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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re:	:
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DELTA AIR LINES, INC., et al.,	:
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Debtors.	:
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Chapter 11 Case No.

05-17923 (PCB)

(Jointly Administered)

**DELTA'S REPLY IN SUPPORT OF MOTION TO REJECT
ALPA COLLECTIVE BARGAINING AGREEMENT**

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I. INTRODUCTION

Delta's pilots are dedicated professionals who render valuable service to Delta and the traveling public. Nothing in Delta's Motion To Reject and supporting documents suggests otherwise. Like Delta's other employees, Delta's pilots have sacrificed in the past to help Delta avoid bankruptcy. And like Delta's other employees, Delta's pilots are now being asked to sacrifice once again. Delta takes no joy in this situation, yet Delta has no choice but to acknowledge and address the economic realities confronting it. The same is true for Delta's pilots.

Despite its rhetoric, ALPA's Objection is far more notable for what it concedes than for what it disputes. ALPA's Objection acknowledges these critical facts:

- that Delta needs costs — including pilot labor costs — that are competitive with its industry rivals in order to survive and prosper;
- that bankruptcies at US Airways, Northwest, and United, and restructuring at American and Continental, have radically diminished labor costs at Delta's historic competitors;
- that even after the concessions made by Delta's pilots in 2004, Delta does not currently have the pilot cost structure it needs; and
- that Delta cannot achieve the cost structure it must have to survive without significant additional contributions from the pilot group.

Thus, the only real question posed in this proceeding, is *how much* additional reduction in pilot labor cost Delta needs. ALPA's Objection narrows the grounds for disagreement and enables the parties, and the Court, to focus on the single most important issue: Delta's financial need.

As explained below, however, ALPA's Objection is entirely premised upon an analysis that does not withstand even minimal scrutiny. ALPA claims to have found" more than \$200 million per year in new money hidden in Delta's Business Plan — money derived from Delta's supposed failure to count all of the \$1 billion in savings from the 2004 ALPA Agreement.

ALPA subtracts that found money from the \$325 million in annual pilot cost reductions proposed by Delta, yielding a much smaller “need” for pilot labor cost reductions, a need that purportedly is more than satisfied by ALPA’s latest proposal.

Unfortunately, ALPA’s \$200 million “find” is at best a gross misunderstanding. While ALPA’s Objection is premised on its own financial analysis, it is notable that ALPA did not share that analysis with the Court, or with the professionals for the Creditors Committee.¹ Delta submits the ALPA Analysis as Exhibit 61.² Nor did ALPA provide any sworn statement explaining or attesting to the validity of the ALPA Analysis. Delta shows below that (a) the ALPA Analysis is inconsistent with the Business Plan model and data upon which Delta relied in securing DIP financing, data that Delta provided to ALPA more than two months ago; and (b) the ALPA Analysis also ignores factual accounting information shared with and explained to ALPA in January 2005. Third Declaration of Edward H. Bastian (“Bastian 3 Decl.”) ¶¶ 5-12; Second Declaration of Geraldine P. Carolan (“Carolan 2 Decl.”) ¶¶ 7-11; Exhibits 62-64.

¹ ALPA failed to agree to requests by the Creditors Committee to meet with ALPA’s financial advisors. See note 5 at page 6 of the Response By The Official Committee of Unsecured Creditors In Support Of The Motion To Reject ALPA Collective Bargaining Agreement (filed Nov. 10, 2005).

² ALPA’s negotiators had mentioned to Delta’s representatives several times over the past month that ALPA had prepared “an analysis” or “a report” which showed that Delta did not need the full \$325 million per year in pilot labor cost reductions that Delta had proposed. Each time it was mentioned, Delta’s representatives promptly asked to see the analysis in order to know the basis of ALPA’s position and to work together toward a clear understanding of the facts and data surrounding the negotiations. Carolan 2 Decl. ¶ 7. ALPA nonetheless waited until November 9, the day its Objection was due, to share with Delta the ALPA Analysis. By that time, of course, ALPA’s Objection had been substantially written. Footnote 3 of ALPA’s Objection is ALPA’s attempt to reserve the right to change its position “based on information presented by the Company for the first time at 1 p.m. on November 9, 2005.” Yet it was ALPA, not Delta, which presented the ALPA Analysis on November 9; Delta simply responded to ALPA’s presentation by pointing out the numerous flaws in ALPA’s analysis. Bastian 3 Dec. ¶¶ 5-12.

II. RECENT FACTUAL DEVELOPMENTS

A. ALPA At Northwest Reaches Tentative Interim Agreement On Further Cost Reductions

On November 3, 2005, the ALPA Master Executive Council at Northwest Airlines reached agreement with Northwest on an interim agreement, called the “1113(c) Extension Letter of Agreement” (the “Northwest Agreement”). If ratified by the Northwest pilots, the Northwest Agreement will take effect November 16, 2005.³ Exhibit 52. The Northwest Agreement includes a 23.9% reduction in hourly pay rates.⁴ As shown below, ALPA at Northwest has tentatively agreed to pay rates ranging from 2% to 9% **below** those that Delta has proposed to ALPA at Delta:

Equipment	Delta Sec. 1113 Proposal (-19%)	Northwest Interim Agreement (-23.9%)	Percent DL rate above NW
DL 777 - NW A330-200/300	\$174.74	\$159.13	9%
DL 767-400 - NW 787	\$165.05	\$162.36	2%
DL 757 - NW 757	\$146.26	\$142.28	3%
DL 737-800 - NW A319/320	\$140.26	\$136.94	2%
DL 737-200/300 - NW DC9-30/50	\$126.21	\$123.68	2%

Carolan 2 Decl. ¶ 2. Overall, the estimated value of the Northwest tentative agreement is \$215 million on an annualized basis (\$17.9 million per month), approximately 60% of the \$358 million in annual pilot labor cost reductions that Northwest seeks in its pending section 1113(c) proposal to ALPA. *Id.* ¶ 3. The leaders of the Northwest pilots have published two letters setting forth their reasons for urging Northwest pilots to vote in favor of the interim agreement.

³ The ratification vote will be completed on November 14 at 4:00 p.m.

⁴ Exhibit 53 is a revised presentation of Delta Exhibit 6, comparing pilot pay rates among carriers for each aircraft type. Exhibit 53 reflects both the new pilot pay rates that will apply at Northwest if the tentative agreement is ratified and Delta’s revised proposal for 19% rate reductions, rather than 19.5%.

