individual workers or pensioners--or for that matter by other third-party beneficiaries, including pension fiduciaries. What labor and management may do voluntarily, the court may accomplish in a § 1113 proceeding. There is no reason to include in the § 1113 proceeding any person or entity whose consent would be unnecessary to a voluntary change in the agreement. All of the legally protected interests are represented by labor, management, and the Pension Benefit Guaranty Corporation. Because IFS is not entitled to block a change in the collective bargaining agreements, it also is not entitled to participate in the litigation as an "interested party."

AFFIRMED

408 F.3d 847, 44 Bankr.Ct.Dec. 221, Bankr. L. Rep. P 80,289, 34 Employee Benefits Cas. 2761

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Exhibit B

0001

1 IN THE UNITED STATES BANKRUPTCY COURT
2 FOR THE NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION
4

5 United Airlines, Inc., et al,) No. 02 B 48191
6) Chicago, Illinois
7 Debtor.) 9:30 a.m.
8) December 14, 2004

9 TRANSCRIPT OF PROCEEDINGS BEFORE THE
10 HONORABLE EUGENE R. WEDOFF

11

12

13 APPEARANCES:

14 For Debtors:

Mr. David Seligman;
Mr. Chris Heck;

15

16 For URPBPA:

Mr. Jack Corrighio;

17

18 For IAM:

Mr. Tom Redburn;

19

20 For Assoc. Flight Attendants: Mr. Robert Clayman;

21

22 For Airline Pilots Assoc.: Ms. Babette Ceccoltti;

23

24 Court Reporter:

JACKLEEN DE FINI, CSR, RPR
U.S. Courthouse
219 South Dearborn
Room 661
Chicago, Il. 60604.

25

0002

1

2 THE CLERK: UAL Corporation, 02 B
3 48191.

4

5 MR. CARRIGILIO: Good morning, Your
6 Honor. Jack Carrighio for the United Retired Pilots
7 Benefit --

8

9 THE COURT: You need to speak directly
10 into a microphone, Mr. Carrighio, to be heard on the
11 telephone.

12

13 Then as long as you've started, let's
14 have the other appearances by counsel in the
15 courtroom.

16

17 MS. CECCOLTI: Good morning, Your
18 Honor. Babette Ceccoltti for the Airline Pilots
19 Association.

20

21 THE COURT: Miss Ceccoltti, perhaps you
22 are not able to hear me. What I was asking for
23 first, because Mr. Carrighio started, I asked for
24 appearances in the courtroom first.

25

26 MS. CECCOLTI: I'm sorry, Your Honor.
27 I couldn't hear you.

28

29 THE COURT: That's what I was afraid
30 of. If you have problems hearing what's going in the
31 court, please let us know.

32

33 MS. CECCOLTI: All right.

34

35 THE COURT: Mr. Seligman, go ahead.

36

0003

1 MR. SELIGMAN: David Seligman on
2 behalf of the debtors.
3 MR. HECK: Chris Heck on behalf of the
4 debtors.
5 THE COURT: And the appearances by
6 telephone, please.
7 MR. REDBURN: Tom Redburn for the
8 International Association of Machinists. Good
9 morning, Your Honor.
10 THE COURT: Good morning.
11 MR. CLAYMAN: Robert Clayman, Your
12 Honor, for the Association of Flight Attendants.
13 THE COURT: Are there any other
14 appearances by telephone?
15 Okay. Two matters before the court
16 this morning, the first is a motion -- and both
17 brought by the United Retired Pilots Benefit
18 Protection Association, the first is a motion to be
19 appointed as section 1113 authorized representatives.
20 If I'm not mistaken, there's no such thing. Section
21 1114 calls for the appointment of an authorized
22 representative for retirees who are not being
23 represented by their union in connection with the
24 change in retiree medical benefits. But there's no
25 parallel provision in section 1113.

