THE STATE OF THE UNIONS IN REORGANIZATION AND RESTRUCTURING CASES

HARVEY R. MILLER, MICHELE J. MEISES, & CHRISTOPHER MARCUS[*†]

> *[Section 1113 of the Bankruptcy Code] requires unions to face those changed circumstances that occur when a company becomes insolvent, and it requires all affected parties to compromise in the face of financial hardship. At the same time, § 1113 also imposes requirements on the debtor to prevent it from using bankruptcy as a judicial hammer to break the union.*

New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.), 981 F.2d 85, 89 (2d Cir. 1992).

INTRODUCTION

The history of relations between organized labor and management is replete with bitter adversarial conflicts, vibrant emotion, and sometimes, high levels of irrationality. The intervention of financial crises often exacerbates the intensity of the tension that has become symptomatic of the relationship. The role of unions as representatives of organized labor has evolved from the proponent of fair and reasonable employment practices and a fierce advocate of collective bargaining, to archaic organizations that appear to rigidly defend their organizations despite the economic realities and the effects of globalization. In circumstances of financial distress, the inflexibility of unions often precipitates a decision to seek relief under chapter 11 of the United States Bankruptcy Code to enhance an employer's bargaining leverage. The threat that a collective bargaining agreement (a "CBA") may be rejected is thought to level the playing field. There is a general belief that—over the recent past and in the current economic circumstances—the power of unions in reorganization and restructuring cases has declined. However, chapter 11 is not a guarantee that the rejection of a CBA, if so approved in bankruptcy, will resolve all labor issues.

This Article submits that the relative power of unions in reorganization cases remains potently significant and has not changed in any material manner in light of an employer's leverage in restructuring or bankruptcy. In cases involving organized labor, union members remain the most instrumental constituency by reason of their ability to threaten and, should they deem it necessary, strike.

---

[*] Harvey R. Miller is a Senior Partner, Michele J. Meises is Counsel, and Christopher Marcus is an Associate in the Business Finance & Restructuring Department of Weil, Gotshal & Manges LLP, New York, New York. The authors wish to express their gratitude to their associate, John W. Lucas, for his assistance in the preparation of this Article.

[†] Mr. Miller's practice has included the representation of airlines and other businesses which involve modification or rejection of one or more collective bargaining agreements.

Section I of this Article describes the interaction between pertinent labor laws and bankruptcy law. Sections II and III discuss the effects of 11 U.S.C. § 1113, or the power to assume or reject CBAs.[1] Section II analyzes the appropriateness of rejection damage claims, and Section III reviews the pervasive power of unions in cases of financially distressed companies. In conclusion, this Article suggests viable options to facilitate and benefit the ability to reorganize and restructure distressed businesses.

I. THE INTERACTION BETWEEN LABOR LAW AND BANKRUPTCY LAW

The laws and principles of reorganization, restructuring, and bankruptcy do not operate in a vacuum. When a unionized business entity seeks to restructure its financing and business or reorganize under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), tensions may arise between provisions of the Bankruptcy Code, which are intended to promote the rehabilitation and reorganization of distressed businesses,[2] and various labor laws, which are designed to protect the collective bargaining process.[3] The policies underlying these two distinctly premised bodies of law often appear to collide, particularly when a chapter 11 debtor moves to reject an existing CBA and impose new wage rates and work rules. While the potential collision may not be fatal, reconciliation of the objectives of such laws often causes acrimonious, extended, and expensive litigation. The litigation is permeated with rancorous emotion detrimental to resolution of the issues.

A. Labor Law

1. National Labor Relations Act (NLRA)

In 1935 Congress passed the NLRA[4] after determining that "disturbances in the area of labor relations led to undesirable burdens on and obstructions of interstate commerce."[5] Congress determined that the "'inequality of bargaining power'

---

[1] 11 U.S.C. § 1113 (2006).

[2] *See In re* Cinole, Inc., 339 B.R. 40, 45 (Bankr. W.D.N.Y. 2006) (indicating purpose of chapter 11 bankruptcy is to allow existing businesses to reorganize and rehabilitate); *In re* Nw. Airlines Corp., Ch. 11 Case No. 05-17930, 2006 WL 687163, at *1 (Bankr. S.D.N.Y. Mar. 10, 2006) (pointing out key Bankruptcy Code sections are concerned with rehabilitation of distressed businesses).

[3] *See* 29 U.S.C. § 157 (2006) (setting forth general collective bargaining powers of employers); Painter v. Mazda Motors Mfg. (USA) Corp., No. 91-CV-73466, 1992 WL 521118, at *6 (E.D. Mich. Mar. 17, 1992) (noting Congress's intent in passing labor laws), *aff'd*, 996 F.2d 1216 (6th Cir. 1993); Kaiser v. U.S. Postal Serv., 785 F. Supp. 648, 658 (E.D. Mich. 1992) ("In passing labor laws, Congress intended, in part, to encourage dispute resolution by the parties themselves through mutually satisfactory mechanisms negotiated in the collective bargaining process.").

[4] 29 U.S.C §§ 151–169 (2006).

[5] H.K. Porter Co. v. NLRB, 397 U.S. 99, 102–03 (1970). *See* NLRB v. Fainblatt, 306 U.S. 601, 608 (1939) (discussing effect of labor disputes on commerce); Fansteel Metallurgical Corp. v. Lodge 66 of

between unorganized employees and corporate employers had adversely affected commerce."[6]

The NLRA establishes the right of employees to organize and bargain collectively.[7] Under the NLRA, employers are required to bargain collectively with the employees' authorized representatives on employment issues.[8] The NLRA also confers on employees and their representatives the right to engage in strikes, picketing, and other concerted activities.[9] Detailed guidelines state the terms for modifying or terminating a CBA.[10] The National Labor Relations Board (NLRB) is empowered to implement the provisions of the NLRA.[11] The United States Supreme Court described the underlying purpose of the NLRA as follows:

> The object of [the NLRA is] . . . to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement . . . ."*It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.*"[12]

Amalgamated Ass'n of Iron, Steel & Tin Workers of N. Am., 14 N.E.2d 991, 994 (Ill. App. Ct. 1938) (noting Congress's intent was to "reduce industrial conflicts").

[6] Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609 (1991) (quoting section 1 of NLRA). *See* NLRB v. Bachelder, 120 F.2d 574, 576 (7th Cir. 1941) (finding "unfair labor practices had led and intended to lead to . . . obstructing commerce"); *see also Fainblatt*, 306 U.S. at 606–07 (discussing language utilized in NLRA).

[7] *See generally* 29 U.S.C. §§ 151, 157 (2006).

[8] *See* 29 U.S.C. § 158(d).

[9] *See generally* 29 U.S.C. § 157 (stating employees' rights to organize activities); *see also* NLRB v. Schwab Foods, Inc., 858 F.2d 1285, 1289 (7th Cir. 1988) (noting employees' right to picket employers); Chicago Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co., No. 01 C 8102, 2005 WL 1838364, at *5 (N.D. Ill. Aug. 2, 2005) (upholding union's rights under NLRA to peacefully strike and picket employers), *aff'd*, 464 F.3d 651 (7th Cir. 2006).

[10] *See* 29 U.S.C. § 158(d) (indicating party wishing to modify or terminate CBA must provide notice to other party, offer to negotiate, notify proper mediation agencies, and abide by existing CBA until it expires or sixty days after notice, whichever is later).

[11] *See* 29 U.S.C. § 153 (setting forth "creation, composition, appointment, and tenure" of NLRB); 29 U.S.C. § 160 (empowering NLRB to prevent "any person from engaging in unfair labor practice affecting commerce"). *See generally* H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (noting NLRB "acts to oversee and referee" collective bargaining).

[12] *H.K. Porter*, 397 U.S. at 103 (quoting S. Rep. No. 74-573, at 12 (1935)) (emphasis added). *Accord* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609 (1991) ("The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations.").

The NLRA thereby provides a bargaining environment to achieve industrial peace based on freedom of contract[13] and protection of the rights of unionized employees.[14]

An employer's violation of NLRA obligations results in an unfair labor practice.[15] Section 8(a) of the NLRA provides that an employer engages in unfair labor practices if it, among other things, interferes with, restrains, or coerces employees in the exercise of their rights guaranteed in section 7 or refuses to bargain collectively with the employees' authorized representatives.[16] Section 8(d) defines the duty to bargain collectively created by section 8(a)(5) as the embodiment of the mutual obligations between the employer and the authorized bargaining agent "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," including the duty to continue the terms of a CBA in "full force" pending pursuit of a CBA's modification procedures pursuant to the NLRA.[17]

Requiring the termination or modification of a CBA as set forth in section 8(d) was not simply to assure continued adherence to contract terms during the bargaining term, but also to enable the resolution of the process without interrupting the flow of commerce or the production of goods.[18] Adherence to the terms of CBAs should be achieved through customary judicial procedures[19] "to facilitate

---

[13] *See H.K. Porter*, 397 U.S. at 108 (noting freedom of contract is NLRA's fundamental policy); *see also* "Automatic" Sprinkler Corp. of Am. v. NLRB, 120 F.3d 612, 618 (6th Cir. 1997) (requiring employer to bargain with union outside unambiguous terms of subcontracting agreement would frustrate fundamental policy of NLRA of freedom of contract); Barnes v. Stone Container Corp., 942 F.2d 689, 693 (9th Cir. 1991) (NLRA—intended to allow parties to negotiate CBA issues without state regulation—preempted state's wrongful discharge statute).

[14] *See* Brooks v. NLRB, 348 U.S. 96, 103 (1954) ("The underlying purpose of this statute is industrial peace."); *see also* Brockway Motor Trucks v. NLRB, 582 F.2d 720, 725 (3d Cir. 1978) (stating encouragement of collective bargaining between parties is part of NLRA's framework for peaceful labor relations). *See generally* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38–39 (1987) (reasoning overriding policy of NLRA to be industrial peace).

[15] *See* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991) ("[E]mployer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."); NLRB v. Beverly Enters.-Mass., Inc., 174 F.3d 13, 25 (1st Cir. 1999) (employer's refusal to bargain collectively constitutes unfair practice under section 158(a)(5)). *See generally* 29 U.S.C. § 158(a)(5) (defining unfair labor practice as employer's refusal to bargain collectively with employees' representative, subject to section 159(a));

[16] *See* 29 U.S.C. § 158(a)(1), (5).

[17] *See* 29 U.S.C. § 158(d).

[18] *See* Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 187 (1971) (declaring section 158(d) is not intended to merely ensure contract compliance, but to "facilitate agreement in place of economic warfare"); *see also* New England Cleaning Servs., Inc. v. Servs. Employees Int'l Union, Local 254, 199 F.3d 537, 540 (1st Cir. 1999) (recognizing section 158(d) is intended to give parties to expiring CBA time to negotiate without "threats of strike or lockout").

[19] *See Allied Chem.*, 404 U.S. at 187 ("[E]nforcement of [CBA] contract should be left to the usual process of the law and not to the National Labor Relations Board."); *see also* Local Union 1395, Int'l Bhd. of Elec. Workers v. NLRB, 797 F.2d 1027, 1030–31 (D.C. Cir. 1986) (holding courts are authorized to hear suits to enforce CBAs and NLRB's interpretations are not entitled to particular deference); Local 259, UAW v. Kellogg Pontiac Sales Corp., 392 F. Supp. 1044, 1048 (S.D.N.Y. 1975) (concluding interpretation of CBAs are not within NLRB's jurisdiction, but handled by arbitrators and district courts).

agreement in place of economic warfare."[20] Accordingly, Congress's "policy . . . to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, [was with] the belief that such an approach from both sides of the table promotes the over-all design of reaching industrial peace."[21]

2. The Railway Labor Act (RLA)

The RLA[22] regulates collective bargaining in the railroad and the airline industries. It was enacted in 1926 to achieve the amicable resolution of persistent labor disputes in the railroad industry[23] and subsequently to enhance employee organization rights[24] and expand its coverage to the airline industry.[25] The purposes of the RLA are:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation nor application of agreement covering rates of pay, rules, or working conditions.[26]

---

[20] *Allied Chem.*, 404 U.S. at 187.

[21] NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488 (1960). *Accord* Dorsey Trailers, Inc. v. NLRB, 134 F.3d 125, 130 (3d Cir. 1998) (stating NLRA's purpose of maintaining national peace to preserve flow of commerce is accomplished by requiring management and labor to enter into peaceful settlement negotiations); Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 717 (2d Cir. 1966) ("At the heart of the statutory scheme was the duty, now imposed upon both sides, to bargain with each other 'in good faith.'").