Exhibits 54 and 55. One of the letters states that the interim agreement is “in the best interest of the NW pilots.” Exhibit 55.

Thus, ALPA recognizes the economic realities confronting Northwest Airlines, which has *higher* revenue per available seat mile than Delta, by agreeing to a 23.9% pay reduction at Northwest, which results in pay rates *below* Delta’s proposed pay rates. Yet ALPA steadfastly resists a lesser 19% pay reduction at Delta, which would yield higher pay rates at Delta than at Northwest. This is baffling to Delta, because the competitive economics and financial realities of the industry govern Delta’s survival and viability as well as Northwest’s.

B. American Airlines Pilots Agree To Consider Further Cost Reductions

The pilots’ union at American Airlines, the Allied Pilots Association (“APA”), has recently announced that it will enter negotiations for pilot labor cost reductions (in addition to reductions of approximately \$660 million per year negotiated in 2003) because it has concluded that American needs to lower its labor costs still further. Exhibits 56-58. In the course of its deliberations, APA retained a third party expert, Airline Capital Associates, Inc., to prepare a report on the state of AMR Corporation, “A Review of AMR Corporation” (the “AMR Report,” Exhibit 59). The AMR Report contains many observations about the airline industry, including the needs of legacy carriers such as American and Delta. Among those are the following:

- “[F]undamental changes have taken place in the industry and . . . tried and true metrics are no longer applicable So, what has happened? It cannot be just the high cost of fuel, because the LCCs are posting profits — if smaller than in prior years — and the major international airlines are also making money.” Exhibit 59 at 1.
- “It is important to note that true ‘profitability’ requires more than profits at the operating level. An airline must generate net profits large enough *both* to service debt and to reinvest in the business. Absent the ability to generate profits sufficient to make investment in the business, the Network carriers face a widening competitive disadvantage, making it increasingly difficult to match the efficiencies of the LCCs . . . or . . . major foreign flag carriers. Given the debt service requirements at the Network carriers, achieving a level of profitability that

will allow the required investment in new aircraft and other technologies presents a significant challenge.” *Id.* (emphasis in original)

- “Unfortunately, there seems to be little relief in sight as higher fuel prices offset most of the progress made on the cost reduction front, and the LCCs continue to hold all the pricing power, thereby keeping a lid on fares, as their market share continues to grow And, as the LCCs continue to gain market share, they make money while the Network carriers accumulate losses.” *Id.* at 2.
- “[T]he Network carriers need to re-think entirely their business models. . . . On the cost side, these carriers need to continuously evaluate the extent of their cost reduction efforts. **Every effort must be made to sustain the momentum of non-fuel cost reductions of recent years.**” *Id.* at 3 (emphasis added).

C. PAFCA and Delta Agree to Further Reductions

Delta employs approximately 175 flight controllers represented by the Professional Airline Flight Control Association (“PAFCA”). PAFCA and Delta have entered into a tentative agreement (the “PAFCA Agreement,” Exhibit 60), to be effective December 1, 2005, if ratified, which confirms that flight controllers will accept their fair share of necessary cost reductions. Carolan 2 Decl. ¶ 5. The PAFCA Agreement reduces compensation of flight controllers by 10% at top-of-scale, and 9% at all other scale levels. Other cost-saving measures include several changes which parallel changes that Delta has already made for non-union employees and proposed to ALPA: reduction in vacation accrual and holidays, reduction of furlough pay, elimination of accident leave, imposition of a hard freeze on the defined benefit pension plan, and elimination of the provision that PAFCA may serve a Section 6 opener to commence collective bargaining in the event of a change of control of Delta. PAFCA’s ratification vote on the tentative agreement is scheduled to conclude on November 14, 2005. *Id.*

D. Recent Bargaining Between Delta and ALPA

Since Delta filed its section 1113 Motion, the Company has repeatedly urged ALPA to engage with the Company’s negotiators in meaningful dialogue regarding its proposals. There were no negotiation sessions, however, between October 31 and November 8. Carolan 2 Decl.¶

6. Once Delta filed its section 1113 Motion on November 1, ALPA was on notice that its Objection would be due on November 9. On the evening of November 8, the Chair of the ALPA negotiating committee contacted Delta to request a meeting on November 9; he requested that Delta arrange for the attendance of Delta's Chief Financial Officer, Edward Bastian. Although Mr. Bastian does not usually attend ALPA labor negotiations, he attended the meeting as requested. *Id.*

At the November 9 meeting, the ALPA negotiators were accompanied by their in-house financial analyst, Ana McAhrn-Schulz, their outside financial advisor, Gene Weil of Milestone Merchant Partners, and their outside counsel, Michael Abram of Cohen Weiss & Simon. ALPA began the meeting with a presentation by Ms. McAhrn-Schulz and Mr. Weil setting forth their joint analysis of Delta's Section 1113 Proposal and their conclusion that Delta's true "need" for annual pilot labor cost reductions was in the range of \$100 million for 2006, \$80 million for 2007 and with no further reductions thereafter. Carolan 2 Decl. ¶ 7, 8; Bastian 3 Decl. ¶ 7. For reasons detailed in Section III.A.-C. below, this analysis is fatally flawed, a fact Mr. Bastian pointed out during the course of ALPA's presentation. Bastian 3 Decl. ¶ 7.

The parties met again on the morning of November 11 to address ALPA's questions regarding Delta's challenge to the accuracy of ALPA's financial analysis. The found money in ALPA's Analysis results from ALPA's misunderstanding or misuse of the accounting for the approximately \$1billion in annual cost reductions then expected to result from the 2004 ALPA Agreement. At this meeting, Mr. Bastian reminded ALPA that he had briefed ALPA in January 2005 and explained that Delta had already incorporated more than \$100 million in pilot pension expense savings in its 2004 financial records — and that ALPA's new Analysis simply ignored that information. Bastian 3 Decl. ¶ 12; Carolan 2 Decl. ¶ 11. Delta produced to ALPA a copy of

the page of Mr. Bastian's January 19, 2005, financial briefing for ALPA which clearly reflected that only \$727 million of savings would appear in a year-over-year comparison between Delta's 2005 and 2004 financial reports. *Id.*, Exhibit 65. Mr. Bastian had explained to ALPA at that time how and why such a result would appear in the financial records. Bastian 3 Decl. ¶ 12.