0004

1 Is that right?
2 MR. CARRIGILIO: Not in 1113 itself,
3 Your Honor. We are relying on the rationale of the
4 Century Brass case and similar cases where they've
5 encountered this type of rather unusual situation
6 where, as we have here, all of the unions except ALPA
7 are representing their retirees. ALPA is not
8 representing their retirees.
9 THE COURT: Okay. I think the
10 situation is really simple: To the extent that you
11 have authorization from the parties in interest, that
12 is the Retired Pilots that you represent to
13 participate in the proceeding, go ahead and
14 participate in the proceeding. But there is no point
15 in my giving you some kind of official status that's
16 not called for by the code. The question that I
17 think underlies your motion is a desire to
18 participate, and I don't take it that there's any
19 objection from parties about your participating to
20 some extent.
21 As with any party that is
22 participating in the proceedings, I would hope that
23 we not have duplication of questioning and
24 unnecessary delay. But if you are representing
25 parties who have an interest in the proceeding and

0005

1 because of the potential for a de facto issue
2 preclusion, I think I have already made a
3 determination that parties whose ultimate interest is
4 in the distressed termination proceeding that's
5 anticipated would have a right to participate in this
6 collective bargaining matter. But that would be the
7 basis for your participation, not any kind of
8 official appointment by the court.
9 MR. CARRIGILIO: The only thing I
10 would say on that, Your Honor, is the extent of the
11 participation is really the issue. There's no one in
12 the mix right now who's in a position to bargain with

13 the debtor on the good faith proposals that are
14 supposed to be going back and forth as to the retired
15 pilots' rights.

16 THE COURT: There's no requirement now
17 for the debtor to be negotiating with the retired
18 pilots. The matter in dispute right now is a
19 collective bargaining agreement. The parties to the
20 collective agreement are the debtor and the union.
21 So as far as negotiations are concerned, those are
22 the only two parties that are appropriate. When the
23 question comes up as to whether there is a necessity
24 for terminating pension plans, that may be one of the
25 issues that's involved in 1113 process, you would

0006

1 have a right to represent the interests of your
2 members insofar as those interests are affected by
3 that determination. But you don't have a right to
4 participate in negotiations regarding a collective
5 bargaining agreement to which your members are not a
6 party.

7 MR. CARRIGILIO: Our only position on
8 that, Your Honor, was the same position in Century
9 Brass. Since we don't have the proposals, we don't
10 really know whether -- just like in Century Brass,
11 ALPA is saying that because they don't represent
12 retirees, they will not bargain away retiree rights.
13 Or perhaps ALPA is doing just that, that in order to
14 get better wage concessions for their active members
15 they're agreeing to a termination or modification of
16 the retiree pension plan.

17 THE COURT: Or course they're
18 perfectly free to do that. If they were negotiating
19 a new collective bargaining agreement, this one
20 terminated, your members would have no right to
21 participate in those negotiations.

22 MR. CARRIGILIO: Well, Your Honor, for
23 the vested rights we believe that we do. If they
24 negotiated --

25
0007

1 THE COURT: Excuse me. On that point
2 you and I simply have a difference of opinion. I
3 believe that the parties to the contract, that is to
4 say the unions on one hand and United on the other,
5 are the ones who are appropriately engaged in
6 negotiations at this point. And were it not for the
7 fact that there is a distressed termination
8 proceeding in prospect as to which there might be
9 some impact on account of determinations that I would
10 make in the 1113 process, you would have no standing
11 to participate in the 1113 process at all. But
12 because there is this potential overlap of issues, I
13 have indicated that I thought it was appropriate to
14 expand the concept of standing for the purpose of
15 adjudicating contested issues regarding the necessity
16 of terminating pension plans.

17 MR. CARRIGILIO: I understand.

18 THE COURT: So you're certainly
19 entitled under that ruling that I have already made
20 to participate in a contested hearing on the question
21 of whether it's necessary to terminate the pension
22 plans. That doesn't give you a right to participate
23 in negotiation over a collective bargaining agreement
24 to which you are not a party.

MR. CARRIGILIO: The only additional

25 point, Your Honor, we raised it in the memo, and I
0008
1 also confirmed it yesterday with PBGC's counsel, is
2 that there's a qualified and a nonqualified component
3 to the retired pilots' pension plan. And as we
4 raised in our brief, and as was confirmed to me
5 yesterday by the PBGC's counsel, they do not -- the
6 PBGC does not believe that it will be in a position,
7 or should be in a position to defend the nonqualified
8 portion of the pilots plan at a distressed
9 termination hearing. They do not believe that would
10 be appropriate.

11 THE COURT: Fine.
12 MR. CARRIGILIO: So it could
13 effectively then be bargained away within the context
14 of this 1113 by a representative, by a union that
15 does not represent its retirees. That's an
16 additional reason why we believe that it would be
17 appropriate to have someone in the mix now to
18 negotiate, especially as to that nonqualified
19 component of the plan.

