

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 11-15463(SHL)

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6 In the Matter of:

7

8 AMR CORPORATION,

9

10 Debtors.

11 - - - - - x

12 BENCH RULING RE: (1) RENEWED MOTION OF DEBTORS FOR ENTRY OF

13 ORDER PURSUANT TO 11 U.S.C. 1113 AUTHORIZING DEBTORS TO

14 REJECT COLLECTIVE BARGAINING AGREEMENT WITH THE ALLIED

15 PILOTS ASSOCIATION, AND (2) MOTION IN LIMINE TO LIMIT SCOPE

16 OF HEARING ON THE RENEWED MOTION PURSUANT TO 11 USC 1113

17 AUTHORIZING DEBTORS TO REJECT COLLECTIVE BARGAINING

18 AGREEMENT

19 U.S. Bankruptcy Court

20 One Bowling Green

21 New York, New York

22

23 September 4, 2012

24 1:12 PM

25

1 B E F O R E :

2 HON SEAN H. LANE

3 U.S. BANKRUPTCY JUDGE

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6 Breach

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Before the Court is debtor, American Airlines' renewed motion to reject the collective bargaining agreement of the Allied Pilots Association (the "APA"), under Section 1113 of the Bankruptcy Code. The APA is the authorized collective bargaining agent for pilots employed at American.

American's renewed Section 1113 application as to the pilots is opposed by the APA, the Supplement B Pilot Beneficiaries, and certain TWA/American pilots that make arguments related to Supplement CC (the "Supplement CC Pilots").

Also before the Court is American's related motion *in limine* seeking to limit the evidence that I should consider in this Section 1113 motion. The motion *in limine* is also opposed by the APA and the Supplement CC Pilots.

For reasons that I'll explain in more detail in a moment, the Court grants American's Section 1113 motion and authorizes American to reject its current collective bargaining with the APA.

I agree with the Committee that this present application has to be reviewed in the context of what has previously occurred in this case. While it is not dispositive, it is, nonetheless, informative and shapes what the discussion is today. Thus, central to the Court's ruling today is the history in this case to date regarding

1 Section 1113 matters.

2 On March 27, 2012, American filed a prior motion  
3 under Section 1113 seeking authority to reject its  
4 collective bargaining agreement with its pilots, flight  
5 attendants and transportation workers. These workers were  
6 represented by the APA, the APFA and the TWU, respectively.  
7 The Court held a three-week trial on this first Section 1113  
8 motion, starting on April 23, 2012 and ending on May 25,  
9 2012.

10 During the trial, the three unions and American  
11 all engaged in additional negotiations outside the auspices  
12 of the Court, including mediation. These negotiations  
13 continued after the conclusion of the trial. No evidence  
14 was presented to the Court as to the substance of these  
15 negotiations other than the parties expressing their  
16 collective desire that the Court refrain from ruling on the  
17 Section 1113 application in the -- until the parties had a  
18 chance to conclude any meaningful negotiations. As a  
19 result, the Court abstained from ruling on the Section 1113  
20 application.

21 In July, all three unions -- the APA, the APFA and  
22 the TWU -- sent out potential agreements to their membership  
23 for a ratification vote. None of the substance of these  
24 potential new agreements was presented to the Court as part  
25 of the Section 1113 proceeding and the potential new

1 agreements constituted the parties efforts at settling their  
2 disputes without court intervention. Thus, it seemed  
3 obvious to all parties and the Court at the time that such  
4 discussions were covered by Federal Rule of Evidence 408,  
5 which, generally speaking, prohibits a party from proffering  
6 to a Court evidence of settlement discussions.

7           Indeed, the APA took a strict view as to what was  
8 appropriately before the Court for purposes of Section 1113.  
9 For example, in the pleading filed at ECF Docket Number 2577  
10 the APA maintained that for purposes of satisfying the  
11 requirements under Section 1113(b)(1)(A), the Court could  
12 only consider a proposal made by American prior to the  
13 filing of the application for rejection.

14           In any event, the ratification votes of the union  
15 members resulted in new collective bargaining agreements  
16 between American and the TWU and between American and the  
17 APFA, but it did not result in a new agreement between  
18 American and the APA.

