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CONSIDERING WHICH LABOR TERMS A DEBTOR MAY IMPOSE ON ITS UNION AFTER REJECTING A COLLECTIVE BARGAINING AGREEMENT UNDER § 1113

ABSTRACT

Section 1113 of the Bankruptcy Code provides courts with a comprehensive set of criteria for determining when chapter 11 debtors can reject collective bargaining agreements during bankruptcy. When courts approve rejection, however, § 1113 and the rest of the Code are silent about which labor terms debtors may unilaterally impose on their unions. On the rare occasions when courts and the National Labor Relations Board have addressed this issue, they have followed one of two approaches. The first approach limits debtors to imposing only labor terms found in their “last, best offer” to unions before filing a § 1113 motion. The second approach, however, permits debtors to impose any labor terms found in any pre-§ 1113 proposals, subject to court approval.

This Comment argues that courts should follow the second approach. The post-§ 1113 scenario when debtors unilaterally impose labor terms is equivalent to the nonbankruptcy scenario of bargain to impasse when employers are permitted to impose terms from any pre-impasse proposals. Applying a similar approach to the post-§ 1113 scenario would enable courts to act consistently in each case. Limiting the terms that a debtor may impose to those of its “last, best offer” would encourage undesirable behavior by the employer, including negotiating in bad faith, failing to meet with the union at reasonable times, and engaging in unlawful surface bargaining. Finally, under the two most commonly applied models of negotiation, the likelihood of the parties reaching a negotiated agreement is higher if debtors have flexibility to impose terms from any pre-§ 1113 proposal.

INTRODUCTION

Section 1113 of the Bankruptcy Code (“Code”) lays out guidelines for courts to follow in evaluating whether to permit debtors to reject collective bargaining agreements during bankruptcy.¹ After an employer files for chapter 11, but before filing a § 1113 motion to reject a collective bargaining agreement, the Code requires the debtor to negotiate with its union in an effort to reach a modified collective bargaining agreement that averts the need to completely reject the existing agreement.² If those negotiations fail, courts may approve rejection of a collective bargaining agreement if the debtor satisfies the requirements found in § 1113.³ While the Code guides courts in approving rejection, it is silent about which labor terms debtors may impose on their unions following rejection.⁴

Courts and the National Labor Relations Board (“NLRB”) have utilized two different approaches when determining which labor terms a debtor may unilaterally impose on its union after rejecting a collective bargaining agreement. One approach, friendly towards organized labor, is to limit the permissible terms to only those found in the debtor’s “last, best offer” to its union before receiving court approval to reject the existing agreement.⁵ A second approach, friendly towards employers, is to permit the debtor to impose any labor terms found in any proposal made to the union during the mandatory pre-§ 1113 negotiations, including those found in its initial § 1113 proposal.⁶

This Comment argues that the second approach giving debtors broad latitude to impose any labor term from any pre-§ 1113 proposal is the best approach for courts and the NLRB to follow. Part I provides an overview of the manner in which courts and the NLRB treated the intersection of labor law and bankruptcy law prior to Congress passing § 1113, and discusses the criteria

¹ See 11 U.S.C. § 1113 (2012).

² *Id.* § 1113(b)(1)(B)(2).

³ *Id.* § 1113(c).

⁴ See *id.* § 1113.

⁵ See, e.g., *N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc.* (In re Maxwell Newspapers, Inc.), 981 F.2d 85, 92 (2d Cir. 1992) (granting § 1113 approval permitting rejection of collective bargaining agreement, but limits debtor to imposing labor terms from its last, best offer).

⁶ Advice Memorandum from the NLRB Office of the Gen. Counsel to W. Bruce Gillis, Jr., Reg’l Director of Region 27, *Mile-Hi Metal Sys., Inc.*, No. 27-CA-9241 et al., 1997 WL 731480, at *12–13 (July 30, 1986) [hereinafter *Mile-Hi Metal Memo*] (NLRB prevents debtor from imposing 40% wage cuts on employees because debtor may only impose terms “encompassed by [any] proposals that the employer presented to the union” during pre-§ 1113 negotiations).

for rejecting a collective bargaining agreement found in § 1113. Part II highlights the lack of precedent in both court decisions and NLRB rulings regarding which labor terms debtors should be permitted to impose following rejection. It also draws a comparison to the analogous situation outside bankruptcy of “bargain to impasse,” and suggests that bankruptcy courts should adopt a similar standard that permits employers to impose any terms “reasonably comprehended” in any pre-§ 1113 proposal.

Part III discusses the perverse incentives debtors would have during negotiations if limited to imposing only terms from their “last, best offer” to unions. If courts gave debtors broad latitude in the terms they could impose, however, the incentive structure during negotiations would encourage desirable behaviors while discouraging undesirable ones. Finally, Part IV examines the two most common models of negotiation—the economic and problem-solving models—and shows that an agreement is more likely under each model if courts permit debtors to impose terms from any pre-§ 1113 proposal if negotiations fail.

I. BACKGROUND

A. *Rejecting Collective Bargaining Agreements in Bankruptcy Prior to § 1113*

1. *11 U.S.C. § 365(a)*

Before Congress adopted § 1113 in 1984, courts looked to § 365(a) of the Code when considering whether to permit debtors to reject collective bargaining agreements.⁷ Section 365(a) gives courts broad authority to permit debtors to unilaterally decide whether to “assume or reject any executory contract or unexpired lease”⁸ The Code does not define what the term “executory contract” actually means, but courts typically interpret the term broadly.⁹ This gives debtors wide latitude to reject contracts under the

⁷ See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521, 523 (1984); 3 *COLLIER ON BANKRUPTCY* ¶ 365.02[1], 365.03[5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013).

⁸ See 11 U.S.C. § 365(a); see also 3 *COLLIER*, *supra* note 7, ¶ 365.02[1], 365.03[5].

⁹ 3 *COLLIER*, *supra* note 7, ¶ 365.03[2](a). The legislative history of § 365 indicates approval for the definition espoused by Professor Vernon Countryman, who defined executory contracts as those “under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.” Vernon Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 *MINN. L. REV.* 439, 460 (1973); see also S. REP.

“business judgment test” if they apply their best business judgment and determine it is in the best interests of the estate.¹⁰ Prior to Congress adopting § 1113, courts considered collective bargaining agreements to be executory contracts that could be rejected by debtors under this simple and deferential “business judgment” standard.¹¹

2. *Mixed Early Precedent on the Labor Law Implications of Rejecting Collective Bargaining Agreements in Bankruptcy*

While courts held broad authority under § 365(a) to approve the rejection of collective bargaining agreements as executory contracts, many were unsure of the best way to handle the intersection of labor law and bankruptcy law. In particular, courts handed down mixed rulings about whether trustees and debtors were subject to unfair labor practice charges under the National Labor Relations Act (“NLRA”) if they rejected collective bargaining agreements while in bankruptcy.¹²

In *Durand v. NLRB*,¹³ the trustee for the debtor rejected a collective bargaining agreement with Local Union Number 2746, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.¹⁴ The union responded by filing an unfair labor practice charge with the NLRB alleging unlawful unilateral

No. 95-989, at 58 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5844; H.R. REP. NO. 95-595, at 347 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6303.

¹⁰ 3 COLLIER, *supra* note 7, ¶ 365.03[2]; *see also* Grp. of Inst. Investors v. Chi., Milwaukee, St. Paul & Pac. R.R., 318 U.S. 523, 550 (1943) (citation omitted) (“[T]he question whether a lease should be rejected and, if not, on what terms it should be assumed is one of business judgment.”); Orion Pictures Corp. v. Showtime Networks, Inc. (*In re* Orion Pictures Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993) (“[A] bankruptcy court reviewing a trustee’s or debtor-in-possession’s decision to assume or reject an executory contract should examine [the] contract and the surrounding circumstances and apply its best ‘business judgment’ to determine if it would be beneficial or burdensome to the estate to assume it.”); Control Data Corp. v. Zelman (*In re* Minges), 602 F.2d 38, 43 (2d Cir. 1979); Allied Tech., Inc. v. R.B. Brunemann & Sons, Inc. (*In re* Allied Tech., Inc.), 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982) (“As long as assumption of a lease appears to enhance a debtor’s estate, [c]ourt approval of a debtor in possession’s decision to assume the lease should only be withheld if the debtor’s judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code, and particularly of 11 U.S.C. § 365.”).

¹¹ *Bildisco & Bildisco*, 465 U.S. at 522 (citation omitted) (“Any inference that collective-bargaining agreements are not included within the general scope of § 365(a) because they differ for some purposes from ordinary contracts . . . is rebutted by the statutory design of § 365(a) and by the language of § 1167 of the Bankruptcy Code.”).

¹² *See* 3 COLLIER, *supra* note 7, ¶ 365.03[5](a); *see also infra* Part III.A.

¹³ *Durand v. NLRB* (*In re* Turney Wood Prods., Inc.), 296 F. Supp. 1049 (W.D. Ark. 1969).

¹⁴ *Id.* at 1051.

modifications of the collective bargaining agreement.¹⁵ The trustee countered by arguing that the NLRB had no jurisdiction in the case because the employer was in bankruptcy.¹⁶ The NLRB, however, found that it did have jurisdiction, and that the trustee had in fact engaged in unfair labor practices.¹⁷ The trustee appealed the ruling to the district court, but the court sided with the NLRB, reasoning “Congress has not seen fit to insulate a receiver or trustee in bankruptcy from the jurisdiction of the National Labor Relations Board as far as unfair labor practices are concerned.”¹⁸

In contrast, the bankruptcy court in *Shopmen’s Local Union Number 455 v. Kevin Steel Products, Inc.*¹⁹ allowed the debtor to reject its collective bargaining agreement with Shopmen’s Local Union Number 455 International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.²⁰ This led the union to appeal to the district court, and the NLRB filed unfair labor practice charges against the debtor.²¹ After the district court found in favor of the union, the debtor appealed to the Second Circuit.²²

Contrary to both the district court and *Durand*, the Second Circuit ruled in favor of the debtor, holding that it could reject the collective bargaining agreement without committing an unfair labor practice because “a debtor in possession . . . is not the same entity as the [prebankruptcy] company. A new entity is created with its own rights and duties . . .” and is not subject to the old collective bargaining agreement.²³ Thus, no unfair labor practices accrue against the new, postpetition entity for voiding the collective bargaining agreement of the old, prepetition entity.²⁴

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1051, 1055.

¹⁹ *Shopmen’s Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698 (2d Cir. 1975).

²⁰ *Id.* at 700.

²¹ *Id.*

²² *Id.* The district court held that it did not have authority to authorize the rejection of a collective bargaining agreement in light of the NLRA, despite the broad authority provided under § 365(a). *Id.*

²³ *Id.* at 704.

²⁴ *Id.*

3. NLRB v. Bildisco & Bildisco²⁵

The uncertainty about how to treat overlapping labor and bankruptcy issues in lower courts ultimately led the Supreme Court to grant certiorari in *NLRB v. Bildisco & Bildisco*. The Court confronted two key issues. First, the Court sought to dictate the conditions under which a bankruptcy court could permit a debtor to reject a collective bargaining agreement.²⁶ Second, the Court wished to determine whether the NLRB could find a debtor guilty of committing an unfair labor practice for unilaterally terminating or modifying a collective bargaining agreement.²⁷

a. Heightened Standard for Approving Rejection

To shed light on the first issue, the Court began by re-establishing the premise that collective bargaining agreements are executory contracts under § 365(a) of the Code.²⁸ The NLRB did not dispute this premise, but, citing numerous circuit court precedents, argued instead that bankruptcy judges should be required to apply a stricter standard than the classic “business judgment” test when considering whether to permit rejection of collective bargaining agreements.²⁹ The Court agreed with the NLRB, noting that due to the “special nature of a collective bargaining agreement . . . a somewhat stricter standard” should be applied to the rejection of a collective bargaining agreement than to the rejection of other executory contracts.³⁰

To apply this higher standard, the Court chose to adopt the new test endorsed by the Third Circuit in *Bildisco*, prior to the Supreme Court granting certiorari.³¹ The test allowed rejection of a collective bargaining agreement under § 365(a) “if the debtor can show that the [collective bargaining]

²⁵ NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

²⁶ *Id.* at 516.

²⁷ *Id.*

²⁸ *Id.* at 522.

²⁹ *Id.* at 523 (citation omitted).

³⁰ *Id.* at 524. The Court specifically rejected a simultaneous argument by the union that the debtor and the union should be required to bargain to impasse before a court can approve rejection of a collective bargaining agreement. *Id.* at 526–27.

³¹ *Id.* at 525–26 (citation omitted). When the Third Circuit heard *Bildisco*, it held that the debtor was permitted to reject the collective bargaining agreement, and that the NLRA did not apply because the “debtor was a ‘new entity’ not bound by the labor agreement.” *Id.* at 519–20 (citation omitted). It also raised the standard for rejecting collective bargaining agreements beyond the typical “business judgment” test, instead requiring the “debtor to show not only that the [collective bargaining] agreement is burdensome to the estate, but also that the equities balance in favor of rejection.” *Id.* at 520–21 (citation omitted).

agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.”³² To appropriately balance the equities, a court would balance “the interests of the affected parties—the debtor, creditors, and employees.”³³ Specifically, a court “must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors’ claims that would follow from affirmation and the hardship that would impose on them, and the impact of rejection on the employees.”³⁴ The Court added the requirement that the debtor be able to demonstrate “reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution.”³⁵

b. No Unfair Labor Practice Violations

In addressing the second issue, the Court examined the question of whether a debtor can be subject to unfair labor practice charges under the NLRA for unilaterally rejecting a collective bargaining agreement between the date a bankruptcy petition was filed and the date the bankruptcy court authorized rejection of the collective bargaining agreement.³⁶ The union and the NLRB both argued that debtors who reject collective bargaining agreements before receiving court approval should be subject to unfair labor practice charges under the NLRA.³⁷ The Court, however, rejected this claim, stating that accepting it “would largely, if not completely, undermine whatever benefit the debtor-in-possession otherwise obtains by its authority to request rejection of the agreement.”³⁸ The Court went on to state that if courts permitted the NLRB to pursue unfair labor practice charges under these circumstances, it would practically force debtors to adhere to collective bargaining agreements that no longer exist, and “would run directly counter to the express provisions of the

³² *Id.* at 526.

³³ *Id.* at 527.

³⁴ *Id.*

³⁵ *Id.* at 526.

³⁶ *Id.* at 527–29.

³⁷ *Id.* at 528–29 (citation omitted).

