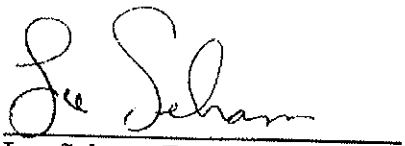
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LEROY "BUD" BENSEL, et al. Plaintiffs, v. AIR LINE PILOTS ASSOCIATION. Defendants.	Civil Action No. 02-2917 (JEI)

EXPERT REPORT OF LEE SEHAM

DATED: November 14, 2008

BY: 

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PRIVILEGED AND CONFIDENTIAL

I.

INTRODUCTION

I have been retained by the Plaintiffs in the *Bensel v. ALPA* litigation to render an opinion as to the Air Line Pilots Association's (ALPA) alleged failure to adequately protect the TWA pilots' seniority interests in the context of TWA's merger with American Airlines (AA) in violation of its Duty of Fair Representation (DFR).[1] It is my conclusion that ALPA's conduct toward the TWA pilots was arbitrary, discriminatory, and in bad faith.

My credentials are set forth in a curriculum vitae which is attached hereto as Exhibit A. I am being compensated for my work, including the preparation of this report, deposition testimony, and trial testimony at the hourly rate of $300.

The agreement ultimately entered into between American and its pilots union stapled over 1200 of the 2250 TWA pilots to the bottom of the merged list.[2] 409 AA pilots who were not even on the payroll at the time of the Asset Purchase Agreement were placed above these veteran TWA pilots. The remaining TWA pilots were added via an approximately 8-1 ratio method that had the effect of decreasing their seniority by as much as 21 years.[3]

There is no dispute that this seniority integration was "harshly unfair" – to the point that it attracted the legislative attention of the United States Congress.[4] As a direct result of this unfair seniority integration, only a fraction of the TWA pilots working in January, 2001 are currently employed at American Airlines.

Prior to implementation, ALPA had several options that would have preserved and/or created substantial leverage for the TWA pilots in their fight to protect their seniority, including: 1) supporting the TWA pilots' refusal to waive the Labor Protective Provisions (LPP's) contained in the TWA/ALPA collective bargaining agreement, 2) pursuing litigation designed to thwart and/or stall the disadvantageous seniority integration devised by the AA pilots' representative, and 3) supporting legislative efforts to mandate a seniority integration arbitration.

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[1] I reserve the right to supplement this report upon review of additional information.
[2] Defendants' Ex. 83 at 8.
[3] More specifically, the agreement provided that TWA pilots with seniority dating from December 2, 1963 to March 20, 1989 would be inserted on the AA pilot seniority list on a worse than an 8 to 1 ratio (AA to TWA) **following** an AA pilot with a seniority date of October 8, 1985. The remaining TWA pilots, with seniority dates commencing with March 23, 1989, were to be slotted in after AA pilots hired as late as April 10, 2001 – three months **after** AA's acquisition of TWA. ALPA 036586-88.
[4] Defendants' Ex. 83 at 8 n.7; Woerth draft letter dated March 14, 2002 at ALPA 044818 ("Supplement CC is harsh and unfair.").

There is ample evidence that ALPA not only refrained from pursuing these options, but actually worked to undermine them. There is also substantial evidence that ALPA's conduct in this regard was motivated by its desire to obtain representation of the AA pilot group with the active cooperation of its union, the Allied Pilots Association (APA).

II.

ECONOMIC, LEGAL AND POLICY BACKGROUND

A. AMERICAN'S INTEREST IN THE ASSET PURCHASE AGREEMENT

On January 9, 2001, TWA and AA entered into an Asset Purchase Agreement, whereby AA agreed to purchase the majority of TWA's assets following TWA's filing for Chapter 11 bankruptcy protection. Pursuant to the Agreement, AA would acquire: 173 valuable slots at five key airports; gain access to 175 new gates; a St. Louis hub that would complement its existing Chicago and Dallas hubs; and 188 new aircraft and up to 227 aircraft on order.[5] AA agreed to pay $500 million in cash and assume approximately $3.0 billion in aircraft and other lease obligations. Even at the original $5 billion price tag, the acquisition was described by analysts as "a bargain."[6] Revenue synergies were expected to generate $400-500 million annually on a steady state basis.[7] American expected these same revenue synergies to offset integration costs, providing earnings per share (EPS) accretion in year two.[8] Despite the unrestrained enthusiasm for the deal from American management, the financial commitment that the transaction required was described as "modest."[9]

The TWA acquisition would make AA the largest airline in the world, "leapfrog[ging] American ahead five years."[10] The transaction added 19.9% to AA's gross revenue and 23.4% to its capacity. TWA's St. Louis hub was described by AA CEO Don Carty as the "crown jewel."[11] Airline analysts estimated that "once TWA is fully integrated that part of American will grow at around 10% to 12% over three to five years – largely because of American's better credit rating and financial expertise."[12]

By acquiring these assets through the bankruptcy process, AA was able to shed significant operating costs that had burdened TWA, including undesirable gate leases and the rejection of the Karabu Ticketing Agreement, which was estimated to be costing TWA $80-100

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[5] AA Analyst Presentation at ALPA 051104, 051106, 051117.
[6] *Business Week* (January 22, 2001 at 34).
[7] AA Analyst Presentation at ALPA 007050.
[8] AA Analyst Presentation at ALPA 051139.
[9] AA Analyst Presentation at ALPA 051139.
[10] TWA-MEC THE AIRLINE WORKERS FAIRNESS ACT, A Vote for a Fair Hearing in Employee Seniority Integrations at 2 *quoting* Ft. Worth Star Telegram, June 13, 2001.
[11] TWA-MEC THE AIRLINE WORKERS FAIRNESS ACT, A Vote for a Fair Hearing in Employee Seniority Integrations at 2 *quoting* AA Newsgram 01-220.
[12] CFO Magazine, May 2001 referenced in Day letter ALPA 029931, 33.

million per year in lost revenue.[13] AA would also be able to avoid the high level of antitrust scrutiny that had scuttled UAL's attempts to merge with US Airways. The Asset Purchase Agreement would have the effect of catapulting AA past UAL to become the largest airline in the world.

For American, however, the TWA transaction was more than just a good deal; it was a strategic imperative. AA Chief Pilot Bob Kudwa took the position that, without the TWA transaction, there would have been an "insurmountable competitive gap" between American and the combined United/US Airways – "the kind of gap that would have really hurt us and our company."[14] In the post-closing/waiver context, AA Chief Pilot Kudwa reiterated the theme: "We did this acquisition to keep up with United. To do that, we need ALL the capacity that TWA produces."[15] As Vice President of Employee Relations Brundage stated: "AMR will do everything it takes to become the number one airline."[16]

Even after the failure of the United/US Airways merger, in July 2001, AA Chief Pilot Bob Kudwa called the TWA acquisition "a strategic coup." American anticipated that because of the acquisition it would be "better positioned than our competitors to take advantage of the upswing in business travel."[17]

B. ALPA'S DOCTRINE OF "INDEPENDENCE-PLUS"

ALPA is a multi-airline pilot union that represents pilot groups at approximately thirty-seven (37) airlines. During the relevant time frame, ALPA maintained a policy referred to as "Independence-Plus" under which the pilots at the respective airlines retained the right to make all relevant policy decisions with the ALPA National organization acting principally as a reservoir of assets for the pilot groups to draw upon in time of need.[18]

As described by President Duane Woerth:

> So the only people [who] ever vote on any issue at American [are AA pilots], just like at Delta and United, that's strictly their business. We pool their resources and make it available to them. They make all the decisions on their own property. Nobody tells them what to put in their opener, what to take off the table. Nobody tells them when they should take a strike vote, when they should end a strike. It's all local.[19]

APA's AEC report stated the concept of Independence-Plus as it had been communicated to the Committee:

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[13] AA Analyst Presentation at 37-38.
[14] Kudwa, January 10, 2001 letter (ALPA 020801).
[15] A 0001366.
[16] Defendants' Ex. 88 at 006394.
[17] TWA-MEC THE AIRLINE WORKERS FAIRNESS ACT, A Vote for a Fair Hearing in Employee Seniority Integrations at 2 *quoting* Kudwa's "Chief Pilots Corner" dated July 6, 2001.
[18] Woerth Depo. at 249-50.
[19] APA00017.

> Our MEC would be empowered to make the final decision on any problem regarding the pilots of our airline as long as this is consistent with the *ALPA Constitution and Bylaws*.[20]

On August 2, 2002, less than a year after having vetoed a TWA-MEC legal strategy, deemed critical by the MEC's legal counsel, because he would not permit the MEC to sue APA, Woerth described ALPA's Independence-Plus policy in the following terms:

> Believe me, Duane Woerth doesn't tell [the company-specific pilot groups] what to do. I can guarantee it. It hasn't happened. They tell Duane Woerth what to do, as it should be. ... They are the power center. They are the decision makers. Both for the whole organization through the Board of Directors and, certainly, **at their company, they have total, complete, absolute discretion to do what's in their best interests.** My job is to make sure all the resources are available so they can exercise their role. **Nobody is going to tell them what to do.** I certainly don't. ... You will have the same independence you have now, but you will have access to ALPA resources ....[21]

Although the ALPA Constitution and Bylaws technically required the president's signature, ALPA advised APA that "ALPA has not declined to sign a contract in more than 20 years ...."[22] Indeed, responding to an American pilot who severely criticized the ALPA-negotiated American Eagle contract, Duane Woerth justified the existence of the inferior 16-year agreement on the grounds that ALPA National had to respect even the bad decisions of its autonomous pilot groups:

> With Independence-Plus, the guys that make the decisions are the pilots there. Not the President. Not the staff. Not another airline. ... We think signing a 16-year contract is a bunch of crap, it's too long. ... The American Eagle guys promoted that, nobody else did ....[23]

In short, even in the presence of what was considered a manifest error in judgment, ALPA National's policy was to assume the role of a passive bystander.

As ALPA attorney Clay Warner testified in the context of the TWA pilots' situation:

> I said this several times and I'll give you more of an analysis of the structure if you want it. But the TWA MEC was the body that made these decisions in the ALPA structure. The president doesn't order the MEC to do anything.[24]

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[20] AEC Report at 040627. See also Rachford Depo. at 23 (pilots and their elected councils would have "the most authority").
[21] ALPA 040660.
[22] AEC Report at 040631.
[23] ALPA 040667; ALPA 043916 (August 2, 2002 Woerth presentation to APA DFW domicile).
[24] Warner Depo. at 169.

As discussed throughout this report, ALPA's Independence-Plus policy was disregarded in the context of TWA pilots' efforts to protect their seniority.[25]

C. ALPA'S PILOT UNITY RESOLUTION AND ITS EFFORT TO PERSUADE THE AMERICAN PILOTS TO JOIN ALPA

From ALPA's perspective, AA's purchase of TWA's assets came at a bad time in terms of ALPA's own plans for expansion. On October 19, 2000, ALPA adopted a national policy of aggressively expanding its ranks by encouraging independent[26] pilot unions to merge with ALPA. Collectively, these independent unions represented as much as a third of unionized pilots nationwide and, therefore, presented an opportunity to enhance ALPA's power and dues revenue. Moreover, the existence of these independent unions has always presented a threat to ALPA – dissatisfied ALPA-represented pilots could observe that going outside the ALPA fold was not only viable, but a path chosen by many thousands of unionized pilots. APA, in particular, has served as a model for pilot groups establishing independent unions that have defeated ALPA in government-supervised elections.[27] ALPA President Duane Woerth described the process of "reuniting" the country's pilots as "one of the biggest goals" of his presidency.[28]

ALPA lost no time in implementing its policy and enjoyed almost immediate success. In May 2001, the Independent Association of Continental Pilots (IACP) approved a merger that brought both Continental and Continental Express pilots into the ALPA structure.[29] In May 2002, the Fedex Pilots Association (FPA) approved a merger that brought the pilots of Federal Express into ALPA.[30] Each of these mergers was achieved by obtaining the good will of the political representatives of the existing independent union. The independent union establishment would then join ALPA in marketing the merger concept to its members. APA was the last of the three independent American pilot unions that the ALPA Board of Directors specifically identified as targets of the October 2000 Pilot Unity Resolution.[31]

Immediately preceding the announcement of the AA-TWA Asset Purchase Agreement in January, 2001, ALPA was aggressively courting the biggest prize – the eleven thousand AA pilots represented by APA. As with IACP and FPA, ALPA's strategy depended on obtaining the good will of the APA representatives.

ALPA's expectations of success were buoyed by reports from within APA that "numerous" American pilots had expressed interest in a re-affiliation and that two of the

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[25] There appears to be no dispute that the concept of MEC autonomy with respect to its decision-making processes was, at least theoretically, applicable to the bankruptcy context. Rosen Depo. at 19; See also Woerth Depo. at 188 ("If they wanted to call American's bluff, they could do that, but I wasn't going to call American's bluff. They would have to make that decision.").

[26] The term "independent" is a short hand reference to unions that are not affiliated with the AFL-CIO.

[27] These groups have included the Continental pilots, the FedEx pilots, and the US Airways pilots.

[28] APA 00249.

[29] 28 N.M.B. 473 (2001).

[30] 29 N.M.B. 321 (2002).

[31] Warner draft letter for Woerth, dated February ##, 2002 at ALPA 044710; Rachford Depo. at 26-27; Exhibit 248.

American pilots' largest bases expressly endorsed an investigation of re-affiliation.[32] In response, in late September, 2000, the APA Board by a 13 to 2 vote (with two abstentions), established the ALPA Exploratory Committee (AEC) to investigate the possible re-affiliation of APA with ALPA.[33] ALPA moved quickly to build some positive momentum.

On October 27, 2000 – for the first time ever – an ALPA president was invited to address the APA Board of Directors.[34] ALPA President Duane Woerth urged the APA representatives to join ALPA's ranks, declaring: "We want you." In terms of timing, Woerth wanted the ALPA-APA merger to occur next year – 2001 – to coincide with ALPA's 70th anniversary.[35]

Woerth assured AA pilots' representatives that their political independence would be preserved and that "we will deal" with the financial issues relating to APA's $45 million contempt fine.[36] Woerth assured the APA representatives that ALPA was not interested in a "hostile takeover"; rather, he proposed that ALPA and APA have a friendly merger preceded by a joint membership education strategy. In short, Woerth acknowledged that ALPA's cherished goal of expansion depended on the good will of APA's leadership.

Following the October 27 meeting, APA staffed the ALPA Exploratory Committee and planned, over the following three months, to provide an "unbiased" series of mailings to AA pilots "to provide them with the material they need to make an informed decision."[37] A cooperative APA voted almost unanimously to give Woerth the opportunity to edit his presentation into an "executive summary" for inclusion in the APA Board's minutes.[38] APA also arranged for a mass mailing of ALPA President Woerth's speech to its pilot-members, but first allowed him the opportunity to edit the speech as he deemed fit.[39] This was followed by a meeting between the leadership of the two unions at ALPA's headquarters in Washington DC on November 30, 2000.[40]

As late as January 25, 2001, ALPA General Manager Jalmer D. Johnson wrote to APA President John Darrah stating his understanding that the APA Board was looking at a "possible affiliation between ALPA and APA," and ALPA offered to finance communications and polling in support of "this campaign."[41]

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[32] AEC Report at ALPA 040624.
[33] AEC Report at ALPA 040624.
[34] Babbitt Depo. at 42; Woerth Dep. at 29-30. Meetings between ALPA President Duane Woerth and APA representatives are known to have occurred on or about July 7, 2000, October 27, 2000, November 30, 2000, April 5, 2001, August 2, 2002, December 3, 2002 and December 9, 2002. During the same period, President Woerth met only once, in person, with the TWA MEC.
[35] Woerth Presentation, ALPA 043883.
[36] Woerth Presentation; Woerth Depo. at 41 ("I wasn't going to turn them down over the fine.").
[37] APA00013.
[38] ALPA 043890.
[39] *Id.*
[40] ALPA 030970.
[41] ALPA 020841. See also Rachford Depo. at 38-39, Ex. 244 (April, 2001 reference that ALPA has "expanded its activities" to achieve merger with independent unions, including APA).

American's January 9, 2001 agreement to purchase TWA's assets had the effect of de-railing the ALPA-AA merger.[42] Furthermore, until the AA-TWA pilot seniority integration was put to bed, ALPA's "mission" would have to be deferred. ALPA President Duane Woerth acknowledged the necessity of this deferral in an address to American pilots at a DFW domicile meeting on August 2, 2002:

> So I've decided, in my presidency, one of the biggest goals is going to be to reunite the pilots of this country and in Canada in the most powerful trade union anybody has ever seen and we can do that. ... Blessed by the Board of Directors to commit serious effort, both human resource effort, communications effort, and money to go especially to the large and powerful and important independent pilots' associations and try to make the case ... that we're all going to have a better profession, more secure careers and more economic power and have better contracts and have more job security if we consolidate our power and not fragment. So that was the mission.
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> * * *
>
> And in the fall of 2000 I was invited by then President LaVoy to come and address your Board, which was two years ago. Obviously, we all know **we had this little event called the TWA merger** and so we've decided to let that all get completed. **It wasn't a lot of sense getting involved in anything like an ALPA Exploratory Committee in the middle of that. That's behind us now.**[43]

Throughout this period APA representatives stated emphatically that there could be no merger with ALPA as long as the TWA pilot integration was pending.[44] Or, as ALPA attorney Dan Katz expressed it: "American pilot representatives were opposed to affiliation with ALPA because of the adverse impact that would have on the American pilots' seniority integration efforts."[45] As late as April, 2002, those American pilots still advocating merger with ALPA referenced the permanency of the AA/TWA seniority integration as non-negotiable.[46]

Although ALPA owed a duty of fair representation to the TWA pilots, ALPA's determination not to collect authorization cards from American pilots meant that its loss of the TWA pilots to APA was inevitable. Thus, in terms of economic interest, ALPA would be motivated to avoid the alienation of APA – the future prize – by minimizing its advocacy of the

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[42] Warner draft letter for Woerth, dated February ##, 2002 at ALPA 044710 ("But very little was ever done with APA, in part because American announced its proposed purchase of TWA assets a few months after the BOD met. Almost immediately after American's proposal was announced, work on the 'APA Organizing' project stopped."); Rosen Depo. at 148 (American pilots take the position that it "isn't the time or place to even think about that."); Holtzman Depo. at 198-99 (ALPA efforts to merge with APA were being "suspended or discontinued" subsequent to announcement of Asset Purchase Agreement); Woerth Depo. at 61 (It was "hopeless" to expect American pilots to vote for ALPA in the middle of a merger with TWA).

[43] Exhibit 253 at APA00249.

[44] Young Depo. at Ex. 27 (APA LAX Chairman Denny Breslin letter); Hollander Depo. at 149-52, Ex. 45.

[45] Hollander Depo. at 152.

[46] DFW Resolution attached to Rindfleisch e-mail dated April 4, 2002 8:38:51 a.m.; APA MIA Resolution at A040670.

TWA pilots. As former ALPA president Randolph Babbitt testified in justifying ALPA's withholding of financial assistance from the TWA pilots in April, 2001: "why would you give them a whole lot of money if they're not going to be part of ALPA."[47]

Under Captain Woerth, merger through expansion appears to have become ALPA's top priority.[48] Other well established ALPA policies were subordinated in order to achieve its expansionist goal. For example, in order to acquire representation of the Continental pilots, ALPA decided to waive its standing policy of rejecting strikebreakers as members in good standing.[49] In seeking representation of the American pilots, ALPA had also indicated that it would reverse its expulsion "for life" of American pilots who had been disloyal to ALPA.[50] ALPA also violated Article XX of the AFL-CIO Constitution by encouraging pilots to de-certify a sister AFL-CIO affiliate, the International Brotherhood of Teamsters, pursuant to the blunt expansionist policy that "we will represent pilots and the Teamsters can represent ground personnel."[51]

In my view, there is substantial evidence to support a finding that ALPA also violated its policy of Independence-Plus and subordinated the interests of the TWA pilots to those of the American pilots in order to pursue this same expansionist policy. To the extent that ALPA failed to adhere to its established policies, failed to take specific actions on behalf of its TWA-pilot members, and/or acted to thwart the TWA-pilots' efforts to protect their own interests for such an improper purpose or in bad faith, ALPA breached its duty of fair representation. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 311 (3d Cir. 2004), *cert. denied*, 544 U.S. 1018, 125 S. Ct. 1976 (2005).

III.

THE ALPA-INDUCED WAIVER OF SCOPE PROVISIONS

A. OVERVIEW

In January, 2001, American Airlines ("American" or "AA") saw a unique opportunity to protect and enhance its competitive position within the airline industry by acquiring financially troubled Trans World Airlines (TWA). In furtherance of the acquisition, American demanded that TWA file for bankruptcy so that TWA could jettison contractual obligations that were financially disadvantageous or otherwise presented an impediment to an operational merger of the two airlines.

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[47] Babbitt Depo. at 165.
[48] Rachford Depo. at 31.
[49] Hunnibell Depo. Ex. 11, AEC Report at 27.
[50] Hunnibell Depo. Ex. 11, AEC Report at 27.
[51] *American Trans Air, Inc.*, 26 N.M.B. No. 27 (1999); Rachford Depo. at 33; *International Brotherhood of Teamsters and Air Line Pilots Association*, Case No. 98-63 (Arb. Lesnick, November 17, 1998); Case No. 98-63 Appeal (Sweeney, December 16, 1998).

In this context, the two airlines sought contractual concessions from the TWA employees, including the pilots who were represented by the Air Line Pilots Association (ALPA). In sharp contrast from typical bankruptcies, however, the principal concession sought by the airlines was not economic in nature. Indeed, American readily made a commitment to ultimately raise all TWA pilots to the substantially higher wages and benefits enjoyed by American pilots. Rather, the airlines' primary objective was for the pilots and other TWA employee groups to waive the scope provisions contained within their respective collective bargaining agreements.

At the time of TWA's January 10, 2001 bankruptcy filing, the TWA pilots enjoyed industry standard contractual scope protection contained in Section 1 of the TWA/ALPA collective bargaining agreement, including: (i) their current collective bargaining representative, ALPA, would represent any employee who performed flying for TWA or any affiliate of TWA, (ii) any successor to TWA was obliged to employ all TWA pilots and be bound by any agreement with ALPA, and (iii) in the event of a merger with another airline, disputes regarding pilot seniority integration would be subject to the procedures set forth in Sections 3 and 13 of the Allegheny-Mohawk Protective Provisions, which require unresolved seniority integration disputes to be submitted to binding arbitration between the carrier and the unions representing all of the affected employees.

Thus, in the context of the TWA/AA transaction, TWA was contractually obligated to require any successor (defined to include the purchaser of "substantially all" of the Company's assets) to "assume and be bound by the Agreement."[52] More specifically, the CBA provided that the Company "shall not conclude or enter into any agreement for any ... Substantial Asset Sale ... unless the particular Purchaser" agreed to Allegheny-Mohawk seniority integration procedures.[53]

Notwithstanding the contractual commitments contained in its CBA with the pilots, TWA, in Article 10.2 of its Asset Purchase Agreement, agreed that it would amend all existing collective bargaining agreements to provide that their scope and successorship provisions would not be applicable to AA. This agreement was unlawful in two respects. First, Article 10.2 reflected TWA's violation of its obligation under the collective bargaining agreement to condition any sale on the purchaser's acceptance of the TWA pilots' contractual scope protections.

Second, under the Bankruptcy Code, TWA could not unilaterally amend these contract provisions. Instead, pursuant to section 1113 of the Code, it was obligated to engage in good faith bargaining with ALPA in order to obtain only those modifications that were "necessary" to its reorganization. 11 U.S.C. § 1113(b)(1)(A). Under section 1113, in the absence of a consensual agreement, the Debtor is entitled to move the court for imposition of the proposed modifications or for the rejection of the collective bargaining agreement in its totality. In order to grant such a motion, the bankruptcy court must find, *inter alia*, that: the Debtor bargained in good faith, the proposed modifications are necessary, the union rejected the proposed

[52] ALPA 017251 at Section 1(C)(1).
[53] ALPA 017253-54 at Section 1(D)(2)(c) and 1(D)(4)(a).

modifications without good cause, and the balance of the equities favors the motion. 11 U.S.C. § 1113(c).

