

Did Trump win again? Yes, but this time it was not “The Donald” but was instead the casino operator Trump Entertainment Resorts, Inc.

On January 15, 2016, Trump Entertainment was **handed a victory by the Third Circuit Court of Appeals**, which held that Trump Entertainment could reject the continuing terms and conditions of a collective bargaining agreement (CBA) that had already expired by its terms. This case is a matter of first impression among the courts of appeal and is likely to significantly alter the balance of power between debtor-employers and their unions.

In this case, the CBA between Trump Entertainment and its largest Union expired after Trump Entertainment filed its Chapter 11 bankruptcy petition. Under the National Labor Relations Act (NLRA), an employer is prohibited from unilaterally changing the terms and conditions of a CBA even after its expiration. Instead, the terms and conditions of an expired CBA continue to govern the relationship between an employer and its unionized employees until a new CBA is negotiated or the parties bargain to impasse. Thus, under the NLRA, Trump Entertainment was required to continue to perform in accordance with the expired CBA.

Complicating this matter is section 1113 of the Bankruptcy Code. Section 1113 contains detailed rules and procedures governing a debtor’s ability to reject a CBA. The procedures are exclusive and a debtor “may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.” See 11 U.S.C. § 1113(a). The issue before the Third Circuit was whether Trump Entertainment could reject the CBA with the Union under section 1113 since the CBA had already expired. If it could not, Trump Entertainment would have to continue to abide by the terms and conditions of the CBA, significantly affecting its reorganization efforts.

The bankruptcy court held that section 1113 was not limited to unexpired CBAs, and that preventing a debtor from being able to reject an already-expired CBA would permit unions to interfere with a debtor’s reorganization. The Third Circuit agreed with the lower court, and held that Trump Entertainment could reject the expired CBA and thereby avoid having to continue to comply with the CBA.

Underlying the Third Circuit’s decision were policy considerations implicit in section 1113, and the role of section 1113 in the overall context of corporate restructurings. Section 1113 was enacted in response to the US Supreme Court’s decision in *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In *Bildisco*, the Supreme Court held that CBAs were executory contracts that could be rejected under section 365 of the Bankruptcy Code, and that a debtor could unilaterally change the terms of a CBA after filing bankruptcy but before the court approved rejection. Section 1113 was passed by Congress, in part, to overturn the second part of *Bildisco* and to prohibit unilateral changes in a debtor’s CBA without bankruptcy court approval. Instead, a debtor could reject a CBA but only by complying with section 1113, which sets forth strict procedural and substantive preconditions to rejection. Section 1113 “was designed to foreclose all but the essential modifications of the working conditions integral to a successful reorganization.” The Third Circuit held that the *Trump Entertainment* case “exemplifies the process that Congress intended” in enacting section 1113 because: (a) Trump Entertainment’s reorganization was dependent upon, among other things, rejection of the CBA; (b) the Union refused to negotiate with Trump Entertainment even though it was given numerous opportunities to do so; and (c) Trump Entertainment would be forced to liquidate if it was not able to reject the CBA.

Furthermore, exempting expired CBAs from section 1113 would interfere with a debtor’s reorganization efforts. An employer who is a party to an expired CBA is statutorily required by the NLRA to maintain the *status quo* under the CBA. Should that employer file bankruptcy, the employer-debtor should have the ability to reject those continuing obligations provided that it satisfies the requirements of section 1113. Otherwise, reorganization would be impossible.

Implications

The Third Circuit is the first court of appeal to rule on whether an expired CBA is subject to rejection under section 1113. By including expired CBAs with the scope of section 1113, the Third Circuit strengthened the hand of employers, at least within the reach of the Third Circuit, who can now move to reject expired CBAs and thereby avoid having to continue to comply with the terms and conditions of the CBAs. Of course, before these debtor-employers may reject the CBAs, they must satisfy the exacting procedural and substantive requirements of section 1113. However, provided that the employers can show that rejection of the CBA is necessary to a reorganization, that all affected parties are being treated fairly and equitably, that the balance of the equities favor rejection of the CBA, and that the parties engaged in good faith negotiations with proposals being exchanged, the employers will be permitted to reject not only current CBAs but also expired CBAs. The end result of the Trump Entertainment decision may be that more companies with burdensome CBAs choose to file bankruptcy in order to reduce their labor costs.

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