IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re	
UAL CORPORATION, et al.,	Chapter 11
Debtors.	Case No. 02-B-48191
	(Jointly Administered)
	Hon. Eugene R. Wedoff
	Hearing Date: January 6, 2005
	Hearing Time: 10:30 a.m.

OBJECTION OF THE ASSOCIATION OF FLIGHT ATTENDANTS-CWA, AFL-CIO, TO DEBTORS' MOTION TO APPROVE LETTER OF AGREEMENT WITH THE AIR LINE PILOTS ASSOCIATION

The Association of Flight Attendants-CWA, AFL-CIO ("AFA"), representing current and retired United flight attendants, and a major creditor in this proceeding, objects to the Debtors' motion to approve a Letter of Agreement modifying United's collective bargaining agreement with the Air Line Pilots Association ("ALPA"). Labor negotiations over changes to a collective bargaining agreement presuppose that the only participants in that process are the parties to that contract. It is their responses alone that will determine the progress of bargaining and the likelihood of a consensual agreement. Simply put, both the Railway Labor Act and the Bankruptcy Code require that the requisite negotiations be bilateral and not be involuntarily converted into tripartite bargaining over the terms of another union's labor contract. Here, the Letter of Agreement gives United two basic choices -- both unlawful -- either allow ALPA to control the Company's response to AFA's bargaining proposals or dictate that termination of the Flight Attendants' pension plan must be a term of any Section 1113 agreement.

After a statement of the relevant facts, we show in Part I below that the Letter of Agreement impermissibly establishes the parameters, indeed dictates significant terms, of any possible modification of the collective bargaining agreement between United and AFA. The Letter of Agreement prevents United from engaging in anything but surface bargaining with AFA or any other employee group. Accordingly, it violates Section 2, First of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, First, which requires the parties to exert every effort to make and maintain agreements. Because the Letter of Agreement was not negotiated with AFA but nevertheless effects the wages, rules and working conditions of United flight attendants, United has violated § 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, which requires that United negotiate exclusively with AFA over its members' conditions of employment. Similarly, the Letter of Agreement ensures that United cannot meet its burden of establishing that they "confer[red] in good faith" as required by Section 1113(b)(2) of the Bankruptcy Code.

In Part II, we show that a number of the Letter of Agreement's provisions effectively dictate the terms of any plan of reorganization and limit the input of other creditors. We demonstrate that the Letter of Agreement, as currently drafted, is not in the interests of the estate or the creditors and should be denied.

FACTS

1. ALPA and United reached an agreement effective January 1, 2005, memorialized in the Letter of Agreement, attached to Debtors' Motion as Exhibit A.

2. Among other things, the Agreement modifies the current United/ALPA collective bargaining agreement in several respects. ALPA agrees to wage and benefit modifications including

reduction in pilot base pay rate by 14.7% and agrees not to oppose United's request to terminate the United Airlines Pilot Defined Benefit Pension Plan (the "A Plan"). Motion, ¶¶ 7-8.

3. The Letter of Agreement also provides that the Plan of Reorganization shall provide ALPA with $550 million in convertible notes with an interest rate yet to be determined. Letter of Agreement, ¶ 7, Exh. D.

4. Significant penalties are imposed on the Debtors in the event the Letter of Agreement terminates. In the event of termination, ALPA is entitled to an "allowed administrative expense under 11 U.S.C. § 503(b) equal to twice the actual cash savings provided to the Debtors under the Letter of Agreement." Motion, ¶ 10. This amounts to approximately $30 million per month. The Administrative Claim is extinguished "upon the effective date of a Plan of Reorganization that complies with this Letter of Agreement in all material respects." Letter of Agreement, ¶ 10.

5. ALPA may terminate the agreement at any time prior to the effective date of a Plan of Reorganization upon the occurrence of any number of listed items. Letter of Agreement, ¶ 19. These include: (1) "continuation or existence of any single-employer defined benefit pension program" for any United employee group (id., ¶ 16(c)); (2) termination or impairment of United's exclusive right to file a plan of reorganization (id., ¶ 16(e)); (3) filing or support by United, of a plan of reorganization or a proposed disclosure statement which, in pertinent part, "proposes or confirms a capital structure or ownership structure that is not reasonably acceptable to [ALPA]" (id., ¶ 16(f)); (4) the appointment of a trustee under 11 U.S.C. § 1104 (id., ¶ 16(g)).

