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11 U.S.C. § 502(d)
11 U.S.C. § 1113(f)
29 U.S.C. § 2104(a)

In re Arrow Transportation Company
of Delaware

Case No. 397-34556-psh11

7/17/98

PSH

Published

The debtor filed a motion for summary judgment on its objections to a proofs of claim filed by various Union entities representing the debtor's employees. The original claims contained several basis for payment, including violation of the Workers' Adjustment & Retraining Notification Act (WARN Act). However, all but two issues were resolved prior to the time the court issued its opinion. The remaining issues concerned the extent to which the Unions claim for prepetition vacation pay should be allowed and whether the debtor was entitled to attorney fees incurred in defense of the WARN Act claim.

The debtor disagreed with the amount of the vacation pay claim asserted by the Unions. Additionally, it argued that many of the employees represented by the Unions had received unauthorized postpetition payment in the form of vacation pay for vacation earned prepetition. It contended that § 502(d) barred payment of any claim held by employees who received post petition pay for vacation earned prepetition unless and until those employees repaid the estate the amount of the post petition transfer attributable to vacation pay earned prepetition.

With respect to the amount of the vacation pay claim, the court noted that the Unions had presented no evidence to rebut that presented in the spread sheets attached to the debtor's affidavit in support of its motion for summary judgment. Consequently, the court accepted the accuracy of the debtor's figures.

With respect to the § 502(d) issue the Unions argued that the transfers were authorized by § 1113(f) and their unrejected collective bargaining agreements that § 502(d) was therefore inapplicable. The debtor had authorized the postpetition use of vacation time and paid employees who took vacation time the full amount of their vacation pay, without regard to whether it was earned pre or post petition.

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The court, citing Ionosphere Club, Inc., 922 F.2d 984 (2nd Cir. 1990), agreed with the Unions. In Ionosphere the court refused to

1 allow a debtor to use the provisions of § 362 to stay proceedings to
2 enforce an unrejected collective bargaining agreement, reasoning that
3 the language of the statute indicates that Congress intended § 1113(f)
4 to be the sole method by which a debtor could terminate or modify a
collective bargaining agreement and that application of other provisions
of the Bankruptcy Code that allow a debtor to bypass the requirements
of § 1113 are prohibited.

5 In the instant case the court found that under the unrejected
6 collective bargaining agreements the debtor was obligated to pay
7 employees for accrued vacation time in the pay period prior to the pay
8 period in which the vacation was taken. It further found that the
prepetition amounts paid were authorized under the code because
required by § 1113(f) and the unrejected collective bargaining
agreements.

9 With respect to the WARN Act claims the Unions argued that the debtor
10 wasn't a prevailing party under the act because they voluntarily
11 withdrew their claims under the Act two days prior to the time the
12 debtor submitted its motion for summary judgment. Alternatively, it
13 argued that the debtor, as a prevailing defendant, was not entitled to
an attorneys fee award under the Act because the Union's claim was not
frivolous or filed in bad faith. The court disagreed. It held that
a party may be a prevailing party within the meaning of a fee shifting
statute regardless of whether there is a decision on the merits.

14 It rejected the Unions argument that there were separate standards for
15 awarding fees under a fee shifting act depending of whether the
16 prevailing party was the plaintiff or defendant in the action. It also
17 rejected the debtor's argument that fees should be awarded to a
18 prevailing party under the act in the absence of circumstances which
19 would make such an award unjust. Instead, it held that the the
20 decision to award attorney fees under the Act was within the discretion
21 of the court. It then concluded that, under the circumstances of the
22 case, the debtor was entitled to an award of attorneys fees incurred
23 in defense of the WARN Act claim.
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 397-34556psh11
ARROW TRANSPORTATION COMPANY OF)
DELAWARE,) MEMORANDUM OPINION
)
Debtor.)
)

The debtor has filed a motion for summary judgment on its objection to the proof of claims filed by the International Brotherhood of Teamsters, Tankhaul Division, International Brotherhood of Teamsters, Local 81 and International Brotherhood of Teamsters, Local 162. ("The Union Group"). The original claims contained several identical bases for payment including a claim under the WARN Act. All but two have now been resolved. The parties still disagree on the extent to which the Union Group's claim for accrued prepetition vacation pay should be allowed. In addition the debtor has made a demand for attorney fees under the WARN Act as the "prevailing party."
/ / / /
/ / / /

