TESTIMONY OF THOMAS CONWAY
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BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW

ON

H.R. 4677
PROTECTING EMPLOYEES AND RETIREES
IN BUSINESS BANKRUPTCIES ACT OF 2010

MAY 25, 2010

I am Thomas Conway, International Vice President (Administration) of the United Steelworkers (USW). Our members are found in nearly every segment of manufacturing, not only steel, but paper, forestry, rubber, energy, mining, automotive parts, and chemicals, as well as health care, service and public employment. On behalf of International President Leo Gerard and our 850,000 members, I appreciate the opportunity to appear before this Subcommittee.

Nearly two and a half years ago, my colleague, International Vice President Fred Redmond appeared before this Subcommittee in connection with bankruptcy reform legislation introduced in the last Congress. Today, as this recession enters its second year, it is all too clear that sensible bankruptcy reform, which elevates the preservation of good paying jobs to a rightful place and treats workers and retirees more fairly, is now more necessary than ever.

Our members in nearly all of our key jurisdictions have suffered through bankruptcy cases. The steel industry, of course, has historically been our major jurisdiction. Last decade, more than 40 steelmakers, including many of our largest steel industry employers, filed bankruptcy cases, mainly as a result of great overcapacity in the world steel industry followed by unfair imports from America's trading partners. The human dimensions were vast. While some companies reorganized or were sold, others simply liquidated. The Pension Benefit Guaranty Corporation terminated pension plans covering nearly 240,000 steelworkers and retirees. And, nearly 200,000 retirees and surviving spouses lost retiree health insurance coverage.

The steel industry recovered substantially, as a result of both the tariffs imposed in March 2002 and the sacrifices made by our members to restructure the industry. However, the consolidation of the steel industry did not come without a price.

Beyond steel, in such industries as aluminum, iron ore, glass, paper and automotive parts, USW members and retirees have also faced devastating corporate bankruptcies. Every day, our bargainers wrestle with enormous challenges and do so within a system that is stacked against the interests of workers and retirees.

The last major reforms to the Bankruptcy Code that focused on worker and retiree interests were enacted in the 1980s, and the United Steelworkers was central in those deliberations. Addressing the right of a reorganizing company to reject a negotiated labor agreement, the legislation passed in the 1980's sought to balance collective bargaining rights against the need of an employer with proven distress to obtain necessary and limited relief. We believe Congress always intended this balance to allow a reorganizing company to reject a labor agreement only after full and earnest bargaining had failed and, even then, only when necessary to avoid liquidation.

But the experience of the last 25 years illustrates that this balance has been upset. The courts regularly grant employer requests for relief under a more lax standard than we believe Congress had intended. Further, employers now push aggressively for changes to labor and pension and retiree insurance agreements,

often as a first shot rather than a last resort. The use of the Bankruptcy Code as a weapon to attack worker and retiree interests calls out for meaningful reform.

First, Congress should seek to restore the balance, giving stronger recognition to the important role of collective bargaining and limiting the right of employers to violate labor agreements, which is after all what rejection really amounts to. This would include demanding that fulsome bargaining occurs before a debtor asks the Court to intervene, defining more narrowly the meaning of the term "necessary to reorganization" so as to force employers to clear a higher bar, and placing meaningful limits on the length of proposed concessions.

Second, reform should assign higher priority to the payment of employee and retiree obligations, allowing them to be paid before the claims of other creditors who are typically more able to absorb losses than is an individual worker and his or her family. Among the other creditors with greater financial reserves are highly-compensated executives, lawyers and investment bankers.

Third, reform should explicitly enshrine the principle of shared sacrifice, meaning that executives should not be allowed to improve their own salaries and benefits while workers and retirees are forced to sacrifice their quality of life. Courts should ask whether executives have first made sacrifices themselves before exposing workers and retirees to losses. Linked to this principle is the need to rein in so-called "incentive plans," which are designed for executives by compensation firms retained by those same executives, and which shower

executives with new and, oftentimes, lavish benefits for results that may have little to do with the ultimate success of reorganization.

Unions are not the only one to express a concern about the ever-growing problems created by management incentive plans and other compensation schemes. Recently, in considering a management incentive plan proposed by a debtor (and objected to by the United Steelworkers), a bankruptcy judge in the Southern District of New York in the Chemtura Corporation Chapter 11 case observed:

> "I'll look to the debtors and debtors' counsel in the future, if any of them read the transcript of this ruling, to present me and other judges with a way to break out of this compensation arms race on motions like this one and in other areas, such as approval of employment contract where we're asked to bless compensation arrangements at ever-increasing levels."

By acting now, Congress can put an end to the "compensation arms race" by forcing debtors to justify the fairness of their efforts to increase management compensation through the guise of "incentive" programs.

Fourth, bankruptcy reform also must take into account the impact of sales and liquidations upon workers and retirees. Congress should clarify that a bankruptcy judge may, in reviewing the sale or auction of a company's assets, favor a purchaser that plans to retain jobs and benefits over a buyer that would simply liquidate assets.

As borne out in numerous recent cases, the need for sale-related protections has risen. We have observed, with greater frequency, cases in which a

company's secured lenders, which appear to be unwilling in the current climate to extend the long-term financing needed to allow a company adequate time to explore reorganization options, pressure companies to sell assets quickly. In some instances, the lenders themselves serve as the buyer. In too many of these cases, the bankruptcy case appears to be run for the exclusive benefit of the lenders and to the detriment of all other creditor groups. Congress can and must act to protect the interests of workers and retirees in these transactions.

The current reform efforts are based upon what most Americans would see as an unimpeachable premise – that in a statutory scheme which exists to allow companies to reorganize, the preservation of jobs and benefits should be a paramount interest. The real long-term stakeholders in a company are its employees and retirees and the communities in which it operates. Long after the banks have been paid, the hedge fund investors have moved on to the next deal, and the so-called turnaround experts have jetted off to their next assignment, the workers and retirees who depend upon the company will remain.

At the Steelworkers, we have long tried to bargain with that basic reality in mind. We know that in some cases, unavoidably, in the interest of securing a long-term future, our members are called upon to modify their labor agreements and forego benefits that, in many instances, they have expected to receive throughout their working life. We also know that a Chapter 11 bankruptcy case is a highly imperfect place to combat the problems caused by areas of economic and social policy, such as three decades of deregulation, trade policies which

disfavor American manufacturing, and a health care system which has long placed American industry at a disadvantage compared to its competitors.

No one is ever objectively happy about confronting these problems, but we also take seriously our responsibility on behalf of our members. Our basic point – and the point which informs the bill pending before Congress – is that the playing field in bargaining should be leveled, that American workers and retirees should not be forced to sacrifice when other stakeholders are spared, and that the U. S. bankruptcy laws should take into account the important social interests of protecting American workers and promoting collective bargaining as a resolution for disputes. Companies still will be able to reorganize, whether on their own or through a sale of the business. The bill before Congress simply would require companies to give greater consideration to the interests of workers and retirees. For all of these reasons, we urge Congress to act quickly on bankruptcy reform.