THE RETURN OF GOVERNMENT BY INJUNCTION IN AIRLINE BANKRUPTCIES

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INTRODUCTION

Holmes wrote that "[h]ard cases[] make bad law," because "some accident of immediate overwhelming interest . . . appeals to the feelings and distorts the judgment."[1] In the Second Circuit's recent decision in *Northwest Airlines Corp. v. Association of Flight Attendants ("AFA")*,[2] a hard case that has made bad law, the "accident of immediate overwhelming interest" was the possibility of a strike, a traditional judicial bete noire.[3] Faced with a labor dispute triggered by Northwest's resort to contract rejection under section 1113 of the Bankruptcy Code,[4] the court labored in (what it characterized as) "a peculiar corner of our law more evocative of an Eero Saarinen interior of creative angularity than the classical constructions of Cardozo and Holmes" in order to enjoin self-help.[5] Like Saarinen's most noteworthy design for aviation, which was abandoned for commercial purposes because of its

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[1] N. Sec. Co. v. United States, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting).

[2] 483 F.3d 160 (2d Cir. 2007).

[3] *N. Sec. Co.*, 193 U.S. at 364. Certain bankruptcy commentators do not limit their rationale to distaste for strikes. *See* Harvey R. Miller, Michele J. Meises & Christopher Marcus, *The State of the Unions in Reorganization and Restructuring Cases*, 15 AM. BANKR. INST. L. REV. 465, 465 (2007) ("The role of unions as the representative 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."). Miller's view ignores the economic reality of collective bargaining. As democratic institutions responsive to employee interests, labor organizations must out of necessity make judgments in light of the economic viability of employers and like any economic actor face risks from adopting unreasonable positions in the marketplace. *See* Douglas Bordewieck & Vern Countryman, *The Rejection of Collective Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293, 319 (1983) (stating union's desire to preclude Ch.11 debtor from rejecting collective bargaining agreement should be afforded considerable weight because union has much to lose if it adopts an incorrect decision). In the airline industry, for example, the advent of airline deregulation and with it competitive pressures on carriers lead to rapid concessionary contract modifications. *See* Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999, 1002 (9th Cir. 1990) (noting deregulation of airline industry lead to intensified competition and caused many airlines to seek concession from labor); Jalmer D. Johnson, *Trends in Pilots' Pay and Employment Opportunities in* CLEARED FOR TAKEOFF: AIRLINE LABOR RELATIONS SINCE DEREGULATION 67, 71 (Jean T. McKelvey ed., 1988) (outlining pay concessions negotiated in pilot contracts immediately following deregulation). *See generally* Karen Van Wezel Stone, *Labor Relations On The Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1490–91 (1990) (noting dependence of airline employees on carrier survival because of carrier-based seniority systems).

[4] 11 U.S.C. § 1113 (2006).

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

impracticality,[6] the Second Circuit's design in *AFA,* the subject of antagonistic views by its very architects, is not built to last.

The issues presented in *AFA* require consideration of three federal statutes: the Railway Labor Act ("RLA"),[7] which governs labor relations in the air transport industry, the Norris LaGuardia Act ("NLGA"),[8] which limits federal jurisdiction to enter injunctive relief in labor disputes, and section 1113,[9] which provides a mandatory collective bargaining process applicable when a debtor seeks to reject a collective bargaining agreement ("CBA") in bankruptcy.

In Part I we review the process of collective bargaining under the RLA, the history of negotiations relevant to *AFA,* and analyze the decision of the Bankruptcy Court denying Northwest's request for a strike injunction and the district court decision reversing that denial. In Part II A we argue that the fractured Second Circuit panel majority in *AFA* could only ground its decision affirming a strike injunction by rewriting, indeed "abrogating," consistent and settled law on the effect of contract rejection in bankruptcy. While the concurrence noted the inconsistency of the majority's approach, we show in Part II B that its alternative route to a strike injunction cannot be squared with the reciprocal obligations of labor and management under the RLA.

The *AFA* decision will surely undermine the effectiveness in bankruptcy of collective bargaining, which is the cornerstone of federal labor policy and should be of paramount importance under section 1113. Federal labor policy favors private bargaining and consensual agreement on terms and conditions of employment—not government or court dictated terms and conditions of employment enforced by injunction under power of contempt. Collective bargaining can only work if there is the mutual possibility of self-help in the absence of agreement.[10] We show that Congress did not undertake in section 1113 to revise that considered balance which is reflected in the jurisdictional limits on the entry of strike injunctions Congress imposed both in the NLGA and in the RLA. Further, the majority's unfounded conclusion that a CBA is abrogated rather than breached causes further mischief by eliminating rejection damages claims for unions on behalf of organized

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[6] This was the terminal Saarinen designed for (the later thrice bankrupt) Trans World Airways at John F. Kennedy International airport in New York. *See* Randy Kennedy, *Airport Growth Squeezes the Landmark T.W.A. Terminal*, N.Y. TIMES, Apr. 4, 2001, at B1 ("the terminal quickly became a dazzling architectural relic in southern Queens"); *see also* Mia Fineman, *Now Boarding At Terminal 5: New Visions*, N.Y. TIMES, Oct. 10, 2004, at AR28 (noting Saarinen's Terminal 5 has remained vacant since 2001).

[7] 45 U.S.C. §§ 151–188 (2000).

[8] 29 U.S.C. §§ 101–115 (2000).

[9] 11 U.S.C. § 1113 (2006).

[10] This is the declared policy of federal law in labor relations as declared in the NLGA. *See* 29 U.S.C. § 102 (2000) (finding in order for employees to negotiate the terms of his employment employees need to be free to engage in "self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"); NLRB v. City Disposals Sys. Inc., 465 U.S. 822, 835 (1984) (section 102 was enacted to foster equal bargaining power between employees and employers by allowing employees to "band together in confronting an employer regarding the terms and conditions of their employment").

employees.[11] This result is at odds with federal bankruptcy policy that treats creditors with equivalent claims—here parties to rejected executory contracts—equally in the distribution of the limited resources of the bankruptcy estate. The inequality fostered by the *AFA* majority could work a potentially massive redistribution of wealth from employees to other creditors or, potentially, equity interests, a result plainly unintended by Congress in section 1113, which, after all, was prophylactic labor legislation.[12]

Finally, in Part III we argue that when a court grants contract rejection under section 1113, a debtor is at liberty to impose new terms and conditions found by the court to be necessary under section 1113(b). Rejection and imposition of those new terms therefore constitute a material breach of the labor agreement, as does rejection of any executory contract. Section 1113 supplants the RLA bargaining process in bankruptcy.[13] As there is nothing in section 1113 that reverses the NLGA's withdrawal of jurisdiction from the federal courts to enjoin a strike if a CBA is rejected, there can be no basis to enjoin a strike triggered by contract rejection. This result is also consistent with the RLA's mutual scheme. Under the RLA, the parties are required to maintain status quo working conditions pending exhaustion of that Act's collective bargaining process: a carrier may not implement terms of its own choosing and a union may not strike to force changes in contractual terms. However, the right to self-help is similarly reciprocal: a union may strike when the negotiating process is exhausted and a carrier may then modify negotiated terms and conditions of employment.[14] Under settled RLA law a union may therefore also strike when a carrier implements new terms before exhausting the RLA process.[15] Given the jurisdictional limits of the NLGA, and in the face of the

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[11] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants *(In re* Nw. Airlines Corp.), 483 F.3d 160, 170 (2d Cir. 2007) (concluding it was most plausible "Northwest abrogated the CBA in its entirety and replaced it"); *In re* Nw. Airlines Corp., 366 B.R. 270, 276 (Bankr. S.D.N.Y. 2007) (citing *In re Nw. Airlines Corp.*, 483 F.3d at 172) (confirming court excluded possibility of damages when it stated "[i]f a carrier that rejected a CBA simultaneously breached that agreement and violated the RLA, the union would be correspondingly free to seek damages or strike, results inconsistent with Congress' intent in passing § 1113.").

[12] *See, e.g.*, Sheet Metal Workers Int'l Ass'n, Local 9 v. Mile Hi Metal Systems, Inc. (*In re* Mile Hi Metal Systems, Inc.), 899 F.2d 887, 895 (10th Cir. 1990) ("Congress enacted The Bankruptcy Amendments and Federal Judgeship Act of 1984, of which section 1113 is a part . . . in direct response to labor concerns about employers' tactical use of bankruptcy laws . . . .").

[13] *See* Shugrue v. ALPA (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 989–90 (2d Cir. 1990) (noting language and legislative intent of section 1113 supports indication "that Congress intended § 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement and that application of other provisions of the Bankruptcy Code that allow a debtor to bypass the requirements of § 113 are prohibited").

[14] *See* Trans Int'l Airlines, Inc. v. Int'l Bhd. of Teamsters, 650 F.2d 949, 960 (9th Cir. 1980) ("[I]f after reasonable efforts the parties have exhausted the bargaining procedures specified by the RLA without agreement, the statute does not bar such remedies, including a strike."); *see also* Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 439 (1989) (citing Burlington N. R.R. Co. v. Bhd. of Maint. Way Employees, 481 U.S. 429, 444 (1987)) (noting cases have "read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's 'virtually endless' . . . dispute resolution mechanisms"); *In re Nw. Airlines*, 483 F.3d at 160.

[15] *See* Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 150 (1969) (explaining if railroad violates the status quo provision of RLA, union cannot be expected not to resort to

labor relations process Congress enacted in section 1113, there can be no basis for the sort of strike injunction affirmed in *AFA*.

I. BACKGROUND

A. The RLA Bargaining Process

Enacted in 1926 and extended to cover the nascent air transport industry in 1936, the "RLA embodies a conception of labor relations in which all existing conditions and practices are presumed to be the product of agreements between management and labor" and establishes a process that requires collective bargaining before changes may be implemented.[16] Under the RLA, bargaining is purposefully long and drawn out—"virtually endless"[17]—with the aim that the parties will reach agreement and avoid the interruption to commerce that a strike would afford. To this end, the RLA requires direct negotiation between the parties and then, at the insistence of either, mediation under the auspices of the National Mediation Board ("NMB").[18] Throughout this process, the parties are required to refrain from self-help in support of their bargaining objectives and maintain the status quo ante, *i.e.*, the carrier may not modify collectively-bargained terms and conditions of employment and the union may not strike.[19] When the NMB concludes that further

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self-help); CSX Transp., Inc. v. Bhd. of Maint. of Way Employees, 327 F.3d 1309, 1320 (11th Cir. 2003) ("If the party proceeds to implement the disputed policy, in breach of the status quo, the other party is entitled to resort to self-help, i.e., a union can call a strike.")

[16] Stone, *supra* note 3, at 1487. The RLA requires collective bargaining wherever a carrier's employees have selected representation. *See* 45 U.S.C. § 152, Second (2000) ("All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."), Fourth (guaranteeing the right of employees to "organize and bargain collectively through representatives of their own choosing") and Ninth (requiring a carrier to "treat with the representative so certified as the representative of the craft or class for the purposes of this chapter"); United Air Lines, Inc. v. Airline Div., Int'l Bhd. of Teamsters 874 F.2d 110, 115 (2d Cir. 1989) (holding once union is certified the carrier "had an absolute duty under section 152 Ninth to sit down at the bargaining table with the union."); Int'l Ass'n of Machinists and Aerospace Workers v. Ne. Airlines, Inc., 536 F.2d 975, 977 (5th Cir. 1976) (explaining duty to bargain under RLA imposes a duty to bargain with representative of employees); Virginian Ry. Co. v. System Fed. No. 40, 300 U.S. 515, 548 (1937) (asserting duty to bargain under RLA compels duty to bargain solely with chosen representative of employee class).

[17] Burlington N. R.R. Co. v. Bhd. of Maint. Way Employees, 481 U.S. 429, 444 (1987); Bhd. of Ry. & S.S, Clerks v. Fla. E. Coast Ry. Co., 384 U.S. 238, 246 (1966) (describing process as "purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute"); *Shore Line*, 396 U.S. at 150 (stating RLA purposefully delays time when parties may invoke self-help, thereby allowing "tempers to cool" and creating an atmosphere of "rational bargaining").

[18] *See* Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377–78 (1968) (outlining RLA's major dispute resolution process); Hiatt v. Union Pac. R.R. Co., 859 F. Supp. 1416, 1420 (D. Wyo. 1994) (acknowledging if parties cannot reach an agreement under RLA, they may seek assistance from National Mediation Board); MICHAEL E. ABRAM et al., THE RAILWAY LABOR ACT, 322–42 (BNA Books 2d ed. 2005) (discussing RLA's dispute resolution process).

[19] *See Shore Line*, 396 U.S. at 150 (explaining RLA requires parties to maintain status quo, which has immediate affect of preventing union strike and management from modifying collectively bargained terms); United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers, 243 F.3d 349, 361–62 (7th Cir.

mediation would not be effective, it will proffer voluntary interest arbitration of the remaining unresolved issues under section 5 (First) of the RLA. If either party declines to arbitrate, both sides may exercise self-help at the end of a thirty-day cooling-off period.[20] The President may, under section 10 of the RLA, appoint an Emergency Board to investigate the dispute and recommend resolution (during which time the parties must maintain the status quo).[21] At the conclusion of such further cooling-off period the parties may resort to self-help.[22] During the status quo

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2001) (indicating court may issue injunctions to stop a "party's illegal self-help and to restore the status quo"). Section 6 ("Procedure in changing rates of pay, rules and working conditions") is the RLA's major dispute provision. 45 U.S.C. § 156 (2000). It provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 U.S.C. § 156. Section 2 (Seventh) provides that "[n]o carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." 45 U.S.C. § 152 (Seventh). Section 2 (First) generally provides that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order 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." 45 U.S.C. § 152 (First).

In the rail industry, collective bargaining agreements historically have been negotiated without fixed duration, and in the absence of any contract limits may serve section 6 notices at any time. *See Fla. E. Coast Ry. Co.*, 384 U.S. at 248 ("The collective bargaining agreement remains the norm; the burden is on the carrier to show the need for any alteration of it."); Abram, *supra* note 18, at 375; Stone, *supra* note 3, at 1495 (stating agreements under RLA are everlasting unless changed pursuant to RLA's altering provisions). In the airline industry, the parties typically negotiate clauses which limit their ability to serve section 6 notices until a stated amendable date. *See* Abram, *supra* note 18, at 376–78; Stone, *supra* note 3, at 1496 (stating airline agreements "typically have a clause waiving the right to initiate bargaining procedures until a specified 'amendable date."); *see also* TWA, Inc. v. Indep. Fed'n of Flight Attendants, 809 F.2d 483, 490 (8th Cir. 1987).

[20] *See* 45 U.S.C. § 155 (First) (2000) (stating no changes to be made "in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" during thirty day period following refusal to arbitrate by either or both parties); Chicago & N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570, 586 (1971); Nat'l R.R. Passenger Corp. v. Transp. Workers Union of Am., 373 F.3d 121, 124 (D.C. Cir. 2004).

[21] *See* 45 U.S.C. § 160 (2000) (allowing President to "create a board to investigate and report" regarding the unresolved disputes); Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Ass'n, 491 U.S. 490, 496 n.4 (1989); *Burlington N.*, 481 U.S. at 436.

