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Harvey R. Miller
Stephen Karotkin
Alfredo R. Pérez
Lawrence J. Baer
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors
and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	**Chapter 11 Case No.**
AMR CORPORATION, *et al.*,	:	**11-15463 (SHL)**
Debtors.	:	**(Jointly Administered)**

DEBTORS' RESPONSE AND OPPOSITION TO MOTION BY THE AD HOC COMMITTEE OF PASSENGER SERVICE AGENTS TO RESTRAIN THE DEBTORS FROM MAKING UNILATERAL CHANGES IN THE TERMS AND CONDITIONS OF EMPLOYMENT

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TO THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:

AMR Corporation (**"AMR"**), and its related debtors and debtors in possession (collectively, the **"Debtors"** or **"American"**), as and for their response and opposition to the motion (the **"Motion"**) by the Ad Hoc Committee of Passenger Service Agents (**"Ad Hoc PSA Committee"**) seeking an injunction restraining the Debtors from making unilateral changes in the terms and conditions of employment of their non-union passenger service agents (the **"PSAs"**), dated February 21, 2012 (ECF No. 1253), respectfully state as follows:

Preliminary Statement

1. In an apparent effort to support a union organizing campaign for American's PSAs[1] now underway and being pursued by the Communication Workers of America (**"CWA"**), a group of PSAs, who have unilaterally designated themselves as an Ad Hoc PSA Committee (with the publicly acknowledged support of the CWA, which has no standing in these chapter 11 cases) seeks an injunction under section 105 of the Bankruptcy Code, relying upon section 1113 of the Bankruptcy Code and sections 151-188 of title 45 of the United States Code (the **"Railway Labor Act"** or **"RLA"**), prohibiting American from changing terms and conditions of employment of the PSAs in the absence of compliance with section 1113 of the Bankruptcy Code. Notably, the PSAs seek this extraordinary relief based upon section 1113 where admittedly no collective bargaining agreement (**"CBA"**) subject to section 1113 exists with the CWA or which in any way covers any of the PSAs. Indeed, whether a CBA will ever

[1] The term "Passenger Service Agents" is generally used to refer to employees in various passenger facing employee classifications, including agents, reservation representatives, and planners. This group of employees includes, *inter alia*, those who book and modify customers' reservations, check-in passengers at airports, and manage incoming and outgoing shipments of cargo.

exist is nothing more than pure speculation and is subject to the occurrence of each of the following, none of which has occurred or has any assurance of occurring:

(a) a decision by the National Mediation Board (**"NMB"**) that the CWA has established the requisite showing of interest for the NMB to authorize and schedule a representation election for the PSAs;

(b) a victory by the CWA in that election, (which would then be subject to review by the NMB to ensure the election outcome was not the result of unlawful interference);

(c) certification of the CWA by the NMB as the PSAs' exclusive collective bargaining representative based upon an election; and

(d) completed negotiation and entry into an initial CBA between CWA and American.

2. The Motion is fatally flawed and should be summarily denied for the following reasons:

(a) The Motion seeks injunctive relief which under Rule 7001(7) of the Federal Rules of Bankruptcy Procedure (the **"Bankruptcy Rules"**) must be sought pursuant to an adversary proceeding;

(b) Section 1113 of the Bankruptcy Code is inapplicable here, where no CBA currently exists and, in fact, may never exist;

(c) The RLA does not require a carrier to maintain the status quo in terms and conditions of employment in the absence of an initial CBA or a subsequently operative CBA, neither of which exists here; and

(d) Resolution of allegations that possible changes in terms and conditions of employment of the PSAs would violate the NMB's doctrine requiring maintenance of so-called "laboratory conditions" during a union organizing campaign is properly within the jurisdiction of the NMB. In any event, no violation of laboratory conditions exists.

