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AMERICAN WORKERS IN CRISIS: DOES THE CHAPTER 11 BUSINESS BANKRUPTCY LAW TREAT EMPLOYEES AND RETIREES FAIRLY?

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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AMERICAN WORKERS IN CRISIS: DOES THE CHAPTER 11 BUSINESS BANKRUPTCY LAW TREAT EMPLOYEES AND RETIREES FAIRLY?

THURSDAY, SEPTEMBER 6, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:15 a.m., in room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Sánchez, Watt, and Cannon.

Also present: John Conyers, Jr..

Staff present: Susan Jensen-Lachmann, Majority Counsel; Zachary Somers, Minority Counsel; and Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. Good morning. This hearing on the Committee of the Judiciary, Subcommittee on Commercial and Administrative Law will now come to order. And I apologize for starting this hearing late.

I will now recognize myself for a short statement.

Earlier this week, the Nation celebrated Labor Day, a special day dedicated to the social and economic achievements of American workers. Unlike most other national holidays that typically commemorate a particular person or historic event, Labor Day is a tribute to the American worker. As Samuel Gompers, founder and longtime president of the American Federation of Labor, observed in 1898, "It is a day when workers can look forward to when their rights and their wrongs would be discussed."

Today's hearing hopefully will provide that long-overdue opportunity. As many of you know, in April of this year, our Subcommittee conducted a hearing on a recent phenomenon in which chief executive officers of businesses going through Chapter 11 bankruptcy proceedings receive outrageously large salaries and bonuses, while they simultaneously slash the wages, benefits and even jobs of workers who are the backbones of those businesses. As one union representative observed, "Chapter 11 is where the rich are getting richer while the poor are getting poorer."

Unfortunately, it appears that this is just one of many inequities that Chapter 11 presents to workers and retirees. The GAO just released a new study today finding that nearly one-half of the Chap-

ter 11 employers who were reviewed in the study terminated their employer-funded benefit plans while they were in bankruptcy. About 28 percent of Chapter 11 employers sought to modify non-pension retiree obligations, such as health insurance plans. And about 29 percent of Chapter 11 employers sought to reject collective bargaining agreements. These statistics I find very disturbing.

Chapter 11 of the Bankruptcy Code was originally enacted to give all participants an equal say in how a business that is struggling to overcome financial difficulties should reorganize. Unfortunately, this laudable goal does not reflect reality, especially for American workers. As the head of the American Bankruptcy Institute has observed, "In case after case, bankruptcy courts have applied congressional intent favoring long-term rehabilitation to sweep aside wage and benefit concessions won at the bargaining table."

Bankruptcy is a last resort, a sort of timeout to give business debtors the breathing room to reorganize their finances. It is not intended to be and should not be used as a pretext to negate contracts negotiated in good faith with employees. If Chapter 11 is being used that way, we have a responsibility to re-level the playing field for American workers whose employers seek Chapter 11 bankruptcy protection.

To help us learn more about these issues, we have six witnesses with us this afternoon. We are pleased to have Kim Townsend, chief steward and member of UAW Local 138; Michael Bernstein, partner at the Arnold & Porter law firm; Fred Redmond, international vice president for human affairs of the United Steelworkers; Captain John Prater, president of the Air Line Pilots Association International; Greg Davidowitch, united master executive council president of the Association of Flight Attendants; and Richard Trumka, secretary-treasurer of the AFL-CIO.

Accordingly, I look forward to the testimony of today's witnesses at our hearing. I would now at this time like to recognize my distinguished colleague, Mr. Cannon, the Ranking Member of the Subcommittee, for his opening remarks.

Mr. CANNON. Thank you, Madam Chair.

Today's hearing raises an issue of common interest to the Members of this Subcommittee: Does Chapter 11 treat employees and retirees fairly when a business in financial trouble seeks protection under the bankruptcy laws?

While there is a shared common interest in the issues to be examined today, there is another shared common interest at stake. That interest is ensuring that businesses can recover and return to viability through a Chapter 11 reorganization.

Today we will hear from a panel of witnesses, the vast majority of which represent organized labor. We must be cognizant of the fact there are additional interests at stake when a business is faced with financial trouble. Unfortunately, many of those interests are not represented here today at the witness table.

A primary purpose of the Nation's bankruptcy laws is to permit a failing company, under court supervision, to rehabilitate and reorganize its business, by allowing it to relieve itself of the burden of oppressive debt and begin with a fresh start. This is a primary

purpose, because returning a company to financial health is preferred to forcing a company to liquidate.

This Nation's big businesses, the employers of the unions represented here today, employ tens of millions of workers, pay tens of billions of dollars in taxes, and keep this Nation competitive in the global economy.

Corporate bankruptcy is not a financial scam, nor is it a gimmick perpetuated by heartless big businesses seeking to avoid paying their bills. The reorganization process as encompassed in Chapter 11 allows troubled companies to keep their doors open, preserving jobs and continuing to give consumers access to their products.

If companies are forced to liquidate, all stakeholders suffer. Employees will lose their jobs; retirees will lose their retirement benefits; and creditors and shareholders will have any potential recovery diminished or eliminated. Liquidation hurts suppliers, customers, taxing authorities, and local communities.

Essential to the reorganization process is the ability of a troubled company to discharge its existing obligations. In some cases, part of those existing obligations are going to be labor legacy costs, including collective bargaining agreements, retiree medical benefits, and defined benefit pension plans.

Section 1113 of the Bankruptcy Code allows a company in Chapter 11 to reject, as a last resort, a collective bargaining agreement. The company can reject a collective bargaining agreement under section 1113 only if good-faith bargaining between the troubled company and the union does not produce an agreement, the statutory prerequisites have been satisfied and the bankruptcy court finds that the "balance of the equities" favors rejection.

Section 1114 of the Bankruptcy Code makes similar provisions for the rejection of retiree medical benefits and pension plans. Rejection of a collective bargaining agreement, retiree medical benefits, or pension plans is not something to be taken lightly. But in many cases, such rejection is the only avenue a failing company has to return to viability and maintain jobs.

Chapter 11 seeks to reconcile equitably many interdependent interests, just like other chapters of the Bankruptcy Code. But the paramount aim of Chapter 11 is to save companies that can still be saved. To reach that aim, we will have to strike the right balance between competing interests.

In the Bankruptcy Abuse Prevention and Consumer Protection Act, we largely, although not completely, left many of the issues to be discussed today alone. Chief among those reasons is that some believe that placing any further restrictions, especially an all-out prohibition, on the termination of collective bargaining agreements or retiree benefits might actually put parties in a far worse position than we currently have under the Bankruptcy Code.

Another concern of further bankruptcy reform in these areas is that labor legacy costs are not really a bankruptcy problem. That is to say that the problems with labor legacy costs that come to the front at the bankruptcy stage were created well before the company was faced with bankruptcy and only arise when a company faces financial problems. We don't want to use the bankruptcy law to fix problems that are really the result of gaps in other areas of the law.

Critics of the bankruptcy laws often complain that the bankruptcy laws are too easy on financially troubled companies. In some areas, this criticism may have some merit and we on this Subcommittee are committed to make sure that the bankruptcy system is not exploited. But it is important that we not overreact.

Many of this country's major corporations, including some of those whose union representatives are before us today, are still in business because the bankruptcy laws—including sections 1113 and 1114—allowed them to reorganize. Moreover, many companies have moved away from the employee benefit practices that are at the heart of today's hearing.

So while we in the minority come to this hearing with open minds and want to work to provide for fair treatment of the American worker and retiree, we also believe that it is important that troubled businesses be able to reorganize even if it means rejecting certain labor legacy costs.

Let me just say, I look forward to hearing from today's witnesses. And the fact that we have some amazing people—I don't know, Mr. Trumka, you may not be aware, but I am a big fan of yours. I worked in the coal industry during the time that you led the union there and made some amazing progress, largely because of your concern and the concern of the union was about mine safety and not necessarily numbers of jobs and optimizing that.

And we just recently had, as you are aware, of course, a tragedy in the area that I used to represent in Utah. This was an awful, awful tragedy. But on the other hand, during the period of time we were trying to save those workers, we had 168 Chinese workers who were drowned because the Chinese don't build dykes that are sufficient to protect their workers. And you are a huge reason why we have such a safe industry today. And we are going to take another look at that, mine safety, as a result of this disaster, which I think is largely a function of local geological factors that we didn't understand at the time that we did the mine plan.

But I appreciate your being here today. Others, you might be interested that I actually worked my way through school by being a Teamster. I am a registered—was a registered Teamster. That said, the bankruptcy laws are complex and they are amazingly robust and bipartisan. And so if we are going to do something with those laws to help on the issues that are before us today, we have to be very clear and very specific about what the opportunities are to improve the law. And I think you will find that there is an openness to do that, although it was so difficult to get the bankruptcy reform bill passed last Congress that I am not sure anybody really wants to open it up, unless we have some great clarity about how and why to do that.

Thank you, Madam Chair. I yield back the balance of the time.

Ms. SÁNCHEZ. I thank the gentleman for his statement.

I would now like to recognize Mr. Conyers, who is a Member of the Subcommittee and the Chairman of the Committee on the Judiciary, for an opening statement.

Mr. CONYERS. Thank you, Madam Chairman.

Good morning, witnesses. It is a pleasure to see you all here. Wow, what a crew. We could talk about a lot of subjects, and sometimes they are all related. I am always happy to have Chris Can-

non with us on whatever our subject matter is in the Committee, because he is one of my best hopes for bipartisanship in the entire 110th Congress, not just on Judiciary Committee. Now, I find out he has a labor background, which no one ever suspected before. [Laughter.]

And so——

Mr. CANNON. If the gentleman would yield, there are a lot of reasons for suspecting it.

Mr. CONYERS. Yes, but we didn't know any. So we are here today to examine under easily the most active Subcommittee on Judiciary the whole question of how bankruptcy ought to be reviewed by this Committee that has jurisdiction over it.

I introduced last year—and Alan Reuther was at the news conference with Senator Bayh and myself—when we introduced a bill that was entitled the Fairness and Accountability in Reorganizations Act, which simply required disclosures of what is really going on in some of the bankruptcy provisions, procedures that occur.

You know, I am reminded that 40 percent to half of all the bankruptcies are due to health-care indebtedness and other problems. And frequently, companies in other cases tell, when they are negotiating, and maybe some of you can confirm this, that if you don't agree with us, we are going into bankruptcy. Bankruptcy is now used as a tool of negotiation to force you into agreements. And it is like, "you know what will happen to you there when you go in a bankruptcy," because a lot of this reorganization business is all corporate-oriented.

And so you never get to an honest collective bargaining negotiation situation because you have the threat of bankruptcy hanging over your head. And this is something that finally in this 110th Congress we are going to be examining very carefully.

I hope somewhere during or after this important hearing we get to discuss a crisis that I have always wanted to raise with those of the brothers and sisters of organized labor who are here this morning. How did we get to this circumstance in American economic policy where two groups can bargain in good faith, sometimes very strenuous bargainings, and then their lawyers battle, their labor leaders and presidents of companies battle, finally there is an agreement signed, and a year-and-a-half later, one party comes back and says, "Oh, by the way, things have gone really into the tank. Things are very bad now. It wasn't what we anticipated. And we want to change the terms of negotiations before."

I don't know what kind of law practice exists where one party can come back to the other and say, "Things are different than we expected, so guess what? We want to cut labor forces. We want to reopen the contract we just signed with great celebration. We are going to have to revisit the pension agreement, the health care. All the legacy costs are now open. And, by the way, we are thinking about, under some so-called free trade laws, we are also thinking about moving out of the place. We may have to close down, even."

And this has never happened before, in my experience that I know about. And I am trying to figure out how this is permissible. The collective bargaining movement is under threat, its very existence. And, of course, there have been no bones about it in this Administration. Let's bust the labor unions. I mean, what do we need

collective bargaining for? Not to mention that the number of people in organized labor is getting smaller and smaller every year. So that is the attitude that I bring to this hearing, and I think it is an extremely important one.

I would just close with this one observation about my friend, Bob Nardelli, who, by his own admission, knows nothing about automobiles. He left Home Depot—well, I won't say they were in the tank, but they lost several billion dollars' worth of value immediately after he left—he got $210 million as a payout, a reward for what he did or a compensation to get him the heck out of Home Depot. And now he is at Chrysler.

Now, here is my suspicion. I have to put it on the record. He is a slash-and-burn guy, if I have ever seen one, and the reason Chrysler has him is because that is what he is good at and that is what they want him to do. The fact that he knows nothing about automobiles is beside the point. What difference? He has an old car in his garage that he likes to pull out to say, "I am with cars. I have been with cars much longer than any of you guys know about."

But this is the nature of the economy, that we have bankruptcy hearings with labor people before this Committee. And I thank the Chairwoman for her indulgence.

Mr. CANNON. Would the gentleman yield?

Mr. CONYERS. Of course.

Mr. CANNON. I want to thank the gentleman, first of all, for his very kind words and his point that the collective bargaining system, its very existence is under threat, is a point that I think is well-taken.

I would just like to establish, since we have my bona fides on the record, I would actually like to take another step. I was part of the group that bought Geneva Steel in Utah, the only integrated steel mill west of the Mississippi River. And as part of that discussion, there was a lot of talk with the financing folks about getting rid of the union, and I was the guy who spiked that idea.

The fact is, there is a place in America for unions. There is a very important place. I try to come down on the side of being thoughtful about what the role of unions would be, but as we go into this hearing, I just want the gentleman to know that, in fact, I am not sure we would call it a bipartisan agreement, but what we want here is an agreement that actually makes sense for America. And America is not just big corporate presidents who make huge salaries. It is also the guys who actually make America work by coming to the job everyday and turning the bolts and doing the other things that are necessary to be done.

For mining the coal, we want to thank the miners of America for the fact that we have lights on right now. And so I just wanted to thank the gentleman again and let him know that I actually care enormously about this issue. And the question is, what do we do to actually create the appropriate balance here?

Thank you.

Mr. CONYERS. Absolutely. And I expected the gentleman to make that kind of statement. I will look forward to working with him, as we do on health care and many other matters.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Today's hearing addresses an area that I believe Congress has long neglected, namely, how American workers and retirees are treated in Chapter 11 bankruptcy cases.

I think it is quite clear that the rights of workers and retirees have greatly eroded over the past two decades, particularly in the context of Chapter 11. Let me just cite three reasons.

First, it is no secret that certain districts in our Nation interpret the law to favor the reorganization of a business over all other priorities, including job preservation, salary protections, and other benefits. Part of the problem is that the law is simply not clear, leading to a split of authority among the circuits.

This is particularly true with respect to the standards by which collective bargaining agreements can be rejected and retiree benefits can be modified in Chapter 11. Businesses, as a result, take advantage of these venue options and file their Chapter 11 cases in employer-friendly districts. According to the American Bankruptcy Institute, this is among the reasons that Delphi, a Michigan company, filed for bankruptcy in New York.

Second, some in the labor community believe Chapter 11 is being used to bust unions or to at least give companies unfair leverage in its negotiations with unions.

Well, it's not just a perception, but a reality. According to a just-released GAO study that I requested nearly two years ago, 30 percent of companies reviewed sought to reject their collective bargaining agreements pursuant to section 1113.

Likewise, nearly as many companies sought to take advantage of section 1114, which allows employers to modify retiree benefits. Let me be specific here. What we are talking about is terminating retiree health care benefits, medical benefits, prescription drug benefits, disability benefits, and death benefits, among other protections. Remember that these benefits were bargained for by Americans who gave their all to their employers and now are in retirement. This is a travesty.

Third, as a result of Chapter 11's inequitable playing field, employers are able to extract major concessions from workers and retirees. As we learned at a hearing held earlier this year by this Subcommittee, executives of Chapter 11 debtors receive extravagant multi-million dollar bonuses and stock options, while regular workers are forced to accept drastic pay cuts or even job losses and while retirees lose hard-won pensions and health benefits. Even though we tried to stop excessive executive compensation in Chapter 11 by amending the Bankruptcy Code in 2005, creative practitioners have already found loopholes to exploit and the problem still continues.

As many of you know, the Ford Motor Company reported a record $12.7 billion loss for last year. But what many of you may not know is that Ford paid $28 million to its new CEO, Alan Mulally, in his first four months on the job. This disclosure comes as companies like Ford, General Motors, and DaimlerChrysler prepare to start negotiations with the unions to obtain concessions and labor cost savings when their current contracts end in this month. A factor that will likely be present at the bargaining table is the threat of a potential Chapter 11 filing.

In recognition of the current law's shortcomings, last year I introduced H.R. 5113, the "Fairness and Accountability in Reorganizations Act of 2006," to guarantee that workers are treated more fairly by requiring greater oversight and approval of all forms of excessive executive compensation.

Specifically, this simple and effective legislation would have required any executive bonus package to be approved by the bankruptcy court for any corporation undergoing reorganization under Chapter 11.

It also would have required the bankruptcy court to take into account the company's foreign assets before allowing the debtor to break its collective bargaining agreements with its American workers or to modify its retirees'health benefits.

Although this long-overdue measure was unfortunately not considered in the last Congress, I intend to pursue similar, and possibly expanded, legislation in this Congress in the very near future.

We need to restore the level playing field that the drafters of Chapter 11 originally envisioned and to ensure that workers and retirees receive the fair treatment they have earned when their company is in bankruptcy.

In the last nine years, Congress went to great lengths to grant advantages to creditors and big business interests over ordinary Americans. It is time that we include the interests of working families in the bankruptcy law and consider how we can add a measure of fairness to a playing field that is overwhelmingly tilted against workers.

Ms. SÁNCHEZ. The gentleman yields back? Thank you.

I would now like to recognize Mr. Watt for an opening statement.

Mr. WATT. Thank you, Madam Chair. And I make an opening statement advisedly, because I know it is the Committee's and the Subcommittee's policy generally not to do it. But since there are not many of us here, perhaps the gentlelady is waiving the rule to my favor. So I will try to be brief. But since I am sitting behind Hank Johnson's nametag, and feel like I can be a little more controversial, and maybe hide behind and blame it on Hank, let me do that.

But under my own name, let me first praise the Chair of this Subcommittee for her outstanding work that she has done since becoming Chair of the Subcommittee. As many of you know, I was the Ranking Member of this Subcommittee over the last several terms under the leadership of my good friend, Chris Cannon. And over all those years, I didn't find out that he was a labor person, either, Mr. Conyers. So my opinion of him was already pretty high, and it has escalated even further.

And my opinion of the Chairperson of this Subcommittee, Ms. Sánchez, was already high before she became Chair and has escalated even further during her tenure. So let me say that as kind of the opening shot.

The point I want to make, though, that one of the many deleterious things that we did during a Republican majority was the substantial amendments, reforms that were made to bankruptcy and the bankruptcy law. There are a number of changes that need to be made to the reform bill that was passed several years ago or a couple of years ago, and this is one of them. This is one of the areas we need to pay some attention to.

And to show you kind of the disparity of the way this plays itself out, this is one of those areas where the judge has the authority to reject basically any contract negotiated, reopen it, rewrite it. At the same time, some of you know I sit on the Financial Services Committee, and there is an amazing crisis going on in the mortgage market. And the same judge who can rewrite the labor contracts has no authority to do anything related to mortgages, even if he finds that the terms were entered into outrageously—I mean, there is just nothing he can do.

So basically, we have made a public policy judgment that the mortgage on a house is a sacrosanct contract, the labor agreement that may allow or may not allow a worker to pay that mortgage is not protected at all in the bankruptcy workout. And that is simply public policy decisions that we have made about what we value, and what we don't value, in a bankruptcy setting.

And those same kind of public policy decisions, unfortunately, have been made throughout the system. And we need to go back, having made those bad choices over and over and over again in a number of contexts, and having seen how they play out in people's lives adversely, we need to revisit those things. And this hearing, I think, will be one of the steps.

The gentlelady has already convened a hearing about this bankruptcy—the mortgage issue that we need to deal with. But there are a number of issues like that in the bankruptcy reform bill that was passed and that need to be revisited. And, the quicker we can

get our arms around all of those things and put them into one package and get them revisited, I think the Nation would be much, much better served.

So we thank you all for being here to make that record. And I know I talked longer than I should have, Madam Chair, and I apologize. But at least part of it was some good things about you and the Ranking Member. So those things I don't apologize for, but the other things I took too long to say.

And I yield back.

Ms. SÁNCHEZ. Thank you.

I thank the gentleman for his statement. And without objection, other Members' opening statements will be included in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing.

I am now pleased to introduce the witnesses on the panel for today's hearing. Our first witness is Kim Townsend. For the past 20 years, Ms. Townsend has been employed as a machine operator at Hastings Manufacturing, LLC. She is the chief steward and member of the three-person bargaining committee for UAW Local 138, which represents the hourly workers at Hastings. She was present of the UAW Local 138 from May 2004 to June 2007, before, during and after the bankruptcy and asset sale. She currently resides in Hastings, Michigan.

Our second witness is Michael Bernstein. Mr. Bernstein is a partner in Arnold & Porter's bankruptcy and corporate reorganization practice and has been involved in numerous bankruptcy cases, including U.S. Airways, TWA, Delphi, and Continental Airlines. Mr. Bernstein has coauthored two books and has published many articles on bankruptcy and related topics.