6. Finally, the Debtors agree to reimburse ALPA for fees and expenses including payment by the company of an unspecified "structuring fee" to ALPA's investment bankers. Letter of Agreement, Exh. G.

ARGUMENT

I. THE LETTER OF AGREEMENT ALTERS THE TERMS AND CONDITIONS OF EMPLOYMENT FOR UNITED'S FLIGHT ATTENDANTS WITHOUT AFA HAVING HAD A CHANCE TO BARGAIN COLLECTIVELY OVER THE CHANGES. IT ALSO PREVENTS UNITED FROM NEGOTIATING IN GOOD FAITH WITH AFA. THE LETTER OF AGREEMENT THEREFORE VIOLATES SECTIONS 2, FIRST AND NINTH OF THE RAILWAY LABOR ACT AND SECTION 1113(B)(2) OF THE BANKRUPTCY CODE.

7. The Letter of Agreement effectively requires United to impose certain terms of employment on AFA or face the unraveling of its agreement with ALPA and the imposition of substantial penalties. United entered into this agreement without bargaining collectively with AFA.

8. Specifically, the requirement that United terminate all of its defined benefit pension plans as a condition of its agreement with ALPA makes it impossible for United and AFA to bargain meaningfully and in good faith over the retention of the Flight Attendants' pension plan. Letter of Agreement, ¶¶ 4(b); 16(c). The Letter of Agreement thus imposes terms on the AFA even though AFA did not bargain with United over these items. As a result, United now can only engage in "take it or leave it" bargaining with AFA. In this way, the Letter of Agreement violates both the Railway Labor Act ("RLA") and the Bankruptcy Code.

9. Section 2, First of the RLA requires United to "exert every reasonable effort to make ... agreements concerning rates of pay, rules and working conditions" with the certified representative of its employees. This duty is deemed to be "heart of the Railway Labor Act." Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377-78 (1969). Section 2, First is "more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis."

Chicago & N.W. Ry. Co. v. UTU, 402 U.S. 570, 577 (1971). This means that United must bargain in good faith and not simply "go[] through the motions." Id. at 575.

10. Concomitantly, Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, requires a carrier to negotiate exclusively with the certified bargaining representative of its employees. Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 545-47 (1937).

11. These duties are wholly consistent with the carrier's obligation under § 1113(b)(2) of the Bankruptcy Code to negotiate in good faith. Good faith bargaining, in this context, requires "an honest purpose to arrive at an agreement as the result of the bargaining process." In re Walway Co., 69 B.R. 967, 973 (Bankr. E.D. Mich. 1987); see also In re Blue Diamond Coal Co., 131 B.R. 633, 646 (Bankr. E.D. Tenn. 1991); In re Lady H. Coal Co., 193 B.R. 233, 242 (Bankr. S.D. W. Va. 1996).

12. Bankruptcy courts have found a lack of good faith in a variety of circumstances. In particular, a "take it or leave it" attitude in negotiations indicates a lack of good faith. In re S.A. Mech., Inc., 51 B.R. 130, 132 (Bankr. D. Ariz. 1985); In re Liberty Cab & Limousine Co., 194 B.R. 770, 777 (Bankr. E.D. Pa. 1996). A debtor that has obligated itself prior to negotiations, by agreeing with the purchaser of its business that it need not assume the collective bargaining agreement, does not fulfill its obligation to negotiate in good faith. Lady H. Coal Co., 193 B.R. at 242.

13. United gives lip service to its duty to negotiate in good faith in its memorandum in support of its motion to reject its collective bargaining agreement with AFA, but then turns around and violates its duty by entering into the Letter of Agreement with ALPA. Thus, although United claims merely to seek "the contractual flexibility to exercise what will remain an unwanted option

of last resort" (Rejection Motion Memorandum at 73) namely, termination of its defined benefit plans, the Letter of Agreement, in fact, requires termination. Letter of Agreement, ¶¶ 4(b); 16(c).

14. Similarly, United claims, in support of its rejection motion, that it "did not give its unions [single] 'take it or leave it' proposals. Rather the Company provided its unions a 'menu' of other possible modifications that each union could substitute for the Company's proposals to reach the target savings for that group." Id. at 140 (emphasis in original). United's representation may have been true with regard to ALPA but, as a result of the Letter of Agreement, it is certainly not the case with regard to AFA.

