ALTERNATIVE DISPUTE RESOLUTION IN CHAPTER 7 & 13 CASES

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Alternative dispute resolution (ADR) can speed up resolution of disputes and reduce the costs to be incurred by debtors and creditors alike. Bankruptcy matters are well suited for ADR because Bankruptcy is a court of equity and bankruptcy lawyers generally prefer negotiation, compromise and settlement over drawn out discovery, motion practice, and conducting trial.

The foundations for ADR can be found in the local rules promulgated by the Bankruptcy Courts of the Northern and Southern Districts of Indiana. Local Rule B 901902 is the starting point in both Districts. The Southern District's rule is comprehensive while the Northern District's rule allows for ADR upon the Court's own initiative or upon the motion of a party to an adversary proceeding or contested matter. The details for ADR in the Northern District are provided by the Courts "General Order Regarding Alternative Dispute Resolution" dated July 7, 2015, and signed by the Bankruptcy Judges of the District as of that date.

Non-binding mediation is the most common form of ADR that is utilized to resolve Bankruptcy disputes. This type of ADR is also commonly ordered by State Court judges as a pre-condition to setting a trial date. Federal District Court judges frequently order mediation or court supervised settlement conferences to encourage parties to resolve their differences.

WHY ADR?

ADR can be completed faster and with less expense when compared to the time and cost invested to go to trial. The parties, with the help of a mediator/facilitator/neutral can help the parties focus on the strengths, weaknesses, risks, and rewards related to their dispute.

The primary benefits of ADR, and specifically mediation, are (1) that the parties exercise their judgment and discretion to reach a solution, and (2) that the parties are in the best position to evaluate what is fair and acceptable when the dispute is resolved.

Another benefit of ADR is that the parties can be creative in fashioning their settlement. In the best mediation, the parties settle with both sides winning a little, but not losing as much as they otherwise would have if the matter were tried.

WHAT MATTERS ARE SUITABLE FOR ADR?

- Avoidance actions
- Preferences
- Fraudulent transfers
- Claims objections
- Damages/cures amounts for leases
- Non-dischargeability of debt
- Lien disputes
- Valuation issues
- Executory contract issues
- Plan confirmation issues
- And perhaps other issues

HOW TO CONDUCT ADR?

The first step is to select a mediator or have one appointed by the court. The mediator should have skills to facilitate discussions that will lead the parties to reach a settlement. For Bankruptcy matters, the mediator's experience and knowledge of Bankruptcy law are critical for

mediation to be successful. In some particularly difficult cases, the appointment of another Bankruptcy Judge can be what is needed to reach a settlement.

After the mediator is chosen, the mediator will work with the parties to set deadlines for providing a confidential mediation statement and perhaps other deadlines before the mediation. One or more mediation sessions may be scheduled.

If mediation is successful, the mediator will report that to the court and generally leave the documentation of the settlement to the parties after a memorandum of settlement is prepared and signed by the parties at the conclusion of mediation.

ARBITRATION?

We have all seen the contracts that require disputes to be arbitrated. These contracts frequently also waive jury trials, waive class action rights and require the parties to choose the laws, jurisdiction and venue of state courts in a state other than the state in which the contract is formed. Do Bankruptcy courts have to honor the arbitration clauses? The Congressional policy is well established that arbitration is favored. The U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (May 21, 2018) has clearly stated and recognized that the Federal Arbitration Act requires courts to enforce arbitration agreements and that the parties' freedom to contract and their agreements to arbitrate are to be given deference. However, not all Bankruptcy disputes will be automatically sent to arbitration.