[22] *See generally* 45 U.S.C. §§ 151–164.

[23] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 349 B.R. 338, 351 (S.D.N.Y.) ("[T]he RLA was drafted and agreed to by representatives of the railroad companies and the railroad employee unions, and Congress formally enacted this agreement."), *aff'd*, 483 F.3d 160 (2d Cir. 2007); William G. Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroads' Obligations: The Contrived Collision of the Interstate Commerce Act With the Railway Labor Act*, 24 TRANSP. L.J. 241, 243 (Spring/Summer 1997) (pointing out poor working conditions of railroad employees prompted labor unrest which led to RLA being enacted in 1926).

[24] *See* Order of R.R. Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330, 339–40 (1960) (stating purpose of RLA was to "obtain stability and permanence in employment for workers"); *see also In re Nw. Airlines*, 349 B.R. at 351 (discussing purpose of RLA).

[25] *See* 45 U.S.C. § 181 (extending RLA to air carriers engaged in interstate commerce); Terry G. Sanders, *The Runway to Settlement*, 72 BROOK. L. REV. 1401, 1406 (Summer 2007) (stating RLA governs process of collective bargaining for railroad and airline industries).

[26] 45 U.S.C. § 151(a).

One of the RLA's primary objectives is to avoid interruptions in interstate commerce.[27] Section 2 (First) of the RLA, the "heart" of the statute,[28] requires carriers and employees to "exert every reasonable effort to make and maintain agreements" concerning pay and working conditions and settle all disputes to "avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."[29]

The RLA provides for an extended process of bargaining and mediation.[30] A party that desires to change pay rates, rules, or working conditions must give advance written notice, after which the parties must confer; if they fail to resolve the dispute, the services of the National Mediation Board (NMB) may be invoked.[31] If mediation fails, the NMB must try to induce the parties to submit to voluntary binding arbitration.[32] If arbitration is rejected and the dispute threatens to substantially interrupt interstate commerce such that it could deprive any part of the nation of essential transportation service, the NMB shall notify the President, who may create an emergency board to investigate the dispute.[33] The process is "purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[34] Every reasonable effort must be made to negotiate a settlement and refrain from unilaterally altering the "status quo" by resorting to self-help.[35]

---

[27] *See* Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 148 (1969) (declaring prior to enaction of RLA, there were many strikes); Tex. & N. O. R Co. v. Bhd. of Ry. & S.S. Clerks, 281 U.S. 548, 565 (1930) (indicating "major purpose of Congress in passing the Railway Labor Act was to . . . prevent strikes") (internal quotations omitted).

[28] *See* Chicago & N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570, 577 (1971) (stating section 2 of RLA is more than statement of policy, but enforceable legal obligations); *see also* Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377–78 (1969) (referring to section 2 of RLA as "[t]he heart of the Railway Labor Act") (citations omitted).

[29] 45 U.S.C. § 152.

[30] *See* Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 302–04 (1989) (discussing bargaining and mediation requirements under RLA in event of major and minor disputes); *Detroit & Toledo Shore Line*, 396 U.S. at 150 (holding parties were obligated to maintain status quo until they exhausted bargaining and mediation procedures).

[31] *See* 45 U.S.C. §§ 152 (Second), 152 (Seventh), 155 (First), 156.

[32] *See* 45 U.S.C. § 155.

[33] *See* 45 U.S.C. § 160.

[34] Bhd. of Ry. & S.S. Clerks v. Fla. E. Coast Ry. Co., 384 U.S. 238, 246 (1966). *See* Burlington N.R.R. Co. v. Bhd. of Maintenance of Way Employees, 481 U.S. 429, 444 (1987) (describing RLA dispute process as "virtually endless"); *Detroit & Toledo Shore Line*, 396 U.S. at 150 (noting because "disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worth-while for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce").

[35] *See Consol. Rail*, 491 U.S. at 302–03 (stressing status quo must be maintained during lengthy process of negotiation); *Detroit & Toledo Shore Line*, 396 U.S. at 148–49 (interpreting RLA to impose "upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted").

The term "status quo" is not in the RLA. Rather, it stems from case law.[36] The RLA requires the parties involved "to maintain objective working conditions during the pendency of a dispute" arising under the governing CBA.[37] The "status quo" requirement is

> central to [the RLA's] design. *Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike*. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout.[38]

Exhaustion of the RLA dispute resolution process without agreement results in the CBA's expiration, after which the parties are relieved of their obligations to maintain the status quo.[39] The process cannot be exhausted until the NMB completes all its services, which may take years.[40]

---

[36] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 483 F.3d 160 167 (2d Cir. 2007) (describing the status quo provisions as "central to [RLA's] design"); *see also* 45 U.S.C. § 152 (failing to include words "status quo"); Aircraft Mechs. Fraternal Ass'n v. Atl. Coast Airlines, 125 F.3d 41, 43 (2d Cir. 1997) (quoting 45 U.S.C. § 152 (First) that the status quo provisions are in line with reasonable efforts under RLA).

[37] *See* 45 U.S.C. §§ 152 (Seventh), 155 (First), 156, 160 (outlining general duties of different parties, functions of mediation board, procedures for changing rates of pay, working conditions, and rules, and role of emergency board); *see also* Williams v. Jacksonville Terminal Co., 315 U.S. 386, 402–03 (1942) (indicating rules against implementation of changes while bargaining is proceeding is directed to prevent conditions already fixed by collective bargaining); *In re Nw. Airlines*, 483 F.3d at 167; Atlas Air, Inc. v. Air Line Pilots Ass'n, 232 F.3d 218, 223 (D.C. Cir. 2000) (stating "[b]y their express terms, these so-called 'status-quo' provisions of the Act only prohibit unilateral changes in wages or working conditions where there is a preexisting collective bargaining agreement").

[38] *Detroit & Toledo Shore Line*, 396 U.S. at 150 (emphasis added). *See* Bensel v. Allied Pilots Ass'n, 387 F.3d 298, 315 (3d Cir.) (referring to *Detroit*, stating purpose of status quo provisions is to promote compromise and prevent strikes), *cert. denied*, 544 U.S. 1018 (2005); Local 553, Transp. Workers Union of Am., AFL-CIO v. Eastern Air Lines, Inc., 544 F. Supp. 1315, 1330 (E.D.N.Y.) (observing status quo requirement as unenforceable even when change would not cause harm because it would go against purpose of RLA, as "strikes and other interruptions of commerce are clearly a danger"), *aff'd*, 695 F.2d 668 (2d Cir. 1982).

[39] *See In re Nw. Airlines*, 483 F.3d at 167 (holding CBA expires after parties have tried all avenues of dispute resolution and negotiations); *see also Burlington*, 481 U.S. at 445 (stating "if the parties exhaust these procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute" yet must abide by restrictions following "invocation of an Emergency Board" under RLA); Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378–79 (1969) (noting right to self-help and Court's consistent position towards allowing self-help).

[40] *See, e.g.*, Int'l Ass'n of Machinists & Aerospace Workers v. Nat'l Mediation Bd., 725 F. Supp. 558, 561 (D.D.C.) (dismissing plaintiff's action for relief from mediation until all avenues are exhausted), *aff'd*, 930 F.2d 45 (D.C. Cir. 1991); *see also Detroit & Toledo Shore Line*, 396 U.S. at 149 (noting purpose of long process was to provide time for agreement).

3. The Norris-LaGuardia Act (NLGA)

The NLGA[41] was enacted in 1932 to correct certain abuses of the use of the injunctive remedy in labor disputes.[42] In essence, the NLGA prohibits federal courts from enjoining strikes over the terms or conditions of employment.[43] Federal courts may not issue "any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of [the NLGA]."[44] The NLGA delineates specific acts that may not be enjoined, including the acts of ceasing or refusing to perform any work.[45] The mandate of the NLGA is not all inclusive: It may not preclude injunctions to enjoin violations of the specific mandate of another labor statute, such as the RLA.[46]

B. The Bankruptcy Code

1. The Objective of Chapter 11

Forty years after the Chandler Act of 1938 was enacted, the Bankruptcy Reform Act of 1978, which became effective in 1979, constituted a comprehensive overhaul

---

[41] *See generally* 29 U.S.C. §§ 101–115.

[42] *See Burlington*, 481 U.S. at 437 (reviewing congressional debates of NLGA to disclose, "the Act's sponsors were convinced that the extraordinary step of divesting federal courts of equitable jurisdiction was necessary to remedy an extraordinary problem"); *see also* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 772 (1961) (expressing purpose of NLGA to be correction of injunction of unions); Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co., 353 U.S. 30, 40 (1957) (noting "Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital").

[43] "Labor dispute" is defined broadly and includes any controversy concerning the terms or conditions of employment. *See* 29 U.S.C. § 113(c); *see also Burlington*, 481 U.S. at 441–42 (looking at congressional intent to broadly construe definition of labor disputes); Order of R.R. Telegraphers v. Chicago N.W. Ry. Co., 362 U.S. 330, 335–36 (1960) (stating language of NLGA and its policy suggest broad construction).

[44] 29 U.S.C. § 101.

[45] *See* 29 U.S.C. § 104(a) (restricting federal court's injunctive authority); *see also* Architectural & Ornamental Iron Workers Local Union No. 63 v. Int'l Union of Elevator Constructors, Local Union 2, 475 F. Supp. 2d 757, 764–65 (N.D. Ill. 2006) (stating while federal courts do not have jurisdiction to issue injunctive relief in labor disputes cases, there are certain situations where Supreme Court has allowed them to issue injunctions); NYP Holdings, Inc. v. Newspaper & Mail Deliverers' Union of N.Y. & Vicinity, 485 F. Supp. 2d 416, 419 (confirming "Section 4 of the NLGA deprives federal courts of authority, 'in any case involving or growing out of any labor dispute,' to issue injunctions preventing a labor union from engaging in certain activities," but noting NLGA's limitation "is not absolute") (quoting 29 U.S.C. § 104), *reconsideration denied*, 492 F.3d 338 (S.D.N.Y. 2007).

[46] *See, e.g., Burlington*, 481 U.S. at 444–45 (indicating NLGA does not preclude courts from enforcing mandates of RLA); Chicago N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570, 581 (1971) (upholding federal courts' jurisdiction to enjoin compliance under various mandates of RLA); Graham v. Bhd. of Locomotive Firemen & Enginemen, 338 U.S. 232, 237 (1949) (recognizing that "[NLGA] did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the [RLA]") (citing Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937)).

of the bankruptcy law.[47] Chapter 11 encompassed the reorganization paradigm that a distressed business could be reorganized and thereafter emerge as a viable economic unit. Congress adopted the view that—absent fraud or incompetence—reorganizations would be effectuated best by allowing a debtor to continue to operate its business as a debtor in possession (DIP) and, therefore, the appointment of a trustee was not encouraged.[48] In effect, chapter 11 provided the means for a fresh start for a distressed business.[49] The legislature sought to balance the interests of debtors and creditors.[50] Chapter 11 affords the debtor certain protections to facilitate its ability to reorganize,[51] while providing certain safeguards to protect the interests of creditors.[52]

Since the Bankruptcy Code became effective, Congress has increasingly responded to pressures asserted by special interest groups which seek to limit the powers of bankruptcy court and debtors.[53] Consequently, unions have maintained a stance at the forefront of special interest groups seeking amendments to enhance their positions in bankruptcy cases.

---

[47] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (effective Oct. 1, 1979) (codified as amended at 11 U.S.C. §§ 101–1532 (2006)); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52–53 (1982) (discussing comprehensive revision of bankruptcy laws by Bankruptcy Code).

[48] *See* H.R. Rep. No. 95-595, at 233 (1978) ("[V]ery often the creditors will be benefited by continuation of the debtor in possession, both because the expense of a trustee will not be required, and the debtor, who is familiar with his business, will be better able to operate it during the reorganization case."); *see also In re* Sharon Steel Corp., 871 F.2d 1217, 1225–26 (3d Cir. 1989) (recognizing in chapter 11 reorganization cases, "appointment of a trustee should be the exception, rather than the rule"); *In re* V. Savino Oil & Heating Co., 99 B.R. 518, 524 (Bankr. E.D.N.Y. 1989) (acknowledging "underlying assumption of Chapter 11 is that debtor-in possession governance is to be the norm," and the "mere filing does not demonstrate that the debtor is incapable or unsuited to superintend its own reorganization").