3. The Motion is completely devoid of any factual and legal support. The Ad Hoc PSA Committee's convoluted and futile effort to manufacture public policy arguments or to

rely on unsupported conclusory allegations as to Congressional intent, cannot alter the plain meaning of the governing statutes and the inescapable conclusion that the declaratory and injunctive relief being sought is completely unsupportable under either section 1113 of the Bankruptcy Code or the RLA.

4. Section 1113 of the Bankruptcy Code expressly applies only to the rejection or modification of a currently operative CBA—circumstances which clearly do not exist here. Similarly, the status quo provisions of the RLA, upon which the Ad Hoc PSA Committee also relies, only prohibit employers' unilateral changes in terms and conditions of employment when the terms and conditions of employment have been set by an operative CBA. The status quo provisions of the RLA are inapplicable to the employment of the PSAs as there has never been a CBA governing terms and conditions of their employment and indeed, there may never be one.

5. Further, under well-established NMB precedent, any changes contemplated by American to the terms and conditions of employment of the PSAs will in no way violate the NMB's requirement that employers maintain "laboratory conditions" during a union organizing campaign. In the present case, any changes that might occur will be implemented because such changes, if made, will be precipitated by business necessity. As American has made abundantly clear, labor cost reductions are a critical element of its reorganization effort and necessary to the success of these reorganization cases.

Facts

6. Following the commencement of these chapter 11 cases and the announcement by the Debtors that a reduction of their labor costs is a critical element of their reorganization effort, the CWA filed an application with the NMB seeking to be certified as the

exclusive collective bargaining representative of the more than 10,340 PSAs employed by American. Ad Hoc Comm. Mot. ¶ 2.

7. Consistent with its statutorily mandated procedures, the NMB is conducting an ongoing investigation of the CWA's application to represent the PSAs in order to determine whether the CWA has provided sufficient evidence of support to even warrant a representation election under NMB rules. Notably, at this time, no such determination has been made and no date for a representation election has been scheduled by the NMB. Indeed, based upon ongoing representation proceedings at the NMB, it is possible that the CWA will not even be able to establish a sufficient showing of interest to warrant the conduct of an election. Accordingly, at this time, neither the CWA nor the Ad Hoc PSA Committee is a legally authorized bargaining representative of the PSAs. Further, there is no assurance whatsoever that they ever will be the authorized bargaining representative of the PSAs. Perhaps most importantly, no CBA covering the PSAs exists and one may never exist. Notwithstanding the foregoing, the Ad Hoc PSA Committee filed the Motion asking this Court to impose the procedural protections set forth in section 1113 of the Bankruptcy Code which expressly apply to the modification or rejection of existing CBAs entered into by authorized bargaining representatives and grant injunctive relief.

Argument

I. THE AD HOC PSA COMMITTEE'S MOTION TO ENJOIN THE DEBTORS FROM UNILATERALLY CHANGING THE TERMS AND CONDITIONS OF EMPLOYMENT FOR THE PSAS IS PROCEDURALLY IMPROPER

8. The Ad Hoc PSA Committee's Motion by its terms seeks injunctive relief under section 105(a) of the Bankruptcy Code. The Ad Hoc PSA Committee's request for injunctive relief is wholly improper and may not be granted pursuant to a motion. A request for injunctive relief under section 105(a) of the Bankruptcy Code is governed by Part VII of the

Bankruptcy Rules. Bankruptcy Rule 7001 specifically requires the commencement of an adversary proceeding to obtain injunctive relief. Fed. R. Bankr. P. 7001(7) (defining an adversary proceeding as "a proceeding . . . to obtain an injunction or other equitable relief . . . ."). *See, e.g.*, *Ramirez v. Whelan (In re Ramirez)*, 188 B.R. 413, 416 (B.A.P. 9th Cir. 1995); *State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1080 (10th Cir. 1996); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 762 (5th Cir. 1995); *Wedgewood Inv. Fund, Ltd. v. Wedgewood Realty Group, Ltd. (In re Wedgewood Realty Group, Ltd.)*, 878 F.2d 693, 701 (3d Cir. 1989); *Stacy Fuel & Sales, Inc. v. Ira Phillips, Inc. (In re Stacy)*, 167 B.R. 242, 248 (N.D. Ala. 1994).