The negotiating teams met again the afternoon of November 11, 2005, at which time Delta presented a revised comprehensive proposal. Exhibit 66. Delta's proposal included changes which (a) reduced the proposed pay reduction from 19.5% to 19%; (b) accepted ALPA's proposal on the amount of per diem expenses; (c) accepted ALPA's sick leave concept (albeit with sick leave credit hours more closely aligned with the Company's original sick leave proposal); and (d) offered an enhancement to the relocation policy. With these modifications, the Company's proposal is valued at \$326.2 million per year.⁵ Carolan 2 Decl. ¶ 13. Delta submits this Exhibit 66 as its revised Section 1113 Proposal.

III. \$325 MILLION ANNUAL PILOT LABOR COST REDUCTIONS ARE NECESSARY FOR SUCCESSFUL REORGANIZATION

ALPA'S Objection argues that Delta's proposed contract changes are not "necessary," but ALPA's arguments clearly take a narrow a view of "necessity," a view that has been rejected by the Second Circuit. *In re Royal Composing Room, Inc.*, 848 F.2d 345, 350 (2d Cir. 1988) (proposed changes "need not be limited to the bare bones relief that will keep it going."). Proposed changes may be "necessary" even though future business conditions cannot be forecast with certainty:

It is impossible to conceive of a case in which some aspect of the debtor's projections as to its future financial needs, the allocation of burden among the various parties, or some item in the menu of modifications in the union contract proposed by the debtor could

⁵ Attached as Exhibit 79 is a revised version of the Section 1113 Proposal "costing table" previously included as Exhibit 5.

not be viewed as unnecessary, inessential or inequitable. Projections are necessarily speculations about the future and are an art, rather than a science.

In re Royal Composing Room, Inc., 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D. N.Y. 1987), *aff'd*, 848 F.2d 345 (2d Cir. 1988).

A. ALPA's Flawed Analysis of Delta's Business Plan

ALPA's Objection is based upon an analysis of Delta's Business Plan that is fatally flawed. The ALPA Analysis suggests that ALPA has found more than \$200 million per year that is otherwise undisclosed in Delta's Business Plan, thus reducing the need for pilot labor cost cuts. ALPA believes that it has found money that was not discovered by the professionals for Delta's DIP lenders, or by the professionals engaged by the Creditors Committee. That sounds implausible because it is. The ALPA Analysis is at best wishful thinking on ALPA's part; it is simply not true — and ALPA has long had sufficient information at hand to know that its Analysis is totally inaccurate. Bastian 3 Decl. ¶¶ 6,12.

ALPA used U.S. Department of Transportation Form 41 data to calculate Delta's 2004 pilot labor costs as a starting point against which to measure reductions from that point forward. But ALPA should have known that such data did not include all pilot costs necessary to calculate an appropriate baseline for their analysis — because Delta had previously explained to ALPA how Delta had accounted for the savings from the 2004 ALPA Agreement in Delta's 2004 financial results. On January 19, 2005, Mr. Bastian explained to ALPA's financial advisors that Delta's 2004 financial results already included more than \$100 million in pilot pension and benefit expense savings due to the 2004 ALPA Agreement. Bastian 3 Decl. ¶ 12; Exhibit 65. ALPA also knew that Delta's pilots had received a 4.5% pay increase on May 1, 2004, and a major pay decrease effective December 1, 2004, which would surely skew any analysis which used actual 2004 costs as a baseline for comparison to future cost levels. Bastian 3 Decl. ¶ 8. In

order to determine accurately Delta's "baseline" pilot labor costs for 2004, *i.e.* full-year recurring costs against which to measure future changes, the following additional cost items should have been added to the raw Form 41 data: (a) \$143 million in pilot pension expense savings for which Delta had already accounted in its 2004 financial reports; (b) \$23 million to account for the annualized impact of a pilot pay increase which became effective on May 1, 2004; (c) \$45 million to account for the effect of the December 1, 2004, pilot pay reduction; and (d) \$50 million to reflect the cost reductions not achieved due to failure to achieve planned growth in flying. Bastian 3 Decl. ¶ 8; Exhibit 63.

As a result of these adjustments, the 2004 "baseline" used in the ALPA Analysis should have been \$261 million higher. That \$261 million difference explains why ALPA concludes erroneously that (a) Delta's pilot labor CASM is less than it actually is; and (b) that Delta needs annual pilot labor cost reductions of approximately \$100 million in 2006, \$80 million on 2007, and no further reductions thereafter, instead of the \$325 million in annual pilot labor cost reductions sought in the Section 1113 Proposal. In fact, ALPA's own methodology, if applied accurately, would yield a "need" for pilot labor cost reductions at Delta greater than the amount Delta seeks. Bastian 3 Decl. ¶ 8; Exhibit 63. This error in calculating the baseline infects and corrupts all of the conclusions in the ALPA Analysis.

B. Delta's Response to the ALPA Analysis

It did not take long for Delta to identify the flaws in the ALPA Analysis. Mr. Bastian pointed out the most obvious flaws during the course of the November 9 meeting. Bastian 3 Decl. ¶ 7. After the meeting with ALPA, members of Mr. Bastian's staff reviewed the ALPA Analysis and confirmed the inaccuracies in ALPA's calculation of the 2004 "baseline" pilot costs. Delta then sent to ALPA a detailed calculation explaining these inaccuracies. Carolan 2 Decl. ¶ 10; Exhibit 62. Again, on November 11, Mr. Bastian met with ALPA representatives to

answer their questions. Mr. Bastian reminded ALPA that he told them, during a financial briefing on January 19, 2005, how and why the estimated \$1 billion in cost reductions from the 2004 Agreement would be reflected in Delta's financial records, including the fact that the pension expense savings would be reflected in Delta's 2004 financial statements, with the consequence that the full \$1 billion of expected savings would appear to be a smaller savings in 2005. Bastian 3 Decl. ¶ 12; Carolan 2 Decl. ¶ 11; Exhibit 65.

The stark reality is that there is no more "found money" to be had at Delta. If there were, either Delta, or Delta's DIP lenders, or Delta's Creditors' Committee, surely would have found it. Bastian 3 Decl. ¶ 12.

C. ALPA Mischaracterizes Delta's Data and Position

Both the ALPA Analysis and ALPA's Objection erect a "straw man," misrepresenting Delta's data and position on pilot labor cost per available seat mile ("CASM") to support their desired results. ALPA states repeatedly that Delta has a "target" pilot labor CASM of 0.82 cents for 2007. Having established that straw man, ALPA attempts to show that Delta does not need \$325 million in annual pilot labor cost reductions to reach that target — because ALPA calculates that Delta is already much closer to that "target" than Delta admits.

