

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

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Delta Pilots' Pension Preservation Organization,
James H. Gray, James Haigh,
Reuben Black, William Wirth,
James Bomar, Ronald Stowe,
Evan Gost, Richard Colby, and
Donald Mairose

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re:) Chapter 11
)
DELTA AIR LINES, INC.,) Case No. 05-17923-pcb
)
Debtor.)
-----X

**OBJECTION TO DELTA'S MOTION TO REJECT ALPA COLLECTIVE
BARGAINING AGREEMENT**

DP3, Inc. d/b/a Delta Pilots' Pension Preservation Organization ("DP3")¹, James H. Gray, James Haigh, Reuben Black, William Wirth, James Bomar, Ronald Stowe, Evan Gost, Richard Colby, and Donald Mairose ("**Retired Pilots**"), by their undersigned counsel, hereby

¹ DP3 is an organization of retired Delta pilots and their spouses, dependents, and survivors. All retired Delta pilots may join, and 2,580 have already done so as of November 9, 2005.

object to Delta's Motion to Reject ALPA Collective Bargaining Agreement. In support of its objection, DP3 and the Retired Pilots state as follows:

1. Delta's retired pilots have the right to receive monthly pension payments pursuant to the express terms of the current collective bargaining agreement between Delta and ALPA, known as the Pilot Working Agreement ("PWA"). (Joint Statement of Stipulated Facts ("**Stipulation**") filed October 12, 2005 [docket no. 711] ¶ 5).

2. Section 26(B)(1)(a) of the PWA requires that Delta "will pay the entire cost of providing retirement benefits . . . under the [Retirement Plan]." (Delta's Memorandum of Law in Support of § 1113 Motion, Exhibit 2). Section 26(I) of the PWA further incorporates each of the pension plans by reference and provides that "[t]he terms of the Plans, as amended, will control in the event of any conflict or difference between *Section 26* [of the PWA] and the Plan terms." (Id.; Stipulation ¶ 6). Section 26(D) of the PWA forbids unilateral modification of the Plans by Delta:

Irrespective of any contrary provisions of the Retirement Plan, the MPPP, the Bridge Plan, the Supplemental Annuity Plan, the D&S Plan, the Western D Plan and the DC Plan, the Company agrees that such Plans will not be amended, changed, varied, modified, or voluntarily discontinued during the term of the PWA and thereafter until the date the parties have been released to exercise self-help after exhaustion of the dispute resolution procedure of the Railway Labor Act, except as agreed by the Association and the Company, or except as otherwise required by law.

(Id.). Each of the incorporated Plans in turn provide for the timely payment of pension benefits to retired pilots. The above provisions will be referred to collectively herein as the "**Pension Payment Provisions.**"

3. The Pension Payment Provisions require Delta to timely pay all pension benefits to retired pilots unless and until the PWA and/or the Plans are modified by consent or, in bankruptcy, through the § 1113 process.

4. Delta's § 1113 proposal to ALPA and its § 1113 motion did not include modifying the PWA to delete or modify the Pension Payment Provisions.

5. Delta's § 1113 proposal to ALPA and its § 1113 motion did not include the termination of Delta's minimum funding contributions to the tax qualified pilots' pension plan or the termination of non-tax qualified pension payments to retired pilots *because* Delta had already unilaterally ceased paying these collectively bargained for pension benefits on the first day of its bankruptcy filing without any effort to satisfy the requirements of § 1113.

6. Delta's cessation of the pension payments required by the PWA constitutes a unilateral modification or rejection of the Pension Payment Provisions subject to the requirements of § 1113.

7. Accordingly, by its own admission, Delta's § 1113 proposal to ALPA and its § 1113 motion do not encompass all of the actual modifications to the PWA sought by Delta.

8. On October 31, 2005, this Court entered an Order Denying DP3's Motion to Compel the Continued Payment of Collectively Bargained For Pension Benefits to the Retired Pilots Pursuant to Bankruptcy Code § 1113 [Docket No. 970] on the ground that only the Debtor may move for relief under Bankruptcy Code § 1113. DP3, the Retired Pilots, ALPA, and Fiduciary Counselors, Inc. have appealed this Order to the United States District Court for the Southern District of New York.

9. The Debtor moved for relief under Bankruptcy Code § 1113 on November 1, 2005.

10. To obtain the relief requested by the Debtor pursuant to § 1113, Debtor must satisfy all of the procedural and substantive requirements of the statute.