15. Instead, AFA is compelled to agree to termination of its defined benefit plan or risk this Court's complete rejection of its collective bargaining agreement. This is completely at odds with Sections 2, First and Ninth of the RLA, 45 U.S.C. §§ 152 First, Ninth, and Section 1113(b)(2) of the Bankruptcy Code.

16. Two Seventh Circuit decisions highlight United's violations of the RLA. In ALPA v. UAL Corp., 874 F.2d 439 (7th Cir. 1989), United and the IAM entered into a collective bargaining agreement that limited the ability of ALPA to negotiate a buyout of the airline. Specifically, the agreement dictated how shares in any proposed ESOP would be allocated among all employee groups in the event of a buyout. United had not bargained with any other employee groups about that agreement, and ALPA sued the company to enjoin its implementation. The Seventh Circuit held that by negotiating an agreement with one union that "affect[ed] the terms of the pilots' employment without giving their union a chance to bargain collectively over the change," United had violated Section 2, First of the Act. 874 F.2d at 445. The Court struck down the provision notwithstanding that it had no immediate impact on the pilots' current agreement.

17. The case is squarely on point. The Letter of Agreement effectively prevents AFA from negotiating the terms of a modified agreement with United that would preserve its defined benefit plan.

18. Similarly, in Illinois Central Railroad Co. v. BLE, 443 F.2d 136 (7th Cir. 1971), one union sought to negotiate exclusively with the employer over matters that were also directly within the ambit of another organization representing employees of the railroad. The Court held that because the second union had a "bargainable interest" in the issues involved, the attempt to exclude that union from negotiations violated the RLA. The parties were ordered to give the second union "the right to participate in the negotiations" at issue. Id. at 144.

19. Here, AFA has a "bargainable interest" in whether its defined benefit plan should be terminated. As in Illinois Central Railroad, however, United and another union have bargained and reached an agreement, directly affecting AFA-represented employees, without input from AFA.

20. Nothing prevents United and ALPA from agreeing to terminate their defined benefit plan. The RLA, however, does prevent them from reaching an agreement that effectively forces AFA to agree to these same terms or possibly face rejection of their collective bargaining agreement by this Court.

21. Piedmont Aviation v. ALPA, 416 F.2d 633 (4th Cir. 1969), is also illustrative. In Piedmont, the employer made a proposal for a two-man crew. ALPA refused to bargain for "a crew of less than three men" claiming it had adopted an internal by-law preventing it from bargaining over that issue. In affirming a preliminary injunction that the union had violated RLA Section 2, First the Court noted that

> [t]he [union's] bylaw does not in itself prove lack of good faith bargaining. But use of the bylaw as a reason for refus[ing] to bargain ... is not consistent with the Railway

> Labor Act's provisions requiring the parties "to exert every reasonable effort to make and maintain agreements...."

Id. at 637 (citations omitted).

22. As explained above, ALPA can terminate the Letter of Agreement if any other employee's pension plan remains intact following the Section 1113 process or ERISA litigation. Termination of the Letter of Agreement could immediately result in the restoration of ALPA's pension plan and the imposition of a monthly penalty of $30 million. These severe consequences will compel United to alter its approach to and conduct in its negotiations with AFA.

23. First, the Company may choose to take an absolutely inflexible bargaining position and demand that AFA agree to termination. In that way it avoids any risk that the pilot pension plan could be restored or that United would be subject to an additional monthly expense of $30 million.

24. Alternatively, United could consult ALPA before formulating any response to an AFA proposal to maintain the pension plan. Considering the risk United is otherwise undertaking if it does not comply with the pension termination condition in ALPA's Letter of Agreement, United could not accept a proposal that would possibly violate this condition until it knew whether ALPA in response would waive or trigger its right to terminate the Letter of Agreement.

25. Should United adopt the first alternative -- of intransigence and insistence on terminating the Flight Attendant's pension plan -- it will have abandoned its statutory duty to "exert every reasonable effort to make" an agreement. 45 U.S.C. §152, First. United would be making no effort to reach an agreement if all it does is unalterably and automatically reject any alternative to pension termination.

