

PHILADELPHIA STORY

How management used bankruptcy as a weapon against musicians – and can we stop this from happening again?

RECENTLY, SOMETHING SHOCKING happened in Philadelphia. The musicians of the Philadelphia Orchestra were pressured into voting away their AFM pension plan. Instead, orchestra management is proposing a “defined contribution” plan, which will leave musicians’ savings at the whim of the stock market.

How could this venerable institution pull out of the AFM pension fund? And what does this mean for other orchestras across the country?

The answer has to do with how management is able to use bankruptcy law to back musicians into a corner. It’s a dark story and it’s reflective of a much deeper problem that resides at the heart of the bankruptcy code.

It comes down to this problem. When bankruptcy laws conflict with other state or federal statutory schemes, bankruptcy law is given predominance. This has led to results that are sometimes antithetical to society.

For instance, in 1985, the Supreme Court showed us in *Ohio v. Kovacs* (469 U.S. 274) that polluters need only file bankruptcy to get around their obligation to clean up.

What happened was this. An Ohio company had created a toxic dump. A state court ordered the company to clean up the site. The company then declared bankruptcy.

The Supreme Court ruled that the company did not have to clean up the site, since its bankruptcy took precedence over the order to clean up. All the state of Ohio could do was get in line with other creditors and try to extract some money from the so-called bankrupt company. But



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whatever money the state could obtain did not equal the cost of cleaning up the site. Ultimately, Ohio had to clean it up, at taxpayers’ expense.

As a result of this ruling, many polluters who engaged in similar toxic dumping ran to court to seek bankruptcy protection. These companies used bankruptcy laws to shield themselves from liability.

In a similar maneuver, orchestra managers use the bankruptcy code to purge themselves of their pension obligations.

Here’s how they’ve done it.

Under bankruptcy law, companies that declare bankruptcy can usually void their contracts under some circumstances. For instance, a car company that declares bankruptcy may be able to void

the contracts it has with various parts manufacturers.

But this didn’t apply to union contracts until another Supreme Court decision, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In the *Bildisco* decision, the court held that collective bargaining agreements could be rejected or modified in the same manner as any other agreement a bankrupt party was subject to.

This was a blow to union workers. But after that decision, the legislature tried to give greater protection to union contracts. The bankruptcy code was altered by Congress to make it more difficult for a bankrupt company to nullify collective bargaining agreements. They created Section 1113 of the bankruptcy code.

Presently, under this section, a union contract may be nullified only if a bankrupt company complies with certain procedural requirements.

One of those requirements is that the company must negotiate in good faith with workers (or their union) over the terms of a new contract. If efforts to reach an agreement fail, the court then can impose terms, provided the company can demonstrate that the workers or union refused to accept the proposal in good faith.

In recent history, based upon my discussions with the AFM Symphonic Services Division, it appears that no orchestra has been able so far to use bankruptcy to nullify a collective bargaining agreement. That’s the good news.

But the bad news is that once an orchestra declares bankruptcy, nothing is certain. A court might uphold a contract or might nullify it. Negotiations become tense for musicians. The leverage is with

the employer.

The situation in Philadelphia is a case in point.

It is clear that the Philadelphia Orchestra’s singular goal was to pull out of the AFM pension plan and create its own “cheaper” defined-contribution plan.

Knowing the great resistance there would be, the orchestra filed a voluntary bankruptcy petition and used the bankruptcy proceeding to assist in its negotiation tactics.

Musicians knew that the bankruptcy court ultimately had the power to cancel their contract. With this threat in hand, orchestra management succeeded in forcing musicians to vote out the AFM pension plan.

Let me pause here and say two things.

First, those musicians who were already vested in the AFM pension plan will not lose that pension.

Secondly, by pulling out of the plan, the Philadelphia Orchestra now owes the pension fund millions of dollars in what is called “withdrawal liability.” (Withdrawal liability is the company’s proportionate share of unfunded vested benefits.)

Management is, of course, trying to use bankruptcy to wipe away this obligation as well. But it is running into some problems.

The Philadelphia Orchestra has a huge endowment. But management claims that much of this endowment is “restricted” and can’t be used to pay creditors like the pension fund. Now the union is learning that much of this money may actually be “unrestricted” or available to pay out.

The pension law, called ERISA, offers another way for the pension fund to collect.

Even if a company is bankrupt, pen-

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“Once an orchestra declares bankruptcy, nothing is certain”

sion funds can attempt to obtain the full amount of withdrawal liability owed by utilizing a provision in the law called the Multi-Employer Pension Plan Amendments Act.

This statute permits pension funds to go after not only withdrawing employers (like the Philadelphia Orchestra itself), but also their “controlling entities” or “controlled groups.”

For tax-exempt entities, such as most symphony orchestras, the general rule is that if 80 percent of the directors or trustees of the tax exempt organization are representatives of or controlled by another organization (even if it is for profit), the other entity may be deemed responsible for the exempt organization’s withdrawal liability. It should also be noted that there is an anti-abuse section of the regulations guiding identification of a nonprofit’s controlled group. It is unclear whether this section can expand the application of control group status to other entities associated with the nonprofit.

A broken system

As I’ve noted in this article, there are severe flaws in the bankruptcy process.

In the case of the Philadelphia Orchestra, shouldn’t the court have scrutinized the orchestra’s endowment before permitting it to take advantage of bankruptcy protection?

If this money was truly available to pay out to pensions and other operating expenses, why was the orchestra allowed to declare bankruptcy in the first place?

Secondly, and most importantly, shouldn’t the bankruptcy code have a “good faith” requirement to prohibit companies from using bankruptcy as a negotiating weapon against workers? The answer, of course, is yes.

Bankruptcy courts need higher standards. They must deny requests for bankruptcy where employers fail to meet those standards.

For now, we must be vigilant. The union should engage in vigorous cam-

paigns against other orchestras who use the threat of bankruptcy. Musicians must not be pressured into voting away their pay, benefits and pension plan. Bankruptcy should not be a weapon that companies can use against musicians and other workers.

Let me leave you with this final anecdote that shows how perverse the bankruptcy system can be.

According to a recent story in the *New York Times*, it seems that donors to the Philadelphia Orchestra were purposely advised to hold off on making financial contributions to the orchestra while the bankruptcy was pending. The orchestra didn’t want to have any extra cash in its pocket while it was trying to declare itself bankrupt. Such behavior is dishonorable at best, fraudulent at worst.

We’re doing what we can. But it’s ultimately up to Congress to strengthen bankruptcy protections for workers and their union contracts.

Labor Board’s new rules may speed up union elections

THE NLRB RECENTLY reformed arcane election rules that have often been used by employers to defeat unions.

Employers have often challenged every little matter, which stalls a union election process. Under the new regulations, the hearing officer will have greater authority to determine whether any issues exist that truly need to be litigated.

The hearing officer will also have the authority to dispense with the filing of legal briefs at the conclusion of a hearing.

Finally, the NLRB will be permitted to conduct elections even where there are pre-election challenges.

– Harvey Mars