

Sec. 1113 of the United States Bankruptcy Code, 11 U.S.C. Section 1113

Sec. 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.

Section 1113 (cont.)

(d)(1) Upon the filing of an application for rejection the court shall **schedule a hearing** to be held **not later than fourteen (14) 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 (10) 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 (7) 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 (30) 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.

Sec. 1113 Provides for Both Interim Changes
and Permanent Rejection of a Collective
Bargaining Agreement

- **Sec. 1113(e): Interim Contract Changes**
- **Sec. 1113(c): Permanent Contract Rejection**

Sec. 1113(e) Interim Contract Changes

Sec. 1113(e)

(e) If during a period when the collective bargaining agreement continues in effect, and **if [1] essential to the continuation of the debtor's business, or [2] 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.

- Court may authorize company to “implement **interim changes** to terms, conditions, wages, benefits or work rules provided by collective bargaining agreement.”
- Such changes may be implemented “after **notice** and hearing”
- “Any **hearing**... shall be **scheduled in accordance with the needs of the trustee**”
- Changes may be authorized if **either**
 - “**Essential to the continuation** of the debtor’s business”; **or**
 - “In order to avoid **irreparable damage** to the estate.”

Motion for Interim Relief Can be Filed Immediately and
Hearing Held on Short Notice.

“Any hearing [on a motion for interim changes] shall be scheduled in accordance with the needs of the trustee [meaning the company].” Sec. 1113(e).

Interim Changes May be Authorized Prior to Filing a Formal Application to Reject

Company may move for authorization to impose interim changes prior to filing an application to reject under Section 1113 (c). Beckley Coal Mining Co. v. United Mine Workers, 98 Bankr. 690 (D.Del. 1988); In re Salt Creek Freight ways, 46 B.R. 347, 348 (Bk. D.Wyo. 1985).

Standard for Grant of Interim Changes

Disjunctive Test: Interim changes can be authorized “**if** [1] essential to the continuation of the debtor's business, **or** [2] in order to avoid irreparable damage to the estate.” Sec. 1113(e)

“There is a difference between the continuation of the debtor’s business and irreparable damage to the estate. The Section 1113 (e) evidentiary standards are in the **disjunctive** Therefore, a debtor need only meet one of the statutory standards without having met the other.” In re United Press International, 134 BR 507 (Bk. S.D. NY 1991)

In UAL Corp. bankruptcy the Court found **both prongs** of this test were met in **imposing interim changes on IAM represented mechanics**. In re UAL Corp., Case No. 02-B-48191 slip opinion (Bk. N.D. Ill. Jan. 10, 2003)

Interim Changes are Temporary Pending Court Ruling on
Application to Reject.

Most courts hold that interim changes should be **temporary** and of **limited duration** and “**is available only until the hearing process [under Section 1113 (c)] is completed** – normally within two months.” Carey, supra, 816 F.2d at 89-90.

However, some courts have granted interim relief extending **longer than two months** and have also granted **repeated extensions**. See, e.g., Landmark Hotel and Casino, Inc., 78 B.R. 575 (9th Cir. BAP 1987)

Interim Change Orders May Not be Appealable

Majority of Courts hold that when an **application to reject is pending**, such that the interim changes will necessarily be of limited duration, an order authorizing interim changes is **not appealable**. See In re Landmark Hotel & Casino, 872 F.2d 857, 858-60 (9th Cir. 1989).

But, One court has held that an order authorizing interim changes under Section 1113 (e) is appealable **when** the changes were of **unlimited duration** and there was **no pending application** to reject, see In re Ionosphere Clubs, Inc., 139 Bankr. 772, 780-81 (S.D. N.Y. 1992).

Summary Sec. 1113 (c) Contract Rejection Procedures

I. Before filing Application to Reject:

- Step 1: Proposal for necessary contract modifications
- Step 2: Provide relevant information -
 - On which proposal based
 - Necessary to evaluate proposal
- Step 3: Meet at reasonable times in good faith
 - Obligation to meet continues after application filed through hearing

II. Filing of Application through Court Hearing

- Step 4: File application to reject
- Step 5: Notice of hearing *at least* -
 - 10 days before hearing
- Step 6: Court Hearing *no later than* -
 - 14 days after filing of application
 - Extension limited to 7 days unless parties agree
- Step 7: Court Ruling *within* -
 - 30 days after commencement of hearing
 - If no ruling changes implemented pending ruling

Nine Point Test for Contract Rejection

The Bankruptcy Courts have generally read Sec. 1113 to set forth nine (9) requirements which must be met for the court to approve rejection of a collective bargaining agreement. As stated in the lead case of In re American Provision Co., 44 B.R. 907, 909 (Bk.D.Minn 1984), those nine requirements are as follows:

- “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.”

