An Alternative Universe to §1113 of the Bankruptcy Code: The Mediation of American Airlines and its Pension Obligations

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I. Introduction

“You wanna fly, you got to give up the [stuff] that weighs you down.”\(^1\) If the “[stuff]” that weighs you down is debt, then this quote, borrowed from a novel, aptly describes the bankruptcy of American Airlines and Chapter 11 bankruptcy in general.

American Airlines was founded in 1930.\(^2\) It was previously known as American Airways.\(^3\) American Airlines was the result of the merger of over 80 small airlines into The Aviation Corporation.\(^4\) American Airways, Inc. officially became American Airlines, Inc. in 1934.\(^5\) The company first traded publicly on the New York Stock Exchange in June of 1939.\(^6\) American Airlines is without a doubt, one of the largest airlines in the world and has contributed nearly $100 billion to the US and international economy.\(^7\)

However, beginning in the early 2000’s rising fuel costs along with reduced demand, among other factors devastated the airlines industry.\(^8\) In 2002, increasing employment and pension obligations forced United to file for bankruptcy.\(^9\) US Airways followed shortly after and filed for bankruptcy protection in 2002 and again in 2004.\(^10\) In

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1. Toni Morrison, Song of Solomon p.179
3. id.
4. id.
5. id.
6. id.
7. id.
8. Andrews Aviation Litigation Reporter, FUEL COSTS, OTHER FACTORS PUSH DELTA, NORTHWEST INTO BANKRUPTCY In re Delta Air Lines Inc.; In re Northwest Airlines Corp., available at 2005 WL 2358036 (ANAVIALR), 1
2005 Delta filed its Chapter 11 bankruptcy petition.\textsuperscript{11} As a result, American Airlines remained the last original legacy airline to avail itself of bankruptcy protection.\textsuperscript{12} And on November 29, 2011, AMR Corporation, the parent of American Airlines filed for Chapter 11 bankruptcy protection.\textsuperscript{13} In its voluntary petition, AMR Corporation lists itself as having greater than $24 billion in assets and over $27 billion in liabilities and more than 100,000 creditors.\textsuperscript{14}

Article I, Section 8, of the United States Constitution authorizes Congress to enact “uniform Laws on the subject of Bankruptcies.”\textsuperscript{15} Under this grant of authority, Congress enacted the Bankruptcy Code in 1978.\textsuperscript{16} The Bankruptcy Code, which is codified as Title 11 of the United States Code, has been amended several times since its enactment.\textsuperscript{17} It is the uniform federal law that governs all bankruptcy cases.\textsuperscript{18} There are two underlying premises of the bankruptcy framework enacted by Congress, and the resulting law is an amalgam of these two aims. One of the ideas is to protect debtors by granting them a financial new beginning from burdensome debts.\textsuperscript{19} The Supreme Court made this point about the purpose of the bankruptcy law in a 1934 decision: “[I]t gives to the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”\textsuperscript{20} The other overarching theme of the bankruptcy laws is to protect creditors and their investments.\textsuperscript{21}

\begin{flushleft}
\textsuperscript{11} id.
\textsuperscript{12} id.
\textsuperscript{13} See In re AMR Corporation, Case No. 11-15463 (SHL).
\textsuperscript{14} See id. (Doc. 1)
\textsuperscript{15} Article I, Section 8 US Constitution
\textsuperscript{16} 11 USC §101 et seq.
\textsuperscript{17} id.
\textsuperscript{18} id.
\textsuperscript{19} See e.g., 11 USC §362 (automatic stay), §365 (rejecting leases), §524 (effect of discharge), etc.
\textsuperscript{20} See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
\textsuperscript{21} See e.g., §506 (secured creditors), §507 (priorities), §547 (preferences), etc.
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Ultra-relevant to the American Airlines bankruptcy are both Sections 365 and 1113 of the Bankruptcy Code. Extremely simplified, Section 365 allows debtors in bankruptcy to reject contracts that are “executory.”\(^\text{22}\) The policy behind this provision is that debtors should be able to abandon burdensome property rights and retain beneficial property rights on their path to a fresh financial start.\(^\text{23}\) Section 1113 has special procedural rules for debtor’s attempting to reject a collective bargaining agreement. By law, the debtor attempting to reject a collective bargaining agreement must first “make a proposal to the authorized representative of the employees covered by such agreement…which provides for the necessary modification in the employees benefits and protections that are necessary to permit the reorganization of the debtor…”\(^\text{24}\) After the initial proposal, the debtor must meet with the employees effected and must attempt to reach a mutually satisfactory modification.\(^\text{25}\) Only after these meetings in good faith may the court allow the debtor to reject the collective bargaining agreement.\(^\text{26}\) For purposes of this paper, we will be assuming Section 1113 of the Bankruptcy Code was amended just prior to American Airlines filing for bankruptcy and reads as follows:

The debtor in possession, or the trustee if one has been appointed, may only reject or alter a collective bargaining agreement if the parties mutually agree to these terms through negotiation,

\(^\text{22}\) §365  
\(^\text{24}\) §1113(b)  
\(^\text{25}\) §1113(b)  
\(^\text{26}\) §1113(c)
mediation, or any other alternative dispute resolution forum that
the parties mutually agree upon.\textsuperscript{27}

With this assumption that the United States Congress has adopted the alternative §1113 proposed above, this paper will explore the possibility of mediating the dispute between the various labor unions with collective bargaining agreements and American Airlines management. Section II will focus on the logistics of the mediation, including the relevant parties, the location of the mediation, and the rules agreed to by the parties. Section III will discuss the selection process for the mediator and the agreed upon mediator. Section IV will encompass a brief, but hypothetical opening statement from the mediator. In Section V will be an in-depth joint session where the parties can present opening statements and negotiate by themselves with the facilitation of the mediator. Following the joint session, Section VI of this paper will proceed to private caucuses between both parties and will cover the parties attempt to resolve their impasse. After the private sessions, the parties will reconvene and memorialize their potential agreement with a closing session found in Section VII. Section VIII will examine post-mediation considerations of the parties and will include first person monologues discussing the approaches of the mediator and the parties. Lastly, Section IX will conclude with a brief discussion on the importance of mediation in the bankruptcy context.

\textbf{II. Mediation Logistics}

\textbf{a. The Parties}

There are many important people and parties to the bankruptcy mediation of American Airlines. While the interests of the Transport Workers Union, cargo agents,

\textsuperscript{27} This passage is only a hypothetical statute, and in no way reflects the current state of the law. It is merely a way to bring this matter to negotiations.
and travel center representatives are equally important, due to page limitations this paper will only focus on the mediation between AMR/American Airlines, the Allied Pilots Association, and the Association of Professional Flight Attendants.\textsuperscript{28}

Thomas W. Horton is the Chairman, President, and Chief Executive Officer of both AMR Corporation and American Airlines. Without a doubt, Horton is calling the shots on behalf of American Airlines, with the assistance of legal counsel. As with all businessmen, Horton wants to maximize the value of his company for his shareholders. Going in to mediation, his goals are essentially three-fold: i) Reduce current and future expenses of the company, ii) Increase current and future revenues of the company, iii) increase or maintain his own personal well-being and credibility.

The Allied Pilots Association (APA) serves as the certified collective bargaining agent for all 10,000 American Airlines pilots. Keith Wilson is the President of APA and a 1977 graduate of the US Air Force Academy.\textsuperscript{29} The APA is infuriated with the events leading to the bankruptcy filing of American Airlines. The APA is of the view that they have already taken $2.6 Billion in benefits and pay cuts to ensure the future stability of the company. The APA is also infuriated that management has hardly shared in the sacrifices and is still reaping humongous compensation in stock options and incentive pay.\textsuperscript{30} The APA wants the best deal for its pilot-members and will not reach a settlement without guaranteeing their pilots, among other things, future job security, fair pay, and a fair benefit package.