[49] *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating policy of bankruptcy law is to give debtor new opportunity for future without burden of debts); Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) (acknowledging purpose of Bankruptcy Act is "to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes"); Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

[50] *See* H.R. Rep. No. 95-595, at 231–32 (recognizing the "need for the debtor to remain in control," otherwise debtors would avoid reorganization, while also recognizing the "legitimate interests of creditors").

[51] *See, e.g.*, 11 U.S.C. § 362 (2006) (providing automatic stay to freeze or suspend certain actions against debtor, its property, and property in debtor's possession upon commencement of bankruptcy case); 11 U.S.C. § 363 (authorizing debtor to use, sell, or lease estate property); 11 U.S.C. § 364 (authorizing debtor to obtain credit); 11 U.S.C. § 365 (authorizing debtor to assume or reject executory contracts and unexpired leases of nonresidential real property); 11 U.S.C. § 1121 (maintaining debtor's retention of exclusive right to file chapter 11 plan and solicit acceptances thereof).

[52] *See, e.g.*, 11 U.S.C. §§ 361, 363 (providing adequate protection to secured creditors of interests in estate property); § 1126 (requiring acceptance of plan by requisite majorities of classes of voting-impaired creditors and equity holders); 11 U.S.C. §§ 1123, 1129 (setting forth confirmation requirements, such as feasibility and best interest of creditors test); FED. R. BANKR. P. 2002 (2006) (requiring due process protections, such as notice and hearing, to creditors prior to obtaining entry of orders and judgments).

[53] The special interest groups that have benefited from such legislation include unions, real and personal property lessors, asbestos claimants, financial institutions, retirees, equipment manufacturers and lessors in the transportation industry, utilities, and trade creditors. *See* B COLLIER ON BANKRUPTCY, App. Pt. 4(b), at 4-213 n.112 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (remarking lobbyists from certain special interest groups, such as commodities industry and railroads, have been more successful than others).

2. The CBA and the Power of Rejection Under the Bankruptcy Code

In 1984, the United States Supreme Court was presented with the issue of whether a CBA was an executory contract that could be rejected under section 365 of the Bankruptcy Code.[54] In addition to other novel issues presented to the Court, the *Bildisco* case also posed the question of whether a trustee or DIP[55] could unilaterally modify the terms and conditions of a CBA prior to a bankruptcy court's approval of the rejection of the CBA notwithstanding the provisions of the NLRA.[56]

Section 365, which governs executory contracts and unexpired leases, provides that, with certain exceptions, the DIP, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."[57] Under section 365, a DIP—in the exercise of business judgment—could reject an executory contract subject to bankruptcy court approval.[58] At the time of the *Bildisco* case, chapter 11 executory contracts were deemed suspended and not binding on a DIP prior to such rejection or assumption.[59] Nevertheless, courts differed over the proper standard to be applied to a CBA before it could be rejected.[60]

The *Bildisco* Court rejected the contention that a CBA is not an executory contract,[61] unanimously affirming the decision of the United States Court of Appeals for the Third Circuit.[62] Aside from the need for stricter scrutiny of the DIP's exercise of business judgment, the Court further concluded that section 365 contained no indication that rejection of a CBA should be governed by a different standard than that applied to other executory contracts.[63] In that context, the

---

[54] *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) (ruling CBAs are executory contracts which can be rejected by DIP).

[55] A DIP acts *qua* trustee under the Bankruptcy Code. *See* 11 U.S.C. § 1107 (2006) (permitting DIP to have all rights and duties of trustees subject to certain limitations); S. Rep. 95-989, at 37 (giving DIP rights of trustee in chapter 11 case); Wolf v. Weinstein, 372 U.S. 633, 649–50 (1963) (stating DIP has same fiduciary duties to creditors as trustee).

[56] *See Bildisco*, 465 U.S. at 516 (presenting question whether DIP may reject CBAs pursuant to section 365 of Bankruptcy Code).

[57] *See* 11 U.S.C. § 365(a).

[58] *See* NLRB v. Bildisco & Bildisco, 682 F.2d 72, 79 (3d Cir.), *aff'd*, 465 U.S. 513 (1984).

[59] *See Bildisco*, 465 U.S. at 532 (acknowledging DIP does not need to comply with section 8(d) of NLRA before getting permission from bankruptcy court to reject CBAs).

[60] *Compare* Bhd. of Ry., Airline & S.S. Clerks v. REA Express, Inc., 523 F.2d 164, 172 (2d Cir.) (holding rejection was permitted only if debtor's business otherwise would collapse), *cert. denied*, 423 U.S. 1017 (1975), *with* Local Unions v. Brada Miller Freight Sys., Inc. (*In re* Brada Miller Freight Sys., Inc.), 702 F.2d 890, 898–99 (11th Cir. 1983) (finding rejection is permitted if favored by balancing equities); *see Bildisco*, 682 F.2d at 79 (stating standard is higher than business judgment rule but lower than one espoused by Second Circuit).

[61] *See Bildisco*, 465 U.S. at 521–22 (looking at statutory construction, suggesting Congress intended executory contracts to include CBA).

[62] *Id.* at 526.

[63] *Id.* at 526–27.

Bildisco Court acknowledged that a CBA is not an ordinary commercial contract, as some lower courts previously had concluded.[64]

However, as a predicate for rejection, the *Bildisco* Court declined to require that the reorganization would otherwise fail. The Third Circuit in *Bildisco* rejected the "forced liquidation" test, which had been adopted by the United States Court of Appeals for the Second Circuit.[65] The Supreme Court agreed and reasoned that the Second Circuit's test was too stringent and was "fundamentally at odds with the policies of flexibility and equity built into [c]hapter 11," thereby unjustifiably subordinating the "multiple, competing considerations" underlying a chapter 11 reorganization to a purported sanctity of the CBA.[66] The Court indicated that, while bankruptcy courts must consider the interests of the debtor, creditors, and employees, the focus of the inquiry should be the "ultimate goal" of chapter 11 to rehabilitate the debtor:

> The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources . . . . [A] beneficial recapitalization could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior collective-bargaining agreement. Thus, the authority to reject an executory contract is vital to the basic purpose to a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization.[67]

In the foregoing context, a bankruptcy court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each party faces, the likelihood and consequences of liquidation absent rejection, the reduced value of the creditors' claims that would result from the court's decision, and the impact of the CBA's rejection on the employees. The Supreme Court noted that "every conceivable equity" need not be considered, "but rather only how the equities relate to the success of the reorganization."[68]

The Court split five to four on the issue of modification of employment terms prior to rejection, holding that a unilateral rejection or modification of a CBA prior to court approval of rejection was not an unfair labor practice under section 8(a) or (d) of the NLRA.[69]

---

[64] *Id.* at 524 (agreeing with Courts of Appeals regarding special nature of CBAs and consequent "law of the shop" which it creates, suggesting somewhat stricter standard should govern decision of bankruptcy court to allow rejection of CBAs).

[65] *See REA Express*, 523 F.2d at 172 (allowing rejection only if it is proven CBA is "sufficiently onerous and burdensome" to make reorganization fail).

[66] *See Bildisco*, 465 U.S. at 525.

[67] *Id.* at 528.

[68] *Id.* at 527.

[69] *Id.* at 553–54.

The majority concluded that the commencement of a bankruptcy case means that the CBA is no longer immediately enforceable and thus may never be enforceable, since an executory contract is in limbo until it is assumed or rejected.[70] Therefore, a DIP is not bound by the NLRA's mid-term modification procedures or to bargain to impasse requirement terms.

The *Bildisco* decision spawned an immediate outcry from organized labor. Unions lobbied for an amendment to the Bankruptcy Code to limit the power to reject CBAs. Within one month of the decision, a receptive House of Representatives overwhelmingly passed H.R. 5174, which would have overturned the Supreme Court's decision.[71] H.R. 5174 would have allowed rejection of a CBA only if the alternative to rejection would be liquidation of the debtor.[72] A less receptive Senate proposed its own bill rejecting the House standard in favor of a balancing of the equities test. Less than five months after *Bildisco* was issued, section 1113 governing the assumption or rejection of CBAs was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[73]

Section 1113 of the Bankruptcy Code sets forth specific procedures, requirements, and timelines for the rejection of CBAs, and was designed to mollify unions, meet the needs of the DIP/employer, and moderate the Court's holding in *Bildisco*.[74] Among its provisions, section 1113 requires a DIP to adhere to the terms of a CBA pending the outcome of a rejection motion and codifies mores stringent standards and procedures than required under section 365.[75] Section 1113 remains the exclusive means of assuming or rejecting a CBA in chapter 11 cases.[76]

---

[70] *See id.* at 532 (remarking "the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again").

[71] *See* H.R. 5174, 98th Cong. § 541 (1984).

[72] *Id.*

[73] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333 (1984); 11 U.S.C. § 1113 (2006) (outlining requirements for rejection of CBAs); *see* Gregory A. Nave, *Collective Bargaining Agreements In Bankruptcy Proceedings: Congressional Response To* Bildisco, 1985 U. ILL. L. REV. 997, 1011 (1985) (comparing procedures for rejecting CBA pre and post *Bildisco*); Billie Zippel, *Bankruptcy and Labor Law Conflict from* NLRB v. Bildisco & Bildisco to the Bankruptcy Amendments of 1984, 12 WM. MITCHELL L. REV. 345, 358 (noting Congress amended Bankruptcy Code by giving procedures and standards to reject CBAs in response to *Bildisco*).

[74] *See* Zippel, *supra* note 73, at 358 (suggesting section 1113 was legislative solution to conflict presented by courts regarding rejection of CBAs); *see also In re* N. Am. Royalties, Inc., 276 B.R. 587, 590 (Bankr. E.D. Tenn. 2002) (discussing procedures under section 1113); Nave, *supra* note 73, at 1011–12 (noting section 1113 did not overrule *Bildisco* entirely but expanded Court's holding).

[75] *See* 11 U.S.C. § 1113(f) (providing DIP cannot unilaterally terminate CBA prior to notice and hearing of court); Orange County Employees Ass'n v. County of Orange (*In re* County of Orange), 179 B.R. 177, 181 n.7 (Bankr. C.D. Cal. 1995) (noting DIP must follow terms of CBA until it is rejected).

[76] *See* 11 U.S.C. § 1113(a) (stating "only in accordance with the provisions of this section"); *see also* S. Labor Union, Local 188 v. Blue Diamond Coal Co. (*In re* Blue Diamond Coal Co.), 160 B.R. 574, 576 (E.D. Tenn. 1993) (concluding that section 1113 removed CBAs from scope of sections 365 and 502 of Bankruptcy Code); *In re* Moline Corp., 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992) (noting assumption or rejection of CBAs are subject to section 1113). Railroads are excluded from coverage under section 1113. *See* 11 U.S.C. §§ 1113(a), 1167; *see also* Air Fla. Pilots Ass'n v. Air Fla., Inc. (*In re* Air Fla. Sys., Inc.), 48 B.R. 440, 443 (Bankr. S.D. Fla. 1985) (noting there is a different section—section 1167—which prohibits

Section 1113 permits a bankruptcy court to authorize the rejection of a CBA only if the DIP makes three substantive showings.

> 1. The DIP must make a proposal to the employees' authorized representative, i.e., the union, prior to the hearing which provides for those "modifications in . . . benefits and protections that are necessary" to permit the debtor's reorganization and "assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably" and provide all relevant information to evaluate the proposal.[77]
>
> 2. The union has refused to accept the proposal without good cause.[78]
>
> 3. The "balance of the equities clearly favors rejection" of the CBA.[79]

While the third requirement codifies the equitable test adopted by the Court in *Bildisco*, the first two requirements "go beyond" *Bildisco*.[80] Significantly, under section 1113, sections 8(a) and (d) of the NLRA are applicable to a DIP, overruling the portion of *Bildisco* that recognized pre-assumption of a CBA was not binding on a DIP.[81]

Section 1113 requires that the DIP "confer in good faith" with the union to attempt to reach "mutually satisfactory modifications"[82] and that a hearing before the bankruptcy court be scheduled expeditiously at which the interested parties may be heard.[83] If all the statutory requirements are fulfilled and the employees'

---

courts from changing terms of CBA subject to the RLA); *In re* Bastian Co., 45 B.R. 717, 721 (Bankr. W.D.N.Y. 1985) (discussing section 1167, which exempts CBAs subject to RLA).