[22] *See Bhd. of R.R. Trainmen*, 394 U.S. at 378 ("Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help . . . ."); Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711, 725 (1945) (acknowledging "compulsions go only to insure that those procedures [negotiation, mediation,

period, and once a first CBA has been achieved, if a carrier modifies terms and conditions of employment, union may strike in response.[23]

B. Bargaining At Northwest Before and After Bankruptcy

Following the economic downturn beginning early in 2001 and accelerated by the September 11 attacks, the nation's passenger aviation industry experienced severe financial stress, which led to the bankruptcies of the vast majority of the mainline carriers, as well as a host of smaller airlines.[24] In the case of Northwest, the financial crisis was played out in a toxic labor relations environment—an environment which had over the years been punctuated by strikes by its major labor groups.[25] In October 2004, Northwest reached agreement with ALPA on pilot concessions worth in excess of $250 million which intended to "bridge" the company until consensual agreements could be reached with its other major labor groups: AMFA, which represents Northwest's mechanics, the IAM, which represents its passenger reservations and ramp personnel, and the PFAA which then represented Northwest's flight attendants.[26] However, in the following year Northwest was unable to reach agreements with its other groups.

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voluntary arbitration, and conciliation] are exhausted before resort can be had to self-help."); Abram, *supra* note 18, at 340.

[23] *See Shore Line*, 396 U.S. at 155 (acknowledging a "union cannot be expected to hold back its own economic weapons, including the strike" if railroad resorts to self-help); Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co., 362 U.S. 330, 343 (1960); Rutland Ry. Corp. v. Bhd. of Locomotive Eng'rs, 307 F.2d 21, 41 (2d Cir. 1962) ("If in fact the railroad has failed to take the steps required of it by the Railway Labor Act, it is not entitled to injunctive relief against the strike of its employees.").

[24] US Airways (and its subsidiary carriers) led the way with its 2002 bankruptcy filing, to be followed by a second reorganization case in 2004. *See* Frank Gamrat & Jake Haulk, *Taken for a ride by US Airways*, PITTSBURGH TRIBUNE REVIEW, Oct. 14, 2007; Micheline Maynard, *US Airways Files for Bankruptcy for Second Time*, N.Y. TIMES, Sept. 13, 2004, at A1. United Airlines filed for chapter 11 in 2002 and American Airlines narrowly avoided a filing that year after negotiating concessionary labor agreements. Daniel P. Rollman, *Flying Low: Chapter 11's Contribution to the Self-Destructive Nature of Airline Industry Economics*, 21 EMORY BANKR. DEV. J. 381, 383 n.17 (2004) (listing various airlines that filed for bankruptcy). Northwest and Delta both filed on September 14, 2005. Richard D. Cudahy, *The Airlines: Destined to Fail?*, 71 J. AIR L. & COM. 3, 6 n.15 (2006); Micheline Maynard, *Delta's Filing Was Not Unexpected, But Northwest Had Hoped to Hold Out*, N.Y. TIMES, September 15, 2005, at C1. Smaller carriers also sought to reorganize: Hawaiian and Aloha in 2003, ATA in 2004, Mesaba and Comair in 2005. Independence Air filed for reorganization in 2005, but ceased operations in early 2006. *See* Peter J. Howe, *Independence Air to Shut Down*, BOSTON GLOBE, Jan. 3, 2006, at C2.

[25] Most recently in 1998, as the collective bargaining processes under the RLA were exhausted Northwest shut down operations in the face of an impending pilot strike, crippling air travel throughout the upper Midwest. *See* Significant Events in Northwest's History (Sept. 14, 2005), http://msnbc.msn.com/id/9344497 (indicating 15 day pilot's strike shut down operations for 18 days); Press Release, Northwest Airlines Ceases Operations Due To Strike (August 28, 1998) http://www.nwa.com/corpinfo/newsc/1998/pr082898e.html; *see also* Michael H. LeRoy, *Creating Order Out of CHAOS and Other Partial and Intermittent Strikes*, 95 NW. U.L. REV. 221, 223 n.16 (2000) (noting that 1998 pilots' strike was latest of 15 against the carrier).

[26] *In re* Nw. Airlines Corp., 346 B.R. 307, 315 n.3 (S.D.N.Y. 2006) (listing labor cost savings including $250 million pre-petition Bridge Agreement from ALPA). At the time Northwest filed for bankruptcy, its flight attendants were represented by PFAA. *Id.* at 314. As discussed *infra* p. 506, AFA became the collective bargaining representative of Northwest's flight attendants in July, 2006. *Id.* at 318 n.11.

At the time both AMFA and PFAA were in mediated negotiations under auspices of the NMB. In August 2005, the NMB declared negotiations between Northwest and AMFA to be at an impasse and proffered interest arbitration. Northwest declined to arbitrate. At the conclusion of the cooling-off period, AMFA struck and Northwest implemented demanded concessions, including the outsourcing of hundreds of aircraft maintenance positions.

Although Northwest asserted that the strike had no lasting or substantial effects on its operations,[27] the impact of other conditions led Northwest to file for bankruptcy in the Southern District of New York on September 14, 2005. Shortly thereafter, by motion dated October 12, 2005, Northwest sought an order pursuant to 11 U.S.C. § 1113(c) to allow it to reject CBAs with all of its unions, including ALPA, the PFAA, and the IAM.[28] Agreements were reached with several smaller unions.[29] In order to provide additional time for negotiations, interim concessionary agreements were reached with ALPA and PFAA and interim relief was imposed on the IAM pursuant to 11 U.S.C. § 1113(e).[30]

Northwest continued to negotiate with ALPA, PFAA and the IAM after filing the section 1113(c) motion.[31] After a lengthy evidentiary hearing and extensive negotiation, Northwest reached a tentative agreement with ALPA on March 3, 2006, which was subsequently ratified by the pilot group on May 3, 2006.[32] Northwest also reached tentative agreements with IAM, the last of which was ratified in July 2006.[33]

PFAA reached a tentative agreement with Northwest on March 1, 2005 subject to membership ratification.[34] The tentative agreement was turned down by a margin of four to one.[35] Following this failure, the bankruptcy court, by memorandum dated June 29, 2006 and order dated July 5, 2006, granted Northwest's section 1113(c) motion with respect to PFAA, authorized Northwest to implement the terms of the failed tentative agreement, but stayed the effective date of the order for fourteen

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[27] *See One Year After Mechanics Strike, NWA Still in the Air*, DULUTH NEWS TRIB., Aug. 14, 2006 (reporting AMFA strike "failed"). The strike was only settled in October 2006. *See* Tom Walsh, *Flight Attendants Would Hurt Themselves By Striking NWA*, DETROIT FREE PRESS, Oct. 13, 2006, (noting AMFA strike "failed to halt Northwest operations" and settlement was imminent); Doug Cunningham, AMFA Reaches Tentative Settlement In 14 Month Northwest Airlines Strike (Oct. 10, 2006) http://www.laborradio.org/node/4372 (emphasizing under settlement agreement "AMFA members will have recall rights"); Press Release, Northwest Airlines, *Northwest Airlines Reaches A Tentative Contract Agreement With AMFA* (Oct. 9, 2006) http://www.nwa.com/corpinfo/newsc/2006/pr100920061710.html (describing Northwest's tentative settlement with AMFA).

[28] *Nw. Airlines*, 346 B.R. at 313–14.

[29] *Id.* at 315 n.2 (including Transport Workers Union of America, Northwest Meteorologists Association and Aircraft Technical Support Association).

[30] *Id.* at 316 (stating proposals "provided for interim labor concessions that approximated 60% of the labor savings being sought from the unions in the Motion").

[31] *Id.* at 317–19.

[32] *Id.* at 318.

[33] *Id.*

[34] *Id.* at 317.

[35] *Id.* at 318 (indicating reasons for rejection were unclear).

days.[36] On July 31, 2006 Northwest unilaterally implemented the terms and conditions contained in the failed tentative agreement.

Concurrently, AFA petitioned for and won a representation election conducted by the NMB. AFA was certified by the NMB, in place of PFAA, as the flight attendants' collective bargaining representative on July 7, 2006.[37] Immediately thereafter, in an attempt to reach a consensual agreement between the parties, AFA engaged in round-the-clock negotiations with Northwest.[38]

On July 17, 2006, pursuant to Northwest's self-imposed deadline and after only 10 days of negotiation, the AFA leadership was able to reach a new tentative agreement.[39] Noting that Northwest had not contended that AFA bargained in bad faith, the bankruptcy court found that "AFA commenced round-the-clock negotiations on the day it was certified and reached a new agreement with the Debtors in a ten-day period, a period set by the Debtors . . . . It cannot be said that AFA refused to bargain in good faith."[40] The July 17, 2006 tentative agreement was submitted to the AFA membership for ratification under an expedited schedule, but failed on July 31, 2006, now by a substantially closer vote of 45% for and 55% against the agreement.[41]

That same day, Northwest exercised the authority granted to it by the bankruptcy court, rejected the flight attendant collective bargaining agreement, and unilaterally implemented the terms of the failed tentative agreement.[42] In response, AFA gave Northwest notice of its intent to engage in self-help in 15 days.[43] AFA said it would use its trademarked CHAOS strategy,[44] indicating that CHAOS activity could begin on any date on or after August 15, 2006. On August 1, 2006, Northwest filed an adversary proceeding seeking a declaratory judgment and a preliminary injunction barring a strike by AFA. The bankruptcy court conducted an evidentiary hearing and heard oral argument on Northwest's preliminary injunction motion on August 9, 2006.[45]

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[36] *Id.* at 315.

[37] *See In re* Representation of Employees of Nw. Airlines, Inc. Flight Attendants, 33 N.M.B. 289 (2006).

[38] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 346 B.R. 333, 343 (Bankr. S.D.N.Y. 2006).

[39] *Id.* at 336–337.

[40] *Id.*, 346 B.R. at 343. As noted *infra* p. 511, these findings were ignored on appeal.

[41] *Id.* at 337.

[42] *Id.*

[43] *Id.* at 336–37 (stating that the PFFA previously agreed to provide 15-day notice of its intent to take self-help and AFA honored that commitment).

[44] CHAOS, "Create Havoc Around Our System," is a strategy which results in sporadic and relatively brief work stoppages. *See id.* at 337; Ass'n of Flight Attendants v. Alaska Airlines, 847 F. Supp. 832, 836 (W.D. Wash. 1993) (upholding legality of CHAOS tactic). The Second Circuit held in *Pan Am World Airways, Inc. v. In'l Bhd. of Teamsters*, 894 F.2d 36 (2d Cir. 1990), that such intermittent strikes are lawful under the RLA.

[45] In light of reported terrorist threats and new security precautions put into effect in early August, AFA postponed its CHAOS start date for 10 days until August 25, 2006. *See In re Nw. Airlines*, 346 B.R. at 338.

C. The Bankruptcy Court Denies Northwest a Strike Injunction

The bankruptcy court, in a focused decision, held that it lacked jurisdiction to enjoin a strike. It noted the many decisions by the Second Circuit holding that the jurisdictional limits of the NLGA were fully applicable to bankruptcy proceedings.[46] While recognizing that the NLGA did not deprive it of jurisdiction to enjoin compliance with a "mandate" of the RLA,[47] the court concluded there was no such mandate here.[48] Instead, Judge Gropper found the right of a union under the RLA to take self-help following unilateral carrier action was an "apt analogy" supporting a union's right to take self-help following a contract rejection, citing the Supreme Court's admonition that "[o]nly if both sides are equally restrained can the Act's remedies work effectively."[49]

The bankruptcy court rejected a suggested analogy to Second Circuit decisions limiting union self-help in the period prior to a first contract under the RLA,[50] noting clear precedent holding that a contract is breached, not eliminated, when rejected in bankruptcy.[51] Emphasizing that the Debtors did not, and could not, show that AFA failed to bargain in good faith, the bankruptcy court held that *Chicago & North Western Railway v. United Transportation Union* ("*Chicago & N.W.*"),[52] did not support an injunction under section 2 (First) of the RLA.[53] In this respect the

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[46] *See id.* at 338; *see also* Petrusch v. Teamsters Local 317(*In re* Petrusch), 667 F.2d 297, 300 (2d Cir. 1981) (affirming reversal of bankruptcy court's strike injunction for lack of jurisdiction under Norris-LaGuardia Act by concluding nothing in the Bankruptcy Code's text or legislative history support the notion that Congress sought to "supersede or transcend" the Norris-LaGuardia Act's limitations); Truck Drivers Local Union 807 v. Bohack Corp., 541 F.2d 312, 318 (2d Cir. 1976) ("[T]he power to permit rejection of the agreement in particular circumstances does not confer an antecedent jurisdiction on the court to enjoin picketing in spite of the Norris-LaGuardia Act."); Lehman v. Quill (*In re* Third Ave. Transit Corp.), 192 F.2d 971, 973 (2d Cir. 1951) ("The well established power of the reorganization court to issue orders necessary to conserve the property in its custody must be exercised within the scope of a jurisdiction which is limited by the broad and explicit language of the Norris LaGuardia Act.").

[47] *In re Nw. Airlines.*, 346 B.R. at 339.

[48] *Id.* at 344–45

[49] *Id.* at 344 (citing Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 155 (1969).

[50] *See Aircraft Mechs. Fraternal Ass'n v. Atl. Coast Airlines, Inc.*, 55 F.3d 90, 91–92 (2d Cir. 1995) (denying union's motion for preliminary injunction when question was whether unilateral changes "are allowed after bargaining has commenced, and after the services of the National Mediation Board have been invoked, but before an agreement is reached."). The Second Circuit answered the question in the affirmative. *Id.* at 92. It first held that section 2 (Seventh) and section 6 only apply when there has been an agreement in effect. *Id.* at 93 ("Sections 2 Seventh and 6 of the Act simply do not impose an obligation . . . to maintain the status quo in the absence of an agreement."). The court also concluded, relying on *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 400 (1942), that section 2 (First) does not prohibit unilateral changes in the status quo where no contract has ever been negotiated. *Atl. Coast Airlines*, 55 F.3d at 93; *but see* Int'l Ass'n of Machinists & Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos, S.A., 924 F.2d 1005, 1008 (11th Cir. 1991) (holding that a unilateral change after negotiations begin but before a CBA is executed violate the status quo provisions of the RLA); *United Transp. Union v. Wis. Cent. Ltd.*, No. 98 C 3936, 1999 WL 261714, *3 (N.D. Ill. Apr. 15, 1999) (holding that a unilateral change after negotiations begin but before a CBA is executed violate the status quo provisions of the RLA).

[51] *In re Nw. Airlines*, 346 B.R. at 340.

[52] 402 U.S. 570 (1971).