Putting aside the incorrect math (described above) that underlies their analysis, ALPA is also wrong about the premise. Delta's Section 1113 Proposal was not based on reaching a target labor CASM of 0.82 cents; it was based on a Business Plan process which is described in the Second Bastian Declaration. The goal was simple: to produce a Business Plan that could provide cash flow, and eventually profits, sufficient to make Delta a viable competitor in today's airline industry. Delta did not have a "target" for pilot labor CASM; the Business Plan projects a pilot labor CASM in 2007 (.79), just as it projected results on all other standard airline financial metrics. Bastian 3 Decl. ¶ 9. ALPA misuses the pilot labor CASM chart at page 19 of the

Second Bastian Declaration. As clearly stated in the text on that page, the chart merely illustrates what would have been the impact on Delta's pilot labor CASM had the \$325 million in pilot cost reductions been in effect in the second quarter of 2005, and compares the pilot labor CASM to comparable figures at other airlines. Bastian 3 Decl. ¶ 9.

D. The Circumstances Surrounding ALPA's Analysis Suggest A Lack Of Due Diligence

Two aspects of ALPA's conduct suggest a lack of due diligence. These factors should certainly weigh in the court's consideration of the balance of the equities between the parties, and whether ALPA has good cause to withhold its agreement on Delta's Section 1113 Proposal.

ALPA's financial advisors should have known that their conclusions are erroneous. ALPA's Analysis concluded that Delta's Section 1113 Proposal would achieve a 2007 pilot labor CASM in the range of .60 to .61 cents, among the lowest in the industry, rather than the .79 cents projected by Delta's Business Plan for 2007. ALPA is a very sophisticated labor organization. Its internal and external advisors are keenly aware that the pilot costs of major carriers are consistently higher than those of the new entrant low cost carriers. It is curious, therefore, that ALPA would conclude that Delta seeks pilot unit labor costs lower than those at JetBlue and AirTran. Bastian 3 Decl. ¶ 11. ALPA does not dispute (a) that Delta's proposed pilot pay rates uniformly exceed those in place at carriers such as US Airways and JetBlue (*see* Exhibit 53 — which ALPA has not disputed); (b) that Delta's pilot workforce is much more senior than the pilot workforces at JetBlue and AirTran; (c) that Delta's pilots have more restrictive work-rules than those at JetBlue and AirTran; and (d) that Delta's pilot employee benefits are much more generous and costly than those in effect at JetBlue and AirTran. With those facts undisputed, it is difficult to conceive how Delta could achieve lower pilot labor costs than those of JetBlue or

AirTran at the rates of pay Delta seeks — and ALPA’s experts and advisors most certainly know that. Bastian 3 Decl. ¶ 11.

ALPA representatives have suggested several times over the past month that ALPA had concluded that Delta’s proposed pilot labor cost reductions were based upon a grossly overstated financial analysis. Carolan 2 Decl. ¶ 7. ALPA declined Delta’s requests to share with Delta the basis for that conclusion — until November 9, 2005, the day ALPA’s Objection was due. *Id.* ALPA has been aware of Delta’s Business Plan since Mr. Bastian made a presentation to ALPA about the Plan on August 16, 2005; Delta provided the underlying computer model and supporting data to ALPA in early September. Bastian 3 Decl. ¶ 6. Since that time, Delta has provided a substantial amount of additional information to ALPA, and responded to numerous follow-up questions from ALPA about Delta’s financial condition and Business Plan. *Id.* Mr. Bastian has been present at several meetings with ALPA representatives, including a Quarterly Financial Update presentation attended by Ms. McAhron-Schulz and Mr. Weil on November 3, 2005. Bastian 3 Decl. ¶ 4. Despite all of these opportunities, at no point prior to November 9 did any ALPA representative ever tell Mr. Bastian that ALPA had found additional money in Delta’s Business Plan. Bastian 3 Decl. ¶ 6.

Delta has shared a substantial amount of financial information with ALPA and has made its financial officers available to ALPA repeatedly. ALPA could easily have shared their Analysis with Delta in a common search for accuracy in the underlying financial information — but ALPA obviously and consciously elected not to do so.

IV. THE BALANCE OF THE EQUITIES FAVORS DELTA

A. ALPA's Position Would Impose An Inequitable Burden On Delta's Other Employees

ALPA argues that Delta does not need the proposed \$325 million per year in pilot cost reductions because the \$605 million in annual non-pilot labor cost reductions will suffice when combined with ALPA's offer of \$91 million. (ALPA Objection at 24-25). Thus, ALPA's position is that Delta should take 87% of an asserted \$696 million need from Delta's non-pilot employees, who comprised only 65% of total mainline labor costs during the first half of 2005. ALPA cannot minimize its own share by putting a disproportionate burden on other employees. "The requirement of fair and equitable treatment forces the debtor to spread the hurt. The burden of saving the debtor must be borne through sacrifice to a similar degree by every constituency." *In re Horsehead Industries, Inc.*, 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003), *citing Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82, 90 (2d Cir. 1987) and *In re Century Brass Prods., Inc.*, 795 F.2d 265, 273 (2d Cir. 1986).

B. A Five-Year Duration is Not Inequitable

ALPA complains about the five-year term contained in Delta's proposals, but ALPA *already* has agreed to a duration that long or longer at other reorganizing carriers — six years at United Airlines, in order "to ensure that the transformation of United will be sustainable." Exhibit 36 at p. 6. Carolan 2 Decl. ¶ 21. At US Airways, ALPA agreed first to a six and one half year agreement, and then later to a five year agreement. Carolan 2 Decl. ¶ 21.

The double standard ALPA applies here ignores the permanent, structural change in the airline industry, and the fact that labor cost restructuring cannot be both short-term and effective. ALPA International's "Summary Situational Assessment and Strategic Plan Priorities" of March 1, 2005, is more realistic. There, ALPA described the "adverse, permanent changes in career

earnings and expectations” occurring in the industry. ALPA told pilots to expect “[l]ong-term contracts with no or very modest pay raises [that] will offer little financial gain over the length of their terms.” ALPA added that “opportunities to improve benefits and work rules also will be constrained by the long duration of contracts.” *Id.* ¶ 22 (Exhibit 75).

