

MEMORANDUM OPINION
(Bench Opinion)

July 2, 2003

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:	:	
	:	
FULTON BELLOWS &	:	Case No. 03-33186
COMPONENTS, INC.	:	Chapter 11
f/k/a JRGACQ CORPORATION	:	
	:	
Debtor	:	

BEFORE THE HONORABLE RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTOR:

LAWRENCE R. AHERN, ESQ.
ANDREW STOSBERG, ESQ.
700 Two American Center
3102 West End Avenue
Nashville, Tennessee 37203

FOR AMERICAN CAPITAL STRATEGIES, LTD.:

MICHAEL L. BERNSTEIN, ESQ.
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

FOR THE UNITED STEELWORKERS
OF AMERICA, AFL-CIO, LOCAL 5431:

GLEN M. CONNOR, ESQ.
Post Office Box 10647
Birmingham, Alabama 35202-0647

APPEARANCES (Continued):

FOR THE INTERNATIONAL ASSOCIATION
OF MACHINISTS & AEROSPACE
WORKERS UNION, LODGE 555:

F. SCOTT MILLIGAN, ESQ.
Suite 130, Regency Business Park
900 E. Hill Avenue
Knoxville, Tennessee 37915

FOR RICHARD F. CLIPPARD, ESQ.,
THE UNITED STATES TRUSTEE:

PATRICIA C. FOSTER, ESQ.
800 Market Street, Suite 114
Knoxville, Tennessee 37902

1 THE COURT: This contested matter is before the court upon the Motion
2 and Supporting Memorandum by the Debtor Seeking Limited Interim Relief from
3 Collective Bargaining Agreements Pursuant to 11 U.S.C. §1113(e) and Request for
4 Expedited Hearing filed by the Debtor on June 16, 2003. By this Motion, the Debtor
5 asks the court to provide interim relief pursuant to 11 U.S.C. § 1113(e) by allowing it
6 to modify two Collective Bargaining Agreements calling for lump sum payments for
7 vacation benefits due on July 3, 2003. Objections to the Debtor's Motion were filed
8 by the International Association of Machinists and Aerospace Workers Union,
9 Lodge 555, on June 27, 2003, and by the United Steelworkers of America, AFL-CIO,
10 Local 5431, on June 30, 2003. A hearing on the Debtor's Motion was held yesterday,
11 July 1, 2003. The record before me consists of seven exhibits introduced into
12 evidence and the testimony of E. Roger Clark, President and Chief Executive Officer
13 of the Debtor, J. Michael Francis, Chief Financial Officer of the Debtor, Jack T.
14 Hower, Representative of the United Steelworkers Union, and George H. Mays,
15 Representative of the Machinists Union.

16 This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

17 The Debtor is a corporation with its principal place of business in
18 Knoxville, Tennessee. The Debtor has been in business in Knoxville under various
19 corporate names since 1904, and it is a manufacturer of bellows, which sense changes
20 in temperature in sensitive products. These bellows are highly sophisticated, high-
21 quality devices used in various larger manufactured products, such as jet engines,
22 electrical power grids, medical equipment, and truck refrigeration devices, among
23 others. The Debtor employs 195 employees, 161 of which are union members and 34
24 of which are salaried, services more than 200 customers, and utilizes the services of
25 more than 300 vendors.

1 Recently, the Debtor has undergone management changes, including a buy-
2 out in March 2000 and four different chief executive officers in the last three years.
3 The current president and CEO, Mr. Clark, has been with the Debtor for only three
4 months, while the current CFO, Mr. Francis, has been with the Debtor for only four
5 months. Mr. Clark testified that the Debtor has suffered financial losses over the past
6 three years, losing approximately \$5,000,000.00 in 2001, \$11,000,000.00 in 2002,
7 and more than \$2,200,000.00 between January 1, 2003, and May 31, 2003.
8 Substantially all of the Debtor's assets, valued by Mr. Francis at approximately
9 \$15,000,000.00, are encumbered with liens securing obligations to American Capital
10 Strategies, Ltd. of approximately \$21,500,000.00. Given its financial stresses, the
11 Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on
12 June 10, 2003, and on June 16, 2003, the Debtor filed the Motion for interim relief
13 presently before me.