20 THE COURT: Again on this subject, we
21 simply have a disagreement. You believe that your
22 clients have a right to negotiate a collective
23 bargaining agreement with the debtors and I disagree
24 because they're not parties to the collective
25 bargaining agreement. So on that one we'll simply

0009
1 have to register that disagreement. And on that
2 basis I'm going to deny the motion for official
3 appointment without prejudice to your participating
4 in the hearing to determine whether it is necessary
5 to terminate these pension plans under the collective
6 bargaining agreement.

7 And, again, the reason why that
8 participation is allowed is solely because it might
9 have an impact on the later determination that the
10 court would be required to make in a distress
11 termination proceeding where your clients would
12 unquestionably have standing to participate.

13 Now that brings us to the second
14 motion, which is the discovery motion. As I
15 understand it from the debtors' reply, there were
16 four items of information that you were seeking in
17 discovery. The first two of which have already been
18 resolved.

19 MR. CARRIGILIO: Well, they've been
20 resolved, but we haven't received them.

21 THE COURT: But there's an agreement
22 by the debtors to provide them.

23 How long will that take to provide?

24 MR. HECK: Your Honor, I think for
25 providing the business plan, we can do that as soon

0010
1 as we have a confidentiality agreement in place.
2 As far as the actuarial information,
3 that's too vague of a term to figure out what the
4 retired pilots want. We have asked them to be more
5 specific in the information they're looking for.
6 Once they do that, the confidentiality agreement in
7 place, we'll be turning over those two categories of
8 documents.

9 THE COURT: Well, do you have any
10 reason to believe that that can't be done by Friday?

11 MR. HECK: No, Your Honor. I think we
12 should be able to do that by Friday.

13 THE COURT: That's what I would have
14 expected.

15 MR. HECK: Depending on once they
16 specify the actual actuarial information, the volume
17 of what they're looking for.

18 MR. CARRIGILIO: May I speak to that?
19 I talked with Mr. Hagan from their office, Your
20 Honor. On that one I have been waiting for the name
21 of their actuary, because just like what we went
22 through on the 1114 process when we were exchanging
23 actuarial information, we had our actuary contact
24 their actuary and say what we needed, items that I
25 think they have termed would be "on the shelf," that

0011 have been provided to other parties within the 1113
1 process.

2 THE COURT: What I'm going to do is
3 simply continue these matters to the Friday omnibus
4 with the expectation that they'll be resolved.
5 Now, on the third and fourth items,
6 the third item being settlement discussion
7 information between the debtor and one of the unions.

8 MR. CARRIGILIO: May I speak to that,
9 Judge, for a moment?

10 THE COURT: I'm just going to tell
11 you, you're not entitled to it. It basically flows
12 from the same discussion we had earlier. If your
13 members were properly parties to the negotiation of a
14 collective bargaining agreement, they might well be
15 entitled to the kind of information that you are
16 seeking, but they're not. The parties to this
17 process of negotiation under section 1113 are the
18 unions on one hand and United on the other. And your
19 members are not parties to that negotiation. Since
20 they're not parties to the negotiation, they're not
21 entitled to what are confidential settlement
22 discussions between the parties. And I don't see any
23 way around that.

24 The issue again that you have standing

0012
1 to pursue at the contested hearing has to do with the
2 necessity of terminating the pension plan. And on
3 that question you are entitled to reasonable
4 discovery. And I think that's acknowledged by the
5 debtors in their agreement to provide you with the
6 first two categories of information that you were
7 seeking. But as to settlement negotiations, you
8 would not be entitled.

9 MR. CARRIGILIO: The only item there,
10 Your Honor, is as part of the 1113 we should have a
11 say in whatever 1113 result there is is fair and
12 equitable as to all affected parties. And where we
13 are going with this request for the proposals between
14 ALPA and United, Your Honor, is to make a
15 determination as to whether they are fair and
16 equitable as to the retired pilots. For instance, if
17 ALPA in order to get a better wage concession out of
18 United is bargaining away retiree benefits to our
19 detriment, we believe we should know about that and
20 be able to point that out to Your Honor, that they
21 made X dollars in wage benefits for themselves by
22 bargaining away benefits of the retirees.

23 THE COURT: My obligation under 1113
24 is to have a hearing on termination of a collective
25 bargaining agreement in the event that the parties to

0013
1 the collective bargaining agreement are not able to
2 reach agreement. I don't know anything in 1113 that
3 requires me to allow other parties who are affected
4 by an agreement to object to the agreement. If
5 that's a requirement, I don't see it in 1113.