C. Termination of Delta’s Defined Benefit Pension Plans Is Not A Foregone Conclusion

ALPA’s Objection suggests, at p. 39, that Delta’s pilots will be required to make sacrifices beyond those proposed in Delta’s Section 1113 Proposal because of “the likely termination” of the pilots’ defined benefit pension plan. While ALPA is telling this Court that plan termination is likely, it is telling a very different story to the pilots. In a communication from the ALPA MEC to the Delta Pilots dated November 10, 2005 (Exhibit 77), ALPA explains that legislation currently pending in Congress could help make the defined benefit pension plan affordable. The MEC letter concludes that “[w]e are in a good position to have action taken on this legislation.” Carolan 2 Decl. ¶ 16; Exhibit 77.

Delta’s Section 1113 Proposal does not call for termination of the pilot defined benefit pension plan, but only for a “hard” freeze of the Plan. That is the only matter before the Court. What else the future might hold for the pilot defined benefit plan is entirely speculative at this time. Together with ALPA, Delta is actively supporting the pending legislation, although no one can accurately predict at this time whether or in what form that legislation might be passed, or its ultimate effect. The fate of Delta’s defined benefit plans depends on a great many factors, including the fate of the legislation. Carolan 2 Decl. ¶¶ 16-17.

Moreover, ALPA’s suggestion that the possibility of plan termination skews the allocation of burdens between pilot and non-pilot employees is factually incorrect. The non-pilot defined benefit plan is also substantially underfunded; it faces similar pressures, and its fate depends on the same unknowable combination of future events. *Id.* ¶ 17.

D. ALPA Mischaracterizes The Facts Regarding Prior Sacrifices By Delta's Non-pilot Employees

Although extended debate about events of a decade ago serves little purpose in the present context, ALPA's claim that it sacrificed more during the period preceding the 2001 Agreement than did other Delta employees is simply not consistent with the facts. Carolan 2 Decl. ¶¶ 18-20. In February 1993, Delta inaugurated an aggressive "Profit Improvement Program" which imposed on non-pilot employees a 5% pay cut (which ultimately lasted for three years), reduction of vacation benefits, and a transition to managed care health programs. Delta asked ALPA to agree to similar reductions for pilots, but ALPA "decline[d] to participate." *Id.* ¶ 18.⁶ In 1994, the 5% wage cuts were continued, and vacations were reduced further. Despite repeated requests from Delta, ALPA did not participate in the financial concessions.⁷ *Id.*

ALPA has also greatly exaggerated the nature and burden of their 1996 contract. At the time of signing the 1996 Agreement, ALPA hailed that Agreement as a "win-win" solution. Exhibit 70. While the 1996 Agreement did contain a 2% reduction in pay rates,⁸ it added a profit sharing program that paid Delta's pilots an average of nearly 5% of pilot pay per annum from September 1997 through December 31, 1999. The Profit Sharing Plan paid out substantially *more* than the value of the pay reduction, and continued to pay for one year after the pay reductions were restored. Carolan 2 Decl. ¶ 19; Exhibit 71. The 1996 Agreement also provided (a) \$250 million in early retirement enhancements, which benefited approximately 500 early retirees; (b) life-of-the-contract job guarantees for all incumbent pilots and the recall of all 400

⁶ Indeed, when some pilots voluntarily offered to take a 5% pay reduction, ALPA filed a grievance contesting their ability to do so. Carolan 2 Decl. ¶ 18 n.6.

⁷ ALPA did agree at one point to defer a scheduled 2% wage rate increase, but later exercised an option to rescind the deferral and receive the backpay due. Carolan 2 Decl. ¶ 18 n.7.

⁸ The 2% pay cut was restored in January 1999, 16 months before Delta was obligated to do so under the agreement, at an annual cost to Delta of \$46 million. Carolan Decl. ¶ 19 n.8.

pilots then on furlough; (c) new individual defined contribution retirement accounts to which Delta contributed an amount equal to 5% of each pilot's covered earnings; (d) options for 10 million shares of Delta common stock (which ALPA subsequently valued at \$404 million); (e) a non-voting member on Delta's Board of Directors; and (f) ongoing access to Company financial and operating information. Carolan 2 Decl. ¶ 19.⁹ In sum, no plausible argument can be made that Delta pilots made greater sacrifices or received less equitable treatment than other Delta employees prior to the 2001 ALPA Agreement. *Id.* ¶ 20.

V. AN ALPA STRIKE WOULD VIOLATE THE RAILWAY LABOR ACT AND COULD BE ENJOINED

ALPA devotes substantial space in its Objection to the “balance of the equities,” using as its centerpiece a “murder/suicide” threat; deny the Motion to Reject, the Court is told, or the Association will call a post-rejection strike that will kill the Company and eliminate every pilot job — indeed every Delta job. To position such a threat as an appeal to equity is profoundly misguided, but in the final analysis, even if the threat were realistic — even if Delta's pilots seriously intended to put the Company into liquidation rather than agree to needed concessions — the threat would be a hollow one, because a strike would be enjoined as a violation of the Railway Labor Act, 45 U.S.C. § 145 *et seq.* (“RLA”).

⁹ Subsequent to the 1996 Agreement, Delta agreed in 1999 to guarantee profit sharing for pilots at the maximum 6% payout, regardless of the Company's financial performance and in 2000 to terminate the Profit Sharing in exchange for an across-the-board 6% increase in basic hourly rate. Also, as of January 1, 2000, Delta agreed to an *additional* mid-term, 3% across-the-board pay raise — a mid-term raise that was not required under the 1996 agreement. Carolan 2 Decl. ¶ 19.

A. **The RLA Was Enacted To Prevent Strikes And Disruptions To The Traveling Public**

“Congress passed the RLA to ‘encourage collective bargaining by [carriers] and their employees in order to prevent, if possible, wasteful strikes and interruptions of interstate commerce.’” *AMFA v. Atlantic Coast Airlines*, 125 F.3d 41, 43 (2d Cir. 1997), quoting *Detroit & Toledo S.L.R.R. v. UTU*, 396 U.S. 142, 148 (1969). Indeed, Congress explicitly declared in enacting the RLA that its *primary* purpose was “to avoid any interruption to commerce or the operation of any carrier therein.” 45 U.S.C. § 151a(1). To this end, the RLA established detailed procedures for the negotiation of labor contracts, and prohibited strikes that occur before those procedures are exhausted. See *Detroit & Toledo*, 396 U.S. at 149; see also *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966).

