

ABI 18th Annual Winter Leadership Conference

Management vs. Labor: The Collision of Bankruptcy and Labor Law and Policy¹

I. The Section 1113 “Score Card”

Section 1113 is designed to cause parties to reach agreement. In the vast majority of cases, it works as designed, and agreements are reached prior to a decision being rendered. But when parties cannot reach agreement and Courts are required to decide, who prevails in the reported² Section 1113 decisions and why?

A. Debtor Meets Section 1113 Standards and “Wins” (Approximately 30 Decisions³).

- *In re Delta Air Lines (Comair)*, — B.R. —, 2006 WL 2567757 (Bankr. S.D.N.Y. 2006).
- *In re Northwest Airlines Corp.*, 346 B.R. 307 (Bankr. S.D.N.Y. 2006).
- *In re US Airways, Inc.*, (Bankr. E.D. Va. January 6, 2005).
- *In re Ormet Corp.*, 316 B.R. 665 (Bankr. S.D. Ohio 2004), *appeal dismissed as moot*, 2005 WL 2000704 (S.D. Ohio Aug. 19, 2005).
- *In re Horizon Natural Res. Co.*, 316 B.R. 268 (Bankr. E.D. Ky. 2004), *appeal dismissed as moot*, 2005 WL 1972592 (E.D. Ky. Aug. 16, 2005).
- *In re Elec. Contracting Servs. Co.*, 305 B.R. 22 (Bankr. D. Colo. 2003).
- *In re Horsehead Indus., Inc.*, 300 B.R. 573 (Bankr. S.D.N.Y. 2003).
- *In re Nat’l Forge Co.*, 289 B.R. 803 (Bankr. W.D. Pa. 2003).
- *In re N. Am. Royalties, Inc.*, 276 B.R. 594 (Bankr. E.D. Tenn. 2002).

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² Of course, there is also a body of cases in which the issue has been addressed without a reported decision.

³ The word “approximately” is used because a number of cases involve a win followed by a loss on appeal (sometimes followed by a later win in bankruptcy court), or a loss followed by a later win in the bankruptcy court after correcting the problems that generated the loss, such that there is more than one reported outcome for a single employer/union situation. The wins and the losses are sometimes informative, however, even when superseded by the opposite outcome in the same case.

- *In re Bowen Enters., Inc.*, 196 B.R. 734 (Bankr. W.D. Pa. 1996).
- *In re Hoffman Bros. Packing Co.*, 173 B.R. 177 (B.A.P. 9th Cir. 1994).
- *In re Appletree Mkts., Inc.*, 155 B.R. 431 (S.D. Tex. 1993).
- *In re Maxwell Newspapers, Inc.*, 981 F.2d 85 (2d Cir. 1992).
- *In re Valley Steel Prods. Co.*, 142 B.R. 337 (Bankr. E.D. Mo. 1992).
- *In re Blue Diamond Coal Co.*, 131 B.R. 633 (Bankr. E.D. Tenn. 1991).
- *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., Local 1431 v. Gatke Corp.*, 151 B.R. 211 (N.D. Ind. 1991).
- *In re Ind. Grocery Co.*, 138 B.R. 40 (Bankr. S.D. Ind. 1990).
- *In re Big Sky Transp. Co.*, 104 B.R. 333 (Bankr. D. Mont. 1989).
- *In re Sierra Steel Corp.*, 88 B.R. 337 (Bankr. D. Colo. 1988).
- *In re Royal Composing Room, Inc.*, 848 F.2d 345 (2d Cir. 1988).
- *In re Tex. Sheet Metals, Inc.*, 90 B.R. 260 (Bankr. S.D. Tex. 1988).
- *In re Sol-Sieff Produce Co.*, 82 B.R. 787 (Bankr. W.D. Pa. 1988).
- *In re Landmark Hotel & Casino, Inc.*, 78 B.R. 575 (B.A.P. 9th Cir. 1987) (affirming bankruptcy court's grant of interim relief as a "compromise" solution in lieu of approving or denying the debtor's application for rejection), *appeal dismissed*, 872 F.2d 857 (9th Cir. 1989).
- *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847 (Bankr. N.D. Ohio 1987).
- *Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82 (2d Cir. 1987).
- *In re Walway Co.*, 69 B.R. 967 (Bankr. E.D. Mich. 1987).
- *In re Century Brass Prods., Inc.*, 55 B.R. 712 (D. Conn. 1985), *rev'd*, 795 F.2d 265 (2d Cir. 1986).
- *In re Ky. Truck Sales, Inc.*, 52 B.R. 797 (Bankr. W.D. Ky. 1985).
- *In re Salt Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985).
- *In re Allied Delivery Sys. Co.*, 49 B.R. 700 (Bankr. N.D. Ohio 1985).

B. Union “Wins” (Approximately 21 Decisions).

- *Ass’n of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc.*, — B.R. —, 2006 WL 2739046 (D. Minn. 2006): The court concluded that “[i]n order to meet the requirement of good faith bargaining under Section 1113, a debtor must at least consider the possibility of including a snap-back provision in its proposals” and that Mesaba failed to meet the Section 1113 standards by “wholly refusing to negotiate regarding snapbacks.” Additionally, the district court remanded for the bankruptcy court to evaluate the effects of the debtor’s proposal on its sole shareholder and to determine whether all parties were treated fairly and equitably. (Further bankruptcy court ruling pending at time of publication.)
- *In re Delta Air Lines (Comair)*, 342 B.R. 685 (Bankr. S.D.N.Y. 2006): The court concluded that the debtor failed to confer in good faith because its proposed modifications included a non-negotiable request for labor cost reductions that the court said represented a minor element of the reorganization budget and was not necessary to reorganization. The court also concluded that the proposal did not ensure that affected parties were treated fairly and equitably among employee groups; the flight attendants’ union thus had good cause to refuse the proposed modifications and the balance of the equities did not clearly favor rejection. (But Comair returned to bankruptcy court and prevailed in second rejection motion.)
- *In re Nat’l Forge Co.*, 279 B.R. 493 (Bankr. W.D. Pa. 2002): The court held that because the debtor failed to present sufficient information regarding the “ultimate amount of concession to be made by retirees,” it did not meet its burden of proving that the proposed modifications were fair and equitable. Additionally, “[s]ince it is impossible to determine whether the Debtor’s proposal is fair and equitable as to the concessions sought from retirees, the Union had good cause to reject the proposal.”
- *In re Jefley, Inc.*, 219 B.R. 88 (Bankr. E.D. Pa. 1998): Where under the debtor’s proposal management employees continued to receive annual salaries of \$350,000 and significant fringe benefits, the court concluded “that the proposal, as presented, is not ‘necessary’ to the Debtor’s reorganization; does not treat the union workers ‘fairly and equitably;’ that the union therefore had good cause to refuse the proposal; and that the balance of the equities does not favor rejection.”
- *In re Ala. Symphony Ass’n*, 211 B.R. 65 (N.D. Ala. 1996): The court concluded that § 1113 “precludes the rejection of the contract by the Symphony in this case, since it impermissibly stopped performing its obligations under the CBA prior to seeking court permission to do so.”
- *In re Liberty Cab & Limousine Co.*, 194 B.R. 770 (Bankr. E.D. Pa. 1996): The court declined to allow modification of the CBA because it concluded that the debtor’s proposal was not fair and equitable as it did not include

reduction of administrative and dispatch employees' wages and because "the most meaningful financial and statistical information available was apparently not furnished to the Union in advance of the parties post petition bargaining session." The court also expressed concern that the parties had not discussed potential future restoration of foregone wages and/or benefits.

- *In re Lady H Coal Co.*, 193 B.R. 233 (Bankr. S.D. W. Va. 1996): The court concluded that the debtor failed to treat all parties fairly and equitably because it did not notify creditors or seek their approval before engaging a broker to conduct sale negotiations and because the negotiated sale included large future compensation agreements for the debtor's corporate officers. Additionally, "the Debtors could not have bargained in good faith as the Debtors were, prior to any negotiations with the union, locked into at an agreement where the purchaser was not assuming the [debtor's wage agreement with the union]."
- *In re Schauer Mfg. Corp.*, 145 B.R. 32 (Bankr. S.D. Ohio 1992): The court concluded that the debtor "has failed to show that the Proposal which it made to the Union makes 'necessary modifications . . . that are necessary to permit the reorganization of the debtor . . . ,' and, further, has failed to provide the Union with relevant information necessary to evaluate the Proposal."
- *In re Sun Glo Coal Co.*, 144 B.R. 58 (Bankr. E.D. Ky. 1992): The court concluded that "the debtors have failed to sufficiently quantify the results of such proposed changes to allow this Court to find that they are 'necessary' to the reorganization of the debtors."
- *In re GCI, Inc.*, 131 B.R. 685 (Bankr. N.D. Ind. 1991): The court held that the debtor failed to negotiate in good faith because it laid off employees, then recalled them without regard to seniority, in violation of the CBA.
- *In re George Cindrich Gen. Contracting, Inc.*, 130 B.R. 20 (Bankr. W.D. Pa. 1991): The court concluded that the debtor "did not provide sufficient information to enable union to determine whether the specific concessions sought by debtor were reasonable or necessary."
- *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639 (Bankr. N.D. Iowa 1991): *The court* concluded that the debtor failed to prove that the proposed CBA modification, under which only *union* employees would receive reduced health benefits, (1) contained modifications "necessary" to permit reorganization or (2) assured that all creditors, the debtor, and all affected parties were treated fairly and equitably.
- *In re Express Freight Lines, Inc.*, 119 B.R. 1006 (Bankr. E.D. Wis. 1990): The court held that the debtor's proposal to reject the CBA contained modifications which were not necessary to reorganization, such as changes

to the grievance procedure. Additionally, it held that the proposal was not fair and equitable to all concerned, since although “[g]enerous raises are projected for the near future for management, presuming, of course, that projected revenues are met,” “the debtor rejected the union’s counter proposal for a profit sharing plan if anticipated profits are realized.”

- *In re Ind. Grocery Co.*, 136 B.R. 182 (Bankr. S.D. Ind. 1990): The court held that the debtor “has not borne its burden of proof that it is fair and equitable to ask for wage cuts of up to 20% from [union] members, many of whom make less per year than [the CFO’s yearly] bonus, while top management takes no reduction.”
- *In re William P. Brogna and Co.*, 64 B.R. 390 (Bankr. E.D. Pa. 1986): The court held that “The debtor’s proposal contains numerous provisions which are non-economic in nature and which we find and conclude are not necessary to prevent the liquidation of the debtor.” The court further held that the proposal was not fair and equitable because although “the debtor has proposed to pay all creditors 100% of their claims within three (3) years after confirmation[,] . . . its proposal does not contain any type of ‘snap-back’ clause or other provision which would inure to the benefit of union employees to compensate fairly and equitably over time for the present cut in wages (41%) and fringe benefits (38%) contained in the debtor’s proposal.”
- *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074 (3d Cir. 1986): The Third Circuit reversed the bankruptcy court’s grant of CBA rejection because the bankruptcy court failed to consider the absence of a “snap back” provision that could compensate employees for their concessions in determining whether the proposed modifications both were necessary and treated all parties fairly and equitably.
- *In re Cook United, Inc.*, 50 B.R. 561 (Bankr. N.D. Ohio 1985): The court held that the debtor failed to show that its proposed CBA modifications were necessary to permit reorganization because even without the anticipated labor savings, the debtor’s operating plan would still show a large positive cash flow. Additionally, the proposal was not fair and equitable because “the impact of rejection upon the employees is out of proportion to the hardship imposed upon the debtors, creditors and [the union] by affirmance of the collective bargaining agreement.”
- *In re Valley Kitchens, Inc.*, 52 B.R. 493 (Bankr. S.D. Ohio 1985): The court held that the debtor failed to satisfy the requirement that the proposal deal only with modifications necessary to permit reorganization because “[t]here were nine subjects dealt with in the proposal given by debtor to the Union, but of these only four had savings for the debtor directly attributed to them.”

- *In re Fiber Glass Indus., Inc.*, 49 B.R. 202 (Bankr. N.D.N.Y. 1985): The court held that the debtor had failed to give the union relevant information, including the “anticipated possibility or probability . . . that one-third of the Union work force would have to be laid off,” and failed to show how its proposed reductions were necessary to reorganization.
- *In re K & B Mounting, Inc.*, 50 B.R. 460 (Bankr. N.D. Ind. 1985): The court concluded that “the debtor did not substantiate its proposal with ‘relevant’ information selected from ‘the most complete and reliable information available’” and that the proposal did not assure that all creditors and affected parties were treated fairly and equitably because “[t]he debtor has not shown that its proposal requires all parties directly affected—management, nonunion employees, suppliers as well as unionized workers—to sacrifice to a similar degree.”
- *In re Am. Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984): The court held that the debtor failed to show that the proposed CBA modifications were necessary where “the savings under the debtor’s proposal amounts to approximately 2% of the debtor’s monthly operating expenses” and where the CBA was scheduled to expire in eight months. Additionally, the court concluded that the debtor had failed to confer in good faith, as “the debtor’s attempts to confer were perfunctory only and meant only to literally meet the requirements of the statute,” even though the union indicated a willingness to confer.

C. On What Grounds Do Debtors Commonly Lose Section 1113 Motions?

1. Failure to provide sufficient information.
2. Refusal to negotiate certain issues/bargain in good faith.
3. Failure to meet “fair and equitable” standard in context of sacrifices made by others.
4. Failure to meet “necessary” standard/request “unnecessary” changes.
5. Other miscellaneous grounds.

II. The Strike Injunction Issue

After a debtor prevails in a Section 1113 case, and the union threatens a strike, can the debtor successfully enjoin the strike?

- A. One Case Addresses Substantively the Right to Enjoin a Strike after Contract Rejection under Section 1113 – but Substantive Basis for Injunction is Railway Labor Act, not Bankruptcy Code.
- *Northwest Airlines Corp. v. Ass’n of Flight Attendants (In re Northwest Airlines Corp.)*, 2006 U.S. Dist. LEXIS 65627 (S.D.N.Y. Sept. 14, 2006) (granting request for an injunction under Railway Labor Act to prevent a threatened strike).
- B. One Case Addresses Substantively the Right to Enjoin a Strike after Contract Rejection under Section 365.
- *Briggs Transp. Co. v. Int’l Bhd. Of Teamsters*, 739 F.2d 341 (8th Cir. 1984) (rejecting request for injunctive relief in an NLRA case based on the NLGA’s protection of right to strike).
- C. Two Cases Address Substantively the Right to Enjoin a Strike in Bankruptcy Not Connected with Contract Rejection.
- *Int’l Ass’n of Machinists & Aerospace Workers v. Eastern Air Lines*, 121 B.R. 428, 438 (S.D.N.Y. 1990) (vacating the court’s order for injunctive relief on the grounds that the union had exhausted the RLA’s negotiation procedures, the airline violated portions of the NLGA by not having “clean hands” and the strike had been lawfully commenced pre-bankruptcy).
 - *In re Petrusch*, 667 F.2d 297 (2d F.2d 1981) (affirming the district court’s decision that the bankruptcy court, because of the NLGA, was without jurisdiction to issue an injunction restraining the picketing labor union during a labor dispute under the NLRA) (not a contract rejection case).
- D. Many Cases Mention the Issue in Dicta without Discussing it Substantively.
- *In re Horsehead Indus., Inc.*, 300 B.R. 573, 587 (Bankr. S.D.N.Y. 2003) (granting the motion to reject the collective bargaining agreement but noting that “[a] strike is an inherent risk in every § 1113 motion ...”).
 - *In re Mile Hi Metal Sys. Inc.*, 899 F.2d 887, 893 n.10 (10th Cir. 1990) (discussing rejection of collective bargaining agreements and commenting that “[a]nother safeguard against overreaching is the fact that rejection of a collective bargaining agreement could give rise to a strike or other labor action which would actually decrease the likelihood of a successful reorganization”).
 - *In re Garofalo’s Fine Foods, Inc.*, 117 B.R. 363, 371 (Bankr. D. Ill. 1990) (discussing that “[c]ourts have utilized various factors in the analysis under section 1113” and noting one factor as “whether the employees would react to rejection by striking”).

- *Truck Drivers Local 807 v. Carey Transp.*, 816 F.2d 82, 93 (2d Cir. 1987) (upholding rejection of a collective bargaining agreement, in doing so, discussing the factors that must be weighed in balancing the equities and considering whether to allow the rejection of a collective bargaining agreement and including one factor as “the likelihood and consequences of a strike if the bargaining agreement is voided”).
- *In re Royal Composing Room, Inc.*, 62 B.R. 403, 405 (Bankr. S.D.N.Y. 1986), *aff’d*, 78 B.R. 671 (S.D.N.Y. 1987), *aff’d*, 848 F.2d 345 (2d Cir. 1988) (“If the changes this Debtor imposes after rejection are unacceptable, the employees are free to resign or strike.”).
- *In re Evans Prods. Co.*, 55 B.R. 231, 234 (Bankr. S.D. Fla. 1985) (allowing the debtor to make changes in the collective bargaining agreement while providing that the union might have the right to call a strike if the employer rejected its collective bargaining agreement).
- *In re Kentucky Track Sales, Inc.*, 52 B.R. 797, 806 (Bankr. W.D. Ky. 1985) (allowing the rejection of a collective bargaining agreement and commenting that “the employees retain the right to strike as their ultimate bargaining tool”).

E. Possible Bankruptcy Code Based Theories to Support a Debtor’s Right to Enjoin a Strike Are Largely Untested.

1. Sections 105/1113/Special Facts and Circumstances.
2. Sections 105/1113/362.
3. To what extent does the Norris LaGuardia Act prevent a bankruptcy court from protecting a debtor’s exercise of rights under Section 1113 or 362?
4. Section 105 injunctions have been entered in a variety of cases to protect debtors’ rights under other provisions of the Bankruptcy Code.
 - *Mirant Corp. v. Potomac Elec. Power (In re Mirant Corp.)*, 299 B.R. 152 (Bankr. N.D. Tex. 2003) (injunction to protect Section 365 right to reject regulated energy contract).
 - *Bessette v. Avco Fin. Servs.*, 230 F.3d 439 (1st Cir. R.I. 2000) (enforcing the discharge injunction imposed by section 524 and holding the court has statutory contempt powers to remedy a violation of section 524). *But see Petuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422 (6th Cir. 2000).
 - *In re Johns-Manville Corp.*, 33 B.R. 254, 263 (Bankr. S.D. N.Y. 1983) *aff’d in part*, 40 B.R. 219 (S.D.N.Y. 1984), *rev’d in part on other grounds*, 41 B.R. 926 (S.D.N.Y. 1984) (protecting the

debtor's rights under section 362 and granting an extension of the automatic stay to enjoin certain proceedings which "would frustrate the statutory scheme embodied in Chapter 11 or diminish [the debtor's] ability to formulate a plan of reorganization").

- *In re Hunt*, 93 B.R. 484 (Bankr. N.D. Tx. 1988) (protecting the debtor's reorganization efforts by enjoining a federal agency from pursuing an action against the debtor to impose penalties because the distraction of the agency proceeding could interfere with the debtor's reorganization effort).
- *Roso-Lino Beverage Distribs. v. Coca-Cola Bottling Co. of New York, Inc.*, 749 F.2d 124 (2d Cir. 1984) (granting distributor's motion for preliminary injunction to prevent bottling company from terminating distributorship and directing parties to arbitrate pursuant to distributorship agreement).

III. Practical Issues in Managing the Section 1113 Case.

- A. How will the debtor make the record that it has provided the required information?
1. Meetings logs.
 2. Information logs.
 3. Single point of contact for information requests.
 4. File of incoming requests and all responses.
 5. Rulings on information requests if necessary--this is not traditional discovery; the information burden is on the debtor.
- B. How will the debtor make the record that all affected parties are treated fairly and equitably?
1. Effects on other employee groups, including management and non-unionized employees.
 2. Comparative attrition rates.
 3. Effects on retirees and participants in pension plans with vested benefits.
 4. Effects of on vendors and other creditors.
 5. Effects on equity holders.
- C. What is the "measuring date" for the Section 1113 conduct?

1. Case law supporting a measuring date "before the hearing."
 2. Cutoff date during hearing.
 3. Last day of hearing.
 4. Post-hearing.
- D. Factors to Consider regarding measuring date.
1. Impact of measuring date on likelihood and timing of consensual agreement.
 2. Procedural and evidentiary issues re handling hearing/testimony/cross-examination/rebuttal case/supplemental case.
- E. Consideration of "procedural order" setting rules of road either early in process or before commencement of hearing.
1. Do you want more certainty or maximum flexibility on matters of process?
 2. Can you fairly assess what procedures best meet your needs and interests early in the process?
- F. Scope of relief.
1. Authorization to reject.
 2. Immediate "bare rejection."
 3. Authorization/rejection subject to terms and conditions of implementation.
- G. Use of Section 1113(e) to help reach permanent agreements.
1. Positive or negative impact on reaching a permanent agreement.
 2. Effect of 1113(e) relief on timing of overall process.
 3. Meeting the 1113(e) standards.
- H. Combination of multiple 1113 motions in single hearing.
1. Common legal standard.
 2. Fair and equitable.
 3. "Necessary" standard as applied to overall package of labor "asks."

4. Increase duration and potential complexity of case.
5. Bifurcation (common economic case/separate issue-specific hearings).

IV. Other Bankruptcy Issues Sometimes Affected by Section 1113 Proceedings

- A. Section 363 -- sales free and clear of labor contracts?
- B. Forum for determination of applicability of successorship clause?
- C. Executive compensation and management retention programs.
- D. Rejection damage claims/sharing in plan currency.
- E. Corporate control provisions.
- F. Waivers of Section 1113 rights?
- G. Union membership on creditor committees.

SUPPLEMENTAL MATERIALS

I. Bankruptcy Code Section 1113 -- Rejection of Collective Bargaining Agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)

(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)

(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may

extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) 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.

II. Rejection "Tests"

- A. The court in *In re Am. Provision Co.*, 44 B.R. 907, 908 (Bankr. D. Minn. 1984), established a nine-part test to determine whether a collective bargaining agreement (CBA) may be rejected under § 1113:
1. The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.
 2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
 3. The proposed modifications must be necessary to permit the reorganization of the debtor.
 4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.

5. The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.
 6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union.
 7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
 8. The Union must have refused to accept the proposal without good cause.
 9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.
- B. Many courts in various jurisdictions have applied the nine-part *American Provision* test. See, e.g., *In re Family Snacks, Inc.*, 257 B.R. 884 (B.A.P. 8th Cir. 2001); *In re Appletree Mkts., Inc.*, 155 B.R. 431 (S.D. Tex. 1993); *In re Elec. Contracting Servs. Co.*, 305 B.R. 22 (Bankr. D. Colo. 2003); *In re Nat'l Forge Co.*, 289 B.R. 803 (Bankr. W.D. Pa. 2003); *In re Blue Diamond Coal Co.*, 131 B.R. 633 (Bankr. E.D. Tenn. 1991); *In re Ind. Grocery Co.*, 138 B.R. 40 (Bankr. S.D. Ind. 1990); *In re Big Sky Transp. Co.*, 104 B.R. 333 (Bankr. D. Mont. 1989); *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847 (Bankr. N.D. Ohio 1987); *In re Salt Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985).
- C. Some courts combine factors 1, 2, and 5 from the *American Provision* analysis, resulting in a seven-part analysis. See, e.g., *In re Carey Transp., Inc.*, 50 B.R. 203, 207 (Bankr. S.D.N.Y. 1985), *aff'd sub nom Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82 (2d Cir. 1987).
- D. Some courts have foregone use of a so-called “test” and instead simply relied on the text of Section 1113(c).
1. “Although the Court has reviewed th[e *American Provision*] nine-part test and believes each of the elements would be met here, the Court is not adopting such a test for its consideration. Rather, the Court will look to the statutory requirements set forth in § 1113(c).” *In re Ormet Corp.*, 316 B.R. 665, 669 (Bankr. S.D. Ohio 2004).⁴
 2. “This court eschews the talismanic nine-step analysis [used in *American Provision*] Instead, this court looks to the three interdependent findings required by Code § 1113(c).” *In re Royal Composing Room, Inc.* 62 B.R. 403, 406 (Bankr. S.D.N.Y. 1986).

⁴ See also *In re Ky. Truck Sales, Inc.*, 52 B.R. 797, 800 (Bankr. W.D. Ky. 1985) (mapping each of the nine *American Provision* elements to a corresponding portion of § 1113(b) or (c)).

III. Courts Have Disagreed as to what the Term “Necessary” in § 1113(b) Means

- A. In *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1088 (3d Cir. 1986), the court concluded that Congress intended the word necessary to be construed strictly, such as “essential” to “prevent liquidation.” *Accord In re Sol-Sieff Produce Co.*, 82 B.R. 787, 792 (Bankr. D. Pa. 1988); *In re William P. Brogna & Co.*, 64 B.R. 390, 392 (Bankr. E.D. Pa. 1986)
- B. The Second Circuit, in *Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82, 89–90 (2d Cir. 1987) rejected the Third Circuit’s approach. It concluded instead that “‘necessary’ should not be equated with ‘essential’ or bare minimum.” Rather, “the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully.” *Accord In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 892–92 (10th Cir. 1990); *In re Royal Composing Room, Inc.*, 848 F.2d 345, 350 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Ass’n of Flight Attendants-CWA, v. Mesaba Aviation, Inc.*, -- B.R. --, 2006 WL 2739046 (D. Minn. 2006); *In re Appletree Mkts., Inc.*, 155 B.R. 431, 441 (S.D. Tex. 1993); *Int’l Union, etc. Local 1431 v. Gatke Corp.*, 151 B.R. 211, 213 (N.D. Ind. 1991); *In re Horsehead Indus.*, 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003); *In re Valley Steel Products Co.*, 142 B.R. 337, 341 (Bankr. E.D. Mo. 1992); *In re Maxwell Newspapers, Inc.*, 146 B.R. 920, 930 (Bankr. S.D.N.Y. 1992) *aff’d in part and rev’d in part*, 149 Bankr. 334 (S.D.N.Y.), *aff’d in part and rev’d in part*, 981 F.2d 85 (2d Cir. 1992); *In re Sun Glo Coal Co.*, 144 B.R. 58, 63 (Bankr. E.D. Ky. 1992); *In re Amherst Sparkle Market, Inc.*, 75 B.R. 847, 851 (Bankr. N.D. Ohio 1987)
- C. The following cases examined the differing definitions of “necessary” but declined to take a position given the facts presented. *See In re Speco Corp.*, 195 B.R. 674, 679 (Bankr. S.D. Ohio 1996); *In re Texas Sheet Metals, Inc.*, 90 B.R. 260, 268 (Bankr. S. D. Tex. 1988).