[77] 11 U.S.C. § 1113(c)(1). *See* 11 U.S.C. § 1113(b)(1)(A) (setting forth requirements for proposing modifications to CBAs); Nat'l Forge Co. v. Indep. Union of Nat'l Forge Employees (*In re* Nat'l Forge Co.), 279 B.R. 493, 498–99 (Bankr. W.D. Pa. 2002) (setting forth requirements under section 1113).

[78] 11 U.S.C. § 1113(c)(2).

[79] 11 U.S.C. § 1113(c)(3).

[80] *See* Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 88 (2d Cir. 1987) (holding that Congress's enactment of section 1113(c)(1), (2) went beyond Court's holding in *Bildisco* but section 1113(c)(3) merely codified Court's equitable test).

[81] *See* Century Brass Prods., Inc., v. Int'l Union (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 272 (2d Cir.) (explaining section 1113 reversed *Bilidsco* insofar as it permitted unilateral rejection of CBA by DIP), *cert. denied*, 479 U.S. 949 (1986); Orange County Employees Ass'n v. County of Orange (*In re* County of Orange), 179 B.R. 177, 181 n.7 (Bankr. C.D. Cal. 1995) ("Section 1113 reflects Congressional displeasure with *Bildisco*'s holding that prior to rejection, a Chapter 11 debtor-in-possession can unilaterally modify a collective bargaining agreement. Thus, pursuant to § 1113, a Chapter 11 debtor-in-possession must adhere to the terms of its collective bargaining agreement pending rejection."); *Moline Corp.*, 144 B.R. at 79 (noting DIP is bound by CBA unless given permission by bankruptcy court after compliance with section 1113).

[82] 11 U.S.C. § 1113(b)(2) (noting both parties must confer in good faith).

[83] 11 U.S.C. § 1113(d)(1).

representative fails to accept the proposal "without good cause,"[84] the bankruptcy court may approve the rejection of the CBA.[85]

II. THE EFFICACY OF SECTION 1113: DAMAGE CLAIMS RESULTING FROM REJECTION OF A CBA

Prior to the enactment of section 1113, the rejection of a CBA was deemed a breach of the agreement immediately preceding the filing of the bankruptcy petition.[86] Rejection of commercial contracts or unexpired leases resulted in a pre-petition general unsecured claim for breach of contract damages.[87] Congress failed to provide in section 1113 for damages arising from the rejection of a CBA. As stated by one court:

> While § 1113 deals extensively with the act of assuming or rejecting a collective bargaining agreement, it says nothing about the effect of assumption or rejection . . . . [W]hen Congress added § 1113 in 1984, it forgot to make conforming amendments to other provisions in the Bankruptcy Code, including § 365.[88]

Accordingly, the resolution of the issue of whether the rejection of a CBA gives rise to a claim for damages remains outstanding.

During the initial years following the enactment of section 1113, a number of courts assumed—both in dicta and with little or no analysis—that claims for rejection damages were possible without any consideration of whether a CBA is an

---

[84] *See* 11 U.S.C. § 1113(c); *In re* UAL Corp., 408 F.3d 847, 849 (7th Cir. 2005) (finding non-interested parties' rejection of plan does not impede approval of plan by court). *But see In re* Delphi Corp., Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y. May 23, 2006) (order regarding motion to limit participation in section 1113 hearing) ("parties in interest" under section 1109(b) may participate in section 1113 hearing only as it pertains to debtors' business judgment under section 363(b), but not as to whether debtors satisfied section 1113).

[85] N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 89 (2d Cir. 1992) (holding "[r]ejection of a collective bargaining agreement is permitted only if the debtor fulfills the requirements of § 1113(b)(1), the union fails to reject the debtor's proposal with good cause, and the balance of the equities clearly favors rejection"); Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 346 B.R. 307, 327 (S.D.N.Y. 2006) ("After the requirements of § 1113(b) are met, § 1113(c)(2) conditions the rejection of a collective bargaining agreement on a union's refusal to accept a debtor's proposal 'without good cause.'"); *see* 11 U.S.C. § 1113(e) (permitting bankruptcy court to grant emergency interim relief prior to rejection of CBA if "essential to the continuation of the debtor's business" or to "avoid irreparable damage to the estate").

[86] *See* 11 U.S.C. § 365(g) (rejection of executory contract is deemed to have occurred on the date prior to commencement of bankruptcy filing); Air Lines Pilots Ass'n, Int'l v. Cont'l Airlines Corp., et al. (*In re Cont'l Airlines Corp.*), 901 F.2d 1259, 1264 (5th Cir.) (referring to 11 U.S.C. § 365(g), "[w]hen so rejected, the agreement is deemed breached the day before the Chapter 11 petition was filed"), *cert. denied*, 506 U.S. 828 (1992).

[87] *See* 11 U.S.C. § 502(g) (allowing claims arising from rejection of executory contracts subject to limitations under section 502); *see also In re Cont'l Airlines*, 901 F.2d at 1265 (holding damages available upon rejection of CBA only if it guaranteed future employment).

[88] *In re* Moline Corp., 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992).

employment agreement.[89] Some courts referenced section 365 or 502(g) in order to suggest that because section 1113 says nothing about the effect of assumption or rejection of a CBA, section 365

> must apply to fill in the gap . . . . However, § 365(g) only provides for the treatment of executory contracts or leases assumed or rejected "under this section," *i.e.*, § 365. The court views the language in § 365(g) as a legislative gaffe . . . . Otherwise, the gaps in § 1113 would make it virtually impossible to determine the consequence of the assumption or rejection. By the same token, if a collective bargaining agreement is rejected, both the damages caused by the rejection and any prepetition collective bargaining agreement claims are treated as prepetition claims entitled to that priority such prepetition claims would otherwise be entitled to.[90]

The first decision to directly address this issue concluded that the Bankruptcy Code neither provided for nor recognized a remedy for damages resulting from the rejection of a CBA. In *Blue Diamond Coal Co.*,[91] a union filed a proof of claim in the amount of approximately $20 million for damages resulting from the DIP's interim changes in its CBA and its subsequent rejection.[92] The DIP objected and moved to expunge the claim. The bankruptcy court agreed and denied the union's claim, holding that section 1113 does not provide for or authorize a union or its represented employees to assert a claim for damages under sections 365 or 502 for breach of an executory contract, because Congress eliminated CBAs from the framework of section 365 when it enacted section 1113.[93] The court further determined that the procedural and substantive barriers Congress established in section 1113 supported the notion that Congress did not intend for damage claims to be allowed: "If rejection is truly necessary, then allowing a claim for damages, especially if the amount of that claim represents lost future wages and benefits, would necessarily assure the failure of the reorganization."[94] On appeal, the district court affirmed the bankruptcy court's decision, holding that the union's appeal was

---

[89] *See, e.g.*, Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 93 (2d Cir. 1987) (noting possibility of breach of contract claims if rejection is approved); *In re* Maxwell Newspapers, Inc., 146 B.R. 920, 934 (Bankr. S.D.N.Y.) (noting "possibility of large damage claims" from rejection), *rev'd*, 149 B.R. 334 (S.D.N.Y.), *aff'd in part, rev'd in part*, 981 F.2d 85 (2d Cir. 1992).

[90] *Moline*, 144 B.R. at 78–79. *See In re* Garofalo's Finer Foods, Inc., 117 B.R. 363, 371 (recognizing that some courts consider amount of employee damage claims under section 502(g) when determining whether DIP has satisfied section 1113).

[91] 147 B.R. 720 (Bankr. E.D. Tenn.), *aff'd*, 160 B.R. 574 (E.D. Tenn. 1993).

[92] *See id.* at 723.

[93] *See id.* at 730.

[94] *Id.* at 732.

mooted by substantial consummation of the debtor's plan, and that, even if not moot, the union was not entitled to a claim for damages.[95]

Since the *Blue Diamond* decision, case law addressing the issue of damages has been scant.[96] However, the Second Circuit recently considered whether damage claims are appropriate in connection with the rejection of a CBA subject to the RLA in the chapter 11 case of Northwest Airlines Corporation ("Northwest").[97]

After a laborious and costly litigation, Northwest obtained approval to reject its CBA with the Association of Flight Attendants-CWA (the "AFA").[98] Subsequently, it imposed new terms and conditions of employment on its flight attendants.[99] The union threatened a work stoppage, coined "Operation Chaos," unless Northwest agreed to terms and conditions that were more favorable than those that had been offered, rejected, and were to be imposed on the union membership under Northwest's proposal.[100] Threatened with a potential closedown of operations, Northwest moved to enjoin the flight attendants.[101] The bankruptcy court denied Northwest's motion for preliminary injunctive relief on the grounds that (i) the imposition of new terms and conditions on the flight attendants amounted to a unilateral action by Northwest in changing the status quo required under the RLA, despite the bankruptcy court's earlier decision that the modifications were necessary to Northwest's reorganization; and (ii) the NLGA deprived the bankruptcy court of jurisdiction.[102]

On appeal, the district court reversed.[103] It held Northwest did not unilaterally change the status quo, and issued a preliminary injunction enjoining the flight attendants from engaging in any form of work stoppage because of the potential irreparable harm to Northwest and violation of the RLA by the flight attendants.[104]

---

[95] S. Labor Union v. Blue Diamond Coal Co. (*In re* Blue Diamond Coal Co.), 160 B.R. 574, 576–77 (E.D. Tenn. 1993).

[96] *See, e.g.*, Michael D. Sousa, *Reconciling the Otherwise Irreconcilable: The Rejection Of Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code*, 18 LAB. LAW. 453, 482–83 (2003) (noting it is astonishing there has been no litigation regarding claims for rejection of CBAs though there have been many major companies filing for chapter 11 bankruptcy). *But see In re* U.S. Airways, Inc., 318 B.R. 810, 812 (Bankr. E.D. Va. 2005) (representing consent order approving modifications to CBA containing reservation of rights of debtor to argue that no rejection damage claims arise if debtor files section 1113 motion, and allowing union to argue rejection damage claims do arise as result of such rejection).

[97] Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 483 F.3d 160, 164 (2d Cir. 2007).

[98] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 346 B.R. 307, 336 (Bankr. S.D.N.Y.), *rev'd*, 349 B.R. 338 (S.D.N.Y.), *aff'd*, 483 F.3d 160 (2d Cir. 2007).

[99] *See id.* at 337.

[100] *See id.*

[101] *Id.*

[102] *See id.* at 344–45.

[103] Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 349 B.R. 338, 344 (S.D.N.Y. 2006).

[104] *See id.* at 383–85.

The district court further concluded that the NLGA did not deprive the bankruptcy court of jurisdiction to issue the injunction.[105]

The union appealed to the Second Circuit, which affirmed the lower court's decision, but on different grounds.[106] Specifically, the Second Circuit held that Northwest's rejection of the CBA was consistent with the RLA and section 1113.[107] Therefore, the NLGA did "not bar the preliminary injunction because the union's proposed [action] would violate the separate duty contained in section 2 (First) [of the RLA that the parties] 'to exert every reasonable effort to make [agreements] . . . and settle all disputes.'"[108] The court rejected the union's argument that Northwest unilaterally altered the status quo, freeing flight attendants to engage in work stoppages, "because Section 2 (First) operates independently of the RLA's status quo provisions" and the union failed "to recognize the unique effect on the status quo of a debtor's rejection of a CBA pursuant to § 1113."[109]

The Second Circuit provided an extensive analysis of the effect of rejection under section 1113. After examining the text of section 1113 and the RLA, the court concluded Northwest's section 1113 rejection of the CBA *abrogated, without breaching*, the CBA.[110] As a result, the CBA ceased to exist.[111] The court focused on the specific purpose of section 1113, which is to permit rejection of CBAs "in favor of alternate terms without fear of liability after a final negotiation before, and authorization from, a bankruptcy court,"[112] and compared its purpose to that of section 365: "Contract rejection under § 1113, unlike contract rejection under § 365, permits more than non-performance; it allows one party, with the court's approval, to establish *new terms* that were not mutually agreed upon, the antithesis of the status quo."[113] Accordingly, a debtor's ability to impose new terms "cannot be reconciled with the continued existence" of the prior CBA.[114] If a rejected CBA remained in force, imposition of new terms would violate section 2 (Seventh) of the RLA, which generally prohibits carriers from changing pay rates or working conditions of employees as a class embodied in CBAs.[115]

The Second Circuit reasoned that the differences between sections 1113 and 365 justified different results in their respective applications. By enacting section 1113 in response to *Bildisco*, Congress intended that debtor-carriers could not

---

[105] *Id.* at 383.
[106] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 483 F.3d 160, 164 (2d Cir. 2007).
[107] *See id.* at 172.
[108] *Id.* at 168 (citing 45 U.S.C. § 152 (First)).
[109] *Id.*
[110] *See id.* at 169–70.
[111] *Id.*
[112] *Id.* at 172.
[113] *Id.* at 171 (emphasis in original).
[114] *Id.*
[115] *See id.*

terminate or modify a CBA immediately after filing a bankruptcy case.[116] Section 365, in contrast, "leads to a legal fiction at odds with the text of (and impetus behind) § 1113."[117] The Second Circuit concluded it was "obligated" to "distinguish the legal consequences of rejection under Section 365" from that of section 1113.[118] As part of that analysis, the Second Circuit determined that the bankruptcy court, under section 1113, may authorize a DIP governed by the RLA to "abrogate its CBA, effectively shielding it from a charge of breach."[119] Inasmuch as the CBA ceased to exist, the Second Circuit found there could be no breach to support damages.[120]

Given the facts of *Northwest*, it is unclear whether the Second Circuit's ruling, as it relates to potential damages for rejection, applies to the rejection of all CBAs pursuant to section 1113, or whether it is limited to those CBAs governed by the RLA. While the court does hold as a general matter that rejection of a CBA *abrogates*, without breaching, the CBA, the holding is largely premised on the notion that a contrary rule would conflict with the provisions of the RLA.