In the context of typical contract renewal negotiations, this process carries with it a bilateral obligation: “While [the major] dispute [process] is working its way through these stages, neither party may unilaterally alter the status quo.” *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969) (emphasis added). That is, neither party can exercise self-help — the union cannot strike and the carrier cannot unilaterally repudiate the existing terms of employment by imposing its own. *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971). ALPA argues that if the Court rejects its collective bargaining agreement in favor of Delta’s Proposal, Delta will have engaged in a unilateral change in the terms of employment, releasing ALPA to strike.

This analysis is faulty for two reasons. First, when an employer in bankruptcy implements its court-approved section 1113 proposals following contract rejection, it is not unlawfully repudiating an existing agreement; rather, it acts lawfully pursuant to court order. Second, as the Second Circuit has expressly confirmed, in the *absence* of an existing agreement,

an RLA employer is permitted to make changes during the course of negotiations, but the union cannot strike until the mandatory bargaining procedures are exhausted. *Atlantic Coast Airlines*, 125 F.3d at 43.

B. Even When The Parties Have No Existing Agreement, The Employer Establishes The Terms of Employment

If this Court grants Delta's Motion to Reject the ALPA Agreement, Delta will implement the terms set out in its revised Section 1113 Proposal, and will immediately commence RLA procedures to bargain with ALPA for a new collective bargaining agreement. "A debtor-in-possession is . . . obligated to bargain collectively with the employees' certified representative over the terms of a new contract . . . following formal approval of rejection by the Bankruptcy Court." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 533 (1984); accord *Clerks v. REA Express, Inc.*, 523 F.2d 164, 170 (2d Cir. 1975). Although section 1113 modified much of the *Bildisco* result, it did not alter this continuing duty to bargain.¹⁰ Following rejection, both the carrier and the union continue to be bound by the RLA procedures which require good faith bargaining, mediation, and release by the National Mediation Board before a strike is permitted.

The post-rejection status of the parties is closely analogous to the situation in which a newly elected union is bargaining for an initial agreement. In both instances, the duty to bargain applies in full force to both parties, but the carrier establishes the terms and conditions of employment that apply while negotiations continue. In *Atlantic Coast Airlines*, 125 F.3d at 43,¹¹

¹⁰ See also *SKS Die Casting & Machining v. NLRB*, 941 F.2d 984 (9th Cir. 1991) (after rejection under § 1113, debtor violated labor law by refusing to bargain); Hardin & Higgins, *The Developing Labor Law* pp. 2305-06 and n.159 (4th ed. 2001) ("Even if rejection of a collective bargaining agreement is authorized, the debtor remains obligated to comply with . . . requirements to bargain in good faith;" citing *REA Express* and stating "[a]lthough these cases are pre-*Bildisco*, they are consistent with the intent of § 1113").

¹¹ In a related case, *Aircraft Mechanics Fraternal Ass'n v. Atlantic Coast Airlines, Inc.*, 55 F.3d 90 (2d Cir. 1995), the Second Circuit held that RLA sections 2, 5 and 6, which proscribe

where the parties had not yet reached an initial agreement, the union sought to strike in response to the airline's adjustment of certain terms of employment. The Second Circuit held that such a strike should be enjoined because it violates the union's duty to negotiate in good faith under the RLA and to exert "every reasonable effort" to make an agreement:

[The question] is . . . whether, in the absence of bad faith on the part of the Airline, the Union may engage in a strike, consistent with its obligation under Section 2 First to make "every reasonable effort" to reach agreement and to avoid interruption to the operation of [the] carrier." 45 U.S.C. § 152 First. . . . [Such a] strike is inconsistent with the Union's duty to negotiate in good faith under the RLA in the absence of a finding of bad faith on the part of the employer. Although the good faith bargaining provision also applies to the Airline, . . . [u]nder [Section 2 First], the carrier's affirmative duty to exert every effort to make collective agreements — that is, to bargain in good faith — does not require that it refrain from exercising 'its authority to arrange its business relations with its employees' where no collective bargaining agreement is in effect.

Id. at 43-44 (citations omitted).

The fundamental purposes behind the Bankruptcy Code and the Railway Labor Act are complementary in this regard. The purpose of the RLA is to protect the traveling public and avoid the disruption of carrier operations by forcing the parties to exhaust protracted bargaining procedures before engaging in disruptive job actions. *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 277 (1969); *REA Express*, 523 F.2d at 168. The RLA places a federal agency, the National Mediation Board, in charge of the timing of any release to strike (following a 30 day cooling off period). The protection of the traveling public embedded in the RLA would be eviscerated if judicial action under section 1113 makes a strike lawful in response to contract rejection.

unilateral changes in wages and conditions of employment where an agreement is in effect, do not impose an obligation on a carrier to maintain the status quo in the absence of a collective bargaining agreement. *Accord Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942).

C. **Delta Will Not Have Taken Unlawful “Unilateral Action” or Violated Its Duty To Bargain With ALPA**

Citing non-bankruptcy cases regarding the labor law duty to bargain in good faith, ALPA claims that if this Court rejects the ALPA Agreement and, pursuant to Court order, Delta implements its Section 1113 Proposal, Delta would have “unilaterally” repudiated its agreement, freeing the pilots from their obligation to refrain from striking. (ALPA Objection at 45-46). But the cases ALPA relies upon involved carriers that had unlawfully walked away from their obligations under existing agreements without bargaining or court intervention. Court-authorized rejection and implementation are qualitatively different from unlawful employer conduct. As the Supreme Court held in *Bildisco* about the analogous requirement in NLRA Section 8(d) to bargain before changing the status quo:

Section 8(d) applies when contractual obligations are repudiated by the unilateral actions of a party to the collective-bargaining agreement. We have recognized that Congress’ central purpose in enacting § 8(d) was to regulate the modification of collective-bargaining agreements and to facilitate agreement in place of economic warfare. [citations omitted] In a Chapter 11 case, however, **the ‘modification’ in the agreement has been accomplished not by the employer’s unilateral action, but rather by operation of law.**

465 U.S. at 533 (emphasis added).

After *Bildisco*, section 1113 was adopted, imposing a set of specific preconditions to rejection and implementation. Among those preconditions, of course, is an express requirement for good faith bargaining on proposed changes. Thus, bankruptcy court-approved rejection of a labor contract, and implementation of proposals found to be “necessary” to successful reorganization, are fundamentally different from the sort of unlawful “unilateral” repudiation to which ALPA refers. In a section 1113 proceeding, it is this Court — not the debtor’s unilateral action — that ultimately will determine whether the agreement is rejected, and it is the Court that

will determine the necessity of the terms to be implemented.¹² This is not the sort of unilateral action that might justify a union strike under the RLA.¹³