11. The Second Circuit summarized the substantive requirements of § 1113 as follows:

Briefly stated, the statute permits the bankruptcy court to approve a rejection application only if the debtor, besides following the procedures set forth by Congress, makes three substantive showings. The first is that its post-petition proposal for modifications satisfies § 1113(b)(1), which in turn limits the debtor to proposing only “those necessary modifications in ... benefits and protections that are necessary to permit the reorganization of the debtor,” and obliges the debtor to assure the court that “all creditors, the debtor and all affected parties are treated fairly and equitably.” Second, the debtor must show that the union has rejected this proposal without good cause. Bankr.Code § 1113(c)(2). Third, the debtor must prove that “the balance of the equities clearly favors rejection of [the bargaining] agreement.” Code § 1113(c)(3).

Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 88 (2d Cir. 1987).

12. To satisfy the procedural requirements of § 1113 with respect to collectively bargained for pension benefits, the Debtor must show (i) that its proposal was based on the most complete and reliable information available at the time of the proposal to modify or terminate pension benefits; (ii) that the debtor provided such relevant information as is necessary to evaluate the proposal to modify or terminate pension benefits; and (iii) between the time of the making of the proposal and the time of the hearing, the debtor must meet at reasonable times to discuss its proposal to modify or terminate pension benefits; and (iv) that the Debtor conferred in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement relating to pension benefits. 11 U.S.C. § 1113(b).

13. The Second Circuit specifically addressed § 1113’s relationship to retirees and retiree benefits, including pension benefits, in the case of In re Century Brass Prod., Inc., 795 F.2d 265 (2d Cir. 1986). The Second Circuit held in Century Brass that “retirees should properly

be characterized as ‘employees’ for purposes of applying § 1113.” Id. at 275. The Second Circuit specifically held “that vested retiree insurance benefits are a proper subject of [the] bargaining” required by § 1113 and further required the bankruptcy judge to appoint an “authorized representative” to negotiate on behalf of the retirees since the union had a conflict of interest as a matter of law. Id. at 267. “[I]f retirees benefits are subjects of bargaining between the union and the employer, and no modification can occur absent the retirees’ consent, those retirees must be represented in the negotiations.” Id. at 274. The Second Circuit’s holding that a debtor is prohibited from modifying “retiree benefits” without first bargaining in good faith with the retirees’ authorized representative specifically included the debtor’s proposed “termination of the existing pension plan and institution of a new plan.” Id. at 269. Therefore, at least in the Second Circuit, union retirees enjoy all of the protections afforded union employees by § 1113, including the right to bargain in good faith with the debtor over whether the proposed modification or elimination of their pension benefits is necessary to the reorganization (something Delta has the burden of proving). Century Brass has not been overruled and is controlling.

14. The Century Brass court reversed the district court’s approval of the debtor’s proposed “termination of the existing pension plan and institution of a new plan” because it had not met § 1113’s good faith bargaining requirement with respect to retiree and pension benefits and remanded the case with instructions that the bankruptcy court appoint a representative for the retired employees of the debtor and then hold such further proceedings under § 1113 as appropriate. 795 F.2d at 269, 276. Delta has similarly failed to meet the good faith bargaining requirement with respect to the retired pilots’ pension benefits and its § 1113 motion to reject the PWA should accordingly be denied.

15. Delta has not shown, and cannot show, that its modification of the Pension Payment Provisions is limited to only those necessary modifications in benefits and protections that are necessary to permit the reorganization of the Debtor since Delta unilaterally ceased all pension payments to, or on behalf of, retired pilots immediately upon the filing of its bankruptcy petition.

16. Delta has not shown, and cannot show, that it conferred in good faith in attempting to reach mutually satisfactory modifications of the Pension Payment Provisions since Delta unilaterally ceased all pension payments to, or on behalf of, retired pilots immediately upon the filing of its bankruptcy petition and did not include these modifications in either its § 1113 proposal or its motion.

17. Delta's failure to include the modifications to the Pension Payment Provisions in either its § 1113 proposal or its motion demands a finding that Delta has failed to satisfy all of the substantive and procedural requirements of § 1113 and its motion must therefore be denied in its entirety.

Dated: November 9, 2005

SCHREEDER, WHEELER & FLINT, LLP

By: /s/ Dean Booth

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and Donald Mairose

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November 2005, I caused copies of the foregoing Objection to Delta's Motion to Reject ALPA Collective Bargaining Agreement to be served via first-class mail to the parties on the Non-ECF Service List from the Case Information Website below.

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I hereby further certify that the foregoing is a complete list of the Non-ECF Participants on www.deltadocket.com as of 3:00 p.m. on November 9, 2005.

This 9th day of November, 2005.

ls

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CLIENTS:4952:1:Bankruptcy Pleadings:Objection to 1113 motion.doc