³⁸ *Id.* at 529. The Court also gave a technical justification for its decision. Reasoning that § 365(g) of the Code regards rejection of executory contracts as a prepetition action, claims relating to rejection must be considered only through the normal bankruptcy claims administration process. So, charges against the debtor under the NLRA are precluded, and recovery can only occur through the claims administration process. *Id.* at 530.

[Code] and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space."³⁹

B. 11 U.S.C. § 1113

1. *Fallout from Bildisco*

Labor unions, believing that the *Bildisco* decision made it too easy for employers to reject collective bargaining agreements in bankruptcy, lobbied Congress to pass legislation that would overrule the decision.⁴⁰ The Court announced its decision in *Bildisco* on February 22, 1984, and just over six weeks later, on April 10, 1984, the Senate Committees on Labor and Human Resources and on the Judiciary held a joint hearing to discuss how to better harmonize the interplay between the NLRA and the Code.⁴¹ According to the Chairman of the Committee on Labor and Human Resources, Utah Senator Orrin Hatch, the goals of the hearing were to:

determine what, if any, adjustments are needed to integrate successfully the goals of the National Labor Relations Act and the Bankruptcy Code. Together, these statutory schemes should function to ensure that a unionized debtor can undergo financial rehabilitation in a timely and equitable manner, without really subverting the collective-bargaining process or undermining the ability of a union to fulfill its representative responsibility on behalf of its particular employees.⁴²

Unions took full advantage of this hearing, making their disdain for the *Bildisco* decision impossible to miss. Leaders from a variety of unions and labor advocacy organizations, including the AFL-CIO, the Food & Commercial Workers Association, and the International Brotherhood of

³⁹ *Id.* at 532 (citation omitted).

⁴⁰ See 3 COLLIER, *supra* note 7, ¶ 365.03[5](c). The House of Representatives responded to *Bildisco* by introducing a bill one month after the Court announced its decision that would preclude unilateral rejection of all collective bargaining agreements in bankruptcy. The bill also required the debtor to prove that it attempted to "develop a complete reorganization plan at the bargaining table before ever coming to court[.]" and that "rejection is the only way to reorganize the business and save union jobs." The bill did not pass the Senate, however, and Senator Orrin Hatch, the Chairman of the Committee on Labor and Human Resources, noted that if the House bill were taken up, it would "sweep endangered business right past rehabilitation into liquidation." *Oversight on Collective Bargaining Agreements and the Bildisco Decision: Joint Hearing Before the S. Comm. on Labor & Human Res., and S. Comm. on the Judiciary*, 98th Cong. 2 (1984) [hereinafter *Hearing*].

⁴¹ *Hearing*, *supra* note 40, at 2.

⁴² *Id.* at 1.

Teamsters, Chauffeurs, Warehousemen & Helpers of America submitted statements to the Committees opposing the *Bildisco* decision.⁴³ Laurence Gold, counsel for the AFL-CIO, urged the Committees to adopt new legislation to overrule *Bildisco*.⁴⁴ He believed that the ruling incorrectly prioritized bankruptcy policy over labor policy, and erroneously interpreted Congressional intent based on a “very slender foundation.”⁴⁵ He also criticized the ruling for “giv[ing] debtors a practical assurance that collective bargaining agreements may be repudiated with impunity, at least as long as there is some minimal attempt to negotiate with the union.”⁴⁶

The International Brotherhood of Teamsters echoed the AFL-CIO’s sentiments.⁴⁷ Expressing concern that “many [employers] have attempted to lower costs by pursuing exploitive labor policies,” the International Brotherhood of Teamsters bemoaned that “[h]eavy-handed threats to file for bankruptcy in order to coerce sacrifices from employees have become a stock weapon in management’s arsenal against labor,” and “a threat to the entire system of collective bargaining that is so basic to our Nation’s labor policies and . . . to the basic structure of the American economy.”⁴⁸ But the worst part of the *Bildisco* decision, according to the union, was “the fact that the decision effectively destroys the incentive for the parties to reach a mutually satisfactory solution at the bargaining table.”⁴⁹

2. Congress Enacts § 1113

Responding to passionate lobbying from organized labor, Congress enacted § 1113 of the Code on July 10, 1984 as part of the Bankruptcy Amendments

⁴³ *Id.* at iii.

⁴⁴ *Id.* at 62–63.

⁴⁵ *Id.*

⁴⁶ *Id.* at 63. Gold further decried the impact of *Bildisco* by stating:

The *Bildisco* standard is so open-textured as to provide no limitations on the court at all. The factors that standard requires to be consulted are extremely complex and inherently incommensurate, and the entire thrust of the reorganization proceeding in such situations is to give great weight to the debtor’s expressed desires and to resolve all doubts in his favor. We see no need to speculate at any length on the possibilities. *It is sufficient that those who know their interest best, management and unions, divide as follows: The employer community praises the decision, and we condemn it. The winners and losers are plain enough.*

Id. (emphasis added).

⁴⁷ *Id.* at 17.

⁴⁸ *Id.* at 18.

⁴⁹ *Id.*

and Federal Judgeship Act.⁵⁰ Section 1113 functionally overruled the *Bildisco* holding, and laid out three specific requirements that debtors must meet before courts will approve rejection of a collective bargaining agreement.⁵¹ The three requirements are: (1) a debtor must make a proposal for modifications to the existing collective bargaining agreement necessary to its reorganization based on the most reliable information available at the time; (2) the union must reject the proposal without good cause; and (3) the balance of the equities must clearly favor rejection of the agreement.⁵²

In practice, courts typically apply § 1113 by means of the analysis found in *In re American Provision Co.*,⁵³ where the court laid out nine requirements extrapolated from the full Code section, including, but not limited to, the three requirements listed above.⁵⁴ In *American Provision*, the debtor sought court approval to reject two collective bargaining agreements with the Miscellaneous Drivers, Helpers and Warehousemen's Union.⁵⁵ In reviewing the debtor's motion, the court interpreted § 1113 to require that the following nine requirements be satisfied before approving rejection of a collective bargaining agreement:⁵⁶

1. The debtor in possession must make a proposal to the [union] to modify the collective bargaining agreement.⁵⁷
2. The proposal must be based on the most complete and reliable information available at the time of the proposal.⁵⁸

⁵⁰ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 390 (codified as amended at 11 U.S.C. § 1113 (2012)); *see also* Orange Cnty. Emps. Ass'n v. Cnty. of Orange (*In re* Cnty. of Orange), 179 B.R. 177, 182 (Bankr. C.D. Cal. 1995) (footnote omitted) ("Labor unions were very upset at the Supreme Court's decision in *Bildisco* that collective-bargaining agreements were not enforceable in bankruptcy prior to rejection. In response, Congress passed § 1113."); 2 THE DEVELOPING LABOR LAW 2467 n.147 (John E. Higgins, Jr. et al. eds., 5th ed. 2006) (citation omitted) ("Section 1113 has been characterized as resulting from a major lobbying effort by labor that was directed at reducing the authority of the bankruptcy court and increasing the role of negotiations between parties.")

⁵¹ 11 U.S.C. § 1113; *see also* 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2468.

⁵² 11 U.S.C. § 1113(c).

⁵³ *In re Am. Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984).

⁵⁴ *Id.* at 909; *see also* 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2468.

⁵⁵ *Am. Provision Co.*, 44 B.R. at 908.

⁵⁶ Courts have universally applied these nine criteria when considering similar motions in cases following *American Provision*. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2468.

⁵⁷ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113(b)(1)(A); Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Sys., Inc.), 899 F.2d 887, 888 (10th Cir. 1990) (citation omitted) ("At the heart of this matter is the requirement in [§] 1113(b)(1)(A) that the debtor make a proposal [to the union]. . . ."); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2468.

3. The proposed modifications must be necessary to permit the reorganization of the debtor.⁵⁹
4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.⁶⁰
5. The debtor must provide to the [union] such relevant information as is necessary to evaluate the proposal.⁶¹

⁵⁸ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113 (b)(1)(A); *In re Liberty Cab & Limousine Co.*, 194 B.R. 770, 776–77 (Bankr. E.D. Pa. 1996) (refusing to approve rejection because most complete and reliable information available did not underpin debtor’s proposal, and debtor did not provide this information to union before hearing); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2468.

⁵⁹ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113 (b)(1)(A); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2468. Most courts define “necessary” as merely making reorganization more feasible. *See, e.g., Mile Hi Metal*, 899 F.2d at 892–93 (rejecting the view that the necessity requirement means “absolutely necessary” and instead holding that it requires the modifications to “be directly related to the debtor’s financial condition” in completing a successful reorganization); *Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82, 90 (2d Cir. 1987) (“[T]he necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully.”). The Third Circuit, however, has taken a contrarian approach, and held that a stricter standard than mere necessity should apply. *See Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1088 (3d Cir. 1986) (“[N]ecessity’ [should] be construed strictly to signify only modifications that the trustee is constrained to accept because they are directly related to the Company’s financial condition and its reorganization. We reject the hypertechnical argument that ‘necessary’ and ‘essential’ have different meanings because they are in different subsections. The words are synonymous.”).

⁶⁰ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113 (b)(1)(A); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469. Courts consider a variety of factors when determining if all parties receive fair treatment, and state “equity requires management to tighten its belt along with labor.” *In re Carey Transp. Inc.*, 50 B.R. 203, 210 (Bankr. S.D.N.Y. 1985); *see also Truck Drivers Local 807*, 816 F.2d at 90–91 (court looks favorably on rejection when management and non-unionized employee groups take pay cuts, in addition to those requested of unions); *Wheeling-Pittsburgh Steel*, 791 F.2d at 1091 (rejection not permitted by the court because no “snap-back” provision was included in the proposal that would raise wages and benefits for union members if company recovered strongly); *Int’l Union v. Gatke Corp.*, 151 B.R. 211, 214 (N.D. Ind. 1991) (lack of “snap-back” provision permissible because of debtor’s exceptionally poor economic conditions, and the fact that all employee groups were similarly affected); *In re K&B Mounting, Inc.*, 50 B.R. 460, 464 (Bankr. N.D. Ind. 1985) (court looks favorably on concessions made by suppliers, secured creditors, taxing authorities, management, and non-union employees).

⁶¹ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113 (b)(1)(B); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469. While similar to the second criterion that mandates the debtor provide information on which the proposal is based, this requirement forces the debtor to provide information for the union to evaluate the merits of the proposal itself. *Am. Provision Co.*, 44 B.R. at 909 n.2 (emphasis added); *see also* *George Cindrich Gen. Contracting, Inc. v. Indep. Haulers Bldg. Material & Constr. Drivers Local No. 341 (In re George Cindrich Gen. Contracting, Inc.)*, 130 B.R. 20, 23–24 (Bankr. W.D. Pa. 1991) (debtor providing union solely with fourteen-month old, incomplete bankruptcy petition and schedules, not sufficient to satisfy requirement of providing union with relevant information to evaluate the proposal); *In re Fiber Glass Indus., Inc.*, 49 B.R. 202, 206–07 (Bankr. N.D.N.Y. 1985) (debtor providing union with projected cost savings from reorganization without also detailing that cost savings would be achieved by laying off one-third of union workers represents failure to meet requirement of disclosing relevant information to evaluate proposal).

6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the [union].⁶²
7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.⁶³
8. The [union] must have refused to accept the proposal without good cause.⁶⁴
9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.⁶⁵

⁶² *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113 (b)(2); N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re Maxwell Newspapers, Inc.*), 981 F.2d 85, 91 (2d Cir. 1992) (ten hours for union to evaluate and respond to debtor's proposal before commencement of hearing to reject current collective bargaining agreement is sufficient); *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847, 852 (Bankr. N.D. Ohio 1987) (debtor meeting two times with union is sufficient); *In re Century Brass Prods., Inc.*, 55 B.R. 712, 716 (Bankr. D. Conn. 1985) (citations omitted) (not "inherently unreasonable" that debtor filed to reject collective bargaining agreement four days after presenting proposed modifications to union), *rev'd on other grounds*, 795 F.2d 265 (2d Cir. 1986); *In re Ky. Truck Sales*, 52 B.R. 797, 801 (Bankr. W.D. Ky. 1985) (debtor meeting four times with union is sufficient to constitute meeting at "reasonable times"); *Am. Provision Co.*, 44 B.R. at 911 (criterion not satisfied when only one meeting occurred between debtor and union and debtor did not pursue union's offer to meet further); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469.

⁶³ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113 (b)(2); *In re Horsehead Indus.*, 300 B.R. 573, 588 (Bankr. S.D.N.Y. 2003) (citations omitted) (permitting rejection of the collective bargaining agreements of the first two locals, but not the third where debtor would not negotiate in good faith with union.); *In re GCI, Inc.* 131 B.R. 685, 695 (Bankr. N.D. Ind. 1991) (not permitting the rejection when debtor does not bargain in good faith, even if union also did not bargain in good faith); *Ky. Truck Sales*, 52 B.R. at 801 (satisfying requirement when debtor genuinely attempts to negotiate reasonable changes to collective bargaining agreement, but parties' positions are simply too far apart for agreement to be reached); *In re S.A. Mech., Inc.*, 51 B.R. 130, 131–32 (Bankr. D. Ariz. 1985) (holding that "take it or leave it" proposal from debtor to union does not constitute good faith); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469.

⁶⁴ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113 (c)(2); N.Y. Typographical Union No. 6 v. Royal Composing Room, Inc. (*In re Royal Composing Room, Inc.*), 848 F.2d 345, 349 (2d Cir. 1988) (union rejecting debtor's proposal is in good faith if union made compromise proposals that would satisfy its needs while preserving savings for the debtor, but union stonewalling and hoping that the court will reject the § 1113 motion because it doesn't satisfy other requirements for rejection does not constitute good cause); *Bowen Enters., Inc. v. United Food & Commercial Workers Int'l Union* (*In re Bowen Enters., Inc.*), 196 B.R. 734, 746 (Bankr. W.D. Pa. 1996) (holding that union did not establish good cause for rejecting collective bargaining agreement when its counterproposals and cost analyses are unrealistic and a sham); *In re Sierra Steel Corp.*, 88 B.R. 337, 340 (Bankr. D. Colo. 1988) (holding that union did not show good cause when it declined debtor's proposal for fear of adverse consequences on collective bargaining negotiations with other employers); *In re Salt Creek Freightways*, 47 B.R. 835, 840–41 (Bankr. D. Wyo. 1985) (union rejecting debtor proposal on principle because it is not in employees' best interest does not constitute good cause); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469.