Our third witness is Fred Redmond. In 1973, Mr. Redmond joined the Steelworkers Union and became an active member of Local 3911, serving as shop steward, grievance committee member and chairman, vice president, and three terms as president of his local union. Mr. Redmond was elected international vice president, human affairs, of the United Steelworkers on March 1 of 2006. In addition to his regular union duties, Mr. Redmond serves as chairman of the USW container industry conference and coordinates bargaining for the USW health care, pharmaceuticals and public employees sector.

Our fourth witness on this panel is Captain John Prater. Captain Prater is the eighth president of the Air Line Pilots Association, International, elected on October 18 of 2006. As the ALPA's chief executive and administrative officer, Captain Prater oversees daily operations of the association, presides over the meetings of ALPA's governing body, and serves as chief spokesman for the union. Captain Prater currently serves as a B767 captain.

Our fifth witness is Gregory Davidowitch. Mr. Davidowitch is the united master executive council president and serves as the union chief spokesperson and leader for more than 25,000 flight attendants employed by United Airlines. Mr. Davidowitch began his flight attendant career on April 17, 1988, and is devoted to the best interests of the flight attendant profession as it continues to evolve.

Our final witness is Richard Trumka. In 1989, Mr. Trumka was elected to the AFL-CIO executive council. He also served as presi-

dent of the mineworkers for three terms. And in 1994, President Clinton named him to the bipartisan Commission on Entitlement and Tax Reform to represent the interests of working families. Mr. Trumka became the youngest secretary-treasurer in AFL-CIO history when he was elected to the post in October 1995.

I want to thank you all for your willingness to participate in today's hearings. Without objection, your written statements will be placed in their entirety into the record, and we would ask that you limit your oral remarks to 5 minutes.

You will note that we have a lighting system that starts with a green light. At 4 minutes, it will turn yellow to warn you that you have a minute left in your testimony. And then it will turn red at 5 minutes. If you observe the lights turn red while you are mid-sentence, please finish your thought. We will allow you to do that. And we want to make sure that we have time for everybody's testimony. After each witness has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

With the ground rules now having been stated, I would invite Ms. Townsend to begin her testimony.

TESTIMONY OF KIM TOWNSEND, CHIEF STEWARD, LOCAL 138, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), HASTINGS, MI

Ms. TOWNSEND. Good morning, Chairwoman Sánchez and Members of the Subcommittee. My name is Kim Townsend. I am chief steward and a member of the bargaining committee of UAW Local 138. Local 138 represents 175 hourly workers at Hastings Manufacturing in Hastings, Michigan. Hastings makes piston rings for Harley-Davidson, General Motors, Ford and Chrysler.

Hastings Manufacturing was founded in 1915 and has been in continuous operation since then. I have worked for Hastings Manufacturing for 20 years. My job is to operate a machine that makes piston rings, and they are the oil rings that go in your engine.

On September 14, 2005, Hastings filed for protection under Chapter 11. On December 5, it was sold in an asset sale auction. I was president of Local 138 in the period leading up to and through the bankruptcy and sale. The Anderson Group, a private equity firm, was the successful bidder in the asset sale auction. It has operated the company under the name Hastings Manufacturing Company, LLC, since December 14, 2005. We make the same products, in the same building, with the same equipment, for the same customers as we did before the asset sale.

Just before the bankruptcy, Hastings employed about 375 people, about 250 of whom were in the UAW bargaining unit. There were about 300 Hastings retirees. The union was doing all we could to help the company out of its financial situation. Management said they needed a million dollars in concessions; we gave them a million dollars in concessions. But it still wasn't enough to save the company.

Shortly after the company filed for bankruptcy, the union found itself having to try to bargain a new contract with three potential buyers. The union had absolutely no clout going into these negotiations. There was very limited good faith, back-and-forth bargaining.

The buyer dictated the terms. Not surprisingly, with no clout, we couldn't negotiate much. If we didn't accept their terms, the plant doors would close, and no one wanted that.

The Anderson Group agreed to maintain seniority and to honor accrued vacation. We had agreed to even more concessions, including paying most of our health-care costs. Of course, it was much worse for the retirees. The new owners wanted no part of the so-called legacy costs.

Due to the bankruptcy, our retirees lost a part of their pensions and all of their health-care coverage. The PBGC took over the pension plan, but the PBGC only guarantees the base pension and not the contractual supplements. The way our contract worked, the monthly-base pension was not very high, but there was a supplement of $750 a month until you were 62, if you retired with 20 years or more seniority. But because the PBGC doesn't recognize contractual supplements, our retirees under the age of 62 lost as much as $500 a month, more than half their pensions for some people.

On top of that financial loss, retirees had to start paying for the health-care insurance for themselves, their spouse, and their dependents, or go without health-care coverage. It was really a financial disaster for these folks who had given their entire work lives to Hastings, and it was hard for all of us because so many of the retirees were the parents, or the aunts, or uncles, or the in-laws of the active workers.

In closing, I would just like to say that the current bankruptcy law seems unfair. The asset sale allowed the new owners to purchase the company "free and clear," with no obligations. The net effect of the bankruptcy proceedings was that the business didn't change at all. The new owners just got rid of the union contract and the obligations to the company's retirees.

We knew the new owners would start making money right off the bat, because the bankruptcy law allowed them to do away with the legacy costs of retirees. But with the way the asset sale works, the union was really powerless to negotiate anything of benefit for retirees or for active workers. I think the law needs to be changed so that the workers and retirees have some bargaining clout when we are negotiating in bankruptcy. And it needs to be changed to provide greater protection for wages, pensions, and health-care benefits.

Thank you for inviting me to testify before you today.

[The prepared statement of Ms. Townsend follows:]

PREPARED STATEMENT OF KIM TOWNSEND

Good morning, Chairwoman Sanchez and Members of the subcommittee. My name is Kim Townsend. I am chief steward and a member of the bargaining committee of Local 138, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW). Local 138 represents 175 hourly workers at Hastings Manufacturing in Hasting, Michigan, which is located about 30 miles south of Grand Rapids. Hastings makes piston rings that are supplied as original equipment to Harley-Davidson, General Motors, Ford and Chrysler, as well as to the aftermarket, especially outside the United States.

Hastings Manufacturing was founded by a local family in 1915 and has been in continuous operation since then. I have worked there for 20 years. For the last 14 years, my job has been to operate a machine that makes oil rings.

In 2004, the company came under financial pressure from the banks, who took over day-to-day management of the plant around June of that year. On September

14, 2005, the company filed for protection under Chapter 11. On December 5, it was sold at an asset sale auction overseen by the bankruptcy court. I was president of Local 138 from May 2004 to June 2007, before and during the bankruptcy proceedings and the asset sale.

The Anderson Group, a private equity firm, was the successful bidder in the asset sale auction. It has operated the company under the name Hastings Manufacturing, LLC since December 14, 2005. We make the same products, in the same building, with the same equipment, for the same customers as we did before the asset sale.

Before the bankruptcy, Hastings employed about 375 people, about 250 of whom were in the UAW bargaining unit. There were about 300 Hastings retirees.

The contract was up in February 2004 and the union negotiated a new one with the company at that time. That was the first of four contracts the union negotiated and had ratified between February 2004 and the asset sale in December 2005.

We were doing all we could to help the company out of its financial situation. Management said they needed a million dollars in concessions, and we gave them a million dollars in concessions. We gave up the raises we'd just negotiated in February, agreeing to take no increases in 2005, 2006, or 2007. We agreed to pay part of the cost of health care and that if your spouse was eligible for health care at their place of employment that they had to go on that plan; we also agreed to the birthday rule for dependents. We gave up one holiday. And we gave up the attendance incentive program under which you could earn five paid days off a year if you had perfect attendance. But it still wasn't enough to save the company.

Shortly after the company filed for bankruptcy, the union found itself having to try to bargain a new contract with each of the potential buyers. There were three bidders, including The Anderson Group. We had never met any of these people before. The union had absolutely no clout going into the negotiations. There was very limited good faith, back and forth bargaining. The buyer dictated the terms.

Not surprisingly, with no clout, we couldn't negotiate much. If we didn't accept their terms, the plant's doors would close and no one wanted that. The Anderson Group agreed to maintain seniority and to keep accrued vacation for the higher seniority workers who were hired by the new owners. We had to agree to pay most of our health care costs. For example, it now costs us $300 a week to get family coverage.

We also had to agree to cut our sickness and accident benefits in half, from 26 weeks to 13 weeks, and to reduce the amount of time you were covered by health care while out on sick and accident from six months to 30 days. We had to agree to continue the two-tier wage system, with a top rate of $13.49 an hour. Finally, we gave up having department stewards and had to lower the number of bargaining committee members from five to three. We now have only two hours a month during which we can do union business on company time.

Of course, it was much worse for the retirees. The new owners wanted no part of the so-called "legacy costs." Due to the bankruptcy, our retirees lost a lot of their pensions and all of their health care coverage.

The PBGC took over the pension plan, but the PBGC only guarantees the base pension and not contractual supplements. The way our contract had been negotiated a long time ago, the amount of the monthly base pension was calculated using a multiplier of the top hourly wage rate—$14—times the number of pension credit years you had when you retired. But there was a supplement of $750 a month until you were 62 if you retired with 20 years or more seniority. But because the PBGC doesn't guarantee contractual supplements, retirees under the age of 62 lost as much as $500 a month—more than half their pension for some people.

On top of that financial loss, the retirees had to start paying for the entire cost of health insurance for themselves, their spouses, and their dependents—or go without health care coverage. When their health care was terminated in November 2005, every retiree who had coverage under the company's health care plan got a check for $150. I don't need to tell you, that didn't go far.

It was a really a financial disaster for these folks who had given their entire work lives to Hastings. And it was hard for all of us because so many of the retirees were the parents, or the aunts or uncles, or the in-laws of the active workers. And now, to make matters even worse, the PBGC is saying that some of the retirees were overpaid and they may have to pay money back to the PBGC.

In closing, I would just like to emphasize that the current bankruptcy law seems unfair. The asset sale allowed the new owners to purchase the company "free and clear," with no obligations. The net effect of the bankruptcy proceedings is that the business didn't change at all—the new owners just got rid of the union contract and the obligations to the company's retirees.

The Hastings retirees don't exist for the owners of Hastings LLC; they severed all ties. The new owners started making money right off the bat because the bank-

ruptcy law allowed them to do away with the legacy costs of retirees. But it is these same retirees and workers who helped build this now-profitable company.

And, with the way the asset sale works, the union is really powerless to negotiate anything of benefit for retirees or for active workers. I think the law needs to be changed so that workers and retirees have some bargaining clout when we are negotiating in bankruptcy. And it needs to be changed to provide greater protection for wages, pension and health care benefits.

Thank you for inviting me to testify before you today.

Ms. SÁNCHEZ. Thank you for your testimony, Ms. Townsend.

The bells that you have been hearing have notified us that we have two votes across the street. We are going to stand the Subcommittee in recess until we have a chance to vote, and we will come back and reconvene the hearing. Thank you.

[Recess.]

Ms. SÁNCHEZ. The Committee on the Judiciary, Subcommittee on Commercial and Administrative Law will come to order. I want to thank you for your patience in waiting for us to vote.

I believe that we were at Mr. Bernstein. Mr. Bernstein, at this time, I would invite you to present your testimony.

TESTIMONY OF MICHAEL BERNSTEIN, ARNOLD & PORTER LLP, WASHINGTON, DC

Mr. BERNSTEIN. Good morning, Madam Chair, Congressman Cannon, and Members of the Subcommittee. Thank you for inviting me to appear before your Subcommittee to testify about important issues concerning collective bargaining agreements and retiree benefits in Chapter 11.

I am a partner in Arnold & Porter LLP, here in Washington, DC, and I am chair of the firm's national reorganization and bankruptcy practice group. However, I am appearing today here at the invitation of the Committee in my individual capacity and not on behalf of my law firm or any of its clients. I am also not here to advocate any position today but, instead, simply to provide the Subcommittee with some insights into how the issues surrounding the modification of collective bargaining agreements and retiree benefits are dealt with by the parties and by the courts in Chapter 11 proceedings.

Ordinarily, a Chapter 11 debtor who wants to reject a contract that it entered into before bankruptcy has the right to do so. It does require court approval, but the standard is a fairly deferential one, the business judgment test. However, as a result of the enactment of Section 1113, the rejection standard is much more rigorous with respect to collective bargaining agreements.

Section 1113 was intended to do several things. First, it was intended to prevent a company from unilaterally modifying or ceasing performance under a collective bargaining agreement. Second, it was intended to establish a heightened standard for modification or rejection of a CBA. That is something substantially harder to achieve than the business judgment test. And, third, it was intended to promote negotiated solutions to these issues wherever possible.

Section 1114, which was enacted several years later and deals with retiree benefits, was intended to serve similar purposes. The requirements for rejection or modification of a collective bargaining agreement under Section 1113 are outlined in detail in my written

statement. It is a difficult standard to satisfy, much higher than for any other sort of contract, and there are numerous cases in which Section 1113 relief has been denied by the courts.

These provisions were not, however, intended to make it impossible for a debtor to modify the terms of a collective bargaining agreement. Congress and the courts have recognized that some debtors are so burdened by above-market labor and retiree costs that, without reducing those costs to a market level, they will be unable to reorganize and unable to emerge from bankruptcy as viable and competitive enterprises.

In these situations, it is in the interest of all constituencies, including the employees, to reduce the labor and retiree costs to a market-competitive level. If it were impossible to obtain relief from above-market labor costs, the result for at least some companies, particularly those that operate in the most competitive industries, would be liquidation. They simply could not survive when their competitors' labor costs were materially lower than their own costs.

In those situations, employees would lose their jobs, creditors' and shareholder's recoveries would be diminished, if not eliminated, and other important constituencies, including customers and suppliers and trade vendors and taxing authorities and local communities, would suffer.

Thus, while the courts should not grant Section 1113 relief lightly—and, in fact, do not do so—it is important that the courts retain sufficient flexibility to grant relief where doing so is necessary to preserve the business.

History shows that, while the negotiation of labor and retiree modifications in bankruptcy is often quite difficult and quite painful, the purposes of Section 1113, which I outlined a minute or two ago, have been achieved.

First, it is clear that a debtor may not unilaterally modify a CBA; so that objective has unquestionably been achieved. Second, the heightened standard established by Section 1113 has been applied rigorously by the courts. I can tell you, as somebody who has participated in the litigation of Section 1113 issues, that the courts do not grant the relief lightly, and that a considerable burden is placed upon a debtor who seeks a rejection order.

Finally, Congress's objective of promoting negotiated solutions has been achieved. In the overwhelming majority of cases in which labor cost reductions are sought, the negotiations that are mandated by Sections 1113 and 1114 have resulted in consensual agreements.

The fact that these issues—which are often highly charged—are usually resolved by agreement is, at least in part, because the company and its employees have an essential common interest: preserving the business as a going concern. Negotiated resolutions also occur because both the debtor and their employees each face substantial risks absent an agreement, so each has an incentive to try to reach consensus. Finally, consistent with the articulated objective of the statute, the courts tend strongly to encourage negotiated resolutions.

In conclusion, I would say this. The issues concerning the modification of collective bargaining agreements and retiree benefits are very difficult ones. Nobody is happy about the idea of reducing

wages or benefits. However, there are some cases in which labor cost modifications are necessary in order for the debtor to reorganize and to emerge as a viable and competitive business. And in those cases, it is better for the necessary modifications to be made rather than to see the reorganization fail and the company to go out of business.

[The prepared statement of Mr. Bernstein follows:]

PREPARED STATEMENT OF MICHAEL L. BERNSTEIN

Madam Chairman Sµnchez, Congressman Cannon, and members of the Subcommittee, thank you for inviting me to testify at your hearing on "American Workers in Crisis: Does the Chapter 11 Business Bankruptcy Law Treat Employees and Retirees Fairly?" My name is Michael Bernstein. I am a partner in the law firm of Arnold & Porter LLP and the chair of the firm's national bankruptcy and corporate reorganization practice.[1] We represent debtors, creditors, committees, investors and other parties in a wide variety of bankruptcy and corporate restructuring matters. I have advised and represented debtors and other parties in connection with matters at the intersection of bankruptcy and labor law, and I have lectured on this subject, as well as on numerous other bankruptcy-related subjects. I have also written various books and articles. For example, I am co-author of "Bankruptcy in Practice," a comprehensive treatise on bankruptcy law and practice published by the American Bankruptcy Institute.

Section 1113 of the Bankruptcy Code addresses particularly difficult issues. It attempts to balance the interest of employees in preserving the wages, benefits and work rules for which their unions negotiated against the need of a chapter 11 debtor to achieve a cost structure that enables it to reorganize and emerge as a viable business that is able to compete in the marketplace. Section 1114 presents similar issues involving retiree benefits. The interests of employees, retirees, companies seeking to reorganize and their creditors and other stakeholders are all legitimate, and often compelling, but they are frequently difficult to reconcile.[2] Sections 1113 and 1114 of the Bankruptcy Code are the mechanism that Congress established to address these competing interests. While the process of negotiating labor agreement modifications in bankruptcy is a difficult one, these provisions have proven to be effective mechanisms to balance the competing interests and to promote negotiated resolutions.

An important tool available to debtors seeking to reorganize in chapter 11 cases is the ability to reject contracts. Rejection (essentially, a court-approved breach or abrogation) is often necessary to enable a debtor to restructure its business and to emerge from bankruptcy as a viable going concern. For example, a debtor may be burdened by an expensive long-term lease for space it no longer needs or an agreement to purchase some product at what has turned out to be an above-market price. Section 365 of the Bankruptcy Code permits a debtor to reject such contracts with court permission. Under § 365, the court uses a "business judgment" standard to determine whether to approve a rejection of a contract. This is a relatively deferential standard.

Section 1113 was enacted in response to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco,* 465 U.S. 513 (1984), which held that a debtor could unilaterally alter the terms of its collective bargaining agreements under § 365 of the Bankruptcy Code without having thereby committed an unfair labor practice. When the decision in *Bildisco* was announced on February 22, 1984, "labor groups mounted an immediate and intense lobbying effort in Congress to change the law."[3] Several months later, § 1113 was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[4] Section 1113 was enacted to ensure that debtors could

[1] The views expressed herein are solely those of the author, and do not necessarily represent the views of my firm or any of its clients.

[2] The balancing is more complex than simply a desire on the part of labor for more pay and benefits and a desire by management to reduce costs. Labor also has an interest in the company having a cost structure that enables it to remain viable, because otherwise it will likely be forced to liquidate and employees will lose their jobs. Similarly, management has an interest in providing wages, benefits and work rules that are at least at a market level, so that the company will be able to retain its employees and attract new employees.

[3] *See In Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC,* 791 F.2d 1074, 1082 (3d Cir. 1986).

[4] Pub. L. No. 98–353 (1984).

not unilaterally alter the terms of a collective bargaining agreement, but instead could do so only after satisfying a heightened standard and obtaining bankruptcy court approval.

The standard for modification or rejection of a collective bargaining agreement under § 1113 is far more difficult to satisfy than the business judgment standard.[5] Further, § 1113 provides that unilateral termination or alteration of any provision of a collective bargaining agreement is prohibited.[6] Instead, a debtor is required, under the Bankruptcy Code, to adhere to the terms of a collective bargaining agreement until it has complied with all the procedural and substantive requirements of § 1113 and obtained court approval for rejection, or negotiated consensual modifications with its employees.[7]

Based on the text of § 1113, courts have established a stringent nine-part test to determine whether a collective bargaining agreement may be rejected.[8] The test is:

2. The debtor in possession must make a proposal to the union to modify the collective bargaining agreement.
2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
3. The proposed modifications must be necessary to permit the reorganization of the debtor.
4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.[9]
5. The debtor must provide to the union such relevant information as is necessary to evaluate the proposal.
6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union.
7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
8. The union must have refused to accept the proposal without good cause.
9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

The debtor must satisfy *all nine* of these standards in order to obtain relief. Failure to satisfy *any* of the factors will result in denial of the debtor's motion to modify or reject the collective bargaining agreement.[10]

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[5] *See Comair, Inc. v. Air Line Pilots Ass'n, Int'l (In re Delta Air Lines, Inc.),* 359 B.R. 491, 498 (Bankr.S.D.N.Y.2007) ("Congress enacted Section 1113 not to eliminate but to govern a debtor's power to reject executory collective bargaining agreements, and to substitute the elaborate set of subjective requirements in Section 1113(b) and (c) in place of the business judgment rule as the standard for adjudicating an objection to a debtor's motion to reject a collective bargaining agreement.").

[6] *See* 11 U.S.C. § 1113(f), which reverses the portion of the *Bildisco* opinion holding that a debtor could unilaterally modify or terminate provisions of a collective bargaining agreement.

[7] Where a debtor requires interim relief from a collective bargaining agreement, it may apply for such relief under § 1113(e), but such interim relief is available only when it is "essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate."