[53] *In re Nw. Airlines*, 346 B.R. at 343.

court held that there was no basis to find that AFA's self-help was "in bad faith" or that the union was required to "begin bargaining all over again, as if this were a first-time contract."[54] Consistent with the Debtors' concession that they did not rely on section 1113 as basis for injunctive relief, the bankruptcy court also concluded that nothing in section 1113 could be read to "bind the union anew to the almost endless requirements of negotiation and mediation provided for in the RLA."[55]

The bankruptcy court found that a CHAOS action would have "a seriously adverse effect on the Debtors' prospects for reorganization and on the traveling public generally"[56] and would "likely cause the Debtors serious injury, perhaps leading to their liquidation, and that it would be highly detrimental to the interest of the public."[57] However, the court also concluded that the absence of injunctive relief "does not necessarily leave a debtor free of any remedy," and that the "parties had not briefed the ability of the bankruptcy court to provide other relief," including authorization for the debtor to implement different terms and conditions of employment.[58]

D. The District Court Reverses

Northwest moved for an expedited appeal and an injunction pending appeal. The district court initially issued an injunction pending appeal.[59] Engaging in what it described as a "long and complex" analysis,[60] the district court issued a 43-page decision reversing the bankruptcy court, and issued a preliminary injunction pending a final decision on the merits by the bankruptcy court.[61]

Emphasizing the need to "define a systemic vehicle of public policy" that would be unlikely to "justify a potentially disastrous walkout by an airline's employees,"[62] the district court somehow concluded that the overarching goal of the RLA, the Bankruptcy Code, and the NLGA (as well as the National Labor Relations Act ("NLRA")[63]), whether considered "individually or in tandem," was to prevent strikes.[64] The district court concluded that the RLA precluded a right to strike, and,

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[54] *Id.* at 343.
[55] *Id.* at 344.
[56] *Id.* at 337.
[57] *Id.*
[58] *Id.* at 344.
[59] Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), No. M-47, 05-17930, 2006 WL 2462892 (S.D.N.Y. Aug. 25, 2006).
[60] Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 349 B.R. 338, 344 (S.D.N.Y. 2006).
[61] *Id.* at 384–85.
[62] *Id.* at 346.
[63] 29 U.S.C. §§ 101–115 (2006).
[64] *In re Nw. Airlines*, 349 B.R. at 344–47, 351–52, 354, 368–69, 373–74, 378–83. The district court found irrelevant: (1) cases holding that unions could strike following a rejection of a CBA because those cases arose under the NLRA, *id.* at 357–58, and (2) cases holding that in considering a rejection motion courts should consider the impact of a possible strike. *Id.* at 363–64; *see In re* Royal Composing Room, Inc., 62 B.R. 403, 406 (Bankr. S.D.N.Y. 1986) (considering threat of union strike in deciding whether to reject

despite the debtors' prior disavowal of section 1113 as a basis for injunctive relief, held that the Bankruptcy Code generally and section 1113 specifically also provided a basis to enjoin a strike.[65]

The court initially noted an "arguable flip side" to the RLA's prohibition on self-help was that "if one party makes a unilateral change in the status quo, the section 6 procedures terminate automatically and the other side is free to engage in self-help."[66] After initial questioning the court ultimately appeared to accept this principle.[67] However, citing the use of the word "arbitrar[y]" in one statement in the RLA's legislative history describing employer action that would justify self-help,[68] decisions by the Second Circuit involving parties' rights under the RLA prior to a first contract, and the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*,[69] which did not discuss the right to strike, the district court found RLA precedent inapplicable here.[70] The district court concluded that a union's right to strike, "insofar as it exists," did not "accrue" following an 1113 rejection decision because the carrier's "technically" unilateral action was nonetheless lawful under another statute and not arbitrary or in bad faith.[71]

The district court emphasized that self-help would be a "suicide weapon" and inconsistent with the goals of the Bankruptcy Code because it would "undermine whatever benefit the debtor-in-possession otherwise obtains [from a rejection order]."[72] It conceded that this policy analysis could also apply to NLRA unions except for what the court described as the RLA's uniquely strong anti-strike policy.[73]

Finally, in reviewing a party's obligations under section 2 (First) of the RLA to exert every reasonable effort to make and maintain agreements,[74] the district court looked to section 1113 and found that "an implied limit on the union's ability to strike can be inferred from the existence of § 1113 itself . . . ."[75] The court held that the reasonableness of self-help was a matter for judicial determination under the RLA and that strike action against an "insolvent carrier" raised the "bar of

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CBA); *In re* Ky. Truck Sales, Inc., 52 B.R. 797, 805 (Bankr. D. Ky. 1985) (recognizing union's ability to strike upon rejection of CBA).

[65] *In re Nw. Airlines*, 349 B.R. at 383–84.

[66] *Id.* at 359.

[67] *Id.*

[68] *Id.* at 360.

[69] 465 U.S. 513 (1984).

[70] *In re Nw. Airlines*, 349 B.R. at 362.

[71] *Id.* at 361–62. The district court also found that a strike would "prematurely curtail" and "effectively eliminate" the NMB's role "as a neutral determinant of the timing of when the section 6 process should properly end . . . ." *Id.* at 366. The court ignored that a 1113 rejection order pursued and implemented by a carrier obliterated the NMB's control over the status quo. Nor did the court consider whether the NMB would necessarily be involved in negotiations under section 1113. *Id.* at 364–68.

[72] *Id.* at 368–70, 380.

[73] *Id.* at 369.

[74] *Id.* at 377–79.

[75] *Id.* at 382.

reasonableness" under section 2 (First).[76] Concluding that self-help against a bankrupt carrier was unreasonable, the court held it was properly enjoined.[77]

II. THE SECOND CIRCUIT'S CONTORTED DECISION

On appeal the Second Circuit affirmed in an opinion by Senior Judge Walker joined by Judge Raggi. Chief Judge Jacobs filed a concurrence. The majority concluded that (1) Northwest's rejection "abrogated (without breaching)" the CBA which "thereafter ceased to exist," (2) the RLA's status quo obligations, including section 2 (First), "ceased to apply," to Northwest, but (3) the duty under section 2 (First) continued to bind AFA, as the court had ruled in the case of initial negotiations towards a first CBA,[78] and (4) self-help by the union was incompatible with its section 2 (First) duty.[79]

With respect to its core conclusion that contract rejection under section 1113 abrogates a CBA, the Court attempted to distinguish contract rejection under section 365 which, as the Court noted, unquestionably constitutes a breach of the rejected contract.[80] Without referencing any language of section 1113 or section 365, any legislative history, or any precedent, the majority held, *ipso facto*, that rejection under section 1113 (captioned "Rejection of collective bargaining agreements") "is an exception to this general principle" because a damages claim would be "inconsistent with . . . §1113."[81] The Court essentially conceded that it was obligated to engage in this contortion because if rejection under section 1113 constituted a breach of the CBA (as with other executory contracts) such rejection "would surely violate Section 2 (Seventh) of the RLA," which requires a carrier to maintain terms and conditions embodied in agreements pending exhaustion of the

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[76] *Id.* at 377–79.

[77] *Id.* at 379–82 (describing the injunction after reviewing the "virtually endless" and "almost interminable" section 6 process as: "essentially temporary," an "authorized emergency remedy" that only "defer[red] the right to strike").

[78] *See* Aircraft Mechanics Fraternal Ass'n v. Atl. Coast Airlines, 125 F.3d 41, 43 (2d Cir. 1997).

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

[80] *Id.* at 170–73.

[81] *Id.* at 170 n.3, 172. The Court suggested that the "unique purpose" of section 1113—the rejection of a CBA and authorizing a debtor to establish new terms with which it must comply—"cannot be reconciled with the continued existence of its prior contract," and thereby attempted to distinguish cases dealing with the rejection and breach of commercial contracts. *Id.* at 171. *See* Miller, *supra* note 3, at 480–82. Of course, as the Court itself noted, the concept of breach under 365 is a "legal fiction." *In re Nw. Airlines*, 483 F.3d at 172. The right to reject pursuant to section 365—and the concomitant right to stop providing services or product or pay for them as would otherwise be required under a commercial contract—cannot be any more logically reconciled with the continued existence—and breach—of said contract than in the case of a CBA. The Second Circuit—and the Miller article— further ignore that for over 100 years bankruptcy law has treated rejection as a breach of an executory contract, *regardless of the legal consequences of the rejection in question. See infra*, pp. 512–16.

RLA bargaining process,[82] and "the union would be correspondingly free to seek damages or strike . . . ."[83]

The newly created "abrogation" theory of the majority instead brought about the desired result: it left the parties as if no CBA had existed, there was no longer a status quo in the absence of mutual agreement, and Northwest was therefore freed from the duty under section 2 (First) to "make every reasonable effort to make and maintain" CBAs.[84] In concluding that AFA had not yet fulfilled its duty under section 2 (First), the majority chose to ignore the trial court's *factual* finding that AFA bargained in good faith, instead concluding that the union leadership had not sufficiently "sought to persuade" the membership to accede to the TA.[85] The panel failed to explain how AFA could meet its duty other than by agreeing to Northwest's demands.[86]

In a concurring opinion, Chief Judge Jacobs caustically noted that "[n]o one can accuse the majority of attempting to harmonize the statutes at issue, or of succeeding."[87] The Chief Judge found himself unable to "possibly explain" to the flight attendants the majority's reasoning.[88] The concurrence concluded that Northwest's modification of the status quo somehow did not privilege a reciprocal right to strike because the modification was pursuant to a rejection order.[89] While conceding that section 1113 authorized Northwest with court approval to change collectively bargained terms without having exhausted the RLA process (contrary to the express commands of section 2 (First) and (Seventh), the concurrence reasoned that the RLA status quo need not be mutual, and (conveniently) that AFA (but not Northwest) continued to be bound by section 2 (First).[90]

A. The Majority Rewrites the Law of Contract Rejection

The majority's holding—integral to its affirmance of the strike injunction—that rejection "abrogate[s] (without breaching)" a CBA, was not advanced by Northwest at any stage of the litigation. It is unprecedented and wholly inconsistent with decisions concerning rejection of collective bargaining agreements both before and

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[82] *In re Nw. Airlines*, 483 F.3d at 171.

[83] *Id.* at 172.

[84] *Id.* at 173–75.

[85] *Id.* at 175 (holding union did not make every reasonable effort to reach agreement by not exhausting dispute resolution processes).

[86] *Id.* at 175–76. Because there is no statutory provision in the NLRA limiting a union's right to strike at any time, and as any no-strike obligation is purely contractual, *e.g.*, Buffalo Forge v. United Steelworkers, 428 U.S. 397 (1976), the *AFA* decision, as the majority concluded, would have no effect on an NLRA union's ability to strike upon contract rejection under section 1113. *In re Nw. Airlines*, 483 F.3d at 173.

[87] *Id.* at 183 (Jacobs, D., concurring).

[88] *See id.* at 177.

[89] *Id.* at 177–78 ("A debtor-carrier's rejection of labor agreement in bankruptcy . . . cannot be described fairly as a unilateral divergence from the status quo, and does not trigger a reciprocal right to strike."). Of course, the exercise of self-help at the end of the RLA process, while authorized is also not "unilateral" in the sense of the concurrence's reasoning.

[90] *Id.* at 177–78, 183.

after the enactment of section 1113 as well as the leading cases articulating the section 1113 rejection standard which all require the bankruptcy courts to consider the likely effect of rejection damages claims upon the reorganization.[91] It ignores the central bankruptcy policy of treating claimants with equal priority equivalently by, in effect, voiding claims for breach of an executory contract solely where the agreement happens to be a CBA.[92]

1. The Long History of the Rejection Doctrine

a. The Rule of Copeland v. Stephens

Rejection is a longstanding term in bankruptcy with remedies for the party whose contract has been rejected, as was well known to section 1113's drafters. This principal power of a debtor in bankruptcy evolved over time but by the early years of the last century the contours of the modern doctrine—that a debtor has a right to either assume or reject an executory agreement and that rejection constitutes a breach of agreement entitling the creditor to a pre-petition claim—were established in common law and thereafter codified in federal bankruptcy statutes.[93]

The necessary background to the doctrine is the distinction drawn in bankruptcy law between the debtor and the estate. As section 541(a)(1) of the 1978 Bankruptcy Code now reflects,[94] a bankruptcy filing creates an estate which consists (with exceptions) of "all legal or equitable interests of the debtor in property."[95] The "fountainhead of U.S. executory contracts doctrine is largely a single English case"[96] decided in 1818, *Copeland v. Stephens*,[97] involving a suit over real property.

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[91] *See, e.g.*, United Food & Commercial Workers Union v. Official Unsecured Creditors Comm. (*In re* Hoffman Bros. Packing Co., Inc.), 173 B.R. 177, 182 (B.A.P. 9th Cir. 1994) (recognizing standard courts should use to authorize rejection is "equitable sharing of the burden of rejection"); *In re* North American Royalties, Inc., 276 B.R. 587, 592 (Bankr. E.D. Tenn. 2002) ("[T]he supreme court warned that the bankruptcy court, when deciding whether to allow rejection . . . it should focus on the relationship of the equities to the reorganization process.").

[92] *In re* Nw. Airlines., 483 F.3d 160, 169 (2d Cir. 2007); Robert E. Scott, *Sharing the Risks of Bankruptcy: Timbers, Ahlers, and Beyond*, 1989 COLUM. BUS. L. REV. 183, 187 (1989) ("No one seriously doubts that similar claims should be treated similarly.").

[93] *See* Cheadle v. Appleatchee Riders Ass'n (*In re* Lovitt), 757 F.2d 1035, 1040–41 (9th Cir. 1985) (reviewing derivation of authority to reject executory contracts); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding Rejection*, 59 U. COLO. L. REV. 845, 870 (1988) (stating 1916 Supreme Court decision in *Chicago Auditorium Ass'n* is "the precursor of the statutory rule . . . that a rejection constitutes a 'breach' of a contract or lease."); Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 447–50 (1973) (describing statutory changes in 1933, 1934, and 1938, all providing for rejection of "executory" contracts and damages resulting from such rejection); 3 COLLIER ON BANKRUPTCY ¶ 365, L.H. (Alan N. Resnick et al. eds., 15th ed. rev. 2004) (reviewing history of rejection of executory contracts in bankruptcy, the common law principle that a bankruptcy trustee could reject or assume executory contracts, and, as relevant here, that the Bankruptcy Act largely adopted these common law principles); 4A COLLIER ON BANKRUPTCY ¶ 70.43(1) at 516–17 (14th ed. 1978).

[94] 11 U.S.C. § 541(a) (2006).

[95] 11 U.S.C. § 541(a)(1) (2006). As Andrew notes, this concept has been in place in federal bankruptcy statutes dating from 1800. Andrew, *supra* note 93, at 851 n.30.

[96] Andrew, *supra* note 93, at 856.

In *Copeland*, the lessor under an unexpired lease, Copeland, sued to recover unpaid rent from Stephens, his bankrupt tenant.[98] Stephens argued that since he was bankrupt and made a general assignment of all of his property to a bankruptcy assignee, the lease automatically passed to Stephens' bankruptcy assignee along with the rest of Stephen's property.[99] Stephens argued that because he was no longer in privity of estate with Copeland he could not be held liable for the unpaid rent.[100]

Rejecting Stephens' argument the court found that the bankruptcy assignees were protected from assuming lease obligations "unless they do some act to manifest their assent to the assignment . . . ."[101] Otherwise, the assignment was to remain in "suspension" unless and until the bankruptcy assignees accepted the lease.[102]

Copeland's significance was not in trying to protect the bankruptcy assignee from the continuing liabilities of the debtor unless they specifically assented, because prior case law already established this right.[103] The significance of *Copeland* instead was its conceptualization that "the right to accept or refuse" meant that the lease would be treated differently than all other assets as never passing to the bankruptcy assignees unless they affirmatively assumed it.[104] This would permit the trustee in bankruptcy to assume economically advantageous agreements while declining to take on burdensome ones.[105]

While the rule of *Copeland* was abandoned in England,[106] the principle behind *Copeland* flourished in the United States, where it was applied to both leaseholds and executory contracts.[107] Before the power to assume or reject became part of the

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[97] 106 Eng. Rep. 218 (K.B. 1818).