As stated above, the concept of scope encompasses multiple provisions, including the continuance of the existing collective bargaining agreement and union representation; however, in the TWA/ALPA context, the only real bone of contention was the continued applicability of the contractual seniority integration provisions, often referred to as Labor Protective Provisions (LPP's) or Allegheny-Mohawk rights. These provisions – which are standard in most airline industry collective bargaining agreements – mandate that an airline condition any merger on a seniority integration process that culminates (in the event of unsuccessful negotiations between the respective employee groups) in final and binding arbitration before a neutral arbitrator. Allegheny-Mohawk rights are the "pillar and key concept in the scope language" of a pilot agreement.[54]

Seniority governs virtually every aspect of a unionized pilot's working life, including his vulnerability to layoff, potential for career advancement, wages, routes, and vacation. But, whereas the TWA collective bargaining agreement called for an arbitration process as the means to determine the relative position of pilots on a merged seniority list, the American pilots' agreement effectively provided for the "stapling" of pilots from an acquired airline to the bottom of the American pilot list. The American pilots were represented by an independent union called the Allied Pilots Association (APA) that had a history of taking advantage of this ability to staple the pilots of acquired airlines to the bottom of the American pilot list.[55]

The Asset Purchase Agreement obligated TWA to resolve the conflict between the airlines' respective labor agreements by demanding that its unions waive their Labor Protective Provisions. As referenced above, in the absence of a voluntary waiver by the TWA pilot representatives of their contractual scope rights, the only way that TWA could accomplish its goal was through the 1113 process.

On April 2, 2001, advisors for the national organization of the Air Line Pilots Association (ALPA) caused the elected representatives of 2,250 Trans World Airlines (TWA) pilots to abandon their existing policy and waive contractual provisions designed to protect TWA pilot seniority in the context of an operational merger between TWA and American Airlines ("American" or AA). As a direct result of this waiver, the TWA pilots' seniority was so dramatically reduced that fewer than 700 of them are still employed by American today.

In inducing this waiver, the ALPA advisors resorted to strategies that exceeded the wide range of reasonableness accorded to labor unions. This conduct included:

- pressuring the TWA pilots to make a premature waiver decision;
- the use of scare tactics whereby the risks associated with continued resistance to company demands for contractual waiver were dramatically exaggerated;
- providing false assurances that the waiver's adverse impact had been or could be avoided;

[54] Brundage Depo. at 28; Woerth Depo. at 152 (giving up LPP's is a "gigantic concession.").
[55] Rosen Depo. at 74; Woerth Depo. at 55.

- the suppression of dissenting views of legal advisors for the purpose of depriving TWA pilot representatives of policy options; and
- the treatment of TWA pilot representatives as hostile adversaries instead of the leaders of an autonomous pilot group whom they should have been dedicated to serving.

In the aftermath of this waiver, ALPA continued to actively undermine the TWA pilots' efforts to protect their seniority rights by, *inter alia*:

- vetoing, without legitimate explanation, legal strategies designed to create leverage for the TWA pilots in ongoing seniority integration negotiations with their American counterparts;
- failing to assist the TWA pilots in lobbying efforts designed to restore their Allegheny-Mohawk rights;
- telegraphing to the American pilots – who were represented by a different union – that they would not support the TWA pilots' efforts to improve their relative position on the merger pilot list; and
- threatening TWA pilot representatives with individual liability if they persisted in their efforts to enhance their seniority position.

Even without ascribing an ulterior motive to it, ALPA's conduct was arbitrary and flouted its own established policy of "Independence-Plus" under which airline-specific pilot groups are accorded full autonomy with respect to the collective bargaining process. However, there is substantial evidence that ALPA's unreasonable conduct was motivated by its desire to curry favor with the American pilot group in order to encourage a voluntary merger between their independent union – the Allied Pilots Association (APA) – and ALPA.

An ALPA-APA merger was a paramount policy goal of ALPA during this time period. As discussed above, a major effort to obtain that merger had to be shelved as a result of the American-TWA merger and could only be resumed once the TWA pilot seniority integration had become a dead issue. Nevertheless, a policy of subordinating the interests of a union's members to the interests of employees the union wishes to represent in the future is manifestly outside the wide range of reasonableness to which union policymakers are entitled.

B. THE TWA PILOTS' POSITION PRIOR TO APRIL 2, 2001

Prior to April 2, 2001, the relevant TWA pilot governing bodies – its Master Executive Council (MEC) and Merger Committee – had taken the adamant position that they would not waive their contractual scope provisions in the absence of an agreement to a fair and equitable seniority integration process, i.e., a process culminating in a final and binding decision before a neutral arbitrator.

In terms of legal guidance, it had been agreed at the outset that TWA-MEC staff attorney David Holtzman would be the TWA-MEC's primary counsel[56], Roland Wilder would be Merger Committee counsel, and -- consistent with ALPA's doctrine of Independence-Plus – ALPA National would "take a back seat."[57]

David Holtzman joined Roland Wilder in advocating against any waiver of scope protections.[58] As Holtzman aptly noted in a meeting with TWA pilots on February 12, 2001: "AA also has the option of waiving the requirement for us to waive our SCOPE."[59] It was agreed that any waiver of scope would leave the TWA pilots "defenseless."[60] With respect to the seniority issue: "The goal [was] to win, and to win by any means."[61]

The strategy mapped out by attorneys Holtzman and Wilder was to aggressively defend the scope protections – even in the face of an 1113 motion – and only to surrender in exchange for an appropriate seniority integration process agreement[62]:

> *Bill Wilder and Bankruptcy Code 11.13 – On whether a CBA can be rejected during ch. 11: The company has to provide proposals to the union, and must bargain. The company has to justify the rejection or modification of the CBA to the court. The court reviews and rules on the rejection of the CBA. Our contract restricts the company's ability to reject it.*
>
> *The state of Delaware is more "company friendly", but would the court allow TWA to vacate our CBA only to void our SCOPE? Bill thinks it's unlikely because they won't be able to justify the rejection of a requirement to be "fair and equitable".*
>
> * * *
>
> *Holtzman suggests that we "give the company relief on SCOPE conditional upon a process agreement."*[63]

As Holtzman advised the Merger Committee on February 5, 2001, preservation of Allegheny-Mohawk sections 3 and 13 was "the ball game."[64] As late as March 26, 2001, Holtzman was participating in the reiteration of TWA pilot strategy pursuant to which "we

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[56] Holtzman was an ALPA attorney designated to exclusively service the TWA pilot group. Wilder Depo. (II) at 42; Rosen Depo. at 81; Holtzman Depo. at 12-14; Woerth Depo. at 152 (Holtzman was "their lawyer").
[57] January 23-25, 2001 Merger Committee Meeting in Herndon, ALPA 052129.
[58] Bensel Depo. at 60-61; Hollander Interview.
[59] Bensel Depo. Ex. 46 at 03256.
[60] January 23-25, 2001 Merger Committee Meeting in Herndon, ALPA 052129.
[61] January 23-25, 2001 Merger Committee Meeting in Herndon, ALPA 052133.
[62] The term "process agreement" refers to the effort to obtain four-party agreement to a seniority integration process culminating in arbitration. Wilder Depo. (II) at 46-47; Holtzman Depo. at 54.
[63] January 23-25, 2001 Merger Committee Meeting in Herndon, ALPA 052134.
[64] Holtzman e-mail February 5, 2001 at ALPA 052124.

insisted on a Process Agreement before we would execute a waiver of scope."[65] According to Holtzman, he changed his position to one in favor of waiving scope as of April 1, 2001.[66]

Similarly, in the March, 2001 time frame, ALPA National attorney Clay Warner provided emphatically optimistic advice to a TWA-MEC representative concerning the TWA pilots' chances of prevailing in litigation with TWA:

> Believe me we will prevail in this argument. In order to strip the contract, they have to show it is so onerous and burdensome that they cannot produce a profit. I don't think this is going to fly.[67]

Mr. Wilder also consistently expressed, in the most uncompromising terms, his opposition to the waiver of the TWA pilots' contractual LPP's.[68] In a legal memorandum dated March 13, 2001, Wilder stated that the "only leverage" that the TWA pilots possessed was found in Section 1 of the collective bargaining agreement. He warned that, in bargaining with AA and APA, unless the leverage were preserved, "we cannot expect fair treatment from either of them."[69] He outlined an aggressive legal strategy that had a "reasonable likelihood" of successfully achieving a fair procedure for seniority integration, provided that the TWA pilots "continue to insist on compliance with Section 1 of the ALPA/TWA collective bargaining agreement as a condition for the transaction's closing."[70] He expressed the view that it was questionable whether TWA would prevail in its 1113 motion due to its prior breach of Section 1 and the prospect of labor strife.[71] In conversations with TWA-MEC members prior to April 2, he described his litigation strategy in terms indicating that it was "almost a foolproof plan."[72] Until the events of April 2, 2001, the TWA-MEC was prepared to go forward with the approach outlined in Wilder's March 13 memorandum and subsequent March 26 letter.[73]

Pursuant to the TWA-MEC's mandate, by letter dated March 26, 2001, Mr. Wilder sought authorization from ALPA President Duane Woerth to implement this legal strategy, which he described as "necessary both to preserve the TWA pilots' rights under the successorship provisions of the CBA and to enhance ALPA's ability to defend" against TWA's 1113 motion.[74] As Mr. Wilder testified, this lawsuit was the "only ... alternative that the TWA pilots had in the face of the emergency that was thus created...."[75]

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[65] Holtzman e-mail to Jonathan Cohen and Michael Winston dated September 4, 2001 at ALPA 044531.
[66] Holtzman Depo. at 59-60.
[67] Hollander Interview; Hollander Depo. at 72 (In the March 15 – April 2, 2001 time frame, Warner had told Hollander "he believed we would prevail and be able to protect the rights of the TWA pilots.").
[68] Bensel Depo. 105-07, 110; Wilder Depo. (II) at 56-57.
[69] Wilder Memorandum dated March 13, 2001 at 3.
[70] *Id.* at 5.
[71] Wilder Memorandum dated March 13, 2001 at 3-4.
[72] Hollander Depo. at 122.
[73] Hollander Depo. at 123-24.
[74] Wilder letter to Woerth, dated March 26, 2001; Wilder Depo. (II) at 86-87.
[75] Wilder MO Trial at 34. See also Wilder Depo (II) at 62 ("In my view it was the **only way** to create the kind of leverage that was needed on the seniority front.").

Wilder never received a written response to this request nor did ALPA legal representatives state their opposition during a March 31 teleconference.[76] Woerth did not authorize the lawsuit.[77] Woerth claims that he turned the litigation authorization request over to ALPA legal counsel and did not receive any response prior to April 2, at which time, Woerth argues, the issue became moot and "he never pursued it further."[78]

I concur with Mr. Wilder that the litigation he proposed was both legally viable and strategically necessary. Even in the event of a dismissal by the district court in favor of bankruptcy court jurisdiction, it would have signaled to the airline parties the determination of the TWA pilots to defend their scope protections in the 1113 context.

It was not until a pre-MEC meeting conducted on April 2, 2001, in St. Louis, that ALPA legal representatives began an effort to convince Mr. Wilder that he was wrong.[79] In discussing the proposed legal strategy with Wilder, ALPA's legal representatives expressed their concern as to "risk" exclusively in terms of American walking away from the TWA transaction.[80]

C. ALPA NATIONAL'S RESORT TO INAPPROPRIATE TACTICS TO INDUCE WAIVER OF SCOPE PROVISIONS

ALPA National advisors[81] induced the TWA pilots to waive their contractual scope provisions through resort to inappropriate tactics, including the following: 1) pressuring the TWA-MEC into making a premature decision; 2) overstating the likelihood of success of TWA's 1113 motion and the attendant failure to discuss the strength of the pilots' legal and non-legal response, 3) exaggeration of potential adverse consequences of losing the 1113 motion, 4) exaggerating the likelihood of American abandoning the transaction; 5) false assurances concerning the impact of a loss of the LPP's, 6) the suppression of dissenting legal opinions, and 7) hostility toward the TWA pilot representatives. The ALPA legal advisors gave every appearance of being involved in an aggressive sales job as opposed to the appropriate role of supplying clients with the requisite information to make their own decision.

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[76] Wilder Depo. (I) at 87, 89.

[77] Woerth Depo. at 214.

[78] Woerth Depo. at 215. I consider this testimony inherently incredible and also contradicted by his subsequent testimony that his practice was to get legal briefings when "something is coming to a head." Woerth Depo. at 217. It is my opinion that Woerth's failure to respond to Wilder's request should be treated as a denial of authorization, since an MEC cannot pursue a litigation option without ALPA National's permission. (Woerth Depo. at 263).

[79] Wilder Depo. (I) at 91; Wilder Depo. (II) at 103, 108; Seltzer Depo. at 55 (No knowledge of any legal recommendation to the TWA-MEC to waive scope prior to April 2, 2001).

[80] Wilder Depo. at 94.

[81] The ALPA attorneys and advisors who attended included: Richard Seltzer (bankruptcy labor attorney from ALPA General Counsel Cohen, Weiss and Simon), Bill Roberts (ALPA Sr. Representation Attorney), Clay Warner (Jr. Representation Attorney), Bob Christy (ALPA Manager of Economic and Financial Analysis), former ALPA President Randy Babbitt (Eclat), David Holtzman (ALPA staff attorney at MEC), Michael Glanzer (Investment Banker), Steve Tumblin (bankruptcy attorney from LeBoef Lamb). David Holtzman testified that it was his idea to invite these advisors to St. Louis en masse. Holtzman Depo. at 142-43.

As discussed in III.D below, there does not appear to be any dispute that ALPA National's tactics caused the TWA-MEC to reverse its position and waive the TWA pilots' scope provisions.[82]

1. Pressure to Make an Immediate Decision

On April 2, 2001, an enormous amount of pressure was placed on the TWA pilot representatives by ALPA advisors to make an immediate decision or face dire consequences. The sudden insistence by ALPA advisors called for a wrenching reversal of the TWA-MEC's policy of resolutely resisting waiver of the TWA pilots' scope provisions. Moreover, the call for immediate surrender of the TWA pilots' position constituted a sharp departure from standard Railway Labor Act practices and ALPA's own practice of engaging in brinksmanship when the demanded concessions were simply too high. As Captain Bensel testified in his deposition:

> We're being told by this group of advisors, here, you've got to accept this offer and you have to do it **within the next couple of hours** or very bad things are going to happen to you, versus playing this thing out, as you do normally in Railway Labor Act negotiations, that you play this out and you see where the other party's going, what they're willing to give, what you're willing to give. And, hopefully, you reach a consensus, and you're able to strike a deal that all parties are satisfied with.[83]

ALPA advisors drove home the need for an immediate decision by repeated iteration of such dramatic metaphors as "the train is leaving the station."[84] Clay Warner's pre-meeting notes reflect that his goal for the April 2 meeting was to "set up officers to step in and close deal."[85]

Babbitt testified that there was "pressure" to make a decision, but could not identify why.[86] He speculated – incorrectly – that the judge was going to rule imminently on the 1113 motion even though the hearings had not yet commenced.[87] In any event, his "impression" was that "at the end of the day they're going to ask and we need to be able to tell."[88] By contrast, Warner testified that he did not recall time pressure being an issue given that the 1113 hearing was "some days" off.[89] Holtzman, who arranged for the April 2 meeting, testified ironically that the meeting date was set so that the TWA MEC could make their decision in the "relative comfort and quiet of their office in St. Louis, rather than to postpone that possibility to [the trial in] Wilmington, where, you know, it's a much more chaotic kind of – kind of scene."[90] Woerth had no knowledge of a next day deadline and speculated there might have been a 30 to 90-day time frame.[91]

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[82] See also Rosen Depo. at 24-25.
[83] Bensel Depo. at 136.
[84] Hollander Interview.
[85] Warner Depo. at 109, Ex. 198.
[86] Babbitt Depo. at 139-40.
[87] Babbitt Depo. at 138.
[88] Babbitt Depo. at 140.
[89] Holtzman Depo. at 74-75.
[90] Holtzman Depo. at 165. Holtzman also testified that it was the MEC that decided to make its decision on April 2.
[91] Woerth Depo. at 233-34.

In any labor dispute concerning a hotly contested issue, an adversary will frequently take an extreme position and only moderate that position with the passage of time.[92] Generally, meaningful movement in position is only obtained when parties reach the temporal stage where significant consequences will arise from the failure to reach an agreement (e.g., an NMB release, a job action, or a court ruling).[93] Put another way, generally a labor union will not concede without putting the threat to the test.[94] This is particularly true of the AA-TWA transaction where, given the amount of time and money invested in the process, the creation of even a short delay in its consummation could have created "substantial pressure" on the carriers.[95]

Mr. Babbitt testified that his own negotiating advice would have been different if he had understood the TWA-MEC to have had another week in which to negotiate:

> Well, if they knew that they had another week I would have been advising them to continue to explore avenues for solution; but if everyone in the room believed that we had, you know, hours then they made the decision based on that. Those are two different cases really in my mind.[96]

There was time available. The question of TWA's obligation to pursue the waiver of scope through the complex 1113 process had previously been resolved in ALPA's favor. While the agreed-to Asset Purchase Agreement required TWA to seek its unions' waiver of their respective scope provisions, American acknowledged that such waiver was subject to a mandatory negotiating process under § 1113 of the Bankruptcy Code. Indeed, ALPA's initial position before the bankruptcy court was that the Asset Purchase Agreement violated the collective bargaining agreement's LPP's and that the proposed order approving the sale should be amended to clearly provide that nothing in the Asset Purchase Agreement or the proposed order would alter or restrict the pilots' contractual rights.[97] While ALPA expressed its optimism that the seniority issue would be resolved "fairly and equitably," it maintained that:

> It is essential that ALPA's labor protective provisions not be waived or modified prior to or in the absence of these issues being fully negotiated between ALPA, TWA, the Purchaser and the Purchaser's pilot group.[98]

In a brief submitted to the bankruptcy court on March 5, 2001, American readily conceded that:

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[92] Babbitt Depo. at 80-81 ("There's usually a difference" between opening positions and what a party would settle for).
[93] Seltzer Depo. at 20-22, 28 (describing 1113 settlements being reached during hearings, after the completion of hearings, or "on the courthouse steps.").
[94] Babbitt Depo. at 83.
[95] Wilder Depo. (II) at 64.
[96] Babbitt Depo. at 141.
[97] Limited Objection of the Air Line Pilots Association International to Debtors' Motion for the Sale of Substantially All of their Assets (February 28, 2001) at 1-2.
[98] *Id.* at 4.

> The Court is not being asked to decide anything with respect to the CBA at this time. ... As TWA has sought neither rejection nor modification of the CBA at this time, it need not make a showing that such changes are necessary before the sale can be approved. Thus, the interests of the ALPA and the IAM are protected.[99]

In my view, American's position reflects that its first priority was to secure a highly valued transaction rather than to take the stand that the transaction was contingent on the TWA pilots' waiver of their contractual scope provisions. In other words, as discussed further below, ALPA was already witnessing the leverage that the TWA pilots had by virtue of American's keen interest in consummating the asset purchase.

TWA made its own commitment via court submissions – a commitment communicated to ALPA President Duane Woerth by ALPA attorney Richard Seltzer on March 16, 2001 – that "'TWA remains willing to continue discussions with ALPA at any time or place during the pendency of this application.'"[100] ALPA appears to concede that there was no specific deadline at the time other than a general presumption that the commencement of the 1113 hearings might trigger a deadline.[101] Moreover, even if abandonment of the transaction was a real option in American's eyes, testimony supports the conclusion that American, at a minimum, would have awaited the outcome of the 1113 hearing.[102]

As of April 2, 2001, the 1113 hearing process had not yet commenced. While the first day of hearings was scheduled for April 6, 1113 hearings at major airlines have been known to stretch on for weeks or even months.[103] Not only does the litigation process allow more time for negotiation, but the litigation process itself often serves to crystallize issues and involve the federal bankruptcy judge in a super-mediatory capacity. ALPA's advisors appear to have been aware of the mediatory role a bankruptcy judge will frequently play in that respect.[104] Yet none of the advisors advised the MEC members that the 1113 process would afford them additional time to make their decision.[105]

ALPA's sudden and premature capitulation defied the expectations of experienced industry participants. As Continental Airlines observed:

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[99] Omnibus Reply to Objections to TWA's Motion for an Order Authorizing the Sale of Substantially all of TWA's Assets (March 5, 2001) at 26-27.

[100] Seltzer letter to Woerth, March 16, 2001 (ALPA at 047450, 51) quoting Hayes Declaration Paragraph 43.

[101] Rosen Depo. at 35.

[102] Brundage Depo. at 31.

[103] Rosen Depo. at 49-51; Wilder Depo. (II) at 111-12; Seltzer Depo. at 91 ("If the parties agree to something, the judge can extend anything."). Pursuant to §1113(d)(1), the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of an application for rejection. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case and the interests of justice require such extension, or for additional periods of time to which the debtor and representative agree. 11 U.S.C. §1113(d)(1). The court is required to rule on an application for rejection within thirty days after the date of the commencement of the hearing. 11 U.S.C. §1113(d)(2). In the interests of justice, the court may extend such time for ruling for such additional period as the debtor and the employees' representative may agree to. 11 U.S.C. §1113(d)(2).

[104] Babbitt Depo. at 14 (Bankruptcy judges effectuate settlements by "making the threat, if you don't settle this I will, and with a strong indication of what his ruling was going to be.").

[105] Holtzman Depo. at 169-70.

> It is by no means certain that this consent will be forthcoming. TWA has a very senior and experienced group of pilots, and a waiver of seniority integration would have a **material adverse impact** upon the TWA pilots. **It is particularly unlikely that TWA's pilots will agree to waive their seniority integration rights before it is clear how American would integrate them into the American seniority list**, which apparently has not yet been established. Negotiations between labor unions regarding seniority integration is always contentious and time consuming, **and it is extraordinarily unlikely to be accomplished by the May 31 closing** deadline under the American sale agreement.[106]

ALPA's sudden capitulation also constituted an abandonment of solidarity with AFL-CIO affiliate the International Association of Machinists, which represented the flight attendants, mechanics, and baggage handlers. Indeed, ALPA's attorneys justified an application for reimbursement of their attorneys' fees by the Debtors based on the argument that ALPA's early waiver of scope undercut the efforts of the IAM to resist the waivers demanded.[107] Significantly, unlike ALPA, the IAM had been unwilling to address TWA's demands for contract modifications "unless [TWA] could somehow force American and/or its unions to agree to a binding seniority integration process."[108] Until ALPA's surrender, the IAM took the position that "there was nothing to talk about unless and until TWA convinced American and/or [American's unions] to discuss ... the establishment of a binding seniority integration process."[109]

Indeed, in direct dealings with ALPA, TWA conceded that agreeing with AA to demand the waiver of scope from ALPA and actually obtaining that waiver were two entirely different issues. As, TWA General Counsel Kate Soled said to David Holtzman:

> We have to have a CBA waiver, and we really don't expect you to do that. Isn't there some agreement we can enter into for the seniority integration going forward.[110]

Significantly, TWA MEC representatives had requested an opportunity to submit the proposed agreement to membership ratification.[111] ALPA advisors, including Roberts and

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[106] Objection of Continental Airlines, Inc. to Debtors' Motion for Order Authorizing and Scheduling a Public Auction at 19-20.