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\textsuperscript{28} See AMR Case Info, available at http://www.amrcaseinfo.com/ (showing that there hundred of creditors with claims against AMR)
\textsuperscript{29} APA National Officers, available at https://public.alliedpilots.org/apa/AboutAPA/APANationalOfficers.aspx
\textsuperscript{30} APA, Where We Are Today, available at https://public.alliedpilots.org/APA/LinkClick.aspx?fileticket=1vENYCrN6lc%3d&tabid=75
\end{flushright}
Laura Glading represents the Association of Professional Flight Attendants (APFA) as its President. The APFA, as most unions, are in a never-ending battle with management. Six months prior to the filing of bankruptcy petitions by American Airlines, the Vice President of APFA, Marcus Gluth had these remarks to say about Tom Horton:

I'm talking about 20 or so employees. I'm talking about the only people on the planets that are delusional enough to think that this airline can be successful on its own. The people that think it's good business to fire 14,000 employees, and then ship half of their jobs overseas and then financially cripple everyone else that's left. The people who promote each other to redundant upper-management positions and then award each other with millions in bonuses, even while they'll drive our company right into the ground. I'm talking about Tom Horton and his crew at the top of this company. It's time for them to take a walk. 31

Needless to say, the APFA will come to the mediation table with lots of emotion and with many of the same goals as the APA, including job security, fair compensation packages, and fair benefit packages for its member-attendants. Having discussed the relevant parties to the mediation, let us examine the site of the mediation.

b. The Location for Mediation

31 APFA vice president explains why flight attendants have no confidence in AA management, http://www.apfa.org/content/view/2253/926/
There are many important factors parties must consider when choosing a mediation site.\textsuperscript{32} However, all of the parties involved are located in the Dallas-Fort Worth area. In fact, the three parties all live within five square miles of one another. Conveniently, all the parties agreed to mediate their dispute at the Southwest Region Regional Office of the Federal Aviation Administration ("FAA") in Forth Worth, Texas.\textsuperscript{33} Having agreed on a site for mediation, the parties labored over selecting a mediator.

c. Mediator Selection

All three parties desire a mediator who is familiar with the bankruptcy rules, will remain neutral, and has some general sense of the flight industry. The parties clashed extensively over selecting a mediator, until Mr. Horton suggested Judge A. Jay Cristol. The parties quickly agreed to Judge Cristol who had previously served as a pilot in the navy, flew Pan Am through bankruptcy, and has over twenty years of experience serving on the Bankruptcy Court for the Southern District of Florida.\textsuperscript{34} In addition, Judge Cristol passes the muster of the Florida Rules for Certified and Court-Appointed Mediators.\textsuperscript{35}

d. The Rules of Mediation

\textsuperscript{32} Comfort, psychological interest, accessibility, and neutrality are among the many important factors in selecting a mediation site.
\textsuperscript{33} FAA Regional Offices, available at http://www.faa.gov/about_office_org/headquarters_offices/arc/ro_center/index.cfm?file_name=contact_us_southwest
\textsuperscript{34} http://www.thelibertyincident.com/author.html
\textsuperscript{35} See FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS RULE 10.340(e) ("Senior Judge. If a mediator who is a senior judge has presided over a case involving any party, attorney, or law firm in the mediation, the mediator shall disclose such fact prior to mediation. A mediator shall not serve as a mediator in any case in which the mediator is currently presiding as a senior judge. Absent express consent of the parties, a mediator shall not serve as a senior judge over any case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator within the previous three years. A senior judge who provides mediation services shall not preside over the same type of case the judge mediates in the circuit where the mediation services are provided; however, a senior judge may preside over other types of cases (e.g., criminal, juvenile, family law, probate) in the same circuit and may preside over cases in circuits in which the judge does not provide mediation services")
In a conference call in the days leading up the mediation, Judge Cristol phoned the participants to go over the ground rules of this mediation.

**Mediator Cristol:** Good afternoon Mr. Horton, Mr. Wilson, and Ms. Glading. I am A. Jay Cristol, and I assume you have all done your homework on me, so I will spare you. I am glad you could all make it on the call today. The purpose of this call today is to go over the rules for the upcoming mediation prior to us all meeting in person. First let me remind you that this mediation will be completely confidential. Also, I can’t stress enough that I will not be serving in my normal role as a judge in this matter. I am a third-party neutral. I will not be deciding any questions of fact or law, and I will merely attempt to facilitate a resolution to your problem. Any resolution or decision-making authority ultimately rests with you. At this time, I believe I am under an obligation to disclose to you that I previously presided over the bankruptcy of Pan Am over ten years ago. I believe my decisions in that case were by all accounts neutral and fair. I will attempt to remain neutral throughout this mediation and if my neutrality becomes challenged I may be forced to recuse myself. If any party has any questions about my neutrality I ask that you raise them now. In addition, I will have no lawyers present during this mediation. Because §1113\(^36\) requires all of the parties to agree to any bankruptcy workout, I believe that attorneys will merely get in the way. Do you all agree?