14 At issue is the interim modification, under § 1113(e), of a provision
15 contained in each of the two Collective Bargaining Agreements. The first Agreement,
16 dated October 16, 1999, is between the Debtor and the United Steelworkers Union.
17 The second Agreement, dated October 26, 1999, is between the Debtor and the
18 Machinists Union. Article 4.01 of each Agreement addresses vacation pay and
19 provides, in summary, that based upon the length of employment, each employee shall
20 be entitled to a lump sum payment of his vacation pay for the upcoming year, to be
21 paid by the Debtor "the first payday in July[.]" The first payday in July of this year is
22 represented to be tomorrow, July 3.

23 The aggregate sum of this vacation pay due to all union employees
24 tomorrow approximates \$628,000.00. The Debtor maintains that if it is required to
25 make this lump sum payment, its cash will be depleted, it will be unable to make

1 payroll the week of July 11, 2003, and it will be forced to shut its doors. The United
2 Steelworkers Union and the Machinists Union argue that the Debtor would not be
3 irreparably harmed by making this payment, counted on by the union members, and
4 that denial of the vacation payment would give the Debtor an upper-hand in future
5 negotiations regarding the Collective Bargaining Agreements.

6 The bankruptcy court may approve the interim modification of a collective
7 bargaining agreement under § 1113(e) of the Bankruptcy Code, which provides in
8 material part:

9 If during a period when the collective bargaining agreement
10 continues in effect, and if essential to the continuation of the
11 debtor's business, or in order to avoid irreparable damage to the
12 estate, the court, after notice and a hearing, may authorize the
13 trustee to implement interim changes in the terms, conditions,
14 wages, benefits, or work rules provided by a collective
15 bargaining agreement. . . . The implementation of such interim
16 changes shall not render the application for rejection moot.

17 The United Steelworkers Union argues that interim relief may not be
18 granted because the Debtor has not filed a motion to reject the collective bargaining
19 agreement under § 1113(a). The court disagrees. A party may seek interim relief
20 under § 1113(e) at any time as long as the collective bargaining agreement is still in
21 effect. *See* 7 COLLIER ON BANKRUPTCY ¶ 1113.04[1] (Lawrence P. King ed., 15th ed.
22 rev. 2003) (citing, among others, *San Rafael Baking Co. v. No. Cal. Bakery Drivers*
23 *Sec. Fund (In re San Rafael Baking Co.)*, 219 B.R. 860 (B.A.P. 9th Cir. 1998)); *see*
24 *also Beckley Coal Mining Co. v. United Mine Workers of Am.*, 98 B.R. 690, 695-96
25 (D. Del. 1988) (holding that in light of the plain language of § 1113(e),

1 a debtor could file a motion for interim relief at any time, as long as the collective
2 bargaining agreement is still in effect, regardless of whether a motion to reject has
3 been filed). Because interim relief is a stop-gap measure, the parties to the collective
4 bargaining agreement are still expected to negotiate towards a modification or
5 rejection in good faith. *See* 7 COLLIER ON BANKRUPTCY ¶ 1113.04[3] (citing, among
6 others, *United Food & Commercial Workers Union, Local 328, AFL-CIO v. Almac's*
7 *Inc.*, 90 F.3d 1 (1st Cir. 1996) (holding that when it enacted § 1113(e), Congress
8 realized that a chapter 11 debtor may occasionally “require emergency relief from the
9 collective bargaining agreement prior to rejection, assumption, or agreed-upon
10 modification of the agreement.”). In this case, it appears that the Debtor is not
11 necessarily inclined to seek rejection of the two Collective Bargaining Agreements if
12 it and the Unions can agree to modifications regarding various labor issues, including
13 vacation pay. In the court’s opinion, requiring the Debtor to first file a motion to
14 reject the Agreements is contrary to the purpose of § 1113(e)’s emergency nature.