A. Prepetition Vacation Pay

1 1) Amount

2 In support of its motion for summary judgment the debtor
3 submitted an affidavit from Conrad Meyers, a professional employed by
4 the court to aid the debtor in its reorganization. Attached to that
5 affidavit as Exhibit B is a spread sheet which shows the amount of
6 priority and general unsecured vacation pay asserted due to each of the
7 debtor's union employees. The Union Group presented no evidence to
8 rebut the accuracy of those figures within the time given under the
9 local rules for response to the debtor's summary judgment motion.
10 Consequently, the court accepts the accuracy of the debtor's figures.

11 2) Application of Section 502(d)¹

12 The debtor argues that the admittedly otherwise valid
13 prepetition claims of 111 of its former employees for vacation pay
14 should be disallowed under § 502(d) of the Bankruptcy Code because
15 those employees received unauthorized postpetition transfers of
16 vacation pay which they have not repaid the estate.

17 Section 502(d) provides, in relevant part,

18 Notwithstanding subsections (a) and (b) of this
19 section, the court shall disallow any claim of any
20 transferee of a transfer avoidable under section . . .
21 549 . . . of this title, unless such . . . transferee
has paid the amount, or turned over any such property,
for which such . . . transferee is liable under section
. . . 550 of this title.

22 / / / /

23 Section 549 allows the trustee (or debtor-in-possession) to avoid
24 . . . a transfer of property of the estate --

25 ¹ All section references are to 11 U.S.C. § 101 et seq. unless
26 otherwise stated.

1 (1) that occurs after the commencement of the case;
and . . .

2 (B) is not authorized under this title or by the
3 court.

4 The parties agree that postpetition the debtor paid each of the
5 111 employees for accrued vacation time. In each case the amount which
6 was paid exceeded the amount of vacation pay actually accrued
7 postpetition. The excess amounts paid reflect amounts earned for
8 accrued prepetition vacation pay. These are the claim amounts at
9 issue. The court has not entered any order approving payment of these
10 amounts.

11 The Union Group contends that the postpetition payments were
12 authorized by the Bankruptcy Code and the terms of their collective
13 bargaining agreement. Consequently the claims should not be disallowed
14 under § 502(d).

15 Vacation benefits are addressed in Article 45 of the collective
16 bargaining agreement. Under this article employees earn vacation pay
17 based on years of service. Each week 1/52 of an employee's annual
18 vacation pay accrues. However, any accrued vacation pay is not due and
19 payable by the employer until "the pay period immediately preceding the
20 period time off is to be taken." Thus, under the collective bargaining
21 agreement the debtor's obligation to pay accrued vacation pay benefits
22 arises in the pay period just preceding the date when the employee
23 chooses to take his vacation.

24 Prior to the bankruptcy filing the 111 employees had each
25 notified the debtor of their chosen vacation dates. While Arrow
26 decided, after filing, to refuse to allow its employees, postpetition,

1 to schedule vacations, it decided, "as a matter of industrial
2 relations, [to] allow . . . employees [who, prepetition, had scheduled
3 vacations] to take their vacations, postpetition, with pay." Affidavit
4 of Conrad Meyers in support of Arrow's Motion for Summary Judgment
5 ("Meyers Affidavit") page 3, lines 16-17.

6 The Union Group's analysis begins with 11 U.S.C. § 1113(f).
7 This section provides:

8 No provision of this title shall be construed to permit
9 a trustee to unilaterally terminate or alter any
10 provisions of a collective bargaining agreement prior to
11 compliance with the provisions of this section.

12 The Ninth Circuit Court of Appeals has rendered few decisions
13 interpreting and applying § 1113. Therefore this court has turned for
14 guidance to the Second Circuit which, in 1990, issued Ionosphere Club,
15 Inc., 922 F.2d 984 (2nd Cir., 1990), one of the first and subsequently
16 generally followed circuit opinions interpreting and applying that
17 section. It held that "Congress intended that a collective bargaining
18 agreement remain in effect and that the collective bargaining process
19 continue after the filing of a bankruptcy petition unless and until the
20 debtor complies with the provisions of § 1113." Id. at 990.