[8] The test was initially articulated by the court in *In re Am. Provision Co.,* 44 B.R. 907, 908 (Bankr. D. Minn. 1984), and has subsequently been adopted by many other courts. *See, e.g., In re Family Snacks, Inc.,* 257 B.R. 884 (B.A.P. 8th Cir. 2001); *In re Appletree Mkts., Inc.,* 155 B.R. 431 (S.D. Tex. 1993); *In re Elec. Contracting Servs. Co.,* 305 B.R. 22 (Bankr. D. Colo. 2003); *In re Nat'l Forge Co.,* 289 B.R. 803 (Bankr. W.D. Pa. 2003); *In re Blue Diamond Coal Co.,* 131 B.R. 633 (Bankr. E.D. Tenn. 1991); *In re Ind. Grocery Co.,* 138 B.R. 40 (Bankr. S.D. Ind. 1990); In re Big Sky Transp. Co., 104 B.R. 333 (Bankr. D. Mont. 1989); *In re Amherst Sparkle Mkt., Inc.,* 75 B.R. 847 (Bankr. N.D. Ohio 1987); *In re Salt Creek Freightways,* 47 B.R. 835 (Bankr. D. Wyo. 1985). Other courts have combined factors one, two, and five from the *American Provision* analysis, resulting in a seven-part analysis. *See, e.g., In re Carey Transp., Inc.,* 50 B.R. 203, 207 (Bankr. S.D.N.Y. 1985), *aff'd sub nom Truck Drivers Local 807 v. Carey Transp., Inc.,* 816 F.2d 82 (2d Cir. 1987).

[9] *See, e.g., In re Century Brass Prods., Inc.,* 795 F.2d 265, 273 (2nd Cir. 1986) ("The purpose [of § 1113(b)(1)(A)] is to spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree."); *see also In re Maxwell Newspapers, Inc.,* 981 F.2d 85, 89 (2nd Cir. 1992) ("This statute [§ 1113] requires unions to face those changed circumstances that occur when a company becomes insolvent, and it requires all affected parties to compromise in the face of financial hardship. At the same time, § 1113 also imposes requirements on the debtor to prevent it from using bankruptcy as a judicial hammer to break the union.").

[10] Most often when courts deny § 1113 relief to a debtor it is on the grounds of failure to negotiate or bargain in good faith, failure to show that the debtor's proposal was "fair and equitable," and/or failure to meet the "necessary" or "essential" standard. *See In re Delta Air Lines (Comair),* 342 B.R. 685 (Bankr. S.D.N.Y. 2006) (debtor failed to confer in good faith); *In re Nat'l Forge Co.,* 279 B.R. 493 (Bankr. W.D. Pa. 2002)(debtor did not meet its burden of proving that

Some courts, in deciding whether to allow rejection of the collective bargaining agreements, have focused on the term "necessary" in § 1113(b). In *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC,* 791 F.2d 1074, 1088 (3d Cir. 1986), the court focused on the word "necessary" and concluded that Congress intended the word "necessary" to be construed strictly. The court commented that "[t]he 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs." *Id.* The court suggested that the use of the word "necessary" equated to "essential" and that rejection under § 1113 was to be used only when necessary to prevent liquidation. In 1987, the Second Circuit rejected the Third Circuit's approach. In *Truck Drivers Local 807 v. Carey Transp. Inc.,* 816 F.2d 82, 89–90 (2d Cir. 1987), the court concluded that "'necessary' should not be equated with 'essential' or bare minimum. . . . [rather] the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully." While the "necessary" standard outlined by the Third Circuit in *Wheeling* is more stringent than the standard articulated by the Second Circuit (and other courts), in practice, even outside of the Third Circuit, courts impose a heavy burden upon a debtor that is seeking to modify its collective bargaining agreements, and if the changes go beyond what is needed in order to reorganize and emerge as a viable and competitive business, then—regardless of precisely how the term "necessary" has been defined—the changes are unlikely to be authorized by the courts.

Section 1113 was designed to encourage negotiated resolutions. It requires the company to engage in good faith negotiation before it seeks relief under § 1113 and to continue such negotiations even after filing a § 1113 motion. In practice, courts have been vigilant to assure that a debtor seeking § 1113 relief is not just "going through the motions" of negotiation, but is in fact engaging in good faith negotiation. At § 1113 hearings, the courts typically hear extensive testimony about the course of negotiations, the details of each proposal and counterproposal, the number and length of meetings, and the information exchanged. If a court is left with the impression that the company did not negotiate in good faith—making every reasonable effort to reach agreement—it will ordinarily deny relief. If the court believes that further negotiations might yield an agreement, it may defer ruling on a rejec-

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the proposed modifications were fair and equitable); *In re U.S. Truck Co., 165 L.R.R.M.* (BNA) 2521 (Bankr. E.D. Mich. 2000) (debtor failed to meet its burdens of proving the proposal to be necessary, fair and equitable); *In re Jefley, Inc.,* 219 B.R. 88 (Bankr. E.D. Pa. 1998) (court concluded "that the proposal, as presented, is not 'necessary' to the Debtor's reorganization; [and] does not treat the union workers 'fairly and equitably'"); *In re Liberty Cab & Limousine Co.,* 194 B.R. 770 (Bankr. E.D. Pa. 1996) (debtor's proposal was not fair and equitable); *In re Lady H Coal Co.,* 193 B.R. 233 (Bankr. S.D. W. Va. 1996) (debtor failed to treat all parties fairly and equitably and did not bargain in good faith); *In re Schauer Mfg. Corp.,* 145 B.R. 32 (Bankr. S.D. Ohio 1992) (debtor "has failed to show that the Proposal which it made to the Union makes 'necessary modifications . . . that are necessary to permit the reorganization of the debtor. . . ."); *In re Sun Glo Coal Co.,* 144 B.R. 58 (Bankr. E.D. Ky. 1992) ("the debtors have failed to sufficiently quantify the results of such proposed changes to allow this Court to find that they are 'necessary' to the reorganization of the debtors."); *In re GCI, Inc.,* 131 B.R. 685 (Bankr. N.D. Ind. 1991) (debtor failed to negotiate in good faith); *In re George Cindrich Gen. Contracting, Inc.,* 130 B.R. 20 (Bankr. W.D. Pa. 1991) (debtor "did not provide sufficient information to enable union to determine whether the specific concessions sought by debtor were reasonable or necessary"); *In re Pierce Terminal Warehouse, Inc.,* 133 B.R. 639 (Bankr. N.D. Iowa 1991) (debtor failed to prove that the proposed collective bargaining agreement modifications were "necessary" to permit reorganization and failed to ensure that all affected parties were treated fairly and equitably); *In re Express Freight Lines, Inc.,* 119 B.R. 1006 (Bankr. E.D. Wis. 1990) (debtor's proposal contained modifications that were not necessary to reorganization and the proposal was not fair and equitable to all concerned); *In re Ind. Grocery Co.,* 136 B.R. 182 (Bankr. S.D. Ind. 1990) (debtor "has not borne its burden of proof that it is fair and equitable to ask for wage cuts. . . ."); *In re William P. Brogna and Co.,* 64 B.R. 390 (Bankr. E.D. Pa. 1986) (proposal was not fair and equitable); *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC,* 791 F.2d 1074 (3d Cir. 1986) (reversing decision authorizing rejection because the bankruptcy court failed to consider and determine whether the proposed modifications both were necessary and treated all parties fairly and equitably); *In re Cook United, Inc.,* 50 B.R. 561 (Bankr. N.D. Ohio 1985) (debtor failed to show that its proposed collective bargaining agreement modifications were necessary to permit reorganization and that its proposal was fair and equitable); *In re Valley Kitchens, Inc.,* 52 B.R. 493 (Bankr. S.D. Ohio 1985) (debtor failed to satisfy the requirement that the proposal deal only with modifications necessary to permit reorganization); *In re Fiber Glass Indus., Inc.,* 49 B.R. 202 (Bankr. N.D.N.Y. 1985) (debtor had failed to show how its proposed reductions were necessary to reorganization); *In re K & B Mounting, Inc.,* 50 B.R. 460 (Bankr. N.D. Ind. 1985) (debtor failed to show the proposed changes were fair and equitable); *In re Am. Provision Co.,* 44 B.R. 907 (Bankr. D. Minn. 1984) (debtor failed to show that the proposed collective bargaining agreement modifications were necessary).

tion motion and order the parties back to the negotiating table. The strong emphasis that the bankruptcy courts place on negotiated resolution of labor issues appears to be consistent with the goal of Congress in enacting § 1113. While no Senate or House Report was submitted with the legislation, statements made at the time of enactment suggest that Congress intended the provision to encourage negotiated resolutions.[11]

In practice, the goal of encouraging negotiated resolutions has been achieved. In the overwhelming majority of situations where a debtor sought to modify a collective bargaining agreement, the issues have been resolved by agreement of the company and the union. This is true, in large part, because both the debtor and its employees face substantial risks absent a consensual resolution.

The company's risks include the following:

First, absent an agreement, the company's request for § 1113 relief may be denied by the bankruptcy court, with the result that the company cannot obtain any relief from the terms of its collective bargaining agreement. Even if the court is convinced that the changes proposed by the debtor are necessary, relief may be denied if the court believes that the debtor has failed to negotiate in good faith, to provide the union with sufficient information, to spread the sacrifice among labor and other constituencies in a fair and equitable manner, or to satisfy any of the other requirements for relief. Companies reviewing the case law will observe that denial by the courts of § 1113 relief is not uncommon. If a company cannot modify its collective bargaining agreements, its reorganization effort may be doomed to failure. Thus, if the company can achieve adequate (even if not ideal) cost savings through negotiation, it has every incentive to do so.

Another risk to the company is that, even if it prevails in court, the company could face a break-down in employee relations, which may imperil the company's future. It is difficult for a company—particularly one trying to rebound from bankruptcy—to prosper with an unhappy and resentful workforce. Any time there are modifications to a collective bargaining agreement, there is likely to be some unhappiness among the labor group that was called upon to make a sacrifice, but the extent of acrimony is likely to be much greater where the modifications were imposed by a court, after litigation, as opposed to having been agreed upon by the parties, as a result of open and good-faith negotiations.

Finally, there may be a risk that the union will strike after a collective bargaining agreement is rejected. Unions often threaten to strike if § 1113 relief is granted. Particularly, in the case of a company that is already suffering financial distress, a strike may destroy the company. Of course, destroying the company is not in labor's interest any more than it is in the interests of any other constituency, but the company nonetheless faces a risk that an employee group, perhaps acting out of anger or resentment or with any eye toward influencing the outcome in future cases, will strike even if doing so would destroy the business.[12] Avoiding a strike is another incentive for a company to seek an agreement rather than litigate against its unions.

The unions, and the employees they represent, also face risks if no agreement is reached. First, they run the risk that the company may prevail in rejection litigation, leaving the employees without any collective bargaining agreement or potentially with more substantial pay and benefits reductions and work rule modifications than could have been achieved through negotiation.

Another risk to the union is that in litigation the court is forced to make "up or down" decisions, while in negotiations the union has more flexibility to construct an

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[11] For example, in discussing the legislation, Senator Hatch stated "I feel that the conference version is a practical, workable mechanism. This provision will require negotiations to attempt to save both the labor contract and the business prior to court adjudication to reject the contract. . . . Only if these good faith negotiations fail does the court get involved in granting an application to reject the contract." *See* 130 Cong. Rec. H7489 (June 29, 1984), *reprinted in* 1984 U.S.C.C.A.N. 576, 591. Congressman Rodino, Chairman of the House Committee on the Judiciary, also commented that the provision would work to ensure "that a process of negotiation will take place between the employer and the union in a reorganization case. . . ." *Id.* at 577.

[12] In some recent airline bankruptcy cases, courts have enjoined threatened strikes following § 1113 decisions, where a strike would have been likely to have put the airline out of business. *See Northwest Airlines Corp. v. Assn. of Flight Attendants—CWA, AFL—CIO (In re Northwest Airlines Corp.),* 349 B.R. 338 (S.D.N.Y. 2006), *aff'd,* 483 F.3d 160 (2d Cir. 2007); *Comair, Inc. v. Air Line Pilots Ass'n, Int'l (In re Delta Air Lines, Inc.),* 359 B.R. 491(Bankr. S.D.N.Y. 2007); *In re Mesaba Aviation Inc.,* 350 B.R. 112 (Bankr. D. Minn. 2006). Because they involved airlines, these cases were governed by the Railway Labor Act ("RLA") rather than the National Relations Labor Act ("NRLA"). It is less clear that the federal courts could enjoin a strike against a company whose labor relations are governed by the NRLA rather than the RLA. *See Northwest Airlines Corp.* 483 F.3d at 173 (Commenting that "[i]n cases governed by the NLRA, we have also hinted that a union is free to strike, even following contract rejection under § 1113.").

agreement that is responsive to the particular concerns of its membership, prioritizing those issues that are most important to the employees it represents.[13]

The union also faces the risk that, even if it wins the litigation, it may destroy the company in the process. Many companies that seek § 1113 relief do in fact need that relief in order to remain viable and competitive. Typically, these companies are paying wages and benefits and offering work rules that are more generous than their competitors, and they need to adjust their wages, benefits and work rules to a market level in order to reorganize and remain in business. If the union refuses to make concessions and succeeds in defeating the company's § 1113 motion, the result may be a liquidation of the company and loss of all jobs. Thus, the union faces not only the risk of losing the § 1113 litigation, but often the equally great risk of winning.

These risks, faced by the company and its employees, create bargaining leverage for both sides. As a result, § 1113 cases are settled much more often than they are litigated. In the best of circumstances, they are treated by the parties as "business problems" rather than "us versus you" disputes, with the company and the union sharing information and analysis and collaborating to arrive at a solution that will result in a workable, fair and market-competitive labor cost structure. Even in those cases with more hostility, though, the parties eventually tend to come to the conclusion that a negotiated solution is preferable to the alternatives. The fact that the unions, as well as companies, tend to be advised by experienced counsel, financial advisors, and other professionals, who recognize the risks to each side, promotes consensual resolutions. Finally, the courts tend to push all the parties for consensual resolution. Most judges seem to prefer a solution crafted by the parties to one imposed by the court. The courts recognize that encouraging consensual resolutions is consistent with the intent of Congress in enacting § 1113 and also that an arrangement worked out between the parties is likely to be more responsive to each of their concerns, and more workable in practice, than one imposed by the court.

In the relatively few cases where the parties are not able to reach agreement, and the court must therefore rule on a § 1113 motion, the debtors sometimes prevail and the unions sometimes prevail. Each case that is litigated will, of course, be decided based on its own particular facts. However, as a general matter it would be fair to say that the burden imposed on a debtor seeking to reject a collective bargaining agreement over a union's objection has been a heavy one, and the courts have rigorously imposed the requirements set forth in the statute.

Many of the same concerns and competing issues are raised by § 1114. Section 1114 provides that the debtor "shall timely pay and shall not modify any retiree benefits," unless the parties all agree to the modifications or the debtor follows the procedures in the statute and receives court approval to modify such benefits.[14] The requirements for obtaining court approval to modify retiree benefits are similar to the requirements set forth in § 1113, including the need to first attempt to negotiate before seeking court approval, the requirement that any modifications be "necessary", and the fair and equitable requirement.[15] In fact, § 1114, which was enacted approximately four years after § 1113, tracks the language of § 1113 in important respects.[16] Judicial interpretation of § 1114, as well as legislative statements made at the time of enactment, suggest that the standards are intended to be very similar or identical.[17]

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[13] In negotiations, it is not uncommon for a debtor to try to establish a level of cost savings that it needs to achieve in order to be viable, but then to give the union considerable flexibility in how to achieve that level of cost savings so that the union can prioritize those items that are of greatest concern to its membership. The union is obviously better able to do this than a court would be.

[14] *See* 11 U.S.C. § 1114(e).

[15] Prior to attempting to modify the benefits, the debtor must "make a proposal to an authorized representative of the retirees," the proposal can only provide for "those necessary modifications in retiree benefits that are necessary to permit reorganization of the debtor," and the debtor must assure "all of the affected parties are treated fairly and equitably." *See* 11 U.S.C. § 1114(f)(1)(A).

[16] Compare § 1113(b) to § 1114(f), setting forth the conditions precedent to requesting modification of retiree benefits. Also, compare § 1113(c) to § 1114(g), establishing the standards for modification of retiree benefits.

[17] *See In re Horsehead Indus., Inc.,* 300 B.R. 573, 583 (Bankr. S.D.N.Y. 2003) ("The statutory requirements under both sections [1113 and 1114] are the same. Accordingly, the discussion relating to requirements under 1113 also applies to 1114."); *In re Ionosphere Clubs, Inc.,* 134 B.R. 515, 519–20 (Bankr. S.D.N.Y. 1991) ("[C]ompliance with 1114 is substantially and procedurally the same as compliance with 1113."). The Senate Report (Judiciary Committee) No. 100–119, provides the following comment about the intent of § 1114: "These standards are intended to be identical to those contained in Section 1113. In adopting this standard the Committee believes

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In practice, § 1114 issues are treated much like § 1113 issues. The retirees are represented either by a labor union or by a retiree committee. The union or committee engage counsel and other professionals to represents its interests. Most often, the company and the retirees' representatives reach agreement on modifications that are necessary to give the company a workable cost structure and that "spread the pain" among present workers, retirees, creditors and other constituencies.

In conclusion, issues involving modification of collective bargaining agreements or retiree benefits are among the most difficult issues faced by the parties, and the courts, in chapter 11 cases. The prospect of reducing employees' wages and benefits, or retirees' benefits, is not something the courts take lightly. A debtor proposing to do this faces a heavy procedural and substantive burden. At the same time, courts recognize, as they must, that some debtors are so hamstrung by above-market or otherwise unaffordable labor and retiree costs that, without relief from such costs, they will not be able to emerge from bankruptcy as viable and competitive enterprises. If these companies are forced to liquidate because they cannot reduce these costs, all constituencies will suffer, including workers who will lose their jobs, retirees who will lose their benefits, creditors and shareholders whose recoveries will be diminished or eliminated, suppliers and customers, taxing authorities, and local communities. Sections 1113 and 1114 provide a framework for the parties, and when necessary the courts, to balance these competing concerns and interests.

While in any given case, one party or the other may be more or less satisfied with the outcome, as a general matter §§ 1113 and 1114 have worked well in achieving a balance between the objectives of preserving bargained-for wages, benefits and work rules to the maximum extent possible and achieving a cost structure that will enable chapter 11 debtors to reorganize. Congress' goal of placing a heightened burden on debtors seeking to modify labor agreements, providing all parties with bargaining leverage, and encouraging negotiated resolutions has been largely achieved.

Ms. SÁNCHEZ. Thank you for your testimony.

At this time, I would invite Mr. Redmond to begin his testimony.

TESTIMONY OF FRED REDMOND, INTERNATIONAL VICE PRESIDENT, HUMAN AFFAIRS, UNITED STEELWORKERS (USW), PITTSBURGH, PA

Mr. REDMOND. Thank you. Good morning, Madam Chair and Members of the Committee.

I would first like to bring you greetings on behalf of the 1.2 million active and retired members of the United Steelworkers. Our members are found in nearly every manufacturing industry, as well as health care, service and public employment. On behalf of the steelworkers union, I am filling in this morning for International President Leo Gerard, who is unable to appear today. But Leo has a very, very strong passion toward this issue that we are discussing, so I thank the Subcommittee for the invitation to appear.

Unfortunately, Madam Chair, our union is all too familiar with the Chapter 11 process. And for me, one corporate bankruptcy hit especially close to home. The aluminum plant that I worked in, in a small town right outside of Chicago, Illinois, called McCook, went through bankruptcy in the McCook Metals case.

The company ultimately liquidated, and that meant the termination of a defined pension benefits and retiree health insurance program for men and women that I have known my entire adult life, including family members. So I cannot forget their losses, nor those suffered by all the steelworkers in other cases. And that is, in part, why I appear before you today.

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that it is important to use a standard with which the courts are already familiar. The Committee believes that the Section 1113 standards strike a fair and reasonable balance between the need to protect the rights of retirees and the rights of other creditors." *See* S. Rep.100–119 (July 17, 1987), *reprinted in* 1988 U.S.C.C.A.N. 683, 687–88.

If we look at the steel cases alone, more than 40 steel companies earlier in the decade filed bankruptcy cases. And that was the result of great overcapacity in the world steel industry, followed by unfair imports from America's trading partners. During that period of time, more than 55,000 steelworkers were laid off. The Pension Benefit Guaranty Corporation terminated pension plans covering 240,000 steelworkers and retirees, and nearly 200,000 retirees and surviving spouses lost retiree health insurance coverage during that period of time.

Now, beyond steel, in the aluminum, iron ore, glass, paper, and automotive parts industry, steelworkers have also faced devastating corporate bankruptcies. Our folks at the bargaining table have had to wrestle with enormous challenges within a system that is stacked against the interests of workers and retirees. In light of our experience, I am here today to ask the Subcommittee to lead a reform of the Bankruptcy Code aimed at treating the American worker and retirees more fairly.

The last major reform to the Bankruptcy Code that focused on worker and retiree interests were enacted in the 1980's, and the steelworkers union was central in those deliberations. Insofar as the ability of a reorganizing company to reject a negotiated labor agreement is concerned, legislation in the 1980's sought to balance collective bargaining rights against the need of an employer with proven distress to obtain necessary and limited relief. We believe Congress have always intended that this balance to allow a reorganizing company to reject a labor agreement was only as a last resort; that is, only after full and earnest bargaining had failed, and only when it became necessary to avoid liquidation.

But the experience of the last 20 years illustrates that this balance has been upset. Employers have pushed aggressively for changes to labor and pension and retiree insurance agreements, often as the first shot rather than as a last resort.