[98] *Copeland*, 106 Eng. Rep. at 218.

[99] *Id.* at 218–19.

[100] *Id.*

[101] *Id.* at 222.

[102] *Id.* at 222–23.

[103] *See* Wheeler v. Bramah, 170 Eng. Rep. 1404 (1813) (stating cases prior to *Copeland* held assignees were not liable for debtor's obligations unless they consented); *Turner v. Richardson*, 103 Eng. Rep. 129 (K.B. 1806) (citing Bourdillon v. Dalton, 170 Eng. Rep. 340 (1794); Andrew, *supra* note 93, at 857.

[104] *Copeland*, 106 Eng. Rep. at 222. *See* Andrew, *supra* note, 93 at 857; David G. Epstein & Steve H. Nickles, *The National Bankruptcy Review Commission's Section 365 Recommendations and the "Larger Conceptual Issues,"* 102 DICK. L. REV. 679, 681 (1998) ("The effect (of bankruptcy) is to transfer to the trustee all of the property of the debtor except his executory contracts . . . ." (citing Watson v. Merrill, 136 F.2d 359 (8th Cir. 1905)); Kotary & Inman, *supra* note 96, at 514–15 (explaining court in *Copeland* held debtor's obligations under lease were not delegated to estate unless trustee assumed).

[105] *See* Andrew, *supra* note 93, at 857 (stating court in *Copeland* allowed debtor to assume or reject lease); Mary O. Guynn, *In Re Thinking Machines: The Only Thought Is In The Name*, 14 BANKR. DEV. J. 227, 230 (1997) (explaining assignee's decision in *Copeland* to assume or reject lease depended upon its economic benefit); Kotary, *supra* note 96, at 515. ("By 1893 . . . courts gave the trustee discretion to assume or reject contracts . . . based solely on the burden or benefit imposed thereby.").

[106] Andrew, *supra* note 93, at 858 ("Copeland's conceptual approach did not endure in England . . . .").

[107] *See id.* at 858 (explaining *Copeland* was "imported into the U.S. largely intact, and was applied to both leases and other contracts.") (citing *Ex parte* Houghton, 12 F. Cas. 584, 585 (D. Mass. 1871); *see also Journeay v. Brackley*, 1 Hilt. 447, 453–54 (N.Y. Ct. C.P. (1857)); Guynn, *supra* note 105, at 230 (determining holding in *Copeland* was adopted by the U.S.).

federal bankruptcy statutes, courts repeatedly relied on the *Copeland* principle.[108] These cases recognized contracts and leases as assets that could potentially impose administrative liabilities upon the estate by virtue of its succession to the debtor's ownership rights.[109] Courts responded by permitting assignees to exclude contracts and leases from the bankruptcy estate.[110] Their reasoning was that if the estate did not succeed to lease or contract assets, it could not be liable for the responsibilities that accompanied them.[111] The resulting doctrine was that the bankruptcy assignee would have to act affirmatively to admit either a contract or lease into the estate, and only at that point would the estate become bound to debtor's contracts or lease liabilities.[112] American courts recognized that bankruptcy assignees "were not bound . . . to accept property of an onerous and unprofitable nature, which would burden instead of benefiting the estate, and they could elect whether they would accept or not . . . ."[113]

However, the doctrine also recognized that "the trustee could elect to accept a contract or lease into the estate if it appeared desirable or profitable to do so."[114] That "election would entitle the estate to the benefits of the other party's performance, at the cost of obligating the estate to the debtor's liabilities as an administrative expense, as if the estate itself had entered into the same contract or lease . . . ."[115] "Even though the trustee was charged with the ultimate duty to accept

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[108] *See In re* Frazin, 183 F. 28, 30, 32 (2d Cir. 1910) (noting *Copeland* and surmising "a trustee, having the option to assume or reject a lease, takes title to such lease only in case he elect to accept it"); Andrew, *supra* note 93, at 858 nn.67–68 (referencing 19th-century bankruptcy cases which cited to *Copeland*).

[109] *See* Andrew, *supra* note 93, at 860; Guynn, *supra* note 105, at 230.

[110] *See* Andrew, *supra* note 93 (stating courts prior to statutory provisions excluded contracts and leases from estate); Frazin, 183 F. at 32 (2d Cir. 1910) (holding in bankruptcy, a trustee has "option to assume or reject a lease"); Streeter v. Sumner, 31 N.H. 542, 558 (1855) ("[T]he assignee must be understood to have an election as to contracts of every kind, to repudiate and reject the assignment . . . .").

[111] Andrew, *supra* note 93, at 860–61. *See In re* Roth & Appel, 181 F. 667, 670 (2d Cir. 1910) (holding that bankruptcy does not "sever such relation, [and] the tenant remains liable, and [] the obligation to pay rent is not discharged as to the future, unless the trustee elect[s] to retain the lease as an asset"); Watson v. Merrill, 136 F. 359, 363 (8th Cir. 1905) ("Bankruptcy neither releases nor absolves the debtor from any of his contracts or obligations, but . . . leaves him bound by his agreements, and subject to the liabilities he has incurred.").

[112] *See* Andrew, *supra* note 93, at 858–59. *See, e.g.*, United States Trust Co. v. Wabash W. Ry. Co., 150 U.S. 287, 299–300 (1893) (holding assignee or receiver must not assume leases, but if he does, he is liable under terms of lease); Sunflower Oil Co. v. Wilson, 142 U.S. 313, 322 (1892) (asserting receivers right to accept or reject contract).

[113] Sparhawk v. Yerkes, 142 U.S. 1, 13 (1891) (citing American File Co. v. Garrett, 110 U.S. 288, 295 (1884)). *See* Dushane v. Beall, 161 U.S. 513, 515 (1896) (holding assignees may reject property which would burden estate); Glenny v. Langdon, 98 U.S. 20, 31 (1878).

[114] Andrew, *supra* note 93, at 861. *See, e.g.*, Menke v. Wilcox, 275 F. 57, 59 (S.D.N.Y. 1921) (holding trustee may adopt or reject a contract as its "interests dictate[]"); Rosenblum v. Uber, 256 F. 584, 588–89 (3d Cir. 1919) (holding bankruptcy trustee may assume a lease considered to be of value to the estate).

[115] Andrew, *supra* note 93, at 861; Atchison, T. & S.F. Ry. Co. v. Hurley, 153 F. 503, 510 (8th Cir. 1907) ("If they elect to assume such a contract, they are required to take it . . . as the bankrupt enjoyed it, subject to all its provisions and conditions, 'in the same plight and condition that the bankrupt held it.'") (citations omitted); Central Trust Co. v. Continental Trust Co., 86 F. 517, 525 (8th Cir. 1898) (adoption of the lease carries with it the obligation of the receiver to pay according to the stipulations of the lease).

or reject, the bankruptcy court still retained the authority to approve the assumption or rejection."[116]

b. The Rule of Chicago Auditorium

In *Central Trust Co. v. Chicago Auditorium Ass'n*,[117] the Supreme Court held that where an executory contract was not assumed it is deemed breached and the creditor is entitled to a claim for damages thereby.[118] *Chicago Auditorium* involved a debtor who agreed to provide livery services to a hotel.[119] When the bankruptcy trustee declined to assume the agreement the hotel asserted a claim for breach of the agreement.[120] In holding that the rejection amounted to a breach of contract, the Court focused on the central bankruptcy policies: equality of treatment among creditors and the ability of the debtor to achieve a fresh start free of prior obligations.[121] The Court explained:

> It is the purpose of the Bankruptcy Act [of 1898], generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform.[122]

The rule of *Chicago Auditorium* implements and is animated by one of the central policies of the federal bankruptcy system: the equality of treatment among creditors whose claims against the bankrupt are of the same character.[123] A creditor whose

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[116] Guynn, *supra* note 105, at 230. *See, e.g.*, Greif Bros. Cooperage Co. v. Mullinix, 264 F. 391, 398 (8th Cir. 1920); *In re* Grainger, 160 F. 69, 75 (9th Cir. 1908).

[117] 240 U.S. 581 (1916).

[118] *Id.* at 592. While *Chicago Auditorium* held that the bankruptcy itself was an anticipatory breach of an executory contract, the Court "made clear that it was addressing exclusively the non-assumption situation." Andrew, *supra* note 93, at 872. *See Chicago Auditorium*, 240 U.S. at 590 ("[T]he trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.").

[119] *Chicago Auditorium*, 240 U.S. at 586.

[120] *Id.* at 587.

[121] *Id.* at 591.

[122] *Id.* (citations omitted).

[123] *See* Andrew, *supra* note 93, at 871, 882 (arguing *Copeland* rule created equality among other creditors); *see also* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 587 (1935) ("[T]he original purpose of our bankruptcy act was the equal distribution of the debtor's property among his creditors . . . .");

pre-petition executory contract is rejected in bankruptcy gains equality of treatment with other pre-petition creditors of the debtor. Both share equally in the debtor's estate in proportion to their claim amounts.[124] By the same token, the rejection power permits the debtor to shed economically burdensome commitments by converting the resulting damages from the breach of the agreement to a pre-petition unsecured claim.[125]

c. Doctrine Codified in the Chandler Act of 1938

In 1938, Congress codified these developments in the Chandler Act. Section 70(b) of the Bankruptcy Act of 1938 provided that "the trustee shall assume or reject any executory contract, including unexpired leases of real property . . . ."[126] Section 63(c) provided that: "Notwithstanding any State law to the contrary, the rejection of an executory contract or unexpired lease, as provided in this Act, shall constitute a breach of such contract or lease as of the date of the filing of the petition in bankruptcy . . . ."[127] Additionally, Congress added a provision that permitted "claims for anticipatory breach of contracts, executory, in whole or in part, including unexpired leases of real or personal property . . . ."[128]

Along with section 70(b), Congress implemented Bankruptcy Rule 607, requiring court approval for assumption of leases and executory contracts.[129] However, the rule did not expressly state whether the requirement applied to rejections, which led to much debate among court and commentators.[130] Some courts looked to the intent of the rule and found that court approval was required to

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Mayer v. Hellman, 91 U.S. 496, 501 (1875) ("The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt.").

[124] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 108–10 (Harv. Univ. Press 1986) (discussing because the assume-or-reject approach appropriately treats rejection as an anticipatory breach and permits a damages claim, in effect it treats creditor like other unsecured creditors in bankruptcy); Andrew, *supra* note 93, at 883 ("It assures non-debtor parties to executory contracts and leases that, for purposes of the bankruptcy distribution, they will not be treated differently than other claimants . . . .").

[125] *See* Burns Mortg. Co. v. Bond Realty Corp., 47 F.2d 985, 987 (5th Cir. 1931) (discussing broad holding in *Chicago Auditorium* to treat rejection as an anticipatory breach, in line with the purposes behind the Bankruptcy Act meant when debtor cannot carry out specific performance, remedy should be limited to damages); Andrew, *supra* note 93, at 873, n.116 (analyzing deeming rejection a "breach" allows presumption that debtor will not perform obligations and "removes uncertainty about the debtor's performance that might stand in the way of establishing a claim").

[126] Chandler Act of 1938, 75 Cong. Ch. 575, § 70(b), 52 Stat. 840, 880 (1938).

[127] Chandler Act of 1938, 75 Cong. Ch. 575, § 63(c), 52 Stat. 840, 874 (1938).

[128] Chandler Act of 1938, 75 Cong. Ch. 575, § 63(a)(9), 52 Stat. 840, 873 (1938).

[129] Fed. R. Bankr. P. 607 (1982) (repealed 1983).

[130] *Id.* ("Whenever practicable, the trustee shall obtain approval of the court before he assumes [an executory contract]."). *See In re* S.N.A. Nut Co., 191 B.R. 117, 121 (Bankr. N.D. Ill. 1996) (discussing former Bankruptcy Rule 607 created "a division of authority on whether assumption or rejection of an executory contract required court approval under the Act."); *In re* 1 Potato 2, Inc., 182 B.R. 540, 542, n.11 (Bankr. D. Minn. 1995) ("The courts were split as to whether rejection required court approval."); *In re* A.H. Robins Co., 68 B.R. 705, 708 (Bankr. E.D. Va. 1986) ("This court is very much aware of the ambiguity surrounding the procedure for rejection or assumption of executory contracts and is well aquatinted with the case law which reveals a split of authority on the question of whether assumption by conduct is possible.").

reject a lease or contract, even though the rule did not explicitly state this.[131] Other courts found that the text of the rule itself made clear that court approval was not required to reject a lease or contract.[132]

d. Section 365 in the Bankruptcy Code of 1978

As part of bankruptcy reform in the 1970s, Congress created a commission to address the issue of whether, among other things, court approval was necessary to reject a lease or an executory contract.[133] In the Report of the Commission on the Bankruptcy Laws of the United States, the commission recommended the clarification of the treatment afforded executory contracts and unexpired leases.[134]

In the Bankruptcy Code of 1978, Congress resolved the split in newly-enacted section 365 which provides that the "trustee [or debtor in possession], subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."[135] The rejection-as-breach rule in section 63(c) was carried into section 365(g) of the Bankruptcy Code basically unchanged. Section 365(g) provides that "[*e*]*xcept as provided in subsections (h)(2) and (i)(2) of this section*, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease[.]"[136] Not surprisingly, every court of appeals has held that rejection of an executory contract entitles the creditor to an unsecured claim against the estate.[137] As one prominent commentator notes, "[r]ejection does not . . . cause

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[131] *See S.N.A. Nut Co.*, 191 B.R. at 121 (acknowledging some courts under Former Rule 607 required approval for assumption and rejection); Bradshaw v. Loveless (*In re* Am. National Trust) 426 F.2d 1059, 1063–64 (7th Cir. 1970) (rejecting argument court lacks power to approve rejection of the contract.); Tex. Importing Co. v. Banco Popular de P.R., 360 F.2d 582, 584 (5th Cir. 1966) ("Chapter X does not expressly provide that executory contracts may be adopted or assumed only with the approval of the court, but we think by necessary implication it requires judicial approval for such adoption or assumption.").

[132] *See, e.g.*, Vilas & Sommer, Inc. v. Mahoney (*In re* Steelship Corp.), 576 F.2d 128, 133 n.2 (8th Cir. 1978) ("[§] 70(b) does not state any particular method by which the trustee shall assume an executory contract."); Brown v. Presbyterian Ministers Fund, 484 F.2d 998, 1005 (3d Cir. 1973) (rejecting the necessity of approval); *In re* Forgee Metal Prod., Inc., 229 F.2d 799, 802 (3d Cir. 1956) ("[T]hat the reorganization trustee take over the contract under the authorization of the bankruptcy court through under 70, sub. B, only the bankruptcy trustee had been expressly given such power.").