Notwithstanding the lack of clarity regarding the scope of the *Northwest* decision, the plain meaning of the statute as well as the underlying purpose of section 1113 militates against the notion that rejection of a CBA (regardless of whether the CBA is covered by the RLA) gives rise to breach of contract damages. The enactment of section 1113 as a response to *Bildisco* removed CBAs from section 365. By doing so, it also removed CBAs from section 502(g), which applies to a claim arising from the rejection of an executory contract under section 365.[121] Yet Congress did not add any provision in section 1113 which would apply comparable principles to a CBA. Nor did Congress provide that section 502(g) is applicable to the rejection of a CBA under section 1113. This leads to the conclusion that an entity asserting a claim for damages arising from rejection of a

---

[116] *Id.* at 172; s*ee* United Food & Commercial Workers Union, Local 328, AFL-CIO v. Almac's Inc., 90 F.3d 1, 4 (1st Cir. 1996) (explaining Congress passed section 1113 in response to Supreme Court's decision in *Bildisco*); S. Labor Union v. Blue Diamond Coal Co. (*In re* Blue Diamond Coal Co.), 160 B.R. 574, 576 (E.D. Tenn. 1993) (noting "Congress enacted § 1113 in order to eliminate collective bargaining agreements from the framework of § 365").

[117] *In re Nw. Airlines*, 483 F.3d at 172–73.

[118] *Id.* at 173 (suggesting, in addition, that employees aggrieved by rejection under section 365 may strike). For a discussion on the right to strike, see *infra* notes 179–197 and accompanying text.

[119] *In re Nw. Airlines*, 483 F.3d at 174. The concurring opinion did not directly address the permissibility of damage claims resulting from rejection under section 1113. *See id.* at 183 ("The majority dilates on whether the CBA was abrogated, breached, modified, partially assumed and partially rejected, or rejected altogether. This misses the point: The CBA . . . is not a private bilateral contract and is therefore not susceptible to such analysis.") (Jacobs, J., concurring).

[120] *See id.* at 174.

[121] 11 U.S.C. § 502(g) (2006) (allowing for claims specifically arising from rejection of executory contract under section 365 subject to limitation under section 502); *see In re Blue Diamond Coal Co.*, 160 B.R. at 576 (E.D. Tenn. 1993) (holding "11 U.S.C. § 1113 effectively withdrew the rejected collective bargaining agreement from the rubric of 11 U.S.C. § 365 and § 501" which encompasses claims arising under 502(g)); Sousa, *supra* note 96, at 482 (holding that *Blue Diamond* was correctly decided, and had Congress intended to provide damages remedy, language to that effect could have been added to section 1113, or, sections 365 or 502 could have been amended).

CBA under section 1113 is not a "creditor," as that term is defined in 11 U.S.C. § 101(10) because it does not have a claim "of a kind specified in section . . . 502(g)."[122] Therefore, there is no entitlement to file a claim under section 501.[123]

Permitting a claim for damages would defeat the very purposes for which section 1113 was enacted. The complex substantive requirements and procedures contained in section 1113 were created to ensure that a CBA may only be rejected if it is "necessary" for a debtor's reorganization.[124] If rejection is, in fact, necessary, then allowing a claim for rejection damages that might dwarf all other general unsecured claims might stymie the reorganization, a result that would be inconsistent with the purposes of allowing rejection in the first instance.

A union with a large damages claim could effectively control the class of unsecured creditors with respect to voting on a chapter 11 plan and potentially block confirmation of a plan that did not satisfy the union's demands. The objectives of the union and those of other creditors may be adverse and prejudice the prospects of reorganization.[125] Alternatively, if a plan provides for unsecured creditors to receive equity, a union holding a large rejection damages claim would obtain a significant, and perhaps controlling, position in the reorganized debtor.

Particular circumstances, however, may result in a claim for damages if the CBA provides for lifetime job guarantees, as in the *Maxwell* case, discussed in section III.[126] CBAs generally set forth the salary and working conditions that will be provided to the employees covered therein, but do not guarantee employment for a fixed term.

Allowing damage claims arising from the rejection of CBAs under section 1113 is extremely problematic. Should there be a cap on rejection damage claims similar to that in section 502(b)(7) of the Bankruptcy Code that limits claims for "damages

---

[122] 11 U.S.C. § 101(10). *See In re* Blue Diamond Coal Co., 147 B.R. 720, 732 (Bankr. E.D. Tenn.) (holding an entity seeking damages under section 1113 cannot be considered creditor under section 101(10)(B) because it does not meet requirement that its claim against estate is "of a kind specified in section . . . 502(g)"), *aff'd*, 160 B.R. 574 (E.D. Tenn. 1993).

[123] *See* 11 U.S.C. § 501.

[124] *See In re Nw. Airlines*, 483 F.3d at 166 (citing 11 U.S.C. § 1113) (allowing DIP to "'reject a collective bargaining agreement' if the bankruptcy court determines (among other things) that 'the balance of the equities clearly favors rejection of such agreement' and that rejection is 'necessary to permit reorganization'").

[125] *See* Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (*In re* U.S. Truck Co.), 800 F.2d 581, 587 (6th Cir. 1986) (noting nature and motivations of unions as claimholders may be different from other claimholders); *see also* Kurt F. Gwynne, *Intra-Committee Conflicts, Multiple Creditors' Committees, Altering Committee Membership and Other Alternatives for Ensuring Adequate Representation Under Section 1102 of the Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 109, 124 (2006) (discussing situations where creditors' committee interests may conflict with interests of certain creditor groups such as unions).

[126] *See infra notes* 152–177 and accompanying text discussing damages resulting from rejection of CBAs; *see also* Michael St. Patrick Baxter, *Is There a Claim for Damages From the Rejection of a Collective Bargaining Agreement Under Section 1113 of the Bankruptcy Code?*, 12 BANKR. DEV. J. 703, 714 (discussing implications of *In re* Maxwell); *cf.* Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503, 534–39 (1994) (noting that damages claim would depend in part on whether such claim would exist outside bankruptcy).

resulting from the termination of an employment contract" to the amount of compensation earned within one year after the debtor commences a bankruptcy case, or the date the employee is terminated, whichever is earlier?[127] CBAs typically are not considered "employment contracts," however. The potential issues lend support to the conclusion that rejection damage claims are not authorized by the Bankruptcy Code.

III. THE PURPORTEDLY DECLINING POWER OF UNIONS IN CHAPTER 11 CASES

A. Section 1113 – The Early Years

The initial judicial constructions of section 1113 of the Bankruptcy Code resulted in the establishment of the following nine factors that have to be considered before a motion to reject may be granted:

> 1. The DIP must make a proposal to the union to modify the CBA;
> 2. The proposal must be based on the most complete and reliable information available at the time;
> 3. The proposed modifications must be necessary to permit the debtor's reorganization;
> 4. The proposed modifications must assure that all creditors, the debtor, and all affected parties are treated fairly and equitably, i.e., share the pain;
> 5. The debtor must provide the union with all relevant information necessary to evaluate the proposal;
> 6. The debtor must meet at reasonable times with the union prior to the hearing to consider the motion to reject the CBA;
> 7. The debtor must confer in good faith with the union to attempt to reach mutually satisfactory modifications of the CBA;
> 8. The union must have refused to accept the proposal without good cause; and
> 9. The balance of the equities must clearly favor rejection of the CBA.[128]

At first, courts were reluctant to grant motions to reject or modify CBAs. These decisions were grounded on the conclusion that the debtor/employer failed to meet its burden under section 1113, further providing an implicit notice to

---

[127] *See* 11 U.S.C. § 502(b)(7) (limiting damages in termination of employment contracts); Donald C. Dowling, Jr., *The Intersection Between U.S. Bankruptcy And Employment Law*, 10 LAB. LAW. 57, 60–61 (1994) (noting Bankruptcy Code limits damages under employment contract terminations).

[128] *See, e.g.*, *In re* Am. Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984) (outlining nine requirements necessary for courts to approve rejection of CBAs under section 1113).

debtor/employers that motions to reject presented complex substantive issues and they should not presume such motions would be granted automatically.[129] It appeared that unions had achieved their objective by the passage of section 1113.

However, a split among Circuit Courts of Appeals emerged. In an about-face from the liberal standard it[130] had employed before its decision was reviewed by the Supreme Court in *Bildisco*, the Third Circuit subsequently construed section 1113 narrowly.[131] Each of the nine factors had to be literally applied. It also reviewed the legislative history as endorsing the higher standard for rejection that had been adopted by the Second Circuit pre-*Bildisco*.[132] In *Wheeling-Pittsburgh*, the Third Circuit set a higher threshold for determining what constitutes a "necessary" modification.[133] The Third Circuit concluded that the standard to be applied in evaluating whether a proposed modification was necessary would not be satisfied by a mere showing that it would be desirable to reject or modify a CBA to lower the costs of employment.[134] It noted that the term "necessary" must be "construed strictly to signify only modifications" that directly related to the DIP's immediate "financial condition and its reorganization" that, if not allowed, would result in the DIP's liquidation.[135] The proposed modifications had to be limited to the short-term goal of preventing the debtor's liquidation, which the Third Circuit viewed as the "mirror image" of that which is "necessary to permit the reorganization of the debtor."[136] Strangely, the Third Circuit criticized the lower court for considering "the long-term economic health" of the debtor "rather than the [immediate] feasibility of the reorganization".[137] In effect, the Third Circuit construed "necessary" to mean that the proposed rejection or modification was essential to avoid the liquidation of the debtor.[138] The Third Circuit's interpretation of

---

[129] *See, e.g., In re* Cook United, Inc., 50 B.R. 561, 564–65 (Bankr. N.D. Ohio 1985) (holding debtor did not establish requirements necessary to reject or accept CBA); *In re* Blue Diamond Coal Co., 131 B.R. 633, 643 (Bankr. E.D. Tenn. 1991) (holding that in "each of the above tests, the burden of proof is to be borne by the debtor with a preponderance of the evidence. The burden of going forward with the evidence can, however, shift to the union, particularly with respect to test 5, 7, and 8"); *Am. Provision*, 44 B.R. at 909 (ruling debtor bears burden of persuasion by preponderance of evidence on all elements).

[130] *See In re* Bilidisco, 682 F.2d 72, 80 (3d Cir. 1982) (declining to adopt strict standard employed by Second Circuit).

[131] Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC, 791 F.2d 1074 (3d Cir. 1986).

[132] *Id.* at 1086–88.

[133] *Id.* at 1088–89.

[134] *See id.* at 1088 (stating "the 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs").

[135] *See id.* (defining "necessary" to be synonym of "essential").

[136] *Id.* at 1089. *See, e.g.*, NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) (noting "fundamental purpose of reorganization is to prevent a debtor from going into liquidation").

[137] *See Wheeling-Pittsburgh*, 791 F.2d at 1090 (stating "it appears that the bankruptcy court was still applying a substantive standard closer to, if not taken directly from, *Bildisco* rather than a standard informed by the legislative history").

[138] *See id.* at 1088–89 (construing term "necessary" to encompass only those modifications essential to debtor's short-term survival or necessary to prevent liquidation).