9. Bankruptcy Rule 7001 protects important interests of the Debtors and other parties in interest. Namely, it provides a procedural safeguard to ensure that with respect to certain enumerated types of relief, parties have a full and fair opportunity to marshal evidence, conduct discovery, and present evidence in support of their arguments. Accordingly, the Ad Hoc PSA Committee should not be permitted to circumvent Bankruptcy Rule 7001 by demanding, in summary motion practice, relief that is required to be the subject of adversary proceeding.

II. THE AD HOC PSA COMMITTEE'S MOTION TO ENJOIN THE DEBTORS FROM CHANGING THE TERMS AND CONDITIONS OF EMPLOYMENT FOR THE PSAS IS WITHOUT BASIS UNDER SECTION 1113 OF THE BANKRUPTCY CODE, AND THE STATUS QUO PROVISIONS OF THE RLA

10. As stated, the Motion seeks an injunction restraining the Debtors from changing the terms and conditions of employment of the PSAs unless and until the CWA is certified by the NMB as the exclusive collective bargaining representative of the PSAs. It seeks a further injunction restraining the Debtors from changing the terms and conditions of employment for the PSAs, in the event that the CWA becomes the PSAs' certified bargaining

representative, pending the negotiation and entry into an initial CBA or compliance by the Debtors with section 1113 of the Bankruptcy Code.

11. The Ad Hoc PSA Committee attempts to support its unprecedented request for injunctive relief by relying upon section 1113 of the Bankruptcy Code and the status quo provisions of the RLA. However, neither statute provides any support for the Ad Hoc PSA Committee's request for declaratory and injunctive relief.

A. Section 1113 of the Bankruptcy Code Does Not Apply Prior to the Existence of a CBA

12. The Ad Hoc PSA Committee seeks to have this Court impose the obligations of section 1113 on the Debtors despite the fact that there is not now, and has never been a CBA applicable to PSAs. Ad Hoc Comm. Mot. ¶ 3. The Ad Hoc PSA Committee asserts, *ipse dixit*, that the Debtors' "obligation to exhaust the procedures of § 1113 is not determined by whether there is a collective bargaining agreement in effect." Ad Hoc Comm. Mot. ¶ 13. Section 1113's plain text, however, provides that section 1113 applies only to rejection or modification of CBAs. Specifically, section 1113(a) states that "The debtor in possession . . . other than in a case covered . . . by title I of the Railway Labor Act [pertaining to railroads], may *assume or reject a collective bargaining agreement* in accordance with the provisions of this section."[2] 11 U.S.C. § 1113(a) (emphasis added). The Second Circuit has confirmed that "section 1113 of the Bankruptcy Code controls the rejection of collective bargaining agreements in Chapter 11 proceedings." *In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d Cir. 1992) (citation and internal quotation marks omitted). Accordingly, section 1113 by its express terms does not apply to the circumstances presented here, where no CBA is, or has

[2] Section 1113(a) of the Bankruptcy Code expressly excludes railroads, which are subject to special reorganization procedures, and are covered by Title I of the RLA. Congress was careful, however, to limit that exclusion to Title I of the RLA. Air carriers are subject to Title II of the RLA and are therefore covered by section 1113(a).

ever been, in effect. *See In re Northwest Airlines Corp.*, 483 F.3d 160, 168 (2d Cir. 2007) (looking "first to the plain text of § 1113" to resolve a labor matter).