Sec. 1113(c) Procedural Timeline for Contract Rejection

I. Before filing an Application to Reject a Collective Bargaining Agreement (“CBA”) the Company must:

Step 1: Make a **Proposal** for necessary contract modifications

Step 2: Provide the Union “with such **Relevant Information** as is necessary to evaluate the proposal”

Step 1:
Make Proposal for Contract Modifications
Which Must:

1. Be “**based on the most complete and reliable information available** at the time of such proposal” Sec.1113(b)(1)(A).
2. Provide for “those **necessary modifications** in employee benefits and protections that are **necessary** to permit the reorganization of the debtor” Id.
3. “Assures that all creditors, the debtor and all affected parties are treated **fairly and equitably**” Id.

1. What is “Complete and Reliable Information”?

- With the Proposal Company Must Provide the Information on Which Proposal Based, which is “the most complete and reliable information available at the time the proposal is made.” Sec.1113(b)(1)(A).
- At Step 2 also Required to Provide Information to “Necessary to Evaluate” Proposal (Discussed Later)

2. What are “Necessary Modifications”?

- 3d Circuit View:
 - The “**bare minimum**” or “**essential**” modifications necessary to prevent the debtor’s liquidation in the short-term. See Wheeling-Pittsburg Steel Corp v. Steel Workers, 791 F.2d 1074 (3rd Cir. 1986.)
- 2d Circuit View:
 - Those modifications “**designed to permit a successful reorganization**” in the long-term.
 - Proposal must contain “**necessary but not absolutely minimal changes that will enable the debtor to complete the reorganization process successfully.**”
 - **Applied by Courts in Texas:** See In re Appletree Markets, 155 B.R. 431, 144 LRRM 2203 (S.D.Tex 1993), *citing*, Truck Drivers 807 v. Carey Transportation Co., 816 F.2d 82, 88-89 (2nd Cir. 1987).
- Even Changes to **Non-Economic Terms** may be “Necessary.” The Court must “**focus on the total impact of the changes in the debtor’s ability to reorganize, not on whether any single proposed change will achieve that result**” In re Appletree Markets, *supra*, 155 B.R. at 441. But see, In re Mile Hi Metal Systems, 899 F.2d 887, 892 (10th Cir. 1992) (Non economic changes not necessary if they provide no financial relief to the company)

3. What is “Fair and Equitable” Treatment?

- How have the courts viewed the requirement that “all of the affected parties [must be] treated fairly and equitably”?
 1. Courts have generally held that fair and equitable treatment means that **all employee groups bear their fair share of wage and benefit reductions**. See Carey, *supra*, 816 F.2d at 90-91; In re Royal Composing Room, 62 BR. 403 (Bk. S.D.NY 1986)
 2. Court will consider **whether similar reductions** were made to management and non-union employees, as well as consider whether concessions made by other creditors. See Id.; In re Bowen Enterprises, Inc., 196 B.R. 734 (Bankr. W.D. 1996); In re Jefley, Inc., 219 B.R. 88 (Bankr. E.D. Pa. 1998).
 3. **Fair and equitable standard** applies to all affected parties, who include the following: unionized, non-union and management employees as well as other creditor parties, **but** -- as discussed below -- does **not necessarily mean equal treatment**. Id.; In re Garafalo’ Finer Foods, Inc., *supra*, 117 B.R. at 370.

**BUT, Fair and Equitable Treatment does not Necessarily
Mean Equal Treatment.**

1. The company “is **not required to prove**, in all instances that **managers and non-union employees will have their salaries and benefits cut to the same degree** that union workers’ benefits are to be reduced.” *Carey, supra*, 816 F.2d at 90.

2. Equal Cuts May not be Required: If Court finds that “employees covered by the pertinent bargaining agreements are receiving **pay and benefits above industry standards**, it is not unfair or inequitable to exempt the other [non-union]employees from pay and benefit reductions...” *Carey, supra*, 816 F.2d at 91.

