Is American Airlines the Waterloo for Airline Management?

"Vae victis." (Woe to the vanquished.)
-Motto of the US 9th Infantry Regiment.

In a stunning turn of events, the US bankruptcy court denied AMR management's 1113c motion to reject the collective bargaining agreement for the pilots of American Airlines. While celebration may be warranted, the wording of the court's ruling indicates this is likely to be a very short-lived victory. Judge Sean Lane said AMR management overreached in terms of scope and reductions in force that were neither necessary to the reorganization of the airline nor keeping with the competitive landscape of its network peers. AMR issued a statement that they will resubmit their petition before the week ends.

What happens at that point is anyone's guess.

American Airlines pilots have chosen their path and they have chosen to use traditional labor leverage rather than financial leverage to secure their future. It is little wonder since the rancid laws of the US bankruptcy code, and the applicable case law make any kind of consensual agreement almost impossible to stomach. The way bankruptcy is practiced in the air transportation industry relies upon the

idea that labor is responsible for the mess, no matter the circumstances. That can be the only reasonable philosophical underpinning of how the Federal Bankruptcy Court of Southern New York can justify requiring labor to not only take the haircut on what it is owed by the airline, but then adding dehumanizing, insulting, and wildly vindictive terms to the "consensual" new agreement - an agreement that is required to get an insulting fraction of what labor is owed.

If we had laws based upon common sense, this would never have transpired. Management seeks out bankruptcy in the airline industry because the law allows them to loot employee compensation without the threat of the employees punching back. That's it. Nothing more. The law provides for this.

Judge Lane makes reference to how this would normally cause a strike, but since airline pilots are under the RLA, that danger is avoided and the courts will allow management to act without any tempering of their rapacity. This is how a federal judge says **you are owned**. We quote from Lane's decision:

> **The diminished likelihood of a strike also weighs in favor of approving rejection of the agreement.** The Second Circuit has held that following rejection of a collective bargaining agreement, it would be unlawful for labor to strike until the bargaining process set forth in the Railway Labor Act has been exhausted. *See Northwest Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO (In re Northwest Airlines Corp.)*, 483 F.3d 160, 175 (2d Cir. 2007).
> Following rejection of the agreement, therefore, both management and a union under the Railway Labor Act such as the APA would be required to continue negotiating in good faith.
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> > *Moreover, A strike is an inherent risk in every § 1113 motion, and in the end, it makes little difference if the Debtors are forced out of business because of a union strike or the continuing obligation to pay union benefits to avoid one. The unions may have the legal right to strike, but that does not mean that they must exercise that right. Northwest, 346 B.R. at 329–330 (quoting Horsehead Indus., 300 B.R. at 587).*
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> The Court must also consider the possibility and likely effect of any employee claim for breach of contract in the event of rejection. It is unlikely

> that the Unions would have rejection claims for breach of contract, as the Second Circuit has observed that "a debtor who rejects a contract pursuant to [Section 1113] abrogates rather than breaches the [collective bargaining agreement] at issue."[1] [emphasis added]

Lane tells AAL pilots that their inability to legally strike per the RLA is a major factor in deciding to reject their contract. In other words, management can act without fear of retribution, so that is exactly what they are going to do. The RLA's emphasis is on achieving and maintaining agreements. The US Supreme Court has opined that the RLA can only be useful if both sides are likewise bound by its proscriptions.[2] Lane goes on to quote the obvious - that a strike could cripple a debtor just as easily as continuing to pay the union what it is contractually obliged to pay. We note that this is not a concern under the same RLA with railroad employees, since the bankruptcy law (11 USC §1167) expressly prohibits it. Rail executives must plan their businesses without the benefit of raiding employee compensation, unlike airline executives. Would not a railroad also be similarly afflicted if they were obligated to pay their employees? If so, why can Title I RLA employees (rail) keep their contracts, but Title II employees (air) must jump on the grenade for the larger good? The ONLY difference between the fate of the railroads and airlines is, not the ability for employees to strike or get paid what they are owed but, the section of the bankruptcy code that governs the fate of their contracts.

