UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re: **PATRIOT COAL CORPORATION, *et al.*,** **Debtors.**	**Chapter 11** **Case No. 12-51502-659** **(Jointly Administered)** **Objection Deadline:** **April 12, 2013 at 4 p.m. CDT** **Hearing Date:** **April 29 to May 3, 2013 at 10 a.m. CDT** **Hearing Location:** **Courtroom 7 North**

UMWA'S OMNIBUS REPLY MEMORANDUM REGARDING THE MOTION TO REJECT COLLECTIVE BARGAINING AGREEMENTS AND TO MODIFY RETIREE BENEFITS PURSUANT TO 11 U.S.C. §§1113 AND 1114

Five parties have filed so-called "objections" to the Debtors' motion to reject the collective bargaining agreement and to modify the retiree benefits herein.[1] All of these "objectors" are however primarily concerned with the allocation of assets among co-debtors and not actually concerned about whether the relief sought should be granted. Thus, Wilmington Trust (¶¶4-6 and 13-16, ECF #3606) and the US Bank Association (¶1 of #3605) are explicitly primarily concerned with substantive consolidation, and not §1113 or 1114. Aurelius and Knighthead (¶¶2-4 and 9-10 of #3608) and Argonaut (p. 2 of #3616) assert without proof that certain "non-obligor" debtors have no obligation for retiree liabilities, and consequently object to using "their" assets to pay corporate responsibilities. Argonaut also incorrectly states that the UMWA has no recourse against "non-obligor" debtors, although this statement is demonstrably

[1] These entities are Argonaut Insurance (#3616), the Official Committee of Unsecured Creditors (#3609), Aurelius and Knighthead Capital Management (#3608), Wilmington Trust (#3606), and US Bank Association (#3605).

inaccurate regarding pension withdrawal liabilities (a fact conceded by most other parties). The Committee (¶1 and Conclusion of #3609) and Aurelius/Knighthead (¶27 of #3608) object to the approval or implementation of the Debtors' proposals. Curiously, they suggest that the Court should grant the §§1113 and 1114 motions on the premise of the Debtors' proposals but then object to implementing that very premise.

A fair reading of these "objections" reveals that none analyzes seriously the standards mandated by Congress in §§1113 or 1114 as applied to the facts of this case when positing that the motion should be denied. Indeed, most of them admit they actually *support* the motion.[2] Rather, these parties ask the Court to do something specifically forbidden by federal law: to reject the labor agreement, or to eliminate the retiree benefits, on the basis of proposals which the Debtors will then be prohibited from actually implementing. This request, made by four of the collateral objectors, reveals that they have misread or misconstrued the statutes involved. The sheer absurdity of the "objections" made by these parties however underscores why the Court should not grant the relief sought herein.[3]

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[2] The lone exception is US Bank Association, which limits itself to asking the Court not to rule on substantive consolidation, an issue not before the Court. The Committee explicitly calls for rejection of the contract in its pleading, but then immediately objects to the implementation of the Debtor's proposal (see ¶1 of #3609), something forbidden by §§1113 and 1114 and federal labor law. Aurelius and Knighthead explicitly say they do not oppose the relief to which they purportedly object (¶5 of #3608). Wilmington likewise explicitly calls for rejection of the contract and modification of the benefits in its purported objection (¶1 of #3606). Argonaut objects solely to the Union and retirees receiving anything from alleged "non-obligor" debtors but otherwise does not oppose the relief sought by the Debtors (p. 2 of #3616). These are not legitimate or principled "objections."

[3] The Committee also adds the bizarre comment that the Debtors' proposal withdrawing from the pension plan and thus triggering withdrawal liability must pass the "ordinary course" test or obtain Court approval (see ¶¶ 16-19 of #3609), apparently on the theory that withdrawing from a pension plan is a "use, [sale] or lease" of property belonging to the debtor. This unprecedented theory is manifestly unfounded. Because contract rejection will cause an immediate and automatic cessation of the obligation to contribute to the pension plan, it will as a matter of law cause a withdrawal from the pension plan. ERISA §4203(a)(1), 29 U.S.C. §1383(a)(1). The Court simply cannot modify this requirement of ERISA. The Committee's contention that the rejection can only occur in the context of a plan is also specifically contradicted by the opening line of §1113(a) (a "debtor in possession…may…reject a collective bargaining agreement *only* in accordance with the provisions of this section") and relevant case authority. E.g., Chicago Council of Carpenters Pension Fund v. Cotter, 914 F.Supp. 237 (N.D. Ill. 1996)(labor agreement could not be rejected even in a confirmed plan); accord Manor Oak Skilled Nursing Facilities, 201 B.R. 348 (Bankr. W.D. N.Y. 1996)(debtor did not reject its collective bargaining agreement but sought to modify the contracts in a

1. Federal Law and §§1113 and 1114 Prohibit Rejection or Modification Combined with a Refusal to Implement the Relief Sought.