19           At that point in August, both American and the APA  
20 agreed that it was appropriate for the Court to issue its  
21 decision on American's Section 1113 application as to the  
22 pilots. Accordingly, the Court issued a decision on August  
23 15, 2012 ruling on American's Section 1113 application as to  
24 the pilots. See *In re AMR Corp.*, 2012 WL 3422541 (Bankr.  
25 S.D.N.Y. Aug. 15, 2012).

1           Generally speaking, the Court concluded that  
2 American had established that significant changes were  
3 necessary to the APA's collective bargaining agreement for  
4 reorganization and the Company had met almost all the  
5 requirements of Section 1113. The Court ruled on each  
6 element of the statute. These elements included, among  
7 other things, the substance of American's proposed  
8 modifications and the information provided regarding the  
9 proposal. These requirements included the key component of  
10 assessing whether the proposed changes were necessary to  
11 American's ability to reorganize.

12           In ruling on this initial Section 1113  
13 application, the Court addressed numerous objections raised  
14 by the APA and overruled the APA objections on a host of  
15 matters. These included, but were not limited to, the APA's  
16 claim that American must first engage in a merger  
17 transaction before being granted relief under Section 1113,  
18 and that the business plan that American relied upon was  
19 fatally flawed and an improper basis for seeking Section  
20 1113 relief.

21           The Court also rejected the APA's view that the  
22 total labor ask of the pilots was not necessary for  
23 reorganization and that the Company's costs were converging  
24 with industry costs. Additionally, the Court rejected the  
25 claim that a number of American's specific proposals



1 relating to the APA were not necessary for reorganization  
2 and that the Company's proposal had not been based on the  
3 most complete and reliable information available to the  
4 Company at that time.

5           Notably, the Court found that American's business  
6 plan provided a sufficient basis for establishing the  
7 necessity of the vast majority of the changes sought by the  
8 Company. That business plan featured a 20 percent labor  
9 cost reduction for each of American's unions, including the  
10 APA.

11           In its decision, however, the Court found that two  
12 elements of American's proposal were not consistent with the  
13 requirements of Section 1113. More specifically, the Court  
14 found that the proposed changes would give American  
15 unrestricted use of furlough and codesharing, but such  
16 unrestricted and unfettered discretion in those two areas  
17 had not been justified as necessary either in American's  
18 business plan or by the practices of American's competitors.  
19 Given the potential impact of those two proposed changes on  
20 the pilots, the Court denied American's motion to reject the  
21 pilot contract.

22           But the Court's August 15th decision specifically  
23 stated that such denial was "without prejudice to American  
24 seeking relief in the future with a new proposal as to the  
25 APA that remedies these deficiencies." *In re AMR Corp.*,

1 2012 WL 3422541, at \*2.

2 On August 17, 2012, American filed its renewed  
3 motion under Section 1113, once again seeking authority to  
4 reject its collective bargaining agreement with the APA. In  
5 light of the Court's decision, the renewed motion addressed  
6 two matters and two matters only, the issues of furlough and  
7 codesharing. As to the first, American dropped in its  
8 entirety its request to provide the contractual provision  
9 regarding furlough. As to the second, American presented a  
10 revised codesharing proposal that limits the Company's  
11 discretion on codesharing. The revised proposal features a  
12 specific proposal with certain partners and has limitations  
13 tied to the amount of overall flying done by American. See  
14 Corrected Decl. of Dennis Newgren in Supp. of Renewed Mot.  
15 for Entry of Order Pursuant to 11 U.S.C. § 1113 Authorizing  
16 Debtor to Reject Collective Bargaining Agreement, dated  
17 August 17, 2012, ¶¶ 10, 13.

18 The APA, in fact, notes that the revised  
19 codesharing proposal is the same as the codesharing proposal  
20 in the proposed agreement sent out to APA members for the  
21 vote in July. See Revised Decl. of Neil Roghair in Opp'n to  
22 Debtors' Renewed Mot. for Entry of Order Pursuant to 11  
23 U.S.C. § 1113 Authorizing Rejection of Collective Bargaining  
24 Agreement, dated Sept. 3, 2012, ¶ 23 (the "Roghair Decl.").

25 With the exception of these changes, American's

1 revised proposal for which it seeks approval is identical to  
2 the one proposed by American on April 19, 2012, which was  
3 the last proposal made by American prior to the start of the  
4 trial on April 23rd. See Roghair Decl., ¶ 12. Having  
5 addressed the two problematic items that were identified by  
6 the Court in its decision on the prior Section 1113  
7 proposal, American now requests that the Court grant its  
8 renewed motion to reject.