**Ms. Glading:** With all due respect Judge Cristol, don’t you think that gives Mr. Horton an unfair leg-up? He has an MBA degree and understands these numbers a lot

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\(^{36}\) Reminder: This is the hypothetical §1113 discussed above.
better than I ever could. I just want a fair resolution to this matter for the employee’s sake.

**Judge Cristol:** Fine. If you all agree, I will allow each of you to bring one financial expert, but they are not to speak unless I ask for their opinion. They are only there for your private communications. Is that agreed to?

**All:** Yes. Ok. Settled.

**Mediator Cristol:** Good. In addition, since there are so many different and complex issues to negotiate for both parties, including base pay, pensions, benefits, maximum amount of overtime hours, *et cetera*, I would like to handle these mediations separately and confidentially. I don’t want either union representative sizing up the other’s offers and vice-versa. Is that acceptable?

**Ms. Glading:** Again Judge Cristol, I think the flight attendants deserve anything and everything that Mr. Horton will be offering the pilots. Our job is equally important and deserves equal amounts of respect and pay.

**Mediator Cristol:** Ms. Glading that is preposterous. This is a mediation and each side is going to have to give and take. I have flown planes nearly my entire life and I have flown as a passenger on many too. While I understand your concerns, this whole operation doesn’t work without the pilots. If you are going to take that position from day one, we are not going to get anything resolved.

**Mr. Wilson:** Thank you Judge. Finally… a voice of reason.

**Mediator Cristol:** Mr. Wilson I wasn’t defending your position. I am merely trying to get this matter resolved.
Ms. Glading: With all due respect Mediator Cristol, I thought you were to remain neutral? I knew from the outset that you would side with the pilots or the airlines!

Mediator Cristol: I don’t believe I have compromised my neutrality. I believe the term “neutrality” means “that the mediator has no personal preference that the dispute be resolved in one way rather than another. The mediator is there to help the parties identify solutions that they find acceptable, not to direct or steer the parties toward results he favors.”\(^\text{37}\) I still remain neutral and I have no preference one-way or another how this matter is resolved. I just see that the pilot’s have a slightly stronger bargaining position.

Ms. Glading: Ok Mediator Cristol I believe that you don’t have any interest in the outcome, so I guess you are still neutral. I guess I will allow the negotiations to occur separately, but I would like to be able to reserve the right to reject our offer, if at the end of the mediations, I don’t think our offer stacks up with the pilots or isn’t in the best interests of our members.

Mr. Horton: I’m not going to let you break a written contract without any consequence, but I will certainly give you a chance to think about any offers and discuss them with your members.

Ms. Glading: That’s a deal.

Mediator Cristol: Sounds good to me. As we were discussing, anything said during this conversation or the upcoming mediation will be confidential unless any of the parties agree to disclose information. I personally will not make any disclosures to the public, unless you authorize me to. In addition, I will remain neutral in this matter. During the process, I will be asking at times that one or two parties leave

the conference room. When this occurs, I will explain the process further when we are ready to separate. The separation process will hopefully help facilitate a settlement. Lastly, as you all know, I have a vast amount of experience as a judge and attorney. However, today and at mediation, I will not be acting in that role. You, the parties, will have the ultimate power in this matter to create and agree upon a settlement. In addition, Florida law and rule as an attorney and a mediator in this proceeding will bind me even though the mediation will take place in Texas. Do you understand? Any further questions before we hang up?

All: No. Good day Judge.

The parties went their separate ways after the phone call with Mediator Cristol. After a few brief days passed, the parties met in a large and comfortable conference room at the FAA site in Forth Worth, Texas to begin their mediation.

III. Mediator Opening Remarks

Mediator Cristol: Good morning Ms. Glading, Mr. Horton and Mr. Wilson. I hope you all remember the ground rules we discussed the other day. Let us begin with a brief opening remark from each of the parties. Mr. Horton why don’t you begin.

