STATEMENT OF

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BEFORE

THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

DECEMBER 16, 2009

PROTECTING EMPLOYEES IN AIRLINE BANKRUPTCIES

Chairman Cohen, Chairman Conyers, Ranking Members Smith and Franks and other members of the committee, I am grateful for the opportunity to give testimony concerning the treatment of airline employees in a business bankruptcy. I am here to ask you to put an end to a particular inequity concerning the application of Bankruptcy Code and its effect on a single industry employee group – namely airline employees. It is not a question of the essence or merit of bankruptcy law as we fully support the concept of permitting companies to restructure; rather it is a question of inequities in Bankruptcy Code application.

As a US Airways Captain with over 26,000 flight hours spanning 38 years of flying, I have personally witnessed the effects of this inequity: I experienced two bankruptcies that took 50% of my salary and up to 60% of my co-workers' salaries, and my pension was terminated. The US Airways pensions, like all pensions, were earned at the negotiating table year after year. They are now worth pennies on the dollar, and the burden of all remaining pension costs have been shifted to the PBGC and the American taxpayer.

Just between the recent US Airways and United Airlines bankruptcies, 183,852 pensions were lost. At US Airways, the average age of the pilots was 51years old. Our pilot group witnessed family uprooting, the selling of houses, divorce and even suicide.

To add insult to injury, according to an October GOA report, the US Airways pensions disappeared at a time when:

- US Airways CEOs received over $120 million, plus
- US Airways CEOs collected over $40 million in stocks, plus
- US Airways CEOs collected another $30 million in reimbursement to pay their income taxes.

In addition, only fourteen months after the carrier exited bankruptcy on September 16, 2005, US Airways made an $8 billion bid for Delta Airlines on November 16, 2006. Later that bid was raised to $9.8 billion.

From 1938 to 2008, the entire airline industry's sum total net profit is negative $16 billion. The early 1980s, the early 1990s and the last eight years were all marked by a wave of airline bankruptcies. There have been over 100 airline bankruptcies since industry deregulation in 1978, and eleven airline bankruptcies in 2008 alone.

Given this track record in post de-regulation, we find it telling that Judge Feinberg of the United States Court of Appeals for the Second Circuit, while ruling on the question whether the Bankruptcy Act allows rejection of a collective bargaining agreement, stated in 1975, *"Although the Board cites a few cases to justify its fear that businesses will swarm into bankruptcy*

proceedings in order to free themselves of labor agreements; we doubt that many will attempt to do so." [1]

I point out these facts to demonstrate that airline corporations have comparatively "easy access" to the bankruptcy process and have shown a willingness to go there and decimate employee collective bargaining agreements. Bankruptcy has played a significant role in the systematic assault on the airline pilot profession. The discriminatory nature of Bankruptcy Code application has caused substantial frustration leading pilots to abandon the industry in droves.

This devastation to the airline pilot profession has raised important safety concerns, which prompted the House to recently pass the Airline Safety and Training Improvement Act by a vote of 409 to 11. During the hearings it came to light that the inexperienced First Officer involved in the Continental Connection tragedy in Buffalo, New York, was earning an annual salary of $16,200. Due to the mass abandonment of the profession by experienced pilots, coupled with entry-level wages that qualify pilots for food stamps, hiring standards have dropped to bare minimums. My friend and colleague, fellow US Airways Pilot Captain Chesley B. Sullenberger, III, testified in congressional hearings, *"I attempt to speak accurately and plainly, so please do not think I exaggerate when I say that I do not know a single professional airline pilot who wants his or her children to follow in their footsteps."*

To understand and address the discriminatory treatment of employees in the airline bankruptcy context, we will divide all unionized labor into three groups:

1. **Railroad employees –** fall under Bankruptcy Code 1167 [covered by the Railway Labor Act (RLA)]
2. **All other employees except railroad and airline** employees **–** fall under Bankruptcy Code 1113 [covered by National Labor Relations Act (NRLA)].
3. **Airline employees**, who are also covered under the Railway Labor Act **–** due to some historical anomaly <u>DO NOT</u> fall under Bankruptcy Code 1167, rather Bankruptcy Code 1113.

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[1] *Docket Nos. 74-1872, 74-2154, Nos. 581, 811 - September Term, 1974 US Court of Appeals for the Second Circuit*

Group 1:

For RLA-covered **railroad** employees only; Bankruptcy Code Section 1167 provides that neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act. A House Judiciary report stated that, "*the subject of railway labor is too delicate and has too long a history for this code to upset established relationships. The balance has been struck over the years. This provision continues that balance unchanged."* [2]

The rationale for 1167 – the delicate nature of labor relations – is no less applicable to airline employees than it is to railroad employees. Nevertheless, RLA-covered airline labor is deprived of the benefits of 1167 and has been lumped in with NLRA employees – with one critical distinction.