9           Section 1113 generally provides that a Court may  
10 authorize a debtor to reject a collective bargaining  
11 agreement if certain requirements are met. These  
12 requirements include that before seeking court relief, the  
13 debtor must (1) make a proposal to a union that provides for  
14 modifications that are necessary to the debtors' ability to  
15 reorganize; (2) that treats creditors, debtors, and affected  
16 parties fairly and equitably; and (3) is based on the most  
17 complete and reliable information available. See 11 U.S.C.  
18 § 1113(b)(1)(A).

19           The statute also requires that the debtor have  
20 shared such relevant information with the union as is  
21 necessary to evaluate the proposal; (2) that it has  
22 conferred in good faith to reach an agreement; (3) that its  
23 proposal has been rejected by the authorized representative  
24 of the employees without good cause; and (4) that the  
25 balance of equity clearly favors rejection. See 11 U.S.C.

1 §§ 1113(b)(1)(B),(b)(2),(c).

2 As the authorized collective bargaining  
3 representative to the pilots, the APA filed an objection to  
4 American's renewed Section 1113 application. Notably, it  
5 does not raise any objection to the revised proposals on  
6 furlough and codesharing. This is in stark contrast to the  
7 APA's position in the first Section 1113 proceeding where it  
8 spent considerable time detailing the alleged deficiencies  
9 of American's proposals on both subjects.

10 But the APA does raise three objections to the  
11 renewed motion. First, the APA argues that the Company has  
12 revised its target for labor cost savings of all employee  
13 groups from 20 percent to 17 percent. They therefore argue  
14 that American's continuing request for \$370 million in labor  
15 cost savings from the pilots, which is based on that 20  
16 percent ask, does not constitute a modification that is  
17 necessary to permit reorganization.

18 The evidentiary basis for this argument, which has  
19 been the subject of most of today's proceeding, appears to  
20 be communications associated with the settlement  
21 negotiations between American and the APA, the APFA and the  
22 TWU, which, as noted above, began during the trial and  
23 concluded with agreements that were ultimately voted on by  
24 each of the unions. The APA also cites to certain  
25 statements made regarding the negotiations and their

1 results, as well as information related to the negotiations,  
2 including the tentative agreement itself that was reached  
3 between the APA and the Company.

4           Moving on to the second objection, the APA again  
5 raises the issue of convergence, in which it argues that  
6 American's cost and labor practices for its pilots are in  
7 the process of reaching parity with the rest of the  
8 industry. It claims that the Company's analysis regarding  
9 labor costs for pilots and the industry standards of  
10 competing carriers is outdated. The APA cites specifically  
11 to a new Delta pilot collective bargaining agreement  
12 finalized in July of 2012 and a "agreement in principle"  
13 reached at United for which the terms are confidential and  
14 not currently known.

15           The third argument raised by APA is consolidation,  
16 namely the notion that American should not be granted  
17 Section 1113 relief now because a merger is inevitable.  
18 They argue that since the close of the trial, the Company's  
19 focus on consolidation has become more concrete and the  
20 range of likely partners has narrowed.

21           Two of the APA's objections can be dispatched  
22 fairly easily. With respect to convergence with competing  
23 carriers, the APA previously made a convergence argument and  
24 presented evidence at trial regarding the terms of the Delta  
25 collective bargaining agreement. *See, e.g., Trial Tr.*

1 111:7-18, May 21, 2012 (Kasper); Trial Tr. 51:11-55:21 May  
2 22,2012 (Glass).

3 The Court has already reviewed the evidence  
4 submitted by the APA regarding the terms of Delta's new  
5 collective bargaining agreement and has overruled the APA's  
6 convergence arguments. To the extent that this "new Delta  
7 evidence" was not previously put before the Court, it could  
8 have been and should have been offered prior to the Court  
9 rendering its decision. See *Matthew Bender & Co. v. West*  
10 *Publ'g Co.*, 158 F.3d 674, 679 (2d Cir. N.Y. 1998) (noting  
11 that a court's "decision to reopen the proof to allow a  
12 party to submit additional evidence is subject to sound  
13 discretion.")