"necessary" imposed a higher burden on DIP employers and effectively negated the rejection power in that Circuit.

The *Bildisco* decision appears to have caused the Second Circuit likewise to change its view of the standards applied to motions to reject CBAs from that expressed in the pre-*Bildisco* decision of *REA Express*.[139] The Second Circuit rejected the Third Circuit's rigid standard in favor of a more liberal standard that would take into account the needs for a debtor's successful reorganization.[140] Rather than limiting review to what is necessary/essential for the debtor's immediate survival, the Second Circuit adopted a standard that encompassed examination of cost savings as a whole and used a more holistic standard to evaluate whether the modification or rejection of a CBA was fair and equitable and would enhance the prospects of the debtor's long-term reorganization. The Second Circuit stated:

> (1) the likelihood and consequences of liquidation if rejection is not permitted; (2) the likely reduction in the value of the creditors' claims if the bargaining agreement remains in force; (3) the likelihood and consequences of a strike if the bargaining agreement is voided; (4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved; (5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in the industry; and (6) the good or bad faith of the parties in dealing with the debtor's financial dilemma.[141]

The majority of courts are aligned with the Second Circuit. The proposed rejection and attendant modifications must be necessary to increase the likelihood of a successful reorganization.[142] These courts have criticized the minority view,

---

[139] *See* Bhd. of Ry., Airline & S.S. Clerks v. REA Express, Inc., 523 F.2d 164, 167–69 (2d Cir. 1975) (adopting strict standard regarding rejection of CBAs, requiring showing of failure of reorganization unless rejection is permitted). *But see Bildisco*, 465 U.S. at 526 (declining to extend rigid standard of *REA Express* and instead adopting lesser standard to "permit rejection of a collective-bargaining agreement . . . if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract").

[140] *See* Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 89 (2d Cir. 1987) (recognizing "necessary" needs to be more liberally construed since Congress chose less restrictive choices of words for statute and also noted importance of being able to negotiate in good faith); *In re* Royal Composing Room, Inc., 848 F.2d 345, 348 (2d Cir.) (upholding decision in *Carey* to have looser definition of what is deemed "necessary"), *cert. denied*, 489 U.S. 1078 (1989); Century Brass Prods., Inc. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 27–76 (2d Cir.) (disagreeing with Third Circuit because its view did not give appropriate weight to honest compromise between parties), *cert. denied*, 479 U.S. 949 (1986).

[141] *Carey*, 816 F.2d at 93.

[142] *See, e.g.*, Sheet Metal Workers' Int'l Ass'n, Local 9 v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Sys., Inc.), 899 F.2d 887, 893 (10th Cir. 1990) (applying Second Circuit's reasoning); United Food & Commericial Workers Local Union v. Appletree Mkts., Inc. (*In re* Appletree Mkts., Inc.), 155 B.R. 431, 441 (S.D. Tex. 1993) (agreeing with Second Circuit's test as it is consistent with history and purpose of section

which includes that of the Third Circuit, because a debtor would be left with no room to negotiate if it could propose only the minimum modifications necessary to avoid liquidation.[143]

In the perspective of the majority view, the balance of power appears to have shifted from the unions to the debtor/employer. Generally, a DIP can make a factual economic presentation that unionized employee costs — together with CBA-required OPEB costs — preclude it from being able to compete in its market. Typically, the union's defense to motions to reject has been that the DIP's proposal was rejected with "good cause." The "good cause" requirement facilitates a negotiated settlement by ensuring that a union has a good reason for refusing to consent to the proposed modifications or face complete rejection of the CBA. "Good cause" is not defined in the statute, however, and courts have not interpreted this term as adding much to the substantive requirements contained in section 1113. They have, however, held that even though the debtor bears the burden of proving that the union lacked "good cause", the union must provide a debtor with detailed reasons for declining to accept the proposed modifications[144] or offer counterproposals that meet its needs while preserving cost savings to the debtor.[145]

1113, as well as "with the realities of a reorganization under Chapter 11 than the Third Circuit's 'bare minimum' test"); *In re* Valley Steel Prods. Co., 142 B.R. 337, 341 (Bankr. E.D. Mo. 1992) (adhering to Second Circuit's view); *In re* GCI, Inc., 131 B.R. 685, 691 (Bankr. N.D. Ind. 1991) (reasoning debtor's proposals must be limited to those impacting its financial condition and increase probability of successful reorganization); *In re* Ind. Grocery Co., 138 B.R. 40, 48 (Bankr. S.D. Ind. 1990) (finding proposed modifications necessary to effect successful reorganization); *In re* Express Freight Lines, Inc., 119 B.R. 1006, 1013–14 (Bankr. E.D. Wis. 1990) (following Second Circuit's decision, recognizing it to be more practical); *In re* Big Sky Transp. Co., 104 B.R. 333, 336 (Bankr. D. Mont. 1989) (acknowledging "necessary" does not mean absolutely minimal, but enough to "enable the debtor to complete the reorganization process successfully"); *In re* Tex. Sheet Metals, Inc., 90 B.R. 260, 271 (Bankr. S.D. Tex. 1988) (finding debtor satisfied good-faith factor under standard set forth by Second Circuit); *In re* Amherst Sparkle Mkt., Inc., 75 B.R. 847, 851 (Bankr. N.D. Ohio 1987) (following interpretation of "necessary" under Second Circuit); *In re* Walway Co., 69 B.R. 967, 973 (Bankr. E.D. Mich. 1987) (noting for modification to be "necessary," it is required for modification to "result in a greater probability of a successful reorganization than if the contract were allowed to continue in force"); *In re* Allied Delivery Sys. Co., 49 B.R. 700, 702 (Bankr. N.D. Ohio 1985) (emphasizing "in the context of this statute 'necessary' must be read as a term of lesser degree than 'essential'").

[143] *See, e.g.*, *Carey*, 816 F.2d at 89 (discussing how meeting bare minimum for modifications would "make it virtually impossible for the debtor to meet its other statutory obligations"). The Third Circuit has since tempered its approach. *See, e.g.*, Bowen Enters., Inc. v. United Food & Commercial Workers Int'l Union, Local 23, AFL-CIO-CLC (*In re* Bowen Enters., Inc.), 196 B.R. 734, 742–43 (Bankr. W.D. Pa. 1996) (declining to extend *Wheeling-Pittsburgh's* reasoning to preclude debtor from proposing various modifications for negotiations).

[144] *See, e.g.*, *Carey*, 816 F.2d at 92 (reasoning union must set forth evidence for not accepting debtor's proposal); *In re* Garofalo's Finer Foods, Inc., 117 B.R. 363, 371 (Bankr. N.D. Ill. 1990) (pointing out "[w]hen the union fails to articulate its reasons for rejection of a debtor's proposal . . . rejection is without good cause"); *In re* Ind. Grocery Co., 138 B.R. 40, 50 (Bankr. S.D. Ind. 1990) (stating "purely selfish concern cannot be good cause for refusing to cooperate with a debtor's good faith efforts to reorganize"); *In re* Royal Composing Room, Inc., 62 B.R. 403, 408 (Bankr. S.D.N.Y.) (finding "a stonewall by the union favors the grant of the debtor's motion for rejection"), *aff'd*, 78 B.R. 671 (S.D.N.Y.), *aff'd*, 848 F.2d 345 (2d Cir.), *cert. denied*, 489 U.S 1078 (1989).

[145] *See, e.g.*, *In re Bowen Enters.*, 196 B.R. at 746 (stating "[w]here the union makes a counterproposal during negotiations that meets its needs while preserving the debtor's savings, its rejection of debtor's

DIPs have successfully demonstrated that unions lacked "good cause" in a variety of ways. For example, DIPs have shown that the union provided no evidence to support its decision to reject the proposed modifications even though it was not economically feasible for the company to continue operating under the existing CBA[146] or insisted on making demands that could not be met if the debtors were to reorganize successfully.[147] DIPs also have shown that the union did not meaningfully participate in the negotiation process[148] or refused to negotiate at all.[149] Thus, so long as a DIP demonstrates it negotiated in good faith and that its proposed modifications are necessary as well as fair and equitable, generally courts have concluded that the union lacked good cause to reject the proposal and then authorized the rejection of the CBA and imposition of proposed modifications to wages and work rules.[150]

The chapter 11 case involving the New York Daily News is particularly illustrative of how courts viewed motions to reject or modify a CBA. The Daily News, which had lost over $100 million over a span of ten years, was party to several CBAs, including a CBA with the New York Typographical Union No. 6. After technological advances made automation necessary and the typesetters' skill obsolete, in exchange for allowing the use of the new technology, the members of the typographical union negotiated lifetime job guarantees in the governing CBA. As the newspaper industry declined and the Daily News confronted continuing losses as well as a five-month work stoppage, the parent company sold the Daily News to Maxwell Newspapers, Inc. ("Maxwell") for approximately $60 million in 1991, ending the work stoppage. The losses continued, and upon the collapse of the Maxwell business empire, Maxwell commenced a case under chapter 11 of the Bankruptcy Code.[151]

---

proposal is with good cause"); *Garofalo's*, 117 B.R. at 371 (noting union's failure to agree during negotiations when debtor needs relief from union indicates lack of good faith on union's part).

[146] *See, e.g.*, *In re* Valley Steel Prods. Co., 142 B.R. 337, 342 (Bankr. E.D. Mo. 1992) (saying Teamsters' refusal of negotiations will prevent possibility of reorganization for debtor).

[147] *See, e.g.*, *Garofalo's*, 117 B.R. at 371 (criticizing union's lack of cooperation with debtor).

[148] *See, e.g.*, *Carey*, 816 F.2d at 92 (recognizing union's tactic is unacceptable and inconsistent with congressional intent); *In re* Sol-Sieff Produce Co., 82 B.R. 787, 795 (Bankr. W.D. Pa. 1988) (detailing union's lack of good faith in rejecting debtor's proposals); *In re* Tex. Sheet Metals, Inc., 90 B.R. 260, 271 (Bankr. S.D. Tex. 1988) (finding the "manifest failure of the two unions to participate meaningfully in the post-petition negotiations confirms their lack of justification for rejecting the debtor's proposed modifications").

[149] *See, e.g.*, *In re* Salt Creek Freightways, 47 B.R. 835, 840–41 (Bankr. D. Wyo. 1985) (concluding union did not negotiate in good faith); *In re* Ky. Truck Sales, Inc., 52 B.R. 797, 805 (Bankr. W.D. Ky. 1985) (establishing union's policy determination not to negotiate medical health coverage to constitute lack of good faith).

[150] *See, e.g.*, *In re Salt Creek Freightways*, 47 B.R. at 841–42 (approving application to reject CBA though union did not accept proposals); *In re* GCI, Inc., 131 B.R. 685, 696 (Bankr. N.D. Ind. 1991) (opining although union's "deeply held belief in the sacred nature of seniority" was legitimate, it was not enough to satisfy good cause requirement); *In re* Sierra Steel Corp., 88 B.R. 337, 340 (Bankr. D. Colo. 1988) (approving debtor's rejection of CBA, holding union did not have good cause to reject proposal).

[151] N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85 (2d Cir. 1992).