D. The National Labor Relations Act is Fundamentally Different and Inapplicable

All of the cases cited by ALPA (ALPA Objection at 43-44), to support its claimed right to strike during bankruptcy and after rejection, were decided under the National Labor Relations Act (“NLRA”), 29 U.S.C. §§ 151 *et seq.*,¹⁴ a statute that expresses “no general ... anti-strike policy.” *Buffalo Forge Co. v Steelworkers*, 428 U.S. 397, 409 (1976). Indeed, the NLRA declares that nothing in that Act “shall be construed so as either to interfere with or impede or diminish in any way the right to strike.” 29 U.S.C. § 163. The RLA, however, is fundamentally

¹² Similarly, changes to agreements approved under the Interstate Commerce Act are not unilateral employer action releasing the union involved to strike. In a merger, the carrier can petition the Surface Transportation Board (“STB”) to make changes to the collective bargaining agreement that are necessary to obtain the benefits of consolidation. The railroad and union negotiate regarding the proposed changes, and if no agreement is reached, either side may request arbitration before the STB. The STB’s ruling that changes may be made to the agreement is “final, binding, and conclusive” and the union may not strike to protest such changes. *CSX Transp. Inc. v. United Tranp. Union*, 86 F.3d 346, 349-50 (4th Cir. 1996) (“the [Norris LaGuardia Act] does not prohibit an antistrike injunction that is issued to enforce an arbitration award made pursuant to § 11347 of the ICA.”).

¹³ Significantly, Bankruptcy Code section 1167 provides that for railroads, but not for airlines, “neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act.” By omitting airlines from Section 1167, Congress clearly intended that when an airline like Delta complies with Section 1113, it **can** change the labor agreement without following RLA section 6 procedures and that it does not violate the RLA status quo in doing so. *See REA Express*, 523 F.2d at 169 (“Congress, by enacting [the predecessor to Section 1167], which excepts ‘railroad employees’ from the operation of [predecessor provision allowing contract rejection], demonstrated that it ‘knew how to remove labor agreements from the scope of a general power to reject executory contracts.’”).

¹⁴ Both the Supreme Court and the Second Circuit repeatedly have cautioned that NLRA principles cannot be imported wholesale to the RLA because of differences between the statutory schemes. *Jacksonville Terminal*, 394 U.S. at 383; *accord Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30, 40-42 (1957); *Pan American World Air Ways v. IBT*, 894 F.2d 36, 40 (2d Cir. 1990); *Long Island Railroad v. Machinists*, 874 F.2d 901, 909 (2d Cir.), *cert. denied*, 493 U.S. 1042 (1990).

different: it was enacted to *prevent* strikes and the related disruptions to the traveling public, *i.e.* to “avoid any interruption to commerce or to the operation of any carrier engaged therein” 29 U.S.C. § 151a.

The reason for this difference is obvious: the airlines and railroads which are subject to the RLA are common carriers that serve the traveling and shipping public; there is, therefore, a substantial public interest — a *vital* public interest — in deterring and avoiding strikes that will necessarily create adverse effects for innocent third parties and the national economy. Such public policy concerns generally are not present in routine disputes between a single NLRA employer and its union.

The Supreme Court has repeatedly held that the mandatory collective bargaining procedures of the RLA are enforceable by injunction, notwithstanding the Norris-LaGuardia Act (“NLGA”). *Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30, 40-42 (1957); accord *Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 794 (2d Cir. 1980) (RLA overrides NLGA ; “Unlike the [NLRA], the [RLA] is specifically designed ... ‘[t]o avoid any interruption to commerce or to the operation of any carrier’”).¹⁵ ALPA cites numerous cases for the proposition that the Bankruptcy Code does not override the anti-injunction provisions of the Norris-LaGuardia Act. ALPA Objection at 44-45. The point is irrelevant. ALPA’s focus on the Bankruptcy Code is misdirection. While the Bankruptcy Code has no such effect, “the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act.” *Chicago River & I. R. Co.*, 353 U.S. at 41-42.

¹⁵ *Chicago & N.W.*, 402 U.S. at 583; *Virginian Ry. v. System Fed’n No. 40*, 300 U.S. 515, 563 (1937). Injunctions issued in response to a violation of a positive command of the RLA are not barred by NLGA. *Summit Airlines v. Teamsters Local Union No. 295*, 628 F.2d 787 (2d Cir. 1980).

VI. THE OBJECTIONS OF RETIRED PILOTS ARE WITHOUT MERIT

A. Retired Pilots Are Not Entitled To Bargain With Delta With Respect To Modifications of the ALPA Agreement

Jim Dean Johnson (“Johnson”), a retired Delta pilot, and DP3, Inc. d/b/a/ Delta Pilots’ Pension Preservation Organization (collectively, “DP3”) have objected to the Motion on the grounds that Delta did not make a proposal to or negotiate with its retired pilots prior to seeking relief under section 1113. Johnson further objects because notice of the hearing on the Motion was not provided to retired pilots under section 1113(d)(1) of the Bankruptcy Code. The objections are utterly without merit.

Collective bargaining agreements are agreements between a union and an employer, and — absent specific contractual provisions to the contrary — *no one else*. Although Delta and ALPA disagree with respect to numerous aspects of the instant Motion, both agree that individuals have no right to participate in the negotiations over the modification of a collective bargaining agreement.¹⁶ The Supreme Court has clearly stated that an RLA employer has “an affirmative duty to treat only with the true representative [*i.e.* the certified union] and hence the negative duty to treat with no other.” *Virginian Ry. Co*, 300 U.S. at 548. Indeed, in its recent decision in *In re UAL Corp.*, 408 F.3d 847 (7th Cir. 2005), the Seventh Circuit soundly endorsed the principle that section 1113(d)(1) only confers “interested party” status on beneficiaries of the underlying collective bargaining agreement and guarantors of that agreement:

¹⁶ As ALPA argued in the Court of Appeals for the Seventh Circuit just last month, the notion that a group of retired pilots should be permitted to participate in the contractual modification negotiations of a debtor and ALPA “runs contrary to this Court’s recent *IFS* decision [*In re UAL Corp.*, 408 F.3d 847 (7th Cir. 2005)], basic principles of federal labor law and Section 1113 of the Bankruptcy Code.” Brief of Appellee Air Line Pilots Association, International at 18, *United Retired Pilots Benefits Protection Association v. United Airlines, Inc.*, No. 05-3121 (7th Cir. Oct. 14, 2005) (attached hereto as Exhibit 78).