The debtor bears the burden of proving to the court that it has met all nine requirements for rejecting the collective bargaining agreement, while the union has a burden of production.⁶⁶ Specifically, “the union must come forward with evidence of a proposed modification’s illegality, and the union’s own good cause for rejecting the debtor’s proposal on such grounds, before the burden of showing legality falls on the debtor.”⁶⁷

II. THE LACK OF ON-POINT BANKRUPTCY PRECEDENT FROM COURTS AND THE NLRB SHOULD SHIFT FUTURE COURTS’ FOCUS TO SIMILAR LABOR LAW PRECEDENT

The Code and court precedent are clear about the requirements that must be satisfied before a court can approve the rejection of a collective bargaining agreement under § 1113, but are silent on which labor terms management may actually impose once the court has approved the rejection.⁶⁸ The Code requires debtors to submit a proposal to the union containing only “necessary” modifications to the existing collective bargaining agreement to gain court approval for rejection under § 1113, but once rejection is approved, the debtor is not limited to imposing only the exact terms contained in this pre-§ 1113 proposal.⁶⁹ Looking beyond this gap in the Code, there is also little bankruptcy case law that addresses what terms the debtor may impose after rejection.

⁶⁵ *Am. Provision Co.*, 44 B.R. at 909; *see also* 11 U.S.C. § 1113(c)(3); 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469. The Second Circuit listed six considerations that other courts look to when deciding whether the balance of equities favors rejection. Those considerations are:

- (1) the likelihood and consequences of liquidation if rejection is not permitted; (2) the likely reduction in the value of creditors’ claims if the bargaining agreement remains in force; (3) the likelihood and consequences of a strike if the bargaining agreement is voided; (4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved; (5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees’ wages and benefits compare to those of others in the industry; and (6) the good or bad faith of the parties in dealing with the debtor’s financial dilemma.

Truck Drivers Local 807, 816 F.2d at 93 (citations omitted).

⁶⁶ *See Sheet Metal Workers’ Int’l Ass’n v. Mile Hi Metal Sys., Inc. (In re Mile Hi Metal Sys., Inc.)*, 899 F.2d 887, 891–92 (10th Cir. 1990); *see also In re Blue Diamond Coal Co.*, 131 B.R. 633, 643 (Bankr. E.D. Tenn. 1991).

⁶⁷ *Mile Hi Metal*, 899 F.2d at 892.

⁶⁸ *See* 11 U.S.C. § 1113.

⁶⁹ *See id.*

As a result of bankruptcy law's silence, the logical place for courts to turn for guidance is federal labor law. In particular, the scenario that occurs when courts have permitted rejection and debtors then impose labor terms on their unions is analogous to the "unilateral implementation of a proposal at impasse" during labor negotiations outside of bankruptcy.⁷⁰ Given the similarities between the two scenarios⁷¹ and the lack of guidance from bankruptcy law, courts should adhere to the standard applied in bargain to impasse cases and permit debtors to impose any terms discussed during pre-§ 1113 negotiations instead of limiting them to imposing terms from only their "last, best offer" to the union.

A. Bankruptcy Court Precedent Is Sparse in Support of Limiting the Debtor to Its "Last, Best Offer"

There are just two instances in which courts have addressed this issue and held that a debtor is limited to imposing labor terms from only its "last, best offer" to the union.⁷² Neither court cited any controlling authority in adopting this approach.⁷³

⁷⁰ 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2475; *see also infra* Part II.C.1.

⁷¹ *See infra* Part II.C.3.

⁷² N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re Maxwell Newspapers, Inc.*), 981 F.2d 85 (2d Cir. 1992); *In re Condere Corp.*, 228 B.R. 615 (Bankr. S.D. Miss. 1998).

⁷³ Some courts have also taken the position that bankruptcy courts do not have the authority to dictate the specific terms that a post-§ 1113 debtor may impose on its union. Section 1113(b) requires employers to make a proposal to the union that includes "necessary modifications" to employee benefits, but § 1113(c), which covers criteria that must be satisfied for courts to *reject* collective bargaining agreements, makes no mention of the court having authority to require *modifications* of specific terms of the agreement. *See* 11 U.S.C. § 1113(b)–(c). As a result, some courts have interpreted § 1113 as precluding courts from dictating specific terms debtors must impose on unions. *See, e.g., In re Ala. Symphony Ass'n*, 155 B.R. 556, 572 (Bankr. N.D. Ala. 1993) ("Although the proposal under [§ 1113(b)(1)(A)] must provide only for necessary modifications, nothing on the face of the statute indicates that the modification language is folded in to subsection (c), which on its face speaks only in terms of rejection . . ."), *aff'd in part, rev'd in part*, 211 B.R. 65 (N.D. Ala. 1996); *In re Sun Glo Coal Co.*, 144 B.R. 58, 61 (Bankr. E.D. Ky. 1992). *But see Maxwell Newspapers*, 981 F.2d at 85, 91–92; *In re Nw. Airlines Corp.*, 346 B.R. 307, 314–15 (Bankr. S.D.N.Y. 2006) (authorizing debtor to impose labor terms from an agreement approved by union leaders and rejected in a ratification vote but refusing to allow debtor to impose terms from earlier proposals during § 1113 negotiations), *aff'd sub nom., Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA*, 483 F.3d 160 (2d Cir. 2007); *Condere Corp.*, 228 B.R. at 619; *In re Garafalo's Finer Foods, Inc.*, 117 B.R. 363, 370 (Bankr. N.D. Ill. 1990) (citing § 105(a) along with § 1113 as jointly giving court authority to dictate terms imposed on union).

1. N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.)⁷⁴

In re Maxwell Newspapers is a prime example of an appellate court limiting a debtor to imposing terms from only its “last, best offer” after the court approves rejection of an existing collective bargaining agreement. In *Maxwell Newspapers*, the holding company of the New York Daily News was losing significant money operating the newspaper and consequently was looking for a buyer to purchase its assets.⁷⁵ The company filed for chapter 11 bankruptcy and found a buyer interested in purchasing the New York Daily News who conditioned his interest on getting rid of the collective bargaining agreement the newspaper had with its typesetters union.⁷⁶ In particular, the potential buyer objected to a provision in the agreement that guaranteed every member of the union a job for life.⁷⁷

The debtor, along with the potential buyer, made an initial proposal to the union that would eliminate the lifetime employment provision.⁷⁸ The union countered with a proposal calling for a “progressive reduction in the number of shifts worked conditioned upon a cash buyout for each union member, three years’ contribution to the pension and welfare funds, and an early retirement enhancement.”⁷⁹ The parties subsequently exchanged three additional proposals before the debtor and potential buyer made the union a final offer.⁸⁰

The union rejected the final offer and the debtor filed a § 1113 motion to reject the collective bargaining agreement, which the bankruptcy court approved.⁸¹ The union appealed to the district court, which reversed the bankruptcy court’s decision because it found that the union had “good cause” to reject the final offer.⁸² The debtor appealed this decision to the Second

⁷⁴ *Maxwell Newspapers*, 981 F.2d 85.

⁷⁵ *Id.* at 87.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 88.

⁸⁰ *Id.* In this final offer, the debtor and potential buyer proposed an immediate reduction in jobs from the current 167 to 80, eventually falling to 15, all of which would be guaranteed for thirteen years. In addition, the debtor and potential buyer also agreed to a small early retirement subsidy, but refused to make any continuing pension or welfare contributions, offering instead to make a one-time payment of \$1 million to the pension fund. *Id.*

⁸¹ *Id.*

⁸² *Id.* at 89.

Circuit, which reversed the district court's ruling, reasoning that the union did not have good cause to reject the final offer because it was asking for more money than the debtor or potential buyer could afford.⁸³

The Second Circuit ruled that the debtor could reject the collective bargaining agreement, but that it would be limited to imposing labor terms found in its final offer to the union.⁸⁴ The court further conditioned its judgment on the requirement that the offers the debtor made at the end of negotiations "are not now to be withdrawn."⁸⁵ The court neither cited any authority for imposing this condition, nor provided any explanation of its rationale.⁸⁶

2. *In re Condere Corp.*⁸⁷

Likewise, in *In re Condere Corp.*, a tire manufacturer filed for chapter 11 bankruptcy and commenced negotiations with Local Union No. 303L of the United Steelworkers of America Rubber Plastic Conference to modify a collective bargaining agreement the parties had signed the previous year.⁸⁸ After six weeks of futile negotiations, the debtor filed a § 1113 motion to reject the collective bargaining agreement, which the court approved.⁸⁹

The court's approval, however, came on the condition that the debtor could only impose terms from its "last, best offer" on several key points.⁹⁰ Similar to *Maxwell Newspapers*, the court did not cite any authority to justify this limitation.⁹¹

B. NLRB Precedent is Sporadic and Mostly Inapplicable

With bankruptcy law's silence on which terms the debtor may impose after obtaining a court's approval for rejection of a collective bargaining agreement under § 1113, the next intuitive place to search for a solution is NLRB precedent. Like bankruptcy courts, however, the NLRB has rarely touched this

⁸³ *Id.* at 89, 91.

⁸⁴ *Id.* at 91–92.

⁸⁵ *Id.*

⁸⁶ *Id.* at 92.

⁸⁷ *In re Condere Corp.*, 228 B.R. 615 (Bankr. S.D. Miss. 1998).

⁸⁸ *Id.* at 618–19.

⁸⁹ *Id.* at 619.

⁹⁰ *Id.*

⁹¹ *See id.*

issue, and on the few times it has, it has served only to limit debtors to imposing labor terms that had been proposed during pre-§ 1113 negotiations.⁹² As the following cases demonstrate, the NLRB has not offered any insight into which particular terms debtors can impose from the proposals they do make.⁹³

1. Appletree Markets, Inc.⁹⁴

In *Appletree Markets, Inc.*, the debtor filed for chapter 11 and after six months of negotiations with its union failed to produce a new collective bargaining agreement, the debtor filed a § 1113 motion to reject the existing collective bargaining agreement, which the bankruptcy court approved.⁹⁵ During pre-§ 1113 negotiations, the debtor had proposed decreasing health insurance, pension, and welfare contributions, but never reached common ground with its union.⁹⁶ When the court approved its § 1113 motion, however, the debtor dropped the existing healthcare plan altogether and substituted its

⁹² See, e.g., Advice Memorandum from the NLRB Office of the Gen. Counsel to Michael Dunn, Reg'l Dir. of Region 16, *Appletree Mkts., Inc.*, No. 16-CA-15724, 1994 NLRB GCM LEXIS 68, at *9 (Nov. 30, 1994) [hereinafter *Appletree Mkts. Memo*] (stating that because the employer only proposed decreasing contributions to health insurance plans during pre-§ 1113 negotiations, its subsequent action to drop the union's plan and substitute its own self-insurance plan was unlawful); Advice Memorandum from the NLRB Office of the Gen. Counsel to Frederick Calatrello, Regional Director of Region 8, *Amherst Sparkle Mkt.*, No. 8-CA-20323 et al., 1988 NLRB GCM LEXIS 167, at *14 (Feb. 25, 1988) [hereinafter *Amherst Sparkle Mkt. Memo*] (stating that it is unlawful for an employer to suspend contributions to health, welfare, and pension plans because it never made such a proposal to modify contributions during pre-§ 1113 negotiations); *Mile-Hi Metal Memo*, *supra* note 6, at *2–3 (finding it illegal for an employer to impose 40% wage cuts after receiving § 1113 approval when no wage cuts beyond 30% were “encompassed” in any pre-§ 1113 proposals). The NLRB has justified its position by holding that employers who attempt to unilaterally implement terms different than those discussed in advance of filing § 1113 motions are guilty of violating the duty imposed on them under the NLRA to bargain with the union, notify the union of proposed changes, and bargain them to impasse before implementing terms unilaterally. See *Appletree Mkts. Memo*, *supra*, at *7; *Mile-Hi Metal Memo*, *supra* note 6, at *12–13.

⁹³ One notable exception to the NLRB's general lack of guidance is found in *Royal Composing Room, Inc.*, when the NLRB barred the employer from imposing any labor terms other than those contained in its “last, best offer” to the union. Advice Memorandum from the NLRB Office of the Gen. Counsel to Daniel Silverman, Reg'l Dir. of Region 2, *Royal Composing Room, Inc.*, No. 2-CA-21808, 1987 NLRB GCM LEXIS 139 (Sept. 30, 1987). But, the employer subsequently appealed the ruling to the Second Circuit, which ultimately permitted the employer to impose a labor term on the union from its initial § 1113 proposal, thereby functionally overruling the NLRB's opinion limiting the employer to imposing terms only from its last, best offer. *N.Y. Typographical Union No. 6 v. Royal Composing Room, Inc.* (*In re Royal Composing Room, Inc.*), 848 F.2d 345 (2d Cir. 1988).

⁹⁴ 1994 NLRB GCM LEXIS 68 (Nov. 30, 1994).

⁹⁵ *Appletree Mkts. Memo*, *supra* note 92, at *1–2.

⁹⁶ *Id.* at *2–3.

own self-insurance plan.⁹⁷ The NLRB found that this action violated the employer's duty to bargain under the NLRA because during pre-§ 1113 negotiations the debtor had only proposed reducing healthcare contributions, not eliminating the plan entirely.⁹⁸

2. Amherst Sparkle Market⁹⁹

In *Amherst Sparkle Market*, the owner of a retail grocery store had been a party to a collective bargaining agreement with his unionized employees for the previous three years.¹⁰⁰ The employer sought to renegotiate the collective bargaining agreement in search of more favorable terms, but when the union refused its proposals, the employer filed for chapter 11.¹⁰¹

After filing, the debtor made a proposal to the union calling for pay cuts; reduced vacation days and paid holidays; a ban on "premium pay;" eliminating established work weeks for part-time employees; and reducing the present health, pension, and welfare benefits, among other reductions.¹⁰² The union rejected the offer.¹⁰³ As a consequence, the debtor filed a § 1113 motion to reject the collective bargaining agreement entirely.¹⁰⁴ The parties subsequently bargained for two additional months and were unable to reach an agreement, prompting the court to approve the § 1113 motion.¹⁰⁵

After gaining court approval for rejection, the debtor imposed labor terms on the union that included suspending pension contributions for one year and ceasing to make health and welfare contributions for ninety more days.¹⁰⁶ The union filed an unfair labor practice charge with the NLRB over the unexpected changes to its "base terms," and the NLRB agreed that the employer had committed a violation.¹⁰⁷ The NLRB ruled that because the changes to the pension, health, and welfare contributions had not been contained in any of the

⁹⁷ *Id.* at *4.

⁹⁸ *Id.* at *8-9.

⁹⁹ 1988 NLRB GCM LEXIS 167 (Feb. 25, 1988).

¹⁰⁰ *Amherst Sparkle Mkt. Memo*, *supra* note 92, at *1-2.

¹⁰¹ *Id.* at *4-5.

¹⁰² *Id.* at *5.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *6.

¹⁰⁶ *Id.* at *7.

¹⁰⁷ *Id.* at *8-9.

employer's pre-§ 1113 proposals, they constituted a violation of the NLRA and were thus illegal.¹⁰⁸

3. Mile-Hi Metal Systems, Inc.¹⁰⁹

In *Mile-Hi Metal Systems*, the metal manufacturing employer filed for chapter 11 and, after two subsequent strikes by the union, received permission from the bankruptcy court to make interim adjustments to the parties' existing collective bargaining agreement while the negotiations on permanent modifications continued.¹¹⁰ During the ongoing negotiations between the parties, the employer made proposals on several labor terms, including reducing wages by 30% for most union members.¹¹¹ When continued negotiations failed to produce an agreement, the court approved the employer's § 1113 motion to reject the collective bargaining agreement entirely.¹¹²

The employer then imposed a 40% wage cut on nearly all union members that was not "encompassed by the proposals that the employer presented to the union" during pre-§ 1113 negotiations.¹¹³ The union filed an unfair labor practice charge with the NLRB against the employer in response to this action.¹¹⁴ The NLRB ruled that the employer's action was illegal because it "actually reduced wages by approximately 40%, more than the 30% reduction originally proposed by the [e]mployer and more than the 25% reduction which constituted its final offer."¹¹⁵ As a consequence, the NLRB ruled that the employer had violated the NLRA.¹¹⁶

¹⁰⁸ See *id.* at *9.

¹⁰⁹ *Mile-Hi Metal Memo*, *supra* note 6, at *4.

¹¹⁰ *Id.* at *1; see also 11 U.S.C. § 1113(e) (2012) (granting courts authority to approve interim changes to collective bargaining agreements while parties negotiate permanent modifications).

¹¹¹ *Mile-Hi Metal Memo*, *supra* note 6, at *1. Other proposed terms included reducing travel expense reimbursements, requiring employees to supply their own tools, permitting employees to transport tools in their own vehicles, permitting the employer to hire replacement workers if the union went on strike in the future without requiring those workers to join the union, and modifying the provision regarding appointing union stewards. *Id.* at *2.

¹¹² *Id.*

¹¹³ *Id.* at *3.

¹¹⁴ *Id.* at *4.

¹¹⁵ *Id.* at *12–13.

¹¹⁶ *Id.* at *5.

C. *Substantial Precedent Exists in the Analogous Labor Law Situation of Bargain to Impasse*

Given the lack of guidance from the Code and the sporadic precedent from bankruptcy case law and the NLRB, courts addressing the issue of which terms debtors may impose after rejection should look for guidance in the consistent precedent that addresses an analogous situation, “unilateral implementation of a proposal at impasse,” under federal labor law.¹¹⁷ Taking a cue from such impasse cases, bankruptcy courts should give debtors the latitude to impose terms discussed throughout pre-§ 1113 negotiations, including those offered in the initial § 1113 proposal, and should not limit the debtor to only imposing terms from its “last, best offer.”

1. *Bargain to Impasse*

Federal labor law precedent establishes that an employer may declare a legally recognizable “impasse” when “irreconcilable differences” between the employer and the union, after “full good faith negotiations,” lead to a “stalemate.”¹¹⁸ An employer that makes unilateral changes to labor terms before the parties reach a genuine impasse violates its duty to bargain with the union under the NLRA.¹¹⁹ Once the parties do reach an impasse, however, courts and the NLRB universally permit the employer to unilaterally impose any terms that were “reasonably comprehended” in any pre-impasse proposals.¹²⁰

A series of rulings from the NLRB have served to establish specific factors indicating that parties have reached a true bargaining impasse.

a. *Taft Broadcasting Co.*¹²¹

In *Taft Broadcasting Co.*, the employer acquired a television and a radio station from a third party, and also assumed the collective bargaining

¹¹⁷ 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2475.

¹¹⁸ 1 *id.* at 988–89.

¹¹⁹ NLRB v. Katz, 369 U.S. 736, 745–46 (1962); *see also infra* Part III.A.

¹²⁰ NLRB v. Intercoastal Terminal, Inc., 286 F.2d 957, 958 (5th Cir. 1961); *see also infra* Part ILC.2. In *Katz*, the Supreme Court specifically barred employers from implementing changes to labor terms that were not discussed during pre-impasse bargaining with the union. The Court described attempts to impose terms outside the scope of negotiations as “a circumvention of the duty to negotiate which frustrates the objectives of [the National Labor Relations Act] much as does a flat refusal” to negotiate. *Katz*, 369 U.S. at 743.

¹²¹ *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967).

agreement negotiated by its predecessor with the American Federation of Television and Radio Artists, AFL-CIO, Kansas City Local.¹²² One year later, the parties held the first of a series of bargaining sessions to try and reach a new collective bargaining agreement.¹²³ The negotiations were contentious because the employer wanted an agreement representing a “substantial departure from the agreement then in effect,” while the union sought “a carryover of the old contract with increases in wage rates and fringe benefits”¹²⁴

The parties met more than twenty-three times over a six-month period without reaching an agreement.¹²⁵ Despite having narrowed the gap between the parties to only a handful of issues, the employer declared an impasse and unilaterally imposed labor terms.¹²⁶ The union responded by filing unfair labor practice charges with the NLRB, but the NLRB sided with the employer.¹²⁷ In its ruling, the NLRB defined “impasse” as the point at which “good-faith negotiations have exhausted the prospects of concluding an agreement.”¹²⁸ It defined the characteristics that should be examined in figuring out whether or not an impasse exists:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exist[s].¹²⁹

The NLRB applied these factors to the case at hand and determined that the parties had in fact reached an impasse.¹³⁰ It noted that the parties had “bargained in good faith with a sincere desire to reach agreement” and had met more than twenty-three times to negotiate, yet “progress was imperceptible on the critical issues and each [party] believed that, as to some of those issues,

¹²² *Id.* at 475.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 477.

¹²⁶ *Id.* at 475.

¹²⁷ *Id.* at 478.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

they were further apart than when they had begun negotiations.”¹³¹ Thus, because the NLRB was “unable to conclude that a continuation of bargaining sessions would have culminated in a bargaining agreement,” it determined that a true impasse had in fact been reached and permitted the employer to unilaterally impose labor terms on the union.¹³²

b. Taft and Beyond

Since deciding *Taft*, the NLRB has continued to use a similar definition of impasse, and applies the same set of factors to determine when an impasse exists.¹³³ Beyond the factors laid out in *Taft*, however, the NLRB has also considered a variety of other factors in determining whether an impasse exists. These factors include: (1) “[w]hether there has been a strike or the union has consulted the employees about one;” (2) the “fluidity” of the parties’ positions; (3) whether the parties continued to bargain even after one side declared an impasse; (4) whether the parties both believe that impasse has been reached; (5) the union’s hostility level towards the employer, (6) the “nature and importance of issues and the extent of difference or opposition;” (7) the “bargaining history;” (8) whether either party has “demonstrated willingness to consider the issue further;” (9) the “duration of hiatus between bargaining meetings;” (10) the “number and duration of bargaining sessions;” and (11) any “other actions inconsistent with impasse.”¹³⁴

2. “Reasonably Comprehended” Standard in Bargain to Impasse Cases

Federal courts consistently prevent employers from imposing terms on their unions that were not included in any pre-impasse proposals. This principle started with an early Supreme Court decision and continued with two subsequent opinions—one from the Fifth Circuit and another from the Supreme Court—that established the generally accepted modern standard: any

¹³¹ *Id.*

¹³² *Id.* In response to the union’s argument that no impasse existed because only a few issues remained to be solved for an agreement to be reached, the court stated that “an impasse is no less an impasse because the parties were closer to agreement than previously, and a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions.” *Id.*

¹³³ See, e.g., A.M.F. Bowling Co., 314 N.L.R.B. 969, 978 (1994) (citations omitted) (defining impasse as “the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. Both parties must believe that they are at the end of their rope.”).

¹³⁴ 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 990–94.

post-impasse terms imposed on unions must be “reasonably comprehended” within pre-impasse proposals.

a. *NLRB v. Crompton-Highland Mills, Inc.*¹³⁵

In 1949, in *NLRB v. Crompton-Highland Mills, Inc.*, the Supreme Court examined for the first time the issue of which terms an employer could impose on its union after bargaining to impasse.¹³⁶ The employer and the union representing the production and maintenance employees at a cotton mill sparred over the terms of a new collective bargaining agreement.¹³⁷ The parties negotiated for five months and agreed on many issues, but were unable to reach an agreement on the most important issue: wage increases.¹³⁸ The employer made only one proposal to the union regarding wage increases, offering an additional one to one-and-a-half cents per hour, which the union rejected immediately.¹³⁹

The negotiations ultimately reached impasse and, twelve days later, the employer unilaterally imposed a two to six cents per hour wage increase for all union members—a “substantially larger” increase than any it had offered during pre-impasse negotiations.¹⁴⁰ The employer had not consulted with the union before implementing this wage increase and had not given the union an opportunity to negotiate the new term.¹⁴¹

The NLRB ruled this action by the employer constituted an unfair labor practice, and, after the district court and the Fifth Circuit refused to uphold the NLRB’s findings, the case reached the Supreme Court.¹⁴² The Supreme Court reversed the two lower court decisions, and upheld the NLRB’s ruling, thereby precluding employers from implementing terms “which are substantially different from, or greater than, those which the employer has proposed during its [pre-impasse] negotiations” with the union.¹⁴³ This holding marked the first

¹³⁵ *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949).

¹³⁶ *See generally id.*

¹³⁷ *Id.* at 219.

¹³⁸ *Id.* at 218.

¹³⁹ *Id.* at 221.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 220.

¹⁴³ *Id.* at 225. The Court wrote that the core problem was that the new wage term was nowhere to be found in any of the employer’s pre-impasse proposals. *Id.* at 224–25. Had the proposed wage term been included in any pre-impasse proposals, there would have been no problem with the employer imposing the

time the Court had limited the terms an employer may impose on its union to those contained within pre-impasse proposals, and was a clear victory for the NLRB.

*b. NLRB v. Intercoastal Terminal, Inc.*¹⁴⁴

In 1961, the Fifth Circuit in *NLRB v. Intercoastal Terminal, Inc.* built on the Supreme Court's decision in *Crompton-Highland Mills* and created a standard now applied universally by courts and the NLRB in determining which labor terms an employer may impose on its union after bargaining to impasse. In *Intercoastal Terminal*, the employer owned two businesses that were jointly treated as a single employer under the NLRA.¹⁴⁵ The first business, named Intercoastal Terminal, Inc., was a plant that received, stored, and shipped oil field materials owned by its customers, while the second business, named Louisiana Processing Company, Inc., was a plant that ground and processed barium sulphate.¹⁴⁶ Two months before the workers in each plant jointly unionized, the employer announced that it was modifying its vacation policy, effective the following year, to give both black and white employees equal vacation time.¹⁴⁷

After the employees unionized, the parties held nine bargaining sessions where they exchanged numerous proposals without reaching an agreement, ultimately reaching an impasse.¹⁴⁸ Shortly thereafter the employer's business slowed down, causing it to unilaterally reduce the work schedules of most union members and to quietly rescind the vacation policy it had announced before the union formed.¹⁴⁹ In response, the union filed a complaint with the NLRB alleging a variety of unfair labor practices.¹⁵⁰ Chief among them was that the employer had violated the NLRA by unilaterally altering the employees' work schedules and changing the vacation policy for a group of

term because it would "carry no disparagement of the collective bargaining proceedings" and may "be welcomed by the bargaining representative, without prejudice to the rest of the negotiations." *Id.* (citations omitted).

¹⁴⁴ *NLRB v. Intercoastal Terminal, Inc.*, 286 F.2d 954 (5th Cir. 1961).

¹⁴⁵ *Id.* at 955.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* After the ninth session, the employer offered to memorialize with the union the issues that the parties had agreed upon, but the union never responded to the offer. *Id.*

¹⁴⁹ *Id.* at 956–57. A few months later, the Louisiana Processing Company went out of business, and the employer laid off six union members. *Id.* at 957.

¹⁵⁰ *Id.* at 955–57.

union employees.¹⁵¹ The NLRB ruled in favor of the union on both charges and the employer appealed.¹⁵²

The appeal reached the Fifth Circuit, which held the employer had not erred by altering the employees' work schedules when the parties reached an impasse, but had erred when it altered the vacation policy.¹⁵³ The reason the court found differently on the two allegations was simple: the employer's ability to unilaterally alter work schedules was "*reasonably comprehended within its earlier proposals*" before the parties had reached an impasse, but the change to the vacation policy "was not within the area of negotiations during the bargaining sessions and was therefore not a permissible activity even following the impasse."¹⁵⁴

c. *Brown v. Pro Football, Inc.*¹⁵⁵

The standard set in *Intercoastal Terminal* that employers may impose terms "reasonably comprehended" in pre-impasse proposals has since been applied universally by circuit courts and the NLRB in similar cases.¹⁵⁶ The Supreme Court affirmed the validity of the standard in *Brown v. Pro Football, Inc.* In *Brown*, the collective bargaining agreement between the National Football League ("NFL") and the National Football League Players Association ("NFLPA") expired, causing the parties to begin negotiations toward a new agreement.¹⁵⁷

During the negotiations, the NFL proposed a plan permitting each team to create a "developmental squad" of up to six players who would practice with

¹⁵¹ *Id.* at 957.

¹⁵² *Id.* at 957–58.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 958–59 (emphasis added).

¹⁵⁵ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

¹⁵⁶ *See, e.g., Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997) ("When impasse occurs, an employer may implement only those changes reasonably falling within its pre-impasse proposal."); *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 596 (2d Cir. 1994) (holding that employer may not delay by one month paying its employees for unused vacation days because such a term was not "reasonably comprehended" in pre-impasse proposals); *Cuyamaca Meats v. Butchers & Food Emp'rs Pension Trust Fund*, 827 F.2d 491, 496 (9th Cir. 1987) ("[A]fter impasse is reached an employer may unilaterally implement new terms of employment only if reasonably comprehended in a pre-impasse offer."); *Allen W. Bird II*, 227 N.L.R.B. 1355, 1358 (1977) ("[I]t is well established that an employer can only make unilateral changes in working conditions consistent with its rejected [offers] to a union."); 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 907–08.

¹⁵⁷ *Brown*, 518 U.S. at 234.

the rest of the team, play in games as substitutes for injured players, and earn a non-negotiable salary of \$1,000 per week.¹⁵⁸ The NFLPA rejected this proposal and made a counterproposal that would give each developmental squad member benefits similar to those of regular players and the freedom to negotiate their own salaries.¹⁵⁹ The NFL rejected this counterproposal and negotiations on the issue eventually reached an impasse, causing the NFL to unilaterally impose terms from its pre-impasse proposal.¹⁶⁰

In response, 235 developmental squad players brought an antitrust suit against the NFL and its teams.¹⁶¹ The suit reached the Supreme Court, which affirmed the *Intercoastal Terminal* standard adopted by lower courts and the NLRB regarding which terms an employer could impose on its union after reaching an impasse.¹⁶² The Court held that “[l]abor law regulates directly, and considerably . . . the [post-impasse] imposition of a proposed employment term,” further stating that “new terms must be ‘*reasonably comprehended*’ within the employer’s [pre-impasse] proposals” because “by imposing more or less favorable terms, the employer unfairly undermine[s] the union’s status.”¹⁶³

3. *Close Similarities Between the Bargain to Impasse and Post-§ 1113 Scenarios Should Encourage Courts to Apply a Similar Standard for Employers Imposing Labor Terms Post-§ 1113*

There are many similarities between a debtor that has received court approval under § 1113 to reject a collective bargaining agreement in bankruptcy and an employer in the bargain to impasse situation outside of bankruptcy.¹⁶⁴ Each scenario ends with the employer unilaterally imposing terms on its union after the parties have tried and failed to reach a new collective bargaining agreement. Before reaching this end result in each scenario, the law requires an employer to “meet at reasonable times”¹⁶⁵ and

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 234–35.

¹⁶¹ *Id.* at 235.

¹⁶² *Id.* at 238 (emphasis added). In addition to its labor law holding, the Court also found that an antitrust exemption protected the NFL from antitrust liability for its concerted action. *Id.* at 237.

¹⁶³ *Id.* at 238 (emphasis added) (citations omitted). While the Court stated that the new terms must be “reasonably comprehended” within the employer’s pre-impasse proposals, it also stated the terms would typically be drawn from the last rejected proposals. *Id.*

¹⁶⁴ See 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2475.

¹⁶⁵ Compare 29 U.S.C. § 158(d) (2012) (requiring employer to “meet at reasonable times” during collective bargaining), and 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 849–50, 891–96, with 11 U.S.C.

“confer in good faith”¹⁶⁶ with its union. Likewise, the employer in each scenario is precluded from imposing labor terms on its union that it had never proposed in pre-impasse or pre-§ 1113 negotiations.¹⁶⁷ Furthermore, in each scenario, the union retains the right to strike after the employer has imposed terms unilaterally, which serves to deter employers from imposing overly onerous terms.¹⁶⁸

The only substantive difference between these two scenarios is that the post-§ 1113 scenario occurs during bankruptcy proceedings while the bargain to impasse scenario does not. Because the core elements of each scenario track one another so closely, however, the post-§ 1113 scenario functionally occurs when the parties have bargained to impasse *during bankruptcy*.¹⁶⁹ With the close similarities between the two scenarios, and the lack of guidance on the post-§ 1113 scenario from the Code, bankruptcy case law, and the NLRB, future courts should turn to the consistent precedent found in federal labor law for the analogous bargain to impasse scenario when determining which terms post-§ 1113 debtors may impose on their unions.

§ 1113(b)(2) (debtor must “meet at reasonable times” with union during § 1113 negotiations), and 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469.

¹⁶⁶ Compare 29 U.S.C. § 158(d) (requiring employer to “confer in good faith” during collective bargaining), and 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 827, 855–919, with 11 U.S.C. § 1113(b)(2) (debtor must “confer in good faith” with union during § 1113 negotiations), and 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2469.

¹⁶⁷ The NLRB has consistently held that the debtor may not impose labor terms that did not appear in any of its pre-§ 1113 proposals. See *supra* Part II.B. Likewise, the Supreme Court in *NLRB v. Katz* specifically barred employers from imposing labor terms that were not discussed during pre-impasse bargaining with the union. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Court described attempts to impose terms outside the scope of negotiations as “a circumvention of the duty to negotiate which frustrates the objectives of [the NLRA] much as does a flat refusal” to negotiate. *Id.*

¹⁶⁸ There is clear case law confirming that employees retain the right to strike after the debtor has unilaterally imposed labor terms following § 1113 rejection. See, e.g., *In re Evans Prods. Co.*, 55 B.R. 231, 234 (Bankr. S.D. Fla. 1985); *In re Ky. Truck Sales, Inc.*, 52 B.R. 797, 806 (Bankr. W.D. Ky. 1985) (holding that following rejection, “employees retain the right to strike as their ultimate bargaining tool”); see also 2 THE DEVELOPING LABOR LAW, *supra* note 50, at 2475 (“[R]ejection of a collective bargaining agreement frees the union to strike the employer.”). Likewise, there is also case law confirming that employees retain the right to strike following an employer unilaterally imposing terms after impasse. See, e.g., *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1154 (D.C. Cir. 1992) (“[The] statutory right to strike . . . [is] beyond the scope of the impasse rule.”).

¹⁶⁹ While the bankruptcy context is a different backdrop for impasse than the non-bankruptcy context, the key bankruptcy policy goal for debtors is to emerge from bankruptcy with a “fresh start.” Permitting debtors broad authority to impose terms from any pre-§ 1113 proposal aligns with this policy goal by giving them a greater opportunity to gain that fresh start than would restricting their ability to impose only terms from the “last, best offer,” which may hinder them moving forward. ELIZABETH WARREN & JAY LAWRENCE WESTBOOK, *THE LAW OF DEBTORS AND CREDITORS* 115 (6th ed. 2008).

Courts and the NLRB have universally permitted post-impasse employers to unilaterally impose any terms on their unions that are “reasonably comprehended” in *any* pre-impasse proposals.¹⁷⁰ The approach most similar to this “reasonably comprehended” standard is one that permits the debtor in possession to impose terms from any pre-§ 1113 proposals on the union after gaining court approval to reject the existing collective bargaining agreement. Applying a standard similar to the “reasonably comprehended” approach to post-§ 1113 debtors would permit courts to consistently apply the law in two analogous scenarios. This is the correct approach for courts to follow for reasons of both consistency and clarity in an area of law that otherwise lacks direction.

III. LIMITING POST-§ 1113 DEBTORS TO IMPOSING TERMS FROM THEIR “LAST, BEST OFFER” DISCOURAGES DESIRABLE BEHAVIOR AND ENCOURAGES UNDESIRABLE BEHAVIOR

If debtors are limited to imposing only terms from their “last, best offer” to unions after rejection, they will be disincentivized from adhering to fundamental mandates in both the NLRA and § 1113 to bargain in “good faith” and meet with the union at “reasonable times.”¹⁷¹ Furthermore, without flexibility in the terms they may impose should negotiations fail, debtors will be incentivized to engage in unlawful surface bargaining¹⁷² with their unions because the risks of trying to make a deal and failing will be greater than those of being caught not genuinely trying to make a deal at all. Instead, if courts permit debtors to impose terms from any pre-§ 1113 proposal, the incentives for debtors will flip, thereby encouraging desirable behaviors under the NLRA and the Code while discouraging undesirable surface bargaining.

A. *National Labor Relations Act*¹⁷³

The National Labor Relations Act has been the foundation of federal labor law since Congress passed it in 1935. The NLRA created numerous rights and protections for employees such as “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through a representative of

¹⁷⁰ See *supra* Part II.B.2.

¹⁷¹ 11 U.S.C. § 1113(b)(2); 29 U.S.C. § 158(d); see also 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 43.

¹⁷² See *infra* Part III.D.

¹⁷³ 29 U.S.C. §§ 151–169.

their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹⁷⁴ The NLRA also provides specific guidance on how unions should be organized internally, sets out unfair labor practices, and creates the National Labor Relations Board to adjudicate unfair labor practice claims.¹⁷⁵ Unfair labor practices for employers found in the NLRA include, among others, “interfere[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed” them to organize and bargain collectively; mistreating employees because they are in a union; or “refus[ing] to bargain collectively with the representatives of . . . employees.”¹⁷⁶

Chief among the policy goals of the NLRA is “encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions” of union employment.¹⁷⁷ Furthering this policy focus on promoting collective bargaining, § 158(d) of the NLRA clarifies the requirements for parties involved in collective bargaining by stating, “[T]o

¹⁷⁴ *Id.* § 157. Congress amended the NLRA twelve years after passing it by enacting the Labor Management Relations Act of 1947 (“LMRA”). *Id.* §§ 401–531. The LMRA altered the NLRA by refocusing federal labor law on increasing rights and protections for employers instead of for employees. *See id.* §§ 141–144, 167, 172–187. The LMRA gave employees the right to refrain from joining a union, made structural changes to the NLRB, further codified what constitutes an unfair labor practice, specifically guaranteed that both unions and employers could freely speak their minds without risk of committing an unfair labor practice, set out fundamental duties for each party during collective bargaining, altered the employee grievance process laid out in the NLRA, increased regulation of internal union affairs, made procedural changes to filing unfair labor practice charges, laid out criteria for when the NLRB should issue injunctions, and prioritized state “right to work” laws over union requirements. *Id.* §§ 141–144, 167, 172–187; *see also* 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 41–47.

¹⁷⁵ *See* 29 U.S.C. §§ 151–169. The NLRB must toe a delicate balance between ensuring that parties engage in whole-hearted collective bargaining discussions while at the same time not having the authority to force parties to come to an agreement or to make particular concessions. The Supreme Court in *NLRB v. Am. Nat’l Ins.* confirmed the limits of the NLRB’s power when it stated that “the [NLRA] does not compel any agreement whatsoever between employees and employers” and “it is equally clear that [under the NLRA] the [NLRB] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” *NLRB v. Am. Nat’l Ins. Co.*, 343 U.S. 395, 399, 404 (1952). The Court did note, however, that “[e]nforcement of the obligation to bargain collectively is crucial to the statutory scheme,” and as such, the NLRB does the best it can to enforce the obligation in spite of its limitations. *Am. Nat’l Ins. Co.*, 343 U.S. at 402.

¹⁷⁶ 29 U.S.C. § 158(a). Other unfair labor practices by the employer under the NLRA include “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it,” to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,” and “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.” *Id.*

¹⁷⁷ 29 U.S.C. § 151.

bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees *to meet at reasonable times and confer in good faith* . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession¹⁷⁸

Under the NLRA and § 1113 of the Code, bargaining in good faith and meeting with the union at reasonable times are two core requirements of collective bargaining negotiations.¹⁷⁹ Adherence to each of these requirements has been frequently litigated since Congress passed the NLRA, further underscoring their importance to the collective bargaining process, as well as the importance of aligning a debtor's incentives to comply with each requirement through the terms that courts will permit debtors to impose following rejection.¹⁸⁰

B. *The Duty to Bargain in Good Faith*

Many courts, beginning in 1940 with the Fourth Circuit in *Highland Park*,¹⁸¹ have confirmed the existence of the duty to bargain in good faith. Beyond merely confirming its existence, courts have consistently enforced it as well in a series of rulings that define what it means to bargain in good faith.

1. *NLRB v. Highland Park Manufacturing Co.*¹⁸²

In *Highland Park*, the employer held a few meetings with its union during collective bargaining negotiations and received multiple proposals from the union without making any substantive counterproposals.¹⁸³ The employer thought it had satisfied its bargaining obligation by merely meeting with the union while, at the same time, repeatedly vowing not to sign any written agreement with the union regardless of the proposed terms.¹⁸⁴

The Fourth Circuit disapproved of both the employer's words and actions, and upheld the NLRB's initial ruling that the employer had failed to bargain in good faith.¹⁸⁵ The court reasoned that the "attitude and position that

¹⁷⁸ *Id.* § 158(d) (emphasis added); see also 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 864.

¹⁷⁹ 11 U.S.C. § 1113(b)(2); 29 U.S.C. § 158(d).

¹⁸⁰ See *infra* Parts III.B–C.

¹⁸¹ NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940).

¹⁸² NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940).

¹⁸³ *Id.* at 634.

¹⁸⁴ *Id.* at 635.

¹⁸⁵ *Id.* at 636.

[management's] representatives assumed . . . clearly show that the [employer] was not then negotiating, nor did it intend to negotiate, in good faith with the representatives of its employees"¹⁸⁶ The court continued that while the NLRA does not require that the parties agree, it does:

*require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement . . . even as to matters as to which there is no disagreement, does not satisfy its provisions.*¹⁸⁷

2. NLRB v. George P. Pilling & Son Co.¹⁸⁸

Other courts have followed the reasoning of *Highland Park*, issuing rulings with similar definitions of good faith in order to rein in employers who fail to display it. The Third Circuit addressed the issue in *NLRB v. George P. Pilling & Son Co.* In *Pilling*, leaders of a newly formed union approached their employer to begin collective bargaining negotiations to which the employer saber-rattled that he “was not going to have any union run his business for him,” while threatening to close the business or lay off anyone who joined the union.¹⁸⁹ Later, during negotiations, the employer rejected all of the union’s proposals, refused to offer any counterproposals, and attempted to circumvent union leadership by communicating directly with rank and file employees.¹⁹⁰

Similar to the Fourth Circuit’s decision in *Highland Park*, the Third Circuit found that the employer’s actions failed to satisfy the requirement to bargain in good faith.¹⁹¹ The court stated that “[b]argaining presupposes negotiations between parties carried on in good faith. The fair dealing which the service of good faith calls for must be exhibited by the parties *in their approach and attitude to the negotiations*”¹⁹² In this case, where the employer would not make a counterproposal, the court found that such inaction went “to support a want of good faith, and hence, a refusal to bargain.”¹⁹³

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 637 (emphasis added).

¹⁸⁸ *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32 (3d Cir. 1941).

¹⁸⁹ *Id.* at 34.

¹⁹⁰ *Id.* at 36–37.

¹⁹¹ *Id.* at 37.

¹⁹² *Id.* (emphasis added).

¹⁹³ *Id.*

3. NLRB v. Montgomery Ward & Co.¹⁹⁴

The Ninth Circuit reached a similar conclusion in *NLRB v. Montgomery Ward & Co.*¹⁹⁵ In *Montgomery Ward*, the employer, retail merchandiser Montgomery Ward, was engaged in collective bargaining discussions with unions for its retail clerks and warehousemen.¹⁹⁶ During the negotiations, the employer refused to make any proposals or to proactively further the discussions.¹⁹⁷ When both unions filed charges with the NLRB accusing the employer of failing to bargain in good faith, the employer argued that the duty to bargain collectively is simply “the duty to recognize the authority of the employee representative, to participate in such discussion as is necessary to avoid mutual misunderstanding, and to enter into binding agreements on such terms [that are] mutually acceptable.”¹⁹⁸ The Ninth Circuit, however, disagreed, stating that good faith requires parties to “participate actively in the deliberations . . . [and] to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground”¹⁹⁹ The court concluded that “a mere formal presence at collective bargaining with a completely closed mind and without this spirit of [cooperation] and good faith” is insufficient.²⁰⁰

4. Additional Decisions Relating to the Duty to Bargain in Good Faith

Additional decisions have further expounded on what it means to bargain in good faith, but all of them require, at their essence, that the parties negotiate “with the purpose of trying to reach an agreement.”²⁰¹ In practice, courts have found employers to lack this requisite purpose when they have engaged in bad-faith behaviors such as refusing union requests to negotiate,²⁰² seeking to

¹⁹⁴ *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

¹⁹⁵ *See generally id.*

¹⁹⁶ *Id.* at 679.

¹⁹⁷ *Id.* at 683.

¹⁹⁸ *Id.* at 686.

¹⁹⁹ *Id.* (emphasis added).

²⁰⁰ *Id.*

²⁰¹ 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 864; *see generally, e.g.*, *NLRB v. Sw. Porcelain Steel Corp.*, 317 F.2d 527 (10th Cir. 1963); *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960); *Majure v. NLRB*, 198 F.2d 735 (5th Cir. 1952); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874 (1st Cir. 1941); *Cal. Girl, Inc.*, 129 N.L.R.B. 209 (1960).

²⁰² *See, e.g., Reed & Prince Mfg. Co.*, 118 F.2d at 885 (bad faith exists when employer “specifically reject[s] proffered opportunities for negotiation”).

undercut union authority,²⁰³ making “take it or leave it” offers,²⁰⁴ purposely stalling negotiations,²⁰⁵ making lowball offers,²⁰⁶ and refusing to sign any agreement.²⁰⁷ Likewise, in proceedings under § 1113(b)(2), courts require the debtor in pre-§ 1113 negotiations to display a similar purpose to reach an agreement with its union, and have found similar bad faith behaviors to violate this good faith requirement.²⁰⁸

C. *The Duty to Meet at Reasonable Times*

The NLRA and § 1113 each also require the employer and its union to meet at “reasonable times,” but neither defines what this means.²⁰⁹ Consequently, courts and the NLRB rely heavily on fact-specific inquiries in individual cases to determine whether the employer has met at reasonable times with its union.²¹⁰ Below are several such cases.

²⁰³ See, e.g., *id.* (finding that bad faith exists when employer tries “to undercut the authority of the [u]nion as representative of its employees”); *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 36–38 (3d Cir. 1941) (bad faith when employer posts notices in factories to circumvent union leadership).

²⁰⁴ See, e.g., *Herman Sausage Co.*, 275 F.2d at 234 (employer’s take it or leave it offer reflects bad faith); *Majure*, 198 F.2d at 737–38 (holding that employer’s refusal to make any concessions from its initial proposal evinces bad faith “tantamount to a demand for complete unilateral control over all important terms and conditions of employment [that negate] the collective bargaining principle envisaged by the [NLRA]”).

²⁰⁵ See, e.g., *Sw. Porcelain Steel Corp.*, 317 F.2d at 530–31 (holding that employer evinces bad faith by purposefully stalling negotiations by regularly requesting to review contract language that was previously agreed upon, agreeing to many matters only in principle but not committing to firm terms, and failing to make constructive suggestions on how to improve the contract language at issue).

²⁰⁶ See, e.g., *Gadsden Tool, Inc.*, 327 N.L.R.B. 164, 170 (1998) (finding bad faith when employer made only lowball offers, even though ultimately accepted by the union).

²⁰⁷ See, e.g., *id.* at 171 (stating that bad faith is displayed when employer verbally agrees to terms with union but refuses to sign written contract).

²⁰⁸ See, e.g., *In re Horsehead Indus., Inc.*, 300 B.R. 573, 590 (Bankr. S.D.N.Y. 2003) (permitting rejection of the collective bargaining agreements of the first two locals, but prohibiting rejection of the third because debtor neglected to negotiate in good faith with the third union local); *In re GCI, Inc.* 131 B.R. 685, 695 (Bankr. N.D. Ind. 1991) (prohibiting rejection where debtor does not bargain in good faith, even if union also did not bargain in good faith); *In re Am. Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984) (finding that debtor did not negotiate in good faith where after only one meeting, union indicated desire to negotiate further but debtor did not attempt to do so).

²⁰⁹ 11 U.S.C. § 1113(b)(1)(B)(2) (2012); 29 U.S.C. § 158(d); see also 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 849.

²¹⁰ See, e.g., *N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.)*, 981 F.2d 85, 91 (2d Cir. 1992) (finding that duty to meet at reasonable times is satisfied when debtor meets with union for ten hours total under the circumstances of the case); *In re Ky. Truck Sales Inc.*, 52 B.R. 797, 801 (Bankr. W.D. Ky. 1985) (four meetings between debtor and union sufficient); *Am. Provision Co.*, 44 B.R. at 910–11 (insufficient when debtor only meets once with union and declines requests to meet further).

1. Richard Mellow Electrical Contractors Corp.²¹¹

In *Richard Mellow*, an electrical contracting company and its union, the International Brotherhood of Electrical Workers Local 81, were scheduled to begin negotiations on a new collective bargaining agreement shortly before the existing one lapsed.²¹² The union attempted to start the negotiations by mailing the employer an initial proposal and suggesting several potential meeting times.²¹³ The parties held a brief meeting a month later and the employer promised to “get back” to the union shortly about scheduling another meeting.²¹⁴ The employer did not get back to the union as promised, and ignored two voicemails from union representatives attempting to schedule meetings.²¹⁵

The employer finally submitted a proposal to the union three months later and the parties met again two months after the proposal was submitted.²¹⁶ During this meeting, the parties were unable to make significant progress.²¹⁷ The union subsequently proposed three possible future meeting times and the employer declined all three, telling the union it would “get back to [it] to set up a meeting sometime in the next two weeks,” but never did.²¹⁸ The NLRB ruled the employer’s actions “clearly fall far short of its obligation to meet at reasonable times and to bargain with the [u]nion,” and held the employer had committed an unfair labor practice.²¹⁹

²¹¹ Richard Mellow Elec. Contractors Corp., 327 N.L.R.B. 1112 (1999).

²¹² *Id.* at 1115. Relations between the two parties had been contentious from the start. When the union first organized, the employer resisted the organizing campaign strongly enough that the union filed unfair labor practice charges as a result of the employer’s actions. *Id.* at 1112. The parties ultimately settled, but not without the employer admitting guilt in “interrogating employees about their union activities . . . threaten[ing] to reclassify employees as apprentices, [threatening to] close its shop and reopen under a new name with new employees; creating the impression of surveillance; promising benefits; announcing new benefits; and granting a wage increase to discourage employees from voting for union representation.” *Id.*

²¹³ *Id.* at 1115.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1116.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

2. Caribe Staple Co.²²⁰

In *Caribe Staple Co.*, the employer was an Illinois based corporation that manufactured staples at a factory in Puerto Rico.²²¹ After its factory workers joined Union General De Trabajadores De Puerto Rico in October 1991, the union initiated collective bargaining negotiations and the parties traded proposals via mail through the end of January 1992.²²² The parties also agreed to meet for three days at the end of March for face-to-face negotiations, but when the employer's representatives arrived in Puerto Rico they announced that they were unable to meet on the third scheduled day.²²³

After the March meetings, the employer only agreed to meet with the union three more times before cutting off negotiations.²²⁴ The union requested meetings in April, June, and September, but the employer delayed each proposed meeting by a few weeks, causing the parties to meet at a later date every time.²²⁵ The employer refused to schedule more than three consecutive days of meetings during each session and capped daily meetings at four hours and fifteen minutes.²²⁶ Further, at each set of meetings the employer found reasons to meet for less time than the parties had originally agreed upon.²²⁷

The NLRB ruled the employer did not satisfy its duty to meet with the union at reasonable times, noting that “considerations of personal convenience, including geographic or professional conflicts, do not take precedence over the statutory demand that the bargaining process take place with expedition and regularity.”²²⁸ The NLRB held that four trips by company management from Chicago to Puerto Rico for negotiating sessions, none of which exceeded three days in duration or four hours and fifteen minutes per session, evidenced “clear noncompliance with a duty to meet at reasonable times.”²²⁹

²²⁰ *Caribe Staple Co.*, 313 N.L.R.B. 877 (1994).

²²¹ *Id.* at 879.

²²² *Id.* at 888.

²²³ *Id.* at 891.

²²⁴ *Id.* at 891–93.

²²⁵ *Id.*

²²⁶ *Id.* at 890–92.

²²⁷ *Id.* at 891–92. In May, the employer cancelled the last two days of meetings in response to union vandalism of employer property. *Id.* In July, the employer reduced the scheduled meeting times on the last two days of talks, and in October, the employer walked out on the third day of negotiations in protest over an unwanted representative the union brought. *Id.*

²²⁸ *Id.* at 893.

²²⁹ *Id.*

3. Sparks Nugget, Inc. v. NLRB²³⁰

In *Sparks Nugget*, the employer and the union representing its employees, Hotel Employees and Restaurant Employees International Union, Local 86, AFL-CIO, were unable to reach a collective bargaining agreement, and as a consequence the union filed unfair labor practice charges against the employer.²³¹ Chief among these charges was that the employer would not meet with the union at “reasonable times.”²³² The union had requested that the parties negotiate in the first place, and asked that the sides meet “regularly and often” to get a deal done.²³³ The employer, however, would only agree to “short, intermittent bargaining sessions” because its managers were “businessmen, and they have to take care of business.”²³⁴ When the union offered to work around the employer’s schedule so that more regular and lengthier meetings could be scheduled, the employer refused.²³⁵

The NLRB ruled the employer’s actions did not comply with the requirement to meet at reasonable times, and the Ninth Circuit upheld that ruling.²³⁶ Both the NLRB and the Ninth Circuit agreed that the employer’s position that its “managers were businessmen, and they had to take care of business” confirmed that the employer was not meeting at reasonable times with its union, because such a statement evinced that “bargaining was not part of its business, but rather *something to be fit in at odd moments*, without regard to whether significant progress toward reaching agreement could be made by proceeding in this manner.”²³⁷

4. *Additional Decisions Relating to the Duty to Meet at Reasonable Times*

Beyond the behaviors condemned in the above cases, courts have found that several other negotiating behaviors violate the duty to meet at reasonable times. For example, employers can breach this duty when they refuse to meet

²³⁰ Sparks Nugget, Inc. v. NLRB, 968 F.2d 991 (9th Cir. 1992).

²³¹ *Id.* at 993.

²³² *Id.* at 993–94.

²³³ *Id.* at 992.

²³⁴ *Id.* at 992–93 (citation omitted).

²³⁵ *Id.* at 993.

²³⁶ *Id.* at 995; *see also* Rhodes St. Clair Buick, 242 N.L.R.B. 1320, 1323 (1979) (finding failure to meet at reasonable times when the union continually requests that the parties negotiate more frequently and for longer periods, but the employer refuses).

²³⁷ *Sparks Nugget, Inc.*, 968 F.2d at 995 (emphasis added) (citation omitted).

unless a federal mediator is present,²³⁸ refuse to meet for two months after the union formed,²³⁹ require the union to submit all proposals in writing while refusing to meet face to face,²⁴⁰ or insist on negotiating exclusively through mailed letters over union objections.²⁴¹ Each of these cases demonstrates the fact-specific inquiries that courts and the NLRB regularly conduct to determine whether employers have satisfied their duty to meet at reasonable times.

D. Surface Bargaining

Surface bargaining occurs when “forms of negotiation have been employed to conceal a purpose to frustrate or avoid mutual agreement.”²⁴² Even if the employer meets with the union regularly and at length, unlawful surface bargaining exists if it is “merely going through the motions of bargaining.”²⁴³

While surface bargaining is conceptually simple to understand, it can be difficult to identify in practice. The NLRB and courts must examine the “totality” of a party’s words and actions to determine if “the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.”²⁴⁴ Only the latter behavior is surface bargaining.

In *Atlanta Hilton & Tower*,²⁴⁵ the NLRB identified several behaviors constituting surface bargaining, including “delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient

²³⁸ *Riverside Cement Co.*, 305 N.L.R.B. 815, 818–19 (1991) (finding that the duty to meet with the union at reasonable times is “wholly independent of the willingness of any mediator to participate”).

²³⁹ *Rhodes St. Clair Buick*, 242 N.L.R.B. at 1323.

²⁴⁰ *NLRB v. U.S. Cold Storage Corp.*, 203 F.2d 924, 928 (5th Cir. 1953).

²⁴¹ *NLRB v. P. Lorillard Co.*, 117 F.2d 921, 924 (6th Cir. 1941); *see also* *Alle Arecibo Corp.*, 264 N.L.R.B. 1267, 1273 (1982) (noting that employer’s insistence on negotiating through mailed letters and phone calls reflects a “callous unwillingness” to satisfy its duty to meet with the union at reasonable times).

²⁴² 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 864; *see also* *NLRB v. Whittier Mills, Co.*, 111 F.2d 474, 478 (5th Cir. 1940) (stating that “willful obstruction of” and “purpose to defeat” collective bargaining negotiations constitutes surface bargaining).

²⁴³ 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 864 (citing *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997)); *see also* *Maywood Do-nut Co.*, 248 N.L.R.B. 529, 537 (1980) (holding that surface bargaining exists where employer evinces attitude of not taking the negotiations seriously, refuses to send any company personnel to bargaining sessions or to make any counterproposals, and hesitates to schedule meetings).

²⁴⁴ *Pub. Serv. Co. of Okla.*, 334 N.L.R.B. 487, 487 (2001), *enforced*, 318 F.3d 1173 (10th Cir. 2003); *see also* 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 864–65.

²⁴⁵ *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1603 (1984).

bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.”²⁴⁶ While court oversight required by § 1113 would preclude debtors from engaging in several of these behaviors, three in particular—delaying tactics, unreasonable bargaining demands, and withdrawal of already agreed upon provisions—would prove appealing to debtors if courts were to limit the terms they can impose when pre-§ 1113 negotiations fail to yield an agreement.²⁴⁷

1. *Delaying Tactics*

In *Regency Service Carts*,²⁴⁸ the NLRB affirmed the ruling of an administrative judge finding that a manufacturer of hotel and restaurant equipment had engaged in surface bargaining with the union representing its employees, Shopmen’s Local Union Number 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO.²⁴⁹ The parties bargained for thirty-two months without reaching agreement, and it was clear that this was the employer’s intended result.²⁵⁰

Throughout the entire process, the employer strenuously resisted scheduling meetings.²⁵¹ When the union made several attempts over a three-

²⁴⁶ 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 865–66 (quoting *Atlanta Hilton & Tower*, 271 N.L.R.B. at 1603). Beyond the behaviors listed in *Atlanta Hilton & Tower*, the NLRB has identified other behaviors constituting surface bargaining that employers would be incentivized to mimic if courts do not provide them flexibility in imposing terms on the union after court approval of § 1113 rejection. 1 THE DEVELOPING LABOR LAW, *supra* note 50, at 866–67; *see, e.g.*, *NLRB v. Wright Motors, Inc.*, 603 F.2d 604, 606–10 (7th Cir. 1979) (holding that employer who makes predictably unacceptable proposals and refuses to consider alternatives engages in surface bargaining); *Neon Sign Corp.*, 229 N.L.R.B. 861, 862–63 (1977) (finding that surface bargaining exists where an employer rejects a union proposal, and makes a counterproposal but does not try to reconcile the differences between the two).

²⁴⁷ These behaviors would not be tempting for debtors if they had flexibility to impose terms from any pre-§ 1113 proposal, because then they could negotiate with the purpose of making a deal, instead of with the purpose of hedging against the possibility of imposing concessionary terms that they do not want to impose if negotiations fail. The next section of this Comment focuses on behaviors such as those in *Atlanta Hilton*, that are plausible under the requirements of § 1113, but there are many behaviors that courts and the NLRB have found to constitute surface bargaining. *See, e.g.*, *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 268 (2d Cir. 1963) (unilateral changes in mandatory bargaining subjects); *Fairhaven Props.*, 314 N.L.R.B. 763, 770 (1994) (employer tries to bypass union by making direct offer to employees on condition that they oust union); *Billups W. Petroleum Co.*, 169 N.L.R.B. 964, 973 (1968) (employer fails to designate bargaining agent with sufficient authority).

²⁴⁸ *Regency Serv. Carts, Inc.*, 345 N.L.R.B. 671 (2005).

²⁴⁹ *Id.* at 677.

²⁵⁰ *Id.* at 672.

²⁵¹ *Id.* at 716.

month span to begin negotiations, the employer ignored each attempt before finally agreeing to meet.²⁵² After the initial meeting, the parties were scheduled to meet twenty-eight more times over a two and a half year span.²⁵³ Despite this plan, the employer continually rejected the union's proposed meeting dates, insisting instead on dates falling after the union's final proposed date.²⁵⁴ The NLRB found that the irregularity of the meetings was due to the employer's refusal to make itself available, despite the union "consistently pressing for more frequent meetings."²⁵⁵

Beyond irregularly scheduled meetings, the employer utilized several other delaying tactics. When the union requested information about the employer's proposals, the employer would stall.²⁵⁶ Of the twenty-nine total bargaining sessions, the employer canceled eight, and did not show up for the final one.²⁵⁷ When bargaining sessions did occur, the employer limited them to three hours.²⁵⁸ Furthermore, sessions were often shortened or interrupted by the employer's habit of arriving late, taking phone calls during meetings, and ending meetings early even when the union desired to continue negotiating.²⁵⁹

The NLRB cited these "dilatory tactics" as proof that the employer engaged in surface bargaining.²⁶⁰ The NLRB stated that the "totality of the [employer's] . . . conduct demonstrates that it intended to frustrate negotiations and prevent the successful negotiation of a bargaining agreement."²⁶¹

2. *Unreasonable Bargaining Demands*

In *NLRB v. A-1 King Size Sandwiches*,²⁶² a company that produced sandwiches and pies for distribution to convenience stores engaged in contentious collective bargaining negotiations with the Hotel, Motel, Restaurant Employees & Bartenders Union, Local Number 737 that

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 672.

²⁵⁵ *Id.* at 716.

²⁵⁶ *Id.* at 675.

²⁵⁷ *Id.* at 716.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 673.

²⁶¹ *Id.* at 727 (quoting *Mid-Continent Concrete*, 336 N.L.R.B. 258, 261 (2001)).

²⁶² *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872 (11th Cir. 1984).

represented its production and maintenance employees.²⁶³ After eighteen bargaining sessions in eleven months, the parties came to an agreement on a handful of minor issues, but were unable to reach agreement on six core issues.²⁶⁴ The union filed unfair labor practice charges, alleging that the employer's bargaining positions on those six core issues, combined with its frequent practice of responding to union complaints about its proposals by making even broader proposals, constituted surface bargaining.²⁶⁵

When the case reached the Eleventh Circuit, the court sided with the union. It held that the employer's unreasonable demands and desire for "unilateral control over virtually all significant terms and conditions of employment" evinced surface bargaining from the employer with "little desire to work towards agreement of a contract."²⁶⁶

3. *Withdrawal of Already Agreed Upon Provisions*

In *Valley Oil Co.*,²⁶⁷ the employer, an oil and gasoline distributor, held sixteen bargaining sessions over four months with the union representing its truck drivers, Teamsters, Chauffeurs, Warehousemen and Helpers Union Local Number 437, but the parties were unable to reach a collective bargaining agreement.²⁶⁸ When negotiations began, the parties agreed on a handful of issues quickly.²⁶⁹ After agreeing to these terms, however, the employer

²⁶³ *Id.* at 873.

²⁶⁴ *Id.*

²⁶⁵ *Id.* The six core issues that the union referred to were: (1) the employer's demand of exclusive authority over all wage decisions; (2) the employer's proposed extraordinarily broad "management rights" clause "which reserved exclusively . . . all authority customarily exercised by Management and 'each and every right, power and privilege that it had ever enjoyed, whether exercised or not . . . '"; (3) the employer's proposed "zipper clause" where "the parties [waived the] right to bargain during the life of the agreement regarding any subject or any matter referred to or covered in the agreement or any other subject matter which could be considered a mandatory or permissive subject of bargaining"; (4) the employer's proposed "no-strike clause" that prohibited the union from striking for either economic or unfair labor practice reasons; (5) the employer's desire to retain uninhibited control over all disciplinary matters; and (6) the employer's demand for full discretion over laying off and recalling employees based on productivity instead of seniority. *Id.*

²⁶⁶ *Id.* at 877; see also *Pub. Serv. Co. of Okla. v. NLRB*, 318 F.3d 1173, 1176-77 (10th Cir. 2003); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 797 (D.C. Cir. 1997) (holding that surface bargaining exists where employer's proposals included cuts to wages, holiday pay, and vacation pay, eliminated the pension plan, swapped the employer's insurance plan for the union insurance plan, and made it easy to fire employees); *Liquor Indus. Bargaining Grp. & Fedway Assocs.*, 333 N.L.R.B. 1219, 1220 (2002); *Burrows Paper Corp.*, 332 N.L.R.B. 82, 93-94 (2000).

²⁶⁷ *Valley Oil Co.*, 210 N.L.R.B. 370 (1974).

²⁶⁸ *Id.* at 373, 383.

²⁶⁹ *Id.* at 383.

changed bargaining representatives, and then withdrew many of the previously agreed upon provisions.²⁷⁰ When the employer reneged on these terms and the parties held ten additional meetings without reaching an agreement, the union went on strike and remained on strike while the NLRB considered unfair labor practice charges against the employer.²⁷¹

The NLRB found that the employer committed an unfair labor practice by engaging in surface bargaining primarily due to its widespread withdrawal from agreements already reached with the union.²⁷² The NLRB determined that such conduct “frustrat[ed] arrival at a contract” and “the conclusion [was] inescapable that the bargaining before the strike occurred was not good faith bargaining.”²⁷³ Once the union went on strike, the employer made a new proposal that included different proposed wage terms because it viewed the strike as “a rejection of its earlier offers.”²⁷⁴ The NLRB found that this “bargaining posture [was] designed to frustrate collective bargaining, rather than legitimate hard bargaining.”²⁷⁵

*E. Limiting the Terms Debtors May Impose to Their “Last, Best Offer”
Discourages Bargaining in Good Faith and Meeting at Reasonable Times
While Encouraging Unlawful Surface Bargaining*

If courts limit debtors’ ability to impose labor terms to only those found in their “last, best offer” at the time pre-§ 1113 negotiations fail, they will be disincentivized from negotiating in good faith and meeting at reasonable times with their unions, and instead will be incentivized to engage in unlawful surface bargaining. While bargaining in good faith and meeting at reasonable times are obligatory under the NLRA, debtors will likely fear that satisfying both requirements while failing to reach an agreement will mean being forced to impose concessionary labor terms post-§ 1113. In the debtor’s mind, this scenario may have worse ramifications than the alternatives of surface

²⁷⁰ *Id.* at 383–84. The employer reneged on the agreement covering wages much later than the other terms, after ten bargaining sessions had failed to yield an agreement and after the union went on strike. The employer’s new proposal for wages, which the union promptly rejected, included 3% increases across the board, along with the creation of new job classifications that further delineated salaries for employees based on whether they had three years of experience or not. *Id.* at 384.

²⁷¹ *Id.* at 383.

²⁷² *Id.* at 385.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 385–86.

bargaining or daring the union to file expensive, slow moving, unfair labor practice charges that may or may not result in liability for the employer.²⁷⁶

Limiting debtors' to imposing only labor terms from their "last, best offer" if negotiations fail would create a detrimental but powerful incentive for debtors to surface bargain as a means of protecting themselves. Surface bargaining does not benefit the union who, regardless of the debtor's true intentions, must continue negotiating, nor does it benefit the debtor, who must spend time and money to put up a façade of genuine negotiations to satisfy the requirements of § 1113(b)(2).²⁷⁷ Debtors will likely view the time and expense of surface bargaining as less costly than the possibility of being forced to impose concessionary labor terms after genuinely attempting, but failing, to reach an agreement.

By contrast, if courts allow debtors to impose terms from any pre-§ 1113 proposal, incentives for debtors would be properly aligned with the requirements of the NLRA. Such flexibility would incentivize debtors to bargain in good faith and meet at reasonable times, while discouraging surface bargaining because debtors would know that if negotiations fail, they will not regret genuinely attempting to reach an agreement as they would if forced to impose labor terms only from their "last, best offer." Thus, if negotiations fail and courts give debtors flexibility to impose any labor term from any pre-§ 1113 proposal, incentives for debtors will be properly aligned with desired behaviors under § 1113 and the NLRA.

IV. UNDER THE TWO PRINCIPAL MODELS OF NEGOTIATION, THE PARTIES ARE MORE LIKELY TO REACH AN AGREEMENT IF COURTS ALLOW THE DEBTOR TO IMPOSE TERMS FROM ANY PRE-§ 1113 PROPOSALS

If courts permit post-§ 1113 debtors flexibility to impose labor terms from any pre-§ 1113 proposal, the parties will be more likely, under the two most widely followed theoretical models of negotiation, to reach an agreement. Under both the economic model and the problem-solving model of negotiation,

²⁷⁶ In addition to uncertainty about whether liability would attach, this scenario would also preserve the debtor's ability to impose preferred labor terms if negotiations fail. Meeting the requirements of the NLRA, by contrast, would likely entail the debtor being forced to impose concessionary and undesired labor terms that may be included in a "last, best offer" if the parties cannot reach agreement.

²⁷⁷ 11 U.S.C. § 1113(b)(1)(B)(2) (2012) (requiring debtor to negotiate with union in good faith between the initial modified collective bargaining agreement proposal and when the § 1113 petition for rejection is made).

if courts permit flexibility in the terms the debtor may impose should bargaining fail, the debtor will be more likely to function like a rational actor trying earnestly to reach an agreement, because it will not have to fear the repercussions if negotiations fail. Similarly, unions will also feel more urgency to act rationally to reach an agreement because if none is reached, its members will be stuck working under labor terms that the debtor may impose from any point in the negotiations, with little union input required.

On the contrary, if the parties must negotiate knowing that only terms from the “last, best offer” may be imposed if an agreement is not reached, debtors will function irrationally under both models by not trying sincerely to reach a deal, and making few, if any, concessions. Unions may also act irrationally, withholding offers and concessions in the hopes that the debtor will bargain against itself, and ultimately impose favorable “last, best offer” terms when it faces no alternative. Thus, because parties to most negotiations will follow one of these two models, it is logical for courts to permit post-§ 1113 debtors to impose terms from any pre-§ 1113 proposal because it maximizes the chances of the parties acting rationally and reaching an agreement.

A. *The Economic Model of Negotiation*

The economic model of negotiation treats bargaining “as a process of convergence over time involving a sequence of offers and counteroffers on the part of the participants.”²⁷⁸ Under the economic theory, each negotiation can be broken down into individual issues, and each issue can be visualized on a continuum, with extremes at each end of the continuum representing the optimal position for one party involved in the negotiations.²⁷⁹

Each party makes a decision about where along the continuum it will begin negotiating, and makes an opening offer to the opposing party based on that decision.²⁸⁰ Parties typically base their opening offers on three key factors: “(1)

²⁷⁸ ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 358 (1990) (quoting BARGAINING: FORMAL THEORIES OF NEGOTIATION 131–32 (Oran R. Young ed., 1975)).

²⁷⁹ THOMAS F. GUERNSEY & PAUL J. ZWIER, ADVANCED NEGOTIATION AND MEDIATION THEORY AND PRACTICE 2 (Anthony J. Bocchino et al. eds., 2005). According to the economic theory of negotiation, each separate issue represents a “bilateral monopoly,” or a scenario where the two parties must “come to the specific terms of exchange between themselves” or else the comprehensive deal they are negotiating will not be consummated. BASTRESS & HARBAUGH, *supra* note 278, at 357.

²⁸⁰ GUERNSEY & ZWIER, *supra* note 279, at 2.

a rank ordering of preferences among payoff outcomes; (2) a schedule of costs during the time when the parties are bargaining . . . and (3) an estimate of the opponent's concession pattern over the course of negotiations."²⁸¹ Combining these factors with the commonly accepted notion that "a tough opening position will produce a better outcome for the tough bargainer's side" enables each party to come up with its "most efficient opening position."²⁸²

As negotiations progress and the "sequence of offers and counteroffers"²⁸³ begins, the parties will each determine where along the continuum they are comfortable moving and where along the continuum they will not move beyond, called their "bottom line."²⁸⁴ Parties follow the doctrine of "convergence to settlement" in determining the frequency and magnitude of concessions they are willing to make.²⁸⁵ Under this doctrine, the parties watch each other's behavior and concession rate, determining the best way to respond based on whether the behavior was expected or surprising.²⁸⁶ If the opponent's behavior was as expected, the party sticks with its pre-negotiation concession plan; however, if it was unexpected, the party changes its concession plan based on "revised expectations" of the opposition's behavior.²⁸⁷

The area on the continuum located between each party's opening offer and bottom line is commonly known as its "bargaining range."²⁸⁸ When the parties' bargaining ranges overlap, a "settlement zone" exists for the particular issue indicating that a solution acceptable to each party can be reached through the process of exchanging offers and counter offers.²⁸⁹ Each party decides whether to accept or reject an offer within its settlement zone by evaluating a handful of factors, including its "preferred outcome, the opponent's current offer, and the

²⁸¹ BASTRESS & HARBAUGH, *supra* note 278, at 359 (citing BARGAINING: FORMAL THEORIES OF NEGOTIATION, *supra* note 278, at 138).

²⁸² *Id.* at 359–60.

²⁸³ *Id.* at 358.

²⁸⁴ GUERNSEY & ZWIER, *supra* note 279, at 2.

²⁸⁵ BASTRESS & HARBAUGH, *supra* note 278, at 360.

²⁸⁶ *Id.* (quoting BARGAINING: FORMAL THEORIES OF NEGOTIATION, *supra* note 278, at 138).

²⁸⁷ *Id.* Generally, "if the other side concedes more slowly than he initially expected, the bargainer makes a concession[;] if the other concedes more rapidly than he expected, [then the bargainer remains firm]." *Id.* (alterations in original).

²⁸⁸ GUERNSEY & ZWIER, *supra* note 279, at 3.

²⁸⁹ BASTRESS & HARBAUGH, *supra* note 278, at 358–59. In fact, the economic theory *assumes* that "a settlement zone exists within which each party is willing to agree. This settlement zone must be susceptible to relatively precise identification and should remain more or less stable during the negotiation process." *Id.* at 358.

costs of deadlock.”²⁹⁰ The parties will not agree to a settlement until each party’s “estimate of the actual risk of deadlock” equals the party’s risk tolerance, causing both parties to accept the offer on the table.²⁹¹

The economic model of negotiation is grounded in the idea of placing a quantitative value on both tangible and intangible issues relevant to each party.²⁹² When functioning as envisioned, the economic model assumes that the parties’ initial positions do not already fall within the settlement zone, requiring each party to quickly determine before trading proposals both its own bottom line and its estimate for that of the other party.²⁹³ Likewise, each party must have “values and goals” that remain constant throughout the negotiation so that it can identify which offers and counteroffers on a particular issue are better or worse as the negotiations proceed.²⁹⁴

The economic model relies heavily on thorough planning and exchange of accurate information before and during the bargaining process.²⁹⁵ Parties plot out their negotiating strategies in advance and “anticipate the reactions of their opponents.”²⁹⁶ With such a “premium” on information, each party must act as a “rational decision mak[er]” in setting its bottom line and must assume that the opposing party is doing the same.²⁹⁷ If the parties act irrationally, this model will not function at maximum efficiency and will force the parties to make unjustified concessions during the bargaining process.²⁹⁸

B. The Problem-Solving Model of Negotiation

The problem-solving model of negotiation requires the parties to identify their own “needs, interests, and desires” in the negotiation, along with those of the other party, while ignoring the “bargaining positions that often mask those needs.”²⁹⁹ Problem-solvers bargain over their interests, as opposed to their entrenched positions, and apply a highly collaborative approach to negotiations

²⁹⁰ *Id.* at 361.

²⁹¹ *Id.*

²⁹² GUERNSEY & ZWIER, *supra* note 279, at 3.

²⁹³ BASTRESS & HARBAUGH, *supra* note 278, at 359; GUERNSEY & ZWIER, *supra* note 279, at 3.

²⁹⁴ BASTRESS & HARBAUGH, *supra* note 278, at 358.

²⁹⁵ *Id.* at 362.

²⁹⁶ *Id.*

²⁹⁷ *Id.*; GUERNSEY & ZWIER, *supra* note 279, at 3.

²⁹⁸ BASTRESS & HARBAUGH, *supra* note 278, at 362.

²⁹⁹ *Id.* at 379; GUERNSEY & ZWIER, *supra* note 279, at 4–5.

that enables the parties to “jointly create . . . win/win solution[s].”³⁰⁰ Under this model, the parties “advance proposals that invite opponents to accept, reject, or modify based on how the proposals intersect with their interests, [and] . . . explain why solutions are acceptable or unacceptable in whole or in part based on” analyzing each party’s needs.³⁰¹ When negotiations hit a wall, problem-solvers “seldom make concessions . . . but instead shift to another proposal that more completely addresses the parties’ mutual problems.”³⁰²

Attempting to reconcile interests rather than bargaining positions is a good negotiating strategy for two reasons. First, there are typically multiple positions that could satisfy a stated interest, and although the parties in most negotiations simply adopt the most obvious position that fulfills the interest, there are often alternative positions that better meet the interests of both parties.³⁰³ Second, working to reconcile positions instead of compromising between them allows the parties to uncover “shared and compatible interests” that “present opportunities for discovering greater numbers of and better quality solutions.”³⁰⁴ Generally, reconciling interests “offers the possibility of meeting a greater variety of needs both directly and by trading off different needs, rather than forcing a zero-sum battle over a single issue.”³⁰⁵

Once the parties have identified each other’s needs and interests, and attempted to reconcile those interests, they then work collaboratively to create mutually beneficial solutions. Any such solution must “satisfy the parties’ needs and interests, to achieve a result that the parties recognize as more advantageous to themselves and each other than the available alternatives.”³⁰⁶

³⁰⁰ GUERNSEY & ZWIER, *supra* note 279, at 4–5.

³⁰¹ BASTRESS & HARBAUGH, *supra* note 278, at 383.

³⁰² *Id.*

³⁰³ *Id.* at 379 (quoting ROGER FISHER & WILLIAM URY, *GETTING TO YES* 42–43 (1981)).

³⁰⁴ *Id.* at 379 (quoting FISHER & URY, *supra* note 303, at 42–43).

³⁰⁵ *Id.* at 379 (quoting Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 795 (1984)). In fact, Menkel-Meadow goes on to say:

[The] principle underlying such an approach is that unearthing a greater number of the actual needs of the parties will create more possible solutions because not all needs will be mutually exclusive . . . because not all individuals value the same things the same way, the exploitation of differential or complementary needs will produce a wider variety of solutions which more closely meet the parties’ needs.

Id. at 379–80.

³⁰⁶ *Id.* at 381. When searching for mutually beneficial solutions, parties must be careful to avoid the “four obstacles to invention of multiple options for mutual gain.” *Id.* (citing FISHER & URY, *supra* note 303, at 59). Those obstacles are: “[p]remature judgment that stifles imagination, searching for a single solution, the

By creating a more conciliatory and cooperative negotiating environment emphasizing reciprocal sharing of the parties' underlying needs, creative solutions can be mutually developed that make each party happy and better preserve the long-term relationship between each side.³⁰⁷

The risks associated with the problem-solving approach, however, are significant. Foremost among them is the potential for a breach of trust by one party once it has elicited the desired information.³⁰⁸ A party's needs, interests, and desires must be shared for the problem-solving approach to function, but if the opposing party adopts a more adversarial approach mid-stream, "there is a real risk . . . that the problem-solver will reveal information valuable to the other side in assessment of the problem-solver's vulnerabilities without correspondingly gaining information about vulnerabilities on the other side."³⁰⁹ This risk requires parties to ask themselves if "bargainers [will] be able to set aside selfish concerns and bargain . . . altruistically, for the long-term good of their opponent," or instead, if they will "only fake these more altruistic concerns in order to position themselves to take advantage of the other" party.³¹⁰ If a party does not trust its opposition enough to believe it will choose the former, then it should adopt a more adversarial negotiating style in lieu of using the problem-solving approach for the negotiations at hand.³¹¹

C. Under Either Model, the Parties Are More Likely to Reach an Agreement if Courts Permit Latitude in the Terms Employers May Impose if Bargaining Fails

During the bargaining that follows the economic model of negotiation, parties never change the particular topic being negotiated, and as negotiations proceed, they "shift and alter their outcome preferences along the bargaining continuum" for that topic until reaching either an agreement or deadlock.³¹² By contrast, during a negotiation under the problem-solving model, the parties

assumption of a fixed resource pie, and thinking that opponents are responsible for solving their own problems." *Id.* On the rare occasion when parties demand only "the same material item . . . problem-solvers resist doing so in the first instance, exploring sharing or substituting solutions before succumbing to the division compromise." *Id.* at 382.

³⁰⁷ GUERNSEY & ZWIER, *supra* note 279, at 5, 8.

³⁰⁸ *Id.* at 8.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 9.

³¹¹ *See id.*

³¹² BASTRESS & HARBAUGH, *supra* note 278, at 383.

keep their “value preferences constant and shift among and between proposed combinations of resources until a solution that satisfies mutual needs emerges.”³¹³ While the methodological underpinnings of each model vary widely, as applied in the § 1113 setting each model is more likely to produce an agreement between the parties if courts permit the debtor to broadly impose labor terms from any pre-§ 1113 offer, including its initial proposal.

1. Economic Model of Negotiation

Under the economic model, the parties each stake out positions on individual issues along a continuum and make concessionary offers and counteroffers along that continuum until both have arrived in a mutually agreeable “settlement zone.”³¹⁴ If the debtor fears that it will be stuck imposing all of the concessionary terms it offers if negotiations fall apart, it will be hesitant to make meaningful concessions or substantial moves along the continuum, reducing the chances of an agreement. Likewise, the union will also not be interested in making concessionary moves along its continuum because it will not want to bargain against itself.

For the economic model to function, each party must try to anticipate the movements along the continuum that the other party will make, and each party must act rationally in making these movements.³¹⁵ If either party is hesitant to make meaningful concessions or moves along its continuum regardless of the movements of the other party, it will upset the requirement of rational action, and will make it unlikely that the parties ever reach the settlement zone.

By contrast, if courts permit the debtor to impose terms from any of its pre-§ 1113 proposals, the debtor will be free to make concessions and move along its continuum in an effort to reach an agreement without fearing the repercussions should the negotiations fail. The union will similarly be willing to move along its continuum with the debtor doing the same, and will be motivated to reach a deal to avert the possibility of the debtor having broad authority to unilaterally impose labor terms from any pre-§ 1113 proposal. Thus, if courts allow debtors to impose terms from any pre-§ 1113 proposal, it will encourage both parties to act rationally and make concessions, which the economic model requires, and will raise the likelihood of an agreement.

³¹³ *Id.*

³¹⁴ *Id.* at 358.

³¹⁵ GUERNSEY & ZWIER, *supra* note 279, at 3.

2. *Problem-Solving Model of Negotiation*

Parties operating under the problem-solving model are also more likely to reach an agreement if courts permit the debtor to impose terms from any pre-§ 1113 proposal should the parties fail to reach an agreement. Under the problem-solving model, parties are required to freely exchange information about their needs, interests, and desires in an effort to reach a mutually beneficial solution.³¹⁶ This approach requires a high level of altruistic collaboration, and similarly requires that the parties trust one another implicitly to not misuse the otherwise private information being exchanged.³¹⁷

If courts limit post-§ 1113 debtors to imposing terms only from their “last, best offer,” both parties would have a strong incentive to avoid the cooperative negotiations that the problem-solving model requires. Debtors may fear the repercussions if the parties do not make a deal, and will have greater incentive to withhold “mutually beneficial” solutions that could benefit the union more than the employer should negotiations fail. The union would be similarly hesitant to offer a variety of solutions as required by the problem-solving model if the debtor refuses to do the same. Further, the debtor will be incentivized to take any private information the union offers regarding what its true needs, interests, and desires are, and use it to limit its own offers should it realize that those needs, interests, and desires are not compatible with its own. Having a similar incentive, the union will surely be aware of this incentive for the debtor and will likely respond by offering little private information as well.

By contrast, if post-§ 1113 debtors have broader authority to impose terms from any pre-§ 1113 proposal, should negotiations fail, each party will be more likely to collaborate in order to find a mutually beneficial solution. Debtors will have no reason to withhold information or ideas that may work for both parties, because should negotiations fall apart, they will not be penalized for making the proposals in the first place. Similarly, unions will have no reason to withhold information or potential solutions because they will be motivated to reach a deal that precludes the debtor from unilaterally imposing the labor terms of its choice from any pre-§ 1113 proposal. Likewise, neither party would have incentive to misuse information provided by the other, because the focus of the negotiations will be on making a deal as opposed to limiting offers in the event that the parties’ needs, interests, and desires are not compatible.

³¹⁶ *Id.* at 4.

³¹⁷ *Id.* at 8.

CONCLUSION

Courts should give debtors flexibility to impose labor terms from any pre-§ 1113 proposal. This approach would create a consistent standard for the nonbankruptcy bargain to impasse scenario and the analogous post-§ 1113 bankruptcy scenario. Flexibility in imposing terms would also encourage debtors to satisfy the NLRA and § 1113 requirements of bargaining in good faith and meeting with the union at reasonable times, and would discourage unlawful and undesirable behaviors such as surface bargaining. In addition, this approach would increase the likelihood of the parties reaching an agreement under the two primary models of negotiation, which is an objective that Congress intended to encourage in passing § 1113.³¹⁸

If courts limit debtors' ability to impose labor terms to only those found in the "last, best offer," debtors, unions, and bankruptcy courts will all lose. Debtors and unions will be less likely to reach mutual agreements and each will be incentivized to hedge against undesirable, worst case scenarios instead of to negotiate earnestly towards an agreement. Courts will be forced to apply inconsistent standards to cases in analogous bankruptcy and nonbankruptcy scenarios and, with the parties less likely to reach agreements on their own, courts will be further bogged down with lengthy bankruptcy proceedings. Thus, for the benefit of debtors, unions, and the court system, courts, and in particular appellate courts whose opinions create precedent, and district courts whose circuits lack precedent, should permit debtors to impose terms broadly from any pre-§ 1113 proposal if negotiations fail.

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³¹⁸ See *Chi. Dist. Council of Carpenters Pension Fund v. Cotter*, 914 F. Supp. 237, 243 (N.D. Ill. 1996) (highlighting the congressional intent of § 1113 to encourage parties to negotiate for mutually agreeable, new collective bargaining agreement, instead of forcing courts to do the leg-work).

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