IV. Mediation – Joint Session

Mr. Horton: Absolutely Mediator Cristol. As you all know, our network of carriers serves 260 airports in more than 50 countries and territories. On average, we have more than 3,300 daily flights. American Airlines isn’t going anywhere. However, American Airlines and our parent AMR filed for bankruptcy protection

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39 id.
on November 29, 2011.\textsuperscript{40} Per the rules of bankruptcy, this allows us to conduct our business in our normal manner and gives us certain protection from creditors.\textsuperscript{41} One month after our bankruptcy filing, the New York Stock Exchange notified us that our stock would be delisted for falling below the minimum-listing price for 30 consecutive days. All of our competitors have gone through the old bankruptcy process and were able to reduce their contractual obligations. Our customers and investors no longer see us as competitive and as a result we are hemorrhaging money. “Competing and winning requires a financial improvement of more than $3 billion, and that, in turn, requires significant savings in employee-related costs – of more than $1.25 billion per year.”\textsuperscript{42} As an initial starting point, I believe “[a]ll workgroups [should] have total costs reduced by 20 percent, including management. While the savings from each group will be achieved somewhat differently, each will experience the same percentage reduction.”\textsuperscript{43} I intend to do everything in my power to help restore this once great airline to its position of leadership in the global airline industry.

\textbf{Ms. Glading: [interrupting]} Tom cut the bologna! You made nearly $10 million over the last three years!\textsuperscript{44} Management as a whole made nearly $37 million between six individuals over the last two years.\textsuperscript{45} If you want shared sacrifice, why doesn’t management really take a meaningful reduction in pay!

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\textsuperscript{40} In re AMR Corporation, Case No. 11-15463 (SHL), §362
\textsuperscript{43} AMR’s Form 10-K for the year ended December 31, 2011, http://www.sec.gov/Archives/edgar/data/6201/000119312512063516/d259681d10k.htm
\textsuperscript{44} id.
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Mediator Cristol: Ms. Glading, might I remind you that we are attempting to peacefully resolve this issue. Outbursts like this will not help in that endeavor. I ask that you remain quiet until you are called upon. Now is an appropriate time, Ms. Glading why don’t you make a brief opening remark, and keep it professional and amicable.

Ms. Glading: As you know, I represent the Association for Professional Flight Attendants. APFA represents more than 17,000 flight attendants at American Airlines. Back in 2003, flight attendants were crucial in keeping American out of bankruptcy when we agreed to a reduction in salary and benefits totaling $340 million.\(^46\) We have been negotiating with American for nearly four years now, before American filed its petition for bankruptcy.\(^47\) We understand that American Airlines is hurting. We also think it is unfair that management has been receiving millions of dollars in compensation while running this once great airlines into the ground. As far as compensation and benefits, we are willing to compromise if management will. However, “for decades we have dutifully done our part to support [our] pension plan by paying into it with our hard earned wages, and we expect it to be there for us when we retire. Anything short of this is a betrayal.”\(^48\) Our members are willing to make a sacrifice, but we must see two things. First we must see sacrifices from management. And second, we must see a promising future for this airline.


\(^{47}\) id.

\(^{48}\) APFA and PBGC both Issue Press Releases Calling on AA to Honor Pensions, http://us1.campaign-archive1.com/?u=1450c9c25bd3b5096022a9f71&id=bdc17c27b1&e=8ab30ce689
Mediator Cristol: Mr. Wilson would you care to make a brief opening statement?

Mr. Wilson: Gladly, but I will keep it brief. The APA represents the 10,000 pilots of American Airlines, including the 649 pilots not yet recalled from a furlough beginning after the September 11 attacks.\(^{49}\) Many of our pilots are on full-time military leave of absence due to service in the armed forces.\(^{50}\) Professional pilots are in high demand and short supply worldwide.\(^{51}\) We realize this and we know that we cannot be outsourced or easily replaced. Our pilot members are looking for a fair deal. No offense Laura, but we believe we are more vital to the ongoing health of the airline, and we don’t believe we should have to make as great a sacrifice as management or the attendants. From a number standpoint, there is no way we would agree to a twenty percent cut in compensation, either present or future, as Mr. Horton suggested.