13. The Ad Hoc PSA Committee concedes that a Debtor-employer need not satisfy the obligations of section 1113 in order to unilaterally change terms and conditions of employment where the relationship is governed by the Labor Management Relations Act (**"LMRA"**), 29 U.S.C. §§ 151 *et seq.*, and where there is no CBA in effect. Ad Hoc Comm. Mot. ¶ 11. However, it contends that collective bargaining relationships governed by the RLA require a different result. The Ad Hoc PSA Committee, however, simply ignores the controlling precedent. Instead, the Ad Hoc PSA Committee cites *In re Mesaba Aviation, Inc.*, 341 B.R. 693, 723 (Bankr. D. Minn. 2006) for the proposition that under the RLA, section 1113 will apply to a CBA that has passed its expiration date and has become amendable. The Debtors agree that *Mesaba Aviation* stands for the proposition that section 1113 continues to apply to a CBA that has become "amendable" under the mandatory collective bargaining provisions of the RLA. However, *Mesaba Aviation* does not stand for the *converse* proposition that section 1113 applies where no CBA has ever been in effect, and indeed, no collective bargaining relationship even exists. *Mesaba Aviation* simply affirms the well-established principle that CBAs governed by the RLA "do not have a fixed term at the close of which they are extinguished in legal effectiveness. Rather, they identify a starting date and an 'amendable date,' after which the terms of the subject agreement may be consensually 'amended' via an involved and multi-sequenced process of negotiation." *Id.* at 710 n.18. Those circumstances do not exist here where there has never been a CBA.

14. Section 1113 requires that a CBA governed by the RLA be in effect, whether operating under its original term or its amendable period, in order for its modification

and rejection provisions to apply. In *Northwest*, 349 B.R. 338 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007), both the District Court and the Second Circuit recognized that there must be an effective RLA governed CBA upon which section 1113 can operate. *Northwest Airlines Corp. v. AFA*, 349 B.R. at 348 n.4 (analyzing whether there was a CBA in effect for the court to reject—RLA governed CBA that passed its amendable date is still held effective by RLA status quo provisions and is the CBA that is rejected under section 1113), *aff'd*, 483 F.3d at 167 (noting that CBA under RLA "hardly ever expires"). Here, no CBA exists or has ever existed between the Debtors and any representative of the PSAs. Accordingly, section 1113 is not applicable and cannot support the requested injunctive relief sought in the Motion.

15. The Ad Hoc PSA Committee's final attempt to support its novel argument that section 1113 applies even in the absence of an effective CBA is by analogy to section 1114 of the Bankruptcy Code, "Payment of insurance benefits to retired employees."[3] The

[3] Section 1114 provides, in relevant part:

> (a) For purposes of this section, the term "retiree benefits" means *payments to any* entity or *person* for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.
>
> (b) (1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits *not covered by such an agreement.*
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> * * *
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> (d) The court, upon a motion by any party in interest, and after notice and a hearing, shall order the appointment of a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits *not covered by a collective bargaining agreement.* The United States trustee shall appoint any such committee. (emphasis supplied)

comparison to section 1114, however, actually undermines the Ad Hoc PSA Committee's position. Section 1114 establishes procedures for changing retiree benefits that, in large part, parallel section 1113 procedures. Significantly, however, on the issue relevant here, the provisions of sections 1113 and 1114 are markedly different. Section 1114 expressly applies to payments to "any person." Section 1114 is not limited to benefits provided under a CBA. In its definition of "authorized representative," section 1114 makes clear that it applies to retiree benefits, even when those benefits were not created by a CBA. Indeed, sections 1114(b) and (d) contain provisions not present in section 1113, providing that, where benefits are *not* covered by a CBA, the "authorized representative" is a committee of retired employees appointed by the Bankruptcy Court. Thus, sections 1114(b) and (d) demonstrate that Congress knew how to create a procedure for non-union employees to protect benefits created in the absence of a CBA and outside of the collective bargaining process. The absence of similar provisions in section 1113 further confirms that section 1113 is not intended to apply to employment terms that were not established by a CBA and where no collective bargaining relationship exists.