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.

Id. at 851 (holding that a party that “is not entitled to block a change in the collective bargaining agreements, . . . also is not entitled to participate in the litigation as an ‘interested party’” under § 1113(d)(1)).

Construing section 1113(d)(1) as Johnson urges would mean that *each and every* retired pilot — as well as any other individual or entity remotely or even just potentially affected by the modification of a collective bargaining agreement — would be entitled to notice and the opportunity to be heard under section 1113(d)(1). Such an entitlement would not only run contrary to basic principles of contract and federal labor law — it would also render section 1113 proceedings, in the Seventh Circuit’s estimation, fundamentally “unmanageable.” *UAL*, 408 F.3d at 851.

Both Johnson and DP3 have also argued, more broadly, that the Motion should be denied because Delta’s retired pilots should have been permitted to bargain with respect to any proposed modification of the collective bargaining agreement. Lacking any support for their position in labor law or in the language of section 1113, they rely solely upon a twenty-year-old decision, *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir. 1986), in arguing their supposed entitlement to bargain with the debtor under section 1113. Their reliance is misplaced, as the holding on which they depend in *Century Brass* has been superseded by statute and no court has since relied upon that holding for the proposition Johnson and DP3 urge.

The *Century Brass* decision was issued two years before Congress enacted section 1114 of the Bankruptcy Code, providing a mechanism for retirees to be given representation and a

means to negotiate with a debtor with respect to modifications to retiree medical and insurance benefits. Section 1114 effectively enacted the very protections *Century Brass* envisioned with respect to retiree insurance benefits, while also making clear that Congress is able to distinguish between “employees” and “retired employees” when drafting legislation (casting further doubt on the continued validity of the Second Circuit’s pronouncement that retirees could properly be characterized as “employees” for purposes of section 1113, *see* 795 F.2d at 275).

Not surprisingly, then, neither Johnson nor DP3 has cited a *single* case post-1988 applying *Century Brass* to require that a debtor negotiate with its retirees as part of the section 1113 process. Quite simply, *Century Brass* has been superseded by statute and, contrary to the position taken by Johnson and DP3, does not require that retirees be permitted to participate in a section 1113 proceeding.¹⁷

B. Delta’s Treatment of Pre-Petition Pension Obligations Is Irrelevant To Its Motion To Reject The ALPA Agreement

In its objection to the Motion, DP3 again advances the issue that was fully briefed, argued and ruled on by this Court last month — whether Delta’s non-payment to retirees of certain **pre-petition** pension obligations attributable to **pre-petition** services constitutes a unilateral modification of the ALPA Agreement. DP3 attempts to recast that issue into an allegation that Delta has somehow not conferred in good faith in attempting to reach a mutually

¹⁷ Indeed, since the enactment of Sec. 1114 the Second Circuit's decisions have emphasized that it is the “union” that takes part in the Section 1113 bargaining process. *See, e.g., In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 90 (2d Cir. 1992) (“Knowing that it cannot turn down an employer’s proposal without good cause gives *the union* an incentive to compromise on modifications of the collective bargaining agreement, so as to prevent its complete rejection.”) (emphasis added); *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990) (Section 1113 “ensures that the debtor attempt to negotiate with *the union* prior to seeking to terminate a collective bargaining agreement.”) (emphasis added).

satisfactory modification of the ALPA Agreement. *See* DP3 Objection at ¶ 6, 16. DP3’s argument is flawed on many levels.

Rather, as set forth in controlling Second Circuit precedent, the prioritizing of benefit claims as set forth in section 507 of the Code (with only true post-petition claims receiving priority, post-petition payment) does not violate — or for that matter, even implicate — section 1113(f)’s prohibition against unilateral termination or alteration of any provisions of a collective bargaining agreement.

The merits of Delta’s dispute with DP3 are irrelevant to Delta’s right to reject the ALPA Agreement under section 1113.¹⁸ Delta’s prioritization of its pension benefit obligations in conformity with section 507 of the Bankruptcy Code in no way undermines the conclusion that Delta has conferred in good faith with ALPA — its sole bargaining counterparty — in attempting to reach a mutually satisfactory modification of the ALPA Agreement. Delta’s non-payment of pre-petition pension obligations is unquestionably a consequence of a bona fide interpretation — or, as Delta contends, the only plausible interpretation — of section 1113(f) of the Bankruptcy Code. Conduct of this sort, which results from “a bona fide disagreement as to the scope and effect” of applicable law, does not evidence bad faith on a debtor’s part. *Bowen Enters.*, 196 B.R. at 745 (concluding that, whether or not the debtor’s elimination of Sunday premium pay was warranted by the court’s section 1113(e) order, “[t]he union’s contention that

¹⁸ As explained at great length in prior filings with this Court, the Second Circuit, the *United* Court and most others have held that the non-payment of obligations (in many cases, specifically pension obligations) attributable entirely to pre-petition services does not constitute a unilateral modification or rejection of a collective bargaining agreement. *See Air Line Pilots Ass’n, Int’l v. Shugrue (In re Ionosphere Clubs, Inc.)*, 22 F.3d 403, 408 (2d Cir. 1994). This topic most assuredly should not be litigated yet again before this Court at the November 16 section 1113 hearing. *See* Objection and Memorandum of Law of the Debtors to Motion of DP3, Inc. to Compel the Continued Payment of Collectively Bargained-For Pension Benefits to the Retired Pilots, Doc. No. 566 (filed Oct. 3, 2005).

debtor ha[d] not bargained in good faith [wa]s without merit” as the debtor’s conduct reflected a “bona fide disagreement as to the scope and effect of the order”).

Finally, DP3’s readvancement of the argument that Delta’s cessation of pre-petition pension payments is a “unilateral modification or rejection” of the ALPA Agreement in violation of section 1113 cannot proceed before this Court at present. This very issue — already argued before this Court and ruled on at a hearing on October 17 — is now on appeal before the United States District Court for the Southern District of New York. Given the pendency of this appeal, DP3’s effort to reinject this wholly extraneous legal issue into the section 1113 rejection proceeding with ALPA would “interfere with the appellate process,” invite the Court to “decide an issue identical to one appealed,” and result in “confusion or waste of time from having the same issues before two courts at the same time.” *Cibro Petroleum Prods., Inc. v. City of Albany (In re Winimo Realty Corp.)*, 270 B.R. 99, 105 (S.D.N.Y. 2001) (internal quotation marks omitted).