[133] *See* United Sav. Ass'n v. Timbers of Inwood Forest Assocs. (*In re* Timbers of Inwood Forest Assocs.), 793 F.2d 1380, 1393 (5th Cir. 1986); Guynn, *supra* note 105, at 231.

[134] H.R. Doc. No. 93-137 pt. I, at 198 (1973). *See* Guynn, *supra* note 105, at 232 ("At least one of the recommended changes involved the standardization and clarification of treatment afforded, executory contracts and unexpired leases."); Epstein, *supra* note 104, at 685 (discussing Commission's recommendations regarding assumption, assignment, and rejection of executory contracts).

[135] 11 U.S.C. § 365(a) (2006).

[136] 11 U.S.C. § 365(g) (2006).

[137] Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1312 (11th Cir. 2007) ("[R]ejection of an executory contract under 11 U.S.C.S. § 365(g) constitutes a pre-petition breach, and the non-debtor party to the rejected contract becomes a general unsecured creditor who may seek contract damages against the debtor as a pre-petition claim in the bankruptcy."); Bank of Montreal v. Am. Home Patient, Inc., 414 F.3d 614, 619 (6th Cir. 2005) ("[R]ejection of an executory contract gives rise to a legal fiction that a breach of the contract occurred immediately prior to the filing of the petition."); Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 519 (5th Cir. 2004) ("The rejection of an executory contract . . . constitutes a breach of such contract . . . .") (citation omitted); CPC Health Corp. v. Goldstein, (*In re* CPC

an executory contract to vanish . . . [it] leav[es] the liabilities of the debtor intact to form the basis of a claim."[138]

2. A Unanimous View: CBAs are Executory Contracts Governed by Section 365

Before section 1113 was enacted all courts which had considered the issue had held that CBAs were executory contracts and that their rejection constituted a breach of contract giving rise to a pre-petition claim.[139] The decision in *NLRB v. Bildisco & Bildisco*[140] reflected that uniform position. *Bildisco* held that a CBA was an executory contract to which adherence was not required by the debtor, as with any other executory agreement.[141] When a debtor elected to reject the agreement and that decision was thereafter judicially approved, the breach of the CBA gave rise to a bankruptcy claim. In this connection, the *Bildisco* Court noted that recovery for such a breach could only be had under the claims administration process and that "losses occasioned by the rejection of a collective-bargaining agreement must be estimated, including unliquidated losses attributable to fringe

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Health Corp.), 81 Fed. App'x 805, 807 (4th Cir. 2003) ("[A] trustee's rejection of a contract is tantamount to a breach and gives rise to an unsecured claim against the estate."); Mason v. Official Comm. of Unsecured Creditors, (*In re* FBI Distribution Corp.), 330 F.3d 36, 42 (1st Cir. 2003) ("If the contract is rejected . . . the contract is deemed breached on the date immediately before the date of the filing of the petition . . . ."); Auction Co. of Am. v. Fed. Deposit Ins. Corp., 141 F.3d 1198, 1201 n.3 (D.C. Cir. 1998) (citing 11 U.S.C. § 365(g)) ("[R]ejecion of an executory contract by bankruptcy trustee is treated as breach occurring immediately before filing of bankruptcy petition"); Aslan v. Sycamore Inv. Co. (*In re* Aslan), 909 F.2d 367, 371 (9th Cir. 1990) (stating executory contracts are subject to unequivocal language of 11 U.S.C. § 365(g), which states rejection constitutes breach); Al Kopolow v. P.M. Holding Corp. (*In re* Modern Textile), 900 F.2d 1184, 1191(8th Cir. 1990) ("[T]he trustee's rejection operates as a breach of an existing and continuing legal obligation of the debtor, not as a discharge or extinction of the obligation itself. In other words, the lessor's claim against the debtor for breach of the lease survives the trustee's rejection of the lease."); Freuhauf Corp. v. Jartran, Inc., (*In re* Jartran, Inc.,) 886 F.2d 859, 869 n.11 (7th Cir. 1989) (quoting 11 U.S.C. § 365(g)) ("The rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease"); Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36, 41 (3d Cir. 1989) (quoting 11 U.S.C. § 365(g)) ("[R]ejection of an executory contract or lease constitutes a breach of such contract or lease . . . immediately before the date of the filing of the petition . . . ."); Int'l Bhd. of Teamsters. v. IML Freight, Inc. (*In re* IML Freight Inc.), 789 F.2d 1460,1463 (10th Cir.1986) ("The rejection of any executory contract constitutes a breach of that contract under 11 U.S.C.S. § 365(g) . . . ."); Truck Drivers Local Union No. 807 v. Bohack Corp., 541 F.2d 312, 321 n.15 (1976) ("If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI.")

[138] Andrew, *supra* note 93, at 888.

[139] *See* O'Neill v. Cont'l Airlines Inc., (*In re* Continental Airlines, Inc), 981 F.2d 1450, 1459 (5th Cir. 1993) (holding rejection of CBA, like rejection of executory contract, constitutes breach that gives rise to pre-petition claim.); U.S. Truck Co. v. Teamsters National Freight Indus. Negotiating Comm. (*In re* U.S. Truck Co.), 89 B.R. 618, 623 (E.D. Mich. Bankr. 1988) (stating CBAs are executory contracts and when they are rejected, they are treated as being breached immediately prior to bankruptcy); Int'l Bhd. of Teamsters v. IML Freight, Inc. *(In re* IML Freight, Inc.*)*, 789 F.2d 1460, 1463 (10th Cir. 1986) (treating CBA like rejected executory contract); *Bohack Corp.*, 541 F.2d at 321 n.15 ("If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI.").

[140] 465 U.S. 513 (1984).

[141] *See id.* at 523–26.

benefits or security provisions like seniority rights" under section 502(c) of the Code.[142]

3. Where in Section 1113 Does Rejection Become Abrogation?

The *AFA* majority concluded that Congress in section 1113 somehow altered this settled law and, in so doing, in effect, dictated different treatment for rejection of a CBA on one hand and all other executory contracts on the other.[143] The Supreme Court has held that amendments to the Code will not be read to "erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[144] What basis is there in section 1113 for the majority's conclusion that Congress chose to abandon the bankruptcy policy of equality of treatment in the case of CBAs rejected under section 1113? There is nothing in the language or legislative history of section 1113 to that effect (and the Second Circuit did not claim otherwise), and we submit there is no basis, much less a "clear" one, to somehow infer a *sub silentio* wholesale revision of bankruptcy doctrine. While the Court suggested that the purpose of section 1113 was to permit rejection and the imposition of new terms "without fear of liability," seemingly at least in part referring to damages,[145] it cited no authority for its suggestion.[146] As the First Circuit has concluded, Congress did not enact section 1113 to eliminate damages in

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[142] *Id.* at 530 n.12.

[143] Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 483 F.3d 160, 166 (2d Cir. 2007).

[144] Pa. Dept. of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990). *See* Dewsnup v. Timm, 502 U.S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate' . . . this Court has been reluctant to accept arguments that would interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); Emil v. Hanley, 318 U.S. 515, 521 (1943) ("We cannot help but think that if Congress has set out to make such a major change, some clear and unambiguous indication of that purpose would appear. But we can find none. Moreover, such an interpretation would lead in many cases to a division of authority between state and federal courts.").

[145] *In re Nw. Airlines*, 483 F.3d at 171–72.

[146] The parade of horrors painted in the *Miller* article—that if rejection is necessary "then allowing a claim for rejection damages that might dwarf all other general unsecured claims might stymie the reorganization," because the union's claim might "effectively control the class of creditors" and potentially block confirmation of a plan—reflects a blindness to the "economic realities" of which creditors are providing the estate with the greatest value and the equality of treatment in this area emphasized since *Chicago Auditorium*, an attitude perhaps emanating from a "rigid" opposition to the interests of employee creditors. *Compare* Miller, *supra* note 3, at 483. *with supra* note 1 and accompanying text. The concerns expressed are without basis. First, if employees have inordinately contributed to a reorganization they, as would be the case with any other creditors, deserve an appropriate return in unsecured claims, and in appropriate cases such claims should be voted with other unsecured claims. Further, there are many protections in the Code concerning approval of a plan of reorganization which have potential application to the vote of a large creditor. In certain circumstances a plan of reorganization can be confirmed if one impaired class approves, even if other impaired classes vote against confirmation. *See* 11 U.S.C. § 1129(a)(7)–(10) (2006). A vote of a creditor can be disallowed if the vote was not in good faith. 11 U.S.C. § 1126(d)–(e) (2006). And in at least one circumstance a court has upheld the separate classification of a union's rejection claim. *See* Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (*In re* U.S. Truck Co.), 800 F.2d 581, 586 (6th Cir. 1986) (placing union in class separate from other impaired creditors).

the event a labor agreement was rejected in bankruptcy.[147] Rather, in section 1113 Congress sought to prevent debtors "from using bankruptcy as a judicial hammer to break the union" and to promote "good faith negotiations," based on a judgment that the decision in *Bildisco* did not adequately *protect* collectively bargained agreements.[148]

Congress accomplished its objective in two ways. *First*, in section 1113(f) it provided that the terms of a collectively bargained agreement continue in full force and effect until and unless the agreement is rejected pursuant to section 1113's procedures.[149] This, in effect, altered the traditional power of a debtor from the time of *Copeland* to elect not to be bound by a pre-petition executory contract. Under the regime of section 1113 a debtor must continue to adhere to its CBAs until and unless it makes out a case for rejection.[150] The tension between the traditional rejection power and the federal policy of collective bargaining were amply demonstrated in Continental Airlines' 1983 bankruptcy filing. There the airline, under the control of Frank Lorenzo, declared bankruptcy and almost immediately declared its collective bargaining agreements to be without force and effect, imposing in their place degraded terms and conditions of employment which had not been agreed to and triggering a strike by all of Continental's major labor groups. The misuse of the rejection power in Continental was a major factor in Congress's swift effort to overrule *Bildisco* and to require adherence to the terms of a CBA pending rejection in section 1113(f).

Second, Congress mandated a collective bargaining process applicable where a debtor seeks to reject an agreement with procedural and substantive safeguards applicable to rejection of a labor agreement.[151] In so doing, Congress made clear

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[147] *See* United Food & Commercial Worker's Union v. Almac's Inc., 90 F.3d 1, 4 (1st Cir. 1996) (noting this "holding[] [was] not what motivated the enactment of section 1113"). In analyzing the "scant" case law since the *Blue Diamond* decision the Miller article ignores Almac's. Miller, *supra* note 3, at 480; *cf.* 11 U.S.C. § 1113(f) (2006) (legislatively overruling *Bildisco's* holding that a debtor need not adhere to terms of collective bargaining agreement before obtaining rejection order); Massachusetts v. Blackstone Valley Elec. Co., 67 F.3d 981, 986 (1st Cir. 1995) ("[P]lain meaning must govern [a statute's] application, unless a palpably unreasonable outcome would result.").

[148] *See* N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 89–90 (2d Cir. 1992); *In re* Century Brass Products, Inc., 795 F.2d 265, 273 (2d Cir. 1986); International Union v. Gatke Corp., 151 B.R. 211, 213 (N.D. Ind. 1991) (mentioning section 1113 "was enacted to protect and foster collective bargaining"); *In re* Mile Hi Metal Systems, Inc., 51 B.R. 509, 510 (Bankr. Colo. 1985).

[149] 11 U.S.C. § 1113(f) (2006) ("No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."). *See* Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 88 (2d Cir. 1987).

[150] Adventures Res., Inc. v. Holland, 137 F.3d 786, 796 (4th Cir. 1998) (holding section 1113 "plainly imposes a legal duty on the debtor to honor the terms of a collective bargaining agreement until the agreement is properly rejected").

[151] *See* ALPA v. Shugrue (*In re* Ionosphere Clubs, Inc.), 22 F.3d 403, 406 (2d Cir. 1994) (stating section 1113 requires debtor to attempt negotiation with union prior to seeking rejection of CBA); *In re* Blue Diamond Coal Co., 147 B.R. 720, 731–32 (Bankr. E.D. Tenn. 1992) (holding Congress "erected both procedural and substantive barriers to debtor's rejection or modification of agreements" (quoting *In re* Roth American, Inc., 975 F.2d 949, 956 (3d Cir. 1992))).

that the section 1113 process and not the RLA would apply to modifications of collectively-bargained agreements in bankruptcy.[152] In the case of railroad reorganization Congress directed that the major dispute process of the RLA must be followed to modify agreements; for the air transport industry section 1113 would apply.[153]

But nothing in section 1113 addresses, much less makes inapplicable, the relationship of section 365 of the Code to other consequences of rejection. The general provision of the Code dealing with the rejection and the consequences of rejection of an executory contract is section 365.[154] Section 1113 defines that in the case of collective bargaining agreements that power can only be exercised "in accordance with the provisions of this section [1113]."[155] As the Fifth Circuit concluded in *Continental*, rejection of a collective bargaining agreement "does not invalidate the contract, or treat the contract as if it did not exist"; rather the contract is considered "breached."[156]

Of course, nothing in section 1113 provides that there is no damages claim for rejection of a collective bargaining agreement. As noted above, the Supreme Court in *Bildisco* affirmed that rejection of a collective bargaining agreement triggered a rejection damages claim. Congress was obviously aware of *Bildisco* when it enacted section 1113, yet nothing in section 1113 explicitly revises this aspect of the decision.[157]

Nor does anything in the text of section 1113 provide that a rejected CBA is "abrogated." No court has, up to now, described a rejected agreement as abrogated or used the word "abrogate" in construing section 1113. Rather, the courts have consistently interpreted section 1113 (titled "Rejection of collective bargaining agreements") as providing standards for "rejection" and authorization for "rejection" when the standards are met.[158] This is certainly how the Second Circuit understood

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[152] *See, e.g.*, United Steelworkers of America v. Unimet Corp. (*In re* Unimet Corp.), 842 F.2d 879, 884 (6th Cir 1988) (recognizing section 1113 "prohibits the employer from unilaterally modifying any provision of the collective bargaining agreement").

[153] *See* 11 U.S.C. § 1167 (2006) (stating debtor may not change CBA which is subject to RLA except in accordance with RLA); 11 U.S.C. § 103(h) (2006); *In re* Air Florida System, Inc. 48 B.R. 440, 443 (Bankr. S.D. Fl. 1985) (noting section 1167 applies only to railroad reorganization proceedings and therefore airlines were not subject to that section); *In re* Concrete Pipe Machinery Co., 28 B.R. 837, 840 (Bankr. N.D. Iowa 1983) (explaining "[t]hrough 11 U.S.C. § 1167, Congress chose to limit the Court's power with regard to collective bargaining agreements governed by Railway Labor Act").

[154] 11 U.S.C. § 365 (2006) (stating trustee's power, with bankruptcy court's permission, to reject executory contracts).

[155] 11 U.S.C. § 1113(a) (2006). *See* 11 U.S.C. § 1113(f) (2006).

[156] O'Neill v. Continental Airlines, Inc. (*In re* Continental Airlines, Inc.), 981 F.2d 1450, 1459 (5th Cir. 1993).

