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The Runway to Settlement

REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN AIRLINE BANKRUPTCIES

INTRODUCTION

In the past few decades, every major U.S. airline has engaged in some type of restructuring in an attempt to avoid the termination of its business.¹ These airlines have been relatively successful in keeping their businesses alive through a combination of responsive business decisions and timely legal maneuvering.² One of the airlines' most effective means for doing so is acquiring cost-cutting concessions from their labor forces, which are their greatest source of financial difficulty.³ These concessions can be acquired in a variety of ways such as bargaining, mediation, and arbitration.⁴ When these methods are not successful, some airlines have chosen judicial intervention as an emergency measure.⁵

In August of 2006, Northwest Airlines' request for such emergency intervention almost backfired when a bankruptcy

¹ Highlights of these airlines' restructuring over the past two decades include: American Airlines' purchase of Trans World Airlines (TWA) in 2001, currently in workout with creditors to return to profitability; Continental Airlines filing bankruptcy in 1983 and emerging in 1986, filing for bankruptcy in 1990 and emerging in 1993; United Airlines filing for bankruptcy in 2002 and emerging in 2006; Northwest Airlines filing for bankruptcy in 2005 and remaining under bankruptcy "protection"; US Airways failing to sell-out to United Airlines in 2001, filing for bankruptcy in 2002 and remaining under bankruptcy "protection," merging with America West Airlines in 2005; Delta Air Lines engaging in extensive workouts in 2004 to avoid bankruptcy, filing for bankruptcy in 2005.

² Recently, the major airlines have considered mergers as a means to streamline their operations and remain solvent. See Jeff Bailey & Don Philips, *Big Consolidated Airline, Inc.*, N.Y. TIMES, Dec. 14, 2006, at C1.

³ The primary concessions that airlines seek from their workforce are reductions in hourly salaries, increases in employee contributions to pension plans and changes in working conditions (i.e., more working hours). See, e.g., Jeff Bailey, *Northwest Air Flight Attendants Reject Contract Again*, N.Y. TIMES, Aug. 1, 2006, at C4; *Wage Cuts Approved for Comair Workers*, N.Y. TIMES, Dec. 16, 2006, at C9.

⁴ These processes are explicitly required by The Railway Labor Act. See discussion *infra* Parts II.A.1, III.A.3.

⁵ This is explicitly permitted by the Bankruptcy Code when an airline is operating in bankruptcy. See discussion *infra* Part II.A.2.

court ruling threatened the airline's ability to acquire these crucial labor-related concessions.⁶ Fortunately, upon realizing the error of the bankruptcy court's decision in both legal analysis and public policy, the district court reversed the bankruptcy court.⁷ The district court's decision, as opposed to that of the bankruptcy court, reflects a proper understanding of the juxtaposition of bankruptcy law and labor law in the unique context of the airline industry. Thanks to that reversal—which was affirmed by the Second Circuit⁸—the airlines will continue to be able to acquire these important labor-related concessions, which are vital to ensuring that the public has reliable air transportation.

This Note argues that the *Northwest Airlines* case provides the correct framework for limiting the effect of labor disputes on airline employees, the airline itself, and the traveling public. Part I provides background information by briefly describing the nature of the major airline business and then outlining the primary reasons for these airlines' financial troubles. Part II reviews the statutes and facts relevant to the *Northwest Airlines* case and summarizes the courts' opinions in that case. Next, in order to appreciate the consequences of the final disposition of that case, Part III analyzes the bargaining relationship between the airline and the union before the airline requests emergency court intervention. This bargaining relationship is critical because it is determinative of each party's ability to earn concessions and reach a settlement. This Note suggests that the bargaining relationship between the union and the airline prior to judicial intervention produces a desirable status quo. Finally, Part IV analyzes the consequences of the *Northwest Airlines* decision on that bargaining relationship and status quo. In doing so, this Note argues that the Second Circuit's decision helps maintain that status quo after emergency court intervention and provides a

⁶ See *In re Northwest Airlines Corp.*, 346 B.R. 333 (Bankr. S.D.N.Y.), *rev'd*, 349 B.R. 338 (S.D.N.Y. 2006), *aff'd*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007). Hereinafter, the collection of court decisions and underlying facts concerning the labor dispute between Northwest Airlines and the flight attendants' unions will be referred to collectively as the "*Northwest Airlines*" case.

⁷ See *In re Northwest Airlines Corp.*, 349 B.R. 338 (S.D.N.Y. 2006), *aff'd*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007).

⁸ See *In re Northwest Airlines Corp.*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007).

step in the right direction toward more reliable air transportation.

I. THE LEGACY CARRIER

The six major U.S. airlines are often referred to as “legacy carriers.”⁹ These airlines include American Airlines, United Airlines, Delta Air Lines, Continental Airlines, Northwest Airlines, and US Airways.¹⁰ The term legacy carrier is often used in conjunction with and compared to “low-cost carriers” such as Southwest Airlines, JetBlue Airways, ATA Airlines, and Spirit Airlines.¹¹ As the name implies, legacy carriers have been flying for significantly longer than the low-cost carriers. In addition, the legacy carriers have traditionally offered “premium services” to its customers such as first- and business-class service, on-board meals, more convenient schedules and airport locations, and generous compensation and pension packages for their employees.¹² In the past, customers were willing to pay a premium in the form of higher ticket prices for these services.¹³

Low-cost carriers, on the other hand, are primarily an invention of the past decade and offer “no-frills” or fewer premium services than their legacy counterparts.¹⁴ In turn, the low-cost carriers are able to offer their services at a reduced cost to the customer.¹⁵ Within the past decade, a price war has

⁹ See OFF. OF AVIATION AND INT’L AFFAIRS, U.S. DEP’T OF TRANSP., AVIATION ANALYSIS: LEGACY CARRIER REVENUE PREMIUMS, FOURTH QUARTER 2002, at 1 (2002), available at <http://ostpxweb.dot.gov/aviation/domestic-competition/4Q02-LegacyCarrierPremiums.pdf> [hereinafter DOT ANALYSIS].

¹⁰ See *id.*

¹¹ See *id.*

¹² See U.S. GOV’T ACCOUNTABILITY OFF., GAO’S AIRLINE AND AIRPORT STUDIES: ACI-NA ANNUAL CONFERENCE ECONOMIC AFFAIRS COMMITTEE 4 (Sept. 25, 2006), available at <http://www.aci-na.org/dexa/docs/Aussendorf.pdf> [hereinafter GAO STUDY].

¹³ See DOT ANALYSIS, *supra* note 9, at 1-2.

¹⁴ *Id.* at 1; see also Lisa Catherine Tulk, Comment, *The 1926 Railway Labor Act and the Modern American Airline Industry: Changes and “CHAOS” Outline the Need for Revised Legislation*, 69 J. AIR L. AND COM. 615, 635 (2004). One must be careful, however, not to automatically construe “no-frills” service as “low-quality” service. For example, “the service quality differential between low-fare carriers and legacy carriers has narrowed as certain low-fare carriers have, to various degrees, improved their product by flying newer planes, installing premium cabins, initiating or improving frequent flyer programs, offering improved in-flight amenities such as live television, offering less restrictive rules for changing tickets, and increasing both the density and the scope of their networks.” DOT ANALYSIS, *supra* note 9, at 1.

¹⁵ DOT ANALYSIS, *supra* note 9, at 1.

developed between legacy and low-cost carriers that has forced some of the legacy carriers to reevaluate their business models and scale back some of their “premium” offerings.¹⁶ In addition, as a result of the competition that the low-cost carriers have generated, demand for premium services has fallen, and, consequently, customers are no longer willing to pay the premium to travel on “name-brand” legacy carriers.¹⁷

Low-cost competition is not the only source of the legacy carriers’ financial difficulties. The prevailing political and economic climate also affects an airline’s profits.¹⁸ Three decades ago, the Airline Deregulation Act of 1978¹⁹ forced the established legacy carriers to cope with low demand that had resulted from the insurgence of competition in the market.²⁰ After September 11, 2001, geopolitical instability, threats of terrorist activity, and economic stagnation further reduced demand for air travel.²¹ Recent instability in the Middle East has also reduced the airlines’ profit margin because exponentially rising fuel costs have caused their operating expenses to skyrocket.²²

¹⁶ See *id.* at 1-2; Tulk, *supra* note 14, at 635-36. For example, many of the legacy carriers have reduced their operating costs by scaling back in-flight catering, particularly on domestic routes. See LUFTHANSA, 2004 ANNUAL REPORT 35 (2004), available at http://konzern.lufthansa.com/en/downloads/presse/downloads/publikationen/lh_gb_2004.pdf. In addition, a few legacy carriers have mimicked their low-cost counterparts by eliminating first and business class altogether on some routes. See United Airlines, Press Release, Ted Unmasked: United Airlines Reveals Look & Feel of New Low-Fare Service (Nov. 18, 2003), available at http://www.travelnewhorizons.com/NHTRAVELER/NHTraveler_12-03.htm#TED%20UNMASKED.

¹⁷ See DOT ANALYSIS, *supra* note 9, at 1-2.

¹⁸ See generally Tulk, *supra* note 14, at 628-36.

¹⁹ Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

²⁰ Tulk, *supra* note 14, at 629 (“In efforts to reduce operating costs, workforces were trimmed and, as a result, unemployment in the aviation industry increased. As time passed and the airline market grew increasingly competitive, mergers and bankruptcies became fairly commonplace in the industry . . .”).

²¹ *Id.* at 634-35.

²² See *Commercial Jet Fuel Supply: Impact and Cost on the U.S. Airline Industry Hearing Before the H. Subcomm. on Aviation, 109th Cong. 1, 3* (2006) (memo [hereinafter *Impact & Cost*] (“[T]he Air Transport Association (ATA) expects jet fuel costs to average \$70 per barrel or \$1.67 per gallon in 2006—a 90-percent increase from 2001.”). In January 2006, the average price for a gallon of commercial jet fuel was \$1.81 per gallon. *Id.* This increase is particularly burdensome because “[a]fter labor, jet fuel is the second largest operating expense for all U.S. airlines, constituting 10 to 25 percent of an airline’s annual operating costs.” *Id.* As of March 6, 2007, the *Wall Street Journal* reported that fuel costs had “eclipsed” labor as the number one expense for many airlines. Susan Carey, *Calculating Costs in the Clouds*, WALL ST. J., Mar. 6, 2007, at B1.

Increased competition, low overall demand for air travel, and high fuel costs have all forced the legacy carriers to engage in significant cost-cutting measures in order to remain solvent.²³ The reduction of premium services,²⁴ however, will only get these legacy carriers so far.²⁵ The legacy carriers quickly discovered that their only chance of returning to profitability was to reduce their existing financial obligations.²⁶ Legacy carriers are particularly burdened by the collective bargaining agreements with their labor unions because these agreements were negotiated *before* every dollar had to be squeezed out of the airline.²⁷ In other words, because fiscal discipline was not as essential at the time of their formation, the market permitted these airlines to indulge their employees in generous compensation, retirement, and pension packages.²⁸ Thus, the legacy carriers need a plan to renegotiate these collective bargaining agreements to include terms more favorable to their economic recovery.²⁹ Many of the legacy carriers have chosen bankruptcy as a means to effectuate that labor-cost reduction plan.³⁰

II. *NORTHWEST AIRLINES CORP. V. ASSOCIATION OF FLIGHT ATTENDANTS*

While Northwest Airlines did not enter bankruptcy solely to reduce its labor costs, it was certainly a motivating factor given that labor is its largest operating expense.³¹ While under bankruptcy protection, a debtor such as Northwest Airlines may request court permission to modify its existing labor contracts when bargaining has not successfully reduced its labor costs. In August of 2006, Northwest Airlines made that exact request. To decide whether to grant that request,

²³ See Tulk, *supra* note 14, at 636 (“Many carriers look to concessions from labor to keep them afloat while they struggle to catch up with the low-cost carriers.”).

²⁴ See *supra* note 12 and accompanying text.

²⁵ See GAO STUDY, *supra* note 12, at 4 (indicating that legacy carriers have not lowered their costs enough to remain solvent).

²⁶ See Richard D. Cuhady, *The Airlines: Destined to Fail?*, 71 J. AIR L. & COM. 3, 11-14 (Winter 2006).

²⁷ *Id.*

²⁸ See GAO STUDY, *supra* note 12, at 9 (citing management and labor decisions as one of the “key factors” causing airline labor problems).

²⁹ See Cuhady, *supra* note 26, at 11-14.

³⁰ See *id.* For a list of the legacy carriers that have declared bankruptcy, see *supra* note 1.

³¹ See *supra* note 22.

the court considered a number of federal statutes and the factual circumstances of the bankruptcy case to decide whether modification was appropriate relief. After the requested relief was granted, the court had to consult some of those same statutes to determine what further action the parties could take in the bargaining process.

A. *The Relevant Statutes*

A collective bargaining agreement is simply a type of executory contract³² “between an employer and a labor union regulating employment conditions” such as wages and work rules.³³ The collective bargaining process places mutual obligations on both the employer and the union.³⁴ Various federal statutes establish and enforce these obligations. Generally, the Railway Labor Act (“RLA”)³⁵ governs the mechanics of the collective bargaining process for the railroad and airline industries.³⁶ In certain situations, Chapter 11 of the United States Bankruptcy Code alters the typical collective bargaining process under the RLA and gives a debtor “special privileges” when it has chosen to operate in bankruptcy.³⁷ Airlines commonly choose to declare bankruptcy as a means of gaining access to these special privileges.³⁸ Specifically, under § 1113 of the Bankruptcy Code, an airline may petition the court to allow it to “reject” (i.e., breach) an existing collective bargaining agreement and substitute more favorable terms.³⁹

³² An executory contract is “[a] contract that remains wholly unperformed or for which there remains something still to be done on both sides.” BLACK’S LAW DICTIONARY (8th ed. 2004).