Mediator Cristol: Thank you all. At this time I’d like to ask Ms. Glading to leave the room for a brief meeting between the APA and the airlines.

V. Mediation – Private Caucuses

a. Caucus with American Airlines and the APA

Mediator Cristol: Now that it is just the three of us, why doesn’t Mr. Horton more fully explain his twenty percent cut in compensation offer from a moment ago and then maybe we can workout a settlement.

Mr. Horton: We as an organization need to get our compensation system in line with the other airlines to be competitive. As a whole we need to reduce employee costs


\(^{50}\) id.

\(^{51}\) id.
and replace pension benefits with a defined contribution benefit. While these measures will help save millions of dollars, we share your concerns and want to leave base pay rates unaffected.\textsuperscript{52}

**Mr. Wilson:** We agree that AMR and American Airlines are struggling. We recognize that much of these problems are outside your control with rising fuel costs and increased government regulation. We see our sister airlines’ employees having their pay cut and their benefits reduced. We understand it’s a global problem. To be honest with you, I just need to put on this macho facade to the public and our members. I can take them back nearly any deal at all, short of a complete liquidation, and spin it as a victory for our members. That being said, we need to meet somewhere in the middle on the numbers of hours our pilots are required to fly, benefit contributions, and overall salary structures, and we would also like a continuing equity stake in the company.

**Mr. Horton:** Thank you Mr. Wilson for your sincerity and your honesty. I am thankful you understand the problems we share and for your flexibility in helping us resolve this issue. As far as equity to your pilots, I think we can make that happen. I am also confident that we could easily negotiate some of these other numbers at another time. So long as I know we are on the same page, I feel confident leaving this room here today knowing that we will reach a settlement in the near future.

**Mr. Wilson:** Me too. Why don’t you call me in my office on Monday and we will work this out. Better yet, why don’t we discuss this over a round of golf?

**Mr. Horton:** Sounds like a plan. Have your secretary call my secretary.

\textsuperscript{52} American Airlines Restructuring, APA, http://www.restructuringamr.com/
Mediator Cristol: Well gentlemen, it sounds like you have this issue resolved. At this time I am going to have a private caucus with Ms. Glading because I get the impression that she will not be quite as easy. Would you mind if I disclose your “settlement” with Ms. Glading?


b. Caucus with APFA

Mediator Cristol: Ms. Glading, in my experience, bankruptcy is often a system of shared sacrifice. If you don’t resolve this matter today or in the near future, you risk putting all of your employees out of work. American Airlines can liquidate and pay off its creditors whenever it deems fit. In my personal opinion, you would be wise to make a reasonable concession and try and get the ball rolling.

Ms. Glading: I understand the process Mediator Cristol, but I truly believe if the flight attendants are the sole remaining hold-out, we will have some leverage of our own over the airlines. So I’m not willing to sacrifice too much at this time.

Mediator Cristol: Well Laura, the APA and AA just talked out their differences and reached an agreement in principle. So you have your wish—you are the remaining holdout. Now what are your demands so that I can relay them to AA?

Ms. Glading: As I said earlier, we would like the same treatment that the pilots have or will receive for our employees.

Mediator Cristol: As I said earlier (emphasis added), I assure you the pilots will not be willing to accept those terms. If you wish, I will relay those terms, but in all honesty I believe you should make a good faith offer by reducing current wages a few percent and reducing future benefits and compensation in step with the pilots.
The airlines may also be willing to share in the equity of the company moving forward.

**Ms. Glading:** You know….Mr. Cristol that sounds like fair terms to start with. I just want what is best for our employees in the long run. I realize that it’s important that we don’t make the airlines bleed money at the cost of the shareholders, because then we might not have any jobs. With equity compensation, I think we can really align the interests of our employees too.

**Mediator Cristol:** I am glad you see it that way. I think we will be able to resolve this matter. Let’s call in the other parties for a brief closing session.