Section 1114 explicitly states that "in no case shall the court enter an order providing for such modification which provides for a modification to a level *lower than* that proposed by the [debtor-in-possession] in the proposal found by the court to have complied with the requirements of this subjection." 11 U.S.C. §1114(g)(first proviso) (emphasis added). While the statute in a second proviso explicitly empowers a union to seek an *increase* in the benefits at any time after modification, id., the plain language specifically prohibits the Debtors from obtaining a modification of retiree benefits and then *not* implementing the consideration for the modification. The Court, in other words, cannot simply void retiree benefits under this statute. If the Court grants the Debtors' request on the basis *inter alia* that their proposal is fair and equitable, then it *must* order implementation of that proposal, including of course any payments required to be made to retirees, in this case, in the form of VEBA funding.

Even if it were not readily evident from the language of the statute, the Code later provides in §1129 that the Court cannot confirm a plan which fails to provide "for the continuation after its effective date of payment of all retiree benefits…at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to the confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits." §1129(a)(13). That is, once the Court grants an order modifying benefits on the basis of the Debtors' proposal to pay them (in this case, through a VEBA funded in certain ways), then the Court cannot later approve a plan which does anything less. Reason dictates this result. It is not plausible that Congress requires courts to find whether a proposal is necessary,

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reorganization plan so that it would not have to cure its pre-petition defaults; court ordered the debtor to assume or reject because "[i]t may not have its cake and eat it too"). No authority supports the Committee's propositions in either regard.

fair and equitable as a prerequisite to modifying retiree benefits, only to ignore the proposal after modifying the benefits. The proposition advanced by the collateral "objectors" is absurd.

Section 1113 has no equivalent provision as the first proviso to §1114(g), but the result is the same because of generally applicable federal labor law. A debtor-in-possession must comply with the National Labor Relations Act, just as all other covered employers must. While contracts may be rejected, the legal requirements of the NLRA cannot. Section 8(a)(5) of the NLRA requires employers to bargain in good faith, and this requirement means that an employer may not make unilateral changes in working conditions absent an impasse reached in good faith. NLRB v. Katz, 369 U.S. 736 (1962). This legal duty to bargain under §8(a)(5) cannot be excused by a bankruptcy court under any conditions for any reason. In re Goodman, 873 F.2d 598 (2nd Cir. 1989).

One part of such duty is the duty actually to implement the last, best offer made by the Debtor in §1113 negotiations. It is an unfair labor practice to implement proposals different from a debtor's §1113 proposal. Mile Hi Sheet Metal Systems, 295 N.L.R.B. 877 (1989); see also Accurate Die Casting, 292 N.L.R.B. 982 (1989)(debtor violates §8(a)(5) by making unilateral changes in working conditions even though the collective bargaining agreement expired).

Enforcing the obligations of employers to bargain in good faith is a matter within the exclusive primary jurisdiction of the National Labor Relations Board. Upon the filing of an unfair labor practices charge by any employee or labor organization, the NLRB will investigate and pursue enforcement of the Act. These enforcement activities are on behalf of the federal government, not the individual employee or union. Because the NLRB's exercise of its police power will not be stayed by 11 U.S.C. §362(b)(4), see, e.g., NLRB v. Edward Cooper Painting,

Inc., 804 F.2d 934 (6th Cir. 1986), the UMWA will be free to seek enforcement through NLRB proceedings of the terms of the Debtors' Fourth §1113 and Fifth §1114 proposals,[4] including of course the powers of the Board to seek injunctive relief under §10(j) of the Act.

Any agreements reached between the Union and the Debtors are likewise not themselves subject to rejection or modification, e.g., In re Schuld Mfg. Co., 43 B.R. 535 (Bankr. W.D. Wis. 1984)(contract reached post-petition cannot be rejected); In re IML Freight, 37 B.R. 556 (Bankr. D. Utah 1984)(same); California Cigarette Concessions, 280 N.L.R.B. 215 (1986)(debtor that refused to sign post-petition collective bargaining agreement was guilty of unfair labor practices), even if such agreement has no court approval. In re DeLuca Distributing Co., 38 B.R. 588 (Bankr. N.D. Ohio 1984)(because a debtor has a legal obligation to bargain, collective bargaining agreements are *per se* in the ordinary course of business); In re IML Freight, 37 B.R. 556 (Bankr. D. Utah 1984).