³³ BLACK’S LAW DICTIONARY (8th ed. 2004).

³⁴ See Jeffrey D. Berman, Note, *Rejection of Collective Bargaining Agreements Under the Bankruptcy Amendments of 1984*, 71 VA. L. REV. 983, 986 n.21 (1985) (citing 29 U.S.C. § 158(d) (1982)).

³⁵ 45 U.S.C. §§ 151-88 (2000).

³⁶ For virtually all other industries, the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2000), governs the collective bargaining process. See *In re Northwest Airlines Corp.*, 349 B.R. 338, 371 (S.D.N.Y. 2006), *aff’d*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007) (“[T]he RLA was passed [before the NLRA]; yet rather than adding additional industries to the RLA’s framework, Congress created a separate statutory scheme for those industries, the NLRA, and expressly carved out employers and employees subject to the RLA from its coverage.”).

³⁷ For example, the debtor has the right to modify—or “reject”—a preexisting collective bargaining agreement against the wishes of the labor union that is a party to that agreement. See discussion of 11 U.S.C. § 1113, *infra* Part II.A.2.

³⁸ See *supra* notes 26-29 and accompanying text.

³⁹ See generally 11 U.S.C. § 1113 (2000).

If the court grants this request, it is not surprising that the union would be perturbed by that result and threaten to strike to dissuade the airline from taking that action. It is the legality of that potential strike, and the court's power to enjoin it under the Norris-LaGuardia Act ("NLGA")⁴⁰ that was the primary issue in the *Northwest Airlines* case.⁴¹

This issue was one of first impression for any bankruptcy court.⁴² To decide whether a strike would be legal under these circumstances, the bankruptcy court needed to analyze the requirements of the aforementioned statutes, which purport to serve multiple functions: First, they dictate the extent to which and when the federal courts may intervene in bankruptcy-labor disputes;⁴³ second, they specify the mechanics of the negotiating and bargaining process between the airline and the union;⁴⁴ third, provide the remedies (both judicial and extra-judicial) that are available to either party if one party fails to follow its statutory duties, or if both parties have followed their respective statutory duties and deadlock remains;⁴⁵ fourth, they reflect the policy concerns Congress considered in enacting all three statutes, supposedly with the expectation that they operate in harmony.⁴⁶

The reality, however, is that while these statutes (the RLA, § 1113, and NLGA) *standing alone* seem to point to an obvious solution for the court, their mandates are considerably less clear in the unique situation where they are implicated simultaneously. Prior to addressing their simultaneous application, however, it is helpful to consider the statutes individually.

1. The Railway Labor Act

Since Congress enacted the RLA in 1926 to govern collective bargaining agreements ("CBAs"),⁴⁷ the Supreme

⁴⁰ 29 U.S.C. §§ 101-15 (2000).

⁴¹ Generally, the Norris-La Guardia Act prohibits federal courts from enjoining strikes in labor disputes. *See infra* Part II.C.

⁴² *In re Northwest Airlines Corp.*, 346 B.R. 333, 335 (Bankr. S.D.N.Y.), *rev'd by*, 349 B.R. 338 (S.D.N.Y. 2006), *aff'd*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007).

⁴³ *See* discussion of the NLGA, *infra* Part II.A.3.

⁴⁴ *See* discussion of the RLA, *infra* Part II.A.1.

⁴⁵ *See* discussion of the RLA, the Bankruptcy Code § 1113, and the NLGA, *infra* Parts II.A.1., II.A.2., II.A.3.

⁴⁶ *See id.*

⁴⁷ It was "amended in 1936 to bring the airline industry within the scope of its coverage." *In re Northwest Airlines Corp.*, 349 B.R. at 351. It is undisputed that the

Court has acknowledged that its primary goal is to prevent and settle strikes in order to avoid interruptions of commerce.⁴⁸ As a means of doing so, the RLA's strategy is to defer strikes for as long as possible in the hope that the parties will reach a settlement.⁴⁹ To accomplish this goal, the RLA imposes obligations on both parties when either party is attempting to alter the terms of an existing CBA.⁵⁰ These obligations are primarily contained in section 2 and section 6 of the RLA.⁵¹

Section 2 is generally regarded as the "heart of the Railway Labor Act"⁵² and requires each party to make every reasonable effort to reach an agreement during the negotiation and bargaining process.⁵³ While the scope of that obligation is vague "and has been left to the courts to interpret on a case-by-case basis,"⁵⁴ section 6 prescribes a detailed scheme of what must happen when an airline is engaged in a "labor dispute" with a union.⁵⁵ This scheme explicitly sets time frames and notice requirements for bargaining and negotiation and requires mandatory mediation, voluntary arbitration, "cooling-off" periods, and even has the possibility of a Presidential Emergency Board.⁵⁶ While these processes are being exhausted, section 6 prohibits both parties from taking any "unilateral" or illegal action that would disturb the status quo created by an existing CBA.⁵⁷ In addition, while the parties are engaged in mediation with the National Mediation Board ("Mediation Board"),⁵⁸ the mediation cannot be terminated at the will of

Northwest Airlines case, and any other case involving the renegotiation of a CBA with airline employees, is governed by the RLA.

⁴⁸ *Id.* at 352 (citing *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 451 (1987)).

⁴⁹ Thomas E. Reinert, Jr., *Airline Labor Disruptions: Is the RLA Still Adequate?*, 15 AIR & SPACE L. 4 (2001).

⁵⁰ See 45 U.S.C. § 152 (2000) (stating that the RLA procedures are the exclusive means to change an existing CBA).

⁵¹ *In re Northwest Airlines Corp.*, 349 B.R. at 352-55.

⁵² *Id.* at 352 (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969)).

⁵³ See 45 U.S.C. § 152 (1926).

⁵⁴ *In re Northwest Airlines Corp.*, 349 B.R. at 352 (citing *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 577 (1971) [hereinafter *Chicago & North Western*]).

⁵⁵ See 45 U.S.C. §§ 152, 155, 157, 160 (2000), cited in *In re Northwest Airlines Corp.*, 349 B.R. at 353.

⁵⁶ *Id.*

⁵⁷ *In re Northwest Airlines Corp.*, 349 B.R. at 353 (citing *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989)).

⁵⁸ The National Mediation Board ("NMB")

either party until an “impasse” has been reached.⁵⁹ It is only when the parties have exhausted this “elaborate machinery,”⁶⁰ and made “every reasonable effort to negotiate a settlement”⁶¹ that the parties may strike.⁶²

In sum, the RLA expressly prohibits the airline from unilaterally amending the terms of a CBA to suit its financial needs and prohibits the union from threatening to strike to prevent the airline from doing so. Stated simply, the parties are forced to bargain and negotiate for a settlement.

2. The Bankruptcy Code

Because the RLA bargaining process can, by design, last indefinitely, Congress enacted § 1113 of the Bankruptcy Code in 1984 as an emergency remedy for debtors.⁶³ Section 1113 is

established by the 1934 amendments to the Railway Labor Act of 1926, is an independent agency that performs a central role in facilitating harmonious labor-management relations within two of the nation’s key transportation modes—the railroads and airlines. Pursuant to the Railway Labor Act, NMB programs provide an integrated dispute resolution process to effectively meet the statutory objective of minimizing work stoppages in the airline and railroad industries.

NMB Mission and Key Functions, available at <http://www.nmb.gov/publicinfo/mission.html> (last visited Apr. 17, 2007).

⁵⁹ See 45 U.S.C. § 156 (2000); *In re Northwest Airlines Corp.*, 349 B.R. at 347 .

⁶⁰ *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148-49 (1969).

⁶¹ *In re Northwest Airlines Corp.*, 349 B.R. at 353 (quoting *Consol. Rail Corp.*, 491 U.S. at 302).

⁶² The Supreme Court has characterized the RLA procedural machinery as a “virtually endless ‘negotiation, mediation, voluntary arbitration, and conciliation.’” *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444-45 (1987) (quoting *Detroit & Toledo*, 396 U.S. at 148-49).

⁶³ Congress enacted § 1113 in response to the Supreme Court’s landmark decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In *Bildisco*, the Court resolved the circuit split over the proper standard for allowing a debtor to “reject” a collective bargaining agreement. Prior to the enactment of § 1113, the federal courts permitted rejection of collective bargaining agreements under the executory contract rejection provision of the Bankruptcy Code (11 U.S.C. § 365 (2000)). Michael D. Sousa, *Reconciling the Otherwise Irreconcilable: The Rejection of Collective Bargaining Agreements under Section 1113 of the Bankruptcy Code*, 18 LAB. LAW. 453, 464 n.76 (2003). Prior to *Bildisco*, the various circuit courts required differing levels of necessity as a prerequisite to rejection. While some courts required that the debtor demonstrate that the CBA was “onerous and burdensome,” others merely required the debtor to demonstrate that the decision was based on a valid “business judgment.” See *id.* at 464; Richard R. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 19 J. MARSHALL L. REV. 301, 338 (1985-86). The Supreme Court in *Bildisco* adopted a middle course between the two possible extremes and established a test that “balanced the equities” of both the debtor and the union to determine whether rejection was warranted. See Sousa, *supra*, at 464. Following *Bildisco*, Congress responded by passing § 1113, which specifies that a debtor “may assume or reject a

one of the “protective” provisions of the Bankruptcy Code because it allows the debtor to relieve itself of burdensome collective bargaining agreements.⁶⁴ Because this relief is likely to upset the expectations of the union and its employees, § 1113 allows a debtor to “reject” an existing CBA *only* with the bankruptcy court’s permission.⁶⁵ Section 1113 requires that the debtor demonstrate, among other things, that the union has no “good cause” to refuse the debtor’s proposals.⁶⁶ In addition, the debtor must show that its proposed modifications are “necessary” to permit its reorganization and that all affected parties are treated “fairly and equitably.”⁶⁷ If these showings are satisfactory, the court may permit the debtor to “reject” certain terms of the CBA and substitute new terms that fit the above criteria.⁶⁸

Section 1113, however, is not the panacea that it seems. Since the enactment of § 1113 in 1984, there has been uncertainty about the consequences of a court-sanctioned rejection.⁶⁹ For example, § 1113 does not specify whether the

collective bargaining agreement only in accordance with the provisions of this section.” *Id.* at 469 (citing 11 U.S.C. § 1113(a)). Section 1113 specifies precise requirements for rejection that *include*, among other things, a requirement that the court must “balance the equities.” *See* 11 U.S.C. § 1113(c).

⁶⁴ Labor is an airline’s single greatest operating expense. *See Impact and Cost, supra* note 22, at 3.

⁶⁵ *See* 11 U.S.C. § 1113(c).

⁶⁶ *See Sousa, supra* note 63, at 469.

An application for the rejection of a collective bargaining agreement will be approved by the bankruptcy court only if the court finds that 1) prior to the hearing on the application, the debtor-in-possession made a proposal for modification of the agreement to the employees’ authorized representative; 2) the authorized representative refused to accept the proposal without good cause; and 3) the balance of the equities clearly favors the rejection of the [CBA].

Id. (citing 11 U.S.C. § 1113(c)).

⁶⁷ *See In re American Provision Co.*, 44 B.R. 907, 908-09 (Bankr. D. Minn. 1984) (establishing a framework for considering the various requirements under § 1113).

⁶⁸ While § 1113 does not specify whether a court must reject a CBA in *whole* or in *part*, the court’s general equity powers under 11 U.S.C. § 105 appear to permit the court to “reject” whatever part of the CBA is necessary to the carrier’s reorganization. *See* 11 U.S.C. § 105 (2000).

⁶⁹ This uncertainty stems in part from the fact that this question has never been litigated and also due to the *apparent* contradictions between § 1113, the RLA, and the NLGA. For example, while the RLA forbids either party from altering the status quo, the Bankruptcy Code allows the debtor to change the CBA terms without the other party’s acquiescence, which appears to be an alteration of the status quo. *See supra* text accompanying notes 57, 65; *see also In re Northwest Airlines Corp.*, 349 B.R. at 345 (“[S]ome actual and potential conflicts of legislative policies and goals have arisen from application of two or more of these laws in particular disputes.”); *but see*

parties must continue to negotiate (pursuant to the RLA) after a court-sanctioned rejection. In addition, § 1113 is silent on whether a court-sanctioned rejection constitutes a “unilateral action,” signaling an end to the RLA process and giving the union a legal right to strike despite the fact that the parties remain in mediation. It is precisely this question that a court had never been asked to answer before the *Northwest Airlines* case.

3. The Norris-LaGuardia Act

If the union does in fact take the position that a CBA rejection under § 1113 constitutes a unilateral action and a violation of the RLA status quo, it seems natural that the union would also take the position that *it* was now free to take unilateral action and threaten to strike.⁷⁰ The express language of the NLGA appears to support this position.⁷¹ Enacted in 1932, the NLGA explicitly removes the federal courts’ jurisdiction to issue injunctions in “labor disputes.”⁷² In other words, if the union threatened to strike in protest of the court-approved CBA terms, the NLGA appears to render the court powerless to stop it.⁷³ Despite this seemingly broad jurisdictional prohibition, the courts have developed exceptions to the NLGA to allow an injunction in “limited circumstances, such as to ‘enjoin violations of the specific mandate of another labor statute.’”⁷⁴ In other words, if either party’s action constitutes a violation of the RLA, then the court *would* have the power to enjoin that party’s action.⁷⁵

infra Part II.C.2 (explaining that there is no contradiction and that the statutes can be reconciled).