15 “[T]he standard for interim relief under § 1113(e) requires a showing that
16 the short term survival of the debtor is threatened unless immediate changes to the
17 collective bargaining agreement are authorized.” *Shugrue v. Air Line Pilots Ass’n,*
18 *Int’l (In re Ionosphere Clubs, Inc.)*, 139 B.R. 772, 782 (S.D.N.Y. 1992). As such,
19 § 1113(e) allows the court to grant interim relief only if either: (1) the relief is
20 “essential to the continuation of the Debtor’s business” or (2) if relief is not granted,
21 the estate will suffer “irreparable harm.” Each of these alternatives requires the
22 Debtor to show “an immediate level of economic emergency, and interim
23 modifications [will therefore] be limited to those bare minimum short-term
24 requirements which will provide the Debtor with what it needs to survive.” *In re*
25 *Blue Diamond Coal Co.*, No. 91-32611, slip op. at 12 (Bankr. E.D. Tenn. May 31,

1 1991).

2 The "essential to" standard is generally construed as meaning "but for"
3 allowing the requested interim relief, the debtor would be forced to liquidate. *See In*
4 *re Salt Creek Freightways*, 46 B.R. 347 (Bankr. D. Wyo. 1985); 7 COLLIER ON
5 BANKRUPTCY ¶ 1113.04[4][a]. The debtor faces "a heavy burden . . . to show that
6 interim relief is essential, either financially or administratively, to the continuation of
7 the debtor's business, not merely that compliance with the terms of the collective
8 bargaining agreement is uneconomical or burdensome." 7 COLLIER ON BANKRUPTCY
9 ¶ 1113.04[4][b] (citing *In re Wright Air Lines, Inc.*, 44 B.R. 744, 745 (Bankr. N.D.
10 Ohio 1984)). This requires a debtor to "introduce evidence of anticipated cost-
11 savings, projected loss and other financial projections to justify that the modifications
12 are 'essential.'" 7 COLLIER ON BANKRUPTCY ¶ 1113.04[4][b] (citing *Wright Air*
13 *Lines, Inc.*, 44 B.R. at 745-46). Additionally, "[t]he Court must consider the interest
14 of the debtor to continue a reorganization to continue to, hopefully, reorganize its
15 financial affairs, the creditors who seek payment of their claims, and the employees'
16 hopes of maintaining and continuing jobs." *In re Blue Diamond Coal Co.*,
17 No. 91-32611, slip op. at 14 (quoting *In re Russell Transfer, Inc.*, 48 B.R. 241, 244
18 (Bankr. W.D. Va. 1985)).

19 In the case before me, the Debtor has offered irrefutable evidence that if it
20 is required to make the \$628,000.00 lump sum payment on July 3, 2003, it will be
21 forced to close its doors. Mr. Francis testified that the Debtor has approximately
22 \$750,000.00 in cash, and Mr. Clark testified that the Debtor's weekly payroll is
23 approximately \$150,000.00. Clearly, if the Debtor pays out \$628,000.00 on July 3,
24 2003, it will have a deficit of approximately \$28,000.00 for payroll the following
25 week, insufficient cash to pay its vendors, and, as Mr. Clark testified, it will be

1 required to shut down. The Debtor cannot operate under a cash deficit, unable to
2 make its payroll obligations, much less reorganize under those conditions. Therefore,
3 the court will grant the Debtor's Motion to modify the two Collective Bargaining
4 Agreements with the United Steelworkers Union and the Machinists Union.

5 However, even though the Debtor is plainly financially distressed, the
6 court does not believe that it is unable to make any payments whatsoever to the union
7 members. Accordingly, the court will require the Debtor to pay 25% of the
8 aggregate sum due under the terms of the two Collective Bargaining Agreements, or
9 roughly \$157,000.00, on July 3, 2003, as required by the Agreements. The court
10 does not believe that this amount will cause the Debtor irreparable harm, especially in
11 light of the expedited bidding procedures approved by the court yesterday and the
12 possible sale of the Debtor's business as a going concern that is designed to occur in
13 early September 2003.