14 As to United, the APA itself admits that the terms  
15 of any deal are confidential and, therefore, unknown and  
16 instead relies on news articles for the alleged details of  
17 this agreement. The danger of relying on such news  
18 articles, however, is clear when considering that the most  
19 recent articles on this subject describe those negotiations  
20 as stalled, with allegations made by the unions of bad faith  
21 bargaining on the part of the company.

22 In any event, the allegations and the evidence  
23 provided on convergence are subject to the same defect that  
24 was identified in the Court's prior decision, namely that it  
25 is anecdotal and does not provide an industry-wide

1 comparison with American's costs. And as noted in the prior  
2 decision, it is also inconsistent with the fact that  
3 American has lost more than \$1 billion in 2011 and that the  
4 pilots admitted during the prior trial that the status quo  
5 was not sustainable.

6 As to the second issue of consolidation, the Court  
7 has already acknowledged in its prior decision that there is  
8 no merger for the Court to consider. That has not changed  
9 today. "While American has begun the process of considering  
10 strategic alternatives to its business plan, that process  
11 has not yet been completed." *In re AMR Corp.*, 2012 WL  
12 3422541, at \*18.

13 While that process has continued since the  
14 issuance of the Court's decision, there is still no fixed  
15 outcome for the Court to take into consideration. Thus, as  
16 nothing has changed on this subject since the issuance of  
17 the Court's opinion on August 15th, the Court rejects the  
18 arguments on consolidation for the same reasons set forth in  
19 its prior decision.

20 The third argument centers on the 17 percent  
21 figure discussed by American and its unions during  
22 settlement negotiations. The APA's position here is flawed  
23 for several reasons, which are worth discussing in detail.

24 First and foremost, the APA seeks to set a  
25 precedent that would drag the Court into parties' settlement

1 discussions. The parties here tried, but failed to reach a  
2 new agreement. The 17 percent cited was the number  
3 presented to the APA and American's two other unions as a  
4 compromise with the hope of avoiding the Court issuing a  
5 ruling on American's rejection motion. The APA now seeks to  
6 use those discussions and that figure as a weapon in this  
7 litigation.

8           While the APA says this is not a settlement, that  
9 contention is contrary to the vast weight of the evidence.  
10 One need only look at the Declaration of Neil Roghair, which  
11 is attached to the APA's opposition. In paragraph 4 it lays  
12 out Mr. Roghair's testimony, which includes a detailed  
13 examination of the differences between American's current  
14 proposal that is the subject of this renewed 1113  
15 proceeding, and what's referred to in the Declaration as the  
16 tentative agreement with the APA that was the subject of the  
17 settlement discussions outside of the Court's purview and  
18 was presented to the APA members for a ratification vote.

19           It then goes through an extensive comparison of  
20 the tentative agreement against the current proposal and  
21 what American seeks in each. And, in fact, it relies on  
22 evidence that does exactly the same. So, for example, in  
23 paragraph 20 of the Roghair Declaration, it notes and relies  
24 upon a chart that is entitled "APA Term Sheet and Tentative  
25 Agreement Comparison, (Roghair Decl., Ex. 2), which does



1 nothing more than compare the APA term sheet that was  
2 provided by American for the 1113 proceeding and a tentative  
3 agreement which is what was worked out by the parties and  
4 then presented to the members for a vote.

5           And this continues throughout the entire  
6 Declaration. Paragraphs 24 and 25 talk about regional jets  
7 and codesharing and discuss the terms of the tentative  
8 agreement. Paragraph 36 makes the conclusion that the  
9 tentative agreement is far more favorable than the August  
10 16th proposal of American. The heading on page 11 of the  
11 Declaration says, "By American's own admission, the terms of  
12 the tentative agreement would be sufficient to enable the  
13 company to reorganize successfully." And I could go on and  
14 on.

15           The Court finds the testimony of Ms. Goulet to be  
16 credible in explaining that the genesis of the 17 percent  
17 figure was a compromise that American struck with the TWU,  
18 the APFA and the APA this summer, which compromises were  
19 ratified by union membership except for the APA. The Court  
20 is unwilling to fault or punish American for then updating  
21 its own business numbers based on the results of such  
22 successful settlement negotiations.

23           It is equally clear, however, that the number that  
24 will ultimately be chosen as the labor savings in any  
25 business plan will affect the results of these proceedings

1 and the ultimate agreement with the pilots.

2           Based on all the evidence, then, the Court  
3 concludes that the 17 percent figure appears to fall clearly  
4 within the ambit of Federal Rule of Evidence 408, which  
5 prohibits statements made during settlement negotiations  
6 from being introduced as evidence. The Rule is intended to  
7 promote "the public policy favoring compromise and  
8 settlement of disputes." 1972 Advisory Committee Notes to  
9 Fed. R. Evid. 408.

10           The APA argues that Rule 408 does not apply to  
11 Section 1113, but that's belied by the fact that the APA  
12 expressly stated to its members that "[t]he terms of the  
13 'last, best final offer,' (LBFO) which represent a  
14 significant improvement over the term sheet" -- that is  
15 American's term sheet for purposes of Section 1113 -- "will  
16 not be taken into consideration by the Court." (Allied  
17 Pilots Association, Unknown Unknowns (July 3, 2012),  
18 [https://public.alliedpilots.org/apa/AboutAPA/APAPublicNews/t  
19 abid/843/ctl/ArticleView/mid/1983/articleId/1409/Tentative-  
20 agreement-QA.aspx](https://public.alliedpilots.org/apa/AboutAPA/APAPublicNews/tabid/843/ctl/ArticleView/mid/1983/articleId/1409/Tentative-agreement-QA.aspx)).

21           The quote continues: "Management's LBFO is  
22 technically a section 408 'settlement offer' and separate  
23 from the 1113 process." *Id.*

24           Indeed, the APA explicitly agreed that "[a]ny  
25 negotiations between American and APA subsequent to the

1 beginning of the 1113 hearing on April 23rd are confidential  
2 and constitute settlement discussions which are not  
3 admissible in evidence under Rule 408 of the Federal Rule of  
4 Evidence." (Debtors' Motion in Limine, Exh. C).

5 The applicability of Rule 408 was specifically  
6 acknowledged by the Court during trial and was not corrected  
7 or qualified by the APA or any other party at that time.  
8 (See Trial Tr., 91:23-92:4, May 14, 2012(Roghair)). Thus,  
9 it is disingenuous at this point to take a contrary  
10 position.

11 The APA also argues that Rule 408 isn't applicable  
12 because certain statements were made publicly and the  
13 settlement agreements were released to the public. However,  
14 these statements relate to negotiations and their results  
15 and, therefore, constitute evidence related to negotiations  
16 and are covered by the Rule. Indeed, it would be impossible  
17 for the unions to vote on whether to accept a settlement  
18 offer without releasing it to its members.

19 The case of *Steede v. Gen. Motors LLC*, 2012 U.S.  
20 Dist. LEXIS 81292, \*10-\*11 (W.D. Tenn. Apr. 3, 2012) is  
21 applicable to the situation at hand. In *Steede*, the Court  
22 held that the fact that a party had settled on a certain  
23 date "likely would be inadmissible because it would be  
24 evidence of [in that case] GM offering 'valuable  
25 consideration in compromising or attempting to compromise

1 [a] claim'" and it would be offering that evidence to  
2 establish liability for damages. *Id.*

3 For support, that court cited the comments to the  
4 1972 Proposed Rule 408 which stated that "[w]hile the rule  
5 is ordinarily phrased in terms of offers to compromise, it  
6 is apparent that a similar attitude must be taken with  
7 respect to completed compromises when offered against a  
8 party thereto. This latter situation will not, of course,  
9 ordinarily occur except when a party to the present  
10 litigation has compromised with a third person." *Id.*  
11 (*quoting* Fed. R. Evid. 408 (1972 Comments to the Proposed  
12 Rule)).

13 The APA also argues that because negotiations had  
14 already concluded, certain of the statements made by the  
15 Company are not covered by Rule 408. The APA cites to  
16 *S.E.C. v. Pentagon Capital Mgmt. PLC*, 2010 U.S. Dist. LEXIS  
17 25092, \*12-\*13 (S.D.N.Y. Mar. 11, 2010).

18 But *SEC v. Pentagon* is clearly distinguishable  
19 from the case at hand. In that case, the Court dealt with  
20 an order of the SEC that makes findings pursuant to facts  
21 discovered in its investigatory authority. The Court held  
22 that such findings "are presumed reliable and admissible  
23 under Rule 803." *Id.* We have no such situation here.

24 The APA also relies on a case called *Blu-J, Inc.*  
25 *v. Kemper C.P.A. Group*, 916 F.2d 637, 642 (11th Cir. 1990),

1 but it is similarly unhelpful. The case simply reiterates  
2 that the Eleventh Circuit test for whether statements fall  
3 under the rule is "whether the statements or conduct were  
4 intended to be part of the negotiations towards compromise."  
5 *Id.* at 642.

6 *Blu-J* deals with a report made by an accounting  
7 firm in connection with negotiations and testimony related  
8 thereto, and the Court, in fact, held that the materials  
9 fell under the ambit of Rule 408. *See id.* There is simply  
10 no discussion of the issue or any facts that would provide  
11 support for the APA's position in this case.

12 The APA further argues that evidence of the  
13 Company's business plan is distinguishable from its labor  
14 proposals. But the Court believes, based on the totality of  
15 the evidence that I've received, both in declarations and  
16 live testimony here today, that such changes are the result  
17 of and, therefore, inextricably linked to the settlements  
18 with the various unions.

19 The Court notes that the use of settlement  
20 discussions and the parties' positions on settlement would  
21 be particularly damaging in the context of Section 1113. As  
22 noted in the Court's August 15th decision, "The language and  
23 history of Section 1113 made clear that the preferred  
24 outcome under Section 1113 is a negotiated solution rather  
25 than contract rejection." *In re AMR Corp.*, 2012 WL 3422541,

1 at \*1 (quoting Collier on Bankruptcy ¶ 1113.01 (Alan N.  
2 Resnick & Henry J.Somner eds., 16th eds)). As the Second  
3 Circuit has recognized, "the entire thrust of Section 1113  
4 is to ensure that well-informed and good faith negotiations  
5 occur in the market place, not as part of the judicial  
6 process." *Maxwell Newspapers, Inc. v. New York*  
7 *Typographical Union No. 6*, 981 F.2d 85, 90 (2d Cir. 1992).

8 Thus, the Court concludes that the introduction of  
9 such conversations in court proceedings would have a  
10 significant chilling effect on the parties' attempts to  
11 reach negotiated solutions to the problems of Section 1113.  
12 This would add yet another obstacle to what all agree is  
13 already an exceedingly difficult process.

14 The Court further notes that the 17 percent figure  
15 relied upon by the APA here was well known before the Court  
16 issued its August 15th decision. If those discussions and  
17 that figure were truly relevant on the issue of necessity,  
18 one would have expected that it would have been brought to  
19 the Court's attention prior to issuing the August 15th  
20 decision. But they weren't and that's no surprise. It just  
21 further confirms that those negotiations were part of  
22 efforts to reach a negotiated solution with American's  
23 unions.

24 The APA's reliance on these communications is  
25 troubling for several other reasons. By relying on

1 settlements proposed and ultimately reached with American's  
2 other unions, the APA now seeks to gain a benefit from being  
3 the last holdout from among the three unions. This is  
4 inconsistent with Section 1113 jurisprudence. In the  
5 Section 1113 proceeding in *Delta Air Lines*, 342 B.R. 685,  
6 694 (Bankr. S.D.N.Y. 2006), Judge Hardin rejected the so-  
7 called last man standing argument as inappropriate.

8           But even assuming the admissibility and truth of  
9 these communications, the notion that a three percent  
10 difference by itself dooms American's present application is  
11 misguided. It is well-established that the necessity test  
12 under Section 1113 is not a bare minimum needed for  
13 reorganization. "Necessity should not be equated with  
14 'essential' or bare minimum" as noted by the Second Circuit  
15 in *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d  
16 82, 89 (2d Cir. 1987); see also *New York Typographical Union*  
17 *No. 6 v. Royal Composing Room, Inc. (In re Royal Composing*  
18 *Room, Inc.)*, 848 F.2d 345, 350 (2d Cir. 1988), which notes  
19 that "[a] debtor's proposal need not be limited to the bare  
20 bones relief that will keep it going."

21           Simply put, these cases all stand for the  
22 proposition that necessity is not a but-for test. See *Delta*  
23 *Airlines*, 342 B.R. 694. Indeed, the Second Circuit has  
24 specifically rejected the Third Circuit's requirement that  
25 necessity "be construed strictly to signify only

1 modifications that the trustee is constrained to accept."  
2 *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of*  
3 *America*, 791 F.2d 1074, 1088 (3d Cir. 1986).

4           Such a requirement would make it impossible for  
5 the debtor to show it negotiated in good faith since "an  
6 employer who initially proposed truly minimal changes would  
7 have no room for good faith negotiating, while one who  
8 agreed to any substantive changes would be unable to prove  
9 that its initial proposals were minimal." *Carey Transp.*,  
10 816 F.2d at 89.

11           Here, the communications sought to be introduced  
12 by the APA mean only that American might be able to succeed  
13 with a bare minimum of a 17 percent labor cost reduction,  
14 when that 17 percent is coupled with a consensual labor  
15 agreement. That would be true because such consensual  
16 agreements bring their own benefits to a debtor seeking to  
17 reorganize.

18           As counsel for the Committee noted at today's  
19 hearing, consensual agreements constitute labor peace and  
20 stability, and Section 1113 does not provide either, even if  
21 a debtor prevails during the proceeding. And here, no such  
22 consensual agreement exists between American and the APA.  
23 Thus the 17 percent figure, without more, does not  
24 necessarily invalidate the notion of seeking a 20 percent  
25 reduction from the pilots and, in fact, the APA at today's



1 hearing suggested a policy whereby unions would be offered a  
2 progressively less beneficial deal depending on where they  
3 settled in the order of the ongoing process.

4 The Court does not adopt that position, but does  
5 note that it was something proposed by the very party that's  
6 objecting to the 20 percent ask.

7 The Court notes that rejection is particularly  
8 appropriate here where the Court has received extensive  
9 evidence of the 20 percent figure, and based on a  
10 substantial evidentiary record during the three-week trial  
11 found that American has established that figure as necessary  
12 for purposes of Section 1113.

13 Indeed, the Court would be greatly concerned about  
14 establishing a bright line numerical necessity rule of the  
15 type advocated here by the APA. It would leave little to no  
16 negotiating room for the parties to conduct meaningful  
17 discussions outside the Court's presence, once again,  
18 defeating the congressional purpose behind the statute.

19 On a side note, it may be true that there has been  
20 some recent positive developments on revenue and/or overall  
21 business performance in this case. But this is merely a  
22 snapshot looking at nothing more than a two or three-month  
23 period at most since the end of the last hearing. It says  
24 little about what is needed for reorganization, which is a  
25 much more long-term inquiry into viability.

1           As for Ms. Clark's testimony on this question, the  
2 Court finds that the communications referenced from the  
3 August 16, 2012 meeting do not change the result here.  
4 These comments occurred only one week after the pilots had  
5 actually rejected the tentative agreement and only one day  
6 after the Court's decision on August 15th. The Court  
7 further notes that these communications did nothing more  
8 than refer, again, to the settlements that had been worked  
9 out between American and the unions and that they must be  
10 understood in the overall context of the business plan as  
11 provided by Ms. Goulet in her testimony here today.

12           For all these reasons and considering this as a  
13 new Section 1113 application within the context of the  
14 Court's prior ruling, the Court finds that American's  
15 current proposal contains modifications that are necessary  
16 to permit American's reorganization and that it satisfies  
17 the requirements of Section 1113. And for the reasons  
18 stated above, the Court overrules the APA's substantive  
19 objections to American's renewed Section 1113 motion.

20           But even putting aside the fatal substantive flaws  
21 in the APA's objection, the Court disagrees with the premise  
22 that as a procedural matter, a debtor is prohibited from  
23 presenting a new Section 1113 proposal that addresses only  
24 defects in its prior proposal without going back to  
25 readdress all the aspects of its proposal that a Court has

1 already found to pass muster under the statute.

2           Where a debtor has made a Section 1113 proposal  
3 that has been found lacking in some way, the Court must  
4 consider the facts and circumstances of each case to  
5 determine what is an appropriate way to proceed. The Court  
6 notes that other courts have exercised their discretion in  
7 such a fashion in appropriate circumstances to allow a  
8 debtor to seek relief by remedying specific defects in a  
9 prior Section 1113 proposal.

10           In *Mesaba Aviation, Inc.*, Transcript of  
11 Proceedings, Case No. 05-39258 (Bankr. D. Minn. Oct. 5,  
12 2006), for example, the debtor sought to remedy defects in  
13 its Section 1113 proposal that had been identified by the  
14 District Court on appeal. On remand, the debtor updated its  
15 proposal on two discreet issues, but the union sought to  
16 reopen the door to a broader necessity inquiry because the  
17 revised proposal reduced the savings sought from labor.

18           The Bankruptcy Court stated that "the present law  
19 of the case binds not only me but all the parties to  
20 determinations that now are twice settled by my [earlier]  
21 decision and [the district court's] affirmance", *id.* at  
22 57:20-23, and this is true notwithstanding the passage of  
23 time from the Court's original decision. Here, very little  
24 time has passed since the Court's August 15th decision -  
25 only 20 days.

1           Most recently, in *In re Hostess Brands, Inc.*,  
2 Transcript of Proceedings, Case No. 12-22052 (Bankr.  
3 S.D.N.Y. May 14, 2012), Judge Drain identified specific  
4 issues in the debtors' Section 1113 proposal that needed to  
5 be fixed and indicated that the Court "would . . . be  
6 receptive to a motion that makes a proposal along the lines  
7 . . . outlined," and told the parties that he was "perfectly  
8 prepared on short notice to consider an amended proposal."  
9 *Id.* at 130:25-131:2, 133:3-4.

10           Such an approach recognizes that a Court's prior  
11 decision remains the law of the case. Here, that decision  
12 held that American's business plan established, with the two  
13 exceptions noted above, the need for the changes sought by  
14 the Company. And this included a finding that the monetary  
15 goals sought by the Company were necessary, even though they  
16 took a very difficult toll on American's employees, a sad  
17 fact that is common to Section 1113 proceedings in  
18 bankruptcy. Those findings were based on an extensive  
19 factual record, particularly on the issue of necessity over  
20 the course of the three-week trial.

21           Indeed, such a proposal and procedure would be  
22 immensely appropriate here given that the only new evidence  
23 presented by the union is a single number, namely a  
24 percentage discussed between the parties after the Section  
25 1113 trial, but before the Court issued its August 15th

1 decision.

2 I am not using that procedure for purposes of  
3 making my decision, but I will also say that I don't think  
4 it would be inappropriate to use that procedure in this  
5 particular case.

6 And, again, I would note that the use of such a  
7 procedure would not be appropriate in all circumstances.  
8 For example, if there was a major catastrophic event that  
9 affected all of the airline industry, then, clearly, there  
10 would be a significant change in factual circumstances that  
11 would need to be addressed by the parties and the Court.

12 Finally, the Court notes that two other objections  
13 have been filed to the request for Section 1113 relief:  
14 One, by the Supplement CC Pilots and the second by the  
15 Supplement B Pilot Beneficiaries. They both claim to  
16 represent a minority of American pilots who claim separate  
17 contractual rights by virtue of Supplement B and Supplement  
18 CC to the collective bargaining agreement that exists  
19 between American and the APA.

20 During the course of the original Section 1113  
21 proceedings, representatives of Supplement B and Supplement  
22 CC Pilot Beneficiaries objected to American's application.  
23 The Court overruled these objections for the reasons stated  
24 in the August 15th decision. There have been no new facts  
25 on this issue presented today to the Court and nothing that

1 changes the Court's decision in that ruling.

2 As to the motion *in limine*, that motion is granted  
3 in part and denied in part consistent with the Court's  
4 ruling today that precludes evidence of the parties'  
5 settlement positions under Federal Rule of Evidence 408.

6 Let me just say one last thing. Just because this  
7 is a renewed motion doesn't mean that it's any less  
8 difficult for purposes of employees. I have a lot of  
9 sympathy for the employees, the pilots, just as I did when  
10 we had our original trial. It's a set of circumstances that  
11 nobody is happy about. And I wish you all good luck in  
12 trying to work out an agreement and hope that the good faith  
13 that was evident in earlier discussions carries over to any  
14 discussions moving forward.

15 And so I hope that all the parties can move beyond  
16 my ruling today to do what they're going to have to do,  
17 whether I rule for American, for the pilots, for anyone,  
18 which is come up with an agreement and that is something  
19 that's got to happen. And in some ways I'm the most  
20 important person here, because I have to issue a ruling, and  
21 in some ways I'm the least important person here because I  
22 have no ability to actually work out an agreement between  
23 American Airlines and the APA, and that's something that you  
24 all have to do and I have no power to do it for you.

25