⁷⁰ In *Northwest Airlines*, the union took exactly that position. See Brief of the Ass’n of Flight Attendants-CWA at 16, *In re Northwest Airlines Corp.*, 349 B.R. 338 (Nos. 05-17930(ALG), 06-1679(ALG)) (“[E]very court that has addressed the issue has concluded that an § 1113 contract abrogation precipitates a union’s right to strike.”).

⁷¹ See 29 U.S.C. § 101 (2000) (“No court of the United States . . . 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; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.”).

⁷² *Id.*

⁷³ The NLGA “lists specific acts that may not be enjoined, including those involving ‘ceasing or refusing to perform any work.’” *In re Northwest Airlines Corp.*, 349 B.R. at 355 (citing 29 U.S.C. §104(a) (2000)).

⁷⁴ *Id.* (citing *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987)).

⁷⁵ *See id.*

The *Northwest Airlines* case addresses the legality of both parties' actions in an RLA-bankruptcy labor dispute, which is necessary to determine whether the NLGA's general prohibition applies.

B. Facts of the Northwest Airlines Case

Northwest Airlines ("the airline") declared bankruptcy in September 2005 for the first time in its history.⁷⁶ In October 2005, Northwest sought relief under § 1113, seeking rejection of its CBAs with six labor unions.⁷⁷ The airline subsequently reached consensual agreements on modifications of the CBAs with five of those unions.⁷⁸ In March 2006, the airline reached an agreement (the "March 1 Agreement") with the sixth union, the Professional Flight Attendants Association ("PFAA").⁷⁹ After a lengthy period of attempted ratification, however, the flight attendants voted down the agreement by a margin of eighty percent to twenty percent.⁸⁰ As a result, the airline requested that the bankruptcy court rule on its § 1113 motion vis-à-vis the PFAA CBA.⁸¹ The bankruptcy court agreed with the airline that rejection was warranted and, on July 5, 2006, ordered the airline to impose terms consistent with the March 1 Agreement on July 17, 2006.⁸²

Following the rejection, the flight attendants voted to replace the PFAA as their bargaining representative with another union, the Association of Flight Attendants ("AFA").⁸³ The AFA quickly commenced bargaining, and "after ten days of non-stop negotiations," reached a new agreement with the

⁷⁶ See Northwest Airlines, Up Close, History, Timeline, Past and Present, <http://www.nwa.com/corpinfo/upclose> (last visited Apr. 12, 2007).

⁷⁷ *In re Northwest Airlines Corp.*, 346 B.R. at 335-36.

⁷⁸ *Id.* at 336.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* Standard practice is that requesting relief under § 1113 initiates an intensive negotiation process that usually leads to out-of-court settlement. Thus, the court may reserve its decision on § 1113 motions until the debtor signals to the court that its assistance is either necessary or no longer required. See 11 U.S.C. § 1113(d)(2) (2000) ("The court shall rule on [an] 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 such additional period as the [debtor in possession] and the employee's representative may agree to.").

⁸² *In re Northwest Airlines Corp.*, 346 B.R. at 336-37. The court found that rejection of the CBA was "necessary" to the airline's reorganization, the PFAA had no "good cause" to reject the March 1 Agreement, and the balance of equities clearly favored rejection. *Id.*

⁸³ *Id.* at 337.

airline on July 17, 2006 (the “July 17 Agreement”).⁸⁴ While the new agreement received the support of the AFA leadership, the employees once again voted down the agreement—this time by a much narrower margin of fifty-five percent to forty-five percent.⁸⁵

In response, pursuant to the bankruptcy court’s § 1113 order, the airline put into effect the new terms consistent with the March 1 Agreement.⁸⁶ In response to that imposition, the AFA gave the airline fifteen days notice of its intention to strike.⁸⁷ The AFA made it clear that it intended to implement a “CHAOS”-type strike.⁸⁸ Believing that threat, or an ultimate strike to be illegal, the airline filed a motion with the bankruptcy court to enjoin the threatened strike activity.⁸⁹

⁸⁴ *Id.* “In light of this new agreement, the airline refrained from imposing the new terms and conditions of employment that had been authorized by the Court’s July 5 order.” *Id.* at 337.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* In addition, the AFA filed a motion seeking an order that the airline be forced to impose the terms of the July 17 Agreement as opposed to the March 1 Agreement. *Id.*

⁸⁸ CHAOS (“Create Havoc Around Our System”) is a course of action designed by the AFA flight attendants. *In re Northwest Airlines Corp.*, 346 B.R. at 337. A CHAOS-type strike consists of

sporadic and relatively brief work stoppages that are designed to create havoc with an airline’s scheduling of flights and to cause the public to lose confidence in the ability of the airline to provide reliable service. At the same time, the program is designed to prevent the airline from attempting to replace striking workers or take other effective responsive action. [The bankruptcy court found that] . . . the threat of CHAOS would be likely to cause the [airline] serious injury, perhaps leading to their liquidation, and that it would be highly detrimental to the interest of the public in a sound and reliable transportation system.

Id. The AFA’s general counsel testified that CHAOS is only intended to “put pressure on management” and to “force an agreement” without putting the company out of business in the process. Brief of the Ass’n of Flight Attendants-CWA at 5, *In re Northwest Airlines Corp.*, 349 B.R. 338 (Nos. 05-17930(ALG), 06-1679(ALG)). The airline, however, citing statistics provided by the AFA, responded that CHAOS has previously had the effect of pushing other airlines “to the brink of collapse,” and causing the airline’s traffic to decrease by twenty to twenty-five percent. Brief of Appellants and Brief in Support of an Injunction Pending Appeal at 9-10, *In re Northwest Airlines Corp.*, 349 B.R. 338 (Nos. 05-17930(ALG), 06-1679(ALG)).

⁸⁹ *In re Northwest Airlines Corp.*, 349 B.R. at 349-50.

C. Court Decisions in the Northwest Airlines Case

1. The Bankruptcy Court

When asked to enjoin the AFA from engaging in a strike following rejection of the CBA, the bankruptcy court refused to reach the preliminary injunction issue because it found that the NLGA precluded the court from exercising jurisdiction.⁹⁰ In reaching this conclusion, the court noted at the outset that “[n]othing in the Bankruptcy Code or in the policies of bankruptcy law overrides the provisions of [the NLGA].”⁹¹ As discussed below, this conclusion was crucial in framing the court’s analysis of the intersection of relevant statutes.

Consistent with Supreme Court precedent, the bankruptcy court acknowledged that the NLGA *does not* universally deprive the courts from enjoining strikes if either party violates or threatens to violate the provisions of the RLA.⁹² Ultimately, however, the court found no reason to take the case out of the NLGA’s general prohibition because the court found that neither party had violated the express provisions of the RLA.⁹³ The court reasoned that the airline’s decision to seek a rejection remedy under § 1113, while not a *per se* violation of the RLA, and certainly within its rights under federal law,⁹⁴ terminated the parties’ RLA section 6 negotiation process.⁹⁵ Thus, while § 1113 technically gave the airline a right to break the status quo and substitute court-approved terms, this action consequently freed the employees to strike at will despite the fact that the Mediation Board had not released the parties from mediation.⁹⁶ Therefore, the court did not accept the airline’s argument that following § 1113 rejection, *both parties* remained bound by the procedural

⁹⁰ *In re Northwest Airlines Corp.*, 346 B.R. 333, 344 (Bankr. S.D.N.Y.), *rev’d* by, 349 B.R. 338 (S.D.N.Y. 2006), *aff’d*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007).

⁹¹ *Id.* at 338.

⁹² *Id.* at 339-40 (citing *Burlington Northern R.R. Co. v. Brotherhood of Maint. of Way Employees*, 418 U.S. 429 (1987); *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570 (1971)).

⁹³ *See id.* at 343-44 (explaining that a violation of the RLA *would have* occurred if the union had either put the “CHAOS program in effect prior to the [d]ebtors’ imposition of new terms and conditions of employment” or if the union had refused to bargain in good faith prior to being released from mediation).

⁹⁴ *Id.* at 344.

⁹⁵ *Id.* at 343 (“There is . . . nothing in § 1113 that suggests that rejection should trigger an implied obligation on the part of the parties to continue to bargain.”).

⁹⁶ *In re Northwest Airlines Corp.*, 346 B.R. at 344.

requirements of the RLA to continue to bargain in good faith and make every reasonable effort to reach an agreement.⁹⁷ Put simply, the court held that the airline could not have it both ways—the airline had the option to stick it out and continue its RLA negotiations, or it could take a chance with rejection and hope the union would acquiesce.⁹⁸ The airline could not force the union to accept new terms while simultaneously forcing the union to sit down and bargain all over again.⁹⁹

In short, the bankruptcy court's conclusion rested on a single premise: because no RLA violation had taken place, the NLGA's "default rule" applied and the court was prohibited from issuing an injunction in a "labor dispute."¹⁰⁰ The airline immediately appealed the bankruptcy court's ruling.¹⁰¹

2. The District Court

The United States District Court for the Southern District of New York convincingly rejected that single premise advanced by the bankruptcy court—that no RLA violation had occurred—and reversed.¹⁰² The district court opinion consisted of two parts: a section criticizing the reasoning of the bankruptcy court and a section harmonizing all four statutes.¹⁰³

⁹⁷ The airline argued that it was essentially in the "position of a new employer without a prior collective bargaining agreement and that they can enforce, by injunctive relief, the obligation of the employees . . . to bargain in good faith toward the formulation of an agreement." *Id.* at 342.

⁹⁸ *See id.* at 343.

⁹⁹ *Id.*

¹⁰⁰ *See supra* note 93 and accompanying text.

¹⁰¹ Bankruptcy judges' opinions can be appealed to the district court for the judicial district on a "clearly erroneous" basis. If either party is dissatisfied with the district court's decision, the case may be appealed to the court of appeals. "The Code also permits any of the circuit courts to adopt a special appellate procedure whereby the first appeal from a bankruptcy court decision is to a panel of bankruptcy judges, called Bankruptcy Appellate Panels ("BAP"), and then to the court of appeals." *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS, TEXT, CASES, AND PROBLEMS* 113 (11th ed. 2006) (citing 11 U.S.C. § 158(c) (2000)). Both parties, however, must consent to appeals to these BAPs.

¹⁰² *In re Northwest Airlines Corp.*, 349 B.R. 338, 383-84 (S.D.N.Y. 2006), *aff'd*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007).

¹⁰³ This includes the National Labor Relations Act ("NLRA") because cases governed by the NLRA were cited by the AFA in its brief to the court. *See, e.g.*, Brief of the Ass'n of Flight Attendants-CWA at 12, *In re Northwest Airlines Corp.*, 349 B.R. 338 (Nos. 05-17930(ALG), 06-1679(ALG)) (citing *In re Petrusch*, 14 B.R. 825 (N.D.N.Y. 1981), an NLRA case, for the proposition that "[t]he well established power of the reorganization court to issue orders necessary to conserve the power 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."). The district court later criticized the analogy of *Petrusch* to the present case. *See infra* note 114.

The district court's criticism of the bankruptcy court was broken into three subsections.

First, the district court noted that if the bankruptcy court's reasoning and conclusion were accepted, it would deprive the Mediation Board of its vital role in the RLA bargaining process.¹⁰⁴ Specifically, it would divest the Mediation Board of its statutory mandate to make an objective determination as a neutral party about when the bargaining had reached an impasse, and to "release" the parties from mediation so that they may seek self-help.¹⁰⁵ Under the bankruptcy court's scheme, if the union *itself* has the power to conclude that the airline has taken unilateral action, the union has essentially usurped the authority of the Mediation Board. The district court found that Congress intended that the *Mediation Board* have the power to keep the parties in mediation indefinitely.¹⁰⁶ This granting of power was explicitly designed to force the parties to settle in order to prevent disruptions in air transportation.¹⁰⁷

Second, the district court found that if the bankruptcy court's reasoning and conclusion were accepted, it would create a conflict between the RLA and § 1113 that would lead to inconsistent obligations.¹⁰⁸ Most importantly, it would render § 1113 a "suicide weapon" rather than a protective device.¹⁰⁹ In other words, by imposing a penalty on a party for exercising its statutory and judicially approved right,¹¹⁰ the purposes of both

¹⁰⁴ *In re Northwest Airlines Corp.*, 349 B.R. at 364-66.

¹⁰⁵ *Id.* Under the RLA, the Mediation Board has tremendous discretion to prolong the bargaining and negotiation process including the ability to induce arbitration, to order cooling-off periods, and to inform that President that a "labor emergency" exists. See 45 U.S.C. § 160.

¹⁰⁶ See *In re Northwest Airlines Corp.*, 349 B.R. at 365 ("[a] 'crucial aspect' of the RLA is 'the power given to the parties and the representative of the public to make the exhaustion of the Act's remedies an almost interminable process'" (citing *Detroit & Toledo*, 396 U.S. 142, 149 (1969))); see also *id.* ("[T]he real 'key' is the Board's authority to hold the parties to a dispute in mediation so they cannot engage in self-help; it is a 'coercive tool essential to bringing the parties to conciliation.'" (citing *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Nat'l Mediation Bd.*, 930 F.2d 45, 47 (D.C. Cir. 1991))).