3. Snap-Backs May not be Required: Finding that “costs under the CBAs were above prevailing competitive wage levels, while management salaries had already decreased from prior levels” a Texas Court held that reductions to union wage rates were not “unfair because they did not require reductions in compensation for management and did not include any ‘snap-back’ or other incentives to allow [union] employees to recoup the reductions” *In re Appletree Markets, supra*, 155 B.R. 431, 439,144 LRRM at 2208.

Step 2: Provide Union With “Relevant Information”

Provide to the Union both:

- **“The most complete and reliable information available at the time of such proposal” on which the proposal is based** Sec.1113(b)(1)(a).
(provided with Proposal)
and
- **Provide the Union “with such relevant information as is necessary to evaluate the proposal”** Sec.1113(b)(1)(B).
(provided thereafter)(see next page)

2. What information is “necessary to evaluate the proposal?”

- Ultimate burden of persuasion remains on the Company
- **But**, after the Company shows what evidence was provided to the Union -
 - the **burden of proof shifts to the Union**
 - Union must “produce evidence that the information provided was not the relevant information which was necessary for it to evaluate the proposal.”

See In re American Provision Co., 44 BR 907, 909-910 (Bk.D.Minn 1984), cited by the S.D. of Texas in In re Appletree Markets, *supra.*; In re Garafalo’ Finer Foods, Inc., *supra.*, 117 B.R. at 370.

Step 3:

Meet at Reasonable Times in Good Faith

1. Company Must “**meet at reasonable times**” with the Union “**to confer in good faith** in attempting to reach mutually satisfactory modifications of such agreement. Sec.1113(b)(2).
2. Obligation to meet extends from the date of the Proposal through the date of the Hearing on contract rejection. Sec.1113(b)(2).
3. **But, time frame to meet and Negotiate is less than 10 days.**

What Does it Mean to “Meet at Reasonable Times” and “Confer in Good Faith?”

The Company may not

- Issue a “take it or leave it proposal” See In re S.A. Mechanical, Inc., 51 B.R. 130 (Bankr. D. Ariz. 1985); OR
- Agree to meet only once or a few times when the Union indicates a willingness to negotiate further. See In re American Provision Co., 44 BR 907, 909-910 (Bk.D.Minn 1984).

But, Court Will Consider Union’s Failure to Negotiate Prior to Bankruptcy Filing in Ruling on Application to Reject

“When it is clear a debtor needs relief, **intransigence** by the union, **in the pre-petition negotiations**, may also warrant rejection” In re Garafalo’ Finer Foods, Inc., 117 B.R. 363, 371 (Bk. N.D. Ill. 1990)

Requirement to provide information and confer in good faith satisfied when “**immediately before it filed for bankruptcy** [company] opened its books to the [union] for examination and ... made information available to the [union] during the bargaining process that followed.” In re Appletree Markets, 155 B.R. 431, 438, 144 LRRM 2203 (S.D.Tex 1993), (finding that requirement to provide relevant information was satisfied when company opened books to union prior to filing for bankruptcy)

Also, Courts have held that it is Not Unreasonable -

- To give the union only ten hours to consider a proposal (In re Maxwell Newspapers, Inc., 981 F.2d 85 (2nd Cir.));
- To file an application to reject four days after it presented proposal (In re Century Brass Products, 55 B.R. 712-716 (Bk. D.Conn 1985)); or
- To meet with the union only four times regarding the proposal (In re Kentucky Truck Sales) 52 B.R. 797, 801 (Bk. W.D.KY. 1985).

The **good faith conference requirement is satisfied** if the Company has seriously attempted to negotiate reasonable modifications to the agreement prior to the hearing. See In re Kentucky Truck Sales, 52 B.R. 797, 801-02 (Bankr. W.D.Ky. 1985)

II. Filing of Application to Reject a Through Court Ruling:

Step 4: File Application to reject collective bargaining agreement [Sec.1113(c) and (d)].

Step 5: Notice of Hearing *at least* -

- 10 Days Before Hearing [Sec.1113(d)(1)].

Step 6: Court Hearing *no later than*-

- 14 Days after filing of application to reject [Sec.1113(d)(1)].
 - Extension limited to 7 days, unless parties agree

Step 7: Court Ruling *within* -

- 30 days after commencement of hearing [Sec.1113(d)(2)].
 - If no ruling in 30 days, Company “may terminate or alter any provisions” of the contract pending Court ruling

Test for Contract Rejection Applied by the Court

After Hearing the Court will Approve Rejection under Sec.1113(c) “only if” it finds that:

- 1) The Company **made a proposal** that satisfies the requirements listed above;
- 2) The Union “refused to accept such proposal **without good cause**”; and
- 3) “The **balance of the equities** clearly favors rejection of such agreement.”