21 The issue before the Ionosphere court was the effect of § 1113 on
22 the application of the automatic stay provisions of § 362 to
23 nonbankruptcy proceedings to enforce a collective bargaining agreement.
24 It interpreted § 1113(f) as "evinc[ing] an intent that other provisions
25 of the Bankruptcy Code are inoperable to the extent that they allow a
26 debtor to bypass the requirements of § 1113. The language of the
statute indicates that Congress intended § 1113 to be the sole method

1 by which a debtor could terminate or modify a collective bargaining
2 agreement and that application of other provisions of the Bankruptcy
3 Code that allow a debtor to bypass the requirements of § 1113 are
4 prohibited." Id. at 989.

5 In this case the court earlier had found that the conditions of
6 § 1113 had not all been met and had declined to approve the debtor's
7 motion to reject the collective bargaining agreement between itself and
8 the unions. Under Ionosphere, therefore, the debtor continues to be
9 bound by the terms of the collective bargaining agreement and may not
10 unilaterally either terminate or modify its terms.

11 Article 45 requires all accrued and unpaid vacation pay to be paid
12 in the pay period just prior to the chosen vacation dates. The
13 debtor's failure to pay any portion of such accrued amount at the time
14 required by the Article because that portion was accrued prepetition
15 would constitute a prohibited unilateral modification of the collective
16 bargaining agreement. The debtor in fact paid that amount; however, it
17 now asks the court to find such payments were an unauthorized transfer
18 under § 549 and consequently should be disallowed under § 502(d) until
19 returned to the estate. To hold for the debtor would be tantamount to
20 allowing it to use other provisions of the Bankruptcy Code to
21 unilaterally modify Article 45.

22 The court agrees with the Union Group that, having decided to
23 allow its employees, who, before the filing had scheduled their
24 vacation dates to take that scheduled vacation, Arrow was bound, under
25 the terms of the collective bargaining agreement, to pay those
26 employees their earned vacation pay in the pay period just prior to the

1 vacation regardless of whether that pay was earned prepetition or
2 postpetition. The prepetition amounts paid were "authorized under this
3 title" under § 549(1)(B) because required under § 1113 and the
4 unrejected collective bargaining agreement. The payments being
5 authorized, the provisions of § 502(d) are inapplicable.

6 **B. Attorney's Fees Under The WARN Act**

7 The debtor argues that because the Union Group has withdrawn its
8 WARN Act claim it is the "prevailing party" under that Act and is
9 entitled to attorney fees incurred in the defense of that portion of
10 the Union Group's claims.

11 The relevant sections of the WARN Act provide:

12 (5) A person seeking to enforce . . . liability [under
13 the WARN Act] . . . may sue . . . in any district court
14 of the United States for any district in which the
violation is alleged to have occurred, or in which the
employer transacts business.

15 (6) In any such suit, the court, in its discretion, may
16 allow the prevailing party a reasonable attorney's fee
as part of the costs. 29 U.S.C. § 2104(a).

17 The Union Group contends that this section does not allow an
18 award of attorney fees in this case because the controversy is before
19 the court in the form of a "claim" filed in bankruptcy court rather
20 than a "suit" filed in district court. This argument is easily
21 disposed of. First, it is beyond dispute that this court has subject
22 matter jurisdiction over claims filed in bankruptcy court which rest on
23 the WARN Act.

24 District courts have original jurisdiction over
25 bankruptcy cases "[n]otwithstanding any Act of Congress
26 that confers exclusive jurisdiction on a court or
courts other than the district courts." 28 U.S.C. §
1334(b). [Allowance of claims procedures] are core
proceedings. Id. § 157(b)(2)(B) and are therefore

1 'squarely within [the bankruptcy court]'s subject
2 matter jurisdiction'.