**VI. Mediation – Closing Session**

**Mediator Cristol:** As I said earlier in our session, an agreement remains entirely within your purview. Nevertheless, I would like to make a few brief remarks before we part ways. I believe this session was helpful and productive. Although neither side has an agreement in place, we have accomplished several important goals. First, all the parties now have a better understanding of where the other parties stand. We all now know the financial condition of the airlines, and both unions positions on sharing the sacrifice. Second, we were able to determine that both unions would be willing to accept equity incentives in return for sacrificing a portion of present and future compensation. What that percentage is remains to be negotiated, but I am confident both sides will come to an agreement. In addition, I believe that all three of the parties here today treated each other with mutual respect and listened to each other effectively. If you carry that attitude and behavior forward, I truly believe you will fully resolve this dispute. Given all
of these positive reinforcements, I would like to thank all the parties for coming
today and for your efforts and business-like resolve today. I wish you all the best
of luck in resolving this matter. Please feel free to reach out to me again if you
need my services further.

VII. Post-Mediation Considerations

a. Mediator’s Approach

Mediator Cristol used many styles in carrying out the above mediation. At most
times, Mediator Cristol used a transformative approach. With this technique the mediator
empowers the participants voice their concerns and to appreciate the other side’s stance.53
This strategy was important to the mediator because transformative mediation tends to
focus on the long-term relationship between the parties, rather than focusing on the issues
presented that brought them to mediation.54 Mediator Cristol tried to follow the parties’
wishes and directives and attempted to remain non-directive. In this style of mediation,
an actual agreement is not the focus.55 With this strategy, the mediator is trying to
facilitate communications and create lasting relationships. However, the transformative
approach was not the only strategy implored by Mediator Cristol.

Mediator Cristol also used an evaluative approach. With this approach, the
mediator evaluates the strengths and weaknesses of the parties’ positions and makes
evaluative judgments about the dispute and the probable outcome at trial.56 With this
type of mediation strategy, the mediator takes a more active role and expresses his

53 Melanie A. Vaughn, Mediation Tips, Md. B.J., July/August 2003, at 46, 48-49
54 id.
55 id.
56 id.
thoughts on issues. Mediator Cristol specifically used this strategy with Ms. Glading when he insisted that she must be rational and not expect as good as a deal as the pilots. Whether this strategy is right or wrong, ethical or unjust in any or all mediations remains to be seen, but it was effective in dealing with Ms. Glading—a slightly uncooperative party.

b. Parties’ Strategies

The two union members to this mediation shared many of the same goals. Their interests included maximizing pay and benefits for their members and ensuring the long-term health and profitability of the airlines. In addition, both airlines wanted to improve their relationships with Mr. Horton and maximize their equity ownership in the airlines. While the two unions shared many of the same goals, they took slightly different approaches. Mr. Wilson had a more positive tone and friendly demeanor throughout the mediation, whereas Ms. Glading took a hostile approach. In the end, the two parties strategies returned similar results.

Mr. Horton and the airlines had slightly different goals and strategies. The airlines would like to reduce costs and compensation as much as possible without tarnishing its image as a customer friendly airline. In addition, the airlines wanted to maximize value for its shareholders. Although not expressed, Mr. Horton was prepared to break off negotiations with the flight attendants if they were being too difficult. His major concern was on retaining the pilots through a peaceful agreement. Lastly, Mr. Horton wanted to use the mediation to gauge where each of the unions stood on shared sacrifices and equity compensation, and he effectively accomplished these two goals.

VIII. Conclusion

57 id.
This paper explores mandatory mediation as an alternative method to the current §1113 framework, where judges determine the fate of collective bargaining agreements. As discussed previously, the APA and AFPA were both in failed negotiations with AA before AA filed for bankruptcy. There could be several reasons these negotiations failed, but the most logical reason is that AA believed it would fare better under §1113 in court then out-of-court negotiations with the individual unions. Section 1113 is management-friendly, because if successfully motioned and pled, it takes away the unions voice and allows the court to impose management’s terms on a collective bargaining agreement. By amending §1113 to require cooperation, it restores the power balance between unions and management. With this newfound power balance, the matter would be riper for mediation; AA would not be as tempted to abandon negotiations and opt for litigation.

Once the matter became ripe for litigation and a power balance was restored, mediation was a natural setting for resolving the parties issues. By amending §1113 and forcing the parties to mediate, AA was saved from liquidation or a forced merger and thousands of pilots and flight attendants were able to keep their jobs—albeit with some sacrifices.