So in light of the strict time limit, let me simply touch upon four specific areas in which I would urge the Subcommittee to adopt reforms. First, we suggest to Congress that we should seek to recapture the balance that I was referring to, giving stronger recognition to the important role of collective bargaining, and limiting the right of employers to violate labor agreements.

Second, reform should assign higher priority to the payment of employee and retiree obligations, allowing them to be paid before other creditors who are more able to absorb losses than is a worker and a worker's family. These other creditors with deeper financial resources include highly compensated lawyers and investment bankers.

And, third, reform should enshrine the principle of shared sacrifice and do it with specificity, meaning that executives should not be allowed to improve their own salaries and benefits while workers and retirees see their quality of life devastated.

Speaking of that last subject, controlling executive compensation in bankruptcy, Congress in 2005 limited the ability of companies to ask for retention bonuses to be paid to executives of bankrupt companies simply for remaining with the company. In fact, it was a steelworker leader from Ohio, David McCall, who first pointed

out the abuses of executive retention schemes in testimony before the Senate Judiciary Committee in early 2005.

Employers, however, have found loopholes in the current law, Madam Chairman, and now simply recast and rename these retention schemes as so-called incentive programs. This is semantics. As one judge in a recent steelworker case said, in considering one of these so-called incentive programs, "If it walks like a duck, quacks like a duck, then it is a duck." And Congress must close this loophole.

And, fourth, bankruptcy reform also must take into account the impact of sales and liquidations upon workers and retirees. For example, Congress should clarify that a bankruptcy judge may, in supervising the sale or auction of assets, give preferential weight to the buyer who intends to retain jobs and benefits in the community as opposed to a buyer who simply wishes to liquidate assets. Congress should also, in our opinion, take special steps to protect their health insurance benefits of retirees in the sale process to ensure that retirees are not left at the side of the road while a proper buyer moves on.

So, Madam Chairman, we recognize that reforming the U.S. Bankruptcy Code will not, by itself, solve all of the problems of American industry, American manufacturing, and at least not to exacerbate the problems being faced by so many American workers and retirees.

So I want to thank you very much for your attention toward this issue that we take very seriously. Thank you, Madam Chairman.

[The prepared statement of Mr. Redmond follows:]

PREPARED STATEMENT OF FRED REMOND

I am Fred Redmond, International Vice President (Human Affairs) of the United Steelworkers (USW). The USW has 850,000 members in the United States and Canada. Our members are found in nearly every manufacturing industry, not only steel, but paper, forestry, rubber, energy, mining, automotive parts, and chemicals, as well as health care, service and public employment. On behalf of the USW, and filling in for International President Leo Gerard, who is unable to appear today, I thank the Sub-Committee for the invitation to appear today.

Our union is all too familiar with the Chapter 11 process. And for me, one corporate bankruptcy hit especially close to home. The aluminum plant I worked in for 25 years in McCook Illinois, near Chicago, went through bankruptcy in the McCook Metals case. The company ultimately liquidated, and that meant the termination of a defined benefit pension and a retiree insurance program. Men and women with whom I had worked for years, including family members, lost almost everything in the McCook bankruptcy. I cannot forget their losses, nor those suffered by Steelworkers in other cases, and that's one reason why I appear before you today.

Looking at steel cases alone for just a minute, more than 40 steelmakers earlier this decade filed bankruptcy cases, and that was the result of great overcapacity in the world steel industry followed by unfair imports from America's trading partners. The human dimensions were vast. Many of our largest steel industry employers were affected—Bethlehem Steel, LTV Steel, National Steel, Wheeling-Pittsburgh Steel, WCI Steel, and Republic Technologies. More than 55,000 Steelworkers were laid off in that period. The Pension Benefit Guaranty Corporation terminated pension plans covered nearly 240,000 steelworkers and retirees. And, nearly 200,000 retirees and surviving spouses lost retiree health insurance coverage.

The steel industry recovered substantially, as a result of both the tariffs imposed in March 2002 and the sacrifices made by our members to restructure the industry. Over these years our union has also led an effort for steel industry consolidation, which did not come without a price, but which has helped to create a stronger industry that even now faces still more real and threatened increases in foreign imports.

Beyond steel, in such industries as aluminum, iron ore, glass, paper, and automotive parts, USW members and retirees have also faced devastating corporate bankruptcies. Our bargainers have had to wrestle with enormous challenges and do so within a system that is stacked against the interests of workers and retirees. In light of our experience, I ask the Sub-Committee today to lead a reform of the Bankruptcy Code aimed at treating American workers and retirees more fairly.

The last major reforms to the Bankruptcy Code that focused on worker and retiree interests were enacted in the 1980s, and the United Steelworkers was central in those deliberations. Insofar as the ability of a reorganizing company to reject a negotiated labor agreement is concerned, legislation in the 1980's sought to balance collective bargaining rights against the need of an employer with proven distress to obtain necessary and limited relief. We believe Congress always intended this balance to allow a reorganizing company to reject a labor agreement only as a last resort, that is, only after full and earnest bargaining had failed and, even then, only when necessary to avoid liquidation.

But the experience of the last 20 years illustrates that this balance has been upset. The courts have interpreted the bankruptcy law in such a way as to regularly grant employer requests for relief under a more lax standard than we believe Congress had intended. Employers now push aggressively for changes to labor and pension and retiree insurance agreements, often as a first shot rather than a last resort. In light of this experience, there are numerous ways in which Congress can and should reform the bankruptcy laws to treat worker and retiree interests more fairly.

First, Congress should seek to recapture the balance I referred to, giving stronger recognition to the important role of collective bargaining and limiting the right of employers to violate labor agreements, which is after all what rejection really amounts to. This would include defining more narrowly the meaning of the term "necessary to reorganization" so as to force employers to clear a higher bar and placing meaningful limits on the length of proposed concessions. Honoring the collective bargaining process also would protect the fundamental right to strike, which has been a particular concern to our brothers and sisters in the airline industry.

Second, reform should assign higher priority to the payment of employee and retiree obligations, allowing them to be paid before the claims of other creditors who are typically more able to absorb losses than is an individual worker and his or her family. Among the other creditors with greater financial reserves are highly-compensated lawyers and investment bankers.

Third, reform should enshrine the principle of shared sacrifice and do it with specificity, meaning that executives should not be allowed to improve their own salaries and benefits while workers and retirees are forced to sacrifice their quality of life. Before exposing workers and retirees to cuts, the courts should simply ask whether executives and managers have first made sacrifices themselves.

On this subject—controlling executive compensation in bankruptcy—Congress in 2005 limited the ability of companies to ask for retention bonuses to be paid to executives of bankrupt companies simply for remaining with the company. In fact, it was a Steelworkers leader from Ohio who first pointed out the abuses of executive retention schemes in testimony to the Senate Judiciary Committee in early 2005. Employers, however, have found loopholes in the current law and now simply recast and re-name these retention schemes as so-called "incentive programs." This is semantics. As one judge in a recent USW case said in considering one of these so-called "incentive" programs: "if it walks like a duck, and quacks like a duck, it's a duck." Congress must close this loophole.

Fourth, bankruptcy reform also must take into account the impact of sales and liquidations upon workers and retirees. For example, Congress should clarify that a bankruptcy judge may, in supervising the sale or auction of a company's assets, give preferential consideration to a purchaser who plans to retain jobs and benefits in the community as compared to the buyer who would simply liquidate assets. Congress also should take steps to extend protection to retiree health benefits in sale situations. Even where a seller in bankruptcy meets an exacting standard for modifying retiree benefits, Congress should require the buyer as well to set aside monies to restore some of the devastating, and oftentimes, life-threatening losses of health care benefits suffered by retirees. That will ensure that retirees are not left by the side of the road as a profitable buyer moves forward.

We at the USW know that a different bankruptcy process is possible. We represent approximately 280,000 members in Canada. Our Canadian employers have not been immune from many of the same problems that have afflicted our U.S. employers, though Canadian employers have not been hamstrung by the gross inefficiencies of the U.S. health care system. In the Canadian insolvency process, we are not aware of any judge who has used the legal process to void a collective bar-

gaining agreement, and our union was instrumental in 2005 in leading the Canadian House of Commons to pass legislation that confirmed that collective bargaining agreements are beyond the authority of the courts (though that law is now under attack by the current government). Our experience in Canada proves that worker interests need not be subordinated in the bankruptcy process.

Madame Chairperson, we recognize that reforming the U.S. Bankruptcy Code will not, by itself, solve all of the problems of American industry. We do not confuse prevention with cure. And on the prevention side are vital questions about our trade and tax policies, our lack of international health care competitiveness, the need for a pro-manufacturing agenda, and other policies that stop the hemorrhaging of jobs in American industry. At the same time, the bankruptcy laws should work in tandem with manufacturing-friendly measures and, at the very least, not exacerbate the problems being faced by so many American workers and retirees. The lives of far too many American workers and retirees have been crushed by corporate reorganizations. Congress can begin to set things right by reforming the bankruptcy laws. Thank you very much Madame Chairperson.

Ms. SÁNCHEZ. Thank you, Mr. Redmond, for your testimony and your recommendations.

I would invite Mr. Prater to begin his testimony.

TESTIMONY OF CAPTAIN JOHN PRATER, PRESIDENT, AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, WASHINGTON, DC

Mr. PRATER. Good morning, Madam Chairwoman, and Members of the Subcommittee. On behalf of the 60,000 ALPA members who fly for 41 airlines in the United States and Canada, I want to thank you for this opportunity to describe how airline management has exploited this Nation's bankruptcy laws following the tragic events of 9/11, and how you can act to level a playing field that kept workers on the sidelines.

Unfortunately, I am no stranger to airline bankruptcies. Having flown for Continental Airlines for 29 years, I know first hand the effect that the deregulation act of 1978 and the bankruptcies that followed had upon our industry and our pilots. During the 1980's, we fought this battle to prevent management's unilateral abrogation of labor contracts and advocated for bankruptcy legislation to protect American workers. Nearly 24 years later, we are back fighting once again to restore balance to the Bankruptcy Code.

The events of 9/11 presented a narrow window of opportunity for airline managements to crush workers, and they took advantage of that window of opportunity with complete abandon. While pilots and other workers rallied to save our airlines after that dark day in September, management and the law we discussed today forced us to give too much. Now that the emergency is over, it is time to fix the Bankruptcy Code.

Since 2001, pilots have given more than $30 billion in concessions to save our airlines and our jobs. As one example, pilots at United Airlines endured two rounds of concessions that included pay cuts of 30 percent, followed by another 12 percent, harsher work rules, less job security, and a terminated pension plan. After United returned to profitability, those pilots have so far been rewarded with only a 1.5 percent pay raises and forms of profit sharing worth about 0.5 percent of their annual W-2 earnings.

In contrast, United's CEO received a compensation package last year worth over $40 million, a 3,500-plus percent increase over the prior year. I ask you: Who saved United Airlines? The CEO who made business decisions that led to bankruptcy, or the pilots and the workers who did their jobs flawlessly, gave up salary and pen-

sions, and flew more hours? I challenge any person in this room or in this industry to tell me the pilots and their fellow United employees did not save that airline.

Pilots at Hawaiian Airlines faced a Section 1113 motion by a profitable company as a lever to wrest employee concessions to either facilitate a sale or to improve the carrier's competitive position. After having already made pre-petition concessions demanded by management to avoid a Chapter 11 filing, pilots were then stunned when management approved a self-tender of the airline's stock at well below market rate following September 11th and before the bankruptcy filing. You can't make this up. No one would believe us.

Delta's management used bankruptcy at two airlines. First, they exacted deep concessions from mainline pilots while in bankruptcy; then, they had the gall to claim that wholly owned subsidiary Comair was simply not profitable enough and also needed to enter bankruptcy. The bankruptcy judge there did not dispute our claims and argument that Comair's Section 1113 motion for a 22 percent pay cut would qualify some full-time pilots for Federal welfare assistance. He simply ignored that fact.

In the end, we reached a concessionary agreement, but it wasn't pretty, and it isn't pretty today. Not long after that, Delta was boasting that it had plenty of cash on hand to fight a hostile takeover attempt by U.S. Airways, and the only reason U.S. Airways could try to buy another airline was because it had used the bankruptcy process twice to cut the wages and the work rules and terminate all the pension plans of its workers.

Wait, it gets worse. The most egregious case of bankruptcy abuse involved Mesaba Aviation, which flies as Northwest Airlines, which was also in bankruptcy. Not only did Mesaba refuse to bargain in good faith, but its management argued in court against the pilots' rights to withhold their services if their contract was rejected, a right that every other party to a rejected contract has under the Bankruptcy Code. Two bankruptcy courts, a Federal district court and the 2nd Circuit Court of Appeals, affirmed that airline employees can be forced to accept the utter destruction of their contract, but may not strike in response. Again, we can't make this up; we are living it.

The willingness of the courts to enjoin any strike in response to the imposition of unilateral terms has taken away any incentive for airlines to negotiate. Why bother, when you can dictate terms in bankruptcy court?

Clearly, Congress must once again overhaul the Bankruptcy Code. Managements have found the loopholes in the law, and the judges have only been too willing to let them exploit those advantages. The current Bankruptcy Code must be overhauled so that the breach of a collective bargaining agreement can be sanctioned only and when truly necessary and only to provide the employer with what it truly needs: to ensure the company's survival.

I would like to sum up by saying that we thank you and the Subcommittee for the opportunity to testify today. I sincerely believe that Congress must restore the balance to the bankruptcy process so that, when our next crisis hits, our air transportation system will serve the public's and the Nation's best interest.

I would be happy to entertain any questions. Thank you.

[The prepared statement of Mr. Prater follows:]

PREPARED STATEMENT OF JOHN PRATER

Good morning Madame Chairwoman and members of the Subcommittee. I am Captain John Prater, President of the Air Line Pilots Association, International. ALPA represents 60,000 professional pilots who fly for 41 airlines in the United States and Canada. On behalf of our members, I want to thank you for the opportunity to testify today about the urgent need for legislation to restore balance and basic fairness to the Section 1113 process under Chapter 11 of the Bankruptcy Code.

In the aftermath of the events of Sept. 11, 2001, ALPA and other labor unions faced continuous efforts by airlines to use the bankruptcy process as a razor-sharp tool to strip away working conditions and living standards that were built over decades of collective bargaining. Airline workers have borne far more than their fair share of the pain to save their airlines, as massive pay cuts, lost pensions and other deep concessions clearly attest. Section 1113 of the code has been applied by the bankruptcy courts, at management's instigation, in a manner far removed from the original intent of these provisions. Instead of protecting employees, the 1113 process has been used by employers to unfairly gut the wages and working conditions of airline and other employees. These same employers also used the bankruptcy law to rubber stamp multimillion dollar rewards for the corporate executives who perpetrate these abuses on workers.

After 9/11, many airline managements used the 1113 procedures to not only gut employee wages and working conditions, they also exploited the bankruptcy process to cut staff to the bone. Both of these factors have combined to make piloting a far less desirable job than it used to be, contributing to increased pilot frustration, attrition and turnover at a number of airlines. Added to the understandable employee frustration and anger, these additional, related problems make the implications of failing to restore balance to the bankruptcy process more serious than just ending the immorality of this unfairness. The current imbalance has created a poisoned environment that has greatly undermined labor relations and employee good will in the airline industry, which are critical to the efficient operation of our essential national air transportation system.

Indeed, ALPA has seen that airline managements' successful efforts through Section 1113 to turn back the clock decades on workers' pay, rights and benefits have far exceeded any legitimate shared economic sacrifices that might have been necessary for the economic survival of the airlines. For example, a typical pilot at United Airlines endured two rounds of concessions that included a 30 percent pay cut, a second pay cut of 12 percent, harsher work rules, less job security, and a terminated pension plan. In 2007, that pilot has so far received only a 1.5 percent pay raise and forms of profit-sharing worth only about 0.5 percent of his W-2 earnings. As harsh a reality as that is, imagine that pilot's disbelief and anger upon learning that the airline's CEO received a compensation package last year worth over $40 million dollars. The contrast of many unionized airline employees losing more than a third of their pay, work rules, and decades-old pension benefits, while outrageous executive compensation and benefits programs are approved for top airline managers, is enough to show that the current Section 1113 process is unbalanced and grossly abused.

Similar horror stories exist among the thousands of pilots flying in the US Airways family of airlines, as managers there departed the scene with golden parachutes, leaving behind employees who now struggle mightily to take care of their families while delivering millions of their passengers safely day after day. Distressing tales of employee suffering wrought by the 1113 process are also told by pilots and other workers at Northwest, Delta, Comair and Mesaba.

As the Subcommittee knows, the Section 1113 procedures are the mechanism by which employers can seek judicial permission to reject and thereby breach collectively-bargained obligations to their employees, and impose in their place dictated pay and working conditions. This Section 1113 process was originally intended to prevent employers from using the Chapter 11 process as an "escape hatch" to simply wipe away with a bankruptcy filing the binding, long and hard-fought pay and working condition achievements of workers secured by their collective bargaining agreements.

Prior to its enactment, in 1984 the Supreme Court ruled in the *Bildisco* case that an employer could walk away from binding collective bargaining agreements after a bankruptcy filing without first making any showing of necessity as to the need to reject the terms of the agreement. In response, the Congress, at the urging of ALPA and other unions, acted swiftly to establish procedures that sought to protect

the rights of employees in bankruptcy to prevent such results. The so-called 1113 process was inserted into the bankruptcy code to require a showing of justification and good-faith bargaining between labor and management in order to obtain needed concessions. Failing such a consensual agreement, a company could impose dictated terms and conditions on its employees after court process only if those concessions were determined by the court to be truly necessary to its survival.

Since that time, the employee protective purpose of Section 1113 has been turned on its head by the bankruptcy courts and subverted by employers to achieve precisely the contract-destroying, worker-bashing results that Congress originally sought to prevent. ALPA has seen the requirements of Section 1113 repeatedly ignored or misapplied, without due regard for the financial security interests of airline employees and their families. The most extreme examples of the one-sided nature of the current process are in recent court decisions which allow management to reject binding collective bargaining agreements and impose working conditions, while prohibiting employees from withdrawing their services under those agreements, as other parties facing such rejection are routinely allowed to do under bankruptcy law. Corrective legislation is urgently needed to restore the original intent and purpose of these Section 1113 provisions, and to restore balance and basic fairness to the bankruptcy process as it impacts honest workers called upon to sacrifice to help save their employers.

ALPA believes that Congress must act to overhaul the Section 1113 process by: (1) tightening the standards governing when management can reject their contractual obligations to workers, so that a breach of a collective bargaining agreement can be permitted only when truly necessary, and only to provide the employer with no more than is truly necessary to ensure the competitive survival of the business; (2) ensuring fair treatment and equitable sacrifices from *both* executives and workers in the bankruptcy process so as to prevent further outrageous abuse by corporate officers lining their own pockets while their employees disproportionally sacrifice to help save the company; and (3) making it clear that employees have the right to strike in response to a breach of their collective bargaining agreements if a consensual agreement between the parties cannot be reached. This clarification is desperately needed to restore balance to the 1113 process and to help foster superior, mutually acceptable labor-management solutions to bankruptcy crises through collective bargaining.

All of these changes are urgently needed to restore some semblance of a level playing field in collective bargaining between workers and management, and to deter employers from ever again using the bankruptcy process as the vehicle for widespread and unjustified abuse of workers. I will now describe a number of additional examples which show what has gone wrong with the current administration of the 1113 process, both in the corporate boardrooms and in the courts, and illustrate why such legislation is so urgently needed to correct the employer abuse which has flourished unchecked in the current environment.

I. THE BANKRUPTCY COURTS HAVE ALLOWED EMPLOYERS TO USE THE SECTION 1113 PROCESS AS LEVERAGE TO GUT LABOR CONTRACTS WITHOUT REQUIRING EMPLOYERS TO SHOW THAT THE CONCESSIONS ARE NECESSARY OR FAIR.

The courts, egged on by opportunistic employers, have progressively undermined the "necessity" standard for granting employer relief in Section 1113. As I have alluded to, this standard is supposed to allow only those changes in working conditions that are truly "necessary to permit the reorganization" of the employer. In practice, these limits have all but been ignored by both employers and the bankruptcy courts, which in many cases have used the bankruptcy process as leverage to simply jam draconian wage and benefit cuts down employees' throats. These scorched-earth tactics of using the 1113 procedures to force extraction of concessions that are not truly necessary or otherwise achievable in consensual bargaining have led to widespread tension and resentment among employees, creating lasting damage to labor relations.

ALPA's experience has shown that circumstances where consensual solutions have been reached by the parties have led to far superior outcomes for airlines, their pilots and the flying public. Congress needs to take steps to restore support for consensual negotiations in such circumstances. Both employers and the bankruptcy courts need to be reined in to ensure that the numerous recent abuses of the 1113 process are never repeated.

It gets worse: we have seen profitable airlines use Section 1113 as a bargaining lever to wrest employee concessions to either facilitate a sale or other transaction or just to improve the competitive position or profitability of the carrier. In the case of the bankruptcy of Hawaiian Airlines, pilots faced a Section 1113 motion by a *prof-*

itable company after having made pre-petition concessions demanded to avoid a Chapter 11 filing. All this after management approved a self-tender of the airline's stock at a substantial premium to market value *following* September 11 and *before* the bankruptcy filing. This scheme by Hawaiian was an outrageous abuse of the process.

