In the United States Bankruptcy Court

for the Northern District of Iowa

HENKE MANUFACTURING CORP. Bankruptcy No. L92-00873W
Debtor(s). Chapter 11

ORDER RE: FINAL HEARING ON CLAIMS REPORT and MOTION FOR ADMINISTRATIVE EXPENSES

The matters before the court are the final hearing on the claims report and the motion for treatment of claims as administrative expenses filed by the International Union of the UAW and its Local 411 (UAW). Hearing was held June 8, 1993 in Cedar Rapids, Iowa. A supplemental telephonic hearing was held November 19, 1993. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

Findings of Fact

The Debtor, Henke Manufacturing Corp. (HENKE), filed a chapter 11 petition May 1, 1992. Henke filed a plan of reorganization March 1, 1993. Docket no. 103. The plan as amended was confirmed June 8, 1993. The plan provides for the sale of all of Henke's assets and the business previously conducted by Henke to be continued by a newly formed corporation, HMC.

Henke is a party to a collective bargaining agreement (AGREEMENT) with the UAW. The agreement is effective August 29, 1991 through February 28, 1995. Declaration of Jim Schuler (docket no. 127), Exhibit A, Article 25. The Agreement requires that Henke provide medical insurance coverage. Id., Article 23. The Agreement provides that Henke must collect union dues through a check-off system and forward them monthly to the UAW. Id., Article 3.

The Plan states that all executory contracts other than the Agreement with the UAW shall be deemed rejected by Henke on the confirmation date of the plan. The plan also recognizes that the Agreement "may be rejected only pursuant to § 1113 of the Code." First amendment to plan, docket no. 133. The Plan provides for payment to employee benefit plans in Class 8:

> Class 8 consists of allowed unsecured claims for contributions to an employee benefit plan to the extent entitled to priority under § 507(a)(4) of the Code. This class is not impaired. The claims in this class are estimated to be approximately $7,150.00.
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> * * *
>
> [A]ll class 8 claims will be paid in full on the Effective Date from the proceeds of the loan from HMC. . . .

Plan, 2.8, 3.8.

The disclosure statement identifies employee benefit plan payments as vacation pay owing to Henke employees as of the petition filing date. The payments are for approximately 35 employees in the total amount of approximately $7,000.00. Disclosure statement (docket no. 102), page 15. In an amendment to the disclosure statement filed April 5, 1993, Henke provides additional information about the Agreement with the UAW and states:

> The [Agreement] is an executory contract. Debtor's present intention is to seek to assume the [Agreement], subject to certain amendments relating to health care insurance coverage. Debtor has made a proposal to the

> Union relative to modifications in the health insurance provisions. Debtor intends to negotiate in good faith with the Union concerning these changes and will seek to reject the [Agreement] only if these negotiations are unsuccessful.

First amendment to disclosure statement, docket no. 132.

Henke's claims report filed March 3, 1993, identifies payments for employee benefit claims as class 8 claims entitled to priority under § 507(a)(4). Docket no. 108. Claim no. 89 is a class 8 claim filed by Dalon DeBoer and allowed as filed in the amount of $680.00. Employee benefit claims deemed allowed as scheduled include the claims of 35 individuals in various amounts, and totaling $6,693.45. The claims report also identifies employee vacation pay claims for vacation time accrued post-petition as administrative claims.

Discussion

The UAW objected to the claims report alleging that Henke either omitted or incorrectly stated the amounts of claims arising under the terms of the agreement. The UAW also filed a motion to treat all obligations arising under the Agreement as administrative expenses pursuant to 11 U.S.C. § 1113(f). The court treats the UAW's motion as a request for payment of administrative expenses under § 503(a).

An employee of Henke, Alan Lutterman, objected to the claims report by letter filed March 30, 1993. Docket no. 129. The objection relates to his claim for two weeks vacation pay. The letter states:

> This amount would be 80 hours pay at $8.17 per hour earned from December 1991, through November, 1992. I realize I did not reach my anniversary date; however, I feel I have accumulated enough man hours during this time frame to warrant this claim.

The claims report indicates that Alan Lutterman's claim for vacation pay will be allowed as a class 8 claim in the amount of $362.64. Any vacation pay Lutterman accrued post-petition would be paid as an administrative expense. Counsel for Henke represented to the court that Lutterman's claim for vacation pay was calculated according to the length of service requirement for accrual under the UAW agreement. Lutterman admits in his letter that he did not reach his "anniversary date." It appears that Lutterman's claim has been allowed according to the terms of the Agreement. Lutterman's objection will be overruled.