3 In re Parker North American Corporation (Parker North American
4 Corporation v. Resolution Trust Corporation, 24 F.3d 1145,1149 (9th
5 Cir. 1994) citing FDIC v. Tamposi, 159 B.R. 631, 634 (Bankr. D.N.H.
6 1993). By filing proofs of claim the Union Group also consented to the
7 court's personal jurisdiction. In re PNP Holdings Corporation and Pay
8 'N Pak Stores, Inc. (Tucker Plastics v. Pay 'N Pak Stores, Inc.), 99
9 F.3d 910 (9th Cir. 1996).

10 Alternatively, the Union Group argues that the debtor is not a
11 "prevailing party" on the WARN Act claim because it voluntarily
12 withdrew that claim prior to the hearing on the parties' motion for
13 summary judgment. The court could find no WARN Act case on point. 29
14 U.S.C. § 2104(a) is what is commonly called a fee shifting statute.
15 Therefore, it has looked to courts' rulings on this issue under other
16 federal fee shifting statutes.

17 The Union Group's argument assumes that a party must prevail in
18 a trial on the merits in order to be deemed a "prevailing party" within
19 the meaning of the fee shifting provision of the WARN Act. In Corcoran
20 v. Columbia Broadcasting System, Inc., 121 F.2d 575 (9th Cir. 1941) the
21 court rejected a similar argument under the fee shifting provisions of
22 the Federal Copyright Act.

23 In Corcoran the plaintiff filed suit against the defendant
24 alleging infringement of copyright. The defendant responded with a
25 motion to dismiss and a motion "for further and better statement of
26 particulars." The motion to dismiss was denied, but the motion for

1 better particulars was granted with leave to the plaintiff to amend its
2 complaint. The plaintiff did not amend but moved to dismiss his
3 complaint. The motion to dismiss was granted with an allowance of
4 costs and attorney fees to the defendant pursuant to the fee shifting
5 provision. This section provided that the court "may award to the
6 prevailing party a reasonable attorney's fee as part of the costs." Id.
7 at 575.

8 On appeal the plaintiff argued that the award of fees was
9 improper because the defendant was not a "'prevailing party' within the
10 meaning of the statute." The court disagreed, holding that:

11 [t]he authority given [by the statute] is not in terms
12 limited to the allowance of fees to a party who
13 prevails only after a trial on the merits. Where, as
14 here, a defendant has been put to the expense of making
15 an appearance and obtaining an order for clarification
16 of the complaint, and the plaintiff then voluntarily
dismisses without amending his pleading, the party sued
is the prevailing party within the spirit and intent of
the statute even though he may, at the whim of the
plaintiff, again be sued on the same cause of action.
Id.

17 I find that the holding of Corcoran is equally applicable to the fee
18 shifting provision of the WARN Act although here the controversy has
19 played out within the context of a claims objection procedure. Where,
20 as in this case, the opposing party is put to the expense of filing
21 pleadings which controvert the WARN Act claim, it is a prevailing party
22 within the "spirit and intent" of the statute regardless of whether the
23 claimant later withdraws its claim or the objecting party prevails on
24 the merits. See also In Schmidt v. Zazzara, 544 F.2d 412 (9th Cir.
25 1976) (Party who succeeds on motion to compel compliance with consent
26

1 judgment is a "prevailing party" despite the fact that she did not
2 prevail in a trial on the merits).

3 Finally, the Union Group argues that as a prevailing party in
4 opposition under the WARN Act the debtor is not entitled to an award of
5 attorney fees because the claim filed by the Union Group was not
6 frivolous or filed in bad faith. The debtor argues, however, that as
7 the prevailing party it is entitled to an award of attorney fees
8 "unless special circumstances would render such an award unjust."

9 In Solberg v. Inline Corp., 740 F. Supp. 680 (D. Minn. 1990) the
10 court held that the fee shifting provision of the WARN Act created
11 separate standards for an award of attorney fees to a prevailing party
12 depending on whether that party was the plaintiff or the defendant.
13 Under the standards adopted by the Solberg court, prevailing plaintiffs
14 were to be awarded attorney fees unless special circumstances existed
15 that would make such an award unjust. By contrast, prevailing
16 defendants were to be awarded attorney fees only if the "plaintiff's
17 action was frivolous, unreasonable, or without foundation, even though
18 not brought in subjective bad faith." The Third Circuit reached a
19 similar conclusion in United Steelworkers of America v. North Star
20 Steel Company, Inc., 5 F.3d 39 (3rd Cir. 1993).