It could hardly be otherwise. If the Debtors could promise things at the table that would never be delivered, and the Court then based its decision that the "balancing of the equities" favored such a proposal, it would make a mockery of the congressional scheme not to provide the very consideration which justified the Court in approving the concessions in the first place. The statute requires the Court either to deny the motion, or fulfill its promise.

The notion therefore that the Court can reject a union agreement, or modify retiree benefits, on the basis of a proposal, and then refuse to enforce that proposal, is wholly antithetical to both American labor *and* bankruptcy law. The collateral "objecting" parties

[4] Section 1114 also covers "future unpaid benefits" in addition to benefits actually being paid to current retirees. See §1114(i). Because the obligation to provide retiree health care benefits is contained in the collective bargaining agreement, and covers both current retirees and active employees who anticipate retiring with these benefits, the Union will have a legally enforceable right to implementation of the promises made in both proposals, not just the §1113 proposal. The Union can trigger this result today, no matter what the objections of other creditors might be, just by accepting the proposals.

calling for this result seek a completely unlawful regime, but in doing so, they have amply demonstrated to the Court why the pending motions must be denied.

2. The Third-Party "Objectors" Have Inadvertently Revealed A Major Flaw in the Proposals and Thereby Ratified the UMWA's Good Cause to Reject Them.

In their zeal to commend to the Court that it reject the contract and eliminate retiree benefits, providing nothing at all of substance in return, the "objectors" have given away the Debtors' game: the essential pillar of the Debtors' scheme is to shed $75 million of annual expenses by changing its retiree healthcare obligations into VEBA payments which are largely unknown and unquantifiable. While the "objectors" absurdly contend that the retirees have it too good, they universally admit that no one really knows what the retirees are getting in exchange for their sacrifice of guaranteed health care. Therein resides the problem.

a. The "Objectors" Admit That The Equities Tip Against The Proposals.

A cursory review of their collective pleadings makes this point beyond any cavil. The Committee (in ¶¶14-19) apparently believes that the proposals are impossible to implement legally under the Code, a proposition which, if correct, seems by definition to mean that the equities cannot possibly tip in favor of implementing them.[5] US Bank Association makes the identical point at ¶¶3, 5, and 7 of its "objection." (#3605).

Several third-party objectors make the correct assertion that it is impossible to value what is being offered to UMWA in the §1113 and §1114 proceedings. The Committee (in ¶¶6, 9 and

[5] The Committee implies that retirees are not allowed to receive more than general unsecured creditors in ¶18. Section 1114 was passed in reaction to the efforts by LTV Steel to reject retiree benefits, putting retirees in the same position as general creditors. In re Chateaugay Corp., 64 B.R. 990 (S.D.N.Y. 1986); 133 Cong. Rec. H8558 (Daily ed. Oct. 13, 1987) ("[T]he triggering event for [enacting § 1114] was [the] bankruptcy of LTV Steel[.]"). The statute now provides that the very worst thing that can happen to retirees is that they receive their benefits as expenses of administration through the §1114 proceedings, and thereafter must receive *at least* a general unsecured claim, or more unless the necessity and fairness tests justify treating retirees as mere unsecured creditors. In most cases, the benefits will be required to paid in cash after the effective date by §1129(a)(13) with a general unsecured claim for any deficiency—that is, substantially *better* treatment that called for by the Code for general creditors. The Committee here assumes that §1114 was never passed. The purpose of §1114 was to *ensure* that retirees would have *better* treatment than the run of creditors.

15 of #3609) raises the fantastical concern that the retirees might be overcompensated by the Debtors' proposals because no one can quantify the stake being given to the VEBA, for several reasons—principally the inherent ambiguities in the proposals themselves, which do not quantify exactly what it being given to the VEBA, but also the dilution effect of the massive claim for pension withdrawal liability of $960 million. The solution is not, however, as the Committee urges, to require later hearings to see whether the Debtors can bait-and-switch the retirees by first securing elimination of their benefits and then never providing the promised VEBA payments after all. Instead, the more appropriate, and rather obvious action, is to deny the motion because the Debtor cannot meet the standard of showing that the equities tip decidedly in favor of its proposal. The same point is made by Wilmington (¶3 of #3608) and the Noteholders (in footnote 8 of ¶11 relating to the profit sharing mechanism and ¶25 of #3606 relating to the value of the stake in the reorganized enterprise). Argonaut agrees (see page 2 of #3616).

Likewise, several objectors castigate the Debtors for providing VEBA funding based upon the value of the enterprise, without actually valuing the enterprise—a contention the Union has been making for months at the bargaining table. The Noteholders make this point (again at footnote 8) and the Committee does so at ¶14.

Several objectors note that the proposals fail to account for the massive potential withdrawal liability of $960 million arising from eliminating contributions to the 1974 Pension plan, which virtually everyone concedes is a jointly and severally held obligation for all 99 estates. Even the Noteholders concede this point (#3606, footnote 8 and ¶¶14, 25).

Finally, it is not clear whether the 35% stake is only for the retiree medical claim or also for the §1113 losses. (See Committee statement, footnote 8 in #3609). These defects make the VEBA proposal essentially a pig-in-a-poke for retirees.

None of these "objectors" has an actual concern for the retirees whose claims they all concede are not being valued with a sufficient degree of precision to know what they are receiving as part of a "fair and equitable" deal. The point here is that parties who would normally be expected to encourage the Debtors to seek the maximum amount of relief they possibly could snatch from the hands of retirees and Union members are genuinely startled by how little is known about what the Debtors are offering. They are scared it will be too much because of their self-interest, but if *they* cannot figure out what is being offered, it follows that the authorized representative of retirees, the UMWA, also had good cause to reject this offer. Indeed, unless there is an exercise of collective clairvoyance, no party in this case is in a position to analyze or quantify the ostensible benefit being offered to the Union and the retirees and its consequent impact on the Debtors.

The cacophony of alarm raised by the Debtors' natural allies highlights a fatal defect in the motion: the Debtors cannot possibly meet their burden to show that they have made an offer of necessary changes only (because the value cannot be quantified, and hence the amount of the concession) that are also fair and equitable (because no one can tell what is being given in return for what is being taken, or how it effects anyone else in the case), or that the balance of the equities tips in favor of the proposals (for all of the reasons just given). The collateral objectors have, perhaps inadvertently, essentially ratified the UMWA's arguments that the proposals were rejected with good cause.

b. The "Objections" Also Show That The Debtors Failed To Provide Timely Information to the UMWA.

Sections 1113(b)(1)(B) and 1114(f)(1)(B) require the Debtors to provide information "necessary to evaluate the proposal." One of the sponsors of §1113 underscored that the debtors "has an *affirmative* obligation to provide all the relevant financial and other information

necessary to adequately evaluate the proposal and if that obligation is not met or if the trustee otherwise delays the proceeding, the application should be denied." 130 Cong. Rec. H7496 (daily ed. June 29, 1984)(Remarks of Rep. Morrison)(emphasis added). The Debtors thus cannot stand pat or give cramped interpretations to information requests. They are supposed to put forth all of the relevant information without prompting, and do so before applying for rejection. Relevant information must be disclosed "subsequent to filing a petition and prior to filing an application seeking rejection." Teamsters Airline Div. v. Frontier Airlines, Inc., 2009 U.S. Dist. LEXIS 61699 (S.D.N.Y. July 20, 2009).

Much of the Debtors' §§1113 and 1114 presentation was designed to imply that UMWA had engaged in foot-dragging and made insincere, overly-demanding information requests that were interposed to burden the Debtors without seeking any information actually needed. Now the Debtors' argument has been exposed by their erstwhile allies: even the Debtors' allies contend that not enough information was provided. They believe the process has gone too *fast*, *not* taken too long. The "objections" suggest that, rather than dragging its feet, the UMWA was stonewalled.

Most of the "objecting" third-parties moreover are parties to confidentiality agreements and thus receive the same quality of information that the UMWA receives. If the collateral objectors think that not enough information was provided—i.e., that it is essential to understanding these proposals that an enterprise valuation be made and shared, and that the funding of the VEBA be quantified and explained, with the dilution inherent in withdrawal liability also factored into the equation—then this fact alone ratifies the position of the UMWA that the obligations to provide information in §§1113(b)(1)(B) and 1114(f)(1)(B) were not met.

This bankruptcy does not suffer from a dearth of professionals. The sheer number of third-party objectors and their lawyers and advisors is daunting, and the expense of carrying on litigation has become a major impediment to the reorganization of Patriot; yet, even among this veritable army there is apparently no one who can figure out the Debtors' proposals. The UMWA is not being disingenuous when it criticizes the Debtors on this score. It is merely a comparatively modest-sized group among a multitude of others who share the same lack of meaningful information.

How can the Court possibly grant this motion?

Conclusion

It cannot. Even though the pleadings filed by the so-called objectors were plainly not intended to defend the Union contract or the retiree benefits, they have inadvertently blurted out the truth—that the Debtors even under their own version of the facts, according to their own allies, ought not to be granted the relief they seek.

Dated this 23rd day of April, 2013.

The United Mine Workers of America

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed April 23, 2013 using the Court's CM/ECF system and that service will be accomplished upon all counsel of record by operation of that system.

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