[107] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at ¶ 26(e); Reply Memorandum in Support of Motion by Trans World Airlines, Inc. for an Order Authorizing Rejection of Certain of Its Collective Bargaining Agreements Pursuant to 11 U.S.C. § 1113 at 1 (In the opening paragraph of its reply brief seeking rejection of the Machinists' contracts, American emphasized that the IAM "is the only one of these unions that continues to place the sale of American and the employment of tens of thousands of people across the country at risk by failing to agree to these essential waivers and modifications.").

[108] Declaration of Terry L. Hayes in Support of Motion Pursuant to 11 U.S.C. § 1113 at ¶ 35.

[109] *Id.* at ¶ 37.

[110] Bensel Depo. Ex. 46 at 3255.

[111] Warner Depo. at 75; Bensel Interview.

Warner, insisted that existing time pressures did not allow for the ratification process.[112] In my opinion, the loss of the membership ratification process both undercut the policy of Independence-Plus and deprived the TWA MEC of a valuable strategic tool.

To the extent that the ALPA National advisors, on April 2, 2001, conveyed that the TWA pilots had to make an immediate decision, ALPA deprived the TWA pilots of the opportunity to obtain a better deal that could only become available with the further passage of time. Put another way, the TWA pilots were called upon to fold before any of the other players were required to ante up. In this respect, the ALPA National advisors were acting in what they should have known to be an arbitrary and capricious manner that would likely condemn the TWA pilots to an inferior deal.

2. Understating the Strength of the TWA Pilots' 1113 Position

ALPA's advisors asserted to the TWA MEC that there was a 100 percent chance of ALPA losing the 1113 motion and that the consequences of losing the motion would be catastrophic, including: the total loss of the collective bargaining agreement, the loss of union representation, and at-will employment status leaving every pilot subject to immediate termination for any reason or no reason at all. The notion of a 100 percent chance of losing the 1113 motion is discussed in this subsection. The likelihood of the catastrophic consequences predicted by the ALPA advisors is discussed in subsection C.3 below.

During the April 2 meeting, there was apparently no effort by ALPA advisors to put the 1113 process in its proper context despite it being ALPA's standard practice to lay out to its pilot-clients exactly what the statutory process consisted of.[113] With respect to the notion of resisting the 1113 motion, David Holtzman testified that, on April 2: "I don't know that that was raised again ...."[114]

In point of fact, section 1113 was added to the Bankruptcy Code in order to accord collective bargaining agreements a special protected status and to raise obstacles to a Company's efforts to demand concessions from their unionized workers in the bankruptcy context.

Prior to the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), an employer that filed for bankruptcy under chapter 11 was permitted to disregard or reject a collective bargaining agreement. *See Matter of Sol-Sieff Produce Co.*, 82 B.R 787, 790 (Bankr. W.D. Pa. 1988). In *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984), the Supreme Court held that the filing of a bankruptcy petition rendered a collective bargaining agreement unenforceable based on an interpretation of 11 U.S.C. § 365 (a). Thus a chapter 11 employer could unilaterally breach the provisions of a collective bargaining agreement before seeking court approval to formally reject the agreement. *Id.* at 534.

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[112] Bensel Interview.
[113] Rosen Depo. 52-53.
[114] Holtzman Depo. at 156.

In response to the substantial advantage to employers permitted by the *Bildisco* decision, Congress enacted 11 U.S.C. § 1113, to govern the procedures for rejection of collective bargaining agreements. *See Sol-Sieff*, 82 B.R. at 791. By enacting § 1113, Congress intended to preclude employers from filing for bankruptcy solely to avoid their responsibilities under a collective bargaining agreement. *See In re Ionosphere Clubs, Inc.*, 22 F. 3d 403, 408 (2d Cir. 1994). Accordingly, § 1113 insures that negotiations between a Chapter 11 employer and a Union occur before the employer seeks to reject a collective bargaining agreement, delineates the standard by which a bankruptcy court may evaluate an application to reject an agreement, and establishes a time frame in which the court may make its determination. *See In re Maxwell Newspapers, Inc.*, 149 B.R. 334, 336-7 (S.D.N.Y. 1992); 11 U.S.C.A. § 1113.

Under applicable bankruptcy law, the TWA collective bargaining agreements would remain in effect "unless and until" TWA, as the debtor, complied with the provisions of § 1113. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 990 (2d Cir. 1990), *cert. denied sub nom, Air Line Pilots Ass'n, Int'l, AFL-CIO V. Shugrue*, 502 U.S. 808 (1991); *In re Arrow Transportation Co. of Delaware*, 224 B.R. 457, 460 (Bankr. D. Or. 1998).

Under then-existing precedent, the provisions of § 1113 had been transformed into nine discrete requirements that follow, and clarify, the statutory language. *See In re Wheeling-Pittsburgh Steel Corp.*, 50 B.R. 969, 974-5 (Bankr. W.D. Pa. 1985), *aff'd*, 52 B.R. 997 (W.D. Pa. 1985). The Third Circuit has acknowledged, and many bankruptcy courts have utilized, this nine-step approach. *See Wheeling-Pittsburgh Steel Corporation v. United Steelworkers of America*, 791 F. 2d 1074, 1080 (3d Cir. 1986); *Kentucky Truck Sales*, 52 B.R. at 800; *Sol-Sieff*, 82 B.R. at 791.

Before a court may authorize the rejection of a collective bargaining agreement, the debtor has the burden of showing that it has satisfied the following nine (9) factors:

After filing a petition and before filing an application to reject a collective bargaining agreement:

1. The debtor-in-possession must make a proposal to "the authorized representative of the employees," e.g., the Union, to modify the collective bargaining agreement. *See* 11 U.S.C.A. § 1113(b)(1)(A).

2. The proposal made by the debtor-in-possession must be based on the most complete and reliable information available at the time of the proposal. *See* 11 U.S.C.A. § 1113(b)(1)(A).

3. The proposal must be necessary for the reorganization of the debtor-in-possession. *See* 11 U.S.C.A. § 1113(b)(1)(A).

4. The proposal must assure that all creditors, the debtor-in-possession, and all other affected parties are treated fairly and equitably. *See* 11 U.S.C.A. § 1113(b)(1)(A).

5. The debtor-in-possession must provide to the Union such relevant information as is necessary to evaluate the proposal. *See* 11 U.S.C.A. § 1113(b)(1)(B).

After making a proposal and before the §1113 hearing:

6. The debtor-in-possession must meet at reasonable times with the Union. *See* 11 U.S.C.A. § 1113(b)(2).

7. At meetings with the union, the debtor-in-possession must bargain in good faith with the Union in attempting to reach mutually satisfactory modifications of the collective bargaining agreement. *See* 11 U.S.C.A. § 1113(b)(2).

Once the above steps are satisfied, the court shall approve an application for rejection of a collective bargaining agreement only if:

8. The court finds that the Union has refused to accept the debtor-in-possession's proposal without good cause. *See* 11 U.S.C.A. § 1113(c)(2); and

9. The balance of the equities clearly favors rejection of the collective bargaining agreement. *See* 11 U.S.C.A. § 1113(c)(3).

See In re Wheeling-Pittsburgh Steel, 50 B.R. at 974-75.

The debtor bears the burden of persuasion by a preponderance of the evidence on all nine requirements. *See In re Wheeling-Pittsburgh Steel*, 50 B.R. at 975.

Then-applicable precedent in the Third Circuit held that the term "necessary," as used in § 1113(b)(1), was synonymous with "essential" or "bare minimum." *See Wheeling Pittsburgh Steel Corp.*, 791 F.2d at 1088.

As of April 2, 2001, TWA and ALPA had, in fact, reached agreement on proposed modifications to the TWA pilots' collective bargaining agreement except with respect to the scope provisions.[115] Even with respect to scope, the TWA-MEC stood ready to exchange the full range of its rights under Section 1 of the collective bargaining agreement in exchange for a seniority integration process culminating in arbitration. In view of the factual context and1113 legal framework, TWA was highly vulnerable on several fronts, including the following:

First, in terms of economic analysis, waiver of contractual seniority integration procedures could not be considered "necessary" to the financial viability of the AA-TWA combination. Rather, it was a cost-neutral means of assigning pilots to respective positions in

[115] Warner Depo. at 36; Seltzer Depo. at 67, 128.

the pecking order. Indeed, it would have been "the most economically advantageous" for American to leave the TWA pilots in their existing positions.[116]

Second, in terms of the necessary equitable analysis, it is undisputed that the TWA pilots' contractual right to seniority integration arbitration was nothing more than the "industry-standard" procedure "designed to provide a fair and equitable integration process."[117] Moreover, this "industry-standard" protection had been dearly bought -- granted in exchange for the pilots' concessions in TWA's two prior bankruptcies.[118] Indeed, the contract on its face strictly forbade TWA from seeking the 1113 concessions it now demanded.[119]

Third, with respect to the statutory procedural obligation to bargain in "good faith," TWA put itself in a precarious position by having effectively surrendered to American its ability to fulfill its contractual obligations to ALPA under § 1 of the collective bargaining agreement, thereby both violating the contract and compromising its ability to negotiate in good faith on the seniority integration issue. *In re Alabama Symphony Ass'n,* 211 B.R. 65 (N.D. Ala. 1996)(finding that §1113 relief was precluded because the debtor "impermissibly stopped performing its obligations under the CBA prior to seeking court permission to do so.").

ALPA made many of the above arguments and others[120], including:

- TWA waived 1113 rights due to prior unilateral action
- CBA contains waiver by TWA of CBA rejection
- Bad faith refusal to compromise on § 1 position
- Rejection not necessary because amendment is precondition
- Rejection not necessary since AA could still back out
- Rejection not necessary due to fair and equitable counter by ALPA
- Balance of equities: past sacrifice and strike possibility
- ALPA had a good faith basis to refuse.[121]

On April 2, 2001, there was no explanation given to the TWA pilot representatives as to legal background of an 1113 motion, the legal standards that TWA would have to satisfy, or the need for subsequent briefing and hearings.[122] There was no explanation of the bankruptcy court's obligation to proceed in an equitable manner.[123] Rather, ALPA bankruptcy attorney Mr.

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[116] Brundage Depo. at 40-41.
[117] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at ¶¶ 9, 26(f).
[118] *Id.* at ¶ 11.
[119] Holtzman Depo. at 81; ALPA 017255 at Section 1(E).
[120] ALPA attorney Seth Rose conceded that these were all "bona fide" arguments. Rosen Depo. at 46; Seltzer Depo. at 75.
[121] Objection of Air Line Pilots Association, International in Opposition to the Debtor TWA's Motion for an Order Authorizing the Rejection of its Collective Bargaining Agreements Pursuant to 11 U.S.C. § 1113 (March 30, 2001) at ¶ 4.
[122] Case Depo. at 91; Pastore Depo. at 106.
[123] Pastore Depo. at 106.

Richard Seltzer[124] said to the TWA MEC that there was a 100% chance of failure in the 1113 process.[125] Moreover, after asserting that the chances of contract rejection were 100 percent, ALPA attorneys rejected the pilots' request that this opinion be reduced to writing.[126]

Evidencing the advisors' pre-determination not to proceed with the 1113 hearing, as of April 2, 2001, there appear to have been no pre-hearing preparations for a hearing scheduled to begin on April 6.[127] To the best of Holtzman's knowledge, nobody was preparing for a fight.[128] Seltzer appears to have made little or no effort to coordinate litigation and negotiations strategy[129] despite the fact that, in the 1113 context, the two are inextricably entwined.[130] In a telling confirmation of this problematic disconnect, Mr. Katz objected to questions put to Mr. Seltzer concerning pre-April 2nd seniority integration negotiations by stating: "The witness hasn't said that he was involved in the seniority integration issues whatsoever. How would he know what was going on?"[131] In my view, the pre-determination by ALPA advisors not to oppose the 1113 motion, as evidenced by this lack of preparation, arbitrarily deprived the TWA-MEC of any ability to defend their Allegheny-Mohawk rights.[132]

3. Exaggeration of Adverse Consequences of an 1113 Rejection

What appeared to have had the greatest impact in terms of causing the TWA pilots to abandon their determination to defend their seniority integration rights was the alarmist characterizations of the catastrophic consequences of losing an 1113 motion.

ALPA attorneys Richard Seltzer and Bill Roberts asserted that the risk of losing the 1113 motion **and** suffering total contract rejection was virtually 100 percent.[133] Attorney Bill Roberts impressed upon the TWA-MEC that the consequence of rejection would be that all TWA pilots would lose their contractual and representation rights and, therefore, be subject to termination at will.[134] More specifically, the TWA-MEC was advised that, with the loss of the contract, would

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[124] Steve Tumblin was also present on April 2, ostensibly as a bankruptcy attorney, but testified that he is neither a litigator nor a bankruptcy attorney nor did he recall giving any advice on the scope issue. (Tumblin Depo. at 12, 76, 79).

[125] Case Depo. at 88; Pastore Depo. at 102; Warner Depo. at 25 ("virtually certain that they would lose the 1113 motion."); Seltzer Depo. at 105 ("a number greater than 99.").

[126] Case Depo. at 88.

[127] Holtzman Depo. at 171, 173. See also Seltzer Depo. at 87-88, 90, 94-95, 99 (no discovery, minimal witness preparation, apparently no experts, preparation deferred until after April 2nd).

[128] Holtzman Depo. at 173.

[129] Seltzer Depo. at 64, 69-70 ("I don't think I was involved.").

[130] Seltzer Depo. at 64-65 (Negotiations history is an issue "to be developed in evidence at the hearing.").

[131] Seltzer Depo. at 72.

[132] I consider that the lack of preparation reflects Woerth's prior determination that he would not authorize further 1113 litigation. As president, Woerth had full discretion as to whether litigation proceeded. (Woerth Depo. at 263). Wilder understood Woerth's failure to respond concerning Wilder's proposal of an aggressive pre-waiver litigation strategy as a rejection of this approach.

[133] Young Depo. at 66; Pastore Depo. at 102, 106. 144; Warner Depo. at 29; Seltzer Depo. at 105-06 ("I said there would not be a contract in effect ...").

[134] Young Depo. at 56, 63, 65-66; Pastore Depo. at 41-43, 109-110 (Bill Roberts, Clay Warner, and Richard Seltzer convinced him that the bankruptcy judge would "wipe out" the "entire contract"); Rosen Depo. at 38-41.

come the loss of the entire grievance process so that pilots could be terminated simply for calling in sick.[135] Clay Warner summarized the message conveyed by the advisors as:

> If you lost, then you'd end up with – the state of the law appeared to be at the time, with nothing: with no collective bargaining agreement, no representation, no grievance rights, and the right to the company to change the terms and conditions of the employment unilaterally.[136]

This message of total vulnerability was delivered with such vehemence that it left one of the MEC members "physically upset."[137]

By way of dramatic reinforcement, former ALPA President Randy Babbitt said that he would "rather be lying in hell with a broken back than working for an airline without a labor union or without a labor contract."[138] Mr. Babbitt indulged in this dire metaphor despite his understanding that TWA was only seeking rejection of a single contractual clause – the scope provision.[139]

As discussed further in section III.D below, the emotional communication of these dire consequences had a causal effect on the TWA-MEC's decision to waive. As First Officer Sally Young testified:

> The reason that I voted any votes in favor of waiving our protective provisions, was because of the risk that was indicated by Bill Roberts and the promise, if you will, of potential further action were American not to follow through on the language in the asset purchase agreement. ... American promising to do its reasonable best to provide fair and equitable integration.[140]

The TWA-MEC Chairman deplored the ALPA advisors determination to offer no options and to, instead, speak exclusively in terms of threats that would arise if waiver did not occur:

> Now, we were relying on experts from Cohen, Weiss & Simon, relying on experts from the Air Line Pilots Association to give us all of the information necessary for us to make a decision, a proper decision. Instead they were giving us only their view or their threat if we didn't follow the – their advice of giving up 1113.
> ...
>
> I think it would have been a better idea to have the 1113 process and law itself presented to us, and the different options available to us, all of the options available to us, rather

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[135] Hollander Depo. at 93.
[136] Warner Depo. at 25-26, 39. In my view, Warner's overall credibility is severely undermined by his conflicting testimony that the potential elimination of the entire agreement was not a "big deal" to the MEC. Warner Depo. at 37. His credibility is further undermined by subsequent testimony that he could not recall the representational issue being raised on April 2, 2001. (Warner Depo. at 80).
[137] *Id.*
[138] Case Depo. at 88-89.
[139] Babbitt Depo. at 128-29.
[140] Young Depo. at 92.

than just being forced down our throats by saying, give this up because there's no way you can win it.[141]

Total contract rejection – while perhaps a theoretical possibility – was antithetical to American's business plan. American did not have a Lorenzo-like goal of breaking a union in order to radically reduce the cost of wages and benefits. To the contrary, American had agreed that, ultimately, all TWA pilots would receive the more costly wages and benefits provided under the American pilot contract. Cost was not the issue.

Nor did American have any long-term interest in eliminating the TWA pilots' union representation since, ultimately, these TWA pilots would presumably be covered by the certification of the APA once the two airlines became a single carrier.[142] The idea that American or TWA would gratuitously provoke an all-out war with almost 2300 TWA pilots in the context of a complex operational merger is nonsensical. Moreover, ALPA's assertion that contractually-based union recognition is so tenuous in the bankruptcy context is belied by its continued reliance on contractual recognition, as opposed to NMB certification, at such carriers as US Airways despite repeated bankruptcy filings.

ALPA advisors asserted that the bankruptcy judge would not have the authority to modify TWA's proposed 1113 order and that the contract would have to be rejected or retained in its entirety.[143] In fact, bankruptcy judges have the power to act as de facto mediators, effectively conditioning 1113 relief on the parties' moderation of their respective positions. Even in airline bankruptcies where the 1113 bargaining proposals were driven almost exclusively by economic need, airlines such as Northwest (involving the flight attendants) and Mesaba (involving multiple employee groups) obtained court orders that limited them to imposing terms similar to their last best offer.[144]

Wholly apart from the coercive power of the bankruptcy judge, companies have a powerful motive to limit their unilateral action to the changes that they themselves characterized as "necessary" in order to avoid the gratuitous provocation of a strike or other job action. Indeed, it is a strange irony that, whereas on April 2 none of the advisors discussed the possibility of self-help[145], these same legal advisors took credit for avoiding a potential strike as a means to justify the Debtors' reimbursement of ALPA's attorneys' fees.[146] It was ALPA's stated position before the court that even a successful 1113 motion by TWA:

(a) would have required American to either terminate the Asset Purchase Agreement or waive TWA's failure to comply with the Asset Purchase Agreement; (b) could have resulted in significant labor unrest, including a strike;

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[141] Pastore Depo. at 104, 106.

[142] The testimony of Seth Rosen raises doubts as to whether ALPA had any genuine concern about the continuity of its representation rights under the TWA LLC structure. Rosen Depo. at 65.

[143] Pastore Depo. at 144.

[144] *In re Northwest Airlines Corp.*, 346 B.R. 307, 330 (Bankr. S.D.N.Y. 2006); *In re Mesaba Aviation Inc.*, Case No. 05-39258 (Bankr. D. Minn. 2006), transcripts of court proceedings on October 16, 2006 at 67.

[145] Hollander Depo. at 95. See, Holtzman Depo. at 164.

[146] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at ¶¶ 15.

> and (c) would not have resolved the issue of a new collective bargaining agreement with American. In sum, ALPA believes that its voluntary waiver was **essential** to the integration of the two airlines.[147]

American had no economic interest in alienating the TWA pilots much less driving them to resign or engage in strike action. American had determined that it needed "ALL the capacity that TWA produces."[148] At least in the short term, American would need most of the TWA pilots in order to fulfill its plan of inheriting a turnkey operation in St. Louis, JFK and other bases that would, with the benefit of AA capital, produce double-digit growth.

As the ALPA National advisors were also well aware, the TWA pilots wielded economic leverage born of the "enormous training costs" that would arise from any effort to replace the TWA pilots. In addition, the ALPA National advisors knew that another source of economic leverage were the "potentially large rejection claims" that would have arisen from any non-consensual waiver of seniority integration procedures.[149] The elimination of these claims – apparently never explained to the TWA pilot representatives – was one of the principle reasons that the Committee of Unsecured Creditors actually opposed TWA's motion to reject the unions' collective bargaining agreements.[150]

The facts indicate that American was not looking for a conflict with the TWA pilots. Indeed, it must be assumed that American would have welcomed an ALPA-APA process agreement.[151] In the absence of such an amicable agreement between the unions, however, it was natural that American would test the TWA pilots to see whether it could obtain the TWA pilots' easy acquiescence on scope and thereby avoid any conflict with APA notwithstanding APA's inherently unreasonable position.

While the ALPA advisors ardently pressed home the dangers of the loss of the union contract and union representation, they did not disclose that the terms of the proposed deal had already greatly reduced the enforceability of the collective bargaining agreement and ALPA's ability to engage in future collective bargaining by providing that TWA LLC could:

> modify work rules and other benefits as necessary to transition to work rules and other benefits at AA. In lieu of bargaining obligations under the Railway Labor Act, TWA-LLC's sole obligation shall be to confer with ALPA on all changes during the notice period and to provide ALPA with all changes or amendments in writing.[152]

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[147] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at ¶¶ 15.
[148] (A 0001366).
[149] *Id*, at ¶ 26(d) and (f).
[150] Objection of Statutory Committee of Unsecured Creditors to Motion of Debtor Trans World Airlines, Inc. for Order Authorizing Rejection of its Collective Bargaining Agreements Pursuant to 11 U.S.C. § 1113 (March 30, 2001) at ¶¶ 1-4.
[151] Babbitt Depo. at 95.
[152] ALPA 034989, 035002.

As ALPA's attorneys later boasted, the agreement, in allowing TWA and American to unilaterally change certain work rules and benefits going forward, gave "TWA and American unprecedented flexibility in integrating the two carriers."[153] In short, the substantial sacrifice of contractual and bargaining rights contained in TWA's proposal greatly reduced the downside risk of any broader contract rejection.

The ALPA advisors' unrelenting emphasis on the worst case scenario, without any discussion of the factors that made this worst case scenario highly unlikely, can have no legitimate justification. As discussed further in section III.C.6 below, the ALPA advisors' apparent unanimity of opinion on these issues appears to have been manufactured and/or coerced. Indeed, at least three of the attorneys present on April 2 had been dismissive of the threat of total contract rejection and loss of representation. ALPA Attorney Clay Warner told one MEC member in the pre-April 2, 2001 time period, even in the event of contract rejection, "that doesn't mean you'll be working for McDonald's rates of pay tomorrow."[154] With respect to the representation issue, Mr. Warner had previously counseled that: "Even if TWA rejected the entire CBA (including the recognition provisions of Section 1), ALPA could easily apply to the NMB to investigate representation of the TWA LLC pilots."[155] Notwithstanding the dire statements on April 2, 2001, Babbitt testified in his deposition that the loss of representation "wasn't an issue in my mind."[156] Nor did ALPA President Woerth have any notion that total contract abrogation was an issue.[157]

Wilder had also expressed his view on multiple occasions that the TWA pilots would prevail with respect to the 1113 motion.[158] Alternatively, he believed that the bankruptcy court might order that a fair and equitable seniority integration be incorporated into the AA/TWA transaction in order for the transaction to proceed.[159]

Even in the event of court-ordered contract rejection, Wilder expected TWA to act with restraint:

> The court under 1113 gives permission to allow rejection, but normally the contract is changed with respect to the provisions that the company wants to change, and that emerges in negotiations between the union and the company that are mandated by 1113.[160]

It was Roland Wilder's opinion that:

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[153] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. §§ 503(b)(3)(D) and (b)(4) Approving Fees and Expenses. at ¶ 26(b)
[154] Hollander Depo. at 88.
[155] Holtzman memorandum to Warner (with italicized Warner responses) March 13, 2001, ALPA 047541, 43).
[156] Babbitt Depo. at 151.
[157] Woerth Depo. at 230-32.
[158] Hollander Depo. at 69.
[159] Wilder Memorandum dated March 13, 2001 at 4.
[160] Wilder MO Trial at 33.