¹⁰⁷ *In re Northwest Airlines Corp.*, 349 B.R. at 365 ("The [Mediation Board]'s power to hold a dispute in mediation 'is the key to the structure that Congress established for bringing about settlements without industrial strife'" (quoting *Local 808, Building Maint., Serv. & R.R. Workers v. Nat'l Mediation Board.*, 888 F.2d 1428, 1432 (D.C. Cir. 1990))).

¹⁰⁸ *In re Northwest Airlines Corp.*, 349 B.R. at 366-70.

¹⁰⁹ *Id.* at 370.

¹¹⁰ *Id.* at 367 ("[I]n this case, Northwest acted lawfully, with express statutory and judicial authorization in altering the status quo pursuant to § 1113.").

the RLA and § 1113 would be defeated.¹¹¹ In addition, permitting a strike following a § 1113 rejection would completely undermine the bankruptcy judge's § 1113 findings: that rejection was "necessary" to the carrier's reorganization, that the union did not have "good cause" to reject the carrier's prior proposals leading up to the § 1113 motion, and that "the equities clearly favored rejection."¹¹²

Third, the district court concluded that the bankruptcy court's reasoning "does not sufficiently take into account the fundamental policy concerns and purposes of the RLA."¹¹³ Consistent with this conclusion, the court rejected most of the bankruptcy court's (and the union's) reliance on National Labor Relations Act ("NLRA") cases for the proposition that § 1113 rejection triggered the right to strike.¹¹⁴ The court cautioned that cross-reliance between RLA and NLRA cases must be done with care because the statutes have two distinct policy purposes reflecting the industries that they govern.¹¹⁵ Specifically, while "[t]he NLRA expressly *protects* the right to strike,"¹¹⁶ the RLA is designed with the express purpose of *preventing* strikes.¹¹⁷ Thus, any NLRA cases that stand for the proposition that § 1113 rejection implies a right to strike are

¹¹¹ It would "undercut[] the Bankruptcy Code's purpose of allowing a debtor to operate, provide services, and attract investments in favor of reorganization." *Id.* at 368. It would also ultimately "defeat the purpose of the RLA . . . , which is to avoid disruption of commerce by insuring that the carrier will continue operations pending resolution of labor disputes. . . ." *Id.* at 368-69.

¹¹² *Id.* at 370 (referring to 11 U.S.C. § 1113(c) (2000)).

¹¹³ *Id.* at 364. "The relationship of labor and management in the railroad [and airline] industr[ies] had developed on a pattern different from other industries. The fundamental premises and principles of the [RLA] are not the same as those which form the basis of the [NLRA]." *Id.* at 371 (quoting *Brotherhood of RR Trainmen v. Chicago River and Indiana RR Co.*, 353 U.S. 30, 31 n.2 (1957) [hereinafter *Chicago River*]).

¹¹⁴ See, e.g., *In re Northwest Airlines Corp.*, 349 B.R. at 374 (the court held that *In re Petrusch*, 14 B.R. 825 (N.D.N.Y. 1981), was "inapt" because it was a case involving an NLRA employer). In *Petrusch*, the court held that, under the NLGA, it could not enjoin employee picket action targeted at the debtor-employer's business. *Id.* The *Petrusch* court based its refusal on the fact that the bankruptcy laws do not supercede the NLGA. *Id.*

¹¹⁵ "[T]he RLA was passed first; yet rather than adding additional industries to the RLA's framework, Congress created a separate statutory scheme for those industries, the NLRA, and expressly carved out employers and employees subject to the RLA from its coverage." *Id.* at 371 (referring to 29 U.S.C. § 152(2), (3) (2000)).

¹¹⁶ *Id.* at 371 (citing 29 U.S.C. §§ 157, 163) (2000)).

¹¹⁷ *Id.* at 372 ("[i]n the context of the railroad and airline industry . . . there is precisely such an anti-strike policy, embodied in the RLA" (citing *Detroit & Toledo v. United Transportation Union*, 396 U.S. 142, 148, 154 (1969); *Burlington R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 451 (1987))).

distinguishable and, at the very least, presumptively inapposite.¹¹⁸

With respect to harmonizing the statutes, the district court noted that this case is primarily one of statutory construction.¹¹⁹ Therefore, it is relevant that both the RLA and § 1113 are more specific than the NLGA.¹²⁰ The Supreme Court held in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana Railroad Co*¹²¹ that the specific provisions of the RLA take “trump” the NLGA.¹²² Consistent with that precedent, the district court concluded that to accommodate both statutes, the NLGA cannot operate to prohibit a court from enjoining compliance with the procedural requirements of the RLA.¹²³ As a result, both parties have a legal obligation, enforceable by injunction, to comply with Sections 2 and 6 of the RLA.¹²⁴

For the reasons cited above,¹²⁵ the district court concluded that § 1113 rejection does not automatically terminate Section 6 of the RLA bargaining process as the AFA argues.¹²⁶ This is because if the union threatens to strike before the Mediation Board has declared an impasse, it would necessarily *not* be exerting “every reasonable effort” to reach a settlement under Section 2 of the RLA.¹²⁷ While the court acknowledged that “reasonableness” under Section 2 is a

¹¹⁸ “The RLA’s fundamental concern with preventing disruption to the transportation industry by channeling all major disputes into a drawn-out bargaining and mediation process, distinguishes it from the NLRA and makes cases decided under the latter statute distinguishable.” *Id.* at 373.

¹¹⁹ *In re Northwest Airlines Corp.*, 349 B.R. at 347.

¹²⁰ The district court acknowledged two fundamental rules of statutory construction. First, that specific provisions take precedence over general provisions. *See id.* at 374, 376. Second, that a “statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum . . .” *Id.* at 375 n.23 (quoting *In re Petrusch*, 14 B.R. 825, 829 (N.D.N.Y. 1981)).

¹²¹ 353 U.S. 30 (1957).

¹²² *In re Northwest Airlines Corp.*, 349 B.R. at 374-75 (referring to *Chicago River*, 353 U.S. at 42) (“[T]he specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-La Guardia Act.”).

¹²³ *Id.* at 375 (“[I]n order to accommodate both [the NLGA and the RLA], the NLGA does not divest a court of jurisdiction to enjoin compliance with the RLA’s specific mandates.”).

¹²⁴ *Id.* at 376-77. *See Chicago & North Western*, 402 U.S. at 577.

¹²⁵ *See supra* notes 104, 108, 113 and accompanying text.

¹²⁶ *In re Northwest Airlines Corp.*, 349 B.R. at 378.

¹²⁷ *Id.* at 377. Most importantly, the district court noted that “the [Mediation Board] is uniquely positioned to assess the new, lawfully authorized status quo that emerged from the operation of the § 1113 Order. . . .” *Id.* at 379. While the Mediation Board might very well declare that an impasse *does exist* post-§ 1113, it must be given the opportunity to assess the new situation. *Id.*

flexible concept, what is “reasonable” must be considered in light of Congress’ policy goals in enacting § 1113.¹²⁸ In this case, the court held that the threat to strike could hardly be considered reasonable, given that the bankruptcy court just concluded that the union had no “good cause” to reject the airline’s prior proposals.¹²⁹ To reach the opposite conclusion and permit the union to strike without exerting every reasonable effort to reach a settlement would be contrary “to the express provisions of the Bankruptcy Code and to the Code’s overall effect to give a [debtor] some flexibility and breathing space.”¹³⁰

Therefore, the district court reversed the bankruptcy court’s decision and remanded the case back to the bankruptcy court to determine whether, *given the jurisdiction to enjoin a strike*, the procedural and substantive requirements were met for an injunction in this case.¹³¹ In reaching this conclusion, the district court emphasized that after rejection, the airline (like the union) is still required to continue to negotiate with the union and attempt to reach a mutually agreeable settlement.¹³² If, ultimately, an impasse remains post-rejection, and the Mediation Board has released the parties from mediation, *only then* does the union possess a right to strike in accordance with § 1113 and the RLA.¹³³ And only at that point will the NLGA prevent a federal court from enjoining the strike.¹³⁴

This decision’s consequences on the parties’ negotiations will be explored in the following two sections. To establish a baseline, it is necessary to explore the nature of the bargaining relationship between the parties *before* the airline has chosen to reject a collective bargaining agreement.

¹²⁸ *Id.* at 378. “By the very existence of § 1113, Congress has given the rehabilitative goal of § 1113 precedence over labor law in order to permit rejection of collective bargaining agreements.” *Id.* at 381.

¹²⁹ It is noteworthy that the union did not appeal the bankruptcy court’s decision to allow rejection. *Id.* at 349.

¹³⁰ *Id.* at 381 (citing *Bildisco*, 465 U.S. 513, 532 (1984)).

¹³¹ *Id.* at 383-84. A court may grant a preliminary injunction where the movant has demonstrated that “(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly toward the [moving party].” *Id.* at 383 (citing *Long Island R.R. Co. v. Int’l Ass’n of Machinists*, 874 F.2d 901, 910 (2d Cir. 1989) (citations omitted)).

¹³² *In re Northwest Airlines Corp.*, 349 B.R. at 382.

¹³³ *Id.*

¹³⁴ *Id.*

3. The Second Circuit Court of Appeals

The Second Circuit affirmed the preliminary injunction issued by the district court.¹³⁵ In doing so, the court reached three primary conclusions: 1) that the airline's rejection under § 1113 "abrogated (without breaching)" the existing CBA, which thereafter "ceased to exist;" 2) that the airline's abrogation terminated the RLA status quo created by the prior CBA, after which the RLA's status quo provisions "ceased to apply;" however, 3) at present, the AFA's proposed strike would "violate the union's independent duty under the RLA to 'exert every reasonable effort to make . . . an agreement.'"¹³⁶

First, the court found that the rejection "abrogated the existing CBA in its entirety and replaced it with the March 1 Agreement."¹³⁷ While this holding strictly conflicts with that of the district court—that the airline simply "replaced certain terms of the CBA with the more favorable terms of the March 1 Agreement" (which otherwise stayed in force)—the *effect* is identical because the Second Circuit found, notwithstanding that abrogation, that the airline did not breach its agreement.¹³⁸ Thus, the Second Circuit held that, pursuant to the bankruptcy court's authority, the airline acted properly in abrogating the existing CBA in favor of new CBA terms necessary to its reorganization.¹³⁹

Second, the court found that the effect of the abrogation is that the RLA's "explicit" status quo provisions no longer apply.¹⁴⁰ By "explicit" provisions, the court is referring to the agreement-specific RLA requirements that govern the parties ability to change "rates of pay, rules, or working conditions . . .

¹³⁵ See *In re Northwest Airlines Corp.*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488, at *12 (2d Cir. Mar. 29, 2007). The Second Circuit panel affirmed with Judges Walker and Raggi signing the majority opinion and Chief Judge Jacobs authoring a concurring opinion. While Chief Judge Jacobs clearly agreed with the disposition of the case, the rationale he used to reach that conclusion more closely resembled that used by the district court. See *generally id.* at *12-19.

¹³⁶ *Id.* at *6.

¹³⁷ *Id.* The court found this to be true because "a carrier's obligation to comply with [the] new terms [authorized by the bankruptcy court] cannot be reconciled with the continued existence of its prior contract." *Id.*

¹³⁸ *Id.* at *6-7 ("If a carrier that rejected a CBA simultaneously breached that agreement and violated the RLA, the union would correspondingly be free to seek damages or strike, results inconsistent with Congress' intent in passing §1113.").

¹³⁹ *Id.* at *8.

¹⁴⁰ *Id.* at *9.

as embodied in agreements.”¹⁴¹ For example, pursuant to 45 U.S.C. § 156, airlines and unions must give thirty days notice of any intended change to existing CBAs.¹⁴² Therefore, assuming that the airline and the union have not come to a mutual agreement on CBA terms following rejection, there is no *agreement* under § 152 and consequently, no status quo to maintain.¹⁴³

Third, the court held that notwithstanding the agreement-specific requirements described above, section 2 of the RLA also contains an independent duty to “exert every reasonable effort to ‘make’ agreements.”¹⁴⁴ The court found that this duty—unlike the more specific duties described above—governs the parties’ conduct even after a CBA has been terminated or rejected.¹⁴⁵

In light of these conclusions, the Second Circuit held that the AFA had not yet discharged its duty to “exert every reasonable effort to make an agreement following rejection.”¹⁴⁶ Like the district court, the Second Circuit acknowledged that reasonableness is a flexible concept.¹⁴⁷ As a guide, however, the court noted that the section 2 “reasonable effort” duty does impose unequal burdens on the airline and the union.¹⁴⁸ Specifically, the court held that absent bad faith on the part of the airline, “a union must come *closer* to exhausting the dispute resolution processes of the RLA than the AFA has in this case in order to satisfy its section 2 . . . duty.”¹⁴⁹ In this case, the court noted three important considerations: 1) the bankruptcy court’s finding that rejection was “necessary;” 2) the airline’s continued eagerness to continue negotiations; and 3) that the Mediation Board had not declared an impasse.¹⁵⁰ In light of those considerations, the court found that the AFA’s proposed

¹⁴¹ *In re Northwest Airlines Corp.*, 2007 WL 926488, at *9 (citing 45 U.S.C. § 152 (2000)).