[157] *See* United Food & Commercial Worker's Union v. Almac's Inc., 90 F.3d 1, 4 (1st Cir. 1996) (recognizing Congress was not motivated by *Bildisco's* holding rejection of CBA would result in a general unsecured claim, when passing 11 U.S.C. § 1113).

[158] *See, e.g.*, ALPA v. Shugrue (*In re* Ionosphere Clubs, Inc.), 22 F.3d 403, 406 (2d Cir. 1993); Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 349 B.R. 338, 356 (S.D.N.Y. 2006) (discussing how § 1113 creates more stringent standard that debtor must meet before rejecting collective bargaining agreement).

the effect or rejection before *AFA*. In *Century Brass*, the Second Circuit described section 1113 as "control[ing] the rejection of collective bargaining agreements in Chapter 11 proceedings,"[159] a formulation followed in *Maxwell Newspapers*.[160] In *Carey*, the court concluded that "the statute permits the bankruptcy court to approve a rejection application" only if the debtor meets the statute's requirements.[161] Similarly in *Royal Composing*, the court expressed hope for a negotiated agreement to "replace the rejected contract . . . ."[162] No circuit has concluded that section 1113 permits "abrogation" of a CBA, and all circuits considering the issue have concluded that a rejected CBA is breached.

In *Northwest* the Second Circuit suggested that the "unique purpose" of section 1113—the rejection of a CBA and authorization for a debtor to establish new terms with which it must comply—"cannot be reconciled with the continued existence of its prior contract," and thereby attempted to distinguish cases dealing with the rejection and breach of all other executory contracts.[163] The reasoning behind that conclusion is opaque. Of course, CBAs are treated differently from all other executory contracts because in section 1113(f), the estate is bound to the CBA until and unless it is rejected.[164] But terms and conditions which are imposed pursuant to a rejection order under section 1113 are not a new CBA precisely because they do not (by definition) involve mutual consent. There is thus no basis in the section 1113 process to conclude that a rejected CBA is abrogated simply because the debtor is free to impose new terms found to be necessary under section 1113(b) in place of collectively bargained ones.[165]

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[159]Century Brass Prods., Inc. v. International Union *(In re* Century Brass Prods., Inc.), 795 F.2d 265, 272 (2d Cir. 1986).

[160] N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers), 981 F.2d 85, 89 (2d Cir. 1992) ("Section 1113 of the Bankruptcy Code 'controls the rejection of collective bargaining agreements in Chapter 11 proceedings.'" (quoting *In re* Century Brass Prods., Inc. 795 F.2d 265, 272 (2d Cir. 1986))).

[161] Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 88 (2d Cir 1987).

[162] N.Y. Typographical Union No. 6 v. Royal Composing Room, Inc. (*In re* Royal Composing room, Inc.), 848 F.2d 345, 351 (2d Cir. 1988).

[163] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 483 F.3d 160, 170–71 (2d Cir. 2007); *In re* Delta Air Lines, Inc., 359 B.R. 491, 505 (Bankr. S.D.N.Y. 2007) ("Section 1113 is forward-looking . . . [and] it necessarily terminates the debtor's obligation to comply with the [prior] agreement."); Miller, *supra* note 3, at 480–82.

[164] *See* 11 U.S.C. 1113(f) (2006) (ruling trustee cannot unilaterally terminate or alter any provision of collective bargaining agreement prior to compliance with rest of section); *In re* Certified Air Technologies, Inc. 300 B.R. 355, 366 (Bankr. C.D. Cal. 2003) (noting more rigorous standards exist for rejection of collective bargaining agreements than other executory contracts).

[165]The court's abrogation notion also runs roughshod over basic RLA doctrine that contract terms that have not been the subject of section 6 negotiations continue to bind the parties even after the parties are free to conduct self-help. *See* Bhd. of Ry. Clerks v. Fla. E. Coast Ry., 384 U.S. 238, 247 (1966) ("Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle."); Manning v. American Airlines, Inc., 329 F.2d 32, 34 (2d Cir. 1964) ("The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."). *See generally* ABRAM, *supra* note 18; K. Stone, *supra* note 3, at 1495 ("[U]nlike collective bargaining agreements under the NLRA, agreements under the RLA never expire.

The *AFA* majority ultimately rests its decision on a new legal fiction: the notion that in passing section 1113, Congress made CBAs binding on the estate and afforded employees limited collective bargaining rights and, in exchange, removed the damages claim that modification of contractual terms would otherwise provide—as well as the right to strike for RLA employees.[166] The majority cites to nothing in the language or legislative history of section 1113 as evidence of such a grand bargain and there is none. As a general matter, there is no basis to treat contracts rejected under section 1113 any differently than other executory contracts under section 365 (captioned "Executory contracts and unexpired leases"). Section 365(g) provides that:

> Except as provided in subsections (h)(2) and (i)(2) of this section, *the rejection of an executory contract or unexpired lease of the debtor* constitutes a breach of such contract or lease—
> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition[.][167]

Thus, by its terms the provisions of section 365 stating that a breach is the consequence of rejection applies to all executory contracts and is not limited to contracts rejected under section 365.[168] Congress created two limited exceptions where rejection may be treated as termination of a contract, sections 365(h)(2) and (i)(2), both of which deal with timeshare lease agreements. Congress did not include CBAs as a further exception to the rule that a rejected contract is breached.

The Fourth Circuit in *Adventure Resources Inc. v. Holland*,[169] recognized that section 1113 did not displace the general applicability of section 365 to claims generated by rejection of a collective bargaining agreement:

> However, in erecting § 1113's substantive and procedural obstacles to the unilateral rejection of collective bargaining agreements, Congress did not indicate that it intended to otherwise restrict the general application of § 365 to those agreements. Section 1113 'governs only the conditions under which a debtor may modify or reject a collective bargaining agreement[.]' Thus, § 365 continues to

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Rather, they stay in effect indefinitely, unless or until changed in accordance with the statutory provisions for altering them.").

[166] *See In re* Nw. Airlines Corp., 346 B.R. 307 (Bankr. S.D.N.Y. 2006).

[167] 11 U.S.C. § 365(g)(1) (2006) (emphasis added).

[168] *Id.*; Michael St. Patrick Baxter, *Is There A Claim For Damages From The Rejection Of A Collective Bargaining Agreement Under § 1113 Of The Bankruptcy Code?*, 12 BANKR. DEV. J. 703, 717–18 (1996) ("Section 365(g) does not require that rejection occur under section 365. It requires only that the executory contract 'has not been assumed under' section 365. A collective bargaining agreement that has been rejected under section 1113 qualifies as a contract that has not been assumed under section 365.") (citation omitted).

[169] 137 F.3d 786, 798 (4th Cir. 1998).

> apply to collective bargaining agreements, except where such an application would create an irreconcilable conflict with § 1113.[170]

Other courts have reached the same result.[171] Similarly, courts have properly looked to section 365 to fill in what would otherwise be gaps in section 1113 on issues other than the rejection process and standards themselves, and have analyzed section 1113 as a specialized and delineated modification of section 365.

For example, the court in *Moline Corp.* noted that section 1113 did not provide the damages consequences of either rejection or assumption of a labor agreement.[172] Notwithstanding that silence the court concluded that "if the debtor never rejects the collective bargaining agreement and thus assumes the agreement by inaction, the plan of reorganization must provide for the payment of the unsecured pre-petition and post-petition claims according to the priority scheme set out in section 507[,]" reasoning that "section 365 must apply to fill in the gap left by section 1113."[173]

In the case of the assumption of labor agreements the courts have routinely looked to section 365 because although section 1113(a) provides that a debtor may "assume or reject" a labor agreement "only in accordance with the provisions of this section,"[174] Section 1113 has no provisions dealing with assumption.[175]

There is no basis in the language of section 1113 to conclude that Congress intended to remove CBAs from the ambit of section 365(g) of the Code and afford unionized employees whose contracts were rejected dramatically different and inferior treatment to other unsecured creditors whose contracts are rejected. *The AFA majority's inability to point to any language in the statute or legislative history reflecting such a material departure from settled bankruptcy policy tellingly reveals that in this hard case the court made bad law without reasoned underpinning.*[176]

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[170] *Id.* 137 F.3d at 798 (citation omitted).

[171] *See, e.g.*, United Food & Commercial Workers Union, Local 211 v. Family Snacks, Inc. (*In* re Family Snacks, Inc.), 257 B.R. 884, 900 (B.A.P. 8th Cir. 2001) ("[T]he better reading is that § 365 covers assumption and rejection of CBAs, except as specifically modified with regard to rejection in § 1113"); Mass. Air Conditioning & Heating Corp. v. McCoy, 196 B.R. 659, 663 (D. Mass. 1996) ("Section 1113 is designed to provide additional procedural requirements for rejection or modification of collective bargaining agreements, and only to that degree supersedes and supplements the provisions in § 365."); *In re* Moline Corp., 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992) ("Collective bargaining agreements are simply executory contracts with a special provision governing their assumption or rejection by the debtor or the trustee in a Chapter 11 case.").

[172] 144 B.R. at 78–79.

[173] *Id.* at 78.

[174] 11 U.S.C. § 1113(a).

[175] *See* Wien Air Ala., Inc. v. Bachner, 865 F.2d 1106, 1111 n.5 (9th Cir. 1989) (applying section 365 to assumption of a collective bargaining agreement because section 1113 only contains procedures for rejection or unilateral modification); Mass. Air Conditioning & Heating Corp. v. McCoy, 196 B.R. 659, 663 (D. Mass. 1996) ("assumption of a collective bargaining agreement–like any other executory agreement–remains within the province of § 365"); *Holland*, 137 F.3d at 798 (stating section 1113 only governs a debtor's ability to reject or modify CBAs).

[176] *See* Baxter, *supra* note 168, at 728 ("Congress did not intend for section 1113 to remove collective bargaining agreements from the purview of section 365(g) for purposes of determining the effects of rejection."); s*ee also In re* Young, 193 B.R. 620, 624 (Bankr. D.C. 1996) (declining to interpret amendment to § 362(a)(3) in a manner that would result in a "dramatic shift" in both pre-Code and pre-amendment

The majority apparently relied on the bankruptcy court's decision in *Blue Diamond Coal* (summarily affirmed by the district court) for the notion that rejection of a labor agreement does not create an unsecured damages claim.[177] The *Blue Diamond Coal* court's conclusion that rejection of a collective bargaining agreement creates no claim in bankruptcy because Congress did not also specifically amend section 502(g) to so provide places the cart before the horse.[178] Bankruptcy policy favors equality in treatment of creditors,[179] and as section 365(g) applies to all creditors with claims founded on executory contracts, if Congress wanted to eliminate claims founded on rejection of CBAs it would have done so affirmatively. As one commentator has already persuasively concluded:

> The likely explanation is that section 1113 was not intended to entirely remove collective bargaining agreements from the purview of section 365. Instead, section 1113 generally overrules section 365 to the extent the latter is inconsistent with the former. Put differently, section 365 generally and section 365(g) in particular continue to apply to collective bargaining agreements to the extent

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practice without "one word of legislative history" to support such an interpretation). The suggestion that the debtor's authority to impose new terms and conditions of employments creates a different rule concerning breach and damages than for commercial contracts is without basis.

[177] Nw. Airlines Corp. v. Ass'n of Flight Attendants *(In re* Nw. Airlines Corp.), 483 F.3d 160, 172 (2d Cir. 2007); s*ee In re* Blue Diamond Coal Co., 147 B.R. 720, 732 (Bankr. E.D. Tenn. 1992) ("[A] claim for damages alleged to have resulted from the rejection of a collective bargaining agreement under § 1113 cannot be premised on 365(g) nor can the claim be asserted pursuant to § 502(g)."). Although concluding that appeal of the issue was moot, the district court in *Blue Diamond* proceeded to affirm in *dicta* the merits of the bankruptcy court's decision. *Blue Diamond Coal*, 147 B.R. at 734 (denying motion). The court, apparently motivated by a misguided policy concern, believed that the allowance of a rejection claim "for damages, especially if the amount of that claim represents lost future wages and benefits, would necessarily assure the failure of the reorganization" because of an antecedent finding that rejection of the labor agreement met the requirements of section 1113 of the Code. Southern Labor Union, Local 188 v. Blue Diamond Coal Co. (*In re* Blue Diamond Coal Co.), 160 B.R. 574, 577 (D. Tenn. 1993). In that regard, the court apparently ignored that a rejection damages claim would be a general unsecured pre-petition claim, and not a claim of administration, a confusion also raised during oral argument before the Second Circuit in the *AFA c*ase. *See* Medical Malpractice Ins. Ass'n v. Hirsch (*In re* Lavigne), 114 F.3d 379 (2d Cir. 1997) (stating that a rejection claim is considered a pre-petition claim); *In re* Ames Dep't Stores, Inc., 306 B.R. 43, 60 (Bankr. S.D.N.Y. 2004) ("[R]ejection claims are pre-petition claims, with no priority over the claims of other unsecured creditors . . . ."); *In re* Nat'l Refractories & Minerals Corp., 297 B.R. 614, 616 (Bankr. N.D. Cal. 2003) (stating that the rejection of a lease before it is assumed is considered to have occurred pre-petition and thus any claim for damages is general, unsecured claim).

Even if one were to accept *Blue Diamond Coal*'s conclusion that no damages claim is provided for rejection of a CBA under section 502(b) that would not support the majority's conclusion that rejection of a CBA abrogates rather than breaches the agreement. *Blue Diamond Coal* did not hold that the rejected CBA was not breached but just that there was no provision in the Code for allowance of a claim based on such a breach. *See Blue Diamond Coal*, 160 B.R. at 574.

[178] *Blue Diamond Coal*, 147 B.R. at 730. *See generally* Baxter, *supra* note 168.

[179] Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal Of Non-Debtor Releases In Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 980 (1997) ("One of the most enduring bankruptcy policies is that favoring equal treatment of similarly situated creditors.").

> that such application would not be inconsistent with section 1113.[180]

As noted above, the Fourth Circuit subsequently reached this same conclusion in *Adventure Resources*.[181] *Blue Diamond Coal* was wrongly decided and the *AFA* majority's reliance on it misplaced.[182]

The strength of the majority's drive to reach a particular result—a strike injunction—is revealed by its willingness to ignore years of circuit precedent construing the substantive rejection standards under section 1113. In the leading case on the substantive rejection standards of section 1113, *Carey Transportation*,[183] the Second Circuit held that a bankruptcy court must consider both "the possibility and likely effect of any employee claims for *breach of contract* if rejection is approved" and the "likelihood and consequences of a strike."[184] The likely effect of unsecured claims triggered by rejection of a labor agreement has universally been considered by the courts as one of the equitable factors to be considered in deciding whether a contract should be rejected or not both before and after the enactment of section 1113.[185] Of course, if a CBA were abrogated, not breached, there would be no damage claims to consider.

The majority never addresses this inconsistency with settled 1113 law. Instead it compounds the confusion by citing, with approval,[186] the portion of *Carey Transporation* recognizing rejection damages claims, albeit, as the concurrence

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[180] Baxter, *supra* note 168, at 729.

[181] Adventure Res. Inc. v. Holland, 137 F.3d 786, 797 (4th Cir. 1998).