26. If United seeks ALPA's counsel to determine its response to such alternatives, it will have effectively invited another bargaining representative to participate in its negotiations with AFA.

Section 2, Ninth of the RLA unequivocally mandates that United must negotiate only with AFA and cannot allow the reactions of another labor organization to influence or dictate a bargaining position or response.

27. Both choices the Letter of Agreement imposes upon United would violate the RLA's and Section 1113's mandate that it bargain in good faith. Good faith is absent in negotiations where one party is committed to a "take or leave it" attitude. Similarly, United cannot engage in good faith negotiations if it must obtain ALPA's view, and ultimately its consent, before it will agree to a proposal preserving the Flight Attendants' pension plan.

II. THE LETTER OF AGREEMENT CONSTITUTES AN IMPERMISSIBLE ATTEMPT TO DICTATE THE TERMS OF ANY PLAN OF REORGANIZATION AND PREDETERMINE LEGAL ISSUES NOT PRESENTLY BEFORE THE COURT.

28. Just as United seeks through the Letter of Agreement to dictate the terms reached at the bargaining table with its other unions, the Agreement also impermissibly seeks to dictate the course of these proceedings. In fact, several provisions of the Letter of Agreement constitute a sub rosa plan of reorganization. At minimum, the Agreement seeks to fetter the discretion of the Court and prejudice the interests of other creditors in matters not presently before this Court for resolution.

29. A sub rosa plan of reorganization arises where the debtor seeks approval of a transaction that has "the practical effect of dictating some of the terms of any future reorganization plan", In re Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983), or "preclude[s] the possibility of alternate methods of reorganization", In re DRW Property Co., 54 B.R. 489, 498 (Bankr. N.D. Tex. 1985). Courts do not permit such transactions because the debtor "should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa." Braniff Airways, 700 F.2d at 940. Instead, when a proposed transaction

specifies terms for adopting a reorganization plan, "the parties and the district court must scale the hurdles erected in Chapter 11. See, e.g., 11 U.S.C. § 1125 (disclosure requirements); id. § 1126 (voting); id. § 1129(b)(2)(B) (absolute priority rule)." Braniff Airways, 700 F.2d at 940.

30. The Letter of Agreement contains provisions that, if approved, would dictate the terms of any plan of reorganization. In this way, the agreement acts as a sub rosa plan, and is therefore impermissible. Specifically, the Agreement provides that a plan of reorganization must include (1) provision for the issuance of $550 million in convertible notes to ALPA; and (2) a capital structure or ownership structure that ALPA deems acceptable. If the reorganization plan does not contain these elements, ALPA can terminate the Letter of Agreement and thereby undo the labor cost-savings contained therein. Termination also triggers the penalty provision of the Agreement, which purports to entitle ALPA to an allowed administrative expense equal to twice the actual cash savings provided to United under the Agreement prior to termination.[1/]

31. In this way, the Debtors and ALPA seek to dictate the terms of any reorganization plan. A plan of reorganization, however, can only be established through the procedures set forth in Chapter 11, not a private agreement between Debtors and a single creditor. Therefore, approval of the Agreement should be denied.

[1/] The penalty provision in the Agreement is not entitled to administrative expense status under 11 U.S.C. §§ 503(b) and 507(a)(1). Administrative expenses are limited to the actual and necessary costs of preserving the estate. 11 U.S.C. § 503(b)(1)(A). Thus, only actual damages resulting from debtor's breach of a post-petition contract are entitled to administrative expense priority, as opposed to penalties or punitive damages, which confer no conceivable benefit to the estate. NL Indus. Inc. v. GHR Energy Corp., 940 F.2d 957, 966 (5th Cir. 1991). For this reason as well, the Court should not approve the Agreement, which seeks to treat contract penalties as administrative expenses in violation of the Bankruptcy Code.

32. The provision specifying that the capital structure or ownership structure of any reorganization plan must be acceptable to ALPA is particularly objectionable. This provision basically gives ALPA veto power over any reorganization plan. Such veto power plainly violates Chapter 11's procedures for plan confirmation, and would give ALPA greater control over plan confirmation than the rights conferred upon creditors under the Bankruptcy Code. As a practical matter, an ALPA veto over exit financing has the potential to limit the Company's ability to negotiate the best possible financing arrangements. Indeed, the veto would permit the interests of a single creditor to trump the bests interests of the estate and its creditors as a whole in derogation of the Bankruptcy Code's fundamental policy goal of fair and equitable treatment of all creditors.