Faced with a loss-producing business, Maxwell determined it could not continue to operate the Daily News and sought to sell the newspaper in the hope of providing some recovery to creditors as well as jobs to employees if a new employer would modernize its plant and continue its operations. In September 1992 negotiations with potential acquirers were underway for purchase of the Daily News' assets. A plan of reorganization based upon a purchase and conditioned on support of the unions as well as concessions by the typographers' union was proposed.[152] A proposal to the typographers' union required the CBA to be modified to eliminate (i) Maxwell's obligation to require any purchaser of the assets of the Daily News to employ any member of the union or continue to employ any member of the union if Maxwell ceases publication or sells the Daily News; and (ii) any obligation to arbitrate any controversy relating to these matters.[153] Maxwell provided proof of the impact of the CBA on the financial stability of the Daily News and asserted that it was unable to find a prospective purchaser who would agree to comply with the terms of the typographer's CBA.[154]

The typographers' union made a counterproposal to progressively reduce the number of shifts worked conditioned on (i) a cash buyout for each union member; (ii) a major contribution to the typographers' pension and welfare funds; and (iii) an early retirement enhancement to forego the lifetime job guarantees.[155] Negotiations between the parties continued, with the union focusing on achieving reductions through inducing employees to retire and the purchaser focusing on the amount of work that needed to be done.[156] Negotiations ultimately broke down when the union rejected the purchaser's final offer to modify the CBA.[157]

Failing to reach an agreement, the bankruptcy court considered (i) Maxwell's motion to modify the CBA with the typographers' union by eliminating the lifetime guarantees that were given to 167 typesetters, resulting in all but fifteen of such employees losing their jobs; and (ii) whether the sale should be approved.[158] Maxwell argued that there was "little likelihood that any purchaser would agree to assume [the CBA] since it guaranteed $9.3 million a year in salaries to employees . . . whose functions have become obsolete" and performed no services.[159] The union objected on a number of grounds, including that Maxwell did not treat the unionized employees fairly and equitably, did not negotiate in good faith, and could not demonstrate that the union had not rejected the proposals with good cause.[160]

---

[152] *See id.* at 87.
[153] *See id.*
[154] *See id.*
[155] *See id.* at 87–88.
[156] *Id.* at 88.
[157] *Id.*
[158] *Id.* at 87–88. The loss of jobs and employee dislocation that may result from a rejection decision are very unfortunate, and courts are very sensitive to the human issues involved.
[159] *In re* Maxwell Newspapers, Inc., 146 B.R. 920, 927 (Bankr. S.D.N.Y.), *rev'd*, 149 B.R. 334 (S.D.N.Y.), *aff'd in part, rev'd in part*, 981 F.2d 85 (2d Cir. 1992).
[160] *Id.*

After a protracted trial, the bankruptcy court, *inter alia*, granted the motion to reject the CBA and approved the sale.[161] The court examined the rejection motion under the three part test established in *Carey*.[162] It found that the first element—that the debtor must propose only those modifications that are necessary, but not absolutely minimal, to permit the reorganization and treats all creditors, the debtor, and all affected parties fairly and equitably— was satisfied because Maxwell bargained in good faith by providing the best available information to the union, proposed a necessary modification to the CBA to eliminate the lifetime job guarantees with respect to unnecessary employees, and imposed no greater burden on the typographers than on other creditors and employees: "[M]odifying the CBA to remove this lifetime guarantee clause is necessary to permit a purchaser to buy the newspaper and to allow the Daily News to operate viably in the future."[163]

As to the "good cause" issue, after stating the standard set forth in *Carey* that the union must provide evidence of its reason for declining to accept the proposed modifications notwithstanding the DIP's burden of proof, the bankruptcy court denied the union's arguments that it had good cause to reject the proposed modifications.[164] The union's argument that Maxwell's original proposal was not made in good faith did not evidence "good cause" because it ignored the subsequent proposals made to the union by the prospective purchaser.[165] In addition, the union's contention that it would be better off taking its chances with a court-ordered rejection and having a claim for damages likewise did not establish good cause.[166] Instead, the bankruptcy court set forth the applicable good cause standard:

> It would seem that a union may safely refuse the debtor's proposal if its members are being unfairly burdened relative to the other parties or the proposal is not necessary for the debtor's reorganization, but, otherwise, the union cannot safely turn down the proposal if it has not proffered an alternative which accomplishes the same economic end and fulfills the needs of the reorganization.[167]

The bankruptcy court found that the union rejected the final proposal without good cause because the union "refused to focus on the needs of reorganization" and "offered no more palatable alternative which would accomplish the same economic result," but rather insisted on financial incentives to induce the excess typographers to retire, expenses which Maxwell could not, and which the purchaser declined to,

---

[161] *Id.* at 934.
[162] *See id.* at 928.
[163] *Id.* at 931.
[164] *See id.* at 932–33.
[165] *See id.* at 932.
[166] *See id.*
[167] *Id.*

fund.[168] The bankruptcy court refused to allow the union to "frustrate rejection any time that it could articulate a reason why the debtor's proposal is distasteful even though rational, made in good faith, fair and equitable, and consistent with the needs of reorganization" because that would amount to a "veto power" which could not be the proper reading of section 1113.[169] The third prong in the bankruptcy court's decision considered the balance of equities which it found clearly favored rejection of the CBA:

> Because of the tremendous costs of assuming the lifetime job guarantees and because none of the prospective purchasers was willing to assume them, I am left with the conclusion that no one would fund the Daily News absent a rejection. I am also convinced that no one would agree to purchase it, even for a drastically reduced price, before it has to cease operations. In short, without the relief sought, the Debtor is doomed and chapter 7 looms large. Although the loss of jobs will be painful, the equities tip decidedly in favor of the rejection.[170]

On appeal, the district court reversed the bankruptcy court's rejection order on the ground that the bankruptcy court's view of "good cause" was too narrow, holding that the union did have good cause to reject the purchaser's final offer, and therefore, Maxwell did not satisfy section 1113.[171] Maxwell appealed to the Second Circuit.

The Second Circuit reversed the district court.[172] It agreed with the bankruptcy court that the union rejected the proposed modifications without good cause.[173] The Second Circuit decided that the district court erred in ruling that the bankruptcy court's findings of fact were clearly erroneous.[174] Although the Second Circuit did not articulate what constitutes "good cause," it considered why this term was included in section 1113:

> We think good cause serves as an incentive to the debtor trying to have its labor contract modified to propose in good faith only those changes necessary to its successful reorganization, while protecting it from the union's refusal to accept the changes without a good reason.

---

[168] *Id.* at 932–33.
[169] *Id.* at 933.
[170] *Id.* at 934.
[171] N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 149 B.R. 334, 341 (S.D.N.Y.), *aff'd in part, rev'd in part*, 981 F.2d 85 (2d Cir. 1992).
[172] N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 92 (2d Cir. 1992).
[173] *Id.* at 90–92.
[174] *Id.* at 90.

> To that end, the entire thrust of § 1113 is to ensure that well-informed and good faith negotiations occur in the market place, not as part of the judicial process. Reorganization procedures are designed to encourage such a negotiated voluntary modification. Knowing that it cannot turn down an employer's proposal without good cause gives the union an incentive to compromise on modifications of the collective bargaining agreement, so as to prevent its complete rejection. Because the employer has the burden of proving its proposals are necessary, the union is protected from an employer whose proposals may be offered in bad faith.[175]

Notably, the Second Circuit's decision was conditioned on the purchaser's last offer to the union remaining open for acceptance.[176]

The *Maxwell* decision makes clear that section 1113 realistically applies equally to third party purchasers. In many instances it is the prospective purchaser who conditions a purchase on modification or rejection of a CBA. The alternative to satisfaction of that condition of an asset purchase agreement might be liquidation and all its consequences.[177]

Cases such as *Maxwell* and *Trans World Airlines*[178] appeared to move the pendulum in favor of management and purchasers. However, appearances are often deceiving. Each case is *sui generic*: the facts and circumstances often drive the decision. The question of realistic alternatives presented by each case must be carefully considered before a judgment may be made as to the long term consequences of a particular decision.

B. The Current State of the Section 1113 Process: The Threat to Strike

The effect of globalization has subjected businesses in the United States, particularly unionized businesses, to the competitive pressures of foreign competitors that manufacture or supply the same or comparable products. As the economic world gets smaller, lower wages and less stringent work rules have had an extraordinarily adverse impact on labor-intensive businesses operating in the United States.

This impact is vividly illustrated by the state of the automobile parts supply industry, which is highly unionized with resulting high wages, difficult work rules,

---

[175] *Id.* (citations omitted). *See* 11 U.S.C. § 1113 (2006) (stating that court will approve debtor's rejection of CBA only if "all of the affected parties are treated fairly and equitably," "the authorized representative of the employees has refused to accept such proposal without good cause," and "the balance of the equities clearly favors rejection of such agreement").

[176] *In re Maxwell Newspapers*, 981 F.2d at 91–92.

[177] *See In re* Trans World Airlines, Inc., 261 B.R. 103, 121–22 (Bankr. D. Del. 2001) (rejection of ticket sales agreement was condition to consummation of sale to American Airlines).

[178] *Id.*

and expensive benefit programs for its unionized workers.[179] The result has been that unionized businesses have been overtaken by international competitors not burdened by similar constraints. This environment has caused the explosion of chapter 11 cases by many such suppliers.[180]

Generally, in such an environment the conclusion of the rejection process is preordained. The DIP will demonstrate that without significant modifications to the CBA, it will not be competitive and will be compelled to liquidate its business,[181] even after compliance with the "sharing the pain" principle of Section 1113.[182] Nevertheless, unions have adopted a highly combative posture in litigating section 1113 motions to coerce a compromise.

The Delphi Corporation chapter 11 cases ("Delphi") illustrate the current strategy employed by unions in rejection proceedings. A supplier of vehicle electronics and transportation components and a former division of General Motors Corporation ("GM"), Delphi was spun off as an independent entity in 1999 and soon faced substantial losses. Delphi attempted to reach a consensual resolution of its labor issues that it claimed caused it to be noncompetitive. The attempts occurred prior to and after the commencement of the chapter 11 cases. The operating losses amounted to billions of dollars. Delphi attributed such losses to (i) its oppressive labor agreements; and (ii) commodity prices. Delphi was unable to pass on the labor and commodity costs to its customers in the existing competitive environment.

Soon after the commencement of the chapter 11 cases, Delphi obtained a scheduling order setting forth certain requirements of Delphi and its unions[183] that included the submission of written proposals by Delphi to its unions setting forth proposed modifications deemed necessary by Delphi to enable its reorganization. It set a two-month deadline for Delphi to file section 1113 rejection motions if the parties were unable to achieve a consensual agreement.[184] The parties extended the deadline twice while they engaged in negotiations as required by section

---

[179] The unionized model of this industry, however, has become unsustainable as union membership in the United States' private sector has fallen to approximately 7.4% of employees. Press Release, United States Department of Labor Bureau of Labor Statistics, Union Members in 2006 (Jan. 25, 2007) (on file with author).

[180] *See, e.g., In re* Delphi Corp., Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y.); *In re* Collins & Aikman, Inc., Ch. 11 Case No. 05-55927 (Bankr. E.D. Mich.); *In re* Dura Auto. Sys., Inc., Ch. 11 Case No. 06-11202 (Bankr. D. Del.); *In re* Dana Corp., Ch. 11 Case No. 06-10354, 2007 Bankr. LEXIS 3327 (Bankr. S.D.N.Y.).

[181] A good illustration of a debtor that was forced to liquidate because it ultimately was unable to reach a consensual labor resolution with its union is LTV Steel Co. *See generally* Riva D. Atlas, *LTV Seems On the Verge of a Shutdown: Without Loan, Steel Giant Could End Its Labor Contract Today*, N.Y. TIMES, Dec. 19, 2001, at C2 (discussing LTV's two bankruptcies and its inability to create sustainable business model in struggling steel industry).

[182] *See* 11 U.S.C. § 1113 (2006) (stating all affected parties must be "treated fairly and equitably").

[183] These unions included, the (i) United Auto Workers, (ii) International Union of Electronic, Electrical, Salaried, (iii) Machine and Furniture Workers-Communications Workers of America, (iv) United Steelworkers of America, International Association of Machinists and Aerospace Workers, (v) International Brotherhood of Electrical Workers, and (vi) International Union of Operating Engineers.

[184] *In re* Delphi Corp., Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y. Oct. 14, 2005) (order scheduling filing date for 1113 motion).

1113(b)(1).[185] The negotiations became more complex because of the involvement of GM as the former parent of Delphi and its largest customer. The unions regularly stated that their members would strike if Delphi obtained court authorization to reject their respective CBAs and attempted to impose modifications to wage rates, work rules, and benefits.[186] Early in the negotiations and with strike threats looming, Delphi withdrew its original proposal for concessions but attributed the withdrawal to GM's entry into the negotiations rather than the unions' threat of a strike.[187] Delphi, the unions, and GM returned to the bargaining table. GM was concerned about its supply chain and, acting as a concerned party, attempted to diffuse the extremely adversarial relationship that had developed among Delphi and its unions. After months of negotiations, Delphi and the United Auto Workers ("UAW") agreed on an incentive program that would encourage eligible workers to retire early in exchange for lump sum payments, substantially subsidized by GM, thereby reducing the ongoing labor force.[188] In an effort to resolve remaining issues, Delphi filed its section 1113 rejection motion.[189] Delphi presented its case over a period of approximately two weeks. At that juncture, in the face of persistent and caustic comments by union leaders that their membership would strike if Delphi attempted to impose modifications of the CBA postrejection, Delphi indefinitely adjourned the prosecution of the rejection motions. Negotiations resumed with the unions and with GM's participation. Almost one year later, Delphi and the UAW, the principal representative of Delphi's organized employees, agreed to amendments of its CBA.[190] The amendments were made in the atmosphere of persistent strike threats. The active participation and assistance of GM in the form of cash contributions and supply contracts enabled Delphi to provide substantially more to union members than had been demanded by Delphi as being "necessary."