[182] *See In re Blue Diamond Coal*, 160 B.R. at 574; s*ee also* Mass. Air Conditioning & Heating Corp. v. McCoy, 196 B.R. 659, 663 (D. Mass. 1996) (noting the limited times and to the degree where § 1113 supersedes § 365). *But see* United Food & Commercial Workers Unions v. Family Snacks, Inc. *(In re* Family Snacks, Inc.), 257 B.R. 884, 900 (B.A.P. 8th Cir. 2001) ("§ 365 covers assumption and rejection of CBAs, except as specifically modified with regard to rejection in § 1113."). The majority's reliance on the differences between sections 1113 and 1114 is also misplaced. Indeed, if anything, the wording of section 1114 supports the existence of a rejection damages claim here. Section 1114 (i) provides for a claim resulting from the *modification* (rather than rejection) of retiree benefits. *In re* Tower Automotive, 342 B.R. 158, 161 (Bankr. S.D.N.Y. 2006) (section 1114 "both protects and sets out a procedure for the modification of retiree benefits . . . ."), *aff'd* 241 F.R.D. 162 (S.D.N.Y. 2006).

[183] Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82 (2d Cir. 1987).

[184] *Id.* at 93.

[185] *See* Ass'n of Flight Attendants v. Mesaba Aviation, Inc., 350 B.R. 435, 463 (D. Minn. 2006) (considering "the possibility and likely effect of any employee claims for breach of contract if rejection is approved."); *In re* Moline Corp., 144 B.R. 75, 78–79 (Bankr. N.D. Ill. 1992) ("[T]he employees' prepetition claims under the collective bargaining agreement would automatically become Chapter 11 administration claims as part of the cure of defaults required to assume an executory contract."); *In re* Garofalo's Finer Foods, Inc., 117 B.R. 363, 373 (Bankr. N.D. Ill. 1990) ("Any section 502(g)(2) employee damage claims may be significant . . . ."); *In re* Texas Sheet Metals, Inc., 90 B.R. 260, 272–73 (Bankr. S.D. Tex. 1988) (considering damages claim for breach of contract that will be brought by employees); *In re* Blue Ribbon Transp. Co., Inc., 30 B.R. 783, 785 (Bankr. D.R.I. 1983) (stating one prong of the test as whether debtor can "provide facts sufficient for the Court to weigh the competing equities in the case and make a determination in favor of the contract"); *In re* Braniff Airways, Inc., 25 B.R. 216, 219 (Bankr. N.D. Tex. 1982) ("Those equities which the court must balance include the employee claims arising from rejection . . . .").

[186] *See In re Nw. Airlines*, 483 F.3d at 169 n.2 (directing bankruptcy courts to consider possibility and effects of employee claims for breach of contract if rejection is approved).

notes, [187] based on the mistaken belief that *Carey Transportation* involved issues under the RLA.[188]

The panel's reasoning, in effect, facilitates a significant redistribution of wealth in the bankruptcy process: from unionized employees whose contracts are rejected and who will thereafter labor under degraded terms, towards other unsecured creditors and, potentially equity holders who might, by virtue of CBA "abrogation" now move "into the money." This judicial legislation is fundamentally incompatible with both the intent to provide increased protection for labor through the enactment of section 1113 and general bankruptcy policy which insists upon like treatment of similarly situated creditors.[189] The potential magnitude of the panel's redistribution effort can be gauged by claims negotiated in recent airline bankruptcies. In filings since September 11, ALPA has on behalf of the airline pilots its represents, negotiated for claims (or equity in the reorganized company) worth several billions of dollars This occurred both in *Northwest* where ALPA negotiated an $888 million unsecured claim, among other things,[190] and in the *US Airways, United* and *Delta* bankruptcies as well.

In the first *US Airways* bankruptcy pilots received 19.33% of the Company's stock as part of a concessionary agreement, and in the second bankruptcy received a new profit sharing plan and an allocation of equity.[191] In the *United* bankruptcy pilots received a $3 billion unsecured claim. In addition, in return for certain contractual changes agreed to by ALPA, a profit sharing plan and $550 million in

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[187] *Id.* at 182 n.3 (Jacobs, D., concurring) ("[N]early all of the cases cited by the majority had nothing to do with the Railway Labor Act or its status quo provisions.").

[188] *Id.* at 165–66 ("This appeal turns on Northwest's likelihood of success on the merits, any assessment of which, in turn, requires us to interpret and heed . . . the Railway Labor Act of 1926 ('RLA')."). With respect to the strike issue, the majority characterized that part of the holding in *Carey* as an "intimat[ion]" or a "hint[]." *Id.* at 172 ("We have intimated that a union would be free to strike following contract rejection under § 365."); *Id.* at 173 ("In cases governed by the NLRA, we have also hinted that a union is free to strike, even following contract rejection under § 1113.").

[189] *See* Int'l Union v. Gatke Corp., 151 B.R. 211, 213 (N.D. Ind. 1991) ("Further, § 1113 was enacted to protect and foster collective bargaining."); Begier v. IRS, 496 U.S. 53, 58 (1990) ("equality of distribution among creditors is a central policy of the Bankruptcy Code"); JACKSON, *supra* note 124, at 30–31 (Harvard Univ. Press 1986) (discussing general unsecured creditors' entitlement to pro rata treatment under bankruptcy policy of treating similarly situated creditors equally).

[190] *See In re* Northwest Airlines Corp., Debtors' Motion for Approval of Compromise and Agreements with the Airline Pilots Association, International, May 31, 2006, Exhibit A (Letter 2006-01, ¶¶ C, E, H, I; Letter 2006-3, ¶ 7), (Case No. 05-17930, Bankr. S.D.N.Y.) [Docket No. 2690] (agreeing to pay $16.8 million as a lump sum upon emergence from bankruptcy, an incentive performance plan, a profit sharing plan, and a general unsecured pre-petition claim in the Company's chapter 11 case in the amount of $888 million).

[191] Press Release, Air Line Pilots Ass'n, Int'l, US Airways ALPA Pilots Ratify Transformation Plan Agreement, ALPA, (Oct. 21, 2004), *available at* http://www.alpa.org/DesktopModules/ALPA_Documents/ALPA_DocumentsView.aspx?itemid=909&ModuleId=785 ("The agreement . . . also offers returns for the pilots, including a profit sharing plan and equity participation shares."); Press Release, US Airways Group, Inc., US Airways Completes Restructuring; Secures $1.24 Billion in New Financing and Investment as it Emerges from Chapter 11 (March 31, 2003), *available at* http://www.prnwire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/03-31-2003/0001917282&EDATE= ("Consistent with the plan of reorganization [t]he remaining stock will be divided as follows: Air Line Pilots Association (19.3 percent) . . . .").

convertible notes were issued as a result of United moving for and obtaining a termination of the pilots' pension plan.[192] In settlement of Delta's 1113 filing ALPA and the Company reached agreement on a restructuring agreement that provided a $2.1 billion pre-petition unsecured claim, $650 senior unsecured "Pilot Notes" notes, and a profit sharing plan providing for 15% of all pre-tax (as defined) income up to a maximum of $1.5 billion, and a 20% share of all pre-tax profits over $1.5 billion.[193] Other unions representing airline employees have also negotiated substantial unsecured claims when faced with section 1113 demands. The ability to negotiate possible future returns in the form of allowed claims has been a substantial factor in the ability of unions to negotiate consensual agreements in bankruptcy.[194] That tool may be eaten away by the *AFA* decision.[195]

4. Is There an Anti-Strike Policy in Section 1113? Whatever Happened to the Norris-LaGuardia Act?

Contrary to the majority, there is nothing inconsistent between either section 1113(f)'s command that a debtor maintain a CBA until rejection is approved, or the imposition of revised terms and conditions of employment and any obligation to adhere to those terms and conditions, and the statutory provision that a rejected CBA is breached. The majority's rewriting of the Code is based on the unsupportable notion that self-help in the face of CBA rejection is "inconsistent with Congress's intent in passing § 1113."[196] But nothing in section 1113 addresses, much less curtails the right to self-help. The majority points to nothing in either the language or legislative history for this remarkable proposition. There is no anti-strike policy in section 1113.[197]

There is, by contrast, a strong policy against strike injunctions enacted in the NLGA. Because the federal courts repeatedly issued strike-breaking injunctions based on their own "views of social and economic policy" and their "disapproval" of strikes,[198] Congress in the NLGA took the "extraordinary step of divesting the

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[192] United Retired Pilots Benefit Protection Ass'n v. United Airlines, Inc. (*In re* UAL Corp.), 443 F.3d 565, 568 (7th Cir. 2006).

[193] Delta Air Lines, Inc., Quarterly Report (Form 10-Q), at 8 (June 30, 2006), *available at* http://www.sec.gov/Archives/edgar/data/27904/000118811206002418/t11194_10q.htm.

[194] *See, e.g.*, Debtors' Motion for Approval of Compromise and Agreements with the Airline Pilots Association, *supra* note 190; US Airways Completes Restructuring, *supra* note 191.

[195] *See In re* Nw. Airlines, Inc., 366 B.R. 270, 276 (Bankr. S.D.N.Y. 2007) (sustaining objection to AFA's bankruptcy claims bases on holding of the panel majority).

[196] Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 483 F.3d 160, 172. *See supra* note 79 and accompanying text.

[197] *Compare* Int'l Union v. Gatke Corp., 151 B.R. 211, 213 (N.D. Ind. 1991) (stating section 1113 was enacted to further protect collective bargaining power, not cripple it), *with* Ass'n of Flight Attendants v. Mesaba Aviation, Inc., 350 B.R. 435, 463 (D. Minn. 2006) (weighing potential strike as determining factor, since strike could cause liquidation). *See generally* 11 U.S.C.A. § 1113 (2006).

[198] Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 715–16 (1982); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 54–55 (1927) (imposing injunction, stating that a dangerous probability of restraint on interstate commerce is enough to interpose with an injunction);

federal courts of equitable jurisdiction" in labor disputes.[199] The NLGA took "the federal courts out of the labor injunction business"[200] by drastically limiting the circumstances under which a court may enjoin a strike.

In particular, the anti-injunction provisions of the NLGA were intended to "prevent overactive courts from interfering in labor-management disputes, and from undermining the ability of labor groups to effectively negotiate labor contracts."[201] Congress achieved this goal by eliminating judicial examination of the principles, motives, and objectives of union activity from scrutiny by the courts. "[T]he licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."[202] Most recently the Supreme Court, by unanimous decision, reaffirmed this basic tenet by rejecting a "substantial-alignment test" and refusing to allow judicial second-guessing of union means and motives in taking self-help.[203] That jurisdictional limitation fully applies to bankruptcy courts. Indeed, "[n]o series of cases contributed more to the feeling that the federal courts abused their equity jurisdiction than those involving employees of railroads in equity receivership."[204]

For this reason, the federal courts have consistently ruled that the equitable jurisdiction of the bankruptcy courts is defined and limited by NLGA. In cases going back over a half century under both the Act and the Code courts concluded that nothing in the text or legislative history of the bankruptcy law support that Congress sought to "supersede or transcend" the NLGA's limitations and that there was no basis to "believe the [NLGA] was to be superseded, *sub silentio*."[205]

Archibald Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MOUNTAIN L. REV. 247, 256 (1958) ("The greatest evils [of labor injunctions] lay in the doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy.").

[199] Burlington N. R.R. Co. v. Bhd. of Maint. of Way Employes, 481 U.S. 429, 437 (1987); *see* Cox, *supra* note 198, at 256 ("The Norris-LaGuardia Act abolished the objectives test by making the legality of employee activities depend upon external conduct rather than an appraisal of the rightness or wrongness, or the desireability [sic] or impropriety, of their goals."); 29 U.S.C. § 101 (2006) (NLGA) ("No court . . . shall have jurisdiction to 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 this chapter.").

[200] Marine Cooks & Stewards, AFL v. Panama S.S. Co., 362 U.S. 365, 369 (1960).

[201] E. Air Lines, Inc. v. ALPA, 710 F. Supp. 1342, 1344 (S.D. Fla. 1989), *aff'd*, No. 89-5229, 1989 WL 409874 (11th Cir. June 7, 1989). *See* Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 369 (1960) ("The language is broad because Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act."). *See generally* 29 U.S.C. § 102 (2006).

[202] United States v. Hutcheson, 312 U.S. 219, 232 (1941).

[203] *Burlington N.*, 481 U.S. at 434, 441–43.

[204] United States v. United Mineworkers of Am., 330 U.S. 258, 320 n.6 (1947) (Frankfurter, J., concurring). *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1155–57 (1989) (discussing "[t]he Origins of 'Government by Injunction' in Railway Strikes"). *See generally* Walter Nelles, *A Strike and It's Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 YALE L.J. 507 (1931) (discussing role of federal judges in undertaking management of bankrupt railways).

[205] Petrusch v. Teamsters Local 317 *(In re* Petrusch), 667 F.2d 297, 300 (2d Cir. 1981) (summarily affirming district court's reversal of bankruptcy court's strike injunction for lack of jurisdiction under

Nor is the potential for self-help in the face of rejection inconsistent with federal bankruptcy policy. Of course, where rejection constitutes a material breach of contract, the creditor is excused from continued performance under the agreement.[206] A debtor cannot both reject an executory contract and demand continued performance by the creditor.[207] The same logic has been recognized in collective bargaining. The possibility of self-help fosters agreements, as the Supreme Court concluded in unanimously overruling a strike injunction in a nation-wide strike of all railroads.[208] In the *United* bankruptcy the Seventh Circuit recognized that the possibility of self-help fostered ALPA's eventual agreement to revised terms with that bankrupt carrier.[209] In sum, there is nothing in section 1113

NLGA). *See* Elsinore Shore Assocs. v. Local 54, Hotel Employees, 820 F.2d 62, 66–67 (3d Cir. 1987); Briggs Transp. Co. v. Int'l Bhd. of Teamsters, 739 F.2d 341, 343 (8th Cir. 1984) ("[T]he parties have cited us to nothing in the Bankruptcy Code or its legislative history indicating a congressional intent to lift the jurisdictional restrictions of the Norris-LaGuardia Act . . . ."); Crowe & Assocs. V. Bricklayers & Masons Union Local No. 2 (*In re* Crowe & Assoc, Inc.), 713 F.2d 211, 214–15 (6th Cir. 1983) (citing *Petrusch* and holding that NLGA bars issuance of strike injunction notwithstanding automatic stay as "Congress would not have silently decided to alter its anti-injunction policy"); Lehman v. Quill (*In re* Third Ave. Transit Corp.), 192 F.2d 971, 973 (2d Cir. 1951) ("The well established power of the reorganization court to issue orders necessary to conserve the property in its custody must be exercised within the scope of a jurisdiction which is limited by the broad and explicit language of the [NLGA]."); Int'l Bhd. of Teamsters, Local 886 v. Quick Charge, Inc., 168 F.2d 513, 516 (10th Cir. 1948) ("There is nothing in the Norris-LaGuardia Act which exempts equity receiverships of any kind from its provisions. It prohibits injunctions in any case involving or growing out of any labor dispute. It provides that, 'No court of the United States shall have jurisdiction to issue (such injunction).'"); Anderson v. Bigelow, 130 F.2d 460, 462 (9th Cir. 1942) ("However, it has been suggested elsewhere that employers can escape the provisions against enjoining peaceful striking or picketing if their enterprises can be brought within a federal receivership. We can find no case supporting such an interpretation of the Norris-LaGuardia Act. It prohibits injunctions 'in any case involving or growing out of any labor dispute.' It provides that 'No court of the United States shall have jurisdiction to issue' such injunctions. There is no exception of 'any case' or 'any labor dispute' in receivership proceedings.") (footnotes omitted).