33. The Letter of Agreement also contains various provisions that seek to impinge on the discretion of this Court and prejudice the interests of other creditors with respect to issues that may come before the Court at a later point in these proceedings. First, the Agreement provides that ALPA may terminate unless all of United's defined benefit plans for other employee groups are terminated. Under the terms of the Agreement, ALPA's termination will also trigger payment of the penalty provision. This provision is simply a transparent attempt to tilt the outcome of any future motion for distress termination of the plans in Debtors' favor.

34. Under Title IV of ERISA, the Debtors must show, among other things, that but for the termination of their pension plans, United will be unable to pay all of its debts under a plan of reorganization and will be unable to continue in business outside of Chapter 11. 29 U.S.C. § 1341(c)(2)(B)(ii)(IV). Clearly, on the basis of its Agreement with ALPA, United intends to argue that it meets this standard because if any of its plans are not terminated crucial cost savings negotiated with ALPA will be undone and twice the amount of savings already received will be

owed as a penalty. In this way, Debtors hope to secure a favorable ruling on any motion for plan termination.

35. Next, the Agreement provides that ALPA may terminate if United's exclusive right to file a plan is ended or impaired, thus triggering the Agreement's penalty provision. During the course of this 24-month bankruptcy, United has obtained repeated extensions of the exclusivity period in this case. In deciding a motion to extend the exclusivity period under 11 U.S.C. § 1121, the Court must determine "whether or not doing so would facilitate moving the case forward." In re Dow Corning Corp., 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997). Plainly, if the Letter of Agreement is permitted, the Debtors will argue that exclusivity must be continued in order to avoid termination of the Letter of Agreement, which would jeopardize the progress of these proceedings. In this way, Debtors hope to preordain resolution of their future motions for extension of exclusivity.

36. Similarly, the Agreement provides that ALPA may terminate upon the appointment of a trustee, again triggering the penalty provision of the Agreement. This provision also seeks to preclude any future determination by this Court that a trustee is warranted. When confronted with a motion for the appointment of a trustee, the Court exercises its discretion to determine whether the appointment would be in the best interests of the creditors and the estate. 11 U.S.C. § 1104(a). If the Letter of Agreement were approved, the Debtors would doubtlessly argue that appointment of a trustee is not in the interest of the estate because it would lead to termination of the Debtors' agreement with ALPA.

37. In addition to attempting impermissibly to dictate the course of these proceedings, the Letter of Agreement also lacks certain key pieces of information such that its full impact cannot be fairly evaluated. One such key piece of information is the interest rate on the convertible notes

to be issued under the Agreement. For example, a bond set at $550 million for each percentage point of interest would impose upon the estate a $5.5 million expense. Another is the amount of the structuring fee that United must pay ALPA's investment bankers under the terms of the Agreement. Investment banking fees on other transactions are frequently tied to a percent of the total transaction. Again, assuming the fee were fixed at 1%, United would bear another $5 million in costs. Without such information, it is impossible to determine the true costs of the Letter of Agreement to the estate. Even excepting Debtors' contention that the § 363 standard governs resolution of the instant motion, this Court cannot determine whether the transaction is in the best interests of the estate without all the information needed to determine the true costs of the transaction.

CONCLUSION

For all the foregoing reasons, AFA respectfully requests that this Court deny Debtors' motion for approval of the Letter of Agreement with ALPA.

Respectfully submitted,

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Date: December 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2004, true copies of the foregoing Objection Of The Association Of Flight Attendants-CWA, AFL-CIO, To Debtors' Motion To Approve Letter Of Agreement With The Air Line Pilots Association were served via overnight delivery on the attached Core Group Service List and via electronic mail or facsimile on the 2004 Service List. Pursuant to Section C.3.i(1) of the Second Amended Notice, Case Management and Administrative Procedures in this proceeding, service lists have been filed with the Court. In accordance with Rules 9014 and 7004, a true copy of the foregoing Objection was served by first-class mail on Frederic Brace, an Officer of United.

Robert S. Clayman

Robert S. Clayman, Esq.