6 Again, if there's a contested hearing,
7 you're perfectly permitted to participate. And the
8 issue in the collective hearing may very well be the
9 need to terminate the pension plan. But if there's
10 an agreement reached, we're not talking about an 1113
11 hearing. At most, we'd be talking about some kind
12 363 hearing, in which case another notice would go
13 out and you'd have an opportunity to be heard on that
14 matter. But it would not be an 1113 process. And if
15 I am mistaken about that, I will certainly look for
16 someone to correct me. But that's my understanding
17 of the way 1113 works. I have hearings in the
18 absence of agreement, not hearings in the presence of
19 agreement.

20 So, again, the agreement process, the
21 negotiation process is one that is to be conducted
22 between the debtor and the unions that are parties to
23 the collective bargaining agreement, not third
24 parties who might be affected by those discussions.
25 So as to that aspect the motion is denied.

0014
1 Now the final aspect has to do with
2 this Bridge report.

3 MR. CARRIGILIO: Yes, sir.
4 THE COURT: That is a difficult issue.
5 The parties who created the Bridge report did so with
6 an understanding between themselves that the Bridge
7 report would be held confidential. But if the Bridge
8 report contains information that's discoverable, how
9 does a private agreement among the parties who
10 generated the Bridge report prevent discovery?

11 MR. HECK: Well, Your Honor, I think
12 the first point on that is that Your Honor entered an
13 order approving all the terms of the Bridge report,
14 and that motion to approve was noticed up. The
15 confidentiality provisions were in that motion. If
16 someone had wanted to object to them at the time,
17 they could have done so before this court entered
18 that order.

19 THE COURT: Well, did I enter an order
20 that said that the provisions of this report are
21 going to be immune from discovery?

22 MR. HECK: No, Your Honor. You
23 entered an order approving --

24 THE COURT: Approving the agreement
25 between the parties.

0015
1 MR. HECK: Yes, Your Honor.

2 THE COURT: The parties were going to
3 agree to hold the contents confidential. Parties
4 enter into confidentiality agreements all the time
5 that are overridden by discovery in lawsuits.

6 MR. HECK: Correct, Your Honor.

7 To clarify, you approved -- in terms
8 of the engagement letter with Bridge, which included

9 the confidentiality provision within it.

10 THE COURT: So, again, my question
11 stands: what we have is an agreement among the
12 parties who sought the Bridge report that it be held
13 confidential. That agreement certainly bound the
14 parties. So neither the unions nor the debtor could
15 voluntarily disclose that report. But if the report
16 is sought in discovery, and if the report's relevant
17 in discovery, then I would suppose that it ought to
18 be discoverable. It may very well be that a
19 confidentiality obligation could be imposed on the
20 party that's seeking the discovery. But I'm not
21 aware of any rule of law that would allow a private
22 agreement between parties, even if it's approved by a
23 court, to preclude discovery of relevant information.

24 TELEPHONICALLY: Your Honor --

25 MR. CARRIGILIO: -- confidentiality

0016

1 agreement, Your Honor, I do want to make that point.

2 THE COURT: Mr. Clayman.

3 MR. CLAYMAN: This is Robert Clayman.

4 THE COURT: Yes.

5 MR. CLAYMAN: We join in the IM's
6 position regarding this. The fact is is that part of
7 the benefit of the bargaining between the parties was
8 confidentiality, just as a matter -- whether you call
9 it public policy or not, the interests of the parties
10 in reaching agreement that a court approving those
11 agreements would seem to be that they actually are
12 meaningful. And if there's an agreement of
13 confidentiality that's simply going to be breached
14 every time there's discovery, then there may not have
15 been an agreement of this kind.

16 THE COURT: What I'm going to do is,
17 since I'm continuing this motion, or at least
18 portions of the motion until Friday anyway, and given
19 that there's very little time for the parties
20 opposing this particular request by the retired
21 pilots to respond to it, I will continue the motion
22 with respect to the Bridge report as well to Friday
23 on the omnibus.

24 But what I would need if I'm going to
25 deny this request for discovery is some authority for

0017

1 the proposition that an expectation among parties
2 that information will be kept confidential is
3 sufficient to preclude discovery.

4 MR. REDBURN: Your Honor, Thomas
5 Redburn from the IM. Can I just throw out one
6 additional point for the court's consideration?