In the case of Delta Airlines, even after many months of litigation before the bankruptcy court, management continued to demand extreme concessions. Only after the establishment of a special neutral arbitration tribunal, which took the matter out of the hands of the bankruptcy court, did management finally reduce its demands and, in response to ALPA's demands, offer the pilots a bankruptcy claim in exchange for substantial concessions. After a consensual agreement was reached on this basis, the Company completed its successful reorganization and returned to profitability. I would note legislative reforms should build off this success and allow consensual use of such expert arbitration panels versed in the industry as an alternative to court proceedings in 1113.

In the Comair bankruptcy, pilots were forced into Section 1113 litigation because the operation was simply deemed *not profitable enough* to its corporate parent, Delta, while at the same time Delta proclaimed that it had plenty of money on hand as a justification to creditors for fighting a hostile takeover attempt by America West/US Airways.

Additionally, testimony at the hearings on Comair's Section 1113 motion established that the Company's demands for a 22% pay cut would qualify some full-time pilots for federal welfare assistance. In response to testimony from a pilot whose family would qualify for federal food stamps were he to work full-time under the Company's demands, the bankruptcy judge indicated that he would not be persuaded by these facts of employee hardship and suffering, because he viewed the issue purely in economic terms. In fact, in his decision granting Comair's Section 1113 motion, the judge failed to take into consideration the impact the Company's 1113 proposal would have on the pilot group and its families. A concessionary agreement was only reached after the airline effectively moderated its demands by offering the pilots meaningful "upside" benefits. This case alone cries out for legislative remedy.

In the case of Mesaba Aviation, the bankruptcy court approved as "necessary" a wage cut of almost 20% that would have lasted for 6 years, within a structure that did not envision any reversal or mitigation of the cuts during that lengthy period. After the district court agreed with ALPA that such overreaching amounted to bad-faith conduct and an abuse of the bargaining process, and subsequent consensual negotiations, the Company finally agreed to a contract that, while definitely concessionary, provided a significantly smaller pay cut but did not prevent the Company from successfully reorganizing under a plan that is expected to provide close to a 100% recovery for all creditors.

All of these circumstances, taken together, show beyond doubt that the current 1113 process, which does not impose effective limits on the "necessity" of employer concession demands, is open to employer abuse and grants inappropriate leverage for employers to wrest unwarranted concessions from employees. These examples also show that consensual solutions to financial crises are always superior to the imposed alternatives. The current 1113 process undermines consensual, legitimate solutions to financial crises. Necessary modifications to that process must correct these imbalances and support superior consensual solutions.

Reforms are also needed to ensure that an employer would not be permitted to commence the 1113 process seeking court permission to reject a collective bargaining agreement unless there has been good-faith bargaining over proposed modifications to the agreement for a reasonable period of time and the parties reach impasse. Reforms should also include setting specific limits on the scope of labor cost relief that can be sought by an employer, including requiring clearly expressed financial contributions that would be asked of employees to help the carrier exit bankruptcy, which would not be permitted to extend more than a short time period following successful exit of the employer from bankruptcy. Such a provision would help prevent the abuse of employers "locking in" long-term drastic concessions which continue long after the exit of bankruptcy, as has been the case at United, Northwest, US Airways, Delta, Comair and Mesaba. Reforms should also require the court to consider whether alternative proposals for relief from the union would be sufficient to permit successful reorganization. Additionally, the bankruptcy court should be required to consider the effect of the proposed cuts on the workforce, the employer's ability to retain a qualified workforce and the effect of a strike in the event the collective bargaining agreement is allowed to be rejected. All of these changes are necessary to ensure that the sacrifices that are extracted from employees are truly

fair, reasonable and necessary, and to stem employer abuse of the current administration of the 1113 process.

II. THE CURRENT DOUBLE STANDARD UNDER CHAPTER 11: DEEP SACRIFICE FOR WORKERS, HUGE PAYOUTS FOR THOSE AT THE TOP.

Modifications should require that the economic relief sought from employees not be disproportionate to the treatment of executives and other groups. These changes are urgently needed to restore basic fairness and credibility to the 1113 process. The current system has led to outrageous unfairness, with workers absorbing huge, long-term cuts in pay, work rules, and retirement benefits while management executives have enjoyed huge payouts which appear to be nothing more than rewards that are directly tied to the level of pain they have inflicted on the employees. For example:

- Pilots at United Airlines, who took concessions of 40% or more in pay, lost numerous important work rules, had their defined benefit pension plan terminated in multiple rounds of Section 1113 litigation, and were locked into a nearly seven-year deeply concessionary agreement, saw the injustice of the United Board raising the pay of Chief Executive Glenn Tilton 40% just months later. This staggering increase is on top of stock grants to Mr. Tilton and other United executives worth in excess of $20 million, as well as stock options worth millions more, made as part of United's plan of reorganization.
- Northwest Airlines' pilots were also forced to accept huge wage cuts of nearly 40%, as well as accept numerous rollbacks to their quality of life by losing key protective working conditions. By contrast, the CEO was rewarded with $1.6 million in salary and bonus payments last year. The revelation that he will also be rewarded with more than $26 million in stock-related compensation over the next few years under a court-approved management equity plan further demonstrates the basic unfairness and abuse of the 1113 process.

We urge reforms that would include a requirement that compensation to be paid to officers and directors be subject to oversight for reasonableness by the court as part of the employer's emergence from bankruptcy. Under current law, executive compensation is only required to be disclosed in the reorganization plan but is not subject to court review. The courts should be required to ensure that executive compensation is reasonable and not disproportionate in light of the other concessions made by other groups during bankruptcy.

Reforms are also needed to require the court to impose an adverse presumption against granting employee relief if the employer has implemented an executive compensation program either during bankruptcy or within six months prior to bankruptcy. If such a program has been implemented, a presumption should be created that the employer has not met the requirement that the proposed cuts not overly burden the affected employee group. These changes are urgently needed to stop any future court-assisted looting of employees by greedy executives of the type that has already occurred.

III. MORE UNFAIRNESS: DEEP CONCESSIONS ARE EXTRACTED FROM EMPLOYEES, WHILE OTHER STAKEHOLDERS SUFFER FEW OR NO ADVERSE CONSEQUENCES.

Legislative reforms are also needed because employees have also suffered extreme unfairness at the hands of the 1113 process compared to other stakeholders and participants in the bankruptcy process. For example:

- Pilots at Hawaiian Airlines faced demands for concessions despite a plan of reorganization that paid unsecured creditors in full.
- Professional advisors, banks, economic experts, financial managers and executives who participate in the Section 1113 process on behalf of airlines do not share in the sacrifices. Instead they earn lucrative fees and even "success" bonuses with the approval of the bankruptcy court, while the workers' pay, work rules and pensions are allowed to be gutted.

Reforms should require the bankruptcy court to conclude, before it can allow an employer to reject a collective bargaining agreement, that the economic relief sought from employees is not disproportionate to the treatment of other stakeholder groups. This is not the case today, and it is a basic flaw of the current system that needs urgent correction.

IV. EVEN MORE UNFAIRNESS: AIRLINES USE SECTION 1113 TO AVOID BINDING OBLIGATIONS TO EMPLOYEES, BUT HAVE CONVINCED SOME COURTS THAT THE BANKRUPTCY LAWS IMMUNIZE THEM FROM FACING ANY EMPLOYEE SELF-HELP IN RESPONSE.

The last item that I wish to bring to the Subcommittee's attention is what I perceive to be the most egregious of the many aspects of unfairness that exists in the current administration of the Section 1113 system that I have highlighted today. As I have explained, airlines have used the Section 1113 process as leverage to obtain what they could never obtain in consensual bargaining—deep, lasting and unfair changes to avoid the binding commitments that they made to their employees in collective bargaining agreements, but that has not been enough for them. They have gone to the bankruptcy and federal courts and asked them to declare that airline employees do not have the right to respond to these unilateral, fundamental breaches of their collective bargaining agreements by withholding services, as common sense, fairness and the basic tenets of labor law would seem to dictate. In fact, two bankruptcy courts, a federal district court, and the Second Circuit Court of Appeals have ruled that airline employees can be forced to accept the utter destruction of their fundamental rates of pay and working conditions in collective bargaining agreements, but may not strike in response. This approach, of course, leaves employees chained to the railroad tracks as the 1113 Express bears down on them. Airline employees are being singled out unfairly by being denied the right to withhold services under a labor contract after it is rejected, which is a right that every other party to a rejected contract has under the current bankruptcy code. In fact, a split panel of the Second Circuit could only justify this highly inequitable result with the fiction that management is not actually breaching a collective bargaining agreement when it obtains judicial permission to reject a labor contract through the Section 1113 process, a notion wholly at odds with settled bankruptcy doctrine.

The willingness of the courts to enjoin a strike in response to management imposition of unilateral terms under Section 1113 has taken away any incentive for airlines to negotiate rather than dictate terms in bankruptcy. Airline employees have a right under the Railway Labor Act to strike after a bankruptcy court grants a motion to reject a collective bargaining agreement under Section 1113 and management imposes new inferior rates of pay, benefits, job security and/or working conditions. We believe that under the Norris-LaGuardia Act (which was enacted in the 1930's to generally preclude injunctions against strikes) bankruptcy judges and U.S. District Court judges do not have jurisdiction to issue injunctions against such strike activity when management has acted unilaterally to change the status quo and tear up a binding labor contract outside of the negotiations process.

It is essential that any reform legislation explicitly preserve the right of airline employees to strike after a Section 1113 contract rejection, and our proposal does that. If the rule were otherwise, as some courts have concluded, management would be allowed to impose conditions without having to face the prospect of a strike. Such blatant inequality allows management free reign to impose conditions without any check on the kind of overreach and abuse that has occurred to date. Legislation is needed to restore the economic balance contemplated in the anti-strike injunction mandates of Congress in the Norris-LaGuardia Act, which the Supreme Court found "was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining." Balance will be restored and management will be forced to act responsibly and fairly in bankruptcy towards its employees *only if* it is faced with the real possibility of a responsive strike.

In sum, while ALPA recognizes that substantial economic sacrifices may be necessary by employees during severe economic disturbances, and in fact has repeatedly acted in a leadership role to help many airlines survive the ravages of the post 9-11 environment, management and the courts have moved the 1113 process far from its original intent to protect workers. Today, it is an extreme and one-sided process that is used to destroy workers' lives. ALPA believes that corrective legislation is urgently needed to fix the misinterpretation and abuse of the 1113 process that has snowballed in the last five years. The Congress must act to restore the original intent of this legislation and protect employees from unfair, dictated sacrifices made while the corporate chieftans reap huge payoffs.

Madame Chairwoman, I appreciate the opportunity to testify here today, and I would be happy to answer any questions you have.

Ms. SÁNCHEZ. Thank you, Captain Prater.

At this time, I would invite Mr. Davidowitch to present his testimony.

TESTIMONY OF GREG E. DAVIDOWITCH, MASTER EXECUTIVE COUNCIL PRESIDENT AT UNITED AIRLINES, ASSOCIATION OF FLIGHT ATTENDANTS, CWA, AFL-CIO, WASHINGTON, DC

Mr. DAVIDOWITCH. Thank you. Good morning, and thank you, Chairwoman Sánchez, for holding this important hearing. I am here today on behalf of AFA-CWA's 55,000 members at 20 airlines around the country.

The lives of too many airline workers and retirees have been devastated by the exploitation of corporate bankruptcy. As president of the flight attendant's union at United Airlines, I spent 38 months of my life, day in, day out, battling unfettered corporate greed during the longest airline bankruptcy in history.

Something must be done to level the playing field. Bankruptcy must no longer be used as a business strategy that simply transfers money to executives' pockets and leaves hard-working Americans with nothing more than slashed pay, diminished health care, destroyed retirement, and the prospect of personal bankruptcy. Flight attendants have lost their homes because of management's cuts; others have had to move back in with their parents, sell their car, cancel college classes, and lose custody of children.

One hundred and forty thousand airline workers have lost their jobs. We have seen drastic wage cuts. For example, at Mesaba Airlines, management's demands for cuts in wages would have reduced some flight attendants' pay to less than $10,000 per year before taxes. This is nothing short of corporate-induced poverty, shifting responsibility for a living wage from the company to the taxpayers.

Management has slashed our medical benefits and, with a devious twist, has also cut retiree medical benefits, a move authorized by the law, but until now was largely taboo. United enticed flight attendants to retire early in order to preserve their retiree medical benefits. After enticing thousands of flight attendants to agree to leave the company in exchange for guaranteed retiree health benefits, management then went to the court to file their Section 1114 motion, demanding immediate individual retiree cost increases that were 10 times that cost of premiums with no cap on future increases. In the end, retirees were forced to shoulder $300 million in changes to their health-care benefits that were approved by the bankruptcy court.

However, United's maneuver prompted the bankruptcy court to appoint a special examiner shortly after they filed their Section 1114 motion. While the examiner questioned the tactics of United management, the bottom line was that the law allowed management to do what they did. A law designed to give extra protection to retiree medical benefits had been turned on its head.

While other major carriers struggle to protect their pension promises with help from Congress, management at United Airlines and U.S. Airways destroyed workers' pensions. AFA-CWA fought to save those pensions using every legal avenue at our disposal, but the bankruptcy court approved a legal maneuver by management that made an end run on the pension protections in the law.

It should be noted that the agency that was created by Congress to protect the interests of the workers' pensions had a hand in destroying our retirement security for a short-sighted gain of $1.5 bil-

lion. And at the same time, they put the country's entire pension system billions of dollars closer to total collapse. This was neither fair nor did it make sense as a matter of public policy.

We should be clear that one United employee's pension did survive. CEO Glenn Tilton was careful to shield his own $4.5 million pension trust from termination. If this Committee wants to enact a law that will be 100 percent effective at all times, let me suggest this: Adopt legislation mandating that pensions of corporate executives are treated exactly the same as those of other employees. If workers' pensions are terminated, executive pensions must be terminated, too, no exceptions.

I protect that, if such a law were passed, not a single additional worker would have to suffer the loss of a pension plan in bankruptcy or that any other provision of their collective bargaining agreement that is not absolutely necessary for the survival of their company. It is really just that simple.

Finally, no consideration of the fairness of the current bankruptcy process would be complete without the mention of executive bonuses and executive compensation in the bankruptcy process. It is simply out of control. Although flight attendants are obligated to work under concessions for an additional 4 years following the exit from bankruptcy, there is no evidence that United's top executives had to make any sacrifices at all.

In the end, how could any of this be considered fair? I implore the Committee to fix the bankruptcy law before there is any more devastation. Put an end to management abuses in the use of bankruptcy laws as just another business tactic to cut costs and line their own pockets. Level the playing field for the workers we represent and enact a law that provides protection of restructuring a company for the good of the long-term, dedicated workers who are committed to the success of their companies.

Thank you.

[The prepared statement of Mr. Davidowitch follows:]

PREPARED STATEMENT OF GREG E. DAVIDOWITCH

Good morning, and thank you Chairwoman Sanchez for holding this important hearing. We are truly fortunate to have someone like yourself and Chairman Conyers in the position to help shape a reform of corporate bankruptcy laws so that what I and many other workers around this country have faced the past several years does not happen again. My name is Greg Davidowitch and I am the Master Executive Council President of the Association of Flight Attendants-CWA, AFL-CIO at United Airlines. I am here today on behalf of AFA-CWA's 55,000 members at 20 airlines around the country.

In a way, it is unfortunate that as a flight attendant and airline worker in the U.S. aviation industry, I am qualified to testify on the subject of today's hearing. The lives of so many airline workers and retirees have been devastated by the exploitation of corporate bankruptcy. I spent 38 months of my life, day in and day out, battling unfettered corporate greed as management used the bankruptcy laws like a weapon to obliterate pay, pensions, healthcare and the jobs of hard-working Americans. The depth of my experience and the devastation experience by the workers I represent will only be summarized in this testimony; there is simply too much to tell. Something must be done to help level the playing field so that bankruptcy is no longer a "business strategy" that simply transfers money to executives' pockets and leaves the rank-and-file employees with nothing more than slashed pay, diminished health care, destroyed retirement security, bitterness, mounting debts and the prospect of personal bankruptcy.

Before I address the impact the bankruptcy process has had on AFA-CWA flight attendants, let me take the Committee back to the fall of 2002. This Committee needs to understand how my airline wound up in bankruptcy in the first place.

United Airlines was driven into bankruptcy by the Bush Administration. The decision of the Air Transportation Stabilization Board (ATSB) to reject United Airlines' request for $1.8 billion in loan guarantees was the opening salvo by the White House in an unprecedented attack on not just United Airlines employees, but also on the jobs, wages and working conditions of workers throughout the airline industry.

The ATSB was established by Congress to provide assistance to the airline industry as it attempted to recover from the economic impact of the historic terrorist attacks of September 11th. As one of the two airlines whose planes were hijacked for use in that devastating attack—attacks that included the horrible murder of flight attendants, pilots and passengers—United Airlines was in a unique position to need the assistance that the ATSB was created to provide. In fact, United's situation was a clear example of what Congress intended when it voted to create the ATSB with strong bipartisan support.

When it met to give final consideration to United's application for this vital economic assistance to recover from the attacks of 9/11, the three-member ATSB, with representatives appointed by the White House from the Federal Reserve, the Treasury Department and the Department of Transportation, rejected the application as inadequate. This was despite the fact that the employee groups at United had already agreed to concessions to keep the airline out of bankruptcy. These agreements with AFA-CWA and the other unions at the airline would have generated $5.8 billion in labor cost savings over 5 and a half years—part of a package of cost cuts that United management believed were sufficient to save the airline and return it to profitability. But the ATSB demanded even greater cuts, and decided that bankruptcy was the preferred option despite agreement by all of United's decisions makers—at that time—that deeper cuts were not necessary.

The White House realized that it could use the ATSB as a tool for re-engineering the airline industry, particularly airline labor costs. As one of the only industries remaining with a majority of union jobs, the Bush Administration seized the opportunity to exploit bankruptcy as a business strategy for social engineering. It was an opportunity to destroy the voice of the hard-working people of the middle class by cutting union jobs and obliterating the protections and benefits negotiated and earned by union members. The ATSB was created by Congress to administer loan guarantees designed to save the airlines from liquidation in the aftermath of September 11. But the White House decided to use the denial of the loan guarantees to force an economic reshaping of the airline industry. As far back as the Reagan Administration, Republican-appointed Secretaries of Transportation had complained that the only thing wrong with the airline industry was that airline workers are paid too much. Forcing United into bankruptcy was the Administration's way of pushing costs far lower than would have been possible or necessary in any other scenario. They knew the economics of this competitive industry would do the rest—forcing similar cost cutting at all the major airlines. Their strategy—unfortunately for airline workers—was devastatingly effective. United's bankruptcy and drastic slashing of employee wages and benefits created a cascade of similar actions throughout the industry. Airline employee wages, benefits and work rules across the industry were soon slashed to levels not seen in decades.

The story that unfolded at United and other airlines in bankruptcy would have been difficult to imagine only five to ten years ago. Like most major carriers, United racked up record profits during the late 1990s, having expanded domestically and internationally. It grew its fleet by more than one-third, to a total of over 600 aircraft. Flight attendant ranks swelled from 15,000 in 1990 to nearly 27,000 by 2000. However, with the collapse of the US airline industry in late 2001, United Airlines found itself losing more than $9 million a day; not simply because of September 11, but also because of the reckless spending, poor planning and other failures of airline management. For example, one failed management business maneuver included an ill-conceived merger with U.S. Airways that cost the airline hundreds of millions of dollars and yielded a personal profit of $50 million for just one executive even though the merger was never approved.

By mid-2002, United was headed toward a record annual loss of over $3 billion, and management began hurried negotiations with the unions that represented the various employee groups. Labor groups ratified a concession package valued at $5.8 billion over five years, including a $412 million cut by United Flight Attendants to help the airline avoid filing for bankruptcy protection. Apparently it was not enough; at least not enough for the White House.

As this Committee looks into whether the current bankruptcy system is fair to workers, I think you will agree that there was nothing fair about this process from the perspective of the workers. The White House apparently had no concern with fairness.

The devastation we see today for airline workers is the aftermath of the decision by the White House not to help stabilize United Airlines. It only took the destabilization of one major carrier to trigger a domino effect of labor cuts throughout the industry. One hundred forty thousand airline workers have lost their jobs. Workers who were not forced out have lost our pensions. We have seen our wages cut by as much as 20 to 40 percent. Management has forced changes in work rules that cause us to work many more hours at reduced pay, and to be away from our homes and our families for more days every month. Management has slashed our medical benefits, even cutting retiree medical benefits—a move authorized by the law but until now was largely taboo.

Many of our flight attendants—and many other airline workers—have had their lives destroyed by these bankruptcies, and by management's use of the law to force devastating cuts on the employees. There have been over 150 airline bankruptcies since the industry was deregulated in 1978, with at least twenty-one in just the six years since September 11.

These most recent rounds of bankruptcy have been especially devastating. One needs to look no further than the numbers. At several of the airlines represented by AFA-CWA, which have gone through bankruptcy, the slashing of union jobs has been dramatic. At ATA Airlines when the company entered bankruptcy on October 26th, 2004 the company had 1,946 active flight attendants and as of April 16, 2007 there were 877 actively employed flight attendants. When Mesaba Airlines entered bankruptcy on October 13, 2005 there were 611 flight attendants on the Mesaba payroll. On April 16, the total number of flight attendants on the payroll had been reduced to just 336. Aloha Airlines had 440 employed flight attendants on December 1, 2004. As of April 16, 2007 there were 386 flight attendants employed by Aloha. USAirways had 7,790 active flight attendants when they entered bankruptcy and almost five years later, their number of active flight attendants was down to 4,770. The nearly 12,000 flight attendant jobs cut at United Airlines is another chilling example. At the same time, there are more passengers traveling today than there were in the year 2001 prior to these cuts, resulting in an unprecedented productivity increase—an increase which, to date, has largely only gone to enrich executives and shareholders.

The total annual flight attendant cost cuts have been dramatic at carriers throughout the industry. Over a five year period between 2002 and 2006, annual flight attendant costs at ATA were reduced from $62 million a year to $38 million. At Northwest the costs went from $631 million to $533 million. US Airways went from $623 million to $267 million. At United the annual costs went from $1.4 billion to $945 million, and prior to the cuts the 27,000 flight attendants only comprised 7.1% of the total labor cost at our airline.

The painful cuts absorbed by the employees were repeated, numerous and stretched out over several devastating years of uncertainty. US Airways, where AFA has represented the flight attendants for decades, went through bankruptcy twice, with multiple rounds of concessionary bargaining each time. At my carrier, United, management dragged the employees through two rounds of full-blown Section 1113 negotiations, while holding bankruptcy court rejection of our entire collective bargaining agreement like a gun to our head each time.

In between rounds of Section 1113 negotiations in 2003 and 2005 United management launched an attack on our retiree medical benefits under Section 1114 of the Bankruptcy Code in January of 2004. Once again they used the law and the threat that all benefits would be cut off as a hammer to beat drastic cuts out of the workers who had invested their entire working lives in the airline. United management added an especially devious twist to this attack on their employees. For months before they actually filed their Section 1114 motion they pretended that they had no intention of filing such a motion. They even enticed workers to retire early before July of 2003 in order to "preserve" their retiree medical benefits. After getting thousands of United flight attendants to agree to leave the company in exchange for "guaranteed" retiree health benefits, they then went to the court to file their Section 1114 motion, demanding immediate increases of costs for individual retirees that were 10 times the cost of premiums with no cap on future healthcare costs. A coalition of unions and retiree representatives negotiated a lower premium increase with a cap on future costs for retirees, but sadly, retirees were forced to shoulder $300 million in health program cuts that were approved by the court in June of 2004. Tens of thousands of retirees were devastated that their health benefits had been slashed through the rarely used section of the bankruptcy code.

The twist in this bankruptcy approved process came just shortly after thousands of United employees, most with many decades of commitment to United Airlines, fell victim to management's deceit. Just after they voluntarily left their careers and income in the hopes of preserving their medical benefits, United management filed

its Section 1114 motion seeking permission to slash those promised benefits. This bankruptcy court-approved move is one of the most outrageous examples of unfairness for the workers.

That maneuver prompted the bankruptcy court to appoint a special examiner shortly after the section 1114 motion was filed. While the examiner questioned the tactics of United management, the bottom line was that the law allowed management to do what they did. The bankruptcy court gave its blessing for this bait and switch—which devastated thousands of flight attendants—and blessed this underhanded tactic by management. A law designed to give extra protection to retiree medical benefits had been turned on its head, and was now another weapon in management's arsenal.

As if the cuts in wages, work rules and medical benefits were not enough, United management also destroyed our pensions, as did other carriers in bankruptcy. Still other major carriers struggled to protect their pension promises with help from Congress, but management at United and US Airways walked away from their promises and used the bankruptcy process to destroy pensions. AFA-CWA fought to save those pensions, using every legal avenue at our disposal. Unfortunately, in the end, tens of thousands of flight attendants found themselves facing an uncertain retirement as the bankruptcy court approved a legal maneuver by management that made an end run on the pension protections in the law.

In meetings with the Pension Benefit Guarantee Corporation (PBGC), in an effort to save the flight attendants' pensions, we were told that the agency thought the United flight attendants' pension plan could and should be saved. We worked in good faith with the PBGC toward that end, and negotiated with United management. Management, however, refused to reach a consensual agreement and turned instead to the bankruptcy court to terminate our pension plan. We were in the courtroom on April 22, 2005 with AFA-CWA and PBGC attorneys ready to oppose United's motion, when principals from United and the PBGC entered the courtroom and announced that a deal had been struck: the PBGC was to receive one and a half billion dollars in consideration of its bankruptcy claim and the pension plans of over one hundred thousand United employees and retirees would be terminated.

Flight attendants never had the opportunity to defend our pension plan according to the provisions within the Employee Retirement Income Security Act (ERISA) and the Bankruptcy Code. They dressed up this sell-out in legal sheep's clothing, sufficient to withstand the scrutiny of the courts under the current law. But no one was fooled—the PBGC reversed course and set off on the path of terminating our pensions precisely because United management agreed to pay the agency over a billion dollars. So, the agency that was created by Congress to protect the interests of workers' pensions instead had a hand in destroying our retirement security for a short-sited gain of 1.5 billion dollars while putting the country's entire pension system billions of dollars closer to total collapse. Instead of saving airline employee pensions, it made a deal with United management that dumped billions of dollars of liability for our pensions onto the taxpayers. Is that fair? Does that even make sense as a matter of public policy? Despite what management, the PBGC and the courts might have said, Congress could never have envisioned that the law would be twisted into results like this.

The claims of United management, like the executives at other airlines, that the impact of the pension termination may be mitigated assumes that United flight attendants will now have to work an extra nine years to recover the benefit levels they had in their defined benefit plan. Their analysis disregards the present value of money and also makes a number of highly unlikely financial assumptions. Especially ridiculous is their formula assumption that flight attendants would receive a four percent annual wage increase every year between the date of termination and the date of retirement, at the same time that wages were being cut an additional 9.5% in a second round of Section 1113 labor contract cuts. That simple statement, obviously misleading, is designed to confuse and mislead flight attendants and others as to the impact on our Members. Nevertheless, the self-serving statement is typical of the assertions United management makes on this specific issue as well as numerous others.

Is there any fairness in the current law regarding termination of pension plans in bankruptcy? One other event at United should answer that question for this Committee. One pension plan survived the United bankruptcy. Or, more accurately, one *person's* pension plan survived. CEO, Glenn Tilton, was careful to shield his own pension from termination. Prior to the bankruptcy he executed a legal maneuver, putting his $4.5 million pension into a trust that successfully insulated it from the bankruptcy. Is it fair that the law allows this drastic disparity of treatment between employees of a bankruptcy company? Obviously not.

It is difficult to describe the sheer scope and the magnitude of the devastation. Billions of dollars have been extracted from the compensation of airline workers. When our good friend Representative George Miller of California conducted the first ever E-hearing during the United bankruptcy, the testimony submitted by our members was nothing short of heart-wrenching. United flight attendants told of losing their homes because of management's cuts. Others have told us they have had to move back in with their parents, sell their car, cancel college classes, or lose custody of a child. Personal bankruptcies have become commonplace among airline workers and with good reason—how could anyone be expected to survive when their earnings are slashed 20, 30 even 40 percent? At Mesaba Airlines, management's demands for cuts in wages would have reduced some flight attendant's pay to less than $10,000 per year *before* taxes. That is nothing short of corporate-induced poverty, shifting responsibility for a living wage from the company to the taxpayers.

Finally, no consideration of the fairness of the current bankruptcy process would be complete without mention of the issue of management bonuses and compensation. If the current system had any element of fairness it would not allow massive bonuses and incredible compensation packages for the very executives who took these companies into bankruptcy in the first place, and who then inflicted massive pay cuts on the workers under color of law.

But, that is exactly what happens. A huge bonus for executives of a bankrupt corporation is simply wrong in light of the enormous sacrifices made by the workers during the course of the bankruptcy. They often give lip service to the concept of pay for performance, but the reality is much different: huge bonuses while workers take cuts. Management typically demands that the workers' concessions be locked in for four, five or even six years. But for management employees they steadfastly refuse to make any long-term commitment to such cuts, while making very modest upfront cuts to give the appearance of fairness.

Mesaba President and COO John Spanjers was asked under oath in a Section 1113 hearing in bankruptcy court to provide some assurance that management cuts would stay in place for the same length of time as those of the employees. Spanjers flatly refused to agree that he and his management team would live under the sacrifice he was asking the employees to make. He is not alone. His colleagues at other airlines have taken bonuses and quickly renegotiated contracts or shifted titles to increase pay during bankruptcy and in the months immediately following bankruptcy while workers continue to suffer the effects years after Chapter 11 is closed.

While airline employees have shouldered the heavy financial burden of the bankruptcy process, airline management has suffered incredibly little—if any at all—sacrifice. While the front line employees have seen their numbers slashed, pay drastically reduced, benefits eliminated and work rules destroyed, the management level employees reap unearned rewards.

Our experience with management compensation at United illustrates that management compensation in the bankruptcy process is simply out of control. Although every other United employee is obligated to work under four additional years of concessions following the date of exit from bankruptcy, there is no evidence that United's top executives have agreed to make any sacrifices during the next four years. To the contrary, 400 members of management stand to cash in on an excess of $400 million. After destroying our contract and career, United's CEO alone reaped over $40 million in 2006, 2000 times the pay of a first year flight attendant. The bonuses were awarded regardless of their past or future performance. When the judge ruled on this cash reward for management following objection by the unions he acknowledged our concern, but essentially said there was nothing he could do about it because the law did not give him the authority to second guess management compensation, or a standard by which to determine "how much is too much." The same judge had already approved millions of dollars in Key Employee Retention Program (KERP) bonuses, several times over, during the course of the bankruptcy.

In a report prepared to defend their additional bonuses, United management argued that the Management Equity Incentive Plan (MEIP) was intended to align the interests of management and other stakeholders. If one were to accept this premise, then the executives of this company do not deserve one penny more than what they are currently compensated. If the executives interests were to be aligned with those of the workers they too would need to experience the grief associated with losing their home, losing their jobs, or not being able to make ends meet. At some point, the greed exhibited by corporate executives must be stopped. That time is now.

Such equity bonuses clearly do not reflect either sound business judgment or good faith, much less respect for the enormous sacrifices of flight attendants and other workers. If there is so much equity available to enrich management, that equity rightfully belongs to those who have sacrificed the most to ensure our company's survival.

All too often management focuses its efforts not on the success of the corporation, but on their own personal gain. This profiteering comes predictably at the expense of the dedicated workers who strive daily to ensure our airlines' viability and success. The prospect of a select group of executives rewarding themselves at the expense of flight attendants and other employees adds fuel to a simmering fury and to a relationship void of trust. Companies with overly-generous salaries, KERPs and very lucrative management profit sharing programs—far above any reasonable measure for a company in bankruptcy—simply cannot pass the test of fairness in using the current law to force billions of dollars in annual concessions from employees.

In the beginning of its bankruptcy, United claimed a successful reorganization depended upon "the fair treatment of employees." Management promised to "equitably share the pain of United's restructuring." Unfortunately, the record reflects an entirely different reality, at United and at most of the other airlines that have been through bankruptcy. In every instance, employees have been forced to make life-changing sacrifices while executives are richly rewarded. In light of the sacrifices made by the dedicated front-line workers whose commitment has been critical to the success of these airlines, these snatch-and-grab schemes by management not only evidence poor judgment, but also reflect downright avarice.

To the Committee's question of fairness I can only respond with my own question: how could any of this be considered "fair?" Any conversation about terminated pensions, reduced healthcare, slashed wages, destroyed careers and lives in shambles could never be measured with fairness.

I would implore you, on behalf of thousands of AFA-CWA members, and tens of thousands of workers in the airline industry, and many more hundreds of thousands of workers in other industries: fix the bankruptcy law before there is any more devastation. Put an end to management abuses and their use of the bankruptcy laws as just another business tactic to cut costs and line their own pockets. Level the playing field for the workers we represent. Enact a law that provides the protection of restructuring a company for the good of the long-term dedicated workers who are committed to the success of their companies.

Again, thank you Chairwoman Sanchez for the opportunity to testify today. I look forward to answering any questions that you or any members of this Committee may have.

Ms. SÁNCHEZ. Thank you.

At this time, I would invite Mr. Trumka to present his oral testimony.

TESTIMONY OF RICHARD TRUMKA, SECRETARY-TREASURER, AFL-CIO, WASHINGTON, DC

Mr. TRUMKA. Thank you, Madam Chairman and Members of the Committee.

On behalf of the 10 million members of the unions of the AFL-CIO, I would like to express our gratitude to you and this Subcommittee for holding this oversight hearing on the bankruptcy system's treatment of America's workers.

Our bankruptcy laws are a critical safeguard in our economy, but one that has become dangerously unbalanced. For 75 years, Congress has repeatedly acted to define bankruptcy as a process of shared sacrifice among corporate constituencies. Congress has always recognized that employees are uniquely vulnerable in bankruptcy. But unlike other creditors, employees generally have only one employer, have only one retirement plan, and have only one health-care plan, yet today the bankruptcy system has become effectively a device for the wholesale transfer of wealth from workers to other creditors.

It is become a system that exploits workers' vulnerabilities, rather than seeking to create a balance between workers and other creditors. As you listen today to witnesses telling the grim stories of what happened to workers in airlines, steel and auto part plants,

remember that no mere lender of money gets treated this way. No bank president will sit across the table from their families after the bankruptcy court has done its work wondering how to provide health care to their children or what retirement will mean. No CEO, no matter how dismal the failure, contemplates losing their home or faces a court order to refrain from quitting their job after their pay was cut in half.

In America in 2007, our bankruptcy system reserves that fate for the people who do that work, who make the planes, forge the steel, mold the rubber, and stamp out the part. So how did we get here?

First, bankruptcy judges have allowed the procedural details of major bankruptcy cases to structurally disadvantage workers. Debtors have been allowed to deal with motions, to set aside labor contracts, and attack worker benefits separately and in advance of addressing the fate of other creditors. Frequently, the other creditors are left nearly whole.

Second, bankruptcy courts have increasingly treated procedural protections—Section 1113 provides for workers collective bargaining agreements—not as a last resort, but as formalities, signaling a willingness to set aside contracts early in cases, which emboldens management to not make concessions in the bargaining that precedes the filing of an 1113 motion by management.

Third, bankruptcy courts have agreed to pay packages that actually reward management that took the company into bankruptcy as a strategic choice rather than forcing management to share in the pain.

Fourth, the PBGC has treated bankruptcy and the abandonment of pension obligations as a routine part of the landscape, rather than using every tool in their arsenal to make companies meet their obligations under their plan. The result? The retirement security protections Congress sought to provide all Americans working in the private sector through ERISA have been rendered an empty gesture by the bankruptcy courts.

Fifth, while Congress recently increased the wage priority, both the amount of the wage priority and the status of severance and health benefits under the wage priority have proven to be insufficient to protect workers in major bankruptcies, like Enron and the following.

And, finally, and most appalling, as President Prater noted, in the last 2 years, we have seen decisions holding that airline workers covered by the Railway Labor Act whose contracts were rejected by bankruptcy courts did not have the right to strike following a rejection of their contract. Our bankruptcy law says to workers in the airline industry, "You can have your contracts rejected, but unlike every other creditor, you cannot act to protect yourself."

Oil companies can withhold fuel delivery. Aircraft leasing companies can take back airplanes. Bankers can refuse to lend. But mechanics, flight attendants and pilots are not entitled to the rights that we give other commercial actors.

Last month, the AFL-CIO sponsored a presidential forum in Chicago. Seventeen thousand people attended. And the most powerful moment of the forum came from—not from the presidential candidates, but from Steve Skvara, who was here a little earlier, a re-

tired worker at bankrupt LTV Steel. See, Steve can't afford health care for himself and his wife after the bankruptcy courts and the PBGC stripped him and his co-workers of one-third of their pensions and their retiree health care.

Steve asked, "What is wrong with America, and what will you do to change it?" Well, I bring Steve's question here today to this Subcommittee. What is wrong with the bankruptcy system is not a mystery, and Congress can act to fix it.

The AFL-CIO and all of its affiliates look forward to working with you, Chairman Sánchez, and the entire Subcommittee and the entire Congress to do just that: Fix a bill that is crying out for fixing.

Thank you.

[The prepared statement of Mr. Trumka follows:]

PREPARED STATEMENT OF RICHARD L. TRUMKA

"American Workers in Crisis: Does the Chapter 11 Business Bankruptcy Law Treat Employees and Retirees Fairly?"

Testimony of Richard L. Trumka

Secretary-Treasurer

American Federation of Labor and Congress of Industrial Organizations

Before the Commercial and Administrative Law Subcommittee

Of the

U.S. House of Representatives Committee on the Judiciary

September 6, 2007

Good morning Madame Chairwoman Sanchez and members of the Subcommittee. On behalf of the ten million members of the unions of the AFL-CIO, I would like to express our gratitude to this committee for holding this oversight hearing on the bankruptcy system's treatment of America's workers. I am particularly honored to be here today with people like Kim Townsend, a hard working member of UAW local 138 in Michigan; Greg Davidowitch, Master Executive Council President of the Association of Flight Attendants-CWA, AFL-CIO at United Airlines, United Steelworker International Vice President Fred Redmond, and ALPA President and Captain John Prater. I hope you've found their testimony as informative and powerful as I have. Because of your leadership, Chairwoman Sanchez, the voices of working people are once again heard in these chambers. And it is about time. Our bankruptcy laws are a critical safeguard in our economy, but one that has become dangerously unbalanced. Laws that were created to protect workers in times of economic stress have become effective devices for imposing the costs

imposed by economic change and the stresses of the business cycle almost entirely upon those least able to absorb those costs.

Business failure is a part of life in a market economy. At one time, business owners, workers, customers, suppliers and investors were left to fight over whatever assets remained when businesses failed. The result was the worst possible outcome—firms that had real value if sacrifices could be shared equally were instead liquidated, with devastating consequences for business and all who depended on them. Beginning in the 1930's, Congress enacted the bankruptcy laws to make business reorganization, rather than liquidation, the preferred approach to business failure. A central purpose in enacting the federal bankruptcy laws was to preserve troubled businesses ability to operate and provide jobs, preventing economic cycles from becoming downward spirals.

In 1977, Congress revamped the entire bankruptcy code with the purpose of once again making clear that the purpose of the code was to encourage, where at all possible, reorganization rather than liquidation, and to encourage the equitable treatment of various classes of creditors in the course of bankruptcy.

In the 1980's, Congress responded to the Supreme Court's ruling in the *Bildisco* case by enacting Section 1113, which provided for special protections for collective bargaining agreements in the bankruptcy process.[1] Section 1113 was premised on Congress' recognition that employees were uniquely vulnerable in bankruptcy—that unlike other creditors, employees generally have only one employer, are resident in only one community, have only one retirement plan and only one

[1] NLRB v. Bildisco, 465 U.S. 513 (1984).

health care plan. In enacting Section 1113, Congress made clear to the courts it intended that bankruptcy courts only set aside collective bargaining agreements as a last resort, after all other avenues for rescuing a company had been tried. And of course, the assumption was that if a court did set aside a collective bargaining agreement, workers and their unions would be free like other creditors, to withhold their labor going forward, just as other creditors are free, if their contracts are rejected to withhold goods and services.

Despite a seventy five year history of Congress repeatedly acting to define bankruptcy as a process that seeks to balance sacrifice among corporate constituencies, today the bankruptcy system has become effectively a device for the wholesale transfer of wealth from workers to other creditors. It has become a system that exploits workers' vulnerabilities rather than seeking to create a balance between workers and other creditors, and finally and most appallingly—a system that says to workers in the airline industry—you can have your contracts rejected, but unlike every other creditor, you cannot act to protect yourself— oil companies can withhold fuel deliveries, aircraft leasing companies can take back planes, bankers can refuse to lend, but mechanics, and flight attendants and pilots are not entitled to the rights we give other commercial actors. Today in practice the bankruptcy system no longer provides protections to workers commensurate with their vulnerabilities—rather the courts have decided workers are uniquely subject to exploitation in ways no other party to the system can be exploited.

As you listen today to witnesses telling the grim stories of what happened to workers in airlines and steel and auto parts plants – remember, no mere lender of money gets treated this way, no bank presidents sit across the table from their families after the bankruptcy court has done its work, wondering how to provide health care to their children or what retirement will mean? No

CEO, no matter how dismal the failure, contemplates losing their home, or faces a court order to refrain from quitting their job after their pay was cut in half. In America, in 2007, our bankruptcy system reserves that fate for the people who do the work -- who make the planes fly and forge the steel and mold the rubber and stamp out the parts.

How has our bankruptcy system become a vehicle for attacking workers—a profitable strategic option for companies?

We see a number of distinct causes:

First—Bankruptcy judges have allowed the procedural details of major bankruptcy cases to structurally disadvantage workers. Debtors have been allowed to deal with motions to set aside labor contracts and attack worker benefits separately and in advance of addressing the fate of other creditors. The entire creditor body then sees every dollar taken from workers as a dollar they may not have to concede.

Second—Bankruptcy courts have increasingly treated the procedural protections of Section 1113 as formalities—signaling a willingness to set aside contracts early in cases, which emboldens management to not make concessions in the bargaining that precedes the filing of an 113 motion by management.

Third—Bankruptcy courts have agreed to pay packages that actually reward management that took the company into bankruptcy as a strategic choice, rather than forcing management to share the pain. (Recent AFL-CIO testimony on executive compensation in bankruptcy is attached). Thus executives thinking about bankruptcy as a way to attack labor contracts can do so secure in the belief that while their current package of options may become worthless, the court will award

them a new package that will become instantly valuable once the court has set aside labor agreements and allowed management to get rid of other peoples' benefits.

Fourth—The Pension Benefit Guarantee Corporation and the Bush Administration has treated bankruptcy and the abandonment of pension obligations as a routine part of the landscape, rather than using every tool in their arsenal to make companies meet their obligations under their plans. So we see the spectacle of government contractors like United Airlines using the bankruptcy system to shed billions in pension obligations, devastating tens of thousands of families, leaving a Federal program to foot the bill for benefits, while paying executives hundreds of millions of dollars and emerging as highly profitable enterprises. The result: the retirement security protections Congress sought to provide all Americans working in the private sector through ERISA have been rendered an empty gesture by the bankruptcy courts.

Fifth—While Congress recently increased the wage priority, both the amount of the wage priority, and the status of severance and health benefits under the wage priority have proven to be insufficient to protect workers in major bankruptcies like Enron. Promises from the White House and the Republican majority to address these issues and issues relating to the impact of employer bankruptcy on workers whose retirement money was invested in employer stock turned out to be just that—empty promises.

And finally, and most appallingly, in the last two years we have seen court decisions holding that airline workers covered by the Railway Labor Act, whose contracts were rejected by bankruptcy courts, did not have the right to strike following rejection of their contracts.[2]

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[2] Northwest Airlines Corp. v. Association of Flight Attendants-CWA, 483 F.3d 160 (2d. Cir. 2007).

There is no question that the business bankruptcy system no longer works for working people. The bankruptcy courts will continue to meekly implement the agenda of management and its senior creditors at the expense of the working people of this country until they are directed to do otherwise by Congress. Workers' unhappy experience with Section 1113 suggests that Congress needs to think about mechanisms that recognize all the key actors in a bankruptcy proceeding—company executives, bankruptcy judges, secured creditors—are incentivized to act in certain ways by the law and by economics. The court's role must be to insure fairness to workers and not just defer to corporate executives' plans and interests. If Congress wants fairness to workers to be a key objective of the process, these key actors must have both the positive and negative incentives to make it so.

And of course that is indeed what Congress and the public have wanted consistently for more than seventy years—a bankruptcy system that encourages reorganizations and is fair to workers. Last month the AFL-CIO sponsored a Presidential forum in Chicago, 17,000 people attended, and the most powerful moment of the forum came not from the candidates but from Steve Skvara, a retired worker at bankrupt LTV Steel who cannot afford health care for himself and his wife of 36 years after the bankruptcy courts and the PBGC stripped him and his co workers of a third of their pensions and their retiree health care. Steve Skvara asked, "what's wrong with America, and what will you do to change it." I bring Steve Skvara's question here today to this subcommittee. What's wrong with the bankruptcy system is not a mystery, and Congress can act to fix it. The AFL-CIO looks forward to working with you, Chairwoman Sanchez, and the entire Subcommittee and the entire Congress, to do just that. Thank you.

United States House of Representatives
Committee on the Judiciary
John Conyers, Jr., Chairman

"Truth in Testimony" Disclosure Form

Clause 2(g)(4) of Rule XI of the Rules of the House of Representatives require the disclosure of the following information by witnesses appearing in a nongovernmental capacity.

Hearing: "American Workers in Crisis" re Chapter 11 Business Bankruptcy Law

Date: Thursday, September 6, 2007 at 10 a.m.

1. Name:
Richard L. Trumka,
AFL-CIO Secretary-Treasurer

2. Entity(ies) you are representing:
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

3. Business Address and Telephone Number:
815-16th Street, N.W., Washington, D.C. 20006 202/637-5300

4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?
☐ YES ☒ NO

5. Have any of the entities that you are representing received any Federal grants or contracts (including any subgrants or subcontracts) during the current fiscal year or either of the two preceding fiscal years that are relevant to the subject matter on which you have been invited to testify?
☐ YES ☒ NO

6. If you answered "yes" to either item 4 or 5, please list the source (by agency and program) and amount of each grant, subgrant, contract, or subcontract, and indicate whether the recipient of such grant was you or the entity(ies) you are representing. *(Please use additional sheets if necessary.)*

7. Signature: Richard L. Trumka Date: 9-07-07

Jud-5/2003

Ms. SÁNCHEZ. Thank you for your testimony, Mr. Trumka, and thank you to all our witnesses.

We will now begin our round of questions. And I will begin by recognizing myself first for 5 minutes.

My first question is for Ms. Townsend. In your written testimony, you state that Hastings employees currently pay for most of their own health-care costs and that it costs about $300 a week for family coverage. Does this mean that Hastings employees currently are paying $1,200 a month for family health-care insurance?

Ms. TOWNSEND. Some of those are, if they choose to take the top coverage.

Ms. SÁNCHEZ. And how are those employees able to pay those premiums?

Ms. TOWNSEND. They are not paying very well. They basically aren't taking home a paycheck.

Ms. SÁNCHEZ. Okay. Do you think that the Hastings retirees got a fair shake in the bankruptcy, or do you think that they bore the brunt of the restructuring?

Ms. TOWNSEND. They bore the brunt of the restructuring.

Ms. SÁNCHEZ. And did the business of the company change as a result of the bankruptcy, or do you think the bankruptcy just served as a mechanism for getting rid of the benefits of the workers and the retirees?

Ms. TOWNSEND. It just served as a mechanism to get rid of the contract and the retirees' negotiated benefits.

Ms. SÁNCHEZ. And is that just your sentiment, or do you think the overwhelming majority of employees feel the same?

Ms. TOWNSEND. Overwhelming majority.

Ms. SÁNCHEZ. Okay, thank you.

Mr. Redmond, in your prepared statement, you account how you personally experienced the impact of Chapter 11 while an employee at the McCook Metals company. When the company liquidated, it resulted in the termination of the company's defined benefit pension plan and the retiree insurance plan, is that correct?

Mr. REDMOND. That is correct.

Ms. SÁNCHEZ. Can you explain to us what it means to have your defined benefit pension plan terminated, what the impact is?

Mr. REDMOND. Well, the impact on the defined pension benefit plan—and this was a Taft-Hartley plan that was assumed by the Pension Benefit Guaranty Corporation—and that plan was negotiated for specific payments based on your years of service. And we have seen people in the McCook situation that, because of the funding situation with the PBGC and the rules that has been established by the PBGC, some of those people lost as much as 50 percent of their scheduled pension payments that they would have been entitled to had the plan not liquidated.

Ms. SÁNCHEZ. And please explain for me what the retirees had to do after they lost their insurance coverage?

Mr. REDMOND. Well, after they lost their insurance coverage, then the majority of the retirees that were young enough or able enough to go out and get other jobs, they had to find alternative means to try to assume some form of health care. There was an effort made by the union to try to reemploy some of these folks, along with the State, do retraining programs in other industries. But in this particular liquidation, the insurance plan was completely terminated, and most of those folks was left without insurance, except those that qualified by age for Social Security, to get Medicare on the Social Security.

Ms. SÁNCHEZ. Thank you.

Mr. Bernstein, Mr. Trumka and I think Mr. Redmond alluded to the idea of shared sacrifice. Do you think that all participants in a Chapter 11 case, including the CEOs and other managerial types,

should have to share the pain that line workers must endure over the course of a company's financial restructuring?

Mr. BERNSTEIN. Yes, Madam Chair, I do believe that there should be shared sacrifice among all constituencies in a Chapter 11 reorganization. I think that, in determining the extent and nature of the shared sacrifice, however, it is important to keep in mind the market forces under which a Chapter 11 company operates so that it needs to pay its salaried employees, and its union employees, and its executives market-based wages so that it can be competitive.

And in determining the way that the shared sacrifice is structured, those market forces need to be taken into account. And, indeed, in Section 1113, one of the factors that the court must find exists in order to grant the debtor 1113 relief is that the 1113 proposal is fair and equitable. And the way that has been interpreted by the courts is meaning that the pain, if you will, is spread in an appropriate manner among the various constituencies.

Ms. SÁNCHEZ. Okay, correct me if I am wrong, but it sort of seems fundamentally unfair for a CEO, such as Glenn Tilton, to preserve a $4.5 million pension fund from termination while the pension plans of all other United employees are terminated. And I think it was Mr. Davidowitch who suggested, "Hey, if you are going to wipe out the pension plans of the line workers, why not write into existence a law that says all pensions, including managers and corporate CEOs, if one of them goes, they all go?"

Don't you think that that would be a huge step toward ensuring the pensions would only be wiped out in the most compelling of circumstances?

Mr. BERNSTEIN. Well, I think that, as it is, the cases in which the courts allow pensions to be terminated or modified are very compelling circumstances and only those circumstances.

Ms. SÁNCHEZ. And yet the CEOs can retain their pensions? Does that sound like shared sacrifice?

Mr. BERNSTEIN. I don't know the details of Mr. Tilton's overall compensation package, but I would say—and so I can't speak to his personal situation—but what I would say as a general matter is that there is no reason for corporations in bankruptcy to be paying materially above-market compensation to anybody, including the senior executives.

However, in looking at the full compensation package for salaried people or executives or even the CEO, a Chapter 11 company needs to look at what the market for CEOs is and pay compensation and benefits and pension benefits that is at least at the market level so that the airline or the other company in Chapter 11 is able to retain its management, just as it needs to pay its represented workforce, its union workers, market wages, or else they will leave and go to a competitor.

Ms. SÁNCHEZ. Well, it seems to me that, in some instances—and my time is expired, so I will be brief—in some instances, the line workers are bearing the brunt, and they are often getting slashes to their salaries and their benefits, which puts them, you know, below market. But because either they can't strike or because there aren't any other employment opportunities in the areas where

these folks live, they are not—the pain is not shared equally among the two classes of workers.

And with that, I will yield. And I would recognize the Ranking Member of the Subcommittee, Mr. Cannon, for 5 minutes of questions.

Mr. CANNON. I would just make the point by beginning and say that the disproportion between workers and executives is that there is—the market is likely different. And I think the goal of what we do here ought to be to create a more robust economy so that workers have the choice of leaving and going to someplace where they will get better compensation, as well.

I will just tell you, an under 3 percent unemployment rate in Utah, workers write the ticket, and that is America. I think that is the good part of it.

Let me ask you, Mr. Redmond, is the standard United Steelworkers contract, does that include a defined benefit program still or have you shifted to a defined contribution?

Mr. REDMOND. In most of our contracts, we still have the defined benefit, but in many others we have shifted to defined contribution plans.

Mr. CANNON. Are you familiar with the Geneva Steel mill and the history of the contracts there in Utah?

Mr. REDMOND. Vaguely. Vaguely. Not that much, but——

Mr. CANNON. I think they were the very first that had a defined contribution contract. Are you familiar with that?

Mr. REDMOND. I know that Geneva did, that the Geneva Steel contract did go from defined benefits to defined contributions, that is correct.

Mr. CANNON. Right, and that happened earlier, like 1987, right?

Mr. REDMOND. That is correct.

Mr. CANNON. There was some attempt by the United Steelworkers to renegotiate that and make it a defined benefits program. Are you familiar with that?

Mr. REDMOND. Yes, somewhat, yes.

Mr. CANNON. Do you recall the worker response, that is the union member response to that?

Mr. REDMOND. No, no, I am not.

Mr. CANNON. It was like a rebellion. It was like, "We are going to leave the union if you try to change our defined contribution," because they got such a—my understanding. Look, I get this—this is not my testimony that I stand by. I just have heard that the defined contribution contract became much more beneficial than what it would have been if it was defined benefits.

Mr. REDMOND. If I may, Congressman, it is a matter of, you know, the situation that we are dealing with when we go to the bargaining table. And our recommendation, what we are asking is that the imposition of terminating the collective bargaining agreement be strictly used as a last resort.

Now, we have had many situations where companies have came to us as a first resort, tried to negotiate as opposed to liquidating, and in some of those situations—in a great majority of those situations—we found it necessary, due to the financial situation of the company, in order to keep jobs in the community, to go from a de-

fined benefit to a defined contribution. So we are not opposed to that particular concept.

Mr. CANNON. But you are saying you respond to companies. Have you gotten to the point at United Steelworkers where you are willing to say there may be a huge benefit long term to having a defined contribution plan instead of a defined benefit plan?

Mr. REDMOND. No, we have not taken that as a institutional position, and we have not taken that as a position clearly across the board portending to our collective bargaining agreements, no, sir.

Mr. CANNON. Have you done anything with health savings accounts, which would do essentially the same thing for health care, give people sort of a control of their money and the opportunity to accumulate value in a health savings account?

Mr. REDMOND. We have been involved in some situations where the health safety account approach have made some sense to some distressed companies that we have had, and we have sat down in a few of our contracts and negotiated health savings accounts.

Mr. CANNON. But you have done that in response to ailing companies, as opposed to going into healthy companies and talking about health savings accounts?

Mr. REDMOND. Well, we have done them in response to the collective bargaining process. We have been in collective bargaining situations where health-care savings accounts made sense. We have been in collective bargaining situations where we have rejected health-care savings accounts because they did not make sense.

These decisions were made by the bargainers at the table, and they are mostly based on the financial situations of the companies and also the willingness amongst our membership to apply different approaches to try to deal with the health care situation.

Mr. CANNON. Let me shoot to Ms. Townsend. You lost your pension. I suspect you lost your health-care benefits, as well; I think you said that. Would you have preferred to have had a defined contribution plan, where you owned whatever it was that you put in, and a health savings account, where you owned the value in that health savings account and that would have been able to keep those? Or do you think that the union representation was adequate in that regard?

Ms. TOWNSEND. I do believe we were adequate in that regard, because our people don't make enough money to be able to have the health savings account. It costs more money out of pocket to have those kinds of accounts and to have money up front——

Mr. CANNON. There is sort of a transition period where you have to have the money in the——

Ms. TOWNSEND. Yes.

Mr. CANNON. But your union could have negotiated a relationship which would have safeguarded you and other employees through that period. Have you looked at that?

Ms. TOWNSEND. Yes, we have.

Mr. CANNON. And is that something that you would have found attractive?

Ms. TOWNSEND. No, we did not find that attractive.

Mr. CANNON. But now, after having looking back to the bankruptcy and the loss of your benefits, would that have been more attractive? Would it be more attractive to you now?

Ms. TOWNSEND. I still contend no, and so have our members.

Mr. CANNON. Thank you.

Ms. SÁNCHEZ. The time of the gentleman has expired. Thank you, Mr. Cannon.

Mr. Conyers, you are recognized for 5 minutes of questions.

Mr. CONYERS. Thank you very much.

What an incredible picture is being painted here today. The whole economy is in need of reexamination, and opening up bankruptcy is only one small part of this equation. What is wrong with this economic picture, and how do we begin to turn this ship around and get it moving right?

And so we have a lot of great lawyers that are working with us on shaping a new bankruptcy approach. And we are going to be working on that. We want to hear from some of these judges, and we want to have fair hearings, so that there won't be any complaints about, you know, how we came to the conclusions.

But I am thinking of Harry Lester, of the steelworkers in Detroit, who told me, because I was going to China—and I went before the steelworkers had a big conference in Dearborn recently—and he said, "Congressman, when China gets through building all of their steel mills, there will be no way that any steel company in the United States of America will be able to compete with them." He said that is what it looks like, the prospect, to be.

I raise the question with all of you about universal health coverage, as I have with Chris Cannon, instead of health accounts. I mean, more costs going out of the employees wages to protect them against health incidents, to me it is like we don't know that, in most industrial countries in the world, they already have had universal health care and that we don't have to copy anybody's. We can and have created a system that is better than theirs, because we have learned from them. So the Ranking Member on the Subcommittee and I have talked about health care, and we are in constant dialogue about it.

We don't have a full employment policy in America. How many of you remember the Humphrey-Hawkins Full Employment and Balanced Growth Act? As we move from this industrial era to a digital era, we have to find out what gives all these companies the right to start breaking contractual agreements. You can't do that in any other circumstance in America where you say, "Things have gone bad now, fellows. Guess what? The contract we signed in broad daylight, sober, doesn't count anymore, and you have to come around, we have to renegotiate that." The lawyer being told that would laugh at his colleague if that were raised.

We have trade laws that encourage taking industries and shops and plants out of America, that encourage it. They aren't neutral on it. It is encouraged. We all know how this is hemorrhaging our workforce. And it is not just people—has my time expired? Is that red?

Ms. SÁNCHEZ. It goes quickly doesn't it, Mr. Conyers?

Mr. CONYERS. What color light am I?

Ms. SÁNCHEZ. You have a red light.

Mr. CONYERS. I don't have my glasses on. But let me just say this, because I really wanted to get a response from everybody on this table on the next round about where we come down on this, because this system—you talk about a powerful economic system that is now going into the waste basket.

Here we have people that go to work everyday that are opening up the Detroit News and the Detroit Free Press to wonder if there is anything about their company thinking about going out, or an equity firm that knows nothing about an industry buying it out merely to usually rip it off, and bankruptcy, here we come, or whatever, or sell it to another higher bidder. Just take the profit out of it, and keep moving, as has been reported here.

So it goes back to this old phrase, "Everything is everything." This is all connected up. Fixing bankruptcy is only a small, but vital, sliver of the revisitation of how we set this country straight. And there has been too little oversight, no hard examination of where we are going.

I would just close on this note, because I hear—and I can't believe my ears—we have young people going around saying, "Why go to college? First of all, we can't afford it. But second of all, it may not make any difference anyway, because now everybody is changing jobs every couple of years."

I mean, people—when my dad came to Detroit, you got one job, and you work in it until you retire. That was it; that was the tradition. And all of this is being changed and very little of it is being realistically examined. And that is why I think this may be one of the most important hearings that the Judiciary Committee's Subcommittees, of which there are five, will be holding this year.

This could be a very important beginning change that could go through the whole Congress. Almost every other Committee is involved in this, and that is why I praise the Chairwoman and the Ranking Member for putting this together today.

Ms. SÁNCHEZ. Thank you. Does the gentleman yield back? The gentleman yields back his time.

I would now like to recognize Mr. Watt for 5 minutes of questions.

Mr. WATT. Thank you, Madam Chair.

Two things. Let me just start by saying two things. Number one, how delighted I am that the Chairman of the full Committee followed the precedent that his father set and, once he got in one job, stayed in it all the way through a career. Isn't that a wonderful thing?

Now, his father might have been in—I don't know what his father did, maybe worked for the automobile industry or he did—there are different careers, but in that sense we are so indebted to his father and to the fact that he stayed the course in one career and has become our leader in this Committee.

The second point I want to make is just to apologize to the witnesses for not being able to be here and hear your testimony. My intent was to be here. I thought I had an hour of general debate on a bill that was on the floor before they would reach the amendment I had. And when we went to vote, they told me that they would probably take 5 minutes in general debate, and then I would

be on with my amendment. So I had to stay on the floor and do my amendment.

But I did want to come back and participate in this discussion, because I think it is so timely and important that we try to establish the things that need to be addressed in bankruptcy reform that need to be changed. I have spent a good portion of my life before I heard the adage, "Consistency is the hobgoblin of small minds," trying to reconcile things and kind of make them consistent.

While we were out on the break, I taught an introductory civil rights class. I sat in as a guest instructor, and I started with this basic phrase that they start the Constitution with, "We hold these truths to be self-evident that all"—and then I left a blank—"are created equal." In a sense, my whole aspiration has been to make sure that that blank was filled not only with White men—because that is what they were talking about when they wrote it—but to make sure that it applied to everybody.

So if I am looking for consistency in things, you all will have to forgive me. I keep looking for a consistent world.

And so, Mr. Bernstein, I am going to start with you, and then I hope the rest of the panel will weigh in. How can I make consistent the notion that a bankruptcy court can rewrite a labor contract in bankruptcy, but a bankruptcy court cannot rewrite a mortgage contract in bankruptcy? Is there some way that I can reconcile those two concepts? I am just interested.

Mr. BERNSTEIN. Let me start with the general rule, Congressman, in section 365, which says that, as a general matter, any contract in bankruptcy can be rejected by the debtor. The debtor has to go to the bankruptcy court, but the standard—as I said in my remarks—is a deferential one. And so ordinarily the debtors' business judgment, if it is rational, is approved, and the contract is rejected.

For collective bargaining agreements, Congress in 1113 enacted a substantially higher standard so that it is much more difficult for a debtor to reject a collective bargaining agreement than it would be any other sort of contract.

Now, with respect to home mortgages, these are not treated under the Bankruptcy Code as executory contracts. They are treated as secured loans. So the concept of rejection of the contract simply doesn't apply under the code. However, there is a concept called cram-down, where a debtor, under some circumstances in bankruptcy, can modify the terms of the secured debt, and ordinarily that can be done with secured debt. That is not the same as rejecting or abrogating the contract, but it can, under some circumstances, modify the terms of the loan.

And you are correct that, with respect to home mortgages, which are secured debt, not executory contracts, there is a prohibition on lien splitting under those circumstances. That is a particular provision in the code that prohibits lien splitting for individual debtors, but it has really nothing to do with the notion of rejecting contracts.

Mr. WATT. Before anybody else responds, can I just take 15 seconds to explain to Mr. Bernstein that——

Ms. SÁNCHEZ. Without objection, the gentleman is granted 2 additional minutes.

Mr. WATT [continuing]. That I took my constitutional law from a gentleman named Robert Bork at Yale University. And most of what he said in my constitutional law class sounded about as bizarre as what you just said. Most of what he said, I never agreed with. It was a great way to learn the law.

But I understand that there are distinctions that we have made. I guess the question I am asking is, how in the world can you rationalize that? And I mean, you probably gave as—I mean, you gave a lawyer's answer. There are distinctions that we have made as a matter of public policy. I think the question I was asking was a broader question of, is there some public policy rationale to this? Or maybe you all will want to weigh in.

Mr. Prater wants to weigh in.

Ms. SÁNCHEZ. The time of the gentleman has expired, but we will allow the witnesses to answer.

Mr. PRATER. Thank you, Madam Chairwoman.

The problem is, is that bankruptcy has destroyed collective bargaining at the companies where we try to negotiate a contract. Market rates for labor are set at the bargaining table, not by a bankruptcy judge. Now, a bankruptcy judge can dictate to us what our labor is worth. It has destroyed industries.

Anybody like the airline industry that has been created out of 21 bankruptcies in the last 5 years knows, let us establish our value as working men and women by negotiating, but we can't be forced to take the rate given by the bankruptcy judge. Give us the right to withhold our services. Don't let the judge take away our right to withhold our service. Establish that. We will establish a fair market price for our services to our employer.

Thank you, sir.

Ms. SÁNCHEZ. There is enough interest, I think, for a second round of questioning, so I will recognize myself for 5 minutes.

Captain Prater, you note in your prepared statement that, in the aftermath of September 11, 2001, ALPA and other unions faced continuous efforts by airlines to use the bankruptcy process as a razor-sharp tool to strip away working conditions and living standards that were built over decades of collective bargaining. Why did the events of September 11, 2001, cause this marked change in the airline industry? And how were its workers treated?

Mr. PRATER. As workers in the industry, we recognize the devastation caused to our industry. We were willing and did meet with all of our managers to try to find the solutions to stay out of bankruptcy. Many places we took round after round of concessions trying to find those consensual approaches to avoid bankruptcy and then had the bankruptcies foisted upon us.

At that point, the system turned. We were no longer able to negotiate. We were dictated to. Yes, the process was met; 1113 made the judge call both parties together. But at the end of the day, the hammer was hanging over our head.

Now, there is no pilot that wants his or her airline to go out of business. We established those long-term relationships with our employer. We made those decades' worth of pension plans by taking money out of our pocket and putting it into those pension plans. So to see those pension plans, 5 out of the 6 people at this table have looked at members in the eye, who are 58, 59, 60 years

old, and seen the faces when their pension plans have been killed. We have had to live with that.

That is why we are here asking for the help of Congress to allow us to not see those faces again. Thank you, ma'am.

Ms. SÁNCHEZ. Thank you.

In light of the Delta Airlines case, you argue that a neutral expert arbitration panel should resolve certain labor issues in a Chapter 11 case rather than a bankruptcy judge. Can you please explain why?

Mr. PRATER. Yes, we found that—again, we are looking for the consensual approaches that will work between management and labor. And we found specifically in that case that, by removing it from the bankruptcy judge, taking it off of the bench and putting it into negotiations with a third-party neutral and arbitrator, we were able to reach a consensus.

It was very difficult. Again, those members lost their pensions. They lost over 40 percent of their wages. We are asking to be able to get that back, but would hate to see this repeated in other industries. Our entire industry has been ravaged by the use of bankruptcy over labor.

Ms. SÁNCHEZ. Thank you.

Mr. Davidowitch, you note that there have been 150 airline bankruptcies since the industry was deregulated in 1978, including 21 bankruptcies just in the 6 years since September 11, 2001. I would like you to please explain, if you can, the role that deregulation, if any, has played in the financial well-being of the airline industry and explain why you think so many airlines have filed since September 11, 2001.

Mr. DAVIDOWITCH. Well, in short, the barriers to entry into the aviation industry are little to none existent. So anybody with a big ego and a pocketful of cash can go out and buy some planes and start up a new service.

The discussion relative to what has happened in the industry is, one, it is a vital service that we provide to our Nation's communities, the people that we represent and the families that we support, or is it a commodity? If it is viewed as a vital service, then certainly there should be certain regulations put into place to protect the workers, as well as the communities in which they live and support.

So when we look at what has transpired in the near term, in the events since September 11th, what has occurred—it is taken it one step further. We now see a degree of social engineering that has occurred, the abandonment of corporate social responsibilities, pulling the rug out from workers mid-career, late-career, creating the next generation of impoverished Americans with no retirement security and no health care.

Nobody more than the long-term dedicated employees of these companies want to see that company be successful. Their futures are inextricably linked. So any premise, any belief that the employers and the unions can't sit down at a level playing field and find a truly consensual agreement is without merit.

The current process forces employees to negotiate with a gun to their head. It is just that simple. The notion that employees are facing no work, a company liquidating, is nonsensical. It is a red

herring. Employees want to see their companies be successful because their families' future, their own future are linked to the success of that corporation.

It is not a question of companies liquidating. What we are confronted with at the bargaining table, under the current process, is being put into a position of facing the rejection of our entire collective bargaining agreement that puts the gun to the heads of the employees.

Ms. SÁNCHEZ. Thank you.

My time has expired, but I am going to ask for some indulgence from the Members of the Subcommittee and ask for 1 additional minute. I have one last question I would like to get through.

Any objection? Without objection, so ordered.

Mr. Trumka, my final question was reserved for you. My question is, do you believe that Chapter 11 has effectively become a device for transferring the wealth of workers to other creditors? And why or why not?

Mr. TRUMKA. Well, the answer is, unquestionably, yes. And quite frankly, I would like to answer, if you might, and answer part of what Representative Conyers asked and part of what Representative Watt's asked.

You see, about in the 1970's, we began to adopt policies in this country that can best be described as growth based on corporate profit; in other words, everything that was good for corporate profit is the policy that we would adopt. Therefore, Mr. Watt, that is why you can, say, reject the union contract and not a mortgage contract, because both of those maximize corporate profit.

What we should be looking at in the country is a policy that is based on growth based on worker prosperity, so that more prosperity to the workers actually stimulates the economy and pushes it up. All the policies that we have been adopting, including bankruptcy, feed into the growth based on corporate profit. That is why they have been interpreted the way they are; that is why they have hurt workers the way they are; that is why they are the way they are.

Each one of those policies has roughly two things in common: One, they inevitably transfer power from workers to their employer; and, two, they ultimately result in fewer good jobs in this country. So, you see, the bankruptcy court or the bankruptcy policies that were originally put into the country to help protect workers and make sure that the pain is shared equally by all the constituents, it is skewed.

You can look at policy after policy, Representative Conyers, that does precisely that very thing. So when you say that bankruptcy is just the tip of the iceberg, I have never heard a more correct or eloquent statement, because truly it is.

Ms. SÁNCHEZ. Thank you, Mr. Trumka. My time is expired.

I would turn to Mr. Cannon for 5 minutes of questions.

Mr. CANNON. I am struck by the nature of the discussion of the panel, because we are talking about sort of like class warfare here, workers versus management, whereas I think the major difference—and, Mr. Prater, I want to particularly ask you about this—the major difference here is that managers could walk, because they are in a competitive environment, whereas employees

are engaged in a collective group. And so you are now talking about the rights of an individual to walk, a manager, and his ability to bid up his price, versus the ability of a group.

And I think, Mr. Trumka, this actually comes back to your concept that—your statement transcends what I think we can do in this hearing, so I am not going to come back and talk about that so much, that is, with larger policy, whether we want to support workers and workers' wealth versus corporate profits. What I want is a world of freedom.

And so I want to focus—and that is why I want to come back to you, Mr. Prater—I want to focus on the difference here. Don't we do better as a society—and this is the big picture here—don't we do better as a society empowering every individual, not just the managers, not just the guys who have the degrees, but empowering every individual? They are not policies that you, as unions, can implement that would empower your people.

In other words, if you want your people as a block to empower you, as unions, then you want to keep them tied in with defined benefits and Medicare, medical plans, and that sort of thing, and then you are negotiating as a group, as opposed to saying, "Let's give every individual in America the opportunity for mobility."

So take a defined benefits plan that is portable to your next job, take a health savings account or some other kind of health plan that is portable so you can take to your next job, isn't that where we really want to go? Don't we want to make all Americans, like the big guys that were—what was the term that—that are the beneficiaries of the transfer of wealth from the collective—don't we want to make all Americans portable, independent and in a market so they can raise their value, Mr. Prater?

Mr. PRATER. Thank you, Congressman. What is the market value of a pilot, and should we be willing to just cross lines to other companies at a moment's notice?

Mr. CANNON. No, I don't think that is the issue. The issue is, can we let that pilot work with a company he loves and induce the company to want to keep him because he can go, as opposed to being a member of a collective where he loses significantly if he changes employment? That diminishes the power of the union, but it empowers the individual. Now, that doesn't mean the individual goes willy-nilly to whatever employer, but it means that he has the ability to negotiate himself.

Mr. PRATER. We use a system of seniority that everyone is well aware of in different industries. But the value of not leaving is, I am expected to pass along my knowledge, as a senior captain, to the next generation of pilots. If I value my experience and my knowledge so much that I want to bargain for myself, why would I create a competitor?

No, that is not the way we do it. We know, on a seniority system, we are entitled. We need as a profession to pass our value, our experience to that next generation. How do we just leave one employer and start over? That is a problem. Right now, with 30 years of flying experience, if I start over tomorrow, I will start at a new pilot's salary of $17,000 a year. How transportable is that?

Mr. CANNON. Well, that is not. But if you have been around for 30 years, you've got a lot of experience. You have a lot of value.

In part, that value will be passed on wherever you go to other pilots, because they are going to look to you for your guidance and counsel and experience. That experience has value.

Now, if you leave an employer because—if you have a contract system that demeans you by, when you leave an employer, from whatever your salary is to a new pilot's salary, that is silly. Why do you want to support a system that would do that?

Mr. PRATER. I think you missed part of the reason that we are collectively organized and try to work under a contract. It is so that we can stand up to our employer if pushed too far. If an employer says, "Yes, you have been on duty for 16 hours, but go ahead and take that trip, because that airplane is full of passengers," that individual can't stand up and say, "No," unless he has a union to back him. That happens, sir.

Mr. CANNON. If you have been working 16 hours—I know it does.

Mr. PRATER. That happens.

Mr. CANNON. Clearly, it is going to happen, and those things will happen. And there are some regulations that try to constrain that, but there is also some latitude. But there are also market forces that effect that, because if you force a pilot to fly more than he is capable of doing and the airplane crashes, then you lose a lot more than just the lives of the people involved in that plane. You lose your market position.

Now, the value of lives is incalculable, frankly, but there are forces here at play. What you are arguing is that the collective is better from the individual. And in America, we sort of think that the individual and his rights are primary. And it seems to me that that is where, as unions, that is the future.

We are not back in the 1920's, when mine workers had no choices. We are in a world where, if unions adapt, there are great things that can be done. I am a big fan of collective bargaining. There is a place for you all to play. But limiting your members' choices just seems to me to be the wrong way to go.

Mr. PRATER. Well, certainly, within the collective bargaining, we are not trying to limit—you know, we are looking forward. You asked many questions about the value of a defined contribution plan? Our members have said, "Get our money out of that company now. Don't let them hold on to one red cent into a defined benefits plan." So that is where we will go in the future. But we have to think about those people who have already served 25, 30 years.

Mr. CANNON. I see that my time has expired, but I just want to—are you saying that your members—may I have an additional——

Ms. SÁNCHEZ. The gentleman is recognized for an additional minute.

Mr. CANNON. Are you saying that you are providing—that your union is providing the defined benefits plan and keeping the funds in the union? Or are you saying it is moving away from defined benefits toward defined contributions?

Mr. PRATER. At the bargaining table, we are moving into more defined contribution plans, because our members have seen the failure of the defined benefit plans.

Mr. CANNON. I think that is very good. Congratulations. Thank you.

I yield back.

Ms. SÁNCHEZ. The time of the gentleman—the gentleman yields back his time.

Mr. Conyers is recognized for 5 minutes of questions.

Mr. CONYERS. We want to stay in contact with everybody here, and I think this discussion has to continue. And I will look forward to it.

Ms. Townsend, what would you like to leave the Subcommittee with, as we close down on this second round of questions?

Ms. TOWNSEND. What I would like to leave the Committee with is to look into the bankruptcy court system and give us more rights when we are sitting at that table negotiating, because when we sit there and we have no clout and no power, and you have to take what they are shoving at you, you have no recourse, other than to keep the doors open and you have a job.

Mr. CONYERS. Sure.

Ms. TOWNSEND. But that is all you have.

Mr. CONYERS. Counsel Bernstein, what would you leave us with?

Mr. BERNSTEIN. Two points, Congressman. One, Section 1113 at the Bankruptcy Code is working as Congress intended it to work. And although the issues, as you have heard today, are very difficult and sometimes quite painful, the bankruptcy courts are rigorously applying the statutes.

Second, that in whatever modifications the Committee may consider to the bankruptcy laws, I would urge the Committee not to make Chapter 11 reorganizations more difficult than they are. They are very difficult already. Most Chapter 11 cases fail, and that doesn't work well for employees, and it doesn't work well for creditors, and it doesn't work well for anybody else.

So the objective of Chapter 11 when it was enacted was to facilitate successful Chapter 11 reorganizations, and no modification to the code should be made which materially detracts from that objective.

Mr. CONYERS. Yes, the name Delphi comes to mind when you mention Chapter 11. And that is a very interesting situation that we will need to go into as this subject matter goes on.

Mr. Redmond, what are your parting comments?

Mr. REDMOND. Well, I would, first of all, like to leave the Committee with the four recommendations that are in our written testimony for you to give some consideration to. But I would also like to just go back to a question that Representative Cannon made in regards to collective action versus individual action.

And I just want to respond by saying you mentioned Delphi. And what this is about is leveling the playing field when it comes to collective bargaining and making collective bargaining a priority as far as the steelworkers are concerned.

In Delphi, where the steelworkers represent between 850 and 900 members, the day that Delphi walked into bankruptcy court and filed for liquidation, they also walked into the courts and filed for liquidation of the current collective bargaining agreement on the same day. Dana Corporation, we had a similar situation, whereas Dana Corporation filed for liquidation, they also filed to liquidate the collective bargaining agreement.

So the thing that we would like to leave with the Committee is this: The collective bargaining agreement, in our opinion, should

have some priority, in terms of having discussions with corporations when they encompass financial difficulties. And in light of their right to file for Chapter 11, we think that they also have an obligation to promote the integrity of the labor agreement and to sit down with the union and try to negotiate alternatives.

And when we speak about defined plans of defined contributions as opposed to defined benefit plans, then these are the sort of things that take place through the collective bargaining process and we think is very, very important to maintain the integrity of the process as a first beginning, as opposed to a last resort.

So I just want to thank you, Mr. Chairman.

Mr. CONYERS. I am going to ask—well, I will put my statement in the record. But part of the problem is that the law is simply not clear, leading to a split of authority among the circuits. It is no secret that certain districts in our Nation interpret the law to favor the reorganization of businesses over other priorities, including job preservation, salary protections, and other benefits.

This is particularly true with respect to the standards by which collective bargaining agreements can be rejected and retiree benefits modified in Chapter 11. Businesses as a result take advantage of these venue options and file their Chapter 11 cases in employer-friendly districts. According to the American Bankruptcy Institute, this is among the reasons that Delphi, a Michigan-headquartered company, filed for bankruptcy in New York.

Now, I don't know what is so great about a law that allows these companies to forum shop. Boy, when they hear a trial lawyer trying to do that, this Congress collectively hits the roof. "How dare they do that!" As a matter of fact, we changed the whole law and started creating legal restrictions on forum shopping, and yet here it is, laying here for the advantage of corporations.

I ask unanimous consent to take a minute to go down to the rest of the folks——

Ms. SÁNCHEZ. Without objection, it will be granted. I am just going to make the Members of the Subcommittee aware that we have one more person who has 5 minutes of questioning, and there is another hearing scheduled in this very room at 1 o'clock. So we are going to need to wrap up testimony very quickly.

I will allow the witnesses to answer.

Mr. CONYERS. Mr. Prater?

Mr. PRATER. I will be as succinct as you like our members to be when they are on the P.A. and you are trying to get a little sleep on the way home. Quite simply, I disagree completely with Mr. Bernstein. The 1113 section has not worked in the Bankruptcy Code.

My family has had five airline bankruptcies, two for me, three for my wife. It has not worked: 1113 came into being in 1984 when Congress recognized that management should not have the unilateral right to abrogate a labor contract. Yet it passed that to a judge, and what we are living with now is the fact that management is getting their way in bankruptcy court. So it has not worked, and we would like to work with Congress to help modify that.

Thank you.

Mr. CONYERS. Thank you.

Mr. DAVIDOWITCH. Here is the irony in the current corporate bankruptcy law. The executives who are largely responsible for putting the company into bankruptcy in the first place are rewarded lavishly with bonuses and enhanced compensation packages during the course of the bankruptcy and rewarded lavishly upon exit from bankruptcy, while the workers see their rights destroyed under Section 1113 and Section 1114, having their health care cut and their pensions taken away from them.

What I would suggest to this Committee, at a minimum, is to restore the balance that Congress intended when the Bankruptcy Code was last reformed to level the playing field. At a minimum, employees should have the right to strike, to withhold their service when their terms of their collective bargaining agreement has been changed. The unfairness that exists under the current application of the law and how it has been interpreted over the years has really created a lopsided scale of justice for the flight attendants and for other workers.

Mr. CONYERS. Thank you.

Mr. Trumka?

Mr. TRUMKA. Thank you.

First thing I would like to do is respond to Representative Cannon and say that, in fact, there is class warfare going on in this country, and we have been attacked continuously for the last 30 years, the workers of this country. And the notion that you can empower individuals to do better than they will collectively I think is nearly laughable.

I came out of a coal mine, and I can tell you something: That coal mine was owned by a large steel company. And I could have stood up and yelled at the top of my lungs, I could have done everything there, and I can promise you that they would given not two hoots about me. It was the fact that we were able to come together, individually, and have a greater voice, and to sit down at the table as equals with the management.

And I can tell you this, that in a labor-management relationship, when you come together as equals, you make much better decisions for everybody. And I will give you a classic example. My son, who is 3 years old, came to me one day and said, "I want something." And I flippantly said, "No." I didn't have to give him a reason. I didn't have to explain to him. It was no. It was no because I had the power and he didn't.

Then my wife came to me, made a request—not necessarily a request. She said she was going to do something. I can guarantee you that it wasn't a flippant no, because the balance of power was a whole lot different there. That is what happens when workers join together and they can have a collective voice. We all make better decisions.

The other thing——

Mr. CANNON. Would the gentleman yield just a moment?

Ms. SÁNCHEZ. Mr. Cannon and Mr. Trumka both, I respect you mightily. We have another hearing scheduled here in 10 minutes. Mr. Watt has not gotten an opportunity to ask his final round of questions.

Mr. WATT. Madam Chair, this sounds like a good discussion.

Ms. SÁNCHEZ. Wait, wait, wait. If I can get a promise from Mr. Watt that he is willing to yield, his 5 minutes to allow this exchange——

Mr. WATT. I will yield to the gentleman——

Mr. CANNON. And I won't take much time, except to say that we are not in very much of disagreement. There was a time when you needed collective bargaining. That time has transformed itself as labor has become more scarce. My goal in life is to be labor scarce and well-paid, and that means—and I think that—and I have been preaching this for years and years to the unions.

And of all people, Mr. Trumka, you are one of the leaders in having actually accomplished this—that is, that if you guys empower your employees to work in many places, and the demand for workers goes up, that is when the employee is no longer a 3-year-old child. That is when he is an adult and an American and has all the respect that America affords to individuals.

So we are not very much in disagreement there.

Ms. SÁNCHEZ. I will allow Mr. Trumka a minute and a half to respond, and then we will conclude this hearing. Mr. Trumka, you get the final word.

Mr. TRUMKA. I just say that that is good to hear that we are not that far apart, because there is a whole lot different than treating your workers, and giving them skills, and telling them to empower them as individuals. Those skills help them empower them collectively so that we all do a lot better, and that is what we do.

Just to come back quickly to the bankruptcy bill and leave you with this parting word, currently all incentives that exist in the bankruptcy bill as interpreted give them to management to take on labor first and foremost. They should be changed so that the incentive is that if you take on and create pain for workers, the pain will be shared equally with you.

Ms. SÁNCHEZ. The time of the gentleman has expired. We are going to conclude our hearing, and I want to thank all the witnesses, again, for their time in coming today to give their testimony. Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses, and ask that you answer as promptly as you can to be made part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any additional material. Again, I thank everybody for their time and their patience, and this hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 12:55 p.m., the Subcommittee was adjourned.]

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