The UAW objects to the claims report, alleging Henke omitted $11,527.19 in claims for both pre-petition and post-petition medical insurance benefits and $975.00 for pre-petition union dues. Declaration of Jim Schuler and Exhibit C. The UAW also argues that 11 U.S.C. § 1113(f) entitles all obligations under the Agreement, whether arising pre-petition or post-petition, to administrative priority status.

On May 26, 1992, the Agreement was modified to change the medical benefits insurance carrier from Blue Cross to Guardian Insurance Company. Declaration of Jim Schuler, Exhibit B. There is a dispute between Henke and the UAW regarding the effect of that change on Henke's liability for increased deductibles under the Agreement as modified. This matter is being arbitrated and is not before the court. Henke does not dispute that the medical claims were incurred in the amounts presented by the UAW. At the telephonic hearing November 19, 1993, Henke argued that some of the medical claims may not have been submitted to the insurance carrier for payment. This factual issue is also not before the court. Although Henke disputes the extent of its liability under the modified Agreement, Henke agrees that post-petition obligations under the UAW Agreement are entitled to administrative priority status. The parties disagree whether § 1113(f) requires administrative treatment for the pre-petition claims of the UAW. The issue for the court, then, is the status of the UAW's pre-petition claims.

The UAW argues that all medical insurance benefits and union dues payable under the agreement are entitled to administrative priority status whether or not the claim arose post-petition. Henke argues that § 1113 requires a debtor to comply with the terms of a collective bargaining agreement from the date of filing the petition and that pre-petition claims arising out of the agreement are to be treated under the priority scheme of § 507. Bankruptcy Code § 1113 provides in relevant part:

> (a) The debtor-in-possession, or the trustee . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.
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> * * *
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> (f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

The requirements of § 1113 apply in a chapter 11 liquidation case. See In re Ionosphere Clubs, Inc., 154 B.R. 623, 625 (S.D. N.Y. 1993); United Steelworkers of America AFL-CIO v. Ohio Corrugating Co., 1991 WL 213850 at *4 (N.D. Ohio 1991); see also In re St. Louis Globe-Democrat, Inc., 86 B.R. 606 (Bankr. E.D. Mo. 1988) (court applied § 1113(f) to case in which debtor assumed the contract, then converted to chapter 7).

The case authority is split over the issue of the effect of § 1113(f) on the payment of claims arising pre-petition under collective bargaining agreements. One view is that § 1113(f) effectively creates "super-priority" status for claims arising under a collective bargaining agreement whether or not they qualify as administrative expenses under § 507. United Steelworkers v. Ohio Corrugating, 1991 WL 213850 at *4; In re Golden Distributors, Ltd., 134 B.R. 760, 765 (Bankr. S.D. N.Y. 1991) aff'd 152 B.R. 35 (S.D. N.Y. 1992).

A second line of authority reconciles § § 507 and 1113 by finding that § 1113 governs only the conditions under which a debtor may modify or reject a collective bargaining agreement but that the priority of pre-petition obligations under the contract is governed exclusively by § 507. Ionosphere Clubs, 154 B.R. at 630; In re Roth American, Inc., 975 F.2d 949, 956-57 (3d Cir. 1992). Courts holding this view have concluded that although failure to make payments required by a collective bargaining agreement may be a breach of the agreement, such failure is not a unilateral termination or alteration of the provisions of the agreement within the meaning of § 1113(f). Spirit Holding Co., Inc. v. Local 881, United Food & Commercial Workers Union (In re Spirit Holding Co., Inc., 157 B.R. 879, 882 (Bankr. E.D. Mo. 1993); In re Moline Corp., 144 B.R. 75, 79 (Bankr. N.D. Ill. 1992).

The court need not decide the effect of § 1113(f) on pre-petition union contract claims because the court finds that Henke has assumed the executory contract and is, therefore, liable for pre-petition claims as administrative expenses.

Section 1113 does not provide a specific deadline for making the decision whether to assume or reject a contract. Cf. 11 U.S.C § 365(d). However, the general rule in reorganization cases is that a debtor may assume or reject an executory contract at any time before the confirmation of the plan. 11 U.S.C. § 365(d)(2). Cases allowing a debtor to reject an executory contract or unexpired lease post-confirmation appear to require that the debtor's motion be pending at the time of confirmation and that the plan contain a valid clause preserving jurisdiction over the contract matter. See In re J. M. Fields, Inc., 26 B.R. 852 (Bankr. S.D. N.Y. 1983) (an Act case); Baker v. Malden Mills, Inc. (In re Malden Mills, Inc.), 35 B.R. 71 (Bankr. D. Mass. 1983).

Henke has not moved to reject the Agreement and is bound by all its terms and conditions. In re St. Louis Globe-Democrat, Inc., 86 B.R. 606, 609 (Bankr. E.D. Mo. 1988); In re Ionosphere Clubs, Inc., 922 F.2d 984, 990 (2d Cir. 1990) cert. denied by Air Line Pilots Assn. Int'l v. Shugrue, 112 S.Ct. 50 (1991).

Two courts have found that if a debtor never files a motion to reject a collective bargaining agreement, at some point, the debtor's inaction is tantamount to assumption of the agreement. St. Louis Globe-Democrat, 86 B.R. at 610 ("Section 1113(f) by operation of law (and, therefore, without the need for a formal motion) effects assumption of such an agreement"); In re Moline Corp., 144 B.R. at 78 (debtor who never rejects the collective bargaining agreement assumes the agreement by inaction) (dictum).

Henke has stated in the plan and disclosure statement that its intention is to assume the Agreement and not to reject it. Henke also stated in its disclosure statement that it would seek to reject the Agreement only in the event of failure of certain negotiations. Henke did not have a motion to reject the Agreement pending at the time of confirmation. The Plan was confirmed, and both sides have performed the Agreement post-petition and post-confirmation.

One of several requirements for approval of rejection of a collective bargaining agreement by a Chapter 11 debtor is that

the proposed modifications are necessary to permit the reorganization of the debtor. 11 U.S.C. § 1113(b)(1); In re American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984). Henke has already obtained confirmation of its plan. Henke could not at this point show that rejection of the Agreement was necessary for reorganization.

The court finds that under the terms of the Plan, the performance of the Agreement and by operation of the Bankruptcy Code, Henke has assumed the Agreement.

A debtor assuming an executory contract must cure all defaults under the contract. 11 U.S.C. § 365(b)(1)(A). All obligations under the contract, including pre-petition defaults, become administrative expense claims entitled to priority. St. Louis Globe-Democrat, 86 B.R. at 610. The UAW's pre-petition claims become administrative expense claims as part of Henke's obligation to cure defaults. In re Moline Corp., 144 B.R. at 78. The UAW claims are entitled to priority status under § § 503(b) and 507(a)(1).

The UAW claims are entitled to payment as Class 1 administrative claims. However, the Plan treats certain claims arising under the Agreement as Class 8 priority claims under § 507(a)(4). The UAW claims would qualify for treatment under either class; they should be entitled to the higher priority treatment as Class 1 claims.

It is unnecessary for the court to discuss the UAW's argument that the claims do not exceed the aggregate limit under § 507(a)(4). See In re P.C. White Truck Line, Inc., 22 B.R. 540 (Bankr. M.D. Ala. 1982).

All claims arising under the Agreement, whether pre-petition or post-petition, are entitled to payment as administrative expense claims. In addition to the claims identified in the claims report as "Class 8" claims, administrative claims arising under the Agreement include the UAW claims for unpaid union dues and medical expenses.

ORDER

IT IS ORDERED that Alan Lutterman's objection to the Claims Report is overruled.

IT IS FURTHER ORDERED that the UAW's objection to the Claims Report is sustained.

IT IS FURTHER ORDERED that the UAW's motion for treatment of claims arising under the UAW Agreement as administrative expenses is sustained. The following claims shall be entitled to administrative expense treatment under the Plan: Dalon DeBoer, Claim No. 89, $680.00; the 35 employees listed as priority claims in the Claims Report for a total of $6,693.45; union dues for March and April, 1992, $975.00; medical claims identified in Exhibit C to Declaration of Jim Schuler in the total amount of $11,527.19.

SO ORDERED ON THIS 22nd DAY OF DECEMBER, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and judgment by U. S. mail to: Michael McDonough, Michael B. Nicholson, Robert D. Fulton, and U. S. Trustee.