---

[185] *See, e.g.*, *Automotive Brief – Delphi Corp.: Two More Months Are Given to Set Union Cost-Cut Pact*, WALL ST. J., Nov. 20, 2006, at B3 (revealing judge overseeing Delphi bankruptcy case extended deadline for negotiations with Delphi's unions two months until Jan. 31, 2007).

[186] Nick Bunkley, *Auto Union Head Vows Hard Line Against Concessions*, N.Y. TIMES, Mar. 28, 2007, at C3 (reporting on threats made by Ron Gettelfinger, head of United Auto Workers, that if executive bonuses for management are approved, while wages and health benefits for employees shrink, employees are prepared to strike).

[187] Sholnn Freeman & Amy Joyce, *Delphi Rescinds Plan to Slash Union Pay*, WASH. POST, Dec. 20, 2005, at D3 (announcing Delphi's withdrawal from earlier proposal because GM—Delphi's former parent company and largest customer—has entered negotiations); *see* John D. Stoll, *Delphi Withdraws Contract Proposal Opposed By Unions*, WALL ST. J., Dec. 20, 2005, at B2 (remarking that Delphi's withdrawal of its cost-cutting proposal was due in part to influential role of Delphi's top customer, General Motors).

[188] *In re* Delphi Corp., Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y. Mar. 22, 2006) (order approving attrition program).

[189] *In re* Delphi Corp., Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y. Mar. 31, 2006) (motion to reject CBAs).

[190] *In re* Delphi Corp., Ch. 11 Case No. 05-44481 (Bankr. S.D.N.Y. July 19, 2007) (order approving amendment to CBA).

As Delphi and similar cases demonstrate,[191] despite a potentially favorable result from a rejection motion for the DIP, unions still possess a powerful ability to cripple a debtor's business and possibly prejudice the debtor's customers. The threat and power to strike can be overwhelming. Consequently, it is hard to conclude that the power of organized labor has substantially diminished in the chapter 11 context. In a world of severe competition, the threat of a strike may be totally disabling to a DIP. The costs of a strike, including the potential closedown of operations, may be decisive. The DIP's market share may be irretrievably lost. In that perspective, the DIP may be presented with a "Hobson's choice."

In contrast to the auto parts supply industry cases that are governed by the NLRA, debtors under the RLA may be in a markedly different situation. The *Northwest* decision is a prime example, as discussed more fully above in Part II.

Although rejection of a CBA may result in reduced labor costs in the near term, it also may upset the relationship between labor and management—a result that could be costly for a reorganized debtor. For example, the president of one of Northwest's unions sent a letter to the union members questioning Northwest's post-chapter 11 management team's abilities.[192]

Similarly, after United Airlines ("UAL") emerged from chapter 11, the Air Line Pilots' Association ("ALPA") complained that UAL's management enriched itself at the expense of the pilots. The UAL took umbrage at UAL's chairman and chief executive's receiving 2006 aggregate compensation of $39.7 million in the form of salary, benefits, stock, and option awards. ALPA contended it was the concessions of its members that enabled UAL to effect its reorganization, yet only management

---

[191] *In re Dana Corp.*, Ch. 11 Case No. 06-10354 (Bankr. S.D.N.Y. Aug. 1, 2007) (order approving settlement with USW and UAW); *In re Delta Air Lines, Inc.*, Ch. 11 Case No. 05-17923 (Bankr. S.D.N.Y. May 31, 2006) (order approving settlement agreement between debtors and Airline Pilots Association); *In re UAL Corp.*, Ch. 11 Case No. 02-48191 (Bankr. N.D. Ill. Apr. 30, 2003) (order approving restructuring agreement between debtors and Air Line Pilots Association).

[192] Press Release, Aircraft Mechanics Fraternal Association, AMFA Gives NWA Management No Confidence Vote as Shortage of Mechanics Fuels Delays (July 2, 2007), http://amfanational.org/index.php?option=com_content &task=view&id=534&Itemid=38 (last visited Oct. 25, 2007):

> In bankruptcy, the NWA EMT showcased their expertise in stripping the dignity and financial security from their employees. The NWA EMT has also lavishly rewarded themselves with millions in bonuses and stock options, illustrating their prowess at managing their own financial affairs. However, what they have failed to demonstrate pre or post bankruptcy is their ability to successfully manage an airline.
>
> It is with this abysmal history of mismanagement in mind that the AMFA National Executive Council has unanimously passed a vote of no confidence in this management team. Doug Steenland and his management team have significantly harmed the relationship with their employees. We cannot help but question whether this EMT can repair that relationship and return our airline to the operational stability it needs to survive.

Id.

was "eligible to participate" in UAL's renewed financial health.[193] American Airlines ("American"), the only United States legacy airline that has not commenced a bankruptcy case, faces similar problems. After its pilot's union, the Allied Pilots Association ("APA"), staged a campaign against the $160 million in management stock awards, the union members, disenchanted with its president, elected a new leader, claiming that the old president was too conciliatory. Tensions continued after American sent a letter to the pilots asking them to focus on improving scheduling flexibility, dispute resolution, and expanding international routes. This tactic incensed the APA, which accused American of trying to improperly negotiate with the pilots by redirecting the talks away from the APA's labor demands.

Whether union members have the ability to strike or not, section 1113 has become a passing scene in which a debtor and its union go through the motions of the 1113 process, as they did in Delphi, only to end up at the bargaining table to negotiate a resolution that may have been achieved if the parties eliminated the stored up anger and resentment and negotiated objectively based on the realities of the situation. The current collective union disdain for section 1113 seems to emanate from the prevailing belief that unions, and therefore its members, are the *most important* aspect of the company, especially in the restructuring context because, without an alternative workforce, companies have little power to refuse a union's demands if they want to avoid liquidation.[194]

The statements of Ronald Bloom, the special assistant to the president of the USWA, made in 2006 to the INSOL International Annual Regional Conference in Scottsdale, Arizona, provide a striking example of his union's position: "[L]ike everyone else, we like win-lose when we win. And we are ok with win-win. But please understand that if we do not win, in the service of helping you remember us for the next time, we are prepared for lose-lose."[195] He also stated that unions "generally take the modest view that it is, as the say, all about us and that [unions] are in fact the logical center of the restructuring process."[196] Guided by that sentiment, it is not difficult to comprehend why unions believe that their

---

[193] *See generally* PilotsUnited.com, The Unofficial Home Page of United Airlines Pilots, SHAME ON GLENN TILTON: $39,700,000 in Compensation in 2006!, http://www.pilotsunited.com (last visited Nov. 15 2007); USAtoday.com, UAL CEO Gets $39.7M Compensation in 1st Year Out of Bankruptcy, http://www.usatoday.com/travel/flights/2007-03-27-united-ceo-compensation_N.htm (last visited Nov. 15, 2007); Jeremy Herron, United Chairman, CEO Gets Compensation Worth $39.7 Million in 1st Year Out of Bankruptcy, AOL MONEY & FINANCE, Mar. 26, 2007, http://www.united.com/ual/news.html#aol (last visited Nov. 15, 2007).

[194] LTV's second chapter 11 case, *In re LTV Steel Co.*, Ch. 11 Case No. 00-43866 (Bankr. N.D. Ohio), probably shocked the United Steelworkers of America. Discouraged by the union's rigidity, LTV opted to close down and liquidate, resulting in the loss of hundreds of steelworker jobs. Subsequently, the USWA negotiated an arrangement with the purchaser of the steel mills that gave that entity many concessions it refused to give to LTV.

[195] Ron Bloom, Remarks at the INSOL International Annual Regional Conference, at 5 (May 21, 2006) http://www.aflcio.org/corporatewatch/upload/BloomINSOLspeech052106.pdf (last visited Nov. 15, 2007).

[196] *Id.*

participation in the restructuring is not materially changed simply because a debtor may reject its CBA pursuant to section 1113.

Bankruptcy Judge Adlai Hardin, who presided over the chapter 11 cases of Delta Air Lines ("Delta"), made this same observation when he denied the first request by Comair, Inc., a Delta subsidiary, to reject its CBA with pilots. In an attempt to encourage Comair and the union to revive negotiations, Judge Hardin highlighted that "the irony is that after the court decides the motion and holds that the CBA is rejected, or not rejected, in either event the parties *must* then resume their negotiations and reach an agreement to avoid consequences that should be unacceptable to either side."[197] Thus, a debtor that rejects a CBA under section 1113 that is unable to source alternate labor is left with nothing more than facing another round of negotiations with a potentially more belligerent union.

Accordingly, the effectiveness of section 1113 is limited when unionized employees have the ability to threaten to strike. It leaves an employer without any alternative but to succumb to demands it may believe are not sustainable or face immediate liquidation. Rejection under section 1113 is just one more chip in the poker game of collective bargaining.

CONCLUSION

Potentially, some might posit that section 1113 of the Bankruptcy Code works and that it causes a more realistic final round of collective bargaining. However, if union members are free to strike after a CBA is rejected on the basis that rejection is necessary to allow a debtor to reorganize, the relief afforded under section 1113 of the Bankruptcy Code often turns into a "suicide weapon," as the court in *Northwest* noted.[198] The power to strike against an employer in financial distress who does not have an alternative workforce to hire in the event of a strike often forces such employers to capitulate to the union's demands or risk liquidation, which, in the end, neither benefits the company, the union, nor other stakeholders.

Labor management issues are not resolved in a vacuum. They involve many other interests and constituencies, particularly in the circumstances of a bankruptcy reorganization. Unfortunately, many labor representatives are caught in a time warp and believe that the economy still is operating in the economic climate of the 1950s and 1960s. They cannot continue to be "oblivious to the obvious." The recent General Motors/UAW settlement may demonstrate that reality finally has reached labor representatives.

Notwithstanding potentially draconian consequences for the possibilities of reorganization, unions continue to lobby Congress for special interest legislation in an effort to gain more leverage, apparently because of the dissatisfaction with the victory they won in 1984 in causing the enactment of section 1113. As a result, on

---

[197] *In re* Delta Air Lines, 342 B.R. 685, 692 (Bankr. S.D.N.Y. 2006).

[198] Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 349 B.R. 338, 370 (S.D.N.Y.), *aff'd*, 483 F.3d 160 (2d Cir. 2007).

September 25, 2007, Congressman Conyers introduced a bill[199] to amend title 11 of the United States Code to improve protections for employees and retirees in business bankruptcies. This supposed effort to "re-level the playing field" in chapter 11, if enacted, would, *inter alia*, increase priority claims, limit executive compensation and enhancements, and make the possibility of a successful reorganization more remote.

If the current state of the law is unsatisfactory, rather than emasculate the possibilities of reorganization, the following options should be considered: Congress could (i) amend the NLRA and expand the power of the bankruptcy court to enable it to enjoin unions threatening to strike upon compliance with certain threshold standards; or (ii) empower bankruptcy courts to require DIPs and their respective unions to enter into mandatory arbitration with court-appointed arbitrators who are experienced and expert in labor negotiations and the DIP's industry. While mandatory arbitration might limit the jurisdiction of the bankruptcy court, it ultimately could prevent the liquidation of a distressed company that is unable to reach a consensual resolution with its unions over their CBAs.[200]

Ill-considered proposed amendments that fail to take into consideration the other interests and constituents involved in a chapter 11 reorganization case are antithetical to the policy of rehabilitation and reorganization of distressed businesses. The adoption of the proposed amendments, together with the enactment of the Pension Protection Act of 2007,[201] may preordain the failure of a reorganization to the real prejudice and detriment of all employees and other stakeholders.

---

[199] Protecting Employees and Retirees in Business Bankruptcies Act of 2007, H.R. 3652, 110th Cong. (2007).

[200] In *Delta Air Lines*, ALPA and Delta agreed to suspend the section 1113 proceeding in favor of mandatory arbitration under the rules of the American Arbitration Association. Just prior to the date set for the decision of the three arbitrators, ALPA and Delta reached a consensual agreement. *In re Delta Air Lines, Inc.*, Ch. 11 Case No. 05-17923 (Bankr. S.D.N.Y. Dec. 13, 2005) (finding consent order to enter into settlement agreement subject to ratification by union members; if members failed to ratify agreement, parties agreed to submit section 1113 dispute to arbitration).

[201] Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).