A recent 2nd Circuit Court of Appeals case ruled that there are instances when arbitration clauses will not be enforced when there is an inherent conflict between enforcing an arbitration clause and the core policies of the Bankruptcy Code. See *Anderson v. Credit One Bank*, 884 F.3d 382 (2nd Cir. 2018). In this case, *Anderson* filed a Chapter 7 case and received a discharge of his credit card debt with Credit One Bank ("Bank"). After receiving his discharge Anderson

requested that the Bank remove a charge off notation on Anderson's credit report. Anderson asserted that his debt should have been noted as having been discharged in Bankruptcy. The Bank refused to correct his credit report. Anderson then reopened his Bankruptcy case to pursue what he believed to be a violation of the discharge injunction. Anderson filed his class action adversary complaint alleging that the Bank "knowingly and willfully violated 11 USC § 524(a)(2) by failing to update his credit report. Anderson saw the Bank's conduct as an effort to coerce payment of the discharged debt. The Bank responded by invoking the arbitration clause and the class action waiver found in the credit card agreement.

The Bankruptcy Court ruled in favor of *Anderson* and stated that Anderson's claim was non-arbitrable because it affected the Bankruptcy Code's core policy of providing a debtor a fresh start. The Court disregarded the arbitration clause because of the inherent conflict between Bankruptcy policy and the Congressional preference favoring arbitration.

The Bank appealed to the District Court and after losing in that court, it appealed to the Second Circuit Court of Appeals. The Second Circuit Court of Appeals affirmed the District Court and Bankruptcy Court orders and found that it was within the Bankruptcy Court's sound discretion to decline to enforce the arbitration agreement. The Bank attempted to appeal to the US Supreme Court and Cert, was denied.

REALLY?

In a recent Chapter 11 case, Judge Ahler, in the Bankruptcy Court for the Northern District of Indiana, Hammond Division, found an inherent conflict between § 362, the automatic stay, and § 1113(f) concerning an arbitration clause in a collective bargaining agreement ("CBA"). The Court ruled that the CBA grievances would otherwise be terminated by the automatic stay if the arbitration clause was not enforced. The Court weighed the equities and found that not enforcing

the arbitration clause would give the debtor the unilateral right to terminate or alter the CBA. *Algozine Masonary Restoration, Inc.*, Case No. 16-23208 Order dated April 15, 2021. Thus, the debtor and the Union proceeded to arbitrate the CBA grievances.

The enforcement of arbitration clauses in Bankruptcy appears to depend on the underlying Bankruptcy policies affected by compelled arbitration and the equities of the case.

RESOURCE MATERIALS

- U.S. Bankruptcy Court S.D. Indiana Local Rule B-9019-2

- U.S. Bankruptcy Court N.D. Indiana Local Rule B-9019-2, and General Order Regarding Alternative Dispute Resolution dated July 7, 2015

- Mediation in Consumer Bankruptcy Cases: Practical & Ethical Consideration
  ABI, Hon. Cynthia A. Norton dated January 1, 2020

- FAQ on Bankruptcy Mediation
  ABI, Levy Journal Article April 2003

- Mediation of a Bankruptcy Case
  ABI, Michael Wilk Journal Article May 2003

- Mindful Mediation: The Ways and Means of Successful Bankruptcy Mediation
  ABA Business Law Today, Judith Ross, February 12, 2019

- Second Circuit Declines to Enforce Consumer Arbitration Post-Bankruptcy
  ABA, Brian Echols, Practice Point, October 10, 2018.

CASES

Epic Systems Corp v. Lewis, 138 S.Ct. 1612 (2018).

Anderson v. Credit One Bank, N.A., 884 F.3d 382 (2d Cir. 2018).

In re Algozine Masonary Restoration, Inc., Case No. 16-23208, (U.S. Bankruptcy Court Northern District of Indiana, Hammond Division, J. Ahler, April 16, 2021 (copy provided).

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
ALGOZINE MASONARY	)	Case No.: 16-23208
RESTORATION, INC.,	)	Chapter 11
	)	
Debtor.	)	

ORDER ON MOTION FOR RELIEF FROM AUTOMATIC STAY (Dkt. No. 358)

This matter is before the Court on a motion (the "Motion") filed by the Administrative District Council 1 of Illinois of the International Union of Bricklayers and Allied Craftworkers, AFL-CIO (the "Union") requesting that the Court determine whether the automatic stay is in effect. In the Motion, the Union alleges that Debtor is a party to two collective bargaining agreements (the "CBAs") that require the payment of contributions on behalf of its covered employees to certain fringe benefit trust funds (the "Funds"). The Funds use the contributions to provide benefits to the covered employees. For the reasons set forth herein, the Court finds that the Union's Motion shall prevail - the automatic stay of 11 U.S.C. § 362 does not apply to the immediate disputes and the Union, pursuant to 11 U.S.C. § 1113(f), may arbitrate under the terms of the CBAs and their prior agreements.[1]

[1] An appeal is currently pending before the Seventh Circuit Court of Appeals concerning Debtor's objection to Claims #19, #20, and #21. The issues raised in this Motion are not involved in the pending appeal and the Court is not deprived of jurisdiction to hear them. *See Matter of Commodore Corp.*, 86 B.R. 564, 567 (Bankr. N.D. Ind. 1988) ("A pending appeal of a bankruptcy decision does not deprive the bankruptcy court of jurisdiction over issues not involved in the appeal.").

According to the Motion, the CBAs provide that if Debtor fails to pay the contributions to the Funds on a timely basis, then Debtor must pay liquidated damages, interest, legal fees incurred in enforcing the payment obligation, and must obtain a bond. Further, any disputes arising under the CBAs must be resolved before a joint arbitration board. Debtor apparently paid all the contributions due as of the petition date (November 10, 2016), but failed to pay timely certain post-petition obligations. Those payments were eventually made, but the Funds purportedly incurred substantial expense in collecting these obligations.[2] Accordingly, the Union asserts that as a result of Debtor's failure to pay, Debtor owes liquidated damages, interest, legal fees, and must obtain a bond. The Union further asserts that the automatic stay does not apply to these disputes and that it should be allowed to exercise its right to arbitrate these grievances before the arbitration board.

The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(a) and (b), 28 U.S.C. § 157(b)(1), and Local Rules 200-1(a)(1) and (2) of the Rules of the United States District Court for the Northern District of Indiana. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). This Order constitutes the Court's findings of fact and conclusions of law.

[2] The Union alleges also that Debtor defaulted as to other post-petition obligations as well that have yet to be collected.

Statement of Stipulated Facts

The parties have stipulated to the facts and exhibits that control these disputes (the "Stipulation")[3]:

1. [Debtor] is a tuckpointing and masonry restoration company with about ten employees in Indiana and Illinois. On March 26, 2009, [Debtor] signed a "Memorandum of Understanding" with the Union ("Bricklayers MOU"). Through paragraph 2 of the Bricklayers MOU, [Debtor] agreed to be bound by the terms of the Joint Agreement between the Union and certain employer associations, including amendments thereto.

2. [Debtor] is also party to a Memorandum of Understanding which binds it to the contract between the Union and the Tuckpointing Contractors Association, Inc. ("Tuckpointers MOU" and "Tuckpointers CBA"). Through those agreements, [Debtor] must make contributions monthly to the Tuckpointers Funds based on work by its employees who are covered by those agreements. (Together, these Tuckpointers and Bricklayers MOUs and CBAs are referred to as the "Agreements.")

3. The Agreements require [Debtor] to submit monthly reports to the Funds showing how many hours its covered employees worked in the preceding month, and to pay to the Funds a set dollar amount of contributions for each hour worked by covered employees. The Funds use that money to provide benefits to employees. Both CBAs provide that if [Debtor] fails to pay the contributions to the Funds on a timely basis, [Debtor] must pay liquidated damages, interest, and legal fees incurred in enforcing the payment obligation. Both CBAs further require that [Debtor] provide a bond if it becomes delinquent.

4. As of June 2019, [Debtor] had paid all contributions due since its petition date of November 10, 2016, including through court-ordered payment plans in response to prior motions brought by the Union (see motions to lift stay at Docket Nos. 93, 135, and 162). It made these post-petition payments later than the time required under the Agreements. Consequently, according to the terms of the Agreements, [Debtor] is liable for liquidated damages, interest, and legal fees under the terms of the Agreements...[Debtor] may also be required to obtain a bond by the terms of the Agreements.[4]

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[3] The following is a statement of the facts stipulated to by the parties with citations to the exhibits removed.

[4] Attached to the Stipulation as Exhibit 5 is a chart that reflects when Debtor paid all contributions for each month under the Bricklayers MOU and Bricklayers CBA, from November

5. The Terms of the Agreements are enforced through a grievance procedure including arbitration before a joint arbitration board ("JAB") for each agreement. The Union wishes to present grievances over [Debtor's] obligation to pay liquidated damages, interest, and legal fees, and to obtain a bond, to the two JABs. The Union may also present grievances regarding [Debtor's] failure to make timely payment of contributions for certain months after June 2019.

6. Paragraph 10.1 of the Bricklayers CBA provides that:

> Any dispute between an Employer and the Union that they cannot resolve shall be referred to the [JAB]. All grievances must be filed within ninety (90) days of the date of the occurrence giving rise to the grievance or of [*sic*] when the party reasonably should have known of the existence of the grievance. In deciding any questions of timeliness of a grievance, the joint arbitration board should give special consideration to claims of concealment or fraud, along with any other factors it considers appropriate. Grievances not raised within the ninety (90) days period shall be deemed waived and not subject to being processed under this procedure.

7. [Debtor] has never proposed any modifications to the Agreements.

8. The Union has not raised a dispute pursuant to Section 10.1 of the Bricklayers CBA. Through the Union's pending Motion, the Union seeks leave from the Court to do so, as described in paragraph 5, above.

Conclusions of Law and Analysis

The sole issue before the Court is whether the automatic stay of 11 U.S.C. § 362 enjoins the Union from enforcing its rights under the Agreements to arbitrate certain grievances that arose post-petition. The filing of a bankruptcy petition invokes the automatic stay of § 362(a) which operates to enjoin, among other things, "the commencement or continuation ... of a judicial, administrative, or other action or proceeding against that debtor that was or could have been

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2016 through May 2020. Attached as Exhibit 6 is a chart showing when Debtor paid all contributions for each month under the Tuckpointers MOU and Tuckpointers CBA, from November 2016 through May 2020.

commenced before the commencement of the [bankruptcy] case[.]" 11 U.S.C. § 362(a)(1).

The automatic stay "is designed to protect debtors from all collection efforts while they attempt to regain their financial footing." *Kimbrell v. Brown*, 651 F.3d 752, 755 (7th Cir. 2011) (internal citations omitted). By halting litigation against the debtor, the stay "gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." *Id.* (citing H.R. REP. NO. 95–595, at 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6296–97).

On its face, § 362 precludes the Union from proceeding with the arbitration of its grievances against Debtor. The scope of the automatic stay has been held to encompass post-petition proceedings conducted pursuant to an arbitration clause. *In re Bunting Bearings*, 302 B.R. 210, 213 (Bankr. N.D. Ohio 2003); *see Savers Fed. Sav. & Loan Assoc. v. McCarthy Constr. Co. (In re Knightsbridge Devel. Co.)*, 884 F.2d 145, 148 (4th Cir. 1989) (post-petition entry of arbitration award violates the automatic stay); *see also FAA v. Gull Air, Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989). The automatic stay, however, is subject to certain exceptions. *See generally* 11 U.S.C. § 362(b). In this regard, it is the Union's contention that § 1113(f) of the Bankruptcy Code operates specifically to prevent the automatic stay from affecting the arbitration provisions within the Agreements. The language of § 1113(f) provides:

> No provision of this title shall be construed to permit a [debtor in possession] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113(f).

The problem is that these two code provisions conflict with one another as they relate to collective bargaining agreements. On the one hand, § 362(a) operates to enjoin, "the commencement or continuation...of a judicial, administrative, or other action," and on the other, § 1113(f) provides that a collective bargaining agreement cannot be modified or altered unless pursuant to § 1113. The Union asserts that the application of the automatic stay in this case would be a unilateral alteration of the Agreements. Debtor disagrees.

In support of their respective positions, the parties principally rely upon *Shugrue v. Air Line Pilots Assoc., Int'l* (*In re Ionosphere Clubs, Inc.*), 922 F.2d 984 (2d Cir. 1990). In that case, the circuit court had to interpret § 362(a) in conjunction with § 1113(f), while taking into consideration an arbitration provision in a collective bargaining agreement. The Air Line Pilots Association, International ("ALPA") sought relief from the automatic stay to initiate an arbitration to determine whether the labor protective provisions in its collective bargaining agreement had been triggered by Eastern Airlines' (the debtor or "Eastern") merger with Continental Airlines. *Id.* at 986. The collective bargaining agreement contained labor protective provisions designed to protect ALPA members in the event of a merger and provided that disputes arising thereunder would be arbitrated and set forth a procedure governing that practice. *Id.* at

987. ALPA also commenced an action in the Southern District of Florida, seeking to enjoin a post-petition wet-lease arrangement that Eastern entered into with Continental Airlines, purportedly in violation of its collective bargaining agreement with Eastern.[5] *Id.* at 988. The collective bargaining agreement prohibited Eastern from engaging in this practice but apparently Eastern entered into this arrangement due to a pilot strike. *Id.* Eastern in turn commenced an adversary proceeding in the bankruptcy court to enjoin ALPA from prosecuting the Florida action. *Id.*

The bankruptcy court stayed ALPA from arbitrating the issue of whether a merger had taken place with Eastern. *Id.* The bankruptcy court also stayed the prosecution of the lawsuit that sought to challenge the wet-leasing arrangement. *Id.* The district court reversed the bankruptcy court as to both issues.

On appeal, the circuit court reviewed the effect that § 1113 of the Bankruptcy Code has on the application of the automatic stay to non-bankruptcy proceedings that seek to enforce a collective bargaining agreement. *Id.* at 989. In resolving this issue, the circuit court utilized a fundamental canon of statutory interpretation which provides that when there exists an irreconcilable conflict between a more recent and more specific statute – here § 1113(f) – and an earlier, more general statute - here § 362 – the more recent and more specific statute governs. *Id.* at 991. The circuit court concluded that § 1113(f) was "meant to prohibit the application of any other provision of the

[5] A "wet-leasing" agreement in this context is where one airline leases aircraft and crews to another airline.

Bankruptcy Code when such application would permit a debtor to achieve a unilateral termination or modification of a collective bargaining agreement without meeting the requirements of § 1113." *Id.* at 990-91. The circuit court found that § 1113(f) must be interpreted as "circumstance specific rather than section specific" because Congress did not expressly except collective bargaining agreements from the automatic stay in § 362(b), nor did it specify in § 1113 that § 362 would be inapplicable. *Id.* at 991. Specifically, the circuit court held that § 1113(f) "precludes application of the automatic stay to disputes involving a collective bargaining agreement only when its application allows a debtor unilaterally to terminate or alter any provision of a collective bargaining agreement." *Id.* at 992.

The *Ionosphere* court determined that, in ascertaining whether the application of the automatic stay would allow a debtor unilaterally to terminate or alter a provision of a collective bargaining agreement, the focus is whether the dispute could be adjudicated in the bankruptcy court. *Id.* at 993. The court reasoned that "if a union has a procedural mechanism to place the dispute before the bankruptcy court and the bankruptcy court has jurisdiction to resolve the dispute, enforcement of the collective bargaining agreement is not foreclosed and application of the automatic stay does not permit a debtor unilaterally to alter its collective bargaining agreement." *Id.* In other words, if the bankruptcy court has jurisdiction to hear a dispute, it has the power to take the necessary steps to enforce its resolution. *Id.* at 993-94.

The *Ionoshpere* court found that the collective bargaining agreement at issue expressly provided for arbitration as a method of dispute resolution with respect to the labor protective provisions. *Id.* at 992. Consequently, the court concluded that applying the automatic stay to ALPA's attempt to initiate an arbitration, concerning whether the labor protective provisions in the collective bargaining agreement had been triggered with respect to the merger, would allow Eastern to alter unilaterally the collective bargaining agreement (i.e., Eastern would effectively be avoiding its obligation to arbitrate). *Id.* Further, the "adjudication of this dispute in the bankruptcy court would nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator." *Id.* Since "application of the automatic stay is in irreconcilable conflict with § 1113(f)," Eastern must seek relief under the provisions of § 1113 if it wishes to avoid its obligation to arbitrate the dispute. *Id.*

In *Bunting Bearings*, an Ohio bankruptcy court adopted the analysis of the circuit court in *Ionosphere* - and that case also is instructive to the legal issues now before this Court. In *Bunting Bearings*, the bankruptcy court was faced with the question of whether the automatic stay enjoined a party from enforcing its right, as set forth in a collective bargaining agreement, to arbitrate a dispute with the debtor-in-possession. *Bunting Bearings*, 302 B.R. at 213. At issue were certain pension plan obligations allegedly owed by the debtor. Like the collective bargaining agreement in *Ionosphere*, the collective bargaining agreement in *Bunting Bearings* specifically mandated arbitration as to the dispute and

established a procedure for the selection of an arbitrator: "[T]he [p]arties arbitration agreement provides, in no uncertain terms, that both the UAW and the DIP are to select an arbitrator." *Id.* at 213, 216.

The *Bunting Bearings* court determined that the circuit court's holding in *Ionosphere* was a "coherent" solution to its dispute and relied upon the canon of statutory interpretation that "when there is an apparent conflict between a later, more specific statute—here § 1113(f)—and an earlier, more general statute—here § 362—the later, more specific statute governs." *Bunting Bearings*, 302 B.R. at 214. The court also noted that *Ionosphere* also conforms with a decision by the Sixth Circuit Court of Appeals in *United Steelworkers of Am. v. Unimet Corp.* (*In re Unimet Corp.*), 842 F.2d 879 (6th Cir. 1988), which addressed § 1113(f) in relation to the Bankruptcy Code's priority scheme and stood for the proposition that "§ 1113(f) can trump general Bankruptcy Code provisions." *Bunting Bearings*, 302 B.R. at 214. In sum, the court concluded that the pension dispute was not subject to the automatic stay, reasoning that "there appears to be neither a procedural mechanism to bring the pension matter [arising under the collective bargaining agreement] before the bankruptcy court nor a basis to invoke the jurisdiction of the [c]ourt." *Id.* at 215–16. The *Bunting Bearings* court further stated:

> [T]his Court agrees with the reasoning of the *In re Ionosphere* decision. This is due to the fact that fundamentally arbitration is based upon the notion of resolving disputes in a timely and efficient manner. As a consequence, a party who, on account of § 362(a), is denied their right to arbitrate for an extended period of time has clearly had, in violation of § 1113(f), their right to arbitrate altered, instead of merely postponed as the DIP argues. In

> this regard, it is noted that in a Chapter 11 case, it is not uncommon for the automatic stay to be in effect for an extended period of time given that it takes some debtors months, if not years to put forth a viable plan of reorganization.

Bunting Bearings, 302 B.R. at 215.

In the case before this Court, the Union contends that the automatic stay does not affect its right to proceed to arbitration for damages arising out of untimely post-petition contributions or as to Debtor's purported failure to make timely contributions after June of 2019. Otherwise, according to the Union, applying the automatic stay to this these disputes is tantamount to allowing Debtor "unilaterally to alter the [CBAs] by avoiding its obligation to arbitrate." Debtor disagrees and contends that finding otherwise "would cause damage to Debtors [*sic*] estate as the Debtor would have to hire separate counsel to litigate the arbitration spend [*sic*] limited estate assets that could be used to pay creditors."[6]

Pursuant to the Stipulation, the grievances at issue concern whether the Union is entitled to liquidated damages, interest, legal fees resulting from untimely benefit contribution payments. Further, the Stipulation provides that the Union may have additional grievances arising out of Debtor's purported failure to make timely benefit contributions after June of 2019. It is undisputed that grievances concerning such unpaid contributions and the Union's potential entitlement to liquidated damages for untimely contributions arise under the Agreements. (Stipulation, ¶ 3). Like the collective bargaining agreements in

[6] Exhibit 1 attached to Debtor's motion for leave to file brief instanter at 4. (Dkt. No. 377).

Ionosphere and *Bunting Bearings*, the Agreements at issue before the Court mandate arbitration and provide for a specific procedural mechanism for resolving the benefit disputes.

The CBAs clearly provide that if the dispute (i.e., grievance) between the Union and the employer (Debtor) cannot be resolved, then that dispute shall be referred to a joint arbitration board. (Ex. 3 and Ex. 4 attached to the Stipulation). Further, the Agreements provide that such grievances are resolved through the selection of a joint arbitration board and establish in detail the criteria concerning the board's composition. *Id.* Once a board is selected, if the board refuses to hear the grievance or is deadlocked, either party can submit the matter to binding arbitration. *Id.* This involves a process whereby each party has a right to "strike" names from a panel of arbitrators until one is chosen. *Id.* Clearly, no such procedural mechanism exists to bring the arbitration before this Court and permitting the adjudication of these disputes before this Court would nullify the arbitration clauses and would substitute the Court's judgment for that of an arbitrator. Therefore, applying the automatic stay to these disputes would effectively allow Debtor unilaterally to terminate or alter the Agreements and avoid its obligation to arbitrate.

Arbitration is based on the notion of resolving disputes in a timely and efficient manner. *Bunting Bearings*, 302 B.R. at 215. In the case before the Court, one CBA provides that a grievance must be filed within "ninety (90) days of the date of the occurrence giving rise to the grievance...," and "[g]rievances not

raised with [this] period shall be deemed waived...". (Ex. 3 attached to the Stipulation). The other CBA provides that the grievance must be filed "within 72 hours after it arises." (Ex. 4 attached to the Stipulation). If a ruling is not forthcoming 72 hours thereafter, the matter is referred to binding arbitration. *Id.* In a Chapter 11 case, the automatic stay can be in effect for an extended period, as it can sometimes take a long period of time to confirm a feasible plan of reorganization. Here, Debtor filed this bankruptcy case in 2016 and the Court has yet to confirm a plan. The Court finds that application of the automatic stay in this case would clearly deny the Union its right to arbitrate timely these grievances in violation of the terms of the Agreements and would constitute a unilateral alteration of the Agreements.

Upon considering the facts presented in this case, the Court finds that the automatic stay is in irreconcilable conflict with § 1113(f) and applying the automatic stay to the foregoing disputes would effectively allow Debtor unilaterally to alter the Agreements and avoid its obligation to arbitrate. [7] *See, e.g., Bunting Bearings* 302 B.R. at 216-218. Accordingly, for the reasons stated herein, the Court concludes that the Union's right to prosecute these disputes

[7] Although not specifically raised in its objection, Debtor argued at the hearing that a procedural mechanism exists to bring this matter before the Court. According to Debtor, the Union could file an administrative claim under § 503, which at the same time would reduce Debtor's costs in that it would not have to arbitrate. Debtor misses the point. Under the Agreements, the Union has the *right* to arbitrate and to invoke the process contemplated under the CBAs. The Court compelling the Union to file an administrative expense would constitute a unilateral alteration of those agreements. Finally, Debtor also argues that the Union is not entitled to attorney fees for bringing the Motion. The Union, however, has indicated that it is not seeking an attorney fee award from this Court.

are subject to the protections of § 1113(f) and are not subject to the automatic stay of § 362.

IT IS THEREFORE ORDERED that the Union's Motion is granted and the automatic stay of 11 U.S.C. § 362 does not preclude the arbitration of the post-petition grievances that have arisen under the Agreements.

All of the foregoing is ordered, adjudged, and decreed this 15th day of April 2021 in Hammond, Indiana.

/s/James R. Ahler
James R. Ahler, Judge
United States Bankruptcy Court