Lastly, we note that the Second Circuit observes that a debtor "abrogates" rather than "breaches" a contract. That is a distinction without a difference according to the RLA. The Second Circuit is nothing more than a tool for airline executives to do an end-run around the RLA, while holding airline employees to the most pedantic interpretations of that act in the face of manifestly obvious assaults to the act's purposes. If there was an "abrogation," we would expect both parties to function as if a contract was indeed "abrogated." This would free the company from having to pay terms it finds onerous, but we would also expect that employees would likewise find freedom from the proscriptions of the contract and be able to operate in a manner not respecting an abrogated status quo.

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[1] Hon. Sean Lane, *Memorandum of Decision*, , United States Bankruptcy Court 11-15463-shl, Doc 4044, pg 98, http://www.amrcaseinfo.com/pdflib/4044_15463.pdf

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

This is not the case as this Alice In Wonderland bulwark of laws requires Title II RLA employees to operate out of respect for a status quo the judge just abrogated, while imposing almost every facet of the company's dream sheet. The result of this mind-bending sense of justice is the managers of airlines can make agreements with creditors and use, not the capital of the airline as collateral, but the future and past compensation of employees as backing for the agreements. Managers find a willing venue in the Second Circuit to force employees to fund management's fees to "rescue" the very enterprises management purposefully destroyed, and making the bond holders whole with the compensation set aside for employees.

It's their party and we pay for it.

Only in this managerial wet dream can an executive pledge the property of someone else for collateral while being paid tens of millions, if not hundreds of millions, out of employee compensation to restructure the enterprise they purposefully destroyed.

Doesn't anyone else have skin in the game?

Why bother to negotiate when the law will allow you to impose and then subsequently force employees to work under conditions they did not agree to? (the "Bankruptcy Gambit")

"You hold 'em, we hit 'em." That's the arrangement management and government have with regard to airline employees. Government holds us (injunctions, RLA, and 1113) while management works us over to the tune of billions of dollars, with them personally enriching themselves with the proceeds. The Glenn Tilton Standard is somewhere between $60-100 million dollars, and you have to know Horton is shooting to get the standard named for himself.[3]

This isn't his first rodeo and AAL pilots had better be damned certain he doesn't go the full eight seconds.

Airline employees <u>are the only ones</u> vulnerable to the mix of laws we have. Non-

[3] Sorkin, Andrew R., *American Airlines and US Airways Dance Around A Merger*, NEW YORK TIMES, July 9, 2012, http://dealbook.nytimes.com/2012/07/09/american-and-us-airways-dance-around-a-merger/

RLA employees are not required to maintain any "status quo" during a dispute, and the rail employees under Title I of the RLA have the entirety of their contract protected under section 1167 of the US bankruptcy code for corporate reorganization.[4] It is the Title II employees of the RLA (airlines) that must maintain the status quo while enduring unilateral change of their working conditions.

That's why management robs us blind. The law requires us to open up our wallets while we continue to work as if nothing happened. It's free money, and as long as we continue to countenance such a practice by our institutional docility, management will keep coming back. It has been the gift that has kept on giving since 1983.

This works right up to the point where airline employees decide they won't take their beatings, and judging by the vote at American Airlines, the pilots have put the world on notice they have had enough. The only question is if they can back it up against the legal bulwark designed to prevent it?

This battle is far from over. Casualties are likely to be high. Management has been temporarily denied authority to abrogate the APA contract - a contract that has provided uninterrupted service since 1959[5] - even after they admitted in open court (and which Judge Lane referenced in his decision) they never had any intention of reaching an agreement with their pilots and have added almost a billion dollars to their cash reserves subsequent to their bankruptcy filing. The court did not object to the abrogation because of the increasing cash position of the airline nor its sworn testimony of bad faith negotiating[6] (both of which are supposed to be deal killers under 11 USC §1113). The court stated,

> "*the undisputed fact that American labor costs for pilots are among the highest of its network competitors and that American has lost more than*

[4] 11 USC §1167

[5] AAL pilots were on a legal strike in February 1997, but were ordered back to work less than 20 minutes after it started, due to a convening of the Presidential Emergency Board.

[6] We note that Sean Lane parsed the difference between the timing of "bad faith" negotiating by saying that under §1113, management is only required to deliver the terms it needs to reorganize, whereas in normal §156 negotiations, management bargains with items it can throw away. The union may propose alternatives to the managerial term sheet, but must keep the original value (as determined by management) whole. As long as management agrees to accept some alternatives, it has met its obligation for bargaining in good faith. Put another way, the union is free to move the Jell-o around the plate, but it still has to eat it.

$10 billion since 2001, including more than $1 billion in 2011."[7]

This shows the court's true colors and given the newfound resolve of the AAL pilot corps, this battle is likely to get ugly - very ugly.

Both AMR and the courts are going to make an example out of you, to serve as a warning to others. You are presenting a direct challenge to their authority and neither organization has shown any tolerance for absorbing insolence.

The legal landscape does not favor the pilots. The best way to change the outcome of this battle is to change the laws governing how it is fought. While APA may be preparing for a long fight, it is our opinion they need to simultaneously move to change the laws while fighting AMR in the courts and on the line. It did not escape our attention that the two objections to AMR's Plan of Reorganization struck at the politically sensitive areas of their plan - job losses, while still providing red meat for the more populist delusions that pilots are overpaid, under worked, and need to share the pain with other line employees. We are asked to believe the court acted independent from political pressure, but the nexus of the AMR Plan of Reorganization was brand virtualization and massive outsourcing. We have no explanation for the court agreeing AMR needs to reorganize at the expense of its employees but denying the heart of what AMR is trying to accomplish, other than politics.

This smells like politics have crept into Judge Lane's courtroom.

How is it that AMR can be faithful to their business plan while rolling back code sharing and layoffs? That leaves areas of pilot pay and working conditions as the arena where AMR would become more competitive, which does not align with competitors at Southwest, Delta, US Airways-West, Alaska, Hawaiian, and likely United/Continental. The only comparator would be US Airways-East, and if the court grants AMR its 1113c petition, the court has given AMR a massive labor cost advantage when the problem is their revenue generation mechanism.

That puts enormous pressure on American Airlines' competitors to likewise reduce their labor costs, and the best way to do that is running the "bankruptcy gambit,"

[7] Hon. Sean Lane, *Memorandum of Decision*, , United States Bankruptcy Court 11-15463-shl, Doc 4044, pg 2, http://www.amrcaseinfo.com/pdflib/4044_15463.pdf

as has been done since 1983. A "C-Scale" airline with 20% market share is going to change the industry. If they merge and become the largest carrier in the market, there is no way other airlines will not rework their pilot contracts.

Newly installed APA president, Keith Wilson, issued a statement which departed from the customary placid tone of many of his predecessors. In this message to his pilots, Wilson stated that APA will be spending more resources on Strike Preparedness, and put AMR on notice that if they are granted their 1113 filing the union is preparing to make it hurt.

> *Does any right-minded person believe that erasing 60 years' worth of bargaining history would result in a brighter future for American Airlines? Does anyone think that securing permission from a bankruptcy judge to reject our pilots' contract constitutes effective employee relations? The answer is, once again, a resounding "no" aimed squarely at AMR management.*
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> *Your APA leadership is committed to securing a consensual, industry-standard contract that respects your sacrifices and recognizes your true worth as professionals. If AMR management one day secures the ability to impose arbitrary terms and conditions,* ***they too will have to live with the consequences of their actions.*** *One of those consequences will be to reinforce for all the fact that AMR's bankruptcy isn't just financial. Instead, what we're seeing is a management devoid of constructive solutions to our airline's problems,* ***which should alarm everyone with a stake in the outcome of American Airlines' restructuring.***
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> *As for how you can help to ensure the necessary course change, maintain professionalism at all times and do not let emotion influence your decisions. Management may be eager to engage in "hostage-taking"—don't oblige them.*
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> *Please note that your APA leadership has dedicated additional resources to ongoing Strike Preparedness Committee operations, beginning with the resumption of Phone Watch.*
> *[…]*
> *Once again, with your decisive vote against the tentative agreement, you had the courage to ask, "What happens next?" I'm likewise certain that you*

> *have the **necessary fortitude for the fight that's certain to come.***
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> *So, while management has been denied the opportunity for now to shred our Green Book* [APA Pilot Contract]*, I submit that the answer to that question is straightforward: what must happen next is appropriate recognition of our profession and our **vital role** in the airline's operation.* [emphasis added]

That statement is directed not only to the pilots and AMR management, but the UCC and court. We can not envision David Bates nor Lee Moak making such a statement while in the crucible of restructuring. Wilson knows what the NMB is telling ALPA and APA, and he knows that the law is contrary to his statements. APA is telegraphing they are digging in for a three front war.