21 Both Solberg and North Star followed the separate standards set
22 by the Supreme Court in Christiansburg Garment Co. v. E.E.O.C., 434
23 U.S. 412 (1980) for awarding attorney fees under the fee shifting
24 provisions of the Civil Rights Act. In applying the standards under
25 the WARN Act both courts relied on the Supreme Court's admonition that
26 "similar language [in fee-shifting statutes] is 'a strong indication'

1 that they are to be interpreted alike." United Steelworkers of America
2 v. North Star Steel Company, Inc., 5 F.3d at 39 citing Independent
3 Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

4 In re Fogerty v. Fantasy, 510 U.S. 517 (1994) the Court
5 clarified its ruling in Zipes. In Fogerty the appellant, the
6 prevailing plaintiff in a copyright infringement action, appealed from
7 a decision of the district court denying him an award of attorney fees
8 under the Copyright Infringement Act. The Act allowed the court, in
9 its discretion, to "award a reasonable attorney's fee to the prevailing
10 party as part of the costs." This language is virtually identical to
11 that contained in the Civil Rights Act and interpreted by the Supreme
12 Court in Christiansburg. Consequently, relying on that case and Zipes,
13 the district court had applied the Christiansburg standards.

14 On appeal the Supreme Court conceded that the language of the
15 fee shifting provision of the Copyright Act was virtually identical to
16 that in the fee shifting provision of the Civil Rights Act interpreted
17 in Christiansburg. Nonetheless, it found that the separate standards
18 applied to fee awards in Christiansburg should not be applied in
19 determining whether to award fees under the Copyright Act. In doing so
20 it noted that "this normal indication [that similar language should be
21 similarly interpreted] is overborne by the factors relied upon in our
22 Christiansburg opinion that are absent in the case of the Copyright
23 Act." Id. at 523. Specifically it found that "[t]he legislative
24 history of § 505 [of the Copyright Act] provides no support for
25 treating prevailing plaintiffs and defendants differently with respect
26 to recovery of attorney's fees." Id. It further found that:

1 [t]he goals and objectives of the two Acts are likewise
2 not completely similar [in that] oftentimes in the
3 civil rights context impecunious 'private attorney
4 general' plaintiffs can ill afford to litigate their
5 claims against defendants with more resources.
6 Congress sought to redress this balance in part, and to
7 provide incentives for bringing meritorious lawsuits,
8 by treating successful plaintiffs more favorably than
9 successful defendants in terms of the award of
10 attorney's fees. Id.

11 Based on the reasoning and holding in Fogerty I conclude that in
12 this controversy under the WARN Act I should not automatically apply
13 the Christiansburg standards for award of attorney fees. Rather, I
14 should first look to the legislative history and the goals and
15 objectives of that Act to determine whether it is appropriate to apply
16 those standards.

17 Christiansburg was a case decided under the Civil Rights Act.
18 The purpose of that Act is to "promote the general welfare by
19 eliminating discrimination based on race, color, or national origin
20 . . ." H.R. Doc. No. 124, 88th Cong., 1st Sess., at 14. The Civil
21 Rights Attorney's Fees Awards Act of 1976, which authorized an award of
22 attorney's fees to a prevailing party in a civil rights action, was
23 enacted to "ensure effective access to the judicial process for persons
24 with civil rights grievances." Hensley v. Eckerhart, 461 U.S. 424, 429
25 (1983). In determining the proper standard for awarding fees under the
26 Civil Rights Acts the Court took into account that civil rights
plaintiffs operated as private attorney generals to redress societal
wrongs.