7 THE COURT: Certainly.

8 MR. REDBURN: And that is that it's
9 not clear to me that this document is relevant to the
10 1113(c) process. This document was created after the
11 debtor had already developed its business plan. And
12 it's my understanding that it was not created for use
13 in connection with the debtors' formulation of its
14 proposals to the unions. So it's not clear to me
15 that this is a document that the retired pilots need
16 in connection with this proceeding.

17 I would also point out that the
18 underlying source documents that were analyzed by the
19 Bridge report, particularly the debtors' business
20 plan, those are going to be made available to all the

21 interested parties in the course of discovery. So
22 it's not clear to me that the pilots have made any
23 showing that this document is either relevant or that
24 it is necessary for them to obtain in order to
25 participate in the 1113(c) proceeding.

0018

1 THE COURT: well, I think you have
2 ignored the fairly broad standard for production of
3 discovery, which is not only documents that are
4 likely to be admissible as relevant in themselves,
5 but also documents that are likely to lead to the
6 discovery of relevant, admissible information.

7 Given that the hearing is anticipated
8 to involve questions of the necessity of terminating
9 pension plans in order for a successful
10 reorganization to occur, a document that analyzes the
11 condition of the debtor financially would certainly
12 seem to me to bear on that question and hence be
13 discoverable. It may be that it's produced after the
14 plan that United is proposing right now, but that
15 doesn't change the fact that it may bear on the
16 necessity for termination of pension plans.

17 MR. REDBURN: Well, Your Honor, as the
18 IM indicated in its limited objection, we are willing
19 to agree to the circulation of an executive summary
20 summarizing the core findings of the report, which I
21 think is all that the retired pilots would need. But
22 that would protect from disclosure the confidential
23 aspects of this report which, you know, echoing
24 Mr. Clayman's statements that the confidentiality
25 which was a critical material term of the agreement

0019

1 settling the trustee motion.

2 THE COURT: I will continue this to
3 Friday. And if any party would like to file any
4 additional memoranda in opposition to the motion, I
5 can consider that to the extent that there's time to
6 do it. But, again, what I understand the situation
7 to be is one in which parties to the preparation --
8 the commissioning, I should say, of a financial
9 report agree among themselves that the report would
10 be held confidential. And the question is whether if
11 the report is relevant for purposes of discovery,
12 that agreement among the parties can preclude
13 disclosure. And, again, my understanding is that an
14 agreement among parties that a document be held
15 confidential does not immunize the document from
16 disclosure. But if there is special circumstances,
17 or if my understanding of the law in this regard is
18 incorrect, I will be happy to hear what you have to
19 say about it.

20 MR. CLAYMAN: Thank you, Your Honor.

21 MR. REDBURN: Thank you, Your Honor.

22 THE COURT: So to summarize then, the
23 requests in this motion insofar as it seeks
24 disclosure of settlement discussion between the
25 unions and United is denied. And other respects, the

0020

1 motion is continued to Friday for a report on
2 production pursuant to the first and second items of
3 discovery, and for potential further argument with
4 respect to the final one.

5 MR. CARRIGILIO: Very well, Judge.

6 Thank you.

7 MR. SELIGMAN: Your Honor -- Your
8 Honor, I'm sorry. I just wanted to give the court
9 also just one update, which doesn't bear directly to
10 this, but we, the debtors, have reached a tentative
11 agreement with a negotiating committee for the
12 pilots. The terms haven't been disclosed yet, and
13 there are a bunch of conditions that have to occur.
14 Because we are here, I wanted to at least advise Your
15 Honor of that. And I am sure we'll be talking more
16 about that at Friday's omnibus hearing.

17 THE COURT: Thank you.

18 MR. CARRIGILIO: May I just get a
19 clarification on that? Is the negotiating committee,
20 is that ALPA?

21 MR. SELIGMAN: Of the pilots.

22 MR. CARRIGILIO: Thank you, Judge.

23 THE COURT: Just so it's clear, we had
24 two motions today. I just outlined the disposition
25 of the second of those two. The first I think I

0021 already made clear is denied for reasons I stated
2 earlier.

3 MR. HECK: Yes, Your Honor. Thank
4 you.

5
6 (which were all the proceedings had in
7 the above-entitled cause, December 14,
8 2004, 9:30 a.m.)

9 I, JACKLEEN DE FINI, CSR, RPR, DO HEREBY CERTIFY
10 THAT THE FOREGOING IS A TRUE AND ACCURATE
TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-
ENTITLED CAUSE.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25