[206] *See, e.g.*, Adelphia Bus. Solutions, Inc. v. Abnos, 482 F.3d 602, 606 (2d Cir. 2007) ("Rejection of an unexpired lease . . . is treated as a breach of the lease."); Med. Malpractice Ins. Ass'n v. Hirsch (*In re* Lavigne), 114 F.3d 379, 387 (2d Cir. 1997); Bear, Stearns Funding, Inc. v. Interface Group–Nev., Inc., 361 F. Supp. 2d 283, 291 (S.D.N.Y. 2005) ("A fundamental principle of contract law provides that the material breach of a contract by one party discharges the contractual obligations of the non-breaching party.").

[207] *See* 11 U.S.C. § 365(a) (2006) (providing trustee can either assume or reject executory contracts of debtor); *In re* Tabernash Meadows, LLC, No. 03-24392 SBB 2005 WL 375660, at *14 (Bankr. D. Colo. Feb. 15, 2005) (explaining debtor may not "demand payment from the non-debtor party while unable, or refusing, to perform its own obligations"); Theresa J. Pulley Radwan, *Limitations on Assumption and Assignment of Executory Contracts by "Applicable Law"*, 31 N.M. L. REV. 299, 302 (2001) ("Rejection of a contract serves as a court-approved breach of contract and terminates both parties' rights to demand further performance under the contract.").

[208] *See Burlington N.*, 481 U.S. at 451–53; *see also* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 997 (1984) ("[T]he union and employer can deal only with each other and a refusal to deal, by imposing costs on the other party, makes him more likely to come to terms. The strike imposes costs on both parties: on the employer, by forcing him to reduce or cease production, and on the workers, by stopping their wages. The balance of those costs will determine the ultimate settling point between the union's initial demand and the employer's initial offer.").

[209] United Retired Pilots Benefit Protection Ass'n v. United Airlines, Inc. (*In re* UAL Corp.), 443 F.3d 565, 569–70 (7th Cir. 2006) ["*UAL I*"] (recognizing ALPA, on behalf of United Airlines' active pilots [as opposed to retired pilots] received substantial consideration in return for giving up contractual right to pension plan, resolving pending 1113 motion, largely because "active pilots had a stick to use against United—the threat

that limits labor self-help in the face of contract rejection and nothing in bankruptcy policy that would support such a limitation. In the absence of a statutory obligation, there can be no basis to enjoin a strike given the NLGA.

B. The Panel's Expansive and Insupportable Construction of Section 2 (First)

The Supreme Court has held that the jurisdictional limits of the NLGA may be overcome to enforce a clear mandate of the RLA.[210] Both the majority and concurring *AFA* opinions attempted to find that mandate in section 2 (First) of the RLA, but for inconsistent reasons. Neither opinion can be squared with the Supreme Court's holdings on section 2 (First), or even the Second Circuit's prior decisions, even assuming, *arguendo*, that section 2 (First)'s duty to "make and maintain agreements" somehow continued to bind AFA but not Northwest.

A court may enter a strike injunction to enforce the RLA's duty to bargain in narrowly limited circumstances: "[e]ven when a violation of a specific mandate of the RLA is shown, '[c]ourts should hesitate to fix upon injunctive remedy . . . unless that remedy alone can effectively guard the plaintiff's right.'"[211] The Supreme Court has instructed that section 2 (First) must not be used as "a cover for freewheeling judicial interference in labor relations of the sort that called forth the [NLGA] in the first place."[212] The *AFA* majority nowhere discusses those limitations or justifies its injunction as the sole remedy available to compel AFA to bargain in good faith (even assuming contrary to the unmentioned factual findings of the bankruptcy court that AFA had not already done so). Striking is not *per se* inconsistent with bargaining in good faith, as the majority acknowledged.[213] Northwest conceded and

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of a strike—that the retirees didn't have."); *see also In re* UAL Corp., 468 F.3d 456, 461 (7th Cir. 2006) [*"UAL II"*] (citing *UAL I* and emphasizing threat of a pilot strike and that pilot unsecured claim was received by pilots "in exchange for surrendering the leverage that they enjoyed—United needs pilots to fly its planes").

[210] *See Burlington N.*, 481 U.S. at 445 (explaining importance of complying with RLA mandates); *see also* Int'l Ass'n of Machinists v. S. B. St., 367 U.S. 740, 772 (1961) ("We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandated of the Railway Labor Act."); Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 607 (1937) ("Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of . . . the Railway Labor Act.").

[211] *Burlington N.*, 481 U.S. at 446 (quoting Int'l Ass'n of Machinists v. S. B. St., 367 U.S. 740, 773 (1961)).

[212] Chicago & N. W. Ry. Co. v. United Transp. Union, 402 U.S. 570, 583 (1971). *See* Regional Airline Pilots Ass'n v. Wings West Airlines, Inc., 915 F.2d 1399, 1402 (9th Cir. 1990) (noting that language of section 2, First through Fourth, gives "impression that the federal courts' obligation is to oversee the broad structure of the process and prevent major deviations, not to be involved in particulars of the bargaining process"). *See generally* 29 U.S.C. § 158(d) (2007) (clarifying and limiting obligation to bargain collectively).

[213] *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants (*In re* Nw. Airlines Corp.), 483 F.3d 160, 172 (2d Cir. 2007) (stating that unions generally have right to strike even if airline carrier breached but did not violate RLA); *see also* NLRB v. Insurance Agents, 361 U.S. 477, 493 (1960) (stating that strike is not a refusal to bargain in good faith); Pan Am. World Airways, Inc. v. International Brotherhood of Teamsters, 894 F.2d 36, 398 (2d Cir. 1990) ("The RLA, however, does not include a time limit within which either

the bankruptcy court found that AFA bargained in good faith, which the *AFA* majority and concurrence both overlook. The majority's view that AFA violated section 2 (First) because it might have done more to gain ratification,[214] is inconsistent with settled law that section 2, First does not require a union to recommend a TA for ratification (which AFA actually did here).[215] The majority thus provides no guidance to the lower courts on the scope of the duty in section 2 (First) that it for the first time—and contrary to precedent—concludes bars a strike under these circumstances.[216]

The concurrence ventures no analysis of what more is required of AFA by section 2 (First) (other than to capitulate to Northwest's demands). Its view that there can be binding status quo obligations in the absence of mutual agreement is inconsistent with settled law (including precedent in the Second Circuit) that an RLA status quo must be consensual.[217] And its conclusion that the status quo obligation that bars a union from striking continues to bind the union post-rejection—while the carrier is excused from the RLA's commands—is inconsistent with the integrated, bilateral RLA process. As the majority notes, the RLA's "explicit status quo provisions are equal and mutual."[218] *Shore Line* teaches that the major dispute process is "an *integrated, harmonious scheme* for preserving the status quo . . . ."[219] Under this integrated, harmonious RLA scheme, self-help by an employer and union who have a contractual history are linked together: the times when a carrier imposes new terms are also the times when a union may engage in self-help.

Because the RLA's status quo obligations are reciprocal, if during the major dispute negotiation process a carrier violates the RLA status quo provisions by unilaterally imposing its own desired terms or conditions of employment, then the union can immediately engage in self-help. Thus in *Telegraphers*,[220] the Court held that a strike injunction was properly denied where the carrier had breached the RLA's major dispute provisions in the face of the continued obligation to "make and maintain" agreements in section 2 (First).[221] In *Shore Line*, the Court noted that if, prior to completion of negotiations, the "carrier resort[s] to self-help, the union

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party must use or lose its right to self-help."). S*ee generally* Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378–79 (referring to the "ultimate right of the disputants to resort to self-help").

[214] *In re Nw. Airlines*, 483 F.3d at 175 (stating that AFA had not yet fulfilled its duty to exhaust dispute resolution process).

[215] *See* Chicago, Rock Island & Pac. R.R. Co. v. Switchmen's Union, 292 F.2d 61, 70 (2d Cir. 1961) (finding good faith bargaining by union despite failure to recommend a settlement).

[216] The *AFA* majority faults the AFA for not seeking the NMB's assistance, *In re Nw. Airlines*, 483 F.3d at 175; however, the NMB's participation began before the bankruptcy. Of course, there is no provision for NMB intervention in the section 1113 process.

[217] *Pan Am*, 894 F.2d at 39 ("The essential ingredient of a status quo that can be disturbed only after exhaustion of the 'major dispute' procedures is a resolution of disputed issues accepted by each side. No such resolution exists here.").

[218] *In re Nw. Airlines*, 483 F.3d at 172.

[219] Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 152 (1969).

[220] Order of R.R. Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330 (1960) (*rehearing denied*).

[221] *Id.* at 359–60.

cannot be expected to hold back its economic weapons, including the strike."[222] There is no basis for the majority's view that courts may "pick and choose" status quo obligations. Thus, neither opinion can be squared with section 1113 or the RLA and both do violence to the bankruptcy and labor relations schemes.

III. SQUARING THE CIRCLE: THE PROPER ACCOMMODATION OF SECTION 1113 AND THE RLA

Application of section 1113 and the RLA in the case of contract rejection must begin from the fact that as the later and more specific enactment, section 1113 displaces the RLA's major dispute provisions when a debtor seeks to reject a CBA.[223] Congress established in section 1113 a mandatory and exclusive process for rejection of a CBA.[224] "The language of the statute indicates that Congress intended section 1113 to be the sole method by which a debtor could terminate or modify a collective bargaining agreement."[225] As the Second Circuit earlier concluded, Congress provided for a comprehensive bargaining process to balance federal labor and bankruptcy policies:

> Section 1113 governs the means by which a debtor may assume, reject or modify its collective bargaining agreement. 11 U.S.C. § 1113(a), (b) and (e) (1988). It ensures that the debtor attempt to negotiate with the union prior to seeking to terminate a collective bargaining agreement. § 1113(b). In the event such negotiations fail, it delineates the standard by which an application by the debtor to terminate the collective bargaining agreement is to be judged by

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[222] *Shore Line*, 396 U.S. at 155. The Second Circuit reached the same result. *See* Rutland Ry. Corp. v. Bhd. of Locomotive Eng'rs, 307 F.2d 21, 41 (2d Cir. 1962) *cert. denied*, 372 U.S. 954 (1963) ("If in fact the [carrier] has failed to take the steps required of it by the [RLA], it is not entitled to injunctive relief against the strike of its employees."); *see also* CSX Transp. Inc. v. United Transp. Union, 879 F.2d 990, 996 (2d Cir. 1989) (holding parties may resort to economic self-help only after parties fail to negotiate, mediate, and arbitrate and after a thirty-day cooling off period); Local 553 v. E. Air Lines, Inc., 695 F.2d 668, 674 (2d Cir. 1982) ("Once the parties have exhausted the Act's mediation process, however, either may resort to self-help by unilaterally changing working conditions or striking, as the case may be.").

[223] *See* Busic v. United States, 446 U.S. 398, 406 (1980); Greene v. United States, 79 F.3d 1348, 1355 (2d Cir. 1996).

[224] *See* ALPA v. Cont'l Airlines (*In re* Cont'l Airlines), 125 F.3d 120, 137 (3d Cir. 1997) ("The provision outlines the procedure that a debtor or appointed trustee must follow to successfully reject a collective bargaining agreement . . . ."); Shugrue v. ALPA (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 989–90 (2d Cir. 1990) ("The language of the statute indicates that Congress intended § 1113 to be the sole method by which a debtor could terminate or modify a CBA . . . ."); *In re* Kitty Hawk, Inc., 255 B.R. 428, 432 (Bankr. N.D. Tex. 2000) (stating section 113 "outlines an exclusive process by which a debtor may seek to modify or reject a collective bargaining agreement"); *In re* Alabama Symphony Ass'n, 155 B.R. 556, 571 (Bankr. N.D.Ala.1993) ("[N]o other provision of the Code may be used to allow a debtor to bypass the requirements of Section 1113.").

[225] *In re Ionosphere Clubs*, 922 F.2d at 989–90.

> the bankruptcy court and establishes a time frame in which this determination is to be made. 11 U.S.C. § 1113(c), (d) (1988).[226]

As the more recent and specific provision, the section 1113 process necessarily supplants the bargaining process mandated by the RLA. Section 1113 does not reference the RLA's major dispute provisions, and the section 1113 process is drastically different from the "almost interminable" RLA bargaining process.[227]

The conclusion is inescapable that Congress displaced the RLA process in section 1113. Indeed, in sections 1167 and 103(h) of the Code, Congress made clear that the section 1113 process, and not the RLA major dispute provisions, would govern when a bankrupt air carrier, as opposed to a bankrupt rail carrier, seeks rejection. Section 1167, in Subchapter IV of chapter 11, provides that "neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the [RLA] except in accordance with section 6 of such Act . . . ."[228] Under section 103(h), "Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad."[229]

Thus, a carrier availing itself of section 1113 is not barred by section 2 (Seventh) from implementing revised terms and conditions of employment as section 1113 does not incorporate the RLA's contract modification process. But because the status quo provisions of the RLA are reciprocal, "an *integrated, harmonious scheme* for preserving the status quo,"[230] there is no basis to apply only one part of that integrated scheme—section 2 (First)—to bar union self-help once the section 1113 process is exhausted either. When Congress chose to supplant the RLA bargaining process in airline bankruptcy—without imposing limits on the use of self-help once that mandatory bargaining process was exhausted and rejection approved—it eliminated any basis to enjoin labor self-help.

CONCLUSION

The Second Circuit's *AFA* decision is a 21st century return to the type of strike-breaking judicial legislation that led to the loss of public trust in the judiciary and the enactment of the sweeping provisions of the NLGA. Faced with the reciprocal nature of the RLA's status quo obligations, the majority created out of whole cloth the novel bankruptcy theory that a CBA is abrogated upon rejection under section 1113. By doing so it sought to shoehorn the case into the framework of its earlier

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[226] *Id.* at 989. *See* Century Brass Prods. Inc., v. Int'l Union (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 272 (2d Cir. 1986) (observing Congress undeniably overturned procedural prong of *Bildisco* when it enacted section 1113); Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 88 (2d Cir. 1987) (reaffirming *Century Brass* panel's discussion of section 1113's substantive requirements).

[227] Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142, 149 (1969).

[228] 11 U.S.C. § 1167 (2006).

[229] 11 U.S.C. § 103(h) (2006).

[230] *Shore Line*, 396 U.S. at 152.

decisions limiting the right to self-help prior to the negotiation of a first CBA.[231] The Court's unprecedented, "peculiar" holding in what it described as a "peculiar" corner of the law is inconsistent with the classical constructions of each of the three statutes at issue and should collapse from its own inconsistencies.[232]

[231] Nw. Airlines Corp. v. Assoc. of Flight Attendants (*In re* Nw. Airlines Corp.), 483 F.3d 160, 173 (2d Cir. 2007).

[232] *See id.* at 164.