By contrast, the WARN Act, which requires that employers having
100 or more employees provide those employees with advance notice of

1 any plant closure, was designed to protect not the interest of society
2 at large, but rather those of an individual worker. The stated purpose
3 of the Act is to provide effected employees with "advance notice . . .
4 essential to the successful adjustment of the worker to the job loss
5 caused by changing economic conditions [and] to insure that large
6 numbers of workers will not be displaced without warning and planning."
7 134 Cong. Rec. S8376 (daily ed. June 22, 1988) (Statement of Sen.
8 Kennedy). If an employer fails to provide the required notice, an
9 affected employee may file suit against the employer and, if
10 successful, recover damages equal to his regular pay for each day of
11 the violation. 29 U.S.C. § 2104(a)(1)(A). In a WARN Act action,
12 unlike a Civil Rights action, the plaintiff is not acting to protect
13 any societal grievance. His action is strictly a private one. The
14 considerations which support application of separate standards for
15 awarding fees to prevailing plaintiffs and prevailing defendants in
16 civil rights actions are not present in a WARN Act suit. Consequently
17 there is no basis under the WARN Act for applying the separate
18 standards enunciated in Christiansburg.

19 A single standard should apply to an award of attorney fees
20 under the WARN Act. The question remains what that standard should be.
21 The debtor urges the court to adopt the standard used for awarding fees
22 to a prevailing party plaintiff under the Civil Rights Act, that is,
23 fees will be awarded absent some circumstance which makes such an award
24 unjust. In making this argument the debtor is, in effect, asking the
25 court to find that the fee shifting provision of the WARN Act is an
26 adoption of the so-called British Rule, under which fees are awarded to

1 a prevailing party as a matter of course, absent exceptional
2 circumstances.

3 The plaintiff in Fogerty raised an identical argument under the
4 Copyright Act. The Court rejected that argument. In doing so it noted
5 that "[t]he word 'may' clearly connotes discretion. The automatic
6 awarding of attorney's fees to the prevailing party would pretermit the
7 exercise of that discretion." Id. at 533. Additionally it noted that:

8 we are mindful that Congress legislates against the
9 strong background of the American Rule. Unlike the
10 British Rule where counsel fees are regularly awarded
11 to the prevailing party, it is the general rule in this
12 country that unless Congress provides otherwise,
13 parties are to bear their own attorney's fees. While
14 § 505 [of the Copyright Act] is one situation in which
15 Congress has modified the American Rule to allow an
16 award of attorney's fees in the court's discretion, we
17 find it impossible to believe that Congress, without
18 more, intended to adopt the British Rule. Such a bold
19 departure from traditional practice would have surely
20 drawn more explicit statutory language and legislative
21 comment. Id.

22 Consequently the court concluded that under the fee shifting provision
23 of the Copyright Act, "attorney's fees are to be awarded to prevailing
24 parties only as a matter of the court's discretion." Id. at 533.
25 Additionally, it noted that "there is no precise rule or formula for
26 making these determinations, but instead equitable discretion should be
exercised . . . " Id.

27 The Union Group argues that the court should exercise its
28 discretion to deny an award of attorney's fees in this case because it
29 withdrew its claim under the Act before the debtor filed its motion for
30 summary judgment. Neither party presented any admissible evidence
31 regarding when the Union Group withdrew its claim. However, in its

1 memorandum in support of its motion for summary judgment the debtor
2 states that it received notice on March 25, 1998 that the International
3 Union was withdrawing its WARN Act claim. In its memorandum in
4 opposition to the debtor's motion the Union Group agrees with that
5 statement. Statements made in legal memoranda are not evidence.
6 However, in light of the Union Group's agreement with the debtor's
7 statements regarding the timing of its notice of the withdrawal of its
8 WARN Act claim, I will accept that statement as true.

9 The debtor's memorandum in support of its motion for summary
10 judgment contains a four page analysis of the debtor's defenses to the
11 WARN Act claim. It was filed two days after its notice of withdrawal
12 of the claim, on March 27, 1998. Further, although the International
13 Union advised the debtor that it was withdrawing its WARN Act claim,
14 the local unions had not done so as of the date the debtor filed its
15 summary judgment motion. Under these circumstances I find that the
16 fact that the Union withdrew its WARN Act claim prior to the time the
17 debtor filed its motion for summary judgment is not a basis for denying
18 the debtor an award of attorney fees under the Act. The court also
19 notes that the WARN act claims asserted by the Union Group comprised a
20 significant portion of its total claims. It was therefore reasonable
21 for the debtor to spend a significant amount of time and effort
22 responding to that claim. Under these circumstances the court finds
23 that the debtor is entitled to an award of attorney's fees incurred in
24 defense of the WARN Act claim.

25 **C. Conclusion**
26