14 The court reiterates that relief under § 1113(e) is only a temporary
15 measure, designed to allow the parties additional time to negotiate and attempt to
16 resolve the issues existing in the current Collective Bargaining Agreements. It does
17 not relieve the Debtor of its obligation for the balance of the vacation pay due the
18 union workers. The court encourages the Debtor, the United Steelworkers Union,
19 and the Machinists Union to make substantial efforts to resolve the vacation pay and
20 other pressing issues concerning their respective Collective Bargaining Agreements.
21 Clearly, it is in the best interest of the Debtor's employees that the Debtor survive as
22 a going concern. If the Debtor is to survive, however, concessions will obviously be
23 necessary on both sides as to the disagreed-upon issues, and the parties must engage
24 in serious negotiations to resolve their differences. It is in nobody's best interest to
25 shut the doors of this Debtor. The court reminds the Debtor that if it is, in fact,

1 unable to negotiate modifications to the existing Collective Bargaining Agreements
2 and must therefore file a motion to reject under § 1113(a), it must evidence to the
3 court that it has (1) made proposals for modifications to the existing Agreements
4 based upon the most complete and reliable information available at the time of the
5 proposals, (2) provided the Unions with adequate information to allow them to fully
6 access the merits of the proposals, and (3) met with Union representatives and
7 negotiated in good faith to reach mutually acceptable modifications to the
8 Agreements. See § 1113(b); *Bowen Enters., Inc. v. United Food & Commercial*
9 *Workers Int'l Union, Local 23, AFL-CIO (In re Bowen Enters., Inc.)*, 196 B.R. 734,
10 741 (Bankr. W.D. Pa. 1996); *In re Blue Diamond Coal Co.*, 131 B.R. 633 (Bankr.
11 E.D. Tenn. 1991).

12 The Debtor proposed an August 8, 2003 deadline for either having new
13 collective bargaining agreements with the Unions in place or for filing a motion to
14 reject the Collective Bargaining Agreements under § 1113(a). This interim relief
15 shall be in effect through August 8, 2003, at which time the court will expect either
16 new collective bargaining agreements with the Unions or the filing of a motion to
17 reject the existing agreements under § 1113(a). I will hold a hearing on August 8,
18 2003, at 9:00 a.m., to see where the parties are in their negotiations and to determine
19 whether the interim relief should be terminated or extended in whole or in part.

20 An order consistent with this Memorandum will be entered this afternoon.

21 FILED: July 3, 2003

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/s/ Richard Stair, Jr.
RICHARD STAIR, JR.
U.S. BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-33186

FULTON BELLOWS & COMPONENTS, INC.
f/k/a JRGACQ CORPORATION

Debtor

ORDER

This contested matter came on for hearing on July 1, 2003, on the Motion and Supporting Memorandum by the Debtor Seeking Limited Interim Relief from Collective Bargaining Agreements Pursuant to 11 U.S.C. §1113(e) and Request for Expedited Hearing filed by the Debtor on June 16, 2003. For the reasons stated in the memorandum opinion dictated from the bench in open court on July 2, 2003, the court directs the following:

1. The Debtor is granted interim relief from the \$628,000.00 in vacation pay due July 3, 2003, pursuant to the terms of the Collective Bargaining Agreements with the International Association of Machinists and Aerospace Workers, Lodge 555, and the United Steel Workers of America, AFL-CIO, Local 5431, to the extent that the Debtor will be required to pay 25%, or approximately \$157,000.00, of the total amount due.

2. A hearing will be held on August 8, 2003, at 9:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, to determine whether the interim relief granted herein should be terminated or extended in whole or in part.

SO ORDERED.

ENTER: July 2, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE