

January 27, 2016

Bankruptcy Code acts to trump National Labor Relations Act

By Michael R. Lied

Michael R. Lied, of Howard & Howard Attorneys PLLC, has practiced employment, labor and immigration law for more than 30 years. A frequent author and lecturer on these subjects, he is former chair of the Illinois State Bar Federal Civil Practice Section Council and Employment Law Section Council. He can be reached at mlied@howardandhoward.com and 309-999-6311.

A recent case from the 3rd U.S. Circuit Court of Appeals presented a question of first impression among the federal appeals courts: Is a Chapter 11 debtor-employer able to reject the continuing terms and conditions of a collective bargaining agreement under Bankruptcy Code's Section 1113 after the labor contract has expired?

By way of background, under the National Labor Relations Act, an employer must generally maintain the terms of a collective bargaining agreement after it expires until a new agreement is negotiated or until the parties reach a bargaining impasse.

The debtors in *In re Trump Entertainment Resorts*, 2016 WL 191926 (3rd Cir. 2016) own and operate the Trump Taj Mahal Casino in Atlantic City, N.J., which has 2,953 employees. The union — UNITE HERE Local 54 — is the largest of the employee unions, representing 1,136 employees.

The most recent collective bargaining agreement between the union and Taj Mahal was negotiated in 2011 for a three-year term. It contained a duration provision that provided: "The collective bargaining agreement shall remain in effect until 11:59 p.m. on Sept. 14, 2014, and shall continue in full force and effect from year to year thereafter, unless either party serves 60 days written notice of its intention to terminate, modify or amend the collective bargaining agreement."

On March 7, 2014, the debtors gave the union notice of their "intention to terminate, modify or amend" the labor agreement and asked the union to begin negotiations for a new agreement. The union failed to respond. On April 10, the debtors followed up on their request. On April 30, the union responded that while it was anxious to commence bargaining, it was not ready to begin some five months before contract expiration. The union said it would contact the debtors within the next several months.

On Aug. 20, at the debtors' request, the union met with the debtors to discuss terms for a new agreement. Although the debtors emphasized their critical financial situation, the union was not receptive to negotiations.

On Aug. 28, the debtors proposed modifications to the agreement, including replacing the pension contributions with a 401(k) program and replacing the health and welfare program with subsidized coverage under the Affordable Care Act.

The union responded that it was prepared to work with the debtors on pensions, but not on the health and welfare proposal. No agreement was reached.

On Sept. 9, the debtors filed for Chapter 11 bankruptcy protection. On Sept. 11, the debtors asked the union to extend the term of the labor agreement, but the union refused, unless the debtors agreed to terminate the extension upon the filing of a Section 1113 motion. With no new agreement in place and with the debtors having served notice to modify the agreement, the agreement expired on Sept. 14.

On Sept. 17, the debtors sent the union a proposal with supporting documentation to demonstrate the debtors' dire financial condition and requested to meet within the next seven days. The union proposed to meet on Sept. 24 for a first bargaining session. After the Sept. 24 meeting, the union requested additional information, which the debtors promptly provided. Two days later, the union sent a counterproposal to the debtors, which consisted largely of more information requests.

On Sept. 26, the debtors filed a motion pursuant to the Bankruptcy Code's Section 1113 seeking to reject the labor pact and implement the terms of the debtors' last proposal to the union. The debtors asserted that rejection of the agreement was necessary to their reorganization based on a three-part business plan, which anticipated concessions from the first lien lenders, local and state authorities and the union.

The bankruptcy court granted the debtors' motion to reject the expired labor agreement and authorized the debtors to implement their last proposal.

Having decided that Section 1113 encompasses the expired labor agreement, the bankruptcy court determined that the debtors satisfied the requirements of Section 1113. Specifically, the court found that the debtors' proposal provided for those necessary modifications that are necessary to permit the reorganization of the debtor, that the union rejected the proposal without good cause and that the balance of the equities clearly favored rejection of the labor agreement.

The bankruptcy court noted that the debtors would be forced to close the casino and liquidate if the requested relief were not granted. The bankruptcy court also expressed concern that while the debtors were imploring the union to engage with them in discussions, offering to meet "24/7," the union was picketing, spreading misinformation and, most egregiously, communicating with customers who had scheduled conferences at the casino to urge them to take their business elsewhere. It was clear to the bankruptcy court that the union was not focusing its efforts on negotiating to reach agreement with debtors.

On appeal, the union challenged whether a bankruptcy court may grant a motion to reject an expired bargaining agreement under Section 1113.

According to the appeals court, Section 1113 balances the concerns of economically stressed debtors in avoiding liquidation with the unions' goals of preserving labor agreements and maintaining influence in the reorganization process. Section 1113 prescribes strict procedural and substantive requirements before a labor agreement can be rejected.

Specifically, before the bankruptcy court will consider an application to reject, the debtor must make a proposal, provide relevant information, meet at reasonable times and confer in good faith. The debtor's modifications must be "necessary" to permit reorganization and must treat all creditors, the debtor and all affected parties "fairly and equitably." The balance of equities must "clearly favor" rejection of the agreement.

By requiring compliance with the stringent provisions of Section 1113, Congress sought to ensure that, when the NLRA yields to the Bankruptcy Code, it does so only for reasons that will permit the debtor to stay in business.

Here, the first lien secured creditor made it clear that it would perform only if the labor agreement and tax relief contingencies were achieved because the business could not succeed without the relief. A successful reorganization, therefore, depended on the rejection of terms that the debtors would otherwise be required to maintain under the National Labor Relations Act.

The court also reasoned that to hold that a debtor may reject the expired agreement — or its continuing obligations as defined by the expired agreement — was also consistent with the purpose of the Bankruptcy Code, which gives debtors latitude to restructure their affairs.

A Chapter 11 reorganization provides a debtor with an opportunity to reduce or extend its debts so its business can achieve long-term viability, for instance, by generating profits that will compensate creditors for some or all of any losses resulting from the bankruptcy. Congress has recognized that it is more economically efficient to reorganize rather than to liquidate because this preserves jobs and assets.

As the bankruptcy court recognized, in many cases, time is the enemy of a successful restructuring, and the Section 1113 rejection process is a much quicker process than the relatively protracted process contemplated by the NLRA.

A contrary holding — that Section 1113 does not allow a debtor to reject expired bargaining agreements or its ongoing obligations — would impede the overriding goal of keeping the business operating.

Whether by force of contract or by operation of the NLRA, the debtors here were bound by the key terms of the expired agreement. But those terms burdened the estate and precluded a successful reorganization.

In the 3rd Circuit's view, just because the debtors filed the Section 1113 motion one week after the agreement expired, they should not be bound by the expired agreement's burdensome terms until the parties negotiate around the impasse. The union's interpretation of the statute would undercut the rehabilitative function of Chapter 11.

The appeals court, thus, affirmed the judgment of the bankruptcy court.

©2016 by Law Bulletin Publishing Company. Content on this site is protected by the copyright laws of the United States. The copyright laws prohibit any copying, redistributing, or retransmitting of any copyright-protected material. The content is NOT WARRANTED as to quality, accuracy or completeness, but is believed to be accurate at the time of compilation. Websites for other organizations are referenced at this site; however, the Law Bulletin does not endorse or imply endorsement as to the content of these websites. By using this site you agree to the [Terms, Conditions and Disclaimer](#). Law Bulletin Publishing Company values its customers and has a [Privacy Policy](#) for users of this website.