What would be “Good Cause” for the Union to Refuse to Accept the Company’s Proposal?

- “Good cause” requirement has been viewed narrowly in light of the bankruptcy code’s purpose to facilitate reorganization.
- A Court has found that a Union did not have good cause to reject a proposal even though it only had 10 hours to respond. In re Maxwell Newspapers, Inc., 981 F.2d 85, 91 (2nd Cir. 1992)
- Purpose of the good cause requirement is “to ensure that well informed and good faith negotiations occur in the market place, not as part of the judicial process.” Id. At 90.

“Good Cause” Cont.

- Union Cannot Refuse to Discuss Company Proposal. Refusal to discuss the Company’s proposal in the belief that it fails to meet the requirements of Sec. 1113 will be found to be “stonewalling” and “inconsistent with congressional intent” in that the good cause requirement is “intended to ensure that a continuing process of good faith negotiations will take place before court involvement.” Carey, *supra*, 816 F.2nd 92.
- Union Must State Reason Based on Objective Evidence for Its Refusal to Accept Company Proposal. The Union must articulate a reason for its refusal to accept the Company’s proposal and that refusal must be based on objective evidence that the proposal is not necessary to a successful reorganization. If the union refuses to accept the Company proposal without a reason supported by evidence its refusal will be without good cause. Carey, *supra*, 816 F.2nd 92; In re Garafalo’ Finer Foods, Inc., *supra*, 117 B.R. at 371.

“Good Cause” Cont.

- “Knowing that it cannot turn down an employer’s proposal without good cause gives the union an incentive to compromise the modifications of the collective bargaining agreement, so as to prevent its complete rejection.” Carey, *supra*, 816 F.2d 92.
- If union makes compromise proposals **during the negotiation process** which meets its needs while still preserving the debtor’s savings, then good cause may exist for rejection of the debtor’s proposal. See In re Royal Composing Room, *supra*, 848 F.2d 349.

Balance of the Equities: What factors does the Court consider in Determining whether the “Balance of the Equities Clearly Favor Rejection”?

- The “balance of the equities” standard:
 - involves balancing the interest of all the affected parties
 - with the focus on the ultimate goal of a successful reorganization.

See Bildisco, 465 US at 526-27; In re Kentucky Truck Sales, 52 B.R.797, 805 (Bk. W.D. Ky. 1985)(Sec. 1113 is a statutory codification of the standard for rejection set forth in Bildisco); In re Garafalo’ Finer Foods, Inc., *supra*, 117 B.R. at 369.

**In a Decision Generally Followed by Courts in the
5th Circuit, the 2nd Circuit Articulated Six (6)
Considerations for Determining when the
Balance of Equities Favors Rejection:**

- 1) The likelihood and consequences of liquidation if the contract is not rejected;
- 2) The likely reduction in value of creditor claims if the contract remains in force;
- 3) The likelihood and consequences of a strike if the agreement is rejected [legal status of right to strike may differ between RLA and NLRA];
- 4) The likely effect of any employee claims for breach of contract if rejection is approved;
- 5) The various parties' cost sharing abilities, taking into account the number of employees covered by the contracts and how their wages and benefits compare to **industry standards**; and
- 6) **The extent to which each party acted in good or bad faith in dealing with a company's financial crisis.**

Truck Drivers 807 v. Carey Transportation Co., 816 F.2d 82 (2nd Cir. 1987).

LAWFUL UNION APPROACH TO SECTION 1113 COMPROMISE PROPOSALS:

I. IDENTIFY GOALS

- for example, an overall goal of protecting the collective bargaining agreement as much as possible consistent with the legitimate needs for savings by the Company.

II. PRIORITIZE GOALS

Examples: protect jobs, wage rates, insurance, seniority, grievance system, work rules, retirement plans, and safeguards to restore full contract in the event of economic recovery.

III. REQUEST RELEVANT INFORMATION

IV. NEGOTIATE IN GOOD FAITH TO ACCOMPLISH GOALS

KEYS TO GOALS:

1. Avoid liquidation (where all jobs and benefits are lost).
2. Avoid rejection of the collective bargaining agreement .
3. Negotiate necessary contractual relief wisely and in the best interest of the members.