Group 2:

NLRA employees have the right to strike in the event their contract is rejected; airline employees do not. Of course, no one is in a rush to exercise that right. It is fully understood that it may potentially damage both the employer and the employees. Nevertheless, it is the potential for exercising the right to strike that allows a union to temper the consequences of what is otherwise a very one-sided 1113 process.

Group3:

Airline Employees – not only are they denied the RLA benefits of 1167 **–** under the RLA, airline employees are denied the ability to use the potential threat of strike to moderate the effects of the Bankruptcy Code's Section 1113 process. The situation continues to exist although the Supreme Court has held in the larger context of collective bargaining under the Railway Labor Act: *"Only if both sides are equally restrained can the Act's remedies work effectively."*[3]

The fact is ONLY airline employees are subject to the coercive 1113 process without any recourse, without access to 1167, without a right to strike, without any means to temper the employer's rapacity. Thus, airline employees **–** and only airline employees **–** can be stripped of their contractual entitlements with impunity.

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[2] *Case Nos. ST91-83338, ST91-84604, ST91-84603 Chapter 11, 1993 US Bankruptcy Court for the Western District of Michigan, Northern Division.*

[3] *Detroit and Toledo Shoreline Railroad Co. v. United Transportation Union*, 396 U.S. 142, 155 (1969).

This was not the intent of the framers of the Railway Labor Act, who sought reciprocal rights in terms of changes in the status quo. It was not the intent of the framers of 1113, who bestowed upon labor unions an ability to seek moderation of their employers' demands by ensuring their right to strike. There is simply no reason or justification for this discriminatory treatment of a single industry's employees.

In the context of union elections, the National Mediation Board has come to recognize that certain rules that have been applied to RLA employees are an historical anomaly rather than a product of conscious policy-making. Thus, the NMB has published a proposed rule change that would allow RLA union elections to be determined by a majority of those who cast votes; the current rule automatically treats non-voters as having cast an anti-union vote. The NMB cogently explained there was no justifiable policy reason for treating railroad and airline employees differently from the entire population of other private industry employees.

Airlines were included under the RLA because they, along with railroads, were seen to be vital elements of the national transportation system and each was characterized by "delicate" labor relations. The relative importance of the airline industry to the national economy has soared while the railroad industry has stagnated – any legitimate policy rationale for excluding airline employees from the 1167 process disappeared a long time ago.

In summary, relative to the "fair treatment of Airline Employees in a Business Bankruptcy":

1) Railroad employees for well documented reasons are not subject to Bankruptcy Code Section 1113, where bankruptcy courts can reject collective bargaining agreements; rather, pursuant to Bankruptcy Code Section 1167, they are subject to the collective bargaining process mandated by Section 6 of the Railway Labor Act.

2) NLRA-governed labor unions, representing nearly all other organized private industry workers in the United States, are subject to 1113; however, a rejection of their collective bargaining agreement gives them the right to strike, a right which serves to temper employers' abuse of the 1113 process.

3) Airline employees have neither the benefit of Section1167 and the Section 6 negotiating process nor the ability to strike if their contract is rejected.

Airline employees stand alone, and this vulnerability has been exploited time and time again – with no indication that it will cease. The current situation has led to grave, unintended consequences, including the near obliteration of professional airline careers on which the public depends for safe air transportation. It is well past time to remedy the discriminatory treatment of airline employees and address the fact that they are stripped of their contractual rights with impunity.

The US Airline Pilots Association requests that Congress fix this discriminating inequity by treating all employees covered by the Railway Labor Act equally and subject to Bankruptcy Code 1167. Proposed language has been drafted and delivered to Congressman Cohen and is attached to this testimony.

Thank you for your kind attention and for the opportunity to share my perspective with this Committee. I will be happy to answer any questions.

Respectfully submitted,

Captain Arnie Gentile
Government Affairs Chairman, US Airline Pilots Association

Captain Arnold Gentile
December 16, 2009

RECOMMENDED AMENDMENTS TO 11 U.S.C §§ 365 & 1113

(New Language is Underscored)

11 U.S.C. § 1113(a) is amended as follows:

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section. Notwithstanding any provision in this section or any other section of U.S. Code Title 11, a debtor in possession or trustee of a debtor covered by title II of the Railway Labor Act may not assume or reject a collective agreement covered by such Act, and the wages or working conditions of employees covered by such collective agreement may only be changed or modified in accordance with Section 6 of such Act.

11 U.S.C. § 365(a) is amended as follows:

Except as provided in Sections 765and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. Notwithstanding any provision in this section, with respect to a debtor covered by title I or title II of the Railway Labor Act, neither the court nor the trustee may change the wages, or working conditions of employees of the debtor established by a collective agreement that is subject to such Act except in accordance with Section 6 of such Act.