B. Assuming *Arguendo* that the CWA Were to Become the Certified Collective Bargaining Representative of the PSAs, the Status Quo Provisions of the RLA Do Not Apply in the Absence of an Initial CBA

16. Section 2, Seventh, and Sections 5 and 6 of the RLA, prohibit an air carrier from changing the rates of pay, rules, or working conditions of its employees embodied in existing collective bargaining agreements, without first completing the procedures in the RLA. These provisions operate as a unitary scheme to require preservation of the contractual "status quo" which must be maintained until RLA bargaining procedures are completed. The Supreme Court held in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), that these status quo provisions do not apply prior to execution of the first CBA covering newly represented employees. The Court reasoned that those status quo provisions were "aimed at preventing

changes in conditions previously fixed by collective bargaining agreements" and did not restrict the carrier from "arrang[ing] its business relations with its employees" prior to the existence of a CBA. *Id.* at 402. As recognized in the Motion, (Ad Hoc Comm. Mot. ¶ 12), the Second Circuit has affirmed the continuing validity of *Williams*, holding that the RLA does not obligate a carrier to maintain existing wages and working conditions prior to execution of an initial CBA. *Aircraft Mechs. Fraternal Union v. Atl. Coast Airlines*, 55 F.3d 90, 93 (2d Cir. 1995); *Virgin Atl. Airways v. NMB*, 956 F.2d 1245, 1253 (2d Cir. 1992) ("[T]he Court [in *Williams*] held that nothing in the [RLA] prevented changes prior to the actual existence of a collective bargaining agreement.")

17. Section 2 First of the RLA, requires a carrier to "exert every reasonable effort to make and maintain agreements"—the so-called "duty to bargain." The duty to bargain attaches as soon as a union is certified, circumstances which, of course, do not exist here. Although unions have sometimes asserted that the duty to bargain contains an implied status quo—freezing terms and conditions while bargaining for an initial CBA is underway—the Second Circuit has squarely rejected this theory. *Atl. Coast*, 55 F.3d at 93 ("[T]he carrier's affirmative duty to exert every effort to make collective agreements—that is, to bargain in good faith—does not require that it refrain from exercising 'its authority to arrange its business relations with its employees' where no collective bargaining agreement is in effect." (quoting *Williams*, 315 U.S. at 402)). It is thus clearly settled law under the RLA that the carrier has freedom to change terms and conditions prior to an initial CBA. *AMFA v. Atl. Coast Airlines* ("*AMFA II*"), 125 F.3d 41 (2d Cir 1997).

18. Attempting to evade this settled law under the RLA, the Ad Hoc PSA Committee mistakenly relies on the Second Circuit's decision in *Northwest*. That case, however, provides no support for the Ad Hoc PSA Committee's position. In *Northwest*, the Bankruptcy

Court had granted Northwest's motion to reject its CBA. The Second Circuit held that the effect of rejection was to "abrogate" the CBA—so that it effectively ceased to exist. Therefore, Northwest did not violate the status quo provisions of the RLA when it implemented new terms and conditions of employment. "The plain text of these provisions [RLA Sections 2, Seventh and 6] compels the conclusion that they do not apply after a carrier has abrogated its CBA and the 'agreement' has ceased to exist." *Northwest*, 483 F.3d at 173. Because no CBA pertaining to the PSAs exists or has ever existed, there is no obligation for the Debtors to maintain the status quo.

C. The NMB's Requirement that Employers Maintain "Laboratory Conditions" During a Union Organizing Campaign Does Not Support the Ad Hoc PSA Committee's Request for the Imposition of an Injunction Against the Debtors

19. The "laboratory conditions" doctrine requires that during union organizing campaigns, "a carrier must act in a manner that does not influence, interfere with, or coerce with employees' selection of a collective bargaining representative."[4] *Frontier Airlines*, 32 NMB 57, 64 (2004). The NMB, which has jurisdiction to resolve disputes pertaining to the maintenance of laboratory conditions during the pre-election period, has found that changes in working conditions during the laboratory period will not taint laboratory conditions if the changes were planned before the laboratory conditions attached, or there is a compelling business justification for the changes. *Delta Airlines*, 35 NMB 260, 298 (2008).

[4] The term "laboratory conditions" does not appear in the RLA, but was created by the NMB to fulfill its statutory obligation to ensure that employees have "an election environment in which [they are] able to make their decision . . . with sufficient insulation from interference, influence or coercion." *Evergreen Int'l Airlines*, 20 NMB 675, 713-14 (1993). "Laboratory conditions" is a requirement created and enforced by the NMB in furtherance of its exclusive Section 2, Ninth jurisdiction. A court's exercise of jurisdiction over the issue would "reach into" and be "inextricably intertwined with" the investigation of representation issues governed by the NMB and therefore should be avoided. *Indep. Fed'n of Flight Attendants v. Cooper*, 141 F.3d 900, 901, 903 (8th Cir. 1998); *see also Air Line Pilots Ass'n v. Texas Int'l Airlines*, 656 F.2d 16, 20 n.6 (2d Cir. 1981) (representation disputes which, involve controversies surrounding the designation and authorization of representatives of employees covered by the RLA, are committed to the jurisdiction of the NMB).

20. In *Delta Airlines*, the airline increased pay for all U.S. non-contract employees by three percent, and the petitioning union argued that such a pay increase tainted laboratory conditions because it was designed to encourage flight attendants to reject representation. *Delta Airlines*, 35 NMB at 299. In rejecting the union's contention that Delta had failed to maintain laboratory conditions, the NMB found that the pay increase was instituted across the board and that Delta had committed that the pay increase would go into effect regardless of whether AFA won the election. The case at bar is closely analogous to *Delta Airlines* because the Debtors have always made it abundantly clear that labor costs must be reduced across-the-board for all employees—both union represented and non-represented in order to achieve a competitive cost structure and resultant economic viability.

21. For rather transparent reasons, the CWA and its proxy, the Ad Hoc PSA Committee, seek to tie the Debtors' hands with regard to reducing its labor costs. It is settled law, however, that a carrier has the right to change terms and conditions of employment prior to a first contract, and that changes in compensation or benefits that take place in the ordinary course of business, or in response to special circumstances (such as a restructuring in chapter 11) separate and apart from union organization efforts do not taint laboratory conditions. *See, e.g.*, *Frontier*, 32 NMB at 65 (pay increases were pre-planned and based on a compensation review showing wages to be below market rate); *Pinnacle Airlines Corp.*, 30 NMB 186, 221 (2003) (temporary changes in an attendance program were for the compelling business justification of maintaining adequate staffing); *Aeromexico*, 28 NMB 309, 340-41 (2001) (where increased compensation changes were planned before the laboratory period, but also, were intended to reduce attrition and to remain competitive with other carriers);

22. The instant situation is not one from which any inference can be drawn that contemplated changes will be implemented in an effort in any way to influence or coerce the employees in their representation process. Indeed, in this case, the changes which the Debtors are considering are *reductions* in the terms and conditions of employment in order to reduce labor costs. Such reductions are not typical of changes utilized by employers to dissuade employees from voting in support of union representation. This is a case where Debtors have proposed altering the terms and conditions of virtually all employees, both union represented and non-represented employees—not just PSAs—to further a successful reorganization and emergence from chapter 11. This is not a situation where this Court should intrude on the jurisdiction of the NMB and enjoin the Debtors based upon unfounded and completely unsupported allegations of failure to maintain laboratory conditions.

Conclusion

23. For the foregoing reasons, the Court should deny the Motion.

WHEREFORE the Debtors respectfully request that the Court deny the Motion in its entirety, and grant the Debtors such other and further relief as is just.

Dated: New York, New York
March 15, 2012

/s/ Stephen Karotkin
Harvey R. Miller
Stephen Karotkin
Alfredo R. Pérez
Lawrence J. Baer

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors
and Debtors in Possession