Like we said, this is going to get ugly - very ugly.

We are all in this together. OPERATION ORANGE has devoted an inordinate amount of attention to the drama at AAL for this reason, and we still stand behind our statement that, for better or worse, American Airlines pilots are in the leadership position in this fight.

Judge Sean Lane will likely seek the comfort of historical precedent and smash pilot working conditions and benefits, while steering away from politically sensitive areas. No judge wants to be overturned nor foment an environment for Congressional override (allowed by the Constitution). This is an area APA would be wise to exploit. A weakness is being telegraphed by the court and that weakness is the political sensitivity of outsourcing, job losses, and ultimately interruptions in air transportation.[8] Whispers by members of the NMB also show that politics is intruding on a theoretical "independent" government agency, when larger pilot unions are being told the government will not allow them to strike.

OPERATION ORANGE has steadfastly maintained the solution to our declining profession is a political solution because the problem has been anchored in politics and bad law. The recent events at AAL back this up, just as the successful "bankruptcy gambits" at all the other network carriers have shown.

[8] Judge Lane cited the reduced threat of a strike as justification for abrogation. This is further evidence that politics have crept into his decision and shows the manifestly obvious fear the governing authorities have of strikes.

We are suggesting that APA adopt a flanking strategy to use with whatever plan it is formulating to bring about the ratified desires of its pilots, as articulated by its new president. The court has shown it may be subject to political pressure, and the UCC is interested in getting their money out of the mess AMR created. If APA **prepares its membership** for a political fight, and uses its standing with other pilot associations to create cross-industry unity to support changes in the law, the entities aligned to pick APA's pockets will see threats coming directly from pilot defiance along with threats coming from scared politicians.

It is time to make management fight a two front war.

If they must fight on the operational **and** political fronts, the "bankruptcy gambit" will likely fail. It will be the "Waterloo" for the A4A.

APA will most certainly be denied release to "self-help," no matter the circumstances. AMR will successfully argue the pilots lack the authority to withhold their labor, or change the matter they perform their duties without NMB release. The RLA will be the justification for the denial.

If APA adopts a strategy that is beyond the reach of the courts and NMB, they can withhold their services with impunity. No court will be able to touch them. **Peaceful exercise of the FIRST AMENDMENT is beyond the reach of the courts, Congress, or any federal agency (NMB), because any law abridging the right of the people to peacefully assemble to petition the government for redress has been defined out of existence since 1791**. That includes the RLA and 11 USC.[9] By definition, neither of those laws can be used to enjoin a peaceful exercise of the FIRST AMENDMENT, nor can any other law. The only way to stop pilots from engaging in such an effort is to amend the Constitution, or say the FIRST AMENDMENT can be abridged for political reasons.

If they try that, every journalist in the nation will unite to decapitate any politician so attempting an abridgment of the same FIRST AMENDMENT that serves as the foundation for their livelihoods. Politics makes strange bedfellows; this would be an example of that truism.

[9] OPERATION ORANGE, *OPERATION ORANGE: Illegal Action or Protected Activity?*, www.operationorange.org/our1stA.pdf

While APA is gearing up for an operational fight, they can call upon the leadership of the other pilot associations to support a nationwide political stand-down for purposes of targeting all the regulations governing pilot contract negotiations. This political stand-down will bring pressure on Congress to change the law and end, once and for all, the "bankruptcy gambit."

It is the only way you will be able to keep what is rightfully yours.

Critics will insist that pilots are best served fighting for their profession on a contract-by-contract basis. We wonder how they can arrive at such a conclusion, given the past three decades of legal assaults on pilot contracts. You never hear of railroad executives cashing out after they gut rail employee contracts, because the law (11 USC §1167) expressly prohibits it. Rail executives must suffer the indignity of actually running railroads, unlike their opportunistic peers at the airlines.

As long as there is value in a pilot contract, the pilots under that contract will be vulnerable to the "bankruptcy gambit." If the emphasis is negotiating an "industry leading contract" in the current regulatory paradigm, the union must also set a date on their calendar for bankruptcy court, because that is where they are going to end up. By negotiating a worthwhile contract in the current regulatory paradigm, the only thing they are doing is setting the stage to make another Glenn Tilton, Frank Lorenzo, or Tom Horton.

If the law is fixed, that avenue is shut off and all the value in the contract is that of pilots, not that of airline management.

That is the true definition of serving the membership.

As long as an association takes its members out on a strike to change the contractual terms, whether agreed to in a free or coerced environment, they are going to be enjoined. However, if association leaders take their pilots out on a political protest, specifically one designed to be a peaceful assembly to petition the government for redress of grievances concerning airline labor law, there is not anything anyone can do to stop it, because that is protected FIRST AMENDMENT activity.

We do not wish to see AAL pilots go through the trauma of fighting for their

contract only to see them back in court for another rinse in Chapter 11. Their union needs to plug the hole in the bucket and then go about filling the bucket.

OPERATION ORANGE outlined the political strategy in our article entitled, "Who Wants To Play To Win?"[10] We are asking all sympathetic pilots to print out a copy and send it to your elected union officials. We are asking this, not only of AAL pilots, but any pilot fearful his management team will run the "bankruptcy gambit" in the future. That list should encompass all the passenger airlines in the US - every one of them.

This isn't going to end well if we don't fix the law. The Founders gave us the iron-clad ability to peacefully assemble to pressure our Congress to change the laws to our liking. If pilots will return strike ballots by 97%+ to gain temporary and untenable improvements in their working conditions, how strong is the resolve to gain permanent enhancements? If our pilot associations sent out "political stand-down" ballots, with the goals of OPERATION ORANGE in mind, the numbers are likely to be as high, if not higher.

The Longshoremen did it in the 1950s[11] and in 1972, ALPA drafted a legal strategy for a nationwide "SOS" to combat skyjacking.[12] The Supreme Court upheld the Longshoreman's political job action and the only reason ALPA's "SOS" fizzled was that **the leadership did not prepare itself and the membership** for what they were doing. They were also coming off the best 30 years in the development of the pilot profession, unlike the present environment where we are coming of the 30 worst years.

Rank-and-file pilots are crying out for leadership and vision. They are fearful of the RLA being abused (witness the Delta TA ratification vote). Your leaders are not going to lead you into a fight if you do not follow. Now is the time to tell them to fight the RLA, and "bankruptcy gambit." We have published our legislative draft[13] and it contains all the necessary ingredients to put our profession back on

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[10] OPERATION ORANGE, *Who Wants To Play To Win?*, www.operationorange.org/playtowin.pdf
[11] Hopkins, George E., *Flying The Line Volume II*, pg 27, Air Line Pilots Association, International. OPERATION ORANGE was not able to independently verify Hopkins' account of the Longshoreman political protest.
[12] ibid
[13] OPERATION ORANGE, *Fair Treatment of Experienced Pilots Act - Part 2*, www.operationorange.org/FTFEPAfulltext.pdf

its feet and end management's ability to loot us under the color of law. [14]

The way we operate under the RLA is no longer a flawed system that works. Through the use of injunctions, they have it all their way; they went for it all and got it all. This is war and OPERATION ORANGE's goal is to return the favor. Management could not leave "well enough" alone. They had relative labor peace as long as everyone operated within the RLA in a reasonable fashion. What they did through the courts, without regard for past precedent and custom, we will do through nomothetical means and secure no less than a full generation's recompense for the injustices we have been made to suffer in the name of managerial avarice.

If you like the status quo, do nothing. By doing nothing, you are deciding to help the next generation of managers pick your pocket and those of your peers. **If you want to save your career, you will need to change the law**. Pressure your elected union leaders to adopt a winning strategy so all your present efforts are not wasted.

You are at war. You will either be the victor or the vanquished.

The career you save will be your own.

For more information, visit www.OPERATIONORANGE.org.

[14] OPERATION ORANGE's legislative draft also includes comprehensive pay and scheduling provisions to rectify pilot contracts that have been destroyed in bankruptcy. An cursory analysis of the how OPERATION ORANGE's legislated minimums would compare to the rejected LBFO is available at www.operationorange.org/paycalcAAL.pdf. Pilot compensation would be greater than 60% higher than the LBFO, and even more compared to the April term sheet. Minimum standards in pilot contracts are integral to OPERATION ORANGE's legislative proposal. This document will be incorporated in a future publication highlighting how OPERATION ORANGE will directly benefit the AAL pilot group.