¹⁴² *Id.* (citing 45 U.S.C. § 156 (2000)).

¹⁴³ *Id.* at *8 (“The RLA does not contemplate the inauguration of a new status quo absent the mutual agreement of labor and management.”).

¹⁴⁴ *Id.* at *10 (citing 45 U.S.C. § 152 (2000)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at *11-12.

¹⁴⁷ *In re Northwest Airlines Corp.*, 2007 WL 926488, at *10; *see supra* text accompanying note 128.

¹⁴⁸ *In re Northwest Airlines Corp.*, 2007 WL 926488, at *10.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *11 The court noted that the AFA has not yet sought the assistance of the Mediation Board; however, it declined to comment on whether the district court may enjoin the parties to return to the Mediation Board. *Id.* at *11 n.8.

strike was not justified because it had not made “every reasonable effort to reach an agreement.”¹⁵¹

III. THE PRE-REJECTION SITUATION

In order to understand the implications of the *Northwest Airlines* case, it is necessary to understand the pre-rejection situation. This Note argues that the pre-rejection situation is a desirable status quo where *both* the airline and union are able to derive some benefits. Specifically, while the airline typically possesses enough leverage to extract the necessary financial concessions from its labor unions, the union also is able to extract “non-financial” benefits in return for making those company-saving concessions. This Note suggests that this type of reciprocity is possible in the pre-rejection situation because certain elements of the bankruptcy process and the RLA afford the union a modicum of bargaining leverage. Given the circumstances of the airline’s bankruptcy, the benefits that the union receives are both justifiable and potentially productive. Therefore, this Note suggests that courts must preserve that pre-rejection bargaining relationship, and resulting status quo, through a proper application of the governing statutes.

A. *Leverage in Airline Bankruptcies*

“Leverage” plays a distinct and important role in CBA-type cases such as *Northwest Airlines*. The amount of leverage that a party possesses is determinative of that party’s ability to make demands or force the other party to make concessions.¹⁵² When one party possesses leverage, it is in a position to extract concessions from its adversary or insist on favorable amendments to an existing CBA.¹⁵³ A party to a labor dispute can gain leverage in one of two ways: 1) when one party gains a new ability to pressure the other party into accepting concessions; 2) or when one party loses an ability to resist pressures or is somehow prohibited from exercising an advantage it may have otherwise enjoyed. The next three

¹⁵¹ *Id.* at *11.

¹⁵² See Scott R. Rosner, *The History and Business of Contraction in Major League Baseball*, 8 STAN. J.L. BUS. & FIN. 265, 280 (2003).

¹⁵³ See David L. Gregory, *COBRA: Congress Provides Partial Protection Against Employer Termination of Retiree Health Insurance*, 24 SAN DIEGO L. REV. 77, 87 (1987).

subsections explore the factors and mechanisms in an airline bankruptcy that may allow either the airline or the union to gain leverage and consequently force the other party to make concessions.

1. The Market for Airline Labor

Historically, market forces have greatly influenced the apportionment of leverage between a labor union and airline management. For example, after deregulation¹⁵⁴ in 1978, a number of new airlines entered the industry and price competition became fierce.¹⁵⁵ At the same time, the price of aircraft fuel increased three-fold.¹⁵⁶ Both low-cost competition and high fuel prices persist in today's airline market.¹⁵⁷ As a result of these factors, which are out of the airlines' control,¹⁵⁸

¹⁵⁴ Prior to 1978, the airline industry was highly regulated. In a recent article on airline bankruptcies, one commentator described the effects of deregulation:

Prior to deregulation, the government largely controlled fares, routes, and other aspects of the airline industry. During that time, if operating costs increased—due to higher fuel costs, or more expensive labor contracts—prices, in most instances, were correspondingly raised. Routes were not added without a demonstrated need for new services. With competition effectively in check, the pre-deregulation era was described as a “fairly comfortable operating environment.” Airline bankruptcies prior to 1978 were “extremely rare.”

Despite the relative certainty of the status quo, airline deregulation was enacted with an eye toward restoring competition in the industry. Lowering the barriers to entry would mean more airlines in the marketplace to challenge existing carriers. Service would be brought to smaller, previously underserved areas. Carriers could set their own rates, with more efficient operators gaining ground on lesser competitors. Consumers would also enjoy lower prices. Deregulation, it was argued, would restore industry profits to the benefit of all.

Eva M. Dowdell, *The Chapter 11 “Shuttle”—Coincidence or Competitive Strategy*, 71 J. AIR LAW & COMM. 669, 671 (2006) (internal citations omitted).

¹⁵⁵ Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1490 (1989). The new entrants to the market were typically non-union operations. As a result, their labor costs were considerably lower than their legacy counterparts. In addition, non-union carriers were not laden with heavy debt burdens, and “were able to take advantage of their lower costs to underbid the major unionized carriers for customers. [As a result,] the unionized carriers were forced to match the discounted fares.” *Id.*

¹⁵⁶ *Id.* at 1489-90.

¹⁵⁷ See *supra* Part I.

¹⁵⁸ New technology is making it possible for the airlines to combat the exponentially rising cost of fuel and regain some “control” over their operating costs. Some airlines are installing new aviation software that “redraw[s] the routes planes fly to get from point A to point B—and saving airlines millions of dollars.” Carey, *supra* note 22. This sophisticated new software helps airlines “find the best balance of fuel usage, flight speed and flight path.” *Id.* Specifically, the software is designed to sometimes direct the planes to fly *more* circuitous international routes in order to avoid

the management of the legacy carriers are forced to “go to war” against their unions and seek substantial concessions in wages and work rules.¹⁵⁹

At first glance this proposition seems counterintuitive: if the *airlines* are the ones in the financial “pinch,” shouldn’t the unions be able to exploit that weakness and force the *airlines themselves* to make the concessions? One commentator addresses this anomaly and argues that the reverse is in fact true: “airline employees are particularly vulnerable to the financial difficulties of their employers due to the fact that historically they have been organized on a company-wide craft basis rather than on an industrial basis.”¹⁶⁰ Therefore, because the seniority system is airline specific (i.e., there is no industry-wide seniority), employees do not have the option of leaving one airline and “transferring” their seniority to another.¹⁶¹ As a result, the employees have an incentive to make concessions because they have a direct stake in the financial health of their employer. In other words, because the employees’ future is contingent on the airline’s solvency, the nature of employee seniority gives an airline significant leverage to extract concessions from its labor unions.

The primary concessions that an airline will seek are decreases in wages, increases in work hours and significant reductions in pension and retirement benefits.¹⁶² While it is indisputable that these financial concessions are disastrous for the employees who rely on wages to make a living, the union is not powerless to extract non-financial benefits in return. As will be discussed below, the bankruptcy process and the RLA do give the union sufficient leverage to acquire these benefits.

2. Creditor Committee Participation

By virtue of the labor union’s participation on bankruptcy creditor committees, the airline is forced to alter its

overflying countries who charge what the airline deems to be excessive overflight, or air usage fees. *See id.* The software then determines whether overflight savings offsets the cost of flying more miles. *Id.*

¹⁵⁹ Stone, *supra* note 155, at 1490. The airlines “used the threat of bankruptcy, merger or sale in negotiations to procure concessions. When negotiations failed, they demonstrated that they were willing to operate during strikes and to hire permanent replacements to take strikers’ jobs.” *Id.* at 1491-92.

¹⁶⁰ *Id.* at 1490-91.

¹⁶¹ *Id.* at 1491.

¹⁶² *See* Jeff Bailey & Nick Bunkley, *Northwest and Its Flight Attendants Await a Strike Ruling*, N.Y. TIMES, Aug. 25, 2006, at C3; *see also* *Delta Adds \$719 Million to Claims of Retired Pilots*, N.Y. TIMES, Nov. 28, 2006, at C4.

behavior in a way that provides the union with distinct benefits. Before analyzing these benefits, it is important to understand the vital role that creditor committees play in the administration of a Chapter 11 reorganization.¹⁶³ The creditor committee's most important role is to oversee the debtor's current operations and reorganization plan.¹⁶⁴ An important part of that power is that the creditors, through the creditors' committee, are given the opportunity to be heard in court when they feel that their interests might be adversely affected by the debtor's actions.¹⁶⁵ The result is that every move that a debtor makes when in Chapter 11 is "subject to bankruptcy court oversight."¹⁶⁶ In addition, the creditors can also work to preserve their interests in out-of-court "work-outs" through direct bargaining between the creditor committees and the debtor.¹⁶⁷

It is only recently, however, that labor unions have been permitted to participate on "general" creditor committees.¹⁶⁸ In

¹⁶³ The Bankruptcy Code provides for the appointment of creditors' committees. *See generally* 11 U.S.C. § 1104 (2000). Committees traditionally consist of the seven largest trade creditors, bondholders, and indenture trustees, with more than one committee appointed in certain circumstances. *See* 11 U.S.C. §§ 1102-03 (2000). The committee's role is generally to consult and meet with the carrier, monitor and investigate management, and negotiate a reorganization plan. *See* 11 U.S.C. § 1103 (2000); *see also* Richard M. Seltzer, *The Changed Role of Unions in Chapter 11 Bankruptcies*, 18 AIR & SPACE LAW. 8 (2003).

¹⁶⁴ "Creditor and equity committees can investigate the debtors' past and current operations, oversee continuing operations, and negotiate with the debtor concerning a reorganization plan." *In re Northwest Airlines Corp.*, 349 B.R. 338, 369 (S.D.N.Y. 2006), *aff'd*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007).

¹⁶⁵ *See id.* at 370; *see also In re Western Pacific Airlines, Inc.*, 219 B.R. 575, 577-78 (D. Colo. 1998) (describing the creditors' committee role as a "watchdog" function).

¹⁶⁶ *In re Northwest Airlines Corp.*, 349 B.R. at 370. In support, the court cited the following statutes:

See, e.g., 11 U.S.C. § 363(b) (1984) (transactions outside ordinary course of business require notice and a hearing); 11 U.S.C. § 365(a) (1984) (court approval required before assuming or rejecting any executory contract or unexpired lease of real property); 11 U.S.C. §§ 364(b)-(d) (1984) (permission required before obtaining certain credit or debt other than in the ordinary course of business or on a secured or superpriority basis).

Id. at 370.

¹⁶⁷ An argument can be made that most of the "real work" in a bankruptcy takes place out of court. *See Seltzer, supra* note 163, at 9.

¹⁶⁸ In 1984, the Court of Appeals for the Third Circuit held that labor unions have a right to participate on general, unsecured creditor committees. *In re Altair Airlines, Inc.*, 727 F.2d 88 (3d Cir. 1984). The court reasoned that because a union, as a "collective bargaining representative has a 'right to payment' of unpaid wages within

the first Continental Airlines bankruptcy in 1983 and in the Eastern Airlines bankruptcy of 1989, the labor unions were relegated to subcommittees and were prohibited from participating on the general commercial creditors' committee.¹⁶⁹ In the Eastern Airlines case, the general creditors' committee, which did not include labor union representatives, chose to "defer to management's labor and strategic policies" immediately after filing for bankruptcy.¹⁷⁰ One commentator argues that in allowing this exclusion, the bankruptcy courts effectively "sidelined" the labor voice in bankruptcy reorganization.¹⁷¹ Today, with *inclusion* as the general rule,¹⁷² unions now sit on creditors' committees as experienced and well-respected members of the reorganization process.¹⁷³

By virtue of that participation, the union now possesses unprecedented bargaining leverage. Specifically, participation on creditor committees allows the union to be involved in every facet of the reorganization process—not merely the labor issues.¹⁷⁴ The effect of this is that the airline is forced to deal with repeat players at every step of the game.¹⁷⁵ For example, the airline must exercise caution in forcing the union to make unreasonable labor concessions because any unreasonableness might carry over and be held against the airline when it is seeking concessions from a creditor over which it *does not* have

the meaning of [the Bankruptcy Code]," the union should have an equal role in the reorganization process. *Id.* at 91.

¹⁶⁹ Seltzer, *supra* note 163, at 8.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* See *In re Ionosphere Corp.*, 113 B.R. 164, 166-67 (Bankr. S.D.N.Y. 1990) (while the Air Line Pilot's Association union moved for the appointment of a trustee a few days after the filing of the case, and while the court found repeated instances of the airline's pre-petition misconduct that would ordinarily justify the appointment of a trustee, the court chose not to appoint a trustee until 13 months after the filing date when the motion was made by the general creditors' committee).

¹⁷² The Air Line Pilots Association International (a labor union) was appointed as the chairman of the creditors' committees recently in the US Airways and United Airlines bankruptcies. Seltzer, *supra* note 163, at 9.

¹⁷³ *Id.* "Unions are able to share strategic views, including views on management or business plans, with other constituencies and forge joint positions within an organized creditor structure that simply does not exist outside of bankruptcy." *Id.*

¹⁷⁴ In 2006, even if Delta Air Line's management concluded that a merger with U.S. Airways was the best strategy for reorganization, that action could not be taken without the consent of the creditors' committee. See Michael J. de la Merced, *US Airways Expected to Present Merger Offer for Delta This Week*, N.Y. TIMES, Nov. 29, 2006, at C7.

¹⁷⁵ See Seltzer, *supra* note 163, at 9.

a leverage advantage.¹⁷⁶ In effect, every aspect of the reorganization process is subject to greater scrutiny and broader consequences.