> The likelihood of TWA doing away with the entire collective bargaining agreement and operating effectively non-union struck me as very much an overstatement. It wasn't going to happen. It's never happened. And it would not have happened here.[161]

Despite this adamantly held view that the TWA pilots would not lose their collective bargaining agreement as a result of the 1113 proceeding, neither Wilder nor anyone else expressed this opinion to the TWA pilot representatives on April 2.[162]

Warner's deposition testimony concerning the possible outcome of the 1113 process was also strikingly different from what the TWA pilot representatives heard on April 2, 2001:

> If you don't want an agreement, you can fight the 1113 and you **probably** won't have an agreement. **You might,** but you'll end up with the same agreement you already have offered to you over here and you won't have the scope provision.[163]

On April 2, however, everything was expressed in terms of dark certainties.

Wilder testified that the bankruptcy court could, of course, nullify Section 1, "but, again, that would leave the TWA pilots no worse off than they were in the evening of April 2nd."[164] Similarly, as reflected in his notes, it was apparently attorney Richard Seltzer's view that TWA could only implement the "last proposal" prior to the 1113 motion.[165] But, again, none of this information, which dramatically mitigated the most likely worst case scenario, was provided to TWA pilot representatives on April 2, 2001.

Instead, on April 2, all of these attorneys either joined the chorus of ALPA National advisors who said that the consequences would be cataclysmic, including the loss of union representation and the union contract, or kept their silence.

4. AA Walking Away

By way of emphasizing the futility of any kind of legal resistance, the ALPA advisors insisted that, in the absence of waiver, American would simply abandon the transaction resulting in the immediate liquidation of TWA.[166] The coercive framework of the ALPA advisors' advice was outlined in a letter subsequently drafted for Duane Woerth's signature by attorney Clay Warner:

> That was the situation the TWA MEC faced in early April. If the MEC agreed to waive its successorship protections and leave seniority integration largely in the hands of APA (subject to American's "best efforts"), the transaction

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[161] Wilder Depo. (II) at 217-18.
[162] Warner Depo. at 31; Holtzman Depo. at 116.
[163] Warner Depo. at 36.
[164] Wilder Depo. (II) at 220.
[165] Exhibit 136 (ALPA 051053).
[166] Rosen Depo. at 25-32; Wilder Depo. (I) at 94.

> would go through, and TWA pilots would be offered positions at TWA LLC under a collective bargaining agreement that would allow relatively quick transition to Green Book pay and benefits. If the MEC refused to waive the successorship provisions, then two results were possible, but both were worse. First, if TWA was successful in its motion to reject the collective bargaining agreement, the transaction would go forward, but the seniority integration would still be largely in the hands of APA, and TWA's pilots would not have a collective bargaining agreement at LLC. Second, if TWA's motion was unsuccessful, then American would walk away from the transaction, TWA would immediately cease operations, and TWA's pilots would be unemployed.[167]

As Clay Warner confirmed, the message to the TWA pilots on April 2, 2001, was that any resistance to the 1113 motion was both futile and completely self-destructive:

> If you won the 1113 motion, then what you would win is, what you would keep in place was an agreement which had to be waived in order for a transaction to occur. So you would kill the transaction. End up with no jobs. You end up with nothing.[168]

Babbitt characterized the choice before the TWA-MEC on April 2, 2001 in the following terms:

> I as someone advising you would have a very difficult time saying I'm going to follow a litigation strategy and hope that it works because if I'm wrong we're all out of work. We lose all of our jobs. We lose everything. We lose our pensions and everything.[169]

ALPA's advice, however, does not appear to have been based on any kind of economic analysis or even on direct conversations with American or TWA, but rather on the supposition that American would sooner abandon the transaction than risk endangering its relationship with APA through non-compliance with the AA/APA collective bargaining agreement.[170] Curiously, David Holtzman – the TWA-MEC's primary counsel – **made no effort to quantify the risk** of American walking out. Rather, he based his recommendation on what he characterized as a desire for total risk aversion:

> Well, you know, I'm coming from the point of view of being risk adverse, you know, where we're talking about that – that many jobs. So you know, at this point, there – there is no gain by taking any risk.[171]

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[167] Letter dated February ##, 2002 at ALPA 044710:
[168] Warner Depo. at 26.
[169] Babbitt Depo. 134-35.
[170] Rosen Depo. at 25-33; Warner Depo. 43-44 (no recollection as to whether any of the April 2 advisors had spoken to American directly); Tumblin Depo. at 73-74 (never heard from anyone at American that American would walk away from the transaction in absence of scope waiver). Holtzman was also unable to recall the factual foundation for the assumption that American would abandon the transaction. Holtzman Depo. at 163.
[171] Holtzman Depo. at 163.

Of course, by agreeing to the waiver of scope, the risk was merely shifted from a loss of jobs due to abandonment of the transaction to a loss of jobs through the dramatic reduction of seniority. Sometimes, even in the face of an employer threat of liquidation, a labor union chooses to continue the fight because the evil consequences of surrender are just as bad or worse.[172] Unfortunately, any chance for a cogent cost/benefit analysis was further compromised due to the advisors' misrepresentations concerning the threat to the TWA pilots' seniority as described in Section C.5 below.

The facts indicate AA's intense interest in consummating the transaction had already translated into substantial leverage at the bargaining table for TWA in "arms-length negotiations." In fact, "TWA was able to extract from American numerous concessions worth hundreds of millions of dollars, including American's agreement to assume more than $500 million in retiree benefits and to honor hundreds of millions of advance ticket sales from TWA customers who had not yet used their tickets."[173] Moreover, "[b]y virtue of the Asset Purchase Agreement and the DIP loan, American assumed enormous risks to preserve TWA's going concern value until an auction could be held."[174] There were to be no breakup fees of any kind – not a single dollar – unless and until there was a court-approved alternative transaction.[175] If American was willing to put hundreds of millions of dollars on the table in order to clinch the TWA deal, there is reason to believe that it would not have ultimately considered a seniority integration proposal that added no dollar costs and sought only a fair procedure.

Leverage also existed vis-a-vis APA both in terms of the pressure that American could bring to bear and APA's own manifest interest in the consummation of a transaction that was expected to markedly increase flying opportunities. AA Vice-President of Employee Relations Brundage asserted after concluding the Transition Agreement with APA that "the TWA acquisition represents tremendous growth opportunities for our pilots and all our employees."[176] Forecasts indicated that the TWA pilots did more than bring their own jobs with them. For example, American CEO Don Carty assured the City of St. Louis that American anticipated a "substantial increase" in traffic at the St. Louis hub and an eventual resurgence of international flying on dormant TWA routes from New York's JFK airport.[177] AA Management maintained that it had no intention to reduce the TWA fleet and that the STL hub was "ripe for expansion."[178] Thus, the transaction was expected to create hundreds of new pilot jobs.[179] Consequently, if the prospect of American walking away became a real one, the question for the American pilots would be whether they were willing to risk the bird in the hand for two in the bush. In sum, the American pilots themselves had a lot to lose from abandonment of the deal.

The facts also reflect that American would not shrink from conflict and hard negotiations with APA if necessary to complete an important acquisition. During the Reno merger, American

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[172] Woerth Depo. at 154-56 (At Mesaba Airlines, Woerth refused to sign contract despite potential for liquidation).
[173] Opposition of American Airlines, Inc. and AMR Finance, Inc. to the Emergency Motions of the Creditors Committee at 8 citing Sale Hearing Tr. 25-34, 186-87; Wilder Memorandum, March 13, 2001 at 4
[174] *Id.* at 10.
[175] American Airlines, Inc.'s Reply to Objections in Connection with Bidding Procedures and Dip Financing at 2, 8.
[176] American Newsgram 01-199.
[177] Text remarks of Don Carty to St. Louis Civic Progress Board on May 21, 2001 at 3-4.
[178] Arpey, January 16, 2001 meeting synopsis (ALPA 020822-24).
[179] Kudwa letter to John Darrah, March 27, 2001 at ALPA 053588-89.

boldly proceeded with the interim operation of the acquired carrier using Reno pilots in what APA considered to be a "direct violation" of its scope clause. *American Airlines, Inc. v. Allied Pilots Association*, 53 F. Supp. 2d 909, 914 (N.D. Tex. 1999), *aff'd*, 228 F.3d 574 (5th Cir. 2000). When APA fought back with a concerted sick out, American obtained both an injunction and contempt sanctions against APA in the amount of $45 million. *American Airlines, Inc. v. Allied Pilots Association*, Case No. 99-CV-025 (N.D. Tex. Feb. 10, 1999)(granting American's motion for temporary restraining order); *American Airlines, Inc. v. Allied Pilots Association*, 1999 U.S. Dist. LEXIS 1376 (N.D. Tex. Feb. 13, 1999)(granting American's motion for civil contempt); *American Airlines, Inc. v. Allied Pilots Association*, 53 F. Supp. 2d 909 (N.D. Tex. 1999)(awarding American $45,507,280.00 in compensatory damages for civil contempt), *aff'd*, 228 F.3d 574 (5th Cir. 2000).

Similarly, in moving forward with the AA-TWA transaction, American had already demonstrated that it was willing to breach its collective bargaining agreement with APA by arranging for the creation of a TWA LLC, staffed by TWA pilots, in violation of the AA-APA collective bargaining agreement.[180] American was also willing to pressure APA to accede to seniority integration procedures for other ALPA-represented pilot groups. American was planning to go forward with the United/US Airways portion of the deal with the expectation that APA would "consent" to the integration of 500 B757 Captains based on Allegheny-Mohawk principles.[181]

Moreover, specifically with respect to the pilot seniority integration issue, American had let APA know that APA could not have it all its own way. With respect to both the seniority list and applicable conditions and restrictions, AA Vice President of Employee Relations Jeff Brundage testified:

> we were very clear even when we began to have some discussions with the TWA pilots and the American pilots, because at one point or another the American pilots suggested that we would just accept and implement any list that they provided to us and we said that's not possible because of the kinds of costs that could be created by the list. So, we said look, we'll, we're going to ... have to negotiate over what the implications of any list you provide us are.[182]

American, for example, had the power and determination to "insist" that the integration not include a "bump and flush" because the "cost implications would be phenomenal."[183] Clearly, American had sufficient leverage to face down APA on matters that were important to the company.

American had no interest in TWA pilots going on the warpath. Indeed, Bob Kudwa advised his fellow American employees: "It's really important to all of us that we make this integration a success. ... A lot of our success depends on developing a healthy level of respect

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[180] Warner Depo. at 95-96; Brundage Depo. at 37.
[181] AA Analyst Presentation at ALPA 051130 (Plaintiffs' Exhibit 172 – January 10, 2001).
[182] Brundage Depo. at 64.
[183] Brundage Depo. at 65.

for our new colleagues."[184] Kudwa actually went so far as to caution the American pilots they had to "keep in mind that these deals are a big win for our pilots ...."[185] Brundage testified:

> it was very much in our interest to get these two pilot groups to agree and get something on paper that we could define and agree to and understand and get plans in place to get the carriers integrated.[186]

Other means existed for American to obtain the same "consent" to Allegheny-Mohawk procedures that they were seeking for the US Airways pilots. American had the ability to forgive the $45 million contempt of court sanction under which APA was laboring – a staggering sum for the union, but paltry in the context of AA's multi-billion dollar investment in the TWA acquisition.

American could also point to the political shelter that would be available to APA were it to agree to the modified Allegheny-Mohawk procedures that had been extended to the Transport Workers Union in advance of their seniority integration arbitration with IAM-represented ground workers. The interests of TWU-represented American employees had been protected by a modified Allegheny-Mohawk procedure, included in the CBA specifically as a result of American's acquisition of TWA, which ensured that "no employee on the master seniority list will be adversely impacted in rates of pay, hours, or working conditions by the integration."[187] This modified Allegheny-Mohawk process produced a substantially favorable result for the TWU-represented American mechanics while effectively preventing the predatory approach pursued by APA. Former TWA employees in the four crafts of Mechanics and Related Employees, Fleet Service Employees, Stock Clerks, and Flight Simulator Technicians located at TWA's St. Louis hub and the Kansas City maintenance facility were permitted to retain and exercise their full TWA seniority.[188] This provision applied to the "vast majority" of former TWA employees in the four job classifications.[189]

The AA-TWA pilot conflict did not have to be an all or nothing proposition for either side. In the pre-waiver context there was a means to negotiate a win-win settlement with APA. Even in the absence of "total victory" for the TWA pilots – which was modestly defined as a fair seniority integration process – there was a model for compromise which would have prevented the near-total victimization that resulted. In pursuing this modified approach, ALPA could have expected the IAM to be a ready ally.

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[184] A0001260.

[185] Kudwa, January 10, 2001 letter (ALPA 020801-02). In January, 2002, Kudwa was reported to be critical of the seniority integration and of how APA had treated the TWA pilots. Rindfleisch e-mail, January 29, 2002 (attaching Breslin report) at 4.

[186] Brundage Depo. at 74-75.

[187] In the Matter of Transport Workers Union of America and International Association of Machinists and Aerospace Workers and American Airlines (Kasher, April 29, 2002) at 3, 9-10; Pablo Lewin July 29, 2001 e-mail to TWA MEC and Holtzman at ALPA 035438.

[188] In the Matter of Transport Workers Union of America and International Association of Machinists and Aerospace Workers and American Airlines (Kasher, April 29, 2002) at 56.

[189] *Id.* at 52.

American's commitment to the transaction should be evaluated not just in terms of dollars, but in the enormous investment of institutional energy and political capital. By late March, the transaction had been approved by the bankruptcy court and the Department of Justice. The carriers had filed a joint application to the Department of Transportation for transfer of TWA's international route authority. ALPA officials, including Bob Christy and David Holtzman, were aware that AA CEO Don Carty was "staking his reputation on the consummation of the deal."[190] It was Mr. Wilder's view that American CEO Don Carty was personally committed to the acquisition of TWA and that American perceived the transaction as "necessary to preserve its competitive position" vis-à-vis United given the pendency of the US Airways acquisition.[191]

Wilder's risk analysis rejected the possibility that American would abandon the transaction and deemed the loss of TWA pilot seniority to be the more serious risk:

> The risk in pursuing the TWA pilots' legal remedies is that AA will decide to abandon the transaction. There is no credible evidence that will occur. On the other hand, the risk in waiving or not enforcing the TWA pilots' scope protections is that AA and APA will be free to treat them arbitrarily under the LLC structure. This would include moving the TWA pilots' flying out of the LLC to the AA system and furloughing them, if ALPA does not agree to APA's seniority demands so as to allow integration. All evidence suggests that this is a genuine threat.[192]

In late March, Roland Wilder expressed his view that it was:

> simply beyond belief that AA would abandon this multi-billion dollar transaction that has passed regulatory and judicial hurdles over the issue of permitting the TWA employee groups to reach fair and equitable seniority integrations.[193]

None of the ALPA National advisors presented these arguments to the TWA-MEC on April 2, 2001.

American had the ability to waive its demand that the TWA pilots' scope provisions be relinquished as a condition of going forward with the transaction.[194] Instead of exclusively pressuring the TWA pilots, American could have forcibly pressured its own pilots toward reaching a process agreement. In my opinion, the ALPA advisors' actions foreclosed this potentially fruitful strategy from being explored.[195]

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[190] January 23-25. 2001 Merger Committee Meeting in Herndon, ALPA 052130.
[191] Wilder Depo. (I) at 80; Wilder Depo. (II) at 66-67.
[192] Wilder Memorandum dated March 13, 2001; Wilder Depo. at 58-59, Exhibit 119. The evidence indicates that this potential threat to the TWA pilots flying during the LCC period did in fact occur. See Section IV.
[193] Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 33.
[194] Warner Depo. at 142.
[195] As AA Senior Vice President of Human Resources testified: "There really was never a discussion about whether or not those scope revisions had to be removed." Brundage Depo. at 56.

5. False Assurances Concerning the Process Agreement

ALPA had good reason to know that the TWA pilots would be subject to a devastating loss of seniority rights once they were stripped of their LPP protection. First, APA had no contractual or other legal obligation to afford the TWA pilots either a fair seniority integration result or even a fair process.[196] Second, APA had in recent years demonstrated its single-minded drive to obtain every advantage for its own current members when it stapled the ALPA-represented pilots of Reno Air to the bottom of the AA pilot seniority list on or about August 31, 1999. *Allen v. American Airlines, Inc*, CV-N-99-539 slip op. at 5 (D. Nev. Sept. 14, 2001).

Correspondence exchanged between ALPA advisors Randy Babbitt and Clay Warner reflect their knowledge that, in the event of the waiver of contractual scope protection, the TWA pilots could expect "little other than placement on the bottom of the [American] seniority list, placing pilots with dozens of years of service below American new hires."[197] Indeed, according to Babbitt, AA Vice President of Employee Relations Brundage made it "very clear" to Babbitt that APA would "probably ... put the TWA pilots on the bottom of the list."[198]

Even in the more delicate parlance used in court submissions, ALPA's bankruptcy attorneys acknowledged that the waiver would adversely impact on the pilots' status (availability of captaincies), pay, working conditions, and equipment and produce a "potentially large" economic impact on these pilots.[199] As Wilder noted, the LPP's "are perhaps the most important protections that a pilot has given the importance of seniority to pilots."[200] In view of seniority's direct impact on pay, working conditions, and job security, its "importance cannot be overestimated."[201]

Under these facts, it was incumbent upon the ALPA advisors to clearly communicate the devastating economic risk that came with the waiver of the TWA pilots' scope protections. Instead, the ALPA advisors downplayed this risk based on their supposed success in obtaining American's "Facilitation Letter" committing American:

> to use its reasonable best efforts with its labor organization representing the airline pilots craft or class [APA] to secure a fair and equitable process for the integration of seniority. In that regard, American will engage a facilitator to organize meetings with the labor organizations representing the Airline Pilots and American and TWA-L.L.C. American agrees to adopt the procedures that result from this process for seniority integration.

ALPA later condemned the facilitation process as "toothless." ALPA complained that the facilitator had virtually no powers; that he was limited essentially to observing the

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[196] Katz statements in Bensel Depo. at 68-69; Warner Depo. at 47-48.
[197] Babbitt draft to Minetta with Clay Warner e-mail cover March 28, 2001 at ALPA 047804-06.
[198] Brundage Depo. at 58.
[199] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at *at* ¶¶ 9, 26(f).
[200] Wilder MO Trial at 27-28.
[201] *Id.* at 28.

interactions between the two unions and was prohibited not only from rendering any decisions, but even from writing a report. Consequently, according to ALPA, the process was doomed from the start.[202] Nevertheless, Arbitrator Bloch observed that it was ALPA itself that had left the TWA pilots in this completely vulnerable position:

> The APA contract made no provision for arbitration, and the demand that such process be stricken from the TWA Agreement had been acceded to. All this placed the American pilots in a virtually unassailable bargaining position in the upcoming seniority discussions.[203]

Notwithstanding the worthlessness of the Facilitation Letter, during the April 2 meeting, ALPA attorneys Clay Warner and Richard Seltzer told the TWA pilots' representatives that the "reasonable best efforts" letter had "meat and guts to it" and that it was "something that we could enforce in court some day."[204] Even seven years later, David Holtzman tried to put a good face on what the advisors knew was total defeat on the issue of seniority:

> I mean, everyone recognized that we were not going to, you know, surrender on seniority integration, that there were – you know, there were, you know, optimistic plans about what might be accomplished ....[205]

He also described the "reasonable best efforts" letter as creating "an affirmative continuing obligation" and telling the MEC that "it would stand up according to its own terms, certainly."[206] But, in the same deposition Holtzman testified that, subsequent to the April 2 waiver, "it may not have been completely surprising" that APA was pursuing a stapling objective.[207]

First Officer Young, who had come to the meeting intending to vote against waiver, voted to accept the proposed modifications, in part, due to assurances from the ALPA advisors that the "best efforts" language would support litigation in the event that the TWA pilots' seniority interests were not properly respected.[208] Similarly, MEC representative Hollander stated that he would never have approved of the waiver if he had been told that the facilitator had no decision-making authority.[209]

It is my opinion that the representations concerning the enforceability of the Facilitation Letter were, at best, disingenuous. First, on its face, the document granted no authority to the facilitator other than to "organize meetings." Thus, in the aftermath of the TWA pilots' waiver of their LPP's, the Facilitation Letter would effectively cede to APA the power to impose its terms on seniority integration. A second indication that ALPA National knew better is found in the brief Richard Seltzer had submitted to the bankruptcy court just three days earlier.

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[202] ALPA Case No. 61-01 at 4 (Arb. Bloch 2002).
[203] *Id.* at 6.
[204] Howard Hollander Interview.
[205] Holtzman Depo. at 155.
[206] Holtzman Depo. at 196.
[207] Holtzman Depo. at 187.
[208] Young Depo. 75, 92. Significantly, in October of the same year ALPA nevertheless prohibited Roland Wilder and the TWA MEC from engaging in such litigation.
[209] Howard Hollander Interview.

In a brief dated March 30, 2001, ALPA stated plainly that a "tentative agreement has been reached on all issues except seniority integration, where ALPA is seeking a fair and equitable process or a fair and equitable integration structure."[210] Mr. Seltzer's brief described the nature of the impasse in the following terms:

> TWA has failed to provide ALPA with information and documents concerning ... how ALPA's concerns with seniority integration are to be addressed, other than American's suggestion that it will 'encourage' its union to resolve fair and equitable seniority integration"
>
> * * *
>
> Indeed, ALPA to date has refused to waive the requested provisions because of the absence of a fair and equitable seniority integration process.[211]

Attached to the ALPA brief as Exhibit C – and dismissed by the brief in terms of its legal import – was the March 14, 2001 Facilitation Letter, which ALPA legal advisors later told the TWA MEC had real "meat" on it.[212]

Any contention that ALPA's attorneys had been duped by American concerning the true significance of the Facilitation Letter is further belied by attorney Clay Warner's draft letter in February, 2002, in which he characterized the loss of scope provisions as leaving seniority "largely in the hands of APA...."[213] Indeed, Warner claims to have advised the TWA-MEC on April 2, 2001 that, absent a change to the APA collective bargaining agreement "the TWA pilots would be on the bottom of a merged seniority list," and that the Facilitation Letter was "nice but not much."[214] According to him, this prediction should have been central to the TWA-MEC's decisionmaking process:

> They should go into it with their eyes wide open expecting that they would get a seniority integration that they didn't like and the pilots they represented didn't like. That would be one of the consequences of waiving scope.[215]

It is my conclusion that Mr. Warner's testimony serves to confirm the nature of the advice that ought to have been provided, not the advice that was in fact provided.[216] I discredit

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[210] Objection of Air Line Pilots Association, International in Opposition to the Debtor TWA's Motion for an Order Authorizing the Rejection of its Collective Bargaining Agreements Pursuant to 11 U.S.C. § 1113 (March 30, 2001) at ¶ 38.

[211] *Id.* at ¶¶ 38, 54.

[212] Seltzer testified that he provided no advice concerning the significance of the Facilitation Letter and had not yet focused on whether the document's promises were illusory since he was not focused on the litigation at that time. (Seltzer Depo. at 133). In my opinion, Seltzer's testimony on this issue must be discounted as not credible given his then-recent submission of a brief that focused directly on American's failure to make a meaningful commitment on the seniority issue.

[213] Warner draft letter for Woerth, dated February ##, 2002 at ALPA 044710.

[214] Warner Depo. at 47-48, 52.

[215] Warner Depo. at 57.

his testimony in view of the substantially consistent accounts of Young, Hollander and Holtzman. Their collective account is further corroborated by Mr. Wilder's testimony that the communications with the pilots at this period "did not negate the notion strongly enough ... that some remedy other than the remedy that I was advocating would be available."[217]

In view of the evidentiary record, I conclude that ALPA advisors deliberately misled the TWA-MEC into believing that the Facilitation Letter created substantive and enforceable legal rights.

The Facilitation Letter was a fig leaf designed by American to obscure the fact that the TWA pilots' LPP's had been completely stripped from them. It was a disingenuous sales technique on the part of American, but, in my opinion, the ALPA National advisors adopted it as their own. In so doing, I conclude that ALPA not only acted in an arbitrary manner, but also in bad faith.

6. The Silencing of Dissenting Advisors

The TWA-MEC members were line pilots without significant legal and financial background. Although the decision concerning waiver was technically theirs to make, they were highly dependent on the advice and counsel provided by the ALPA advisors on April 2, 2001. As decision-makers, they were entitled to full disclosure of the pros and cons of alternative policy decisions.

Nevertheless, there is ample evidence that, on April 2, 2001, ALPA acted to suppress dissenting views among the advisors and otherwise worked to present a deceptively united front, thereby depriving the TWA-MEC of an opportunity to receive counsel and advice concerning alternative courses of action.[218] Advisors who declined to express previously held views concerning the pertinent issues include Roland Wilder, David Holtzman, Clay Warner and Randolph Babbitt. The evidence supports the conclusion that, at least with respect to Wilder and Holtzman, ALPA induced these attorneys to violate their duties toward their client, the TWA-MEC.[219]

Important to understanding these individuals' conduct is the economic, political, and ideological control that ALPA National exercised over the advisors. Even when the advisors were ostensibly hired to represent the TWA-MEC's interests, they were vetted by ALPA and generally paid for out of ALPA central treasury.[220] The contracts of the outside advisors generally provided that they were "working for ALPA."[221] The in-house advisors were directly

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[216] I am similarly unconvinced by Warner's testimony that: "Reasonable best efforts really wasn't a portion of that ... that discussion." (Warner Depo. at 53).
[217] Wilder Depo. (I) at 162.
[218] Seltzer testified that it was standard procedure for the advisors to engage in consultations with David Holtzman prior to MEC meetings to establish an agenda and who would address what issue. (Seltzer Depo. at 139-40).
[219] It also appears to have been Robert Christy's original position, emphatically stated at a TWA MEC meeting in January, 2001, that "we're not going to waive scope." Holtzman Depo. at 51-52.
[220] Warner Depo. at 60.
[221] Warner Depo. at 60.

employed by ALPA National.[222] When the TWA pilots made efforts to reach outside the ALPA fold to obtain, with their own money, truly independent counsel, ALPA President Duane Woerth emotionally responded "no, and hell no."[223] In short, it is my opinion that an important tool in ALPA's Woerth-era program of centralist control[224] was the control of those professionals advising airline-specific local pilot groups.

Even assuming the advisors were capable of disregarding ALPA National's political and economic control, they evinced an ideological handicap that would naturally lead them to improper conduct. These advisors generally described ALPA as a monolithic or "unitary" organization and resisted the notion that the TWA-MEC and the TWA pilots could have interests that were in conflict with ALPA National.[225] As Seltzer testified with respect to a potential conflict between his representation of the American flight attendants and the TWA MEC:

> First of all, the firm represents ALPA, not the TWA MEC. We represent ALPA.[226]

Thus, any conflict that ALPA had with its TWA-MEC would inevitably be assimilated by the advisors who were vetted by, paid for, or jointly retained by ALPA.[227]

Roland Wilder

In terms of the silencing of dissent, most notable is ALPA's treatment of TWA-MEC Merger Counsel Roland P. Wilder, Jr. Of all the professional advisors present at the April 2, 2001 meeting, Mr. Wilder stands out for a number of reasons. First, he was the only attorney who had a written retainer with the TWA-MEC.[228] Wilder expressly recognized the MEC, and not ALPA National, to be his client.[229]

Second, Mr. Wilder had the greatest professional experience of any of the professional advisors participating in the room that day concerning Railway Labor Act and airline seniority integration issues.[230] Indeed, with respect to the latter subject area, he was one of only six legal practitioners in the country.[231] Moreover, ALPA hardly could have challenged Wilder's superior credentials because the national union, in exercising its vetting rights, had effectively submitted Mr. Wilder to the TWA MEC as their sole choice for merger counsel.[232] Unfortunately, this necessary endorsement had a darker side – ALPA National's apparent ability to control Mr.

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[222] Warner Depo. at 61.
[223] Rachford Depo. at 41-43.
[224] Rachford Depo. at 23-24.
[225] Warner Depo. at 60; Holtzman Depo. at 78; Seltzer Depo. at 70.
[226] Seltzer Depo. at 146-47.
[227] Woerth Depo. at 193-94 ("I didn't do a special retainer ... Richard Seltzer normally represents us in bankruptcy. He has for a long time.").
[228] Wilder Depo. (II) at 28-29; Retainer Agreement, January 17, 2001.
[229] Wilder Depo. (II) at 28-29; Retainer Agreement, January 17, 2001.
[230] Wilder Depo. (I) at 55.
[231] Wilder MO Trial at 14.
[232] Wilder MO Trial at 269, 271; Young Depo. at 37; Pastore Depo. at 63-68.

Wilder by either silencing him or denying him authorization to take legal action that was "necessary" to protect the TWA pilots' seniority rights.

On April 2, 2001, ALPA advisors held a closed door meeting in an apparent effort to orchestrate unanimity amongst themselves. Merger Committee Chairman Michael Day, having by chance wandered into this meeting of professionals, described the union advisors as ALPA's "henchmen" who were "beating up" on Roland Wilder:

> [T]hey were trying to get him to back off of his position that we should not waive scope, which was ludicrous because he was supposed to be representing us.[233]

Former Merger Committee Chairman Bud Bensel concurred with the characterization of Wilder having been "beaten up" and testified that in Wilder's meeting with the ALPA advisers "voices were raised substantially."[234] Even Mr. Wilder – who, in view of ALPA's continuing status as an important potential source of work, might be expected to express his view in moderate terms – described the ALPA advisors as being "forceful in their views" and indicated that the environment might have been "rough and tumble."[235]

Mr. Wilder's dialogue with the ALPA National advisors did not change his views; indeed, he has testified that he disagreed "very, very strongly" with the advice provided by the ALPA National advisors, and, that the advice he provided in his March 13, 2001 memorandum would be the same even today.[236] He considered the TWA pilots' LPP's to be "their most potent weapon for achieving a fair seniority integration" and the idea that these rights might be waived constituted a matter of "extraordinary importance and concern to me."[237] Nevertheless, on April 2, ALPA was apparently able to silence him on this issue.[238]

After the "beating," Mr. Wilder changed his vote, or, at least allowed himself to be bullied into sullen acquiescence to the position of the ALPA National advisors.[239] As another witness testified, a "quite distraught" Roland Wilder "capitulated."[240] Ted Case provided the following testimony concerning his inquiry with Mr. Wilder as to why the attorney had gone silent:

> I never really got a direct response other than Mr. Wilder telling me how disappointed and how disgusted and how unprofessional the proceedings with the advisers was and that he would never involve himself in any of this activity of this nature again.[241]

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[233] Wilder MO Trial at 226-27.
[234] Wilder MO Trial at 339.
[235] Wilder Depo (I) at 101; Wilder MO Trial at 160.
[236] Wilder Depo. (I) at 69; Wilder Depo. (II) at 63, 68 ("My position would be the same today given the same circumstances.").
[237] Wilder MO Trial at 30-31.
[238] Hollander Depo. at 70 (Wilder did not repeat his previously expressed views on April 2 and "stood 100 percent silent on that day.").
[239] Bensel at Wilder MO Trial at 338-39; Bensel Depo. at 115-16.
[240] Case Depo. at 90.
[241] Bensel at Wilder MO Trial at 340.

Another witness recounted that Wilder "told me personally that it was one of the most embarrassing things he's been involved in with this group of people [ALPA National], and he will not be involved with them ever again."[242] To Wilder it was a "professional embarrassment."[243] A third witness described Mr. Wilder's behavior in the following manner:

> I looked at him. I saw his body language. I saw his gestures. I saw his motions. ... I saw a man that was disgusted. I saw a man that was outraged. I saw a man that was like a child put in a corner and told to stand there and be settled.[244]

Even Roland Wilder appears to have tacitly admitted that he was silenced. Wilder testified that he disagreed with the ALPA advisors at the meeting that took place "earlier in the morning" and "I strongly disagreed at the meeting attended by the – not attended by the MEC, but the meeting **before** the MEC."[245]

Clay Warner[246]

As previously discussed, in March, 2001, attorney Clay Warner was emphatically optimistic concerning the TWA pilots' chances of prevailing in the pending 1113 litigation. Indeed, his own notes indicate that he, David Holtzman and Roland Wilder advised the TWA-MEC not to be deterred by the threat of an 1113 filing:

> DH – Threat of 1113 –
>
> - Should continue on course – integration process and transition agreement
>
> - Don't focus on 1113 process, but stay on course to get deal[247]

Nevertheless, at the April 2, 2001, meeting, Warner reversed course and provided "contradictory" advice.[248] When challenged concerning this sudden reversal, Warner meekly responded that his advice had been "premature" and that he had to "defer" to the other ALPA attorneys present.[249]

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[242] Bensel Depo. at 116.
[243] Bensel Depo. at 117.
[244] Hollander Depo. at 160.
[245] Wilder MO Trial at 160.
[246] Although directly employed by ALPA National, it would be reasonable to conclude that the TWA-MEC was entitled to all the benefits of an attorney-client relationship with Warner given that he was assigned to "provide all services necessary and appropriate to the TWA Master Executive Council in connection with the transaction." Warner Depo. at 10.
[247] Warner Notes at ALPA 047712.
[248] Hollander Depo. at 73.
[249] Hollander Interview.

David Holtzman

As discussed above at pages 10-11, David Holtzman, functioning during the pre-April 2 time frame period as the TWA-MEC's "primary counsel," had consistently advocated against the waiver of scope. Indeed, as discussed immediately above, he had advised the TWA pilots that they should not focus on the 1113 process, but stay on course to get a deal including a fair integration process. As Captain Hollander testified, during this period David Holtzman "always believed we would prevail."[250] Nevertheless, on April 2, 2001, he too was silent.[251]

The acquiescence of the MEC's primary counsel is placed in better perspective by an overview of his post-April 2 conduct. Holtzman's conduct – and his own communications – reflect that he considered ALPA National, not the TWA-MEC, to be his master. When he perceived a conflict between the two entities, not only did he fail to withdraw, but actively engaged in what may fairly be described as a program of espionage at the behest of ALPA National's legal counsel.

Holtzman reported to ALPA Legal concerning the activities of TWA MEC members.[252] He even went so far as to report to ALPA National Legal conversations that he "overheard" between the TWA MEC Chairman Pastore and the MEC's "other set of lawyers."[253] He engaged in mockery, with ALPA National counsel, concerning the officers he represented.[254] In addition to passing to ALPA National information concerning potential litigation counsel that had "not yet been officially provided," Holtzman appears to have engaged with ALPA National legal counsel in a deliberate deception concerning ALPA National's willingness to finance the defense of the Bensel litigation.[255] With respect to the Bensel litigation, Holtzman took orders from Warner to "avoid the issue, avoid Skip [Reynolds -- the TWA-MEC's prospective legal counsel] if possible, and avoid at all costs discussing timing of representation and sources of funding."[256] Holtzman arranged for material that the TWA MEC Secretary/Treasurer Ted Case sent to Skip Reynolds to be forwarded to ALPA National.[257]

The tenor of Holtzman's correspondence leaves little doubt that he knew that his disclosures of TWA-MEC litigation strategy would be deemed an act of disloyalty by the TWA-MEC: "The officers could make it very hard on the staff if they know this information was provided to you in advance."[258] Not surprisingly, ALPA pressed the TWA MEC not to exclude David Holtzman from MEC conference calls, while at the same time using Holtzman as a spy to

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[250] Hollander Depo. at 75.
[251] *Id.*
[252] ALPA at 044685; ALPA at 044797 ("I believe this is part of [Pastore's] campaign to assert that TWA, Inc. could have survived as a stand alone carrier and/or that there were other purchasers waiting in the wings.").
[253] Holtzman e-mail to Wagner and Clay dated January 11, 2002 at ALPA 044695. See also ALPA 0044827-29 ("Hefley and Case have been on the phone quite a bit with the Boies firm. From what I gather, they're about to sue somebody, or maybe just file something with the NMB.").
[254] ALPA 050251.
[255] ALPA 044814; ALPA 044815 ("I assume that we're just humoring them. [S]eems like a waste for [Attorney Skip Reynolds]."; ALPA 044826 ("I haven't said anything on the lawyer-funding.").
[256] ALPA 044815.
[257] ALPA 044816.
[258] Holtzman e-mail to ALPA National Legal dated March 20, 2002 at ALPA 044830.

obtain information concerning MEC policy decisions.[259] As Holtzman describes the situation, the TWA-MEC "saw me as somehow adversarial to ... their agenda...."[260]

Holtzman clearly perceived that the interests of ALPA National and the TWA-MEC were divergent and, by early May, 2001, foresaw the possibility of DFR litigation by the TWA pilots against ALPA National.[261] Nevertheless, he appears to have avoided making any effort to address his clear conflict of interest by asserting that "there isn't an ... ALPA National and and an MEC ... it's one entity."[262] On the other hand, Mr. Holtzman also defined the TWA-MEC as the "policy making body for the TWA pilots ...."[263]

Both Holtzman and Wilder held themselves out as the TWA-MEC's legal counsel. Nevertheless, the facts indicate that Wilder withheld legal advice and later declined to implement critical legal strategy at the behest of ALPA National. For his part, Holtzman's own correspondence indicates that he not only silenced himself on April 2, but later actively conspired against the interests of the TWA-MEC. To the extent this conduct was induced by ALPA National, ALPA was promoting improper professional conduct and possibly tortiously interfering with the TWA-MEC's contractual relations with its professional advisors.

As discussed, ALPA operated under the internal institutional conflict that its continued representation of the TWA pilots undermined its expansionist goals. As discussed below, the ALPA-designated counsel of Cohen, Weiss and Simon had its own conflict born of its representation of the American flight attendants union, which sought to endtail the TWA flight attendants. The conflict of interest that existed within ALPA as an institution and within ALPA's own general counsel is precisely why the TWA pilots needed a genuinely independent counsel at the MEC level. Unfortunately, the independence of those attorneys who held themselves out as the TWA-MEC's counsel – Holtzman and Wilder – appears to have been fatally compromised by ALPA National.

Randolph Babbitt[264]

In addition to attorneys Warner, Holtzman and Wilder, former ALPA President Randolph Babbitt devised a strategy of trying to thwart consummation of the AA-TWA Asset Purchase Agreement except on terms that would preserve the TWA pilots' seniority. Recognizing that American pilots had "no obligation" to commit to any seniority integration process and that, therefore, the TWA pilots were at risk of being placed at the "bottom of [the AA pilot] seniority list, placing pilots with dozens of years of service below American new hires," on or about March 28, 2001, Babbitt drafted a letter to Secretary Minetta of the United States Department of Transportation requesting that final DOT approval of the asset purchase be conditioned on

[259] Woerth letter to Pastore dated October 17, 2001 at ALPA 02590.
[260] Holtzman Depo. at 138.
[261] Holtzman Depo. at 33-34.
[262] Holtzman Depo. at 78.
[263] Holtzman Depo. at 101.
[264] Babbitt was the MEC-retained labor advisor. (Warner Depo. at 24). Nevertheless, as discussed in this section, he submitted his DOT initiative to ALPA National – not the MEC – for approval and allowed ALPA National to veto its implementation.

"language requiring American to take appropriate steps to meet the minimum fairness standards always required in the past by the DOT with regard to having provisions to insure the fair and equitable integration of employees from TWA into the combined work force of American."[265] Babbitt suggested that the letter be sent and TWA-MEC representatives had been supportive of approaching the DOT on the seniority issue.[266] Nevertheless, a handwritten note indicates that Duane Woerth vetoed Babbitt's strategy.[267] According to Babbitt, no one ever communicated to him that his strategy had been rejected.[268] Nevertheless on April 2, 2001, neither Babbitt nor any of the other advisors raised an application to the DOT as a possible strategy.[269]

Shortly prior to April 2, Babbitt had also recommended that the MEC develop a bottom line seniority proposal accompanied with the threat of litigation for the purpose of creating some leverage – a strategy strikingly similar to that proposed by Roland Wilder.[270] This strategy found no expression on April 2, 2001.

Instead, notwithstanding his recent predictions of total seniority loss expressed in his draft letter to the DOT, on April 2, Babbitt told the MEC representatives: "I'm talking to AA Vice President Bob Baker. There are no problems here. You're going to get jobs with a well-heeled major airline. These guys aren't going to kill you."[271]

Despite his knowledge of the risk of the TWA pilots being stapled to the bottom of the list, at the April 2 meeting, Babbitt joined the chorus of advisors who exaggerated the risks of resisting, and provided false assurances regarding the consequences of the recommended scope waiver. Furthermore, he kept his silence with respect to the strategies of resistance that he previously had endorsed.

Richard Seltzer and the Conflict of Cohen, Weiss & Simon

On April 7, 2000, the Association of Professional Flight Attendants (APFA) announced that it had retained Cohen, Weiss & Simon (CWS) as its General Counsel – the firm in which Richard Seltzer served as a partner.[272] APFA used CWS attorneys, *inter alia*, as an integral part of its negotiating team and to advise the union with respect to American's acquisition of TWA.[273]

CWS's representation of APFA was problematic on its face since APFA shared APA's goal of denying date of hire seniority integration to TWA employees within their respective

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[265] ALPA 047804-06; Babbitt Depo. at 116-18 and Exhibit 161.
[266] Babbitt Depo. at 118; Warner Depo. 65-67.
[267] ALPA 047804. Babbitt's retainer provided for him to be directed by both the TWA MEC and ALPA's president. Babbitt Depo. at 47 and Exhibit 151; Warner Depo. at 69-72, Exhibit 161.
[268] Babbitt Depo. at 119.
[269] Babbitt Depo. at 147-48.
[270] Babbitt Depo. at 111; Mr. Wilder testified that Mr. Babbitt gave every indication of supporting the goal of obtaining a process agreement. Wilder Depo. (II) at 50-51, 53.
[271] Bensel Interview.
[272] APFA Hotline Message dated April 7, 2000.
[273] APFA Hotline Message dated April 7, 2000; Mady Gilson letter to Cureton, Caplan dated July 19, 2005.

crafts. *Cooper v. TWA Airlines, LLC,* 274 F. Supp. 2d 231, 236 (E.D.N.Y. 2003)(former TWA flight attendants were not given seniority credit for their years of TWA service; rather, they were placed at the bottom of AA's seniority list). Upon being confronted by TWA pilot representatives concerning the apparent conflict in March, 2002, the ALPA/CWS reaction was a suspicious combination of downplaying the conflict and subsequently denying indisputable facts.

The existence of a potential conflict was first confirmed by ALPA in March, 2002, when Clay Warner advised Theodore Case that CWS had had a conflict involving representation of the American Flight Attendants since late 2000 and, therefore, could not provide representation for the TWA pilots in the context of the Bensel litigation.[274] On March 20, 2002, ALPA attorney Jonathan Cohen provided a similar confirmation to TWA-MEC Chairman Bob Pastore.[275]

ALPA's subsequent correspondence appears to be self-contradictory with respect to CWS's role and the magnitude of the conflict. By letter dated April 30, 2002, ALPA President Duane Woerth asserted that CWS disclosed the "conflict" to the TWA MEC and that there was no objection. Woerth then attempted to portray CWS as the junior partner to LeBoeuf, Lamb in the TWA bankruptcy litigation.[276] However, CWS's own submission to the bankruptcy court concedes that it played a pivotal role in advising the TWA-MEC and obtaining its waiver of the TWA pilots' scope protections. Moreover, the effort to portray CWS as the junior partner in the representation effort is belied by the firm's central role with respect to the all-important 1113 process and Duane Woerth's reliance on CWS participation as key evidence of ALPA's support of the TWA pilots: "In addition, when it became apparent that TWA would file a motion in bankruptcy court to reject is collective bargaining agreement with ALPA, an attorney who specializes in such issues was brought in from ALPA's General Counsel, Cohen, Weiss and Simon."[277]

Notwithstanding CWS's central role in the 1113 litigation and the decision to waive scope, Mady Gilson's letter to Alexandra B. Stremler dated July 19, 2005, states:

> I can verify that APFA has inquired of Cohen, Weiss and Simon, LLP (CWS) and has been informed that services provided by CWS with respect to American Airlines' acquisition of Trans World Airlines were on behalf of APFA; CWS did not provide services on behalf of the ALPA TWA MEC with respect to that transaction.[278]

There appears to be an irreconcilable inconsistency between the representations CWS reportedly made to APFA on the one hand, and the representations that ALPA made to the TWA-MEC, and CWS made to the federal bankruptcy court, on the other.

According to ALPA President Woerth's April 30, 2002 correspondence, CWS reportedly disclosed the "conflict" to the TWA-MEC at the outset of its representation of the TWA pilots.

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[274] Case Depo. at 24.
[275] TWA-MEC letter to Duane Woerth, March 28, 2002 at ALPA 020429-30.
[276] Case Depo. Exhibit 59.
[277] Case Depo. Exhibit 61.
[278] Mady Gilson letter to Cureton, Caplan dated July 19, 2005.

This contention does not appear to be very credible. Warner testified that the he inquired into the issue and discovered "to my satisfaction" that the alleged conflict had been disclosed, but remembered little else.

> I don't remember exactly how it came to light. I don't remember exactly who I talked to. And I don't remember exactly how I became satisfied.[279]

In further derogation of his credibility, Warner testified almost in the next breath that "it wasn't worth looking into."[280]

Seltzer, for his part, testified that he made no disclosure of a potential conflict to any member of the TWA-MEC. Indeed, in the context of conflict analysis, he did not consider the TWA-MEC to be his client, only ALPA.[281] While he claims to have made reference to his firm's representation of the American flight attendants in a conversation with David Holtzman, he did not refer to it as a "conflict." Seltzer then purportedly relied on Holtzman to convey the information to the appropriate people.[282]

Seltzer's refusal to acknowledge the APFA conflict, or to even acknowledge the TWA pilots as his client, are further evidence that ALPA's advisors were not principally motivated by consideration of the TWA pilots' best interests.

The Deliberate Withholding of a More Comprehensive Cost/Benefit Analysis

A fairly cogent presentation of the pros and cons of each approach – waiver versus non-waiver – is outlined in attorney Clay Warner's pre-meeting notes. The cons of reaching an agreement with TWA included the possibility of a furlough and/or asset transfer while at LLC and a "possible/probable crummy seniority integration." The pros of resisting scope waiver through 1113 and related strategies included a "possible strong sen[iority] integration process" and the possible attainment of all the benefits that had been tentatively agreed to with American.[283] According to the pilots in attendance at that meeting, none of the cons of waiver or the pros of non-waiver appear to have been discussed during the MEC meeting of April 2, 2001. Even the multitude of "cons" in resisting waiver – no CBA, no union representation, no grievance process, no pay increase, no mirror benefits – were prefaced in Warner's pre-meeting notes by the word "possibly."[284] Nevertheless, on April 2, these dire "cons" were mischaracterized as a certainty, rather than a possibility.

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[279] Warner Depo. at 118-9.
[280] Warner Depo. at 119.
[281] Seltzer Depo. at 44-45, 146-47.
[282] Seltzer Depo. at 146-48.
[283] Warner Notes at ALPA 047728.
[284] Warner Notes at ALPA 047728.

7. The Advisors' Hostility Toward the TWA-MEC Members

Not only were the consequences of non-waiver characterized as immediate and dire, but they were delivered in a threatening manner:

> ... Bob Christy was really threatening ... he was mad at us that we weren't -- we were considering – he actually got into a pretty heated argument with Ted Case. He was very forward, very aggressive. Told us we ... were crazy if we were considering not waiving our Allegheny-Mohawk rights.
>
> We need to get our heads on straight, or we needed to get real ...
>
> Michael Glanzer got in a screaming match with Roland Wilder because Roland wouldn't, you know, get on the bandwagon with the rest of the advisors' opinions – opinion about waiving that day....[285]

Captain Bensel testified that, on April 2, the ALPA advisors "coerced and intimidated" the TWA MEC into waiving scope.[286] Even Roland Wilder described the ALPA advisors as employing "forceful terms" to convince the TWA-MEC that they "needed" to waive scope.[287] Babbitt described the meeting as "very emotional."[288]

When the vote was done, the ALPA National advisors left the room and walked down the hall where they asked the receptionist, Lianne Polar, if they could use an office. They entered the TWA-Express MEC office and made a speakerphone call to Robert Christy, who had left the meeting earlier.

Captain Hollander, who listened from an adjacent office, heard the advisors tell Christy that "we got 'em" and "we are off the hook." They described Captain Hollander as a "real son of a bitch" and a "prick" and accused Captains Case and Hollander of having tried to "run the meeting." They triumphantly referred to having "got" First Officer Sally Young and, referring to the TWA MEC representatives, announced that "they gave."[289]

The hostility reflected in the ALPA advisors' comments were echoed later in pointed refusal by the ALPA Executive Council to provide requested economic assistance. Captain Bensel was told by an Executive Council member that the TWA MEC was not getting "any [expletive deleted] money from us." When Captain Bensel asked "are you punishing us," the Executive Council member replied: "well, you can look at it like that."[290]

I cannot attribute ALPA's conduct at the April 2, 2001 meeting to the acute risk aversion indicated in Mr. Rosen's testimony for several reasons: 1) under ALPA's Independence-Plus,

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[285] Young Depo. at 113.
[286] Bensel Depo. at 212.
[287] Wilder Depo. (II) at 109.
[288] Babbitt at 131.
[289] Hollander Interview.
[290] Bensel Depo. at 160-61.

the risk analysis belonged to the TWA-MEC, 2) ALPA has demonstrated its willingness to accept high levels of risk in other contexts (e.g., Mesaba and Comair), 3) risk aversion does not account for the misleading advice or the personal hostility toward the TWA pilot representatives, and 4) risk aversion does not account for the extraordinary strategy of silencing dissent.

D. CAUSATION

Both TWA pilots and ALPA attribute the TWA MEC's decision to waive their scope protections to the intervention of ALPA National's advisors. TWA MEC Secretary Treasurer Theodore Case testified that the waiver decision resulted from the "overwhelming advice" of ALPA counsel.[291] First Officer Sally Young said that she went to the April 2 meeting with the intention of voting against waiver, but changed her vote based on the advisors' combination of ominous predictions of an immediate loss of all contractual and representation rights combined with assurances that the "best efforts" LOA was enforceable.[292] TWA MEC Chairman Pastore testified that, instead of a detailed explanation of the 1113 process and the different options that might be pursued, the waiver decision was "forced down our throats" by unrelenting threats of dire consequences.[293] ALPA advisors did not just recommend; they "strenuously" argued in favor of a particular result.[294] None of the advisors presented for the MEC's consideration of a strategy to force American to change its position on the seniority issue.[295]

The evaluation provided by ALPA's legal advisors was "key" to the TWA pilots' acceptance of the waiver proposal.[296] Without the work of LeBoeuf, Lamb and Cohen, Weiss & Simon, ALPA and the TWA pilots "would have been unable to evaluate or agree to make the requested changes to the ALPA CBA...."[297] In terms of causation, it is undisputed that, but for the intervention of the ALPA National advisors, the TWA-MEC would not have waived the contract's scope provisions.[298]

In terms of impact, Mr. Wilder testified: "I think that if we had taken the steps that I had urged, the TWA pilots would have achieved a stronger seniority position than they did."[299] He lamented: "I have never seen success achieved through weakness in labor matters or collective bargaining matters."[300] I concur with Mr. Wilder.

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[291] Case Depo. at 86.
[292] Young Depo. at 63, 65-66, 75, 92.
[293] Pastore Depo. at 106.
[294] Warner Depo. at 37.
[295] Seltzer Depo. at 126.
[296] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at ¶ 14.
[297] *Id.* ¶ 29; Tumblin Depo. at 143-44.
[298] I have discounted David Holtzman's testimony that the TWA-MEC was "optimistic" and "ready to go forward" as incredible due to its inconsistency with the testimony of both MEC members and advisors. (Holtzman Depo. at 169).
[299] Wilder MO Trial at 161.
[300] Wilder MO Trial at 161.

E. ALTERNATIVE APPROACHES AVAILABLE TO ALPA NATIONAL

The vulnerable condition in which ALPA left its TWA members is beyond dispute and is confirmed by subsequent events. The question arises, however, as to whether ALPA had any reasonable alternatives to the effective capitulation found in the Facilitation Letter that might have produced a better result.

ALPA had three alternatives in the 1113 context: 1) delay the 1113 process through litigation for injunctive relief from the district court, 2) litigate in opposition to the 1113 motion up to and including, if necessary, a ruling on the motion, and, 3) in the event that the 1113 motion was granted, to engage in a collective job action.

The litigation strategy relied on a grievance filed on March 2, 2001, alleging that TWA had violated the TWA pilots' scope protections by entering into an Asset Purchase Agreement that pre-supposed the waiver of these protections. In a memorandum from attorney Roland Wilder to the TWA MEC dated March 13, 2001, he proposed to enjoin the closing of the AA/TWA deal until the grievance could be heard by the TWA/ALPA Adjustment Board, which has exclusive jurisdiction over such contractual disputes. As Wilder explained: "The purpose of the proceeding would be to hold up the closing until American accepts the duty to assure a fair and equitable seniority integration." Wilder expressed confidence that AA would not walk away from the deal since the "gains from the transaction would appear to far outstrip the costs of even comprehensive merger protection...." Wilder concluded:

> There is, in my view, a reasonable likelihood that we will be successful in inducing the other parties to agree to a fair procedure for seniority integration if we continue to insist on compliance with Section 1 of the ALPA/TWA collective bargaining agreement as a condition for the transaction's closing.

Wilder followed up his March 13, 2001, memorandum with a letter to Duane Woerth dated March 26, 2001, in which he recommended the same litigation strategy and characterized it as "necessary." Moreover, Wilder had already drafted a complaint, supporting affidavit, order, and 38-page brief. We concur with the opinion expressed in Wilder's March 26 letter that such action was "necessary" to create leverage for the TWA pilot group.

Even in the absence of the above litigation strategy, the TWA pilots still had the right and ability to resist TWA's 1113 motion. In my experience, a union's aggressive litigation posture in the 1113 context can produce significant movement in the carrier's position. At United Airlines, the mechanics' refusal to ratify a tentatively agreed to 1113 agreement subsequently led to a re-negotiated deal with significantly enhanced job security provisions. The Aircraft Mechanics Fraternal Association (AMFA) succeeded in converting the 1113(c) proceeding into a two-way street by obtaining the following job security protections from United:

- the right to perform an annual audit for the purpose of verifying compliance with the CBA's outsourcing limits;
- United's agreement not to furlough any line mechanics from any then-existing point as a direct result of the outsourcing of then-existing line aircraft maintenance work;

- United's agreement not to outsource the three "C" check lines of work performed by AMFA-represented employees at the San Francisco Maintenance Center;
- United's agreement that if the flight schedule at a hub station is reduced by more than 25% after the ratification date, there shall be no additional outsourcing of ground equipment or building maintenance work at that station until recall is offered to mechanics who (i) have been furloughed at that station as the direct result of said flight schedule reductions, and (ii) have the skills and ability to perform the additional work to be outsourced;
- Job security protection as a direct result of outsourcing from the following shops at the San Francisco Maintenance Center:

    - Pneumatics;
    - Avionics;
    - Landing Gear;
    - APU;
    - Engine Accessories;
    - Engine Disassembly, Assembly, and Test;
    - Reversers;
    - Nose Cowls and Radomes;
    - Wire Harnesses;
    - Heat Transfer Units;
    - Tire Shop;
    - Plant Maintenance; and
    - Flight Controls[301]

The United mechanics were materially assisted by having previously obtained overwhelming member approval of a strike action in response to any court-imposed change in working conditions.

At Northwest Airlines, the flight attendants were able to substantially reduce their economic concessions by forcing a re-valuation of head count reduction and were successful in preventing encroachment on their scope clause via the Company-proposed introduction of foreign-based flight attendants. These significant improvements came only as a result of prolonged and intensive 1113 court hearings.

At Mesaba Airlines, the major unions, including ALPA, created the Mesaba Labor Coalition, which, by virtue of prolonged litigation and threatened strike action[302], was able to obtain a significant reduction in both the level and duration of economic concessions.

In each of the above situations, the unions' aggressive pursuit of 1113 litigation not only served to demonstrate their determination, but also provided additional time to work out a deal. In each case, the risk-taking ultimately produced substantially better deals for the employee

[301] Letter of Agreement between United Airlines and AMFA, May 15, 2005, Exhibit B, ¶¶ E.4-8.
[302] Woerth Depo. at 198.

groups involved.[303] As discussed in section C.2 above, ALPA had a number of strong arguments to make in the 1113 context, including that TWA had waived the right to seek relief by unilaterally modifying the collective bargaining agreement and otherwise failed to negotiate in good faith. Moreover, as Mr. Wilder observed, the real benefit of litigating is measured principally, not in terms of whether the union prevails on the legal merits, but by the opportunity that it creates to obtain a better deal.

In view of the ultimate consequences to the TWA pilot group of the disadvantageous seniority integration – the furlough of approximately half their number and the demotion to First Officer of many of the remainder – the TWA pilots had good reason to take measured risks.

The risk may be considered "measured" for several reasons. First, while bankruptcy judges are frequently inclined to take those actions necessary to ensure a successful reorganization, they are also loath to reject collective bargaining agreements. As discussed in section C.3 above, the most likely extent of the TWA pilots' downside risk was the imposition of TWA's last best offer. Indeed, at Mesaba (involving all of the principal unionized employee groups) and Northwest (involving the flight attendants), bankruptcy judges pressured the employers to restrict the scope of the 1113 order to their last best offer.

Second, even assuming a worst-case scenario involving rejection of their collective bargaining agreement, AA would still feel a strong compulsion to hire former TWA pilots for a number of reasons: physical presence in the new St. Louis domicile, proficiency on the acquired equipment, avoidance of anti-union and age discrimination charges, and cost. Indeed, it is undisputed that by hiring TWA's pilots, American saved "enormous training costs."[304] The difference between such new-hire seniority as compared with the seniority "stapling" that half of the TWA pilots actually received should not have been enough to dissuade a determined and well-counseled TWA-MEC from pressing the seniority issue to the brink.

Third, there were good reasons to believe that AA and APA might blink. For AA, the TWA bankruptcy presented a unique opportunity to significantly improve market share while skirting the level of Department of Justice scrutiny that had recently scuttled UAL's efforts to purchase US Airways assets. For APA, the AA-TWA transaction would produce a new hub, additional equipment, more dues revenue, and was forecast to bring many hundreds of new jobs beyond those that the TWA pilots were bringing with them. In sum, APA and its members had reasons to expect a substantial benefit from the transaction without acting in a predatory manner. In addition, AA pilots would be the net beneficiaries of the more senior TWA pilot group's attrition rate.

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[303] The unions' efforts at Mesaba benefited immensely from the formulation of a common strategy, which was conspicuously absent in the TWA context. Seltzer testified incorrectly about the degree of inter-union cooperation in the Mesaba case. (Seltzer Depo. at 30). The unions coordinated communications, public relations, witness presentation and even brief writing.

[304] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at ¶ 24. In fact, it would have been to American's economic advantage to leave all of the TWA pilots in their existing positions. Brundage Depo. at 40-41.

In sum, there were excellent reasons to press, even to the brink, for something better than a deal that left APA with a "virtually unassailable bargaining position." Moreover, even total failure in the 1113 context would have left the TWA pilot group with another card to play – a job action.

The existing case law provided that bankruptcy courts should consider, as part of their analysis of the balance of the equities, the likelihood and consequences of a strike if the contract is rejected. *In re Brada Miller Freight System, Inc.*, 702 F.2d 890, 899 (11th Cir. 1983) ("the impact of a potential strike on the debtor need also enter into the court's calculus"); *In re C. & W. Mining Co., Inc.*, 38 B.R. 496, 502 (Bankr. N.D. Ohio 1984) ("The court should also consider the possibility of a strike if rejection is approved"); *In re Pesce Baking Co., Inc.*, 43 B.R. 949, 959 (Bankr. N.D. Ohio 1984) (court rejected the company's motion to reject in part because it found that "[a] strike against the debtor is a distinct possibility"). Considering the possibility of a post-rejection strike is important because such a strike may force the debtor to liquidate, thus defeating the main purpose of a Chapter 11 bankruptcy filing, which is reorganization.

Further, several courts had expressly stated that employees may strike if their collective bargaining agreement is rejected. *In re Mile Hi Metal Systems, Inc.*, 899 F.2d 887, 893 n. 10 (10th Cir. 1990) ("Another safeguard against overreaching is the fact that rejection of a collective bargaining agreement could give rise to a strike or other labor action which would actually decrease the likelihood of a successful reorganization"); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 373 (Bankr. N.D. Ill. 1990) ("the employees affected may possibly strike in protest to a decline in wages and benefits...."); *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 806 (Bankr. W.D. Ky. 1985) ("Following the rejection of a collective bargaining agreement ... the employees retain the right to strike as their ultimate bargaining tool"); *In re Pesce Baking Co., Inc.*, 43 B.R. 949, 959 (Bankr. N.D. Ohio 1984) ("The Bankruptcy Code does not prohibit the union members from waging a strike against the debtor").

While there was no then-existing[305] Railway Labor Act precedent addressing the strike issue in the 1113 context, union-side attorneys universally expressed the view that the result should be the same. The Railway Labor Act is constructed on the premise that the parties' respective rights to engage in self-help – defined as unilateral changes to the contract by the carrier or strike action by the union – are co-extensive. Indeed, the United States Supreme Court has held that, in the absence of mutual restraint, it is understood that the union shall be entitled to strike:

> If the railroad is free at this stage to take advantage of the agreement's silence and resort to self-help, the union cannot be expected to hold back its own economic

[305] Since the AA-TWA transaction, courts in three cases have issued injunctions against airline union attempts to strike following rejection of a collective bargaining agreement under Section 1113: *Northwest Airlines Corp. v. Association of Flight Attendants-CWA*, 349 B.R. 338 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007) (holding that "Section 2 (First) of the Railway Labor Act forbids an immediate strike when a bankruptcy court approves a debtor-carrier's rejection of a collective-bargaining agreement that is subject to the Railway Labor Act and permits it to impose new terms, and the propriety of that approval is not on appeal."); *In re Mesaba Aviation Inc.*, 350 B.R. 112 (Bankr. D. Minn. 2006) (reached the same result as the District Court in the *Northwest Airlines* case and entered a preliminary injunction restraining the union from any strike or job action); *Comair, Inc. v. Air Line Pilots Association*, 359 B.R. 491 (Bankr. S.D.N.Y. 2007) (granting motion for preliminary injunction against ALPA).

weapons, including the strike. **Only if both sides are equally restrained can the Act's remedies work effectively.**

Detroit and Toledo Shore Line Railroad Co. v. United Transp. Union, 396 U.S. 142, 155, 90 S. Ct. 294, 302 (1969) (emphasis added). The requirement that a union refrain from work stoppages during the same period that the carrier must refrain from unilateral changes in working conditions has been characterized as a "parallel obligation." *Empresa Ecuatoriana de Aviacion v. District Lodge*, 690 F.2d 838, 843 (11th Cir. 1982). The Railway Labor Act does not recognize a carrier's ability to have its way with the collective bargaining agreement without the union and its members having the right to respond in kind.

Of course, the very fact that this issue had not yet been decided ensured that the threat of strike had the power to create an uncertain situation. ALPA's legal advisors believed that the TWA pilots would have been entitled to engage in self-help remedies under the Railway Labor Act[306]; however, this entitlement was never communicated to the TWA pilot leadership for consideration as part of their decision-making process.

In the context of 1113 negotiations, the TWA pilots both had ample motive to strike and good reason to consider the down-side risk as a measured one worth taking. Indeed, a strike in any context carries with it the risk of killing the "golden goose." But, in view of the eventual loss through furlough of half their numbers, and the demotion of many of those who remained, most TWA pilots would probably have considered this a risk worth taking. This decision should have been theirs to make.

IV.

ALPA'S REFUSAL TO AUTHORIZE HORNS OF DILEMMA LITIGATION

A. INTRODUCTION

The waiver of contractual LPP's left the TWA pilots at a desperate disadvantage in ongoing seniority integration negotiations with APA.[307] Attorney Wilder and the TWA-MEC believed that this disadvantage could be redressed through legal action.

At a special TWA-MEC meeting held on April 23, 2001, ALPA President Duane Woerth pledged the full support of the Association for the TWA pilots' struggle to preserve their seniority. Specifically, with respect to support of any future TWA-pilot legal strategy, the following was reported:

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[306] Joint Motion of the Debtors and the Air Line Pilots Association, International for an Order Pursuant to 11 U.S.C. § 501(b)(1)(A) or, Alternatively, 11 U.S.C. § § 503(b)(3)(D) and (b)(4) Approving Fees and Expenses at ¶ 26(c); Holtzman Depo. at 112.

[307] Even Woerth concedes that there was no leverage that ALPA possessed to get a better deal for the TWA pilots. Woerth Depo. at 209.

> Captain Woerth responded if there were any basis for litigation, ALPA would do what was necessary to protect the pilots. ALPA would not leave any stone unturned to protect the TWA pilots.[308]

Given what was at stake in terms of seniority, Woerth's emphatic promise to leave no stone unturned was appropriate. In response, Roland Wilder conceived a legal strategy, outlined in a memorandum dated July 2, 2001, which he believed would "generate much-needed leverage for the TWA merger representatives." Woerth understood Wilder's strategic objective: "to get somebody to talk to us instead of just proceeding along the path."[309] Woerth also believed that the American and APA would "pay for an agreement so they wouldn't go through all this litigation...."[310] Nevertheless, ALPA reneged on President Woerth's commitments by refusing to authorize viable legal strategies, including one legal theory (discussed in section V.) that ALPA itself had initially endorsed.

B. FACTUAL AND LEGAL BACKGROUND

Sometime in April, 2001, APA commenced negotiations that directly impacted the terms and conditions of employment of pilots employed by TWA, LLC. These negotiations culminated in an APA/AA Transition Agreement that, among other things, defined an "American pilot" as a pilot employed by AA as of April 10, 2001 and new hire pilots in training as of that date.[311] The Transition Agreement also memorialized numerous provisions governing TWA LLC operations and flying opportunities, including: 1) no new fleet types, 2) no new pilot domiciles, 3) hour decreases in TWA-LLC specific aircraft type utilization (UTIL) to be "equal **or greater**" than AA UTIL decreases, 4) any decreases in block hours or available seat miles for TWA-LLC were to be "equal **or greater**" than AA and any increases in block hours or available seat miles at AA would be "equal **or greater**" than TWA-LLC, 4) a mandatory minimum annual reduction in the number of TWA-LLC aircraft, 5) a constant downward re-setting of TWA-LLC aircraft maximums, and 6) confirmation of the parties' shared "desire to take aircraft out of TWA LLC faster than is required by the mandatory draw down schedule above."[312] As ALPA Attorney Clay Warner acknowledged, the AA/APA Transition Agreement provided that TWA LLC could not, at any point, increase in size faster (or decrease more slowly) than American.[313] Clearly, APA was engaged in negotiations concerning the terms and conditions of an employee group – the TWA pilots – that it was not authorized to represent.[314] Holtzman testified that he

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[308] Pastore Depo. Exs. 25, 78.
[309] Woerth Depo. at 254.
[310] Woerth Depo. at 269.
[311] Transition Agreement, ALPA at 044487, 90.
[312] Transition Agreement, ALPA at 044487, 90-95.
[313] Warner Memorandum, July 24, 2001, ALPA 044944, 46.
[314] This Transition Agreement was clothed as a "settlement" of an "apparent" violation of the American-APA collective bargaining agreement's scope clause that provided that all flying performed by AA affiliates would be performed by pilots on the AA seniority list. (Warner Memorandum, July 24, 2001, ALPA 044944, 45). However, APA does not appear to have raised any objections in the context of the bankruptcy proceedings, indicating its own interest in seeing the transaction proceed despite American's breach of its CBA. Moreover, as discussed in this section, the predatory nature of the Transition Agreement raised significant statutory issues.

was concerned that "American and APA were making agreements about the terms and conditions of TWA employment."[315]

By letter dated June 8, 2001, TWA MEC Chairman Robert Pastore protested to APA President John Darrah that APA was unlawfully negotiating with American the TWA pilots' terms and conditions of employment, including furlough protection for TWA-LLC pilots and the draw down schedule of TWA-LLC aircraft.[316] In a letter copied to Duane Woerth, Pastore demanded the inclusion of ALPA in these negotiations.[317]

Pastore's demand was in furtherance of a legal strategy devised by TWA-MEC counsel Roland Wilder. Wilder's objective was to place APA (and thus American) on the "horns of a dilemma."[318] This term referred to APA's potential liability under overlapping legal theories, including: 1) the unlawful nature of APA's effort to negotiate terms and conditions of employment for an employee group it was not certified to represent, 2) APA/American's attendant obligation to include ALPA in any negotiations related to such issues, and/or 3) APA's potential DFR violation for excluding TWA pilots from any participation in the negotiating process.

Wilder drafted a legal memorandum in which he cited case law supporting his basic theory. One Railway Labor Act case cited by Wilder involved the Sixth Circuit's decision to invalidate a contractual union shop provision because the union involved could not "legally negotiate" the terms and conditions of employment of an employee group it was not certified to represent. *Bhd. of R.R. Trainmen v. Smith*, 251 F.2d 282, 287 (6th Cir. 1958).[319] An analogous case, not cited by Wilder, involved ALPA's successful litigation against the IAM to enjoin it from negotiating contractual provisions designed to prevent ALPA from furthering its own objectives. *Air Line Pilots Ass'n, Int'l v. UAL Corp and Int'l Ass'n of Machinists & Aerospace Workers*, 717 F. Supp. 575 (N.D. Ill. 1989), *aff'd*, 897 F.2d 1394 (7th Cir. 1990) (invalidating poison pill provisions contained within collective bargaining agreement between United Air Lines and the International Association of Machinists which prevented ALPA from taking over United by means of a heavily leveraged Employee Stock Ownership Plan).

Wilder also cited substantial case law in support of an alternative theory that APA's assertion of negotiating authority over the terms and conditions of employment of TWA pilots provided the latter with necessary legal predicate for a DFR lawsuit against APA.[320] Among the cases cited in support of this theory were *Koshatka v. Philadelphia Newspapers*, 762 F.2d 329, 335 (3d Cir. 1985)(a union could not deny a non-member of the bargaining unit "the duty of fair representation once it had agreed to represent him in the grievance process."); *BIW Deceived v. Local S6, Indus. Union of Marine Shipbulding Workers of Am., IAMAW District Lodge 4*, 132 F.3d 824, 833 (1st Cir. 1997)("a union owes a duty of fair representation to nonmembers whom it has undertaken constructively to represent.").

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[315] Holtzman Depo. at 188.
[316] Pastore June 8, 2001 letter to Darrah at ALPA 028098.
[317] *Id.*
[318] Wilder Depo. (II) at 130.
[319] Wilder, July 2, 2001, Memorandum at ALPA 046329-30.
[320] Wilder, July 2, 2001, Memorandum at ALPA 046329-30.

Wilder identified an appropriate factual basis for distinguishing the then-current situation from prior cases involving a union's right to negotiate contractual language governing the future integration of employees from a soon-to-be acquired company:

> AA and APA may seek to exclude ALPA on the basis that their discussions involve negotiation of the APA scope clause and terms of the American pilot's service, not the TWA pilots. This argument is difficult to sustain in light of the fact that the flying over which the parties are negotiating is traditional TWA flying. The issue, therefore, is not of job preservation but of predatory work acquisition. The aircraft gained by the APA will be at the expense of the TWA pilots.[321]

The potential leverage for the TWA pilots is apparent from the remedy sought by Mr. Wilder:

> A remedy could take the form of an injunction to require inclusion of ALPA in negotiations over the draw down schedule and furlough protection. It may also include an injunction against implementation of any agreement until proper negotiations occur.[322]

Wilder concluded that, as a result of the waiver and the tack APA was taking, "additional leverage of the sort described in the memorandum was quite desperately needed" and his opinion in that respect had not changed at the time of his deposition.[323] [I]t was an answer to the stated needs of the TWA pilots for somebody to do something to help them. ... Sitting here today there was no other option."[324]

The potential for the generation of leverage through this type of litigation was enhanced by Mr. Wilder's favorable track record in prior mergers involving mechanics' groups in the US Airways-PSA and Delta-Western mergers in which he obtained "substantial protection" for the affected groups.[325] In my opinion, the proposed Wilder litigation was certainly legitimate in the legal abstract.[326] In the context of the TWA pilots' dire circumstances, however, such litigation was nothing less than critical to their negotiating position. As Wilder explained, in labor

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[321] Wilder, July 2, 2001, Memorandum at ALPA 046329-30.
[322] Wilder, July 2, 2001, Memorandum at ALPA 046329-30.
[323] Wilder Depo. (I) at 125; Wilder Depo. (II) at 133.
[324] Wilder Depo. (II) at 131-33.
[325] Wilder Depo. (I) at 82; Wilder MO Trial at 34-35; Wilder Depo. (II) at 116-21.
[326] In fact, ALPA utilized a closely related legal argument in its January 10, 2002 submission to the NMB in which it contended that it was APA's objective to shift the burden of the furloughs to the TWA group and that APA would not be in a position to do this legally until the single carrier proceeding was completed and APA's certification extended to cover the TWA pilots. (Defendants' Ex. 83 at 2-4; Holtzman Depo. 255-56). In addition, David Holtzman drafted a grievance asserting that the disproportionate furlough of TWA pilots constituted a contractual violation. Holtzman Depo. 254-55, Exhibit 179. These actions by ALPA, in my view, undercut the genuineness of any ALPA argument that Wilder's legal theory was non-viable. The argument so forcefully made in the January 10, 2002 submission was made in the wrong forum; a forum in which ALPA knew it would not prevail. (Holtzman Depo. at 260-61).

litigation, the leverage created in ongoing negotiations can be more important than whether the litigant ultimately prevails.[327]

C. ALPA'S DENIAL OF AUTHORIZATION

TWA pilot representatives enthusiastically endorsed Wilder's legal strategy.[328] Nevertheless, ALPA told Wilder he could not file the lawsuit and that was the "final word" on that point.[329] "[U]ltimately the idea was not implemented because of objections from ALPA National."[330]

In his self-contradictory testimony, ALPA attorney Seth Rosen attaches the responsibility for the waiver of scope to the TWA-MEC (it "makes the call"), but tacitly concedes that ALPA National thwarted the MEC's litigation strategies.[331] Rosen personalizes the issue by accusing Roland Wilder of wanting to "litigate, litigate, litigate" whereas ALPA's approach focused on "trying to get the best deal possible."[332] Nevertheless, as Rosen tacitly concedes, the real question is whether the need and potential for leverage to be produced by litigation outweighed the potentially counter-productive effect of alienating APA negotiators.[333]

Rosen's explanation – aside from being contrary to the explanation offered by Woerth with respect to the reasonable best efforts litigation – is not consistent with the facts. Even in the pre-waiver time frame, when the TWA pilot-negotiators still possessed some contractual leverage, their APA counterparts pretended to wipe their rear ends and vomit on the TWA seniority integration proposal.[334] Obviously, the TWA pilot-negotiators and their Merger Counsel were in the best position to determine the "risk" of losing APA's good will.[335] Whereas the TWA-MEC supposedly possessed the authority to "make the call" with respect to the devastating decision to waive scope[336], it was subsequently stripped of its authority to determine how to restore its lost leverage. Rosen's position that ALPA was merely exerting paternalistic control to protect the TWA pilots from themselves does not ring true and is not consistent with ALPA's existing Independence-Plus policy that permitted the American Eagle pilots to negotiate a 16-year collective bargaining agreement that Woerth characterized as a "bunch of crap."

The TWA pilot representatives believed that their litigation strategies would prove effective. TWA Merger Committee Chairman Michael Day concluded that, to the extent that APA implemented something other than a pure staple job, it was attributable to APA's concern

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[327] Wilder Depo. (II) at 120.
[328] Wilder Depo. (I) at 130-31, 136.
[329] Wilder Depo. (I) at 136.
[330] Wilder MO Trial 45.; Wilder Depo. (II) at 136-37. See also Holtzman Depo. at 212-13; Woerth Depo. at 252-53.
[331] Rosen Depo. at 19, 93-95.
[332] Rosen Depo. at 93-94.
[333] Rosen Depo. at 93-95.
[334] Bensel Depo. at 84.
[335] Wilder Depo. (II) at 139.
[336] In reality, the TWA-MEC never possessed even this measure of autonomy since any decision not to waive scope required a contemporaneous commitment to litigate the 1113 motion; however, the MEC had no right to make any determinations with respect to litigation issues. (Woerth Depo. at 263).

that Mr. Wilder might initiate litigation.[337] The prior TWA Merger Committee Chairman, Bud Bensel, concurred that APA was "very, very concerned about litigation."[338] As David Holtzman testified, Wilder, as the Merger Committee counsel, was "hired to, you know, assist with seniority integration and he was entitled to, you know, apply the tactic at the time that – that he thought would be most effective."[339] But, due to ALPA National's forceful intervention, the TWA pilot representatives who were in the best position to evaluate the impact of litigation strategy were denied the authority to implement.

There appears to be no written correspondence from ALPA to Wilder explaining its refusal to authorize the lawsuit, nor is there any correspondence from Wilder to ALPA requesting an explanation as to why his effort to obtain "much-needed leverage" for the TWA pilot negotiators was being thwarted. In my opinion, Wilder had an obligation to zealously pressure ALPA to authorize the lawsuit and, if necessary, advise ALPA that it was exposing itself to DFR liability.

Evidence of ALPA's ability to get Mr. Wilder to consider the interests of ALPA, rather than those of his TWA-MEC client, appears in David Holtzman's correspondence dated July 13, 2001, to ALPA attorneys Seth Rosen and Bill Roberts – just eleven days after Wilder's transmission of his July 2, 2001 legal memorandum to ALPA – in which Holtzman describes the expected cooperation of Wilder in an effort to dissuade the TWA pilots from pursuing a litigation strategy that targeted APA:

> I expect that there will be major fireworks before [July 26] on the Pastore-Bensel plan to raise $3-5 m from the pilots to hire a big name attorney. Its hard to say where things will stand in terms of rationality on the 26th. Bensel is telling the MEC that a big name attorney thinks that there is a cause of action. [MEC Vice-Chairman] Keith O'Leary, who was present for the meeting, told me that the big name attorney said that he does not see anything but that the APA would be his target. I believe that Roland will say next week in LA that he does not see a cause of action at this time. I think that Roland is sensitive to **our concerns**.[340]

This correspondence constitutes compelling evidence on several levels in that it reflects: 1) the utilization of Holtzman as an ALPA National monitor in derogation of his duty to the TWA-MEC, 2) the continuing effort of ALPA National to make the TWA-MEC's merger counsel responsive to ALPA's "concerns" other than those of his TWA-MEC client, and 3) that ALPA National's "concerns" were being governed by objectives that were not consistent with those of the TWA pilots, specifically including the avoidance of litigation against APA.

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[337] Wilder MO Trial at 232.
[338] Wilder MO Trial at 334.
[339] Holtzman Depo. at 70-71.
[340] Holtzman e-mail to Seth Rosen dated July 13, 2001 at ALPA 052455 (emphasis supplied).

V.

ABANDONMENT OF BEST EFFORTS LAWSUIT IN OCTOBER 2001

A. FACTUAL AND LEGAL BACKGROUND

Via a memorandum dated August 16, 2001, Roland Wilder requested that ALPA initiate legal action to enjoin AA and APA from entering into an agreement imposing an APA-dictated seniority solution pending an arbitration hearing that would determine whether American had complied with its obligation to use its "reasonable, best efforts" to obtain a fair and equitable integration process for the merger of the AA and TWA pilot seniority lists. Alternatively, Wilder requested on behalf of the TWA-MEC that it be granted permission to undertake the proposed litigation.[341]

The memorandum discussed factual support for the conclusion that American had not used its reasonable best efforts to achieve a fair seniority integration, including the fact that the recent "draw-down" agreement between American and APA, which provided for the transfer of TWA aircraft into AA's service, was "not a work protection agreement, but a work acquisition agreement whereby the APA obtained work belonging to the TWA pilots."[342] The memorandum cited analogous case law in which a federal court issued an injunction preventing the transfer of work based on the employer's contractual commitment to make "every effort" to keep work within the bargaining unit.[343]

Wilder asserted that prompt federal court legal action was necessary to preserve the jurisdiction of the adjustment board that would decide the case because if "AA and APA were to enter a seniority integration agreement prior to the adjustment board's decision, then the board process would be rendered moot."[344] From a strategic perspective, more important than the preservation of the adjustment board's jurisdiction per se was the potential for creating leverage by freezing American's operational plans.[345]

In late August, Wilder met with Duane Woerth and Jonathan Cohen to discuss the litigation strategy. Concerning this meeting, Wilder testified:

> ALPA's immediate response was the strategy had merit and should a cram down occur, then we would have employed the strategy. ... [T]hat was made clear in a meeting attended by Captain Woerth, Mr. Cohen, the director of the legal

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[341] Wilder Memorandum dated August 16, 2001 at 1.
[342] Wilder Memorandum dated August 16, 2001 at 2.
[343] Wilder Memorandum dated August 16, 2001 at 5 citing *IAM v. Pratt-Whitney*, 87 F. Supp. 2d 116 (D. Conn. 2000).
[344] Wilder Memorandum dated August 16, 2001 44 at 3.
[345] Although ALPA eventually proceeded with a "reasonable best efforts" arbitration, divorced of any injunction action, after the adoption of Supplement CC, it was a case in which ALPA apparently did not believe there to be any chance of prevailing. Warner e-mail to Holtzman and Wagner dated February 1, 2002; Warner e-mail to Flynn and Wagner at ALPA 046256 (defining "success in terms of delay....").

department, perhaps another ALPA official, Captain Pastore, Captain Day, and myself.[346]

With TWA MEC endorsement and ALPA National approval, Wilder went back to his firm "to complete the research, draft the memorandum, and complete the motion papers necessary for this overture."[347]

Wilder's account of ALPA's initial approval of this litigation strategy is confirmed by a memorandum from ALPA Legal to Duane Woerth, in which Jonathan Cohen, Clay Warner and Marta Wagner opine that there is "some legal support" for Wilder's legal strategy and that, therefore, "we recommend that the papers necessary to file and begin prosecution of the case be prepared."[348] According to Wilder, Cohen and Woerth were content that the approach that I had suggested had merit ... and could prevent a cramdown."[349] While the same memorandum raises the issue of potential backlash by American, it would be expected that the cost/benefit analysis would have been for the TWA-MEC to make.

Wilder himself enthusiastically advocated the litigation strategy, asserting that it would have a "substantial likelihood of success" and predicting that it would be extremely effective in achieving a better seniority integration.[350] He also believed the litigation to be necessary, under the circumstances, since the only leverage that the TWA pilots otherwise had at this juncture was the American pilots' "intellectual curiosity" in their approach.[351] "It was a way of preventing what was feared by the TWA-MEC as an imminent disaster."[352] Wilder's opinion as to the necessity of the litigation strategy has never changed.[353]

Due to an unexpected extension in the facilitation process, the litigation was postponed. As of September 17, 2001, however, the facilitation was over and had failed.[354] Consequently, in October, 2001, the Wilder firm was proceeding on the assumption that a filing of the lawsuit was imminent. Tens of thousands of dollars in legal time were spent to develop the legal submission that Wilder reportedly was ready to file.

Shortly before the planned filing, Wilder continued to express a high degree of confidence that the lawsuit would be effective. Bud Bensel states that, on or about October 21, 2001, Wilder advised him: "My son Billy can finish this up. ... I am going to stop this insanity right now, dead in its tracks. I am going to stop this craziness." Similar expressions of confidence were made by Wilder to other TWA pilots, including Howard Hollander and Sally Young.

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[346] Wilder MO Trial at 179.
[347] Wilder MO Trial at 71-72.
[348] Warner Depo. at 138-39, Exhibit 138 -- Cohen, Warner, Wagner memorandum to Duane Woerth dated September 28, 2001 at ALPA 044991.
[349] Wilder Depo. (II) at 151-52; Warner Depo. at 142 ("In fact it was the strategy [the ALPA legal department] was prepared to recommend.").
[350] Wilder Memorandum dated August 16, 2001 at 7; Hollander Depo. at 138.
[351] Wilder Depo. (I) at 122.
[352] Wilder Depo. (II) at 150.
[353] Wilder Depo. (II) at 151.
[354] White letter to Michael Day dated September 18, 2001 at ALPA 029608.

B. ALPA's DENIAL OF AUTHORIZATION

Notwithstanding ALPA's prior approval, on or about October 22nd, Wilder threw a copy of the complaint on a conference room table at the Mayflower Hotel, and angrily exclaimed: "God damn it, I can't file the lawsuit. Duane [Woerth] won't let me."[355] Captain Bensel described Wilder as being "visibly upset" and that he "made certain people understood he was upset."[356]

In a telephone conversation that same day, the TWA MEC representatives reminded Woerth that he had made a prior commitment that ALPA would take legal action to defend the seniority of TWA pilots. Woerth reportedly replied: "I am not taking any legal action and I am not going to let you take any legal action. ... I don't sue unions and I don't sue companies I don't have a contract with."[357] When TWA MEC Chairman Bob Pastore pointed out that this was not a cogent reason, Woerth peremptorily replied: "You're going to have to sign the deal, that's it." Bud Bensel similarly testified that the reason Duane Woerth provided for refusing to authorize the lawsuit was that he was "not going to authorize litigation against a union or an employer with which he had no contract."[358]

The explanation provided by Woerth was arbitrary for many reasons including: 1) the critical importance of the seniority issue, 2) ALPA's policy of independence-plus, and 3) ALPA's willingness in the past to litigate against another union when the circumstances warranted and to even permit ALPA MEC's to litigate amongst themselves in defense of their seniority rights.[359]

ALPA's veto of the planned litigation, the preparation of which had received prior authorization from ALPA Legal, prompted Sean Clarke to resign from the Merger and Grievance Committees with a letter in which he denounced Duane Woerth's "betrayal" and affirmed: "never have I witnessed something so ugly." The resignation letter, which was transmitted to the TWA MEC and David Holtzman, was promptly transmitted by Holtzman to ALPA National legal staff without a copy to any TWA MEC member.[360]

The political nature of ALPA's decision to prohibit the TWA-MEC litigation strategy appears to be confirmed by the non-involvement of ALPA National's legal staff. Wilder, who did not participate in the teleconference with Duane Woerth, contacted ALPA attorney Clay

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[355] Bensel Interview; Warner Depo. at 144 ("It was Captain Woerth's decision" to reject the litigation.); Holtzman Depo. at 222.

[356] Bensel Depo. at 191; Young Depo. At 103-04.

[357] Bensel Interview; Hollander Interview.

[358] Bensel Depo. at 190. See also Young Depo. at 103.

[359] I do not credit Woerth's testimony that he denied litigation authorization because he believed that the TWA pilots would lose a better deal that was on the table. Woerth Depo. at 258. Woerth never saw the APA's last best offer and could not describe with any specificity in what way it was superior to the ultimate Supplement CC cram down. (Woerth Dep. at 269-70).

[360] Sean Clarke resignation letter dated October 26, 2001 with cover e-mail from David Holtzman at ALPA 044618-20.

Warner to confirm ALPA's determination to prohibit the lawsuit. Warner did not provide a rationale for ALPA refusal and Wilder made no effort to determine it.[361] In fact, Wilder described Warner as being "surprised at the decision" and left Wilder with the impression that Warner had not been consulted prior to the decision being made.[362] There simply was no rationale that was shared with either ALPA National's counsel or the TWA-MEC's merger counsel[363]:

> A: ... He wasn't certain precisely what the reason for it was, but it was rather clear to me that it – the decision had to do with the – overall strategy of ALPA rather than the technicality, the legal technicalities of the suit. ... This had more strategic implications than tactical or technical implications.
>
> Q: And – and what strategical way was not filing this lawsuit going to help the pilots, the TWA pilots according to the ALPA people that you talked to?
>
> A: I don't know. Nobody told me that.[364]

Wilder subsequently communicated to the TWA MEC that "we had run out of options to prevent what they feared from happening."[365]

The lack of participation of ALPA's legal staff is further confirmed by the testimony of Seth Rosen, who betrays an almost total lack of familiarity with the relevant circumstances. At one point Rosen's testimony suggests that the litigation strategy was vetoed due to ALPA National's preference for friendly negotiation:

> we did not agree and especially in this -- this instance. We are in a negotiating arena and we're trying to negotiate our way out as difficult a situation as it is. And this was not the course of action that people thought was appropriate to pursue.[366]

Rosen's explanation concerning the preference for negotiation makes absolutely no sense given the TWA-MEC Merger Counsel's determination that, in the absence of litigation, there was nothing left to do but surrender and accept what had been offered.[367] Moreover, any rationale proffered by Rosen cannot be credited in view of his subsequent testimony that he did not even know that the TWA-MEC had made a request to litigate the issue.[368] He then testified: "I can't say that there was a decision not to authorize."[369] In short, ALPA's determination to refuse litigation authority was unrelated to the case's legal or strategic merit, it was a political decision.

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[361] Wilder Depo. (I) at 142.
[362] Wilder MO Trial at 73; Wilder Depo. (II) at 160.
[363] Wilder Depo. (II) at 162.
[364] Wilder Depo. (II) at 160.
[365] Wilder MO Trial at 73.
[366] Rosen Depo. at 113-14.
[367] Defendants' Ex. 43. See also Woerth's acknowledgement that the purpose of the litigation was to "stop the cram down." (Woerth Depo. at 257-58).
[368] Rosen Depo. at 119.
[369] Rosen Depo. at 121.

Wilder believed each of the legal strategies – developed in March, July, and August – was a "viable" means of obtaining leverage in the struggle to defend the TWA pilots' seniority.[370] Yet each of these strategies was nixed by ALPA National.[371] Woerth asserted that the decision to litigate was within the sole discretion of ALPA's president.[372] Nevertheless, Woerth's aggressive assertion of his authority in this respect rendered the doctrine of Independence-Plus a nullity for the TWA pilots since the entire process, from the outset, took place in a litigation context.

Wilder was "disappointed" in his legal theories being rejected and concluded: "I got to say I didn't get a lot of help."[373] According to the veteran RLA practitioner, ALPA's consistent rejection of his efforts to defend TWA pilot seniority was a singular experience: "I don't think I participated in a situation quite like this before."[374]

Throughout Mr. Wilder's efforts to create leverage through carefully articulated legal strategies, ALPA "never once" responded to him in writing.[375] Conversely, Mr. Wilder never demanded a written explanation for ALPA's rejection of his legal theories. Instead, when legal strategies, which he considered critical to TWA pilots' chances of success, were thwarted by ALPA, he quietly complied with the directive. This conduct created the impression that Roland Wilder, ultimately, was working for ALPA National and not for his actual client, the TWA-MEC.[376] Indeed, the Holtzman correspondence of July 13, 2001, reflects that ALPA's attorneys counted on Wilder being responsive to ALPA National's "concerns" about litigating against APA even when these concerns ran counter to his client's objectives.[377]

The relative ease with which ALPA undermined Wilder's legal strategies is not consistent with Mr. Wilder's obligation to zealously represent his client – the TWA MEC. By letter agreement dated January 17, 2001, and signed by Roland Wilder, Baptiste & Wilder (BW) agreed to represent the TWA MEC. The services to be rendered pursuant to the retainer included representation in court and arbitration.[378] TWA MEC Chairman Robert A. Pastore was the only signatory for the TWA MEC and all retainer payments to BW were made by the TWA MEC.

Given these facts, Wilder's acceptance of ALPA National's directive to drop a lawsuit that he enthusiastically endorsed is inexplicable.[379] Admittedly, ALPA is a highly centralized national union that, instead of local unions, has somewhat less autonomous Master Executive

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[370] Wilder MO Trial at 143.
[371] Wilder MO Trial at 143-44.
[372] Woerth Depo. at 263.
[373] Wilder Depo. (I) at 151-52.
[374] Wilder Depo. (I) at 142; Wilder Depo. (II) at 188.
[375] Wilder Depo. (I) at 158; Wilder Depo. (II) at 90, 121.
[376] Pastore Depo. at 188.
[377] Holtzman e-mail to Seth Rosen dated July 13, 2001 at ALPA 052455.
[378] Wilder Depo. (II) at 29-30.
[379] Contemporaneous correspondence further reflects ALPA National's power to induce Mr. Wilder to engage in activities he would prefer to abstain from. In the immediate aftermath of ALPA's destruction of his litigation strategy, David Holtzman wrote to Clay Warner and Marta Wagner: "Roland says that he is not jumping ship and will present the grievance if we feel that there is a reason for him doing that. He's not anxious to do it but will if we want him to." Holtzman e-mail to Warner and Wagner dated October 26, 2001 at ALPA 044615.

Councils. Nevertheless, federal courts have recognized ALPA's Master Executive Councils ("MECs") as separate and independent legal entities. In discussing the individual and independent nature of these MECs, one court provided various compelling reasons as to why, under the ALPA structure, these organizations are recognized as separate legal entities:

> Each of ALPA's operating airlines has a Master Executive Council (hereinafter "MEC") which is composed of elected pilot representatives from the pilot employees at each airline. The MECs function as the coordinating council for the ALPA-represented employees at each airline. Most significantly under this structure, the individual MECs do not represent the pilot employees at the other ALPA-represented carriers. **Furthermore, these MECs have their own separate legal counsel.**

Nellis v. Air Line Pilots Association, 144 F.R.D. 68, 70 (E.D. Va. 1992) (emphasis added).

In regard to the retention of separate legal counsel, the court determined that "these independent merger counsels are solely accountable to the individual MEC they represent." *Id.* Other courts in various jurisdictions have consistently recognized MECs in a similar manner. *See Delta Air Lines, Inc. v. Air Line Pilots Association*, 238 F.3d 1300, 1303 (11th Cir. 2001) (recognizing MEC as "the governing body for Delta's ALPA-represented pilots"); *Mann v. Air Line Pilots Association*, 848 F. Supp. 990, 992 (S.D. Fla. 1994) (recognizing MEC as "separate governing body for the pilots of each carrier" that ALPA represents.); *Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 636 (2d Cir. 1985) (recognizing MECs for Pan Am pilots and National Pilots as separate unions involved in the litigation). In my opinion, the evidence supports the conclusion that ALPA induced Wilder to violate his duty to zealously represent his client.

C. IMPACT OF ALPA's REJECTION

Wilder advised the TWA pilots that, without the "best efforts" litigation, the TWA pilots would have a "large problem."[380] He later confirmed, in a letter dated October 31, 2001, that ALPA National's disapproval of the legal strategy compelled the TWA pilots' capitulation to the harshly unfair proposal of the APA.

> After it became apparent that ALPA National would not authorize the pursuit of injunctive relief, I said that the plan I had outlined would not succeed and that no other alternatives were available to the MEC.[381]

Although the October 31 letter described the litigation as having "less than a 50 percent chance of leading to an acceptable seniority solution," Wilder had previously advised TWA MEC representatives that the litigation would, at a minimum, stall the integration process for a lengthy period of time, thereby providing the TWA pilots the necessary leverage to obtain a

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[380] Pastore Depo. at 194.
[381] Defendants' Ex. 43.

more equitable seniority integration.[382] Moreover, Wilder's own October 31st letter references a memorandum dated August 16, 2001, in which he urged ALPA to "act promptly" to authorize litigation and that there was a "substantial likelihood of success." Of course, the outcome of any litigation is difficult to predict with certainty. Nevertheless, in view of Wilder's professional stature, the time he devoted to the project, and the confidence he expressed in its outcome, it is reasonable to conclude that the litigation had the potential to materially enhance the seniority prospects of the TWA pilots.

That the TWA pilots' adversaries may have had defenses to the legal strategies proposed by Wilder does not afford an adequate explanation for ALPA's consistently rejectionist posture or support a claim that the rejections did not inflict damage on the TWA pilots. As Mr. Wilder explained:

> In the labor field, litigation, arbitration, mediation are means to an end, and that end is an agreement between the contesting entities. So leverage is the most critical component that you try to achieve in negotiating any agreement involving rates of pay, rules, working conditions, seniority and the like. ... I thought if the transaction was, in your words, held hostage for a short period of time, that would have been enough.[383]

Wilder's litigation strategies to enhance his clients' seniority position had a proven track record even where the litigation itself was not ultimately successful:

> Even though the litigation ultimately was unsuccessful, we gained, and that's the name of the game; where you end up at the end, not whether you win litigation battles or arbitration along the way.[384]

D. RATIONALE FOR ALPA's REJECTION OF TWA-MEC LITIGATION STRATEGY

ALPA's peremptory directive to Wilder to drop a lawsuit that had been financed and authorized by the TWA MEC evidences ALPA's extreme hostility to the TWA pilots' interests. The risk/benefit analysis was for the TWA pilots to make and they had received expert counsel concerning the pertinent issues. By contrast, ALPA had no legitimate interest at stake since it would inevitably lose representation of the TWA Pilots and Woerth had apparently obtained no legal counsel prior to imposing his veto.

Significantly, ALPA's persistent determination to thwart the implementation of TWA-MEC strategic decisions also constituted a violation of its established policy of Independence-Plus. The arbitrary and capricious nature of ALPA's conduct was not, in my opinion, consistent with its duty of fair representation.

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[382] Hollander Interview.
[383] Wilder MO Trial at 142-43, 148.
[384] Wilder MO Trial at 151.

In the context of ALPA National's continuing subversion of the TWA pilots' strategies to avoid a disastrous seniority integration, it is not surprising that, as early as August 21, 2001, an ALPA legal memorandum anticipated that ALPA would be subject to a DFR litigation by the TWA pilots.[385] The reason why ALPA, given this expectation, continued a course of conduct that would have the effect of inducing such costly litigation is indicated in the same memorandum, which identifies merger with APA as one of ALPA's "Strategic Initiatives."

"Independence-Plus" was not the only fundamental ALPA policy that was contemporaneously subordinated to ALPA's paramount goal of expanding its ranks. ALPA's constitution reflects a policy of expelling strikebreakers from ALPA and prohibiting their exercise of membership rights and privileges.[386] In 1996, ALPA's firm adherence to this policy derailed negotiations to obtain the merger of the Independent Association of Continental Pilots (IACP) into ALPA. Nevertheless, under Captain Woerth's stewardship in the aftermath of ALPA's Unity Resolution, ALPA dropped its opposition to strikebreakers as members in order to persuade the Continental pilots to join their ranks.[387] ALPA also assured APA that the issue of five American pilots who had been "expelled for life" for their disloyalty in taking the American group out of ALPA could be "easily resolved."[388] ALPA's driving interest in expansion also led it into violating the AFL-CIO Constitution when ALPA encouraged pilots to de-certify a sister AFL-CIO affiliate, the International Brotherhood of Teamsters, at American Trans Air, Inc.[389]

Throughout 2001, ALPA had a steady eye on developments at APA. ALPA's representation department monitored APA internal elections[390], collective bargaining process[391], APA's flirtation with the Teamsters' affiliation[392], and endorsements of ALPA by APA officials.[393] Pro-ALPA American pilots kept ALPA apprised of political developments within APA, met with ALPA at its DC headquarters[394], met with Duane Woerth in Las Vegas[395], and were promised reimbursements for their pro-ALPA campaign expenses.[396]

Because of this careful monitoring, ALPA was keenly aware that American pilots were "quite angry" that ALPA continued to represent the TWA pilots.[397] ALPA was also aware that

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[385] Jonathan Cohen memorandum dated August 21, 2001 at ALPA 053453-54.

[386] Under the ALPA Constitution, members are specifically prohibited from engaging in strikebreaking and subject to discipline, fine, or expulsion. (ALPA Constitution and By-laws Article VIII, Section 1(A)(5)). Pilots expelled for strikebreaking should not be accepted as members "until approved by the Local Council and Master Executive Council having jurisdiction and Vice President-Administration/Secretary and by action of the Executive Board, at a meeting, subject to such conditions or fines as the Executive Board may fix." Article II. Sec. 4 D and E (1).

[387] AEC Report at ALPA 040644.

[388] AEC Report at ALPA 040644.

[389] *American Trans Air, Inc.*, 26 N.M.B. No. 27 (1999); Rachford Depo. at 33; *International Brotherhood of Teamsters and Air Line Pilots Association*, Case No. 98-63 (Arb. Lesnick, November 17, 1998); Case No. 98-63 Appeal (Sweeney, December 16, 1998).

[390] ALPA 038491.

[391] ALPA 039391.

[392] ALPA Rindfleisch e-mail July 27, 2001 8:30:13 a.m.

[393] ALPA Rindfleisch e-mail July 27, 2001 8:34:18 a.m.

[394] Clark Depo. at 121-22.

[395] Clark Depo. at 160-61.

[396] ALPA 052293.

[397] Rindfleisch, ALPA 039345 (July 27, 2001).

its continued representation of the TWA pilots was the basis for an energetic campaign to get American pilots to revoke their pro-ALPA authorization cards.[398]

E. ONGOING VIOLATIONS OF INDEPENDENCE-PLUS

Other events during this time frame illustrate ALPA National's continuing interference with TWA-MEC decisionmaking in derogation of ALPA's established Independence-Plus policy and ALPA's hostility toward independent-minded TWA MEC representatives.

By letter dated October 17, 2001, ALPA National aggressively intervened in the TWA-MEC's efforts to oversee its own merger committee and otherwise manage its affairs.[399] Woerth also sought to compel the presence of David Holtzman – an ALPA source for confidential MEC information – at MEC meetings. The correspondence, drafted by ALPA Legal, had the objective of impressing on the TWA MEC representatives that they would "have to stay on the present course unless the [Executive Council] says otherwise."[400]

Two days later, Duane Woerth wrote again demanding advance written notice of all special MEC meetings and threatening the prospect of "individual damage claims for which no indemnity or defense by the Association" would be available, unless the TWA MEC followed the procedures laid out in his October 17 letter.[401] These threats mirror a tactic later employed against TWA MEC representative Sally Young by Clay Warner. Attorney Warner was heavily involved in the re-drafting of Woerth's October 17 letter and sought to make the letter "more forceful."[402]

In late October, the TWA MEC voted 5 to 1 to reject the proposed Supplement CC with Captain Steve Rautenberg as the sole dissenting vote. Soon thereafter, ALPA National deposed the sitting MEC and collapsed all representation into a single domicile.[403] With the TWA MEC thereby reduced to two members – Steve Rautenberg and Sally Young – ALPA President Duane Woerth gave 24-hours notice of a meeting on November 7, 2001[404], to re-consider the Supplement CC proposal.[405] Notice was simultaneously provided by Duane Woerth to APA President Darrah and a letter drafted by David Holtzman for Pastore's signature stating that there was "reason to believe" that the TWA MEC would accept APA's integration proposal.[406]

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[398] ALPA Rindfleisch e-mail November 26, 2001 10:26:42 a.m.
[399] Woerth letter to Pastore dated October 17, 2001 at ALPA 02950.
[400] Warner e-mail dated October 16, 2001 at ALPA 044572.
[401] Woerth letter to Pastore dated October 19, 2001 at ALPA 030283.
[402] Warner e-mail dated October 16, 2001 at ALPA 044572.
[403] Young Depo. at 116. In a prior vote, on July 26, 2001, the TWA MEC voted unanimously to maintain all TWA domiciles until final absorption into AA. Seltzer notes, July 26, 2001, at ALPA 027131.
[404] Woerth had never before called a TWA-MEC meeting. Holtzman Depo. at 225. In advance of this meeting, Woerth violated standard ALPA negotiating protocol by directing that David Holtzman – without authorization of the TWA-MEC – negotiate changes to the merger proposal with AA Vice President of Employee Relations Brunddage. Holtzman Depo. at 237-40.
[405] Holtzman Depo. at 224; Young Depo. at 117.
[406] Holtzman e-mail to Clay Warner dated November 6, 2001 at ALPA 044629-32.

ALPA knew that, given Rautenberg's interest in accepting Supplement CC, the temporary restructuring of the MEC provided a window of opportunity for the proposal to be adopted.[407] A snapshot of the pilot group gave Rautenberg a majority vote on the newly constituted two-person MEC.[408] Thus, the meeting called by Woerth presented Rautenberg with the power to single-handedly "reconsider" and approve what the full MEC "had previously rejected."[409] The MEC's efforts to prevent Rautenberg, as a single individual, from controlling the fate of the TWA pilot group had been previously thwarted by ALPA President Duane Woerth.[410]

Nonetheless, Ms. Young refused to second a motion for re-consideration and TWA MEC Chairman Pastore resisted pressure from ALPA National to waive the seconding requirement.[411] In response to Ms. Young's adherence to the MEC's existing position established just three weeks earlier[412], Mr. Warner screamed at her and threatened that she would get sued by her fellow pilots and that ALPA would provide her with no assistance.[413]

Attorney Warner's treatment of Ms. Young was so overbearing, that many of the attending TWA pilots called on him to stop the abuse. Warner's conduct also led to a written complaint from Ms. Young in which she requested that David Holtzman conduct an investigation into Mr. Warner's use of "coercive threats."[414] While Holtzman forwarded Ms. Young's e-mail to Mr. Warner, the request for an investigation was never acted upon.[415]

Young, consistent with the MEC's standing position, was intent on preserving the TWA pilots' right to engage in further legal challenges to the process by which seniority integration had been achieved.[416] It would be reasonable to assume that ALPA knew that the rump TWA-MEC's approval of the harshly unfair integration proposal would have insulated ALPA from litigation. *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533-34 (7th Cir. Ill. 1992) *cert. denied* 510 U.S. 861, 114 S. Ct. 175 (1993).

In my opinion, ALPA's resort to threats of individual liability against TWA MEC representatives is evidence of arbitrariness and bad faith. Individuals, even union officers such as the TWA-MEC representatives involved in this instance, are generally not liable for DFR claims as a matter of law. *See e.g.*, *Morris v. Teamsters Local 819*, 169 F.2d 782, 783 (2d Cir. 1999); *Felice v. Sever*, 985 F.2d 1221, 1230 (3d Cir. 1993); *Borowiec v. Boilmakers Local 1570*, 899 F.2d 23, 28 n.3 (1st Cir. 1989); *Montplaisir v. Leighton*, 875 F.2d 1,4 (1st Cir. 1989); *Evangelista v. Inlandboatmen's Union*, 777 F.2d 1390, 1400 (9th Cir. 1985); *Carter v. Smith Food King*, 765 F.2d 916, 920-21 (9th Cir. 1985); *Ramsey v. Signal Delivery Serv., Inc.*, 631 F.2d

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[407] Warner Depo. at 171, 174; Woerth Depo. at 276-77; Rautenberg e-mail to David Holtzman dated October 30, 2001 at ALPA 050051.
[408] Warner Depo. at 177.
[409] Warner Depo. at 157, 177.
[410] Warner Depo. At 159.
[411] Benzel Interview; Holtzman Depo. at 243.
[412] Young Depo. at 128.
[413] Young Depo. at 118.
[414] Young e-mail to Holtzman dated November 11, 2001; Holtzman Depo. at 245-46, Exhibit 177.
[415] Holtzman Depo. at 245-46; Warner Depo. at 180.
[416] *Id.* at 118, 129.

1210, 1212 (5th Cir. 1980); *See Also, Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 616 (1981); *Moore v. Electrical Workers (IBEW) Local 6*, 2000 U.S. App. LEXIS 16394 (9th Cir. 2003).

VI.

LEGISLATIVE EFFORT

Commencing on or about September 28, 2001, the TWA MEC, in cooperation with Missouri Senator Christopher Bond, launched a major effort to obtain legislation that would mandate an Allegheny-Mohawk seniority integration process for the AA and TWA employee groups known as the Airline Workers Fairness Act (AWFA).[417] An experienced lobbyist expressed his view that the legislation had "sufficient merit and political support to pass in both the House and the Senate."[418] By dint of Senator Bond's support and the TWA pilots' grassroots lobbying effort, the United States Senate adopted the legislation.[419] In terms of its impact at the negotiating table, the AWFA "gave the APA some impetus to enter into direct negotiations with the TWA folks" and "put a little more on the table to get this resolved."[420] Subsequently, however, a Senate-House conference stripped the AWFA provision from the legislation.

There is substantial evidence that indicates that, not only did ALPA fail to support the AWFA legislation, but actually worked behind the scenes to defeat it. Such conduct is utterly incongruous with ALPA's affirmations during this time frame that providing pilot groups with access to political power via the AFL-CIO was one of ALPA's principal assets.[421]

Roland Wilder testified that he did not know whether ALPA put its full strength behind the legislative effort and that he did not perceive ALPA's Legislative Affairs Department to be involved.[422] TWA pilot representatives who engaged in lobbying efforts on Capitol Hill were advised by legislators and their staffers that ALPA National did not support the legislation and wanted the legislators to "ignore" the TWA pilots.[423] ALPA Director of Government Affairs Paul Hallisay actually stated that ALPA's Legislative Affairs Department and legal staff were doing **nothing** to support the lobbying effort.[424] Woerth appears to have made no effort to obtain the political support of the AFL-CIO.[425] Testimony concerning Duane Woerth's angry reaction to the TWA pilots' lobbying efforts supports the conclusion that ALPA actions in this regard were motivated by hostility rather than disinterest.[426]

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[417] ALPA 029789-029797.
[418] Estes Associates letter to Matt Comlish dated October 18, 2001 at ALPA 029924.
[419] Wilder Depo. (II) at 193-94.
[420] Brundage Depo. at 50, 76.
[421] Woerth on August 2, 2002 to DFW Domicile – ALPA 040661, 68.
[422] Wilder Depo. (I) at 146-47; Wilder Depo. (II) at 174-75.
[423] Arthur Depo. at 45, 47, 49.
[424] Arthur Depo. at 53, 57; Wilder Depo. (II) at 175.
[425] Woerth Depo. at 297.
[426] Rachford Depo. at 52.

In characterizing the legislation as a long shot, ALPA attorney David Holtzman cited the fact that calls from AA employees outnumbered TWA pilots calls by 10 to 1.[427] Yet ALPA apparently made no effort to rally its significantly larger membership base to the cause.[428]

If ALPA did, in fact, deliberately withhold its support from, or worked to undermine, the TWA pilots' lobbying efforts, it would be difficult to describe this conduct as anything other than arbitrary and in bad faith.

In terms of causation, ALPA LEC 003 Secretary-Treasurer James Arthur, who was actively engaged in the TWA pilot lobbying effort, attributes the failure of the legislative effort to ALPA.[429] This allegation draws considerable support from the fact that, a little over six years later, substantially similar legislation was enacted as part of the Consolidated Appropriations Act of 2008 (Section 117 of Public Law No. 110-161). The Act passed in the House of Representatives by a 241 to 178 margin and in the United States Senate by an 81 to 12 margin and was signed into law by President George W. Bush on December 26, 2007.

VII.

WOERTH'S "GET REAL" COMMENTS

Due to its potentially devastating impact, evidence that Duane Woerth told APA pilots that he advised TWA pilots to "get real" is worthy of separate treatment. The evidence indicates that, on April 5, 2001, -- just days after the scope waiver – ALPA President Duane Woerth, in a meeting with APA members and representatives, stated his view that the TWA pilots would have to "get real" with respect to their seniority integration bargaining proposals and that they had "unrealistic goals."[430]

It is hard to overstate the near-total emasculation of ALPA's bargaining posture that such comments from the ALPA National president would have created. ALPA is perhaps the most centralized union in the airline industry. Unlike AMFA, the IAM, the TWU, or the IBT, there are no local unions. Virtually all political and financial power resides with the National structure. For President Woerth to communicate to APA that he did not support the TWA pilots' bargaining posture was to cut them off at the knees. In my view, the comments would be worse in their impact than an attorney communicating to the counsel of his client's adversary that he placed no store in his own client's position.

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[427] Holtzman e-mail dated October 4, 2001 at ALPA 038907.
[428] Malandro letter dated October 31, 2001 at ALPA 05372-73.
[429] Arthur Depo. at 57-58.
[430] Reifsnyder Depo. at 6; Warner Depo. 125-27, Exhibit 144; Pastore Depo. at 116, 125; Warner e-mail April 16, 2001 at ALPA 053475; Keith O'Leary April 18 e-mail covering DFW Domicile news covering April 4-6 meeting including April 5, 2001 briefing by Duane Woerth at 036537-APA SFO Vice Chairman posting with cover letter from Scott Sherrin dated April 17, 2001 at ALPA 028115.

ALPA attorney Clay Warner knew that TWA pilots saw Woerth's comments as a DFR issue, but nevertheless advised ALPA that no response was "necessary or appropriate."[431] Warner had no recollection of any effort to investigate whether Woerth had actually made these statements.[432] Nor could Warner recall any response made to the complaining TWA pilot who brought the matter to ALPA's attention.[433] By way of explaining the lack of a response, Warner testified:

> I guess none of us can come up with an answer that would be satisfactory to this gentleman, that would do anything other than make him more angry than he obviously already is.[434]

In my estimation, Mr. Warner's testimony that a response would only make the complaining TWA pilot "more angry" strongly indicates that Woerth did make these astonishing statements.[435] Testimony that Woerth assumed an "almost disinterested" attitude in the only AA/TWA pilot negotiation he attended is consistent with an intent to telegraph to APA that the TWA pilots did not have the support of ALPA.[436]

Woerth's comments reflect that ALPA's goal at this time period was improving relations with APA and the American pilots even at the cost of fatally undermining the TWA pilots' negotiating position. Its actions in this regard must be considered arbitrary and in bad faith, particularly in light of its obligation under ALPA Merger Policy to press APA to accept a procedure that would enable the American and TWA pilots to obtain a fair and equitable resolution of their seniority dispute.[437]

CONCLUSION

It is my opinion that ALPA not only failed to pursue potentially effective strategies in defense of the TWA pilots' seniority interests, but also actively undermined the efforts of the TWA pilots to defend these same interests. I also conclude that there is substantial evidence that ALPA's failure to pursue and/or interference with these strategies was motivated by its desire to acquire representation rights for the AA pilots. It is my conclusion that ALPA's conduct toward the TWA pilots was arbitrary, discriminatory, and in bad faith.

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[431] Warner Depo. at 127, Exhibit 144 --Warner e-mail April 16, 2001 at ALPA 053475.
[432] Warner Depo. at 127.
[433] Warner Depo. at 129.
[434] Warner Depo. at 130.
[435] The record contains additional evidence of ALPA National's willingness, during the Woerth administration, to undercut an MEC's position by communicating its disagreement with the MEC to a negotiating adversary. Rachford Depo. at 119, 125.
[436] Baehler Depo. at 27.
[437] Rachford Depo. at 55-56, Ex. 20.

DATA AND OTHER EVIDENCE CONSIDERED FOR PURPOSES OF PREPARING REPORT AND RENDERING OPINION

1. Deposition Transcript of LeRoy "Bud" Bensel
2. Deposition Transcript of Howard Hollander
3. Deposition Transcript of Ted Case
4. Deposition Transcript of Sally Young
5. Deposition Transcript of James Arthur
6. Deposition Transcript of Bob Pastore
7. Deposition Transcript of Ronald Rindfleisch (I and II)
8. Deposition Transcript of Jerry Mugerditchian
9. Deposition Transcript of Mark Hunnibell
10. Deposition Transcript of John Clark
11. Deposition Transcript of Sherry Cooper
12. Deposition Transcript of James Baehler
13. Deposition Transcript of Jalmer Johnson (I and II)
14. Deposition Transcript of Roland Wilder (MO Trial)
15. Deposition Transcript of Roland Wilder
16. Deposition Transcript of Seth Rosen
17. Deposition Transcript of Randy Babbitt
18. Deposition Transcript of David Holtzman
19. Deposition Transcript of Marta Wagner
20. Deposition Transcript of Jeffrey Brundage
21. Deposition Transcript of Clay Warner
22. Deposition Transcript of Ron Reifsnyder
23. Deposition Transcript of Michael Glanzer
24. Deposition Transcript of Richard Seltzer
25. Deposition Transcript of Steve Tumblin
26. Deposition Transcript of Tom Rachford
27. Deposition Transcript of Duane Woerth
28. Interview with Bud Bensel
29. Interview with Howard Hollander
30. Interview with Bob Pastore
31. Documents produced by ALPA in this litigation
32. Documents produced by Plaintiffs in this litigation
33. Documents produced by Allied Pilots Association in this litigation
34. TWU/IAM Kasher Arbitration Award
35. Mesaba and NWA 1113 transcripts
36. All other documents cited to in the report

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Amherst College, B.A. 1984
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New York University 1987
School of Law, J.D.
(NYU Law Review)

Professional Experience:

Partner, Seham, Seham, Meltz & Petersen, LLP (1994-present)

Associate, Seham, Klein & Zelman (1988-1993)

Associate, Rosenman & Colin (1987-1988)

General Counsel, American Maritime Safety, Inc. (1994-present)
White Plains, NY

Appeared before the National Transportation Safety Board and a Presidential Emergency Board (PEB)

Frequent lecturer on such topics as the Railway Labor Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Fair Labor Standards Act, drug testing issues, U.S. Coast Guard Regulations and the development of policies to prevent sexual harassment in the workplace.

Admissions: State Courts of New York and New Jersey (1988)

Circuit Courts of Appeal:

- Second Circuit
- Fourth Circuit
- Fifth Circuit
- Eighth Circuit
- Ninth Circuit
- Eleventh Circuit
- District of Columbia Circuit

Supreme Court of the United States

Memberships:

American Bar Association
ABA Labor and Employment Law Section
New York State Bar Association

AIRLINE UNION REPRESENTATION

Aircraft Mechanics Fraternal Association (AMFA) (1988-present)

- Alaska Airlines
- Atlantic Coast Airlines
- American Trans Air
- Horizon Air
- Mesaba Airlines
- Northwest Airlines
- United Airlines
- US Airways Shuttle (Trump Shuttle)

Airline Professionals Association – IBT Local 1224 (2001-2007)

Allied Pilots Association (APA) (1988-1992)

Association of Professional Flight Attendants (APFA) (1994-1999)

FedEx Pilots Association (FPA) (1999-2002)

Independent Association of Continental Pilots (IACP) (1993-2001)

National Pilots Association (NPA)

Professional Flight Attendants Association (PFAA) (2003-2006)

US Airline Pilots Association (USAPA) (2008)

AIRLINE REPRESENTATION

Varig Brazilian Airlines (1988-present)

SAS Scandinavian Airlines

El Al Airlines

Aer Lingus

RLA-RELATED PUBLICATIONS AND PROFESSIONAL SEMINARS

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