This increased scrutiny allows the union to exert pressure on the airline to make concessions it might not have to make outside of bankruptcy. One area where this is particularly felt is in the management of the bankruptcy estate.¹⁷⁷ For example, in *In re Ionosphere Corp.*,¹⁷⁸ the creditors' committee threatened, with the court's implicit permission, not to support the airline's further use of escrowed funds for operating expenses if the airline did not immediately agree to have a trustee replace the airline's management.¹⁷⁹ Because the creditor committee's support was so essential to obtaining that much-needed cash for basic operating expenses, the airline's ability to resist the committee's ultimatum was compromised.¹⁸⁰

The ability to force management to step down¹⁸¹ has the potential to give the labor union two distinct benefits. First, by forcing the current management to step down and substitute a

¹⁷⁶ *Id.* at 9 (“Today, when a carrier’s management enters the meeting room of a creditors’ committee to seek support for a strategic move, they must face the representatives of the carrier’s employees, who are present as respected, often key, decision makers for the creditors’ committee.”).

¹⁷⁷ See 11 U.S.C. § 541 (2000) (The “bankruptcy estate” is composed of “all legal or equitable interests of the debtor in property as of the commencement of the case”). In Chapter 11, management of the bankruptcy estate includes continuing to run the debtor’s business.

¹⁷⁸ *In re Ionosphere Corp.* is the name of the Eastern Airlines bankruptcy case. Because Eastern Airlines wanted to file its petition in the Southern District of New York (“S.D.N.Y.”), it caused one of its affiliates, Ionosphere Corporation, which operated the airport lounges and was domiciled in the S.D.N.Y., to file a bankruptcy petition in the S.D.N.Y. Then, Eastern Airlines was permitted to file in the S.D.N.Y. even though it was a “foreign” venue. This type of forum shopping is permitted under the Code through the “affiliate venue” doctrine. See 28 U.S.C. § 1408(2) (2000) (“a case under title 11 may be commenced in the district court for the district . . . in which there is pending a case under title 11 concerning such person’s affiliate, general partner, or partnership”).

¹⁷⁹ See *In re Ionosphere Corp.*, 113 B.R. 164, 171 (Bankr. S.D.N.Y. 1990).

¹⁸⁰ This results in a reduction of bargaining leverage. See *supra* Part III.A.; see also MICHAEL A. GERBER, BUSINESS REORGANIZATIONS 257-58 (2d ed. 2000).

¹⁸¹ See GERBER, *supra* note 180, at 257-58.

In cases involving larger companies particularly, management is prone to change on the eve of bankruptcy or soon afterwards. Professors Lopucki and Whitford demonstrated this in a study that they conducted of 43 large, publicly held companies that had sought relief in Chapter 11. They found that in the period beginning eighteen months before filing and ending six months after confirmation, 91% of the companies experienced a change in CEO.

Id.

trustee, it is less likely that the prior management's poor business judgments will continue.¹⁸² In effect, the union, through the creditor committee, now possesses the ability to indirectly influence management decisions.¹⁸³ Second, forcing management to step down allows the union to resume RLA bargaining with the trustee, who is more likely to be neutral than the airline's management.¹⁸⁴ Thus, the ability to force this type of concession from the airline demonstrates the tremendous influence the union now has by virtue of its participation on these committees.

In sum, the net result of this multilateral involvement is an increase in good faith and reasonableness on the part of the airline. While the relationship between the airline as the debtor and the union as a creditor remains adversarial in many respects, increased union participation fosters an environment where compromise is more likely. As will be discussed below, were the union to gain a *surplus* of leverage—by acquiring the right to strike—the compromise-inducing features of this relationship would be destroyed as the airline would be at the mercy of the union.

3. The RLA in the Bankruptcy Context

When the “status-quo provisions” of the RLA operate in conjunction with the Bankruptcy Code, the union possesses significant bargaining leverage over the airline. The status-quo provisions of the RLA are roughly analogous to the automatic stay in the Bankruptcy Code.¹⁸⁵ This is because both provisions have the effect of giving the debtor “breathing space” to sort out its obligations and concentrate on a reorganization plan.¹⁸⁶ Under Section 6 of the RLA, “the parties must bargain

¹⁸² See *infra* note 218 and accompanying text.

¹⁸³ See *Cooke v. U.S.*, 796 F. Supp. 1298, 1300-01 (N.D. Cal. 1992) (debtor-airline acquiesced to creditors' committee recommendation that the current CEO be replaced by an experienced party who had been hired part-time “to assist the faltering airline with interline agreements and to encourage lenders and investors to put additional capital into [the airline]”).

¹⁸⁴ See *In re New Orleans Paddlewheels, Inc.*, 350 B.R. 667 (Bankr. E.D. La. 2006) (“With a trustee, all interests are assured a neutral party with the best interests of the creditors at heart.”).

¹⁸⁵ See generally 11 U.S.C. § 362(d)-(g) (2000) (the automatic stay prohibits any attempt by a creditor to collect a debt or improve his position *without* the express authority of the bankruptcy court).

¹⁸⁶ See *In re Timbers of Inwood Associates, Ltd.*, 808 F.2d 363, 367 n.7 (5th Cir. 1987) (describing the automatic stay as “breathing space” (citing *In re American Mariner Industries, Inc.*, 734 F.2d 426, 431 (9th Cir. 1984))).

in good faith over the proposed modifications”¹⁸⁷ and neither party is permitted to alter the status quo by unilaterally changing the existing CBA.¹⁸⁸ While in bankruptcy, this prohibition on unilateral changes is critical because it prohibits the union from taking any action that would harm the airline’s current operations.¹⁸⁹ Only when a resolution is reached, or when the Mediation Board has declared an impasse and a conclusion of the Section 6 bargaining procedures, may the status quo be disturbed.¹⁹⁰ Therefore, like the automatic stay, the status quo provisions “freeze” any attempt by either party to force or reach a solution in any manner *other than* what is explicitly provided by the RLA.¹⁹¹

At first glance, this appears to give the airline a leverage advantage. Because the union is prohibited from striking, it is forced to sit down with airline management and bargain according to prescribed procedures. While this argument may hold outside of bankruptcy, it fails to appreciate the nature of this “forced” bargaining *in bankruptcy*. In bankruptcy, forced bargaining reduces the union’s leverage over the airline because, unlike a NLRA-governed dispute, the union is *expressly prohibited* from applying “immediate economic pressure” to force the employer to acquiesce to its demands.¹⁹² Thus, while the parties are required to bargain, they are not required to abide by any specified time limitations.¹⁹³

When operating in bankruptcy, time is an airline’s greatest enemy.¹⁹⁴ The reality of the airline business is that most major airlines are operating at a loss, and employment costs are a large reason for their insolvency.¹⁹⁵ Because the

¹⁸⁷ *In re Northwest Airlines Corp.*, 346 B.R. 333, 340 (Bankr. S.D.N.Y.), *rev’d by*, 349 B.R. 338 (S.D.N.Y. 2006), *aff’d*, ___ F.3d ___, Nos. 06-4371-cv(L), 06-4468-cv(CON), 2007 WL 926488 (2d Cir. Mar. 29, 2007).

¹⁸⁸ *See Tulk*, *supra* note 14, at 618-19.

¹⁸⁹ *See id.* at 618-19.

¹⁹⁰ *See id.* at 619.

¹⁹¹ *See supra* note 188 and accompanying text.

¹⁹² *See Reinert*, *supra* note 49, at 4.

¹⁹³ The RLA does not set a maximum time for bargaining. *See supra* note 106.

¹⁹⁴ *See Stone*, *supra* note 155, at 1499.

¹⁹⁵ For the fiscal year 2005, the average operating loss for the six legacy carriers was approximately \$513M. *See* Annual Reports and SEC 10-K Filings for American Airlines, United Airlines, Delta Air Lines, US Airways, Continental Airlines and Northwest Airlines, *available at* <http://www.aa.com>, <http://www.continental.com>, <http://www.nwa.com>, <http://www.united.com>, <http://www.delta.com> and <http://www.usairways.com> (last visited Mar. 11, 2007).

airline has no control over the cost of fuel or passenger demand, the airlines will seek financial give-backs and concessions from its creditors and unions as the quickest way to relieve themselves of burdensome obligations and return to profitability.¹⁹⁶ It is the airline's *immediate* need for labor concessions that gives the union leverage.¹⁹⁷ This is because the "immediate need" is antithetical to the RLA status quo provisions. While the airline requires quick concessions, the status quo provisions allow the union to "hold-out" under the guise of "continued bargaining," "good faith consideration," or "consultation with membership."¹⁹⁸ Other than making a motion for immediate rejection under § 1113, the airline is virtually powerless to expedite this process.

Fortunately, this system has a self-checking feature. That feature is that the union is not foolhardy—it appreciates the potential consequences for its members if the airline should fall deeper into debt.¹⁹⁹ Therefore, the union is *not* likely to use the interminable nature of the status quo to categorically refuse concessions—it will merely defer acceptance of those concessions and "hold-out" in order to gain concessions of its own. Due to the airline's financial situation, the union understands that these concessions will likely not come in the form of financial benefits. However, financial benefits are only a part of the union's *modus operandi*, for unions use CBAs to provide their employees with less-tangible, "cost-neutral" benefits.²⁰⁰

¹⁹⁶ See Stone, *supra* note 155, at 1499.

¹⁹⁷ *Id.* ("With time and the pressure of the status quo on their side, unions have often negotiated for outcomes that altered the employer's initial decision or cushioned its impact on their members.")

¹⁹⁸ *Id.* (The RLA's status quo requirement "enables unions to discuss [management] decisions before they are implemented and to prevent unilateral employer actions in the interim.")

¹⁹⁹ It is important to remember that the unions must balance the benefits that its constituents might receive from holding out with the injury that would occur to its constituents' careers if extended periods of onerous obligations forced the airline into liquidation. For example, in 2003 American Airlines was on the verge of bankruptcy and its parent corporation authorized a bankruptcy filing. It was "only the unions' agreement to \$1.6 in concessions that kept the airline solvent and [out of bankruptcy]. These concessions were undoubtedly more attractive to the labor unions than the possible aftermath of the airline declaring bankruptcy." Tulk, *supra* note 14, at 634. Perhaps the reason for this fear was because the unions knew that while in bankruptcy, the airline would have the option of rejection under § 1113 and they would have no "good cause" to oppose that request.

²⁰⁰ See Berman, *supra* note 34, at 985-86; see also Telephone Interview with Karen Mazure, Member, AFA Financial Review Committee for United Airlines Flight Attendants (Nov. 4, 2006) [hereinafter AFA Interview].

These “cost-neutral” benefits run the gamut of tangibility. On one end, the union can use the threat of “holding-out” as a means to affect “strategic level corporate decisions.”²⁰¹ In addition, unions actively seek greater participation in management decisions as means of improving their members’ prestige and endowing them with a voice in shaping the future of the company.²⁰² For example, in the *Northwest Airlines* case, the flight attendants were successful in altering the airline’s future hiring plan, which the flight attendants perceived as troublesome to their job security.²⁰³ Furthermore, in exchange for reductions in wages or increases in work hours, the unions can bargain for representation on the airline’s board of directors.²⁰⁴ Other options are more financial in nature and are contingent on the future success of the company. These options include: bargaining for a plan of employee ownership, profit-sharing programs, stock options, and “greater employee involvement in financial planning.”²⁰⁵ In the *Northwest Airlines* case, the plan of reorganization being proposed by Northwest’s management provides that employees “will own about 20 percent of the airlines through profit sharing and claims granted in exchange for concessions.”²⁰⁶ In

²⁰¹ See Stone, *supra* note 155, at 1499; see also *supra* note 183 and accompanying text.

²⁰² In the United Airlines bankruptcy, in exchange for financial concessions, the flight attendants were able to negotiate and receive “quality-of-life” concessions. First, they renegotiated the disciplinary policy for employees who were tardy to work in “no-fault” situations. Second, they rebuffed an attempt by airline management to remove the stripes from their uniforms, which the flight attendants perceived as an attempt to degrade the image of the flight attendants vis-à-vis the rest of the flight crew. AFA Interview, *supra* note 200.

²⁰³ In an earlier proceeding, the flight attendants convinced the management to drop its proposal to hire foreign flight attendants for some of its trans-pacific routes. See *In re Northwest Airlines Corp.*, 346 B.R. at 328 n.25. The court found that this concession showed considerable “flexibility in the allocation of concessions,” especially since the hiring of these foreign workers would have made “good business sense.” *Id.* at 327. The record showed that “[t]he hiring of foreign flight attendants would not only reduce costs, but it would also allow the [airline] to attract and serve customers in a segment of their business in which they compete with foreign airlines that appear to offer better language capabilities.” *Id.*

²⁰⁴ See Stone, *supra* note 155, at 1491.

²⁰⁵ *Id.*

²⁰⁶ *Northwest Expects To Be Worth \$7 Billion After Bankruptcy*, N.Y. TIMES, Feb. 16, 2007, at C7. This proposal is promising considering that in typical bankruptcy reorganizations, equity holders at the time the company entered bankruptcy often “lose” their ownership interest when the company emerges from bankruptcy. (Airline employees often own stock in their employer.) Because equity holders enjoy the lowest priority of those who must be “paid out” as part of a reorganization plan, equity holders are often stripped of their ownership interests so that creditors, who have a higher priority, can be compensated as required by bankruptcy law. When the company

the recent United Airlines bankruptcy, the flight attendants bargained for convertible notes and company contributions to 401K retirement plans in exchange for the airline terminating their pensions.²⁰⁷ The Northwest and United cases demonstrate the immediacy with which the airlines need to save money. In those cases, the airlines are willing to confer *significant* future financial benefits in order to reduce their short-term obligations.²⁰⁸

This type of quid pro quo that affords the union greater participation in the reorganization process is similar to the negotiations occurring through the union's participation on creditor committees.²⁰⁹ Airline management should view this type of reciprocal bargaining with open eyes because an agreement to share control and involve unions in long-range planning is hardly a price to pay for concessions that reduce the airline's most burdensome obligation. Therefore, the courts should seek to perpetuate an environment where these reciprocal concessions are possible.

B. The Pre-Rejection Situation as Good Public Policy

While the airline may ultimately be able to earn financial concessions on its labor-related CBAs, labor unions do possess enough bargaining leverage in the pre-rejection situation to extract substantial concessions for their members.²¹⁰ As a matter of bankruptcy and labor policy, these benefits are justified and will tend to facilitate a more efficient and equitable reorganization. Specifically, the leverage apportionment between the union and the airline prior to rejection establishes a manageable and potentially productive status quo in two distinct ways.

emerges from bankruptcy, creditors are often compensated by exchanging their debt claims for newly issued equity (stock) in the company, which effectively eliminates the previous equity holders' interests.

²⁰⁷ AFA Interview, *supra* note 200. The bankruptcy court in the United Airlines case found that termination of the pensions was necessary in order to keep the airline functioning. United was released from \$3.2 billion in pension obligations through 2010. In response, "[t]he federal agency that guarantees pensions, the Pension Benefit Guaranty Corporation, . . . assume[d] responsibility for the plans, which cover about 134,000 people." Micheline Maynard, *United Air Wins Right to Default on its Pensions*, N.Y. TIMES, May 11, 2005, at A1.

²⁰⁸ It is noteworthy that the airline reneged on offers to provide supplemental insurance and "early-out" terminations—both of these concessions would have required the airline to sacrifice capital in the short term. AFA Interview, *supra* note 200.

²⁰⁹ See *supra* Part III.A.2.

²¹⁰ See *supra* notes 201-08 and accompanying text.

First, while the airline is entitled to certain protections designed to give a debtor a “fresh start,”²¹¹ it is well established that these protections should not come at the complete expense of the creditors.²¹² In other words, it is both expected and typical for the debtor to have to make significant sacrifices in exchange for the protective features of the bankruptcy code—particularly § 1113.²¹³ The debtor’s sacrifices can be considered fair consideration for the opportunity for a second chance.²¹⁴ In addition, to put labor disputes in perspective, the reduction of labor costs is only one of the many important pieces in the bankruptcy puzzle.²¹⁵ Neither party (including the court) can afford to have the labor component of the bankruptcy swallow up other important considerations or hinder the overall reorganization process.²¹⁶ In this way, any internal mechanism, such as greater union participation, that quickens the

²¹¹ See ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS, TEXT, CASES, AND PROBLEMS* 123 (Aspen 2006) (By distinguishing between pre- and post-bankruptcy petition debts, the debtors receive the first benefit of the fresh start—the “opportunity to put misfortune or irresponsibility behind them and to begin life anew.”).

²¹² See *Christo v. Yellin*, 228 B.R. 48, 53 (B.A.P. 1st Cir. 1999).

If viewed as a balancing of competing interests, bankruptcy laws should serve both the need of the debtor for economic rehabilitation by debt forgiveness and a fresh start, . . . [and] the interests of creditors and society that the absolved debts be free of fraud, and that the debtor’s assets in excess of exemptible amounts be distributed to the creditors.

Id. (citing Hon. William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The ‘Opt-Out’ as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 152 (1997) (citation omitted)).

²¹³ These protections include, but are not limited to: the power to reject a collective bargaining agreement, 11 U.S.C. § 1113 (2000); the power to reject executory contracts and unexpired leases, 11 U.S.C. § 365 (2000); the automatic stay, 11 U.S.C. § 362 (2000); the trustee’s power to avoid unperfected security interests in personal and real property, 11 U.S.C. § 544 (2000); and the trustee’s power to rescind harmful transactions occurring shortly before filing the bankruptcy petition, 11 U.S.C. § 547 (2000).

²¹⁴ See *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (explaining that the “fresh start” has limits and that even “the honest but unfortunate debtor” may not have the opportunity for a completely “unencumbered new beginning”).

²¹⁵ In airline bankruptcies, while labor is an important component of the restructuring process, the airline must negotiate with other important constituencies to reduce its operating costs and current obligations. See Northwest Airlines, Current News Releases, Northwest Airlines Files its Plan of Reorganization (Jan. 12, 2007), available at <http://www.nwa.com/corpinfo/news/2007/pr020820071739.html> (describing new agreements with airports (terminal and hanger leases), partner airlines, aircraft manufacturers, and banks).

²¹⁶ See Richard L. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 19 J. MARSHALL L. REV. 301, 356 (1986) (“[T]he purpose of bankruptcy reorganization is debt adjustment and maximizing the equitable distribution of available assets and future earnings among creditors.”).

resolution of labor disputes is productive for the overall bankruptcy restructuring process. The less time that the parties spend in adversarial legal proceedings or on opposite sides of the bargaining table, the less likely it is that any animus will carry over and affect other aspects of the reorganization.²¹⁷

Second, when a debtor seeks bankruptcy protection, it is an indication that the debtor requires assistance. While market forces may have contributed to the debtor's insolvency, it *should* be assumed the debtor is somewhat responsible for its financial distress. In fact, the courts recognize a presumption that the debtor, prior to declaring bankruptcy, made at least some unwise business decisions leading up to its bankruptcy filing.²¹⁸ Therefore, the incorporation of experienced parties such as the labor unions into the management structure should be looked upon favorably.²¹⁹ In addition, by granting the employees a stake in the future of the company, it gives the employees an incentive to provide better customer service. Increased customer satisfaction is critical to putting the airline on the right track toward profitability, particularly in the airline industry where reputation can have a significant effect on demand for an airline's services.²²⁰

The fate of this desirable status quo is contingent upon other courts' following the lead of the district court and Second Circuit in the *Northwest Airlines* case. The next section will demonstrate how the district court's decision establishes a framework for the preservation of that leverage apportionment and pre-rejection status quo notwithstanding an airline's request for emergency relief under § 1113.

²¹⁷ This concern is particularly acute because the *general* creditors committees are involved in every aspect of the reorganization. See *supra* Part III.A.2.

²¹⁸ See *In re Ionosphere Corp.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990) ("The language of § 1104(a)(1) of the Code represents Congressional recognition that some degree of mismanagement exists in virtually every insolvency case.").

²¹⁹ See *supra* note 173 and accompanying text.

²²⁰ See Jo Ann J. Brighton, *The Doctrine of Necessity: Is it Really Necessary?*, 10 J. BANKR. L. & PRAC. 107, 112-13 (2000) ("The Court discussed that despite the capital intensive nature of the railroad industry and, to a lesser extent, the airline industry, retention of skills, organization and reputation for performance must be considered valuable assets contributing to going concern value in aiding rehabilitation where that is possible." (citing *In re Gulf Air, Inc.*, 112 B.R. 152, 153-54 (Bankr.W.D.La. 1989))).

IV. THE POST-REJECTION SITUATION

In the *Northwest Airlines* case, the rejection of the CBA under § 1113 had the potential to destroy the pre-rejection status quo if the union were permitted to take immediate strike action. If other courts do not follow the lead established by the Second Circuit, and alternatively apply the rationale of the bankruptcy court, the airlines will suddenly be at the mercy of their employees, for they simply cannot afford to halt their operations for days, or even weeks.²²¹ On a broader scale, if the bankruptcy court's harmonization of the statutes prevails in other courts nationwide and unions are permitted to strike immediately after rejection, the status quo will be instantly altered as the union comes into possession of its strike weapon. The result will be a reduction of the bilateral concessions and compromises that make that status quo a productive one.²²²

This Note suggests that even though the objectives of both parties might continue to be in conflict following rejection, the framework established in the Second Circuit increases the likelihood that the pre-rejection status quo will be maintained *after rejection*. To go one step further and ensure its maintenance, this Note argues that courts and the Mediation Board must insist on holding unions—both the AFA in *Northwest Airlines* and unions in the future—to the “good faith obligations” explicitly found in both the Bankruptcy Code and the RLA.

A. *After Rejection, What's Next?*

The Second Circuit's decision in *Northwest Airlines* requires the parties to return to the RLA-Section 6 bargaining table.²²³ Not only must they return, but, pursuant to Section 2

²²¹ When the bankruptcy court granted Northwest's motion for § 1113 relief, it found that a strike would have disastrous consequences on the airline, its employees and its creditors. See *In re Northwest Airlines Corp.*, 346 B.R. at 329 (“[T]he Court has already found that revisions to the PFAA agreement and the Debtors' other collective bargaining agreements are ‘necessary’ to prevent liquidation and preserve value. The Debtors cannot survive under the present agreements, and liquidation of this service company would likely cost all employees (including the flight attendants) their jobs and result in little or no recovery to creditors.”).

²²² See e.g., Seltzer *supra* note 163, at 8 (Through participation on general creditor committees, “[l]abor unions are now . . . viewed and treated by debtors, committees, creditors, the courts, and the media as full bankruptcy ‘players,’ and that shift has been an improvement for the bankruptcy reorganization process.”).

²²³ See *supra* note 132 and accompanying text. This proposition assumes that on remand, the bankruptcy court found that the standard was met for a preliminary

of the RLA, they must also continue to make “every reasonable effort” to reach a settlement that is mutually agreeable.²²⁴ It is unrealistic, however, to assume that both parties will return to the bargaining table in the same place as where they started—that is to say equally eager to work toward a solution.

For a number of reasons, the union is not likely to be amenable to further negotiations after the terms it had originally bargained for and expected were substituted at the request of the airline.²²⁵ First, it is clear after numerous adversarial legal proceedings that bargaining is insufficient and that the debtor has no more options. Specifically, by asking the court for permission to reject a CBA after a failed bargaining process, the airline has signaled to the court and the public that the union is unwilling to compromise and that it has no choice but to invoke to § 1113 as a last resort.²²⁶ Second, the union is faced with the fact that it has been established on the record that the union has refused to agree to “necessary” modifications without any “good cause.”²²⁷ Therefore, from the perspective of the public, the Mediation Board, and any potential arbitrator, there is a presumption of the union’s bad faith.²²⁸ Third, because the union was not willing to make sufficient concessions in its wages or benefits, it is unlikely that it now enjoys any of the “new” management responsibilities that could have resulted from pre-rejection compromises.²²⁹ In other words, the union representatives are likely to feel even more alienated from the airline’s management than before.

Despite the union’s probable distaste for future bargaining, the Second Circuit in *Northwest Airlines* has made it clear that the union has a continued obligation to do so.²³⁰ Therefore, from the union’s perspective, the best that it could

injunction and the union was consequently enjoined from strike activity. *See supra* note 131 and accompanying text.

²²⁴ *See supra* note 130 and accompanying text.

²²⁵ “Collective bargaining agreements . . . and other policies regarding workplace relations exist in part to clarify the rights and responsibilities of workers and management and to assure a certain equality of treatment and expectations.” Peter Robinson, et al., *DyADS: Encouraging “Dynamic Adaptive Dispute Systems” in the Organized Workplace*, 10 HARV. NEGOT. L. REV. 339, 361 (2005). This expectancy is necessarily upset when one party (with the court’s permission) imposes un-bargained for terms on the other party.

²²⁶ *See Matter of Walway Co.*, 69 B.R. 967, 973 n.15 (Bankr. E.D. Mich. 1987).

²²⁷ *See supra* note 66.

²²⁸ This presumption will be applied in Part IV.D *infra*.

²²⁹ *See supra* notes 202-05.

²³⁰ *See supra* note 132 and accompanying text.

hope for is that the resumption of negotiations is a short-lived formality. Specifically, the union would likely prefer that the Mediation Board quickly declare an “impasse”—then, after declining an invitation to enter arbitration,²³¹ the union’s power to strike would no longer be deferred.²³² Because the union would finally possess its long-anticipated economic weapon, it would then have the power to force the airline to accept its terms under duress.²³³ If the Mediation Board were to quickly declare an impasse after rejection, the bankruptcy court’s decision will have effectively prevailed—over Second Circuit’s decision—to the detriment of the policies of both the Bankruptcy Code and the RLA.²³⁴ If the union were permitted to strike without having to return to the bargaining table in good faith, then the union would receive a leverage windfall that would compromise the pre-rejection leverage apportionment and virtually eliminate the reciprocal benefits that come with it.²³⁵

On the other hand, the airline probably hopes that the union, following costly and potentially embarrassing § 1113 litigation, would be enticed to compromise or simply accept the new court-approved terms. In the alternative, the airline might also hope that the post-rejection negotiation process continues indefinitely.²³⁶ After all, it has already been given permission to institute terms that are specifically designed to aid in its reorganization.²³⁷ Despite this, the airline must keep

²³¹ The union would not likely elect arbitration because it would introduce more uncertainty into the process. Specifically, the union would run the risk of the arbitrator being sympathetic to the public interest involved if a strike occurred. *See In re Northwest Airlines Corp.*, 349 B.R. at 350 (noting that “Northwest carries 130,000 passengers per day, has 1,200 departures per day, is the one carrier for 23 cities in the country, and provides half all airline services to another 20 cities”).

²³² *Id.* at 382.

²³³ The bankruptcy court in *Northwest Airlines* found that if the airline were to accept the flight attendants’ terms, that modification would not provide the airline with the necessary savings to avoid liquidation. *See supra* note 221 and accompanying text.

²³⁴ This is because the bankruptcy court did not believe that the parties were required to resume RLA bargaining after rejection. *See supra* note 99 and accompanying text. Therefore, if the resumption of bargaining post rejection is merely a short-lived formality, the union is not *really* being required to bargain pursuant the district court’s order.

²³⁵ *See supra* Part III.B.

²³⁶ The Mediation Board has the statutory authority under the RLA to compel indefinite mediation. *See supra* Part II.A.1.

²³⁷ *See supra* notes 67-68 and accompanying text.

in mind that the substituted terms are merely temporary.²³⁸ This is because, per the district court's and Second Circuit's opinions in *Northwest Airlines*, a labor strike has not been enjoined *ad infinitum*.²³⁹ On the contrary, the courts have merely *deferred* the union's right to strike to a later date when the Mediation Board has declared an impasse (i.e., that no further bargaining would lead to a solution).²⁴⁰ For this reason, while the airline has won the immediate battle, which was necessary to save money in the short-term, the union is much closer to being given the "green light" to strike.²⁴¹

In sum, the Second Circuit's decision has resulted in the following situation: the airline continues to have an incentive to bargain in good faith with the union to reach a settlement. In contrast to the pre-rejection situation, this incentive is fueled not by a pressing need to cut costs (for the court has already done that), but by a fear that a strike is now *more* imminent. On the other hand, the union has an incentive not to bargain in good faith and to reach impasse as quickly as possible in order to "earn" the right to strike. Given these conflicting objectives, it *can* be said that the district court's decision will help to maintain the pre-rejection status quo and prevent a strike. This is possible because of the "good cause" requirement found in § 1113(c)(2).

B. Strict Adherence to the "Good Cause" Requirement of § 1113

Under § 1113(c)(2), a court may not approve a rejection of a CBA unless it finds that the union has refused to accept the debtor's proposal without "good cause."²⁴² This Note argues

²³⁸ See *In re Northwest Airlines Corp.*, 349 B.R. at 382 ("[w]here a debtor succeeds in making a showing under § 1113 that rejection of its collective bargaining agreements is necessary to reorganization, that modification is essentially temporary; the debtor can implement the necessary changes [as approved by the court] only until the parties bargain to a new contract.").

²³⁹ *Id.*

²⁴⁰ See *supra* note 133 and accompanying text.

²⁴¹ *Id.*

²⁴² Section § 1113(c)(2) refers to the debtor's "proposal," which is discussed in § 1113(b). Section § 1113(b) states in pertinent part:

(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—

that such a finding should automatically trigger a post-rejection presumption that the union did not act in good faith during pre-rejection bargaining.²⁴³ This presumption should be at the forefront of the Mediation Board's mind while supervising post-rejection mediation and should be a major factor in its decision to declare an impasse. Given the union's presumptive bad faith prior to rejection, it should not be permitted to approach the post-rejection bargaining process with the *sole* intent of reaching impasse so that it can strike. In other words, the Mediation Board should be charged with a duty to ensure that the post-rejection bargaining process is truly a good faith exercise and is lengthy enough so that the appropriate concessions can be made.²⁴⁴ While the district court's decision "forces" the parties to bargain post-rejection and explicitly preserves the Mediation Board's *exclusive* power,

(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.

11 U.S.C. § 1113(b) (2000).

²⁴³ In other words, if the union had no "good cause" to refuse the airline's proposal, and it did so anyway, that refusal must have been based in some "less-than-good" cause such as greed or a desire to punish.

²⁴⁴ Shortly after the enactment of § 1113, Bankruptcy Judge Richard Merrick hinted at the importance of time in the § 1113 process. See Richard L. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 19 J. MARSHALL L. REV. 301, 362. Judge Merrick asserted that the "key to the success" of § 1113 rests in the management's ability to convince the union that wage and benefit concessions are required for the "future viability" of the airline and their jobs. *Id.* at 362. In addition, Judge Merrick hypothesized that "local situations" will govern the sacrifices that each party will have to make to ensure the airline's viability. *Id.* at 363. As discussed above, this Note suggests that Judge Merrick's dual propositions are absolutely correct. In other words, the only way for this to work—i.e., to afford the airline with the necessary time to do this "convincing"—is to allow the parties to return to the pre-rejection status quo where the Mediation Board has control over whether the union strikes. In other words, the Mediation Board must anticipate and counter the union's objective of hastening the post-rejection bargaining to reach impasse.

the courts must retain jurisdiction over the case to ensure that the Mediation Board is zealously exercising its statutory authority.

C. *What Constitutes Good Cause*

The *Northwest Airlines* case demonstrates why a presumption of bad faith is a necessary “check” on the union’s bargaining behavior. In granting Northwest Airlines’ motion for rejection, the bankruptcy court found that “the record contains ample evidence that the union did not have good cause to reject management’s last offer.”²⁴⁵ Specifically, the union was not able to justify its refusal to accept the airline’s proposals.²⁴⁶ Despite this conclusion, the bankruptcy court appeared to backpedal less than two months later when it authorized the union to strike. In its decision allowing the union to strike, the bankruptcy court asserted that it “[could] not be said” that the union refused to bargain in good faith.²⁴⁷ The bankruptcy court based that assertion on the single fact that once the AFA was certified to replace the PFAA, the union and the airline engaged in “round-the-clock negotiations” for ten days to reach an agreement.²⁴⁸ While this observation is technically correct, its emphasis on procedure caused the court to miss the substantive point that it had observed in its prior decision,²⁴⁹ which was that bargaining that fails to address the needs of reorganization does not constitute good faith.²⁵⁰ The district court adeptly recognized this backpedaling as an obfuscation of the Mediation Board’s statutory role in the

²⁴⁵ *In re Northwest Airlines Corp.*, 346 B.R. at 328.

²⁴⁶ The court found that while the PFAA leadership technically endorsed the March 1 Agreement, the leadership actually “gave the agreement little support.” *See id.* at 328. In addition, the record suggests that the parties agreed on a target amount of wage concessions. “Once the level of concessions is set, the only remaining question is how to reach the target and the value of the components. The [airline’s] March 1 Agreement reaches that target . . . [however,] the PFAA . . . failed to submit an alternative proposal that reaches that target” *See id.* at 328.

²⁴⁷ *See id.* at 343.

²⁴⁸ *Id.*

²⁴⁹ See the bankruptcy court’s ruling on the debtor’s § 1113 motion *supra* note 82.

²⁵⁰ An examination of the parties “good faith” must include a *procedural* and *substantive* analysis. *See* William J. Goldsmith, et al., *Tossing the Coin Under Section 1113: Heads or Tails, the Union Wins*, 23 SETON HALL L. REV. 1516, 1542 (1993) (arguing that in considering a debtor’s motion for rejection under § 1113, the court must address both the procedural aspects of the bargaining process and the substantive aspects of the union’s refusal).

bargaining process,²⁵¹ and the Second Circuit concurred with that judgment. Had the appellate courts affirmed the decision of the bankruptcy court, the “no good cause” requirement of § 1113 would have been rendered superfluous.²⁵² In other words, the *bankruptcy court*, as opposed to the Mediation Board, would have effectively given itself the authority to declare an impasse notwithstanding the union’s lack of good cause. The Bankruptcy Code and the RLA clearly require greater scrutiny of the union’s bargaining behavior.

D. Argument for a New Presumption of “Bad Faith”

This Note suggests that this heightened scrutiny can be obtained through the operation of a presumption of bad faith following rejection. The presumption should operate in the following manner: assuming that the bankruptcy court’s finding of “no good cause” in a § 1113 motion is factually correct,²⁵³ the post-rejection burden of proof should shift to the union to demonstrate that the factual situation has somehow changed and that it now has justifiable reasons for refusing to acquiesce to the court-approved terms.²⁵⁴ In other words, the Mediation Board should require that the union rebut this presumption as a pre-requisite to the declaration of an impasse. This presumption would change the union’s incentive structure both before and after rejection.

Prior to rejection, if the union knows that it will not receive a leverage windfall and will be subject to a presumption of bad faith following the granting of a § 1113 motion, the union is more likely to compromise and *avoid* the § 1113 litigation altogether.²⁵⁵ Following rejection, the presumption would also weaken the unions’ incentive to treat the RLA bargaining as a mere formality or pretext. As opposed to the

²⁵¹ See *supra* text accompanying notes 104-07.

²⁵² See Goldsmith, *supra* note 250, at 1539.

²⁵³ In the *Northwest Airlines* case, there is no reason to believe that the bankruptcy court’s findings underlying the § 1113 motion were incorrect given that the Union chose not appeal the granting of that motion. See *supra* note 129.

²⁵⁴ For example, if the circumstances permitted, the union could argue that a sudden *increase* in demand for air travel has increased the airline’s profits and simultaneously *decreased* the need for labor concessions.

²⁵⁵ In the *Northwest Airlines* case, the five unions that reached consensual agreements with the airline immediately following the filing of the § 1113 motion demonstrated proper foresight of the consequences of rejection—they appreciated that their leverage was at its peak during the pre-rejection status quo. See *supra* note 78 and accompanying text.

pre-rejection situation where time was the *enemy* of the airline, in the post-rejection situation, time is an *ally* (i.e., the airline benefits from any post-rejection delays). This is because the airline is realizing financial savings without having to make non-financial concessions to the union.²⁵⁶ Consequently, the presumption of bad faith would have the effect of giving the union an incentive to bargain in good faith following rejection.

While the Second Circuit's decision made the correct first step by allowing the Mediation Board to continue to participate in the process post-rejection, the courts must insist that the Mediation Board keep the negotiations open until the union has rebutted the presumption. While courts have historically been reluctant to review Mediation Board decisions, this reluctance has been in ordering the Mediation Board to *cease* mediation and immediately declare an impasse.²⁵⁷ On the contrary, this Note suggests that courts scrutinize all Mediation Board "impasse decisions" in the RLA/bankruptcy context with the goal of *extending* the time for mediation. By allowing the mediation process to continue indefinitely, the Mediation Board will allow the airline to make the necessary concessions and quid pro quo that will likely lead to a settlement.²⁵⁸ Both the RLA and Bankruptcy Code provide authority for this "extension" of bargaining time.²⁵⁹ Under the RLA, the Supreme Court has made it clear for decades that the purpose of the RLA is to preserve the status quo indefinitely so that a settlement can be reached.²⁶⁰ Under the Bankruptcy Code, the extension of post-rejection negotiations increases the likelihood that the airline will make non-financial concessions that will enhance its reorganization potential and improve its future operations.²⁶¹

²⁵⁶ See, e.g., *supra* notes 200-08 and accompanying text (describing some of the cost-neutral benefits that the flight attendants can receive in exchange for giving financial concessions).

²⁵⁷ See *In re Northwest Airlines Corp.*, 349 B.R. at 366.

²⁵⁸ See *supra* note 244.

²⁵⁹ With respect to the RLA, it is universally understood that bargaining can last indefinitely. See *supra* note 62. With respect to the § 1113 of the Bankruptcy Code, courts will often delay imposing new terms after approving a CBA rejection in order to allow the parties to bargain and reach a mutually acceptable settlement. See *supra* note 81.

²⁶⁰ See *supra* note 106 and accompanying text. To date, Congress has not challenged that proposition by amending the RLA or limiting its operation through another statute.

²⁶¹ See *supra* Part III.B.

CONCLUSION

This Note began by suggesting that the disposition of the *Northwest Airlines* case increased the likelihood that airlines can continue to acquire company-saving concessions. As the district court in *Northwest Airlines* articulated, and the Second Circuit affirmed, the acquisition of those concessions is contingent on the airline-debtor's unfettered access to § 1113 of the Bankruptcy Code.²⁶² While § 1113 contains internal mechanisms and requirements to prevent abuses on the debtor's side, § 1113 lacks reciprocal mechanisms to prevent creditors such as labor unions from unfairly capitalizing on the debtor's need for emergency relief.

With that in mind, the Second Circuit's decision places the parties in a position where the unions do not receive an "unearned" windfall of bargaining leverage. Alternatively, the bankruptcy court's decision creates an incentive to reach a settlement without court intervention. By virtue of that decision, unionized employees can simultaneously increase their job security and receive significant, non-financial benefits. At the same time, the unions have a distinct disincentive to litigate their labor disputes because they are less likely to earn a strike weapon and more likely to have unfavorable terms imposed upon them by the court. Subsequent courts can ensure that this incentive structure remains intact by following the framework established by the appellate courts in the *Northwest Airlines* case. By doing so, and holding the parties to their statutory obligations following court intervention, the courts can decrease the frequency and lessen the effects that labor disputes have on the already volatile airline industry.

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²⁶² See *In re Northwest Airlines*, 349 B.R. at 346 ("[It would be] ironic . . . for the Court to conclude . . . that a debtor's lawful resort to a Bankruptcy Code provision meant to keep an insolvent business running while it reorganizes its debts would serve as the automatic trigger point to end the procedures Congress mandated to govern amicable settlement of major labor disputes involving carriers, and thereby prompt an immediate strike